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Title 17—Commodity and Securities Exchanges

(This book contains parts 200 to 239)

Part

CHAPTER II—Securities and Exchange Commission 200

CHAPTER II—SECURITIES AND EXCHANGE COMMISSION

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AUTHORITY: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

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Section 200.30–1 is also issued under 15 U.S.C. 77f, 77g, 77h, 77j, 78c(b) 78*l*, 78m, 78n, 78*o*(d).

Section 200.30–3 is also issued under 15 U.S.C. 78b, 78d, 78f, 78k–1, 78s, 78q, 78eee, 79d.

Section 200.30–5 is also issued under 15 U.S.C. 77f, 77g, 77h, 77j, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a-8, 80a-20, 80a-24, 80a-29, 80b-3, 80b-4.

SOURCE: 27 FR 12712, Dec. 22, 1962, unless otherwise noted.

§ 200.1 General statement and statutory authority.

The Securities and Exchange Commission was created in 1934 under the Securities Exchange Act. That Act transferred to the Commission the administration of the Securities Act of 1933, formerly administered by the Federal Trade Commission. Subsequent laws assigned to the Securities and Exchange Commission for administration are: Public Utility Holding Company Act of 1935, Trust Indenture Act of 1939, Investment Company Act of 1940, and Investment Advisers Act of 1940. In addition, under the Bankruptcy Code, the Commission is a statutory party in cases arising under chapters 9 and 11. Considered together, the laws administered by the Commission provided for the following.

(a) Public disclosure of pertinent facts concerning public offerings of securities and securities listed on national securities exchanges and certain

securities traded in the over-the-counter markets.

(b) Enforcement of disclosure requirements in the soliciting of proxies for meetings of security holders by companies whose securities are registered pursuant to section 12 of the Securities Exchange Act of 1934, public utility holding companies, and their subsidiaries and investment companies.

(c) Regulation of the trading in securities on national securities exchanges and in the over-the-counter markets.

(d) Investigation of securities frauds, manipulations, and other violations, and the imposition and enforcement of legal sanctions therefor.

(e) Registration, and the regulation of certain activities, of brokers, dealers and investment advisers.

(f) Supervision of the activities of mutual funds and other investment companies.

(g) Administration of statutory standards governing protective and other provisions of trust indentures under which debt securities are sold to the public.

(h) Regulation of the purchase and sale of securities, utility properties, and other assets by registered public utility holding companies and their electric and gas utility subsidiaries; enforcement of statutory standards for public utility holding company system simplification and integration; and approval of their reorganization, mergers and consolidations.

(i) Protection of the interests of public investors involved in bankruptcy reorganization cases and in bankruptcy cases involving the adjustment of debts of a municipality.

(j) Administrative sanctions, injunctive remedies, civil money penalties and criminal prosecution. There are also private rights of action for investors injured by violations of the Acts.

(15 U.S.C. 78d–1, 78d–2; 11 U.S.C. 901, 1109(a))

[27 FR 12712, Dec. 22, 1962, as amended at 43 FR 13375, Mar. 30, 1978; 49 FR 12684, Mar. 30, 1984; 60 FR 14623, Mar. 20, 1995; 60 FR 32794, June 23, 1995]

§ 200.2 Statutory functions.

Following are brief descriptions of the Commission's functions under each of the statutes it administers:

(a) *Securities Act of 1933.* (1) Issuers of securities making public offerings for sale in interstate commerce or through the mails, directly or by others on their behalf, are required to file with the Commission registration statements containing financial and other pertinent data about the issuer and the offering. A similar requirement is provided with respect to such public offerings on behalf of a controlling person of the issuer. Unless a registration statement is in effect with respect to such securities, it is unlawful to sell the securities in interstate commerce or through the mails. (There are certain limited exemptions, such as government securities, non-public offerings, and intrastate offerings.) The effectiveness of a registration statement may be refused or suspended after a hearing if the statement contains material misstatements or omissions, thus barring sale of the securities until it is appropriately amended. Registration is not a finding by the Commission as to the accuracy of the facts disclosed; and it is unlawful so to represent. Moreover, registration of securities does not imply approval of the issue by the Commission or insure investors against loss in their purchase, but serves rather to provide information upon which investors may make an informed and realistic evaluation of the worth of the securities.

(2) Persons responsible for filing false information with the Commission subject themselves to the risk of fine or imprisonment or both; and the issuing company, its directors, officers, and the underwriters and dealers and others may be liable in damages to purchasers of registered securities if the disclosures in the registration statements and prospectus are materially defective. Also the statute contains antifraud provisions which apply generally to the sale of securities, whether or not registered.

(b) *Securities Exchange Act of 1934.* This Act requires the filing of registration applications and annual and other reports with national securities exchanges and the Commission, by companies whose securities are listed on the exchanges. Annual and other reports must be filed also by certain companies whose securities are traded

on the over-the-counter markets. These must contain financial and other data prescribed by the Commission for the information of investors. Material misstatements or omissions are grounds for suspension or withdrawal of the security from exchange trading. This Act makes unlawful any solicitation of proxies, authorizations, or consents in contravention of Commission rules. These rules require disclosure of information about the subject of the solicitation to security holders. The Act requires disclosure of the holdings and the transactions by an officer, director, or beneficial owner of over 10 percent of any class of equity security of certain companies. It also requires disclosure of the beneficial owners of more than five percent of any class of equity securities of a registered company. It provides substantive and procedural protection to security holders in third-party and issuer tender offers. The Act also provides for the registration with, and regulation by, the Commission of national securities exchanges, brokers or dealers engaged in an over-the-counter securities business, and national associations of such brokers or dealers. It gives the Commission rulemaking power with respect to short sales, stabilizing, floor trading activities of specialists and odd-lot dealers, and such matters as excessive trading by exchange members. The Act authorizes the Board of Governors of the Federal Reserve System to prescribe minimum margin requirements for listed securities.

(c) *Public Utility Holding Company Act of 1935.* This Act authorizes the Commission to regulate gas and electric public-utility holding companies under standards prescribed for the protection of the public interest and the interest of investors and consumers. The Act generally limits a public-utility holding company to a single integrated public-utility system, and requires simple corporate and capital structures. If not exempt, a public-utility holding company must register with the Commission. Generally, a registered holding company must obtain Commission approval before it can issue and sell securities, acquire utility securities or assets or any other interest in any business, or enter into transactions with its affiliates. It must also comply with extensive reporting and record-keeping requirements. Although largely free of these requirements, an exempt holding company remains subject to the geographic limitations of the Act. The Act permits the acquisition of interests in ''exempt wholesale generators'' and ''foreign utility companies'' unrelated to a system's utility operations.

(d) *Trust Indenture Act of 1939.* This Act safeguards the interests of purchasers of publicly-offered debt securities issued under trust indentures by requiring the inclusion of certain protective provisions in, and the exclusion of certain types of exculpatory clauses from, trust indentures. The Act also requires that an independent indenture trustee represent the debtors by proscribing certain relationships that could conflict with proper exercise of duties.

(e) *Investment Company Act of 1940.* This Act establishes a comprehensive regulatory framework for investment companies and subjects their activities to regulation under standards prescribed for the protection of investors. Among other things, the Act provides for the registration of investment companies with the Commission; requires them to disclose their financial condition and investment policies to their shareholders; prohibits them from substantially changing investment policies without shareholder approval; bars persons guilty of securities fraud from serving as officers or directors; prevents underwriters, investment bankers, or brokers from constituting more than a minority of the directors of an investment company; requires that management contracts be submitted to shareholders for their approval; prohibits transactions between investment companies and their directors, officers, or affiliated companies or persons, except when approved by the Commission; and prohibits investment companies from issuing senior securities except under specified terms and conditions. The Act also regulates advisory fees, sales and repurchases of securities, exchange offers, and other activities of investment companies. The Act authorizes the Commission to exempt

any person or class of persons or securities from any provisions of, or rules under, the Act and to conduct any investigation it deems necessary to determine existing or potential violations of the Act. It also authorizes the Commission to prepare reports to security holders on the fairness of plans of reorganization, merger, or consolidation. The Commission may institute a court action to enjoin acts or practices of management involving, among other things, a breach of fiduciary duty and the consummation of plans of reorganization, merger, or consolidation that are grossly unfair to security holders.

(f) *Investment Advisers Act of 1940.* Persons who, for compensation, engage in the business of advising others with respect to their security transactions must register with the Commission. Their activities in the conduct of such business are subject to standards of the act which make unlawful those practices which constitute fraud or deceit and which require, among other things, disclosure of any interests they may have in transactions executed for clients. The Act grants to the Commission rule-making power with respect to fraudulent and other activities of investment advisers.

(g) *Chapter 11 of the Bankruptcy Code.* Chapter 11 of the Bankruptcy Code (11 U.S.C. 1101 *et seq.*) provides for Commission participation as a statutory party in reorganization cases. Under section 1109(a) of the Bankruptcy Code (11 U.S.C. 1109(a)), which also applies to Chapter 9 cases regarding municipalities, the Commission ''may raise and may appear and be heard on any issue in the case.''

(11 U.S.C. 901, 1109(a))

[27 FR 12712, Dec. 22, 1962, as amended at 49 FR 12684, Mar. 30, 1984; 60 FR 14624, Mar. 20, 1995]

GENERAL ORGANIZATION

§ 200.10 The Commission.

The Commission is composed of five members, not more than three of whom may be members of the same political party. The members are appointed by the President, with the advice and consent of the Senate, for 5-year terms, one term ending each year. The Chairman is designated by the President pursuant to the provisions of section 3 of Reorganization Plan No. 10 of 1950 (3 CFR, 1949–1953 Comp., p. 1006). The Commission is assisted by a staff, which includes lawyers, accountants, engineers, financial security analysts, investigators and examiners, as well as administrative and clerical employees.

§ 200.11 Headquarters Office—Regional and District Office relationships.

(a)(1) Division and Office Heads in the Headquarters Office (450 Fifth Street, NW., Washington, DC 20549) have Commission-wide responsibility to the Commission for the overall development, policy and technical guidance, and policy direction of the operating programs under their jurisdiction.

(2) Each Regional Director is responsible, subject to the supervision of the Director of the Division of Enforcement, for the direction and supervision of his or her work force and for the execution of all programs in his or her region as shown in paragraph (b) of this section, in accordance with established policy. Each District Administrator is responsible, subject to the supervision of the relevant Regional Director, for the direction and supervision of his or her work force and for the execution of all programs through his or her office, in accordance with established policy.

(b) Regional Directors and District Administrators of the Commission.

Region 1: Northeast Region. Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia—Regional Director, 7 World Trade Center, suite 1300, New York, NY 10048.

Boston District—District Administrator, 73 Tremont Street, suite 600, Boston, MA 02108.

Philadelphia District—District Administrator, The Curtis Center, suite 1005 E., 601 Walnut Street, Philadelphia, PA 19106.

Region 2: Southeast Region. Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, Virgin Islands—Regional Director, 1401 Brickell Avenue, suite 200, Miami, FL 33131.

Atlanta District—District Administrator, 3475 Lenox Road, NE., suite 1000, Atlanta, GA 30326.

Region 3: Midwest Region. Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Ohio, Wisconsin—Regional Director, 500 West Madison Street, suite 1400, Chicago, IL 60661.

Region 4: Central Region. Arkansas, Colorado, Kansas, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Wyoming—Regional Director, 1801 California Street, suite 4800, Denver, CO 80202.

Fort Worth District—District Administrator, 801 Cherry Street, 19th Floor, Fort Worth, TX 76102. Salt Lake District—District Administrator, 500 Key Bank Tower, 50 S. Main Street, suite 500, Box 79, Salt Lake City, UT 84144.

Region 5: Pacific Region. Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington—Regional Director, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036.

San Francisco District—District Administrator, 44 Montgomery Street, Suite 1100, San Francisco, CA 94104.

(c) The following geographic allocation determines where registered brokers, dealers, transfer agents, clearing agents, registered securities associations, investment advisers, and others as designated in this chapter must file reports required to be filed in regional or district offices:

Northeast Regional Office: New Jersey, New York.

Boston District Office: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont.

Philadelphia District Office: Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia.

Southeast Regional Office: Florida, Puerto Rico, Virgin Islands.

Atlanta District Office: Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee.

Midwest Regional Office: Illinois, Indiana, Iowa, Kentucky, Ohio, Michigan, Minnesota, Missouri, Wisconsin.

Central Regional Office: Colorado, Nebraska, New Mexico, North Dakota, South Dakota, Utah, Wyoming.

Fort Worth District Office: Arkansas, Kansas, Oklahoma, Texas.

Pacific Regional Office: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington.

[27 FR 12712, Dec. 22, 1962, as amended at 28 FR 6970, July 9, 1963; 41 FR 44696, Oct. 12, 1976; 47 FR 26818, June 22, 1982; 49 FR 12684, Mar. 30, 1984; 49 FR 13679, Apr. 6, 1984; 52 FR 2677, Jan. 26, 1987; 59 FR 5943, Feb. 9, 1994; 59 FR 12543, Mar. 17, 1994]

§ 200.12 Functional responsibilities.

This section sets forth the administrative and substantive responsibilities of the Division Directors, Office Heads, Regional Directors and District Administrators, and certain other Commission officers. All Commission officers and other staff members, except administrative law judges and the Inspector General, shall perform, in addition to the duties herein set forth, such additional duties as the chairman of the Commission may assign from time to time. These officers also serve as liaison with Government and other agencies concerning matters within their respective functional responsibilities.

(15 U.S.C. 77u, 78d, 78d–1)

[37 FR 23826, Nov. 9, 1972, as amended at 59 FR 5943, Feb. 9, 1994; 60 FR 14624, Mar. 20, 1995]

§ 200.13 Executive Director.

(a) The Executive Director is responsible for developing and executing the overall management policies of the Commission for all its operating divisions and staff offices. The Executive Director also provides executive direction to, and exercises administrative control over, the Office of Administrative and Personnel Management, the Office of the Comptroller, the Office of Filings and Information Services, the Office of Freedom of Information and Privacy Act Operations, and the Office of Information Technology. In addition, the Executive Director implements the following statutes, regulations, and Executive orders, as well as those that the Chairman may designate:

(1) Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

(2) Small and Disadvantaged Business Utilization Program (15 U.S.C. 631 *et seq.*).

(3) Government Printing and Binding Regulations, U.S. Congress Joint Committee on Printing (1977).

(4) Occupational Safety and Health Programs for Federal Employees under Executive Order 12196 of February 26, 1980 (29 CFR 1960.1–1960.90).

(5) Federal Managers' Financial Integrity Act of 1982 (31 U.S.C. 3512).

(6) National Security Information under Executive Order 12356 of April 6, 1982.

(7) Government Performance and Results Act of 1993 (31 U.S.C. 1101 *et seq.*).

(8) Recommendations of the Report of the National Performance Review (September 1993).

(b) The Executive Director appoints personnel, reviews and approves policies and procedures, and assures appropriate resources to implement the programs set forth in paragraph (a) of this section, and authorizes and transmits reports required by them.

(c) The Executive Director also designates certifying officers for agency payments, prescribes procurement regulations, enters into contracts, designates contracting officers, and makes procurement determinations.

(d) As the Chief Operating Officer of the Commission, the Executive Director shall be responsible for:

(1) Implementing the goals of the President and the Chairman and the mission of the Commission;

(2) Providing overall organizational management to improve agency performance;

(3) Assisting the Chairman in promoting ongoing quality improvement, developing strategic plans, and measuring results;

(4) Directing ongoing reengineering of the Commission's administrative processes;

(e) Overseeing Commission-specific application of performance measures, procurement reforms, personnel reductions, financial management improvements, telecommunications and information technology policies, and other government-wide systems reforms adopted as a result of the recommendations of the National Performance Review; and

(f) Reforming the Commission's management practices by incorporating the principles of the National Performance Review into day-to-day management.

[60 FR 14624, Mar. 20, 1995]

§ 200.13a The Secretary of the Commission.

(a) The Secretary of the Commission is responsible for the preparation of the daily and weekly agendas of Commission business; the orderly and expeditious flow of business at formal Commission meetings; the maintenance of the Official Minute record of all actions of the Commission; and the service of all instruments of formal Commission action. He or she is custodian of the official seal of the Commission, and also has the responsibility for authenticating documents.

(b) The Secretary has been delegated responsibilities relating to the Commission's rules of practice, administrative proceedings under the Commission's statutes, and other responsibilities.

(c) In addition, he or she administers the Commission's Library.

[50 FR 12239, Mar. 28, 1985]

§ 200.13b Director of the Office of Public Affairs, Policy Evaluation, and Research.

The Director of the Office of Public Affairs, Policy Evaluation, and Research is the chief public information officer for the Commission, and oversees activities that communicate the Commission's actions to those interested in or affected by them. His or her responsibilities include liaison with the news media, dissemination of information to the news media and to the general public, supervision of internal and some external publications and of audio-visual presentations. Responsibilities of the Director, and of his or her staff, include special projects that may be deemed appropriate to communicate information on Commission actions.

[50 FR 12239, Mar. 28, 1985, as amended at 60 FR 14625, Mar. 20, 1995]

§ 200.14 Office of Administrative Law Judges.

(a) Under the Administrative Procedure Act (5 U.S.C. 551–559) and the federal securities laws, the Office of Administrative Law Judges conducts hearings in proceedings instituted by the Commission. The Administrative Law Judges are responsible for the fair and orderly conduct of the proceedings and have the authority to:

(1) Administer oaths and affirmations;

(2) Issue subpoenas;

(3) Rule on offers of proof;

(4) Examine witnesses;

(5) Regulate the course of a hearing;

(6) Hold pre-hearing conferences;

(7) Rule upon motions; and

(8) Unless waived by the parties, prepare an initial decision containing the conclusions as to the factual and legal issues presented, and issue an appropriate order.

(b) The Chief Administrative Law Judge performs the duties of an Administrative Law Judge under the Administrative Procedure Act and the duties delegated to him or her by the Commission that are compatible with those duties. The Chief Administrative Law Judge is responsible for the orderly functioning of the Office of Administrative Law Judges apart from the conduct of administrative proceedings and acts as liaison between that Office and the Commission.

[60 FR 14625, Mar. 20, 1995]

§ 200.15 Office of International Affairs.

(a) The Office of International Affairs (''OIA'') is responsible for the negotiation and implementation of the Commission's bilateral and multilateral agreements and understandings with foreign financial regulatory authorities. OIA coordinates and participates in activities relating to the Commission's international cooperation programs and develops initiatives to enhance the Commission's ability to enforce the federal securities laws in matters with international elements.

(b) OIA assists in and facilitates the efforts of the Commission's other divisions and offices in responding to international issues and in developing legislative, rulemaking and other initiatives relating to international securities markets. OIA facilitates the development of and, where appropriate, provides advice and presents Commission positions relating to international initiatives of other U.S. Government departments and agencies affecting regulation of securities markets. OIA plans, coordinates and participates in Commission meetings with foreign financial regulatory authorities.

[58 FR 52418, Oct. 8, 1993]

§ 200.16 Executive Assistant to the Chairman.

The Executive Assistant to the Chairman assists the Chairman in consideration of legal, financial, and economic problems encountered in the administration of the Commission's statutes. He or she arranges for and conducts conferences with officials of the Commission, members of the staff, and/or representatives of the public on matters arising with regard to general programs or specific matters. Acting for the Chairman, he or she furnishes the initiative, executive direction, and authority for staff studies and reports bearing on the Commission's administration of the laws and its relations with the public, industry, and the Congress. The Executive Assistant is also responsible for assisting members of the Commission in the preparation of the opinions of the Commission, and to the Commission for the preparation of opinions and decisions on motions and certifications of questions and rulings by administrative law judges in the course of administrative proceedings under Rule 102(e) of the Commission's Rules of Practice (§ 201.102(e) of this chapter), and in other cases in which the Chairman or the General Counsel has determined that separation of functions requirements or other circumstances would make inappropriate the exercise of such functions by the General Counsel. In cases where, pursuant to a waiver by the parties of separation of function requirements, another Division or Office of the Commission's staff undertakes to prepare an opinion or decision, such Division or Office rather than the Executive Assistant will prepare such opinion or decision, although the Executive Assistant may assist in such preparation.

The Executive Assistant is further responsible for the exercise of such review functions with respect to adjudicatory matters as are delegated to him or her by the Commission pursuant to 101 Stat. 1254 (15 U.S.C. 78d–1, 78d–2) or as may be otherwise delegated or assigned to him or her.

[54 FR 18100, Apr. 27, 1989, as amended at 60 FR 32794, June 23, 1995]

§ 200.16a Inspector General.

(a) Under the Inspector General Act of 1978, as amended, (5 U.S.C. app.) the Inspector General performs independent and objective investigations and audits relating to the Commission's programs and operations. An investigation seeks to detect and prevent waste, fraud, and abuse in the Commission's programs and operations, such as violations of federal statutes or regulations by contractors and Commission employees or the Standards Of Ethical Conduct For Employees of the Executive Branch. An audit seeks to determine whether:

(1) Program goals and results identified in enabling legislation are achieved.

(2) Resources are efficiently and economically used and managed.

(3) Financial operations are properly conducted.

(4) Financial reports are fairly presented.

(5) Applicable laws and regulations are complied with.

(b) In cooperation with Commission management, the Inspector General generally promotes economy, efficiency, and the effectiveness of waste or fraud detection and prevention in the Commission's programs and operations. The Inspector General also keeps the Congress and the Chairman informed about problems and deficiencies in the Commission's programs and operations.

(c) The Inspector General reports to the Chairman, but is independent of all other Commission management. In addition, the Inspector General independently prepares semi-annual reports to the Congress.

(d) With respect to misconduct of Commission employees and contractors, the Inspector General, after consultation with the Ethics Counsel, where appropriate, serves as the Commission's liaison with other federal audit and investigative agencies, such as the Department of Justice and the Executive Council on Integrity and Efficiency.

(e) Subpoenas issued in the course of an audit or investigation conducted by the Office of the Inspector General shall be effected by any method prescribed by § 201.232(a) and (c) of this chapter.

[60 FR 14625, Mar. 20, 1995]

§ 200.17 Chief Management Analyst.

The Chief Management Analyst is responsible to the Executive Director for overseeing the performance of management analysis tasks which pertain, but are not limited, to:

(a) Agency work methods and procedures;

(b) Effective personnel and resource allocation and utilization;

(c) Organizational structures and delegations of authority;

(d) Management information systems and concepts; and

(e) The preparation of recurring special reports and analyses.

[60 FR 14625, Mar. 20, 1995]

§ 200.18 Director of Division of Corporation Finance.

The Director of the Division of Corporation Finance is responsible to the Commission for the administration of all matters (except those pertaining to investment companies registered under the Investment Company Act of 1940) relating to establishing and requiring adherence to standards of business and financial disclosure with respect to securities being offered for public sale pursuant to the registration requirements of the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) or the exemptions therefrom; establishing and requiring adherence to standards of reporting and disclosure with respect to securities traded on national securities exchanges or required to be registered pursuant to section 12 (g) of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*(g)) and with respect to securities whose issuers are required to file reports pursuant to section 15(d) of that Act (15 U.S.C. 78*c*(d)); establishing and

requiring adherence to disclosure and procedural standards in the solicitation of proxies for the election of directors and other corporate actions; establishing and requiring adherence to standards of disclosure with respect to the filing of statements respecting beneficial ownership and transaction statements pursuant to sections 13 (d), (e), and (g) (15 U.S.C. 78m(d), 78m(e), and 78m(g)) of the Securities Exchange Act of 1934; administering the disclosure and substantive provisions of the Williams Act relating to tender offers; and ensuring adherence to enforcement of the standards set forth in the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*) regarding indenture covering debt securities. Those duties shall include, with the exception of enforcement and related activities under the jurisdiction of the Division of Enforcement, the responsibility to the Commission for the administration of the disclosure requirements and other provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Trust Indenture Act of 1939, as listed below:

(a) All matters under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) including the examination and processing of material filed pursuant to the requirements of that Act (except such material filed by investment companies registered under the Investment Company Act of 1940), the interpretation of the provisions of the Securities Act of 1933, and the proposing to the Commission of rules under that Act.

(b) All matters, except those pertaining to investment companies registered under the Investment Company Act of 1940, arising under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) in connection with:

(1) The registration of securities pursuant to section 12 of the Act (15 U.S.C. 78*l*), including the exemptive provisions of section 12(h) (15 U.S.C. 78*l*(h)).

(2) The examination and processing of periodic reports filed pursuant to sections 13 and 15(d) of the Act (15 U.S.C. 78m, 78*o*(d)).

(3) The examination and processing of proxy soliciting material filed pursuant to section 14(a) and information statements filed pursuant to section 14(c) of the Act (15 U.S.C. 78n(a), 78n(c)).

(4) The examination and processing of statements respecting beneficial ownership transaction statements and tender offer statements filed pursuant to sections 13 (d), (e), and (g) and 14 (d), (e), (f), and (g) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(d), 78m(e), 78m(g), and 78n(d)), and the administration of the other protective standards of these provisions.

(5) The interpretation of the foregoing provisions of the Act, as well as Section 16 thereof (15 U.S.C. 78p), and proposing of rules under those portions of the Act to the Commission.

(c) All matters, except those pertaining to investment companies registered under the Investment Company Act of 1940, arising under the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*).

[41 FR 29374, July 16, 1976, as amended at 50 FR 12239, Mar. 28, 1985; 60 FR 14625, Mar. 20, 1995]

§200.19a Director of the Division of Market Regulation.

The Director of the Division of Market Regulation is responsible to the Commission for the administration and execution of the Commission's programs under the Securities Exchange Act of 1934 relating to the structure and operation of the securities markets and the prevention of manipulation in the securities markets. These responsibilities include oversight of the national market system, the national clearance and settlement system, and self-regulatory organizations, such as the national securities exchanges, registered securities associations, clearing agencies, the Municipal Securities Rulemaking Board, and the Securities Investor Protection Corporation. Duties also include the registration and regulation of brokers, dealers, municipal securities dealers, government securities brokers and dealers, transfer agents, and securities information processors. The functions involved in the regulation of such entities include reviewing proposed rule changes of self-regulatory organizations, recommending the adoption and amendment of Commission rules, responding to interpretive, exemptive, and no-action

requests, and conducting inspections, examinations, and market surveillance. In addition, the Director shall have the duties specified below:

(a) Administration of all matters arising under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), except:

(1) The examination and processing of applications for registration of securities on national securities exchanges pursuant to section 12 of the Act (15 U.S.C. 78*l*).

(2) The examination and processing of periodic reports filed pursuant to sections 13 and 15(d) of the Act (15 U.S.C. 78m, 78*o*(d)).

(3) The examination and processing of proxy soliciting material pursuant to regulations adopted under section 14 of the Act (15 U.S.C. 78n).

(4) The examination and processing of ownership reports filed under section 16(a) of the Act (15 U.S.C. 78p(a)).

(5) The denial or suspension of registration of securities registered on national securities exchanges, pursuant to section 19(a)(2) (15 U.S.C. 78s(a)(2)) by reason of failure to comply with the reporting requirements of that Act.

(6) The enforcement and related activities under the jurisdiction of the Division of Enforcement.

(15 U.S.C. 78d, 78d–1, 78d–2, 80a–37)

[37 FR 16792, Aug. 19, 1972, as amended at 43 FR 13376, Mar. 30, 1978; 60 FR 14625, Mar. 20, 1995]

§ 200.19b Director of the Division of Enforcement.

The Director of the Division of Enforcement is responsible to the Commission for supervising and conducting all enforcement activities under the acts administered by the Commission. The Director recommends the institution of administrative and injunctive actions arising out of such enforcement activities and determines the sufficiency of evidence to support the allegations in any proposed complaint. The Director supervises the Regional Directors and, in collaboration with the General Counsel, reviews cases to be recommended to the Department of Justice for criminal prosecution. The Director grants or denies access to nonpublic information in the Commission's enforcement files under § 240.24c–1 of this chapter; provided that access under that section shall be granted only with the concurrence of the head of the division or office responsible for the information or the files containing it.

[60 FR 14626, Mar. 20, 1995]

§ 200.19c Director of the Office of Compliance Inspections and Examinations.

The Director of the Office of Compliance Inspections and Examinations (''OCIE'') is responsible for the compliance inspections and examinations relating to the regulation of exchanges, national securities associations, clearing agencies, securities information processors, the Municipal Securities Rulemaking Board, brokers and dealers, municipal securities dealers, transfer agents, investment companies, and investment advisers, under Sections 15C(d)(1) and 17(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–5(d)(1) and 78q(b)), Section 31(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–30(b)), and Section 204 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–4).

[60 FR 39644, Aug. 3, 1995]

§ 200.20b Director of Division of Investment Management.

The Director of the Division of Investment Management is responsible to the Commission for the administration of the Commission's responsibilities under the Investment Company Act of 1940 and the Investment Advisers Act of 1940, the administration and execution of the Public Utility Holding Company Act of 1935, and with respect to matters pertaining to investment companies registered under the Investment Company Act of 1940 and pooled investment funds or accounts, the administration of all matters relating to establishing and requiring adherence to standards of economic and financial reporting and the administration of fair disclosure and related matters under the Securities Act of 1933 and the Securities Exchange Act of 1934 and enforcement of the standards set forth in the Trust Indenture Act of 1939 regarding indentures covering debt securities, as listed in paragraphs (a) through (e) of

this section. These duties shall include inspections arising in connection with such administration but shall exclude enforcement and related activities under the jurisdiction of the Division of Enforcement.

(a) The administration of all matters arising under the Investment Company Act of 1940 (15 U.S.C. 80a), except those arising under section 30(h) of the Act (15 U.S.C. 80a–29(h)).

(b) All matters arising under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) arising from or pertaining to material field pursuant to the requirements of that Act by investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) and pooled investment funds or accounts.

(c) All matters arising under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), except the examination and processing of statements of beneficial ownership of securities and changes in such ownership filed under section 16(a) (15 U.S.C. 78p(a)) of such Act, pertaining to investment companies registered under the Investment Company Act of 1940 and pooled investment funds or accounts in connection with:

(1) The registration of securities pursuant to section 12 of the Act (15 U.S.C. 78*l*), including the exemptive provisions of section 12(h) (15 U.S.C. 78*l*(h)).

(2) The examination and processing of periodic reports filed pursuant to sections 13 and 15(d) of the Act (15 U.S.C. 78m, 78*o*(d)).

(3) The examination and processing of proxy soliciting material filed pursuant to section 14(a) and information material filed pursuant to section 14(c) of the Act (15 U.S.C. 78n(a), 78n(c)).

(d) All matters pertaining to investment companies registered under the Investment Company Act of 1940 and pooled investment funds or accounts arising under the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*).

(e) All matters arising under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*).

(f) The administration and execution of the Public Utility Holding Company Act of 1935 in connection with:

(1) The administration and processing of proxy solicitation material subject to §§ 240.14a–1—240.14a–14 of this chapter.

(2) The examination and processing of ownership reports filed under section 17(a) of the Act (15 U.S.C. 79q(a)).

[41 FR 29375, July 16, 1976, as amended at 50 FR 5064, Feb. 5, 1985; 60 FR 14626, Mar. 20, 1995; 67 FR 43535, July 8, 2002]

§ 200.20c Office of Filings and Information Services.

The Office of Filings and Information Services is responsible for the receipt and initial handling of all public documents filed at the Commission's headquarters office. The initial handling includes determining acceptability, extracting data for EDP input, calculating fees, conducting cursory and substantive examinations, assigning filings to branches and preparing deficiency correspondence. In addition, the Office is responsible for the custody and control of the Commission's official records; for the development of plans and implementation of the Commission's records management program; for authenticating all documents produced for administrative or judicial proceedings; for maintaining liaison with the National Archives and Records Service and other Government agencies with respect to the Commission's records and its records management program. The Office provides filer-support services relating to the Commission's EDGAR system and the receipt of fees and filings for all types of filers, regardless of filing media. The Office also manages the Commission's public reference facilities to facilitate public access to electronic filings and ensure that all information contained in public filings with the Commission is timely made available to investors.

(Sec. 4(b), 48 Stat. 885, sec. 1106(a), 63 Stat. 972, 15 U.S.C. 78d(b); secs. 1, 2, 76 Stat. 394, 395, 15 U.S.C. 78d–1, 78d–2; secs. 19, 48 Stat. 85, 908, 15 U.S.C. 77s; sec. 23(a), 48 Stat. 901, sec. 8, 49 Stat. 1379, 15 U.S.C. 78w(a); sec. 20, 49 Stat. 833, 15 U.S.C. 78t; sec. 319, 53 Stat. 1173, 15 U.S.C. 77sss; sec. 38, 54 Stat. 841, 15 U.S.C. 80a–37; sec. 211, 54 Stat. 855, sec. 14, 74 Stat. 888, 15 U.S.C. 80b–11; sec. 15B, 15 U.S.C. 78o–4(a); sec. 17A, 15 U.S.C. 78q–1 (c)(2); 11 U.S.C. 901, 1109(a))

[43 FR 13376, Mar. 30, 1978, as amended at 49 FR 12685, Mar. 30, 1984; 60 FR 14626, Mar. 20, 1995]

§ 200.21 The General Counsel.

(a) The General Counsel is the chief legal officer of the Commission. He or she is responsible for the representation of the Commission in judicial proceedings in which it is involved as a party or as amicus curiae, for directing and supervising all civil litigation involving the Commission in the United States District Courts, except for law enforcement actions filed on behalf of the Commission, for directing and supervising the Commission's responsibilities under the Bankruptcy Code and all related litigation, and for representing the Commission in all cases in appellate courts. The General Counsel is responsible for the review of cases which the Division of Enforcement recommends be referred to the Department of Justice with a recommendation for criminal prosecution. In addition, he or she is responsible for advising the Commission at its request or at the request of any division director or office head, or on his or her own motion, with respect to interpretations involving questions of law; for the conduct of administrative proceedings relating to the disqualification of lawyers from practice before the Commission; for the preparation of the Commission comments to the Congress on pending legislation; and for the drafting, in conjunction with appropriate divisions and offices, of legislative proposals to be sponsored by the Commission. The General Counsel is also responsible for the review and clearance of the form and content of articles, treatises, and prepared speeches and addresses by members of the staff relating to the Commission or to the statutes and rules administered by the Commission. He or she is responsible (with the Associate Executive Director of the Office of Administrative and Personnel Management) for administering the Commission's Ethics Program, and (with the Ethics Counsel) for interpreting subpart M of this part and 5 CFR part 2635. He or she serves as Counselor to the Commission and its staff with regard to ethical and conflicts of interest questions and acts as the Commission's liaison on such matters with the Office of Administrative and Personnel Management, the Office of the Inspector General and the Department of Justice. The General Counsel also is responsible for coordinating and reviewing the interpretive positions of the various divisions and offices. In addition, he or she is responsible for appropriate disposition of all Freedom of Information Act and Privacy Act appeals pursuant to the authority delegated in § 200.30–14 of this chapter, and is the Commission's advisor with respect to legal problems arising under the Freedom of Information Act, the Privacy Act, the Federal Reports Act, the Federal Advisory Committee Act, the Civil Service laws and regulations, the statutes and rules applicable to the Commission's procurement, contracting, fiscal and related administrative activities, and other statutes and regulations of a similar nature applicable to a number of Government agencies.

(b) The General Counsel is also responsible for assisting members of the Commission in the preparation of the opinions of the Commission, and to the Commission for the preparation of opinions and decisions on motions and certifications of questions and rulings by administrative law judges in the course of administrative law proceedings, except (1) in cases where, pursuant to a waiver by the parties of separation of function requirements, another Division or Office of the Commission's staff undertakes to prepare an opinion or decision, in which cases the General Counsel may assist in such preparation, and (2) with respect to administrative proceedings against lawyers under Rule 2(e) of the Commission's Rules of Practice (§ 201.2(e) of this chapter) or other cases in which the Chairman or the General Counsel has determined that separation of function requirements or other circumstances would make inappropriate the exercise of such functions by the General Counsel. In the cases described in clause (2), the Executive Assistant to the Chairman exercises such functions. The General Counsel deals with general problems arising under the Administrative Procedure Act, including the revision or adoption of rules of practice. The General Counsel is also responsible for the exercise of such review functions with respect to adjudicatory matters as are delegated to

him or her by the Commission pursuant to 101 Stat. 1254 (15 U.S.C. 78d–1, 78d–2) or as may be otherwise delegated or assigned to him or her.

(c) The General Counsel also is responsible to the Commission for the administration of the Government in the Sunshine Act for publicly certifying, pursuant to § 200.406, that, in his or her opinion, particular Commission meetings may properly be closed to the public. In the absence of the General Counsel, the Solicitor to the Commission shall be deemed the General Counsel for purposes of § 200.406. In the absence of the General Counsel and the Solicitor, the most senior Associate General Counsel available shall be deemed the General Counsel for purposes of § 200.406. In the absence of the General Counsel, the Solicitor, and every Associate General Counsel, the most senior Assistant General Counsel available shall be deemed the General Counsel for purposes of § 200.406. In the absence of the General Counsel, the Solicitor, every Associate General Counsel and every Assistant General Counsel, such attorneys as the General Counsel may designate (in such order of succession as the General Counsel directs) shall exercise the responsibilities imposed by § 200.406.

[43 FR 13376, Mar. 30, 1978, as amended at 47 FR 26821, June 22, 1982; 47 FR 37077, Aug. 25, 1982; 49 FR 12685, Mar. 30, 1984; 49 FR 13866, Apr. 9, 1984; 50 FR 12240, Mar. 28, 1985; 54 FR 18100, Apr. 27, 1989; 54 FR 24331, June 7, 1989; 60 FR 14626, Mar. 20, 1995]

§ 200.21a The Ethics Counsel.

(a) The Ethics Counsel within the Office of the General Counsel of the Commission shall oversee compliance with subpart M of this part and 5 CFR part 2635. When appropriate and subject to the authority of, and in consultation with, the Inspector General, the Ethics Counsel shall inquire into alleged violations of subparts C, F, and M of this part, and 5 CFR part 2635.

(b) Subject to the oversight of the General Counsel or his or her delegate, the Ethics Counsel shall:

(1) Receive and review allegations of misconduct by a Commission employee.

(2) Refer matters involving management questions to Division Directors, Office Heads, District Administrators, or Regional Directors, and matters involving alleged or apparent employee misconduct to the Office of the Inspector General, except for matters involving alleged professional misconduct ultimately referable to state professional boards or societies.

(3) Refer complaints that appear to involve a violation of Federal criminal statutes, and do not appear to be frivolous, to the Inspector General for referral to the Department of Justice under 28 U.S.C. 535.

(4) Act as liaison with the Office of the Inspector General on matters that the Ethics Counsel has referred to that Office, and with state or local authorities on matters that, on occasion, the Ethics Counsel may refer to them.

(5) Arrange for the review of proposed publications and prepared speeches under § 200.735–4(e).

(6) Provide advice, counseling, interpretations, and opinions with respect to subparts C, F, and M of this part, and 5 CFR part 2635.

(7) Oversee investigations and refer findings of professional misconduct to state professional boards or societies.

(8) Draft rules and regulations as necessary to implement the Commission's Ethics Program.

[60 FR 14626, Mar. 20, 1995]

§ 200.22 The Chief Accountant.

The Chief Accountant of the Commission is the principal adviser to the Commission on, and is responsible to the Commission for, all accounting and auditing matters arising in the administration of the federal securities laws. The Chief Accountant oversees the accounting profession's standard-setting and self-regulatory organizations, develops or supervises the development of accounting and auditing rules, regulations, opinions and policy, and interprets Commission accounting policy and positions. The Chief Accountant is responsible for recommending the institution of administrative and disciplinary proceedings relating to the disqualification of accountants to practice before the Commission. The Chief Accountant supervises the procedures

to be followed in the Commission's enforcement activities involving accounting and auditing issues and helps resolve differences on accounting issues between registrants and the Commission staff.

[60 FR 14626, Mar. 20, 1995]

§ 200.23a Office of Economic Analysis.

The Office of Economic Analysis is responsible for providing an objective economic perspective to understand and evaluate the economic dimension of the Commission's regulatory oversight. It performs economic analyses of proposed rule changes, current or proposed policies, and capital market developments and offers advice on the basis of these analyses. The Office also assists the Commission's enforcement effort by applying economic analysis and statistical tools to issues raised in enforcement cases. It reviews certifications and initial and final regulatory flexibility analyses prepared by the operating divisions under the Regulatory Flexibility Act.

[60 FR 14627, Mar. 20, 1995]

§ 200.23b [Reserved]

§ 200.24 Office of the Comptroller.

This Office, under the direction of the Associate Executive Director of the Office of the Comptroller, is responsible to the Executive Director, Chairman and Commission for the internal financial management and programming functions of the Securities and Exchange Commission. These functions include: budgeting, accounting, payroll and adminstrative audit. The Associate Executive Director of the Office of the Comptroller, and his or her designees, serve as liaison to the Commission before the Office of Management and Budget and Congressional Appropriations Committees on appropriation matters, and the Treasury Department and the General Accounting Office on financial and progamming matters.

(11 U.S.C. 901, 1109(a))

[49 FR 12685, Mar. 30, 1984, as amended at 60 FR 14627, Mar. 20, 1995]

§ 200.24a Director of the Office of Consumer Affairs.

The Director of the Office of Consumer Affairs is responsible to the Chairman for the Commission's investor education and consumer protection program. The program includes, but is not limited to:

(a) Presenting seminars and instructional programs to educate investors about the securities markets and their rights as investors; preparing and distributing to the public materials describing the operations of the securities markets, prudent investor behavior, and the rights of investors in disputes they may have with individuals and entities regulated by the Commission; and increasing public knowledge of the functions of the Commission.

(b) Implementing and administering a nationwide system for resolving investor complaints against individuals and entities regulated by the Commission by processing complaints received from individual investors and assuring that regulated individual and entities process and respond to such complaints.

(c) Providing information to investors who inquire about individuals and entities regulated by the Commission, the operation of the securities markets, or the functions of the Commission.

(d) Advising the Commission and its staff about problems frequently encountered by investors and possible solutions to them.

(e) Transmitting to other offices and divisions of the Commission information provided by investors which concerns the responsibilities of these offices and divisions.

(f) Providing for greater consumer input in Commission rulemaking proceedings.

[60 FR 14627, Mar. 20, 1995]

§ 200.25 Office of Administrative and Personnel Management.

(a) The Office of Administrative and Personnel Management (OAPM) is responsible for providing a wide variety of programs for human resources, office services, and other administrative and management services for the Commission. The Associate Executive Director

of the Office of Administrative and Personnel Management is responsible to the Executive Director and the Chairman of the Commission for developing and executing these programs.

(b) OAPM develops, implements, and evaluates the Commission's programs for human resources and personnel management, such as position management and pay administration; recruitment, placement, and staffing; performance management and employee recognition; employee training and career development; employee and labor relations; personnel management evaluation; employee benefits and counseling; and the processing and maintenance of employee records. OAPM administers the Ethics Program, and helps the Office of the Executive Director manage the Senior Executive Service Program. It reviews requests, recommendations, and justifications for certain awards, recruitment and relocation bonuses, retention allowances, special salary rates, and other personnel compensation or benefit determinations for sufficiency and compliance with law, regulations, and Commission policy. OAPM develops and executes programs for office services, such as telecommunications; procurement and contracting; property management; contract and lease administration; space acquisition and management; management of official vehicles; safety programs; emergency preparedness plans; physical security; mail receipt and distribution; and publications, printing, and desktop publishing.

(c) With respect to human resources management, the Associate Executive Director of the Office of Administrative and Personnel Management is the Commission's liaison with the Office of Personnel Management, other agencies, professional organizations, educational institutions, and private industry. He or she is also the Printing Liaison with the Joint Committee on Printing, and the Contract Officer.

[60 FR 14627, Mar. 20, 1995]

§ 200.26 [Reserved]

§ 200.26a Office of Information Technology.

The Office of Information Technology is responsible for the analysis, design programming, operation, and maintenance of all ADP systems; developing and implementing long-range ADP plans and programs; coordinating all ADP and systems analysis activities being considered or carried out by other divisions and offices, and furnishing such organizations with appropriate assistance and support; providing technical advice to the staff in connection with development of Commission rules and regulations having ADP implications; facilitating the Commission's surveillance of ADP in the securities industry; evaluating and recommending new information processing concepts and capabilities for application within the Commission; and, development of microcomputer and office automation capabilities and support within the Commission.

(15 U.S.C. 78d–1, 78d–2; 11 U.S.C. 901, 1109(a))

[43 FR 13377, Mar. 30, 1978, as amended at 49 FR 12685, Mar. 30, 1984; 60 FR 14627, Mar. 20, 1995]

§ 200.27 The Regional Directors.

Each Regional Director is responsible for executing the Commission's programs within his geographic region as set forth below, subject to review by the Director of the Division of Enforcement and policy direction and review by the other Division Directors, the General Counsel, and the Chief Accountant. The Regional Directors responsibilities include particularly the investigation of transactions in securities on national securities exchanges, in the over-the-counter market, and in distribution to the public; the examination of members of national securities exchanges and registered brokers and dealers, transfer agents, investment advisers and investment companies including the examination of reports filed under § 240.17a–5 of this chapter; the examination and processing of filings under §§ 230.251 to 230.264 of this chapter issued pursuant to section 3(b) of the Securities Act of 1933; the examination and processing of filings under § 239.28 of this chapter and any related filings under the Trust Indenture Act of 1939; the prosecution of injunctive actions in U.S. District Courts and administrative proceedings before Administrative Law Judges; the

rendering of assistance to U.S. Attorneys in criminal cases; and the making of the Commission's facilities more readily available to the public in that region. In addition, the Northeast Regional Director is responsible for the Commission's participation in cases under chapters 9 and 11 of the Bankruptcy Code in the Northeast Region, excepting Delaware, District of Columbia, Maryland, Virginia, and West Virginia; the Southeast Regional Director is responsible for such participation in the Southeast Region, as well as Delaware, District of Columbia, Maryland, Virginia, and West Virginia; the Midwest Regional Director is responsible for such participation in the Midwest and Central Regions, excepting Utah; and the Pacific Regional Director is responsible for such participation in the Pacific Region and Utah.

(15 U.S.C. 77u, 78d, 78d–1; secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 13, 15(d), 23(a), 48 Stat. 894, 895, 90k; sec. 203(a), 49 Stat. 704; secs. 3, 8, 49 Stat. 1377, 1379; secs. 4, 6, 10, 78 Stat. 569, 570–574, 580; sec. 2, 82 Stat. 454; secs. 1, 2, 84 Stat. 1497; secs. 10, 18, 89 Stat. 119, 155; sec. 308(b), 90 Stat. 57; (15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78m, 78o(d), 78w(a)); 11 U.S.C. 901, 1109(a))

[37 FR 23826, Nov. 9, 1972, as amended at 44 FR 21566, Apr. 10, 1979; 49 FR 12685, Mar. 30, 1984; 50 FR 12240, Mar. 28, 1985; 59 FR 5943, Feb. 9, 1994; 60 FR 14627, Mar. 20, 1995]

§ 200.27a The District Administrators.

Each District Administrator is responsible for executing the Commission's programs as set forth below, subject to review by the appropriate Regional Director and policy direction and review by the relevant Division Directors, the General Counsel, and the Chief Accountant in Washington, DC. The District Administrators' responsibilities include particularly the investigation of transactions in securities on national securities exchanges, in the over-the-counter market, and in distribution to the public; the examination of members of national securities exchanges and registered brokers and dealers, transfer agents, investment advisers and investment companies including the examination of reports filed under § 240.17a–5 of this chapter; the prosecution of injunctive actions in U.S. District Courts and administrative proceedings before Administrative Law Judges; the rendering of assistance to U.S. Attorneys in criminal cases; and the making of the Commission's facilities more readily available to the public in that district.

[59 FR 5943, Feb. 9, 1994]

§ 200.28 Issuance of instructions.

(a) Within the spheres of responsibilities heretofore set forth, Division and Office Heads, and all Regional Administrators may issue such definitive instructions as may be necessary pursuant to this section.

(b) All existing procedures and authorizations not inconsistent with this section shall continue in effect until and unless modified by definitive instructions issued pursuant to this paragraph.

§ 200.29 Rules.

The individual operating divisions shall have the initial responsibility for proposing amendments to existing rules or new rules under the statutory provisions within the jurisdiction of the particular division. Where any such proposals presents a legal problem or is a matter of first impression, or involves a matter of enforcement policy or questions involving statutes other than those administered by the Commission, or may have an effect on prior judicial precedent or pending litigation, submission of the proposal should be made to the Office of the General Counsel for an expression of opinion prior to presentation of the matter to the Commission.

§ 200.30–1 Delegation of authority to Director of Division of Corporation Finance.

Pursuant to the provisions of Pub. L., No. 87–592, 76 Stat. 394 (15 U.S.C. 78d–1, 78d–2), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Division of Corporation Finance, to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) With respect to registration of securities pursuant to the Securities Act

of 1933 (15 U.S.C. 77a *et seq.*), and Regulation C thereunder (§230.400 *et seq.* of this chapter):

(1) To determine the effective dates of amendments to registration statements filed pursuant to section 8(c) of the Act (15 U.S.C. 77h(c)).

(2) To consent to the withdrawal of registration statements or amendments or exhibits thereto, pursuant to Rule 477 (§230.477 of this chapter), and to issue orders declaring registration statements abandoned, pursuant to Rule 479 (§230.479 of this chapter).

(3) To grant applications for confidential treatment of contract provisions pursuant to Rule 406 (§230.406 of this chapter) under the Act; to issue orders scheduling hearings on such applications and to deny any such application as to which the applicant waives his right to a hearing, provided such applicant is advised of his right to have such denial reviewed by the Commission.

(4) To accelerate the use or publication of any summary prospectus filed with the Commission pursuant to section 10(b) of the Act (15 U.S.C. 77j(b)) and Rule 431(g) (§230.431(g) of this chapter) thereunder.

(5) To take the following action pursuant to section 8(a) of the Act (15 U.S.C. 77h(a)):

(i) To determine registration statements to be effective within shorter periods of time than 20 days after the filing thereof;

(ii) To consent to the filing of amendments prior to the effective dates of registration statements as part thereof, or to determine that amendments filed prior to the effective dates of registration statements have been filed pursuant to orders of the Commission, so as to be treated as parts of the registration statements for the purpose of section 8(a) of the Act (15 U.S.C. 77h(a));

(iii) To determine to be effective applications for qualification of trust indentures filed with registration statements.

(6) Pursuant to instructions as to financial statements contained in forms adopted under the Act:

(i) To permit the omission of one or more financial statements therein required or the filing in substitution therefor of appropriate statements of comparable character, or

(ii) To require the filing of other financial statements in addition to, or in substitution for, the statements therein required.

(7) Acting pursuant to section 4(3) of the Act (15 U.S.C. 77d(3)) or Rule 174 thereunder (§230.174 of this chapter), to reduce the 40-day period or the 90-day period with respect to transactions referred to in section 4(3)(b) of the Act (15 U.S.C. 77d(3)(B)).

(8) To act on applications to dispense with any written consents of an expert pursuant to Rule 437 (§230.437 of this chapter).

(b) With respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and Regulation A thereunder (§230.251 *et seq.* of this chapter):

(1) to authorize the granting of applications under Rule 262 (§230.262 of this chapter) upon a showing of good cause that it is not necessary under the circumstances that an exemption under Regulation A be denied;

(2) to authorize the issuance of orders qualifying offering statements pursuant to Rule 252(g) (§230.252(g) of this chapter); and

(3) to issue orders declaring offering statements withdrawn or abandoned pursuant to Rule 259 (§230.259 of this chapter).

(c) With respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and Regulation D thereunder (§230.501 *et seq.* of this chapter), to authorize the granting of applications under Rule 505(b)(2)(iii)(C), (§230.505(b)(2)(iii)(C) of this chapter) and under Rule 507(b) (§230.507(b) of this chapter) upon the showing of good cause that it is not necessary under the circumstances that the exemption under Regulation D be denied.

(d) With respect to the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*):

(1) To determine to be effective prior to the 20th day after filing thereof applications for qualification of indentures filed on Form T–3 (§269.3 of this chapter) pursuant to section 307 of the Act (15 U.S.C. 77ggg), and Rule 7a–1 thereunder (§260.7a–1 of this chapter);

(2) To authorize the issuance of orders exempting certain securities from the Act under sections 304(c) and (d)

thereof (15 U.S.C. 77ddd(c) and 77ddd(d)) and § 260.4c–1 and § 260.4d–7 of this chapter.

(3) In cases in which opportunity for hearing is waived, to authorize the issuance of orders determining that a trusteeship under an indenture to be qualified and another indenture is not so likely to involve a material conflict of interest as to make it necessary to disqualify the trustee pursuant to section 310(b)(1)(ii) of the Act (15 U.S.C. 77jjj(b)(1)(ii)) and Rule 10b–2 thereunder (§ 260.10b–2 of this chapter).

(4) To authorize the issuance of orders exempting any person, registration statement, indenture, security or transaction, or any class or classes of persons, registration statements, indentures, securities, or transactions from the requirements of one or more provisions of the Act pursuant to section 304(d) of the Act (15 U.S.C. 77ddd(d)) and rule 4d–7 thereunder (17 CFR 260.4d–7 of this chapter).

(5) To determine to be effective prior to the 10th day after filing thereof an application for determining the eligibility under section 310(a) of the Act of a person designated as trustee for delayed offerings of debt securities under the Securities Act pursuant to section 305(b)(2) of the Act and rule 5b–1 [17 CFR 260.5b–1 of this chapter] thereunder.

(6) To authorize the issuance of an order permitting a foreign person to act as sole trustee under qualified indentures under section 310(a) of the Act (15 U.S.C. 77jjj(a)) and § 260.10a–1 through § 260.10a–5 of this chapter.

(7) To issue notices with respect to applications for, and authorize the issuance of orders granting, a stay of a trustee's duty to resign pursuant to section 310(b) of the Act and Rule 10b–4 [17 CFR 260.10b–4 of this chapter] thereunder.

(e) With respect to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*):

(1) To determine to be effective applications for registration of securities on a national securities exchange prior to 30 days after receipt of a certification pursuant to section 12(d) of the Act (15 U.S.C. 78*l*(d));

(2) Pursuant to instructions as to financial statements contained in forms adopted under the Act:

(i) To extend the time for filing or to permit the ommission of one or more financial statements therein required or the filing in substitution therefor of appropriate statements of comparable character.

(ii) To require the filing of other financial statements in addition to, or in substitution for, the statements therein required;

(3)(i) To grant and deny applications for confidential treatment filed pursuant to section 24(b) of the Act (15 U.S.C. 78x(b)) and Rule 24b–2 thereunder (§ 240.24b–2 of this chapter);

(ii) To revoke a grant of any such application for confidential treatment.

(4) To authorize the use of forms of proxies, proxy statements, or other soliciting material within periods of time less than that prescribed in §§ 240.14a–6, 240.14a–8(d), and 240.14a–11 of this chapter; to authorize the filing of information statements within periods of time less than that prescribed in § 240.14c–5a of this chapter; and to authorize the filing of information under § 240.14f–1 of this chapter within periods of time less than that prescribed therein.

(5) To grant or deny applications filed pursuant to section 12(g)(1) of the Act (15 U.S.C. 78*l*(g)(1)) for extensions of time within which to file registration statements pursuant to that section, provided the applicant is advised of his right to have any such denial reviewed by the Commission.

(6) To accelerate at the request of the issuer the effective date of registration statements filed pursuant to section 12(g) of the Act (15 U.S.C. 78*l*(g)).

(7) To issue notices of applications for exemptions and to grant exemptions under section 12(h) of the Act (15 U.S.C. 78*l*(h)).

(8) At the request of the issuer to accelerate the termination of registration of any class of equity securities as provided in section 12(g)(4) of the Act (15 U.S.C. 78l(g)(4)) or as provided in § 240.12g–4(a) of this chapter.

(9) Upon receipt of a notification from the Secretary of the Treasury designating a security for exemption pursuant to section 3(a)(12), to issue

public releases announcing such designation.

(10) To issue public releases listing those foreign issuers which appear to be current in submitting the information specified in Rule 12g3–2(b) (§ 240.12g3–2(b)).

(11) To grant exemptions from Rule 14d–10 (§ 240.14d–10 of this chapter) pursuant to Rule 14d–10(e) (§ 240.14d–10(e) of this chapter.

(12) To grant an exemption from § 240.14b–2(b) or § 240.14b–2(c), or both, of this chapter.

(13) To determine with respect to a tender or exchange offer otherwise eligible to be made pursuant to rule 14d–1(b) (§ 240.14d–1(b) of this chapter) whether, in light of any exemptive order granted by a Canadian federal, provincial or territorial regulatory authority, application of certain or all of the provisions of sections 14(d)(1) through 14(d)(7) of the Exchange Act, Regulation 14D and Schedules 14D–1 and 14D–9 thereunder, and rule 14e–1 of Regulation 14E, to such offer is necessary or appropriate in the public interest.

(14) To administer the provisions of § 240.24c-1 of this chapter; provided that access to nonpublic information as defined in such section shall be provided only with the concurrence of the head of the Commission division or office responsible for such information or the files containing such information.

(15) To administer the provisions of Section 24(d) of the Act (15 U.S.C. 78x(d)).

(16) To grant requests for exemptions from:

(i) Tender offer provisions of sections 13(e) and 14(d)(1) through 14(d)(7) of the Act (15 U.S.C. 78m(e) and 78n(d)(1) through 78n(d)(7)), Rule 13e–3 (§ 240.13e–3 of this chapter) and Rule 13e–4 (§ 240.13e–4 of this chapter), Regulation 14D (§§ 240.14d–1 through 240.14d–11 of this chapter) and Schedules 13E–3, TO, and 14D–9 (§§ 240.13e–100, 240.14d–100 and 240.14d–101 of this chapter) thereunder, pursuant to Sections 14(d)(5), 14(d)(8)(C) and 36(a) of the Act (15 U.S.C. 78n(d)(5), 78(d)(8)(C), and 78mm(a)); and

(ii) The tender offer provisions of Rules 14e–1, 14e–2 and 14e–5 of Regulation 14E (§§ 240.14e–1, 240.14e–2 and 240.14e–5 of this chapter) pursuant to section 36(a) of the Act (15 U.S.C. 78mm(a)).

(f) Notwithstanding anything in the foregoing:

(1) Matters arising under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) and the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*) pertaining to investment companies registered under the Investment Company Act of 1940 are not within the scope of the functions delegated to the Director of the Division of Corporation Finance, except those arising under section 30(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–29(f));

(2) In any case in which the Director of the Division of Corporation Finance believes it appropriate, he may submit the matter to the Commission.

(g) With respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and Rule 701 thereunder (§ 230.701 of this chapter), to authorize the granting of applications under Rule 703(b) (§ 230.703(b) of this chapter) upon a showing of good cause that it is not necessary under the circumstances that an exemption under Rule 701 be denied.

(h) With respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and Rule 144A thereunder (§ 230.144A of this chapter), taking into account then-existing market practices, to designate any securities or classes of securities to be securities that will not be deemed ''of the same class as securities listed on a national securities exchange or quoted in a U.S. automated inter-dealer quotation system'' within the meaning of Rule 144A(d)(3)(i) (§ 230.144A(d)(3)(i) of this chapter).

(i) With respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and Regulation S thereunder (§ 230.901 *et seq.* of this chapter), and in consultation with the Director of the Division of Market Regulation, to designate any foreign securities exchange or non-exchange market as a ''designated offshore securities market'' within the meaning of Rule 902(a) (§ 230.902(a) of this chapter).

(j) With respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Trust Indenture Act of 1939

(15 U.S.C. 77aaa *et seq.*), and Regulation S–T thereunder (part 232 of this chapter), to grant or deny a request submitted pursuant to Rule 13(b) of Regulation S–T (§ 232.13(b) of this chapter) to adjust the filing date of an electronic filing.

(k) With respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*), and Regulation S–T thereunder (part 232 of this chapter), to set the terms of, and grant or deny as appropriate, continuing hardship exemptions, pursuant to Rule 202 of Regulation S–T, (§ 232.202 of this chapter), from the electronic submission requirements of Regulation S–T (part 232 of this chapter).

[41 FR 29375, July 16, 1976]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 200.30–1 see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 200.30–3 Delegation of authority to Director of Division of Market Regulation.

Pursuant to the provisions of Pub. L. 87–592, 76 Stat. 394, 15 U.S.C. 78d–1, 78d–2), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Division of Market Regulation to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) With respect to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*):

(1) To approve the withdrawal or striking from listing and registration of securities registered on any national securities exchange pursuant to section 12(d) of the Act (15 U.S.C. 78*l*(d)) and Rules 12d2–1 and 12d2–2 thereunder (§§ 240.12d2–1 and 240.12d2–2 of this chapter);

(2) To extend unlisted trading privileges and to deny applications for unlisted trading privileges by national securities exchanges pursuant to section 12(f)(2) of the Act, 15 U.S.C. 78*l*(f)(2), and Rule 12f–1 thereunder, 17 CFR 240.12f–1, provided that any applicant exchange denied unlisted trading privileges is advised of its right to have such denial reviewed by the Commission.

(3) Pursuant to section 15(b) of the Act (15 U.S.C. 78*o*(b)):

(i) To authorize the issuance of orders granting registration of brokers or dealers within forty-five days of the filing of an application for registration as a broker or dealer (or within such longer period as to which the applicant consents);

(ii) To authorize the issuance of orders canceling registrations of brokers or dealers, or pending applications for registration, if such brokers or dealers or applicants for registration are no longer in existence or have ceased to do business as brokers or dealers;

(4) Pursuant to Rule 19h–1 (§ 240.19h–1 of this chapter):

(i) To grant applications with respect to membership in, association with a member of, or participation in, a self-regulatory organization and for other relief as to persons who are subject to an applicable disqualification where such relationships or other relief have been approved or recommended by a self-regulatory organization;

(ii) To extend the time for Commission consideration of notices for admission to membership or participation in a self-regulatory organization or association with a member of persons subject to a statutory disqualification pursuant to paragraph (a)(7) of that rule.

(5) Pursuant to Rule 17a–5(1)(3) (§ 240.17a–5(1)(3) of this chapter), to consider applications, by brokers and dealers for exemptions from, and extension of time within which to file, reports required by Rule 17a–5 (§ 240.17a–5 of this chapter), and to grant, and to authorize the issuance of orders denying, such applications provided such applicant is advised of his right to have such denial reviewed by the Commission.

(6) Pursuant to Rules 14e–4(c), 14e–5(d), and 15c2–11(h) (§§ 240.14e–4(c), 240.14e–5(d), and 240.15c2–11(h) of this chapter), and Rules 101(d), 102(e), 104(j), and 105(c) of Regulation M (§§ 242.101(d), 242.102(e), 242.104(j), and 242.105(c) of this chapter), to grant requests for exemptions from Rules 14e–4, 14e–5, and 15c2–11 (§§ 240.14e–4, 240.14e–5, and 240.15c2–11 of this chapter), and Rules

101, 102, 104, and 105 of Regulation M (§§ 242.101, 242.102, 242.104, and 242.105 of this chapter).

(7) Pursuant to Rule 15c3–1 (§ 240.15c3–1 of this chapter):

(i) To approve lesser equity requirements in specialist or market maker accounts pursuant to Rule 15c3–1(a)(6)(iii)(E) (§ 240.15c3–1(a)(6)(iii)(E) of this chapter);

(ii) To grant exemptions from Rule 15c3–1 (§ 240.15c3–1 of this chapter) pursuant to Rule 15c3–1(b)(3) (§ 240.15c3–1(b)(3) of this chapter);

(iii) To grant temporary exemptions upon specified terms and conditions from the debt equity requirements of Rule 15c3–1(d)(§ 240.15c3–1(d) of this chapter);

(iv) To approve a change in election of the alternative capital requirement pursuant to Rule 15c3–1(f)(1) (i) and (ii) (§ 240.15c3–1(f)(1) (i) and (ii) of this chapter); and

(v) To review applications of OTC derivatives dealers filed pursuant to Appendix F of § 240.15c3–1f of this chapter, and to grant or deny such applications in full or in part.

(8) Pursuant to Rule 17a–10(d) (§ 240.17a–10(d) of this chapter), to consider applications by broker-dealers for extensions of time in which to file reports required by Rule 17a–10(§ 240.17a–10 of this chapter), and to grant, and to authorize the issuance of orders denying, such applications provided such applicant is advised of his right to have such denial reviewed by the Commission. Any extension granted shall not be for more than 150 days after the close of the calendar year for which the report on Form X–17A–10 (§ 249.618 of this chapter) is made.

(9) Pursuant to Rule 10b–17(b)(2) (§ 240.10b–17(b)(2) of this chapter), to review applications of various issuers for exemption from the notice requirements of Rule 10b–17 (§ 240.10b–17 of this chapter) and to grant or deny such applications, with authority to issue orders granting and denying same, provided each applicant is advised of his right to have a denial reviewed by the Commission.

(10) Pursuant to Rule 15c3–3 (§ 240.15c3–3 of this chapter) to find and designate as control locations for purposes of Rule 15c3–3(c)(7) (§ 240.15c3–3(c)(7) of this chapter) certain broker-dealer accounts which are adequate for the protection of customer securities.

(11) [Reserved]

(12) Pursuant to Rule 19b–4 (§ 240.19b–4) of this chapter, to publish notices of proposed rule changes filed by self-regulatory organizations and to approve such proposed rule changes.

(13) Pursuant to section 15B(a) of the Act [15 U.S.C. 78o–4(a)], to authorize the issuance of orders granting registration of municipal securities dealers within forty-five days of the filing of an application for registration as a municipal securities dealer (or within such longer period as to which the applicant consents).

(14) Pursuant to section 17A(c)(2) of the Act (15 U.S.C. 78q–1(c)(2)), to authorize the issuance of orders accelerating registration of transfer agents for which the Commission is the appropriate regulatory agency before the expiration of thirty days following the dates on which applications for registration as a transfer agent are filed.

(15) Pursuant to Rule 10a–1(f) [§ 240.10a–1(f)] to grant requests for exemptions from Rule 10a–1;

(16) Pursuant to sections 17A(b)(1), 17A(b)(2) and 19(a) of the Act (15 U.S.C. 78q–1(b)(1), 78q–1(b)(2) and 78s(a)), to publish notice of the filing of applications for registration and for exemption from registration as a clearing agency.

(17) Pursuant to Rule 17f–2 (§ 240.17f–2 of this chapter).

(i) To disapprove a ''Notice Pursuant to Rule 17f–2'' pursuant to Rule 17f–2(e) (§ 240.17f–2(e) of this chapter).

(ii) To grant exemptions upon specified terms, conditions and periods, for classes of persons subject to Rule 17f–2 pursuant to Rule 17f–2(g) (§ 240.17f–2(g) of this chapter).

(iii) To approve amendments to plan of a registered national securities exchange or a national securities association submitted pursuant to Rule 17f–2(c) (§ 240.17f–2(c) of this chapter).

(18) Pursuant to Rule 17d–1 (§ 240.17d–1 of this chapter) to designate one self-regulatory organization responsible for the examination of brokers and dealers which are members of more than one such organization to insure compliance

with applicable financial responsibility rules.

(19)(i) To grant and deny applications for confidential treatment filed pursuant to section 24(b) of the Act (15 U.S.C. 78x(b)) and Rule 24b–2 thereunder (240.24b–2 of this chapter);

(ii) To revoke a grant of confidential treatment for any such application.

(20) Pursuant to sections 8(c) and 15(c)(2) of the Act (15 U.S.C. 78h(c) and 78o(2)) and paragraphs (g) of Rules 8c–1 and 15c2–1 thereunder, to make findings that the agreements, safeguards, and provisions of registered clearing agencies are adequate for the protection of investors.

(21) Under section 17A(c)(4)(B) of the Act (15 U.S.C. 78q–1(c)(4)(B)), to set terms and conditions upon which transfer agents registered with the Commission may withdraw from registration as a transfer agent by filing a written notice of withdrawal.

(22) Under section 17A(c)(4)(B) of the Act (15 U.S.C. 78q–1(c)(4)(B)), to authorize the issuance of orders canceling registrations of transfer agents registered with the Commission or denying applications for registration as a transfer agent with the Commission, if such transfer agents are no longer in existence or are not engaged in business as transfer agents.

(23) Pursuant to section 17(b) of the Act (15 U.S.C. 78q(b)), prior to any examination of a registered clearing agency, registered transfer agent, or registered municipal securities dealer whose appropriate regulatory agency is not the Commission, to notify and consult with the appropriate regulatory agency for such clearing agency, transfer agent, or municipal securities dealer.

(24) Pursuant to section 17(c)(3) of the Act, 15 U.S.C. 78q(c)(3), in regard to clearing agencies, transfer agents and municipal securities dealers for which the Commission is not the appropriate regulatory agency, (i) to notify the appropriate regulatory agency of any examination conducted by the Commission of any such clearing agency, transfer agent, or municipal securities dealer; (ii) to request from the appropriate regulatory agency a copy of the report of any examination of any such clearing agency, transfer agent, or municipal securities dealer conducted by such appropriate regulatory agency and any data supplied to it in connection with such examination; and (iii) to furnish to the appropriate regulatory agency on request a copy of the report of any examination of any such clearing agency, transfer agent, or municipal securities dealer conducted by the Commission and any data supplied to it in connection with such examination.

(25) Pursuant to Rule 17f–1 (§ 240.17f–1 of this chapter), to designate persons not subject to § 240.17f–1 as reporting institutions upon specified terms, conditions, and time periods.

(26) [Reserved]

(27) To approve amendments to the joint industry plan governing the consolidated transaction reporting declared effective by the Commission pursuant to Rule 11Aa(3–1) (§ 240.11Aa3–1 of this chapter) or its predecessor, Rule 17a–15, and to grant exemptions from Rule 11Aa3–1 pursuant to Rule 11Aa3–1(g) (§ 240.11Aaa3–1(g) of this chapter) to exchanges trading listed securities that are designated as national market system securities until such times as a Joint Reporting Plan for such securities is filed and approved by the Commission.

(28) To grant exemptions from Rule 11Ac1–1 (''Rule'') (§ 240.11Ac1–1), pursuant to paragraph (e) of the rule.

(29) To issue supplemental orders modifying the terms upon which self-regulatory organizations are authorized to act jointly in planning, developing, operating or regulating facilities of a national market system in accordance with the terms of amendments to plans which plans have been previously approved by the Commission under section 11A(a)(3)(B) of the Securities Exchange Act of 1934.

(30) Pursuant to section 17(a) of the Act, 15 U.S.C. 78q, to approve amendments to the plans which are consistent with the reporting structure of Rules 17a–5(a)(4) and 17a–10(b) filed by self-regulatory organizations pursuant to Rules 17a–5(a)(4) and 17a–10(b).

(31) Pursuant to section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), to extend for a period not exceeding 90 days from the date of publication of notice of the filing of a proposed rule change pursuant to section 19(b)(1) of the Act, 15

U.S.C. 78s(b)(1), the period during which the Commission must by order approve the proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved.

(32) Under §240.10b–10(f) of this chapter, to grant exemptions from §240.10b–10 of this chapter.

(33) Pursuant to Rule 17a–6 (§240.17a–6 of this chapter) to approve record destruction plans and amendments thereto filed by a national securities exchange or a national securities association.

(34) Pursuant to Rule 17d–2 (§240.17d–2 of this chapter) to publish notice of plans and plan amendments filed pursuant to Rule 17d–2 and to approve such plans and plan amendments.

(35) Under §240.13e–4(h)(8) of this chapter:

(i) To grant exemptions from §240.13e–4 of this chapter; and

(ii) To determine with respect to a tender or exchange offer otherwise eligible to be made pursuant to rule 13e–4(g) (§240.13e–4(g) of this chapter) whether, in light of any exemptive order granted by a Canadian federal, provincial or territorial regulatory authority, application of certain or all of the provisions of section 13(e)(1) and rule 13e–4 and Schedule 13E–4 thereunder to such offer is necessary or appropriate in the public interest.

(36) To grant exemptions from Rule 11Ac1–2 (§240.11Ac1–2 of this chapter), pursuant to Rule 11Ac1–2(g) (§240.11Ac1–2(g) of this chapter).

(37) Pursuant to Rule 11Aa2–1, 17 CFR 240.11Aa2–1, to publish notice of the filing of a designation plan with respect to national market system securities, or any proposed amendment thereto, and to approve such plan or amendment.

(38) To disclose:

(i) To the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the state banking authorities, information and documents deemed confidential regarding registered clearing agencies and registered transfer agents; and

(ii) To the Department of Treasury, information and documents deemed confidential regarding possible laundering of money through or by brokers or dealers, including compliance by brokers or dealers with the Currency and Foreign Transactions Reporting Act of 1970, as amended.

(39) Under §240.9b–1 of this chapter:

(i) To enable distribution of an options disclosure document or amendment to an options disclosure document to the public prior to the time required in the Rule or to lengthen the period before distribution can be made;

(ii) To require refiling of an amendment to an options disclosure document pursuant to the procedure set forth in §240.9b–1(b)(2)(i) of this chapter.

(40) Pursuant to section 15B(b)(2)(B) of the Act, 15 U.S.C., 78o–4(b), to review and, where appropriate, approve the selection by the Municipal Securities Rulemaking Board (''Board'') of public representatives to serve on the Board.

(41) Pursuant to Rule 6a–2(c) (§240.6a–2 of this chapter) to exempt registered national securities exchanges from the filing requirements imposed by Rule 6a–2 with respect to certain affiliates and subsidiaries of the exchange.

(42) Under §240.11Aa3–2(f) of this chapter, to grant or deny exemptions from §240.11Aa3–2 of this chapter.

(43) To grant or deny exemptions from Rule 17Ad–14 (§240.17Ad–14 of this chapter), pursuant to Rule 17Ad–14(d) (§240.17Ad–14(d) of this chapter). (Pub. L. 87–592, 76 Stat. 394, 15 U.S.C 78d–1, 78d–2).

(44) To review, publish notice of, and where appropriate, approve plans, and amendments to plans, submitted by self-regulatory organizations pursuant to Rule 19d–1(c) under the Act (§240.19d–1(c)).

(45) To grant exemptions from Rule 3b–9 under the Act. (§240.3b–9(c) of this chapter).

(46) Pursuant to section 15(b)(9) of the Act, 15 U.S.C. 78*o*(b)(9) to review and, where appropriate, grant exemptions from the requirement of section 15(b)(8) of the Act, 15 U.S.C. 78*o*(b)(8).

(47) Pursuant to section 15(a)(2) of the Act, 15 U.S.C. 78*o*(a)(2), to review and, either unconditionally or on specified terms and conditions, grant exemptions from the broker-dealer registration requirements of section 15(a)(1) of the Act, 15 U.S.C. 78*o*(a)(1), to

government securities brokers or government securities dealers that have registered with the Commission under section 15(a)(2) of the Act, 15 U.S.C. 78*o*−5(a)(2), solely with respect to effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security principally backed by a guaranty of the United States.

(48) Pursuant to paragraph (d) of Rule 15c2–12 (17 CFR 15c2–12), to grant or deny exemptions, either unconditionally or on specified terms and conditions, from Rule 15c2–12.

(49) Pursuant to section 11A(b) of the Act and Rule 11Ab2–1 thereunder (17 CFR 11Ab2–1), to publish notice of and, by order, grant under section 11A(b) of the Act and Rule 11Ab2–1 thereunder: Applications for registration as a securities information processor; and exemptions from that section and any rules or regulations promulgated thereunder, either conditionally or unconditionally.

(50) Pursuant to sections 17A(b) and 19(a) of the Act (15 U.S.C. 78q–1(b) and 78s(a)):

(i) To authorize the issuance of orders granting an extension to a temporary clearing agency registration, for up to two years or such longer period as the clearing agency consents.

(ii) To authorize the issuance of orders granting the withdrawal of an application to become a registered clearing agency, at any time prior to final determination of such application by the Commission, upon submission of a request for such withdrawal by applicant.

(51) Pursuant to paragraph (a)(4) of § 240.9b–1 of this chapter, to authorize the issuance of orders designating securities as ''standardized options.''

(52) Pursuant to Rules 17h–1T and 17h–2T of the Act (§§ 240.17h–1T and 240.17h–2T of this chapter):

(i) To designate certain broker-dealers as Reporting Brokers or Dealers; *or and*

(ii) To grant or deny an exemption, conditionally or unconditionally, to a broker or dealer pursuant to section 17(h) of the Act.

(53) To administer the provisions of § 240.24c-1 of this chapter; provided that access to nonpublic information as defined in such section shall be provided only with the concurrence of the head of the Commission division or office responsible for such information or the files containing such information.

(54) To administer the provisions of Section 24(d) of the Act (15 U.S.C. 78x(d)).

(55) Pursuant to § 240.15c6–1 of this chapter, taking into account then existing market practices, to exempt contracts for the purchase or sale of any securities from the requirements of § 240.15c6–1(a) of this chapter.

(56) Pursuant to § 270.17Ad–16 of this chapter, to designate by order the appropriate qualified registered securities depository.

(57) Pursuant to Section 19(b)(2)(B) of the Act, 15 U.S.C. 78s(b)(2)(B), to institute proceedings to determine whether a proposed rule change of a self-regulatory organization should be disapproved.

(58) Pursuant to Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C), to abrogate a change in the rules of a self-regulatory organization and require that it be refiled in accordance with Section 19(b)(1), 15 U.S.C. 78s(b)(1), and reviewed in accordance with Section 19(b)(2), 15 U.S.C. 78s(b)(2), of the Act.

(59) Pursuant to paragraph (e)(6)(iii) of Rule 19b–4 (§ 240.19b–4 of this chapter), to reduce the period before which a proposed rule change can become operative, and to reduce the period between an SRO submission of a filing and a pre-filing notification.

(60) To grant exemptions from Rule 17a–23 (§ 240.17a–23 of this chapter), pursuant to Rule 17a–23(i) (§ 240.17a–23(i) of this chapter).

(61) To grant exemptions from Rule 11Ac1–4 (''Rule'') (§ 240.11Ac1–4), pursuant to paragraph (d) of the rule.

(62) From January 2, 1997 through February 17, 1997, to modify for a period not to exceed 60 days, the effective date or the compliance date of Rule 11Ac1–1 (§ 240.11Ac1–1) or Rule 11Ac1–4 (§ 240.11Ac1–4), or amendments to Rule 11Ac1–1 or Rule 11Ac1–4, with respect to any party affected by such rules.

(63) Pursuant to section 36 of the Act (15 U.S.C. 78mm) to review and, either unconditionally or on specified terms

and conditions, grant or deny exemptions from section 11(d)(1) of the Act (15 U.S.C. 78k(d)(1)).

(64) Pursuant to §240.15a–1(b)(1) of this chapter, to issue orders identifying other permissible securities activities in which an OTC derivatives dealer may engage.

(65) Pursuant to §240.15a–1(b)(2) of this chapter, to issue orders determining that a class of fungible instruments that are standardized as to their material economic terms is within the scope of eligible OTC derivative instrument.

(66) Pursuant to §240.17a–12 of this chapter:

(i) To authorize the issuance of orders requiring OTC derivatives dealers to file, pursuant to §240.17a–12(a)(ii) of this chapter, monthly, or at such times as shall be specified, Part IIB of Form X–17A–5 (§249.617 of this chapter) and such other financial and operational information as shall be specified.

(ii) Pursuant to §240.17a–12(n) of this chapter, to consider applications by OTC derivatives dealers for exemptions from, and extensions of time within which to file, reports required by §240.17a–12 of this chapter, and to grant or deny such applications.

(67) To issue orders under Rules 15b3–1(c)(4), 15b6–1(e), 15Ba2–2(e)(4), 15Bc3–1(e), 15Ca2–1(c)(4), and 15Cc1–1(d) (17 CFR 240.15b3–1(c)(4), 240.15b6–1(e), 240.15Ba2–2(e)(4), 240.15Bc3–1(e), 240.15Ca2–1(c)(4), and 240.15Cc1–1(d)).

(68) Pursuant to Section 36(a) of the Act, 15 U.S.C. 78mm(a), to grant requests for exemptions from the tender offer provisions of Rule 14e–1 of Regulation 14E (§240.14e–1 of this chapter).

(69) Pursuant to paragraph (c) of Rule 11Ac1–5 (17 CFR 240.11Ac1–5), to grant or deny exemptions, conditionally or unconditionally, from any provision or provisions of Rule 11Ac1–5.

(70) Pursuant to paragraph (d) of Rule 11Ac1–6 (17 CFR 240.11Ac1–6), to grant or deny exemptions, conditionally or unconditionally, from any provision or provisions of Rule 11Ac1–6.

(71) Pursuant to paragraph (c) of Rule 11Ac1–7 (17 CFR 240.11Ac1–7), to grant exemptions, conditionally or unconditionally, from any provision or provisions of Rule 11Ac1–7.

(72) Pursuant to Sections 15(a)(2) and 36 of the Act (15 U.S.C. 78o(a)(2) and 78mm), to review and, either unconditionally or on specified terms and conditions, to grant or deny exemptions to any bank, savings association, or savings bank from the broker-dealer registration requirements of Section 15(a)(1) of the Act (15 U.S.C. 78o(a)(1)) or any applicable provision of this Act (15 U.S.C. 78c *et seq.*) and the rules and regulations thereunder based solely on such bank's, savings association's, or savings bank's status as a broker or dealer.

(73) Pursuant to section 6(a) of the Act, 15 U.S.C. 78f(a), and Rule 6a–1 thereunder, 17 CFR 240.6a–1:

(i) To publish a notice of filing of an application for registration as a national securities exchange, or for exemption from registration based on limited volume;

(ii) To publish amendments to an application for registration as a national securities exchange, or for exemption from registration based on limited volume; and

(iii) To extend deadlines for submission of comments to an application for registration as a national securities exchange, or for exemption from registration based on limited volume; and amendments to an application for registration as a national securities exchange, or for exemption from registration based on limited volume.

(74) Pursuant to section 36 of the Act (15 U.S.C. 78mm) to review and, either unconditionally or on specified terms and conditions, grant, or deny exemptions from rule 17a–25 of the Act (§240.17a–25 of this chapter).

(75) Pursuant to Section 19(b)(7)(A) of the Act, 15 U.S.C. 78s(b)(7)(A), to publish notices of proposed rule changes filed by self-regulatory organizations relating to security futures products.

(76) Pursuant to Section 19(b)(7)(C) of the Act, 15 U.S.C. 78s(b)(7)(C), to abrogate a change in the rules of a self-regulatory organization relating to security futures products and require that it be refiled in accordance with Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1).

(77) Pursuant to Section 6(g)(3) of the Act, 15 U.S.C. 78f(g)(3), to publish acknowledgement of receipt of a notice of

registration as a national securities exchange for the sole purpose of trading security futures products under Section 6(g) of the Act and Rule 6a–4 of the Act (17 CFR 240.6a–4).

(b) To designate officers empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records in the course of investigations instituted by the Commission pursuant to section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)).

(c) In nonpublic investigatory proceedings within the responsibility of the Director or Deputy Director, to grant requests of persons to procure copies of the transcript of their testimony given pursuant to Rule 6 of the Commission's rules relating to investigations as in effect subsequent to November 16, 1972 (17 CFR 203.6).

(d) To notify the Securities Investor Protection Corporation (''SIPC'') of facts concerning the activities and the operational and financial condition of any registered broker or dealer which is or appears to be a member of SIPC and which is in or approaching financial difficulty within the meaning of section 5 of the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. 78aaa *et seq.*

(e) To determine whether, and issue orders regarding, proposals for designation of a contract market for futures trading on an index or group of securities meet the eligibility criteria set forth under section 2(a)(1)(B)(ii) of the Commodity Exchange Act, 7 U.S.C. 2(a).

(f) With respect to the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. 78aaa *et seq.* (''SIPA''):

(1) Pursuant to Section 3(a)(2)(B) of SIPA, to:

(i) Extend for a period not exceeding 90 days from the date of the filing of the determination by the Securities Investor Protection Corporation (''SIPC'') that a registered broker-dealer is not a SIPC member because it conducts its principal business outside the United States and its territories and possessions, the period during which the Commission must affirm, reverse or amend any determination by SIPC; and

(ii) Affirm such determination filed by SIPC.

(2) Pursuant to Section (3)(e)(1) of SIPA, to:

(i) Determine whether proposed bylaw changes filed by SIPC should not be disapproved or whether the proposed bylaw change is a matter of such significant public interest that public comment should be obtained, in which case the Division will notify SIPC of such finding and publish notice of the proposed bylaw change in accordance with Section 3(e)(2) of SIPA; and

(ii) Accelerate the effective date of proposed bylaw changes filed by SIPC.

(3) Pursuant to Section (3)(e)(2) of SIPA, to publish notice of proposed rule changes filed by SIPC.

(g) Notwithstanding anything in the foregoing, in any case in which the Director of the Division of Market Regulation believes it appropriate, he may submit the matter to the Commission.

[37 FR 16795, Aug. 19, 1972]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §200.30–3 see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

EFFECTIVE DATE NOTE: At 68 FR 12783, Mar. 17, 2003, §200.30–3 was amended by revising paragraph (a)(10), effective Apr. 16, 2003. For the convenience of the user, the revised text is set forth as follows:

§ 200.30–3 Delegation of authority to Director of Division of Market Regulation.

* * * * *

(a) * * *

(10)(i) Pursuant to Rule 15c3–3 (§240.15c3–3 of this chapter) to find and designate as control locations for purposes of Rule 15c3–3(c)(7) (§240.15c3–3(c)(7) of this chapter) certain broker-dealer accounts which are adequate for the protection of customer securities.

(ii) Pursuant to section 36(a) of the Act (15 U.S.C. 78mm(a)) to review and, either unconditionally or on specified terms and conditions, grant or deny exemptions from the collateral requirements of paragraph (b)(3) of Rule 15c3–3 of the Act (§240.15c3–3 of this chapter) for a type of collateral after concluding that the characteristics of such collateral are substantially comparable to the

characteristics of a type of collateral previously exempted by the Commission.

* * * * *

§ 200.30–4 Delegation of authority to Director of Division of Enforcement.

Pursuant to the provisions of Pub. L. No. 100–181, 101 Stat. 1254, 1255 (15 U.S.C. 78d–1, 78d–2), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Division of Enforcement to be performed by him or under his direction by such other person or persons as may be designated from time to time by the Chairman of the Commission.

(a)(1) To designate officers empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records in the course of investigations instituted by the Commission pursuant to section 19(b) of the Securities Act of 1933 (15 U.S.C. 77s(b)), section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)), section 18(c) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79r(c)), section 42(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–41(b)) and section 209(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9(b)).

(2) In nonpublic investigative proceedings, to grant requests of persons to procure copies of the transcript of their testimony under § 203.6 of this chapter.

(3) To terminate and close all investigations authorized by the Commission pursuant to section 20 of the Securities Act of 1933 (15 U.S.C. 77t), section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u), section 18 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79r), section 42 of the Investment Company Act of 1940 (15 U.S.C. 80a–41) and section 209 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9).

(4) To terminate the authority to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records in the course of investigations instituted by the Commission pursuant to section 19(b) of the Securities Act of 1933 (15 U.S.C. 77s(b)), section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)), section 18(c) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79r(c)), section 42(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–41(b)) and section 209(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9(b)).

(5) To grant or deny applications made pursuant to Rule 193 of the Commission's Rules of Practice, § 201.193 of this chapter, provided, that, in the event of a denial, the applicant shall be notified that such a denial may be appealed to the Commisson for review.

(6) To notify the Securities Investor Protection Corporation (''SIPC'') of facts concerning the activities and the operational and financial condition of any registered broker or dealer which is or appears to be a member of SIPC and which is in or approaching financial difficulty within the meaning of section 5 of the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. 78aaa *et seq.*

(7) To administer the provisions of § 240.24c-1 of this chapter; provided that access to nonpublic information as defined in such section shall be provided only with the concurrence of the head of the Commission division or office responsible for such information or the files containing such information.

(8) Pursuant to Rule 204–2(j)(3)(ii) (§ 275.204–2(j)(3)(ii) of this chapter) under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*), to make written demands upon non-resident investment advisers subject to the provisions of such rule to furnish to the Commission true, correct, complete and current copies of any or all books and records which such non-resident investment advisers are required to make, keep current or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Investment Advisers Act of 1940, or any part of such books and

records which may be specified in any such demand.

(9) To administer the provisions of Section 24(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78x(d)).

(10) To institute subpoena enforcement proceedings in federal court to seek an order compelling the production of documents or an individual's appearance for testimony pursuant to subpoenas issued pursuant to paragraph (a)(1) of this section in connection with investigations pursuant to section 19(b) of the Securities Act of 1933 (15 U.S.C. 77s(b)), section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)), section 18(c) of the Public Utilities Holding Company Act of 1935 (15 U.S.C. 79r(c)), section 42(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–41(b)) and section 209(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9(b)).

(11) To authorize staff to appear in federal bankruptcy court to preserve Commission claims in connection with investigations pursuant to section 19(b) of the Securities Act of 1933 (15 U.S.C. 77s(b)), section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)), section 18(c) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79r(c)), section 42(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–41(b)) and section 209(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9(b)).

(12) Pursuant to Section 36 of the Securities Exchange Act of 1934 (15 U.S.C. 78mm) to review and, either unconditionally or on specified terms and conditions, grant, or deny exemptions from rule 17a–25 of the Act (§ 240.17a–25 of this chapter), provided that the Division of Market Regulation is notified of any such granting or denial of an exemption.

(b) Notwithstanding anything in the foregoing, in any case in which the Director of the Division of Enforcement believes it appropriate, he may submit the matter to the Commission.

[37 FR 16796, Aug. 19, 1972, as amended at 37 FR 25166, Nov. 28, 1972; 40 FR 14748, Apr. 2, 1975; 44 FR 22716, Apr. 17, 1979; 44 FR 50835, Aug. 30, 1979; 44 FR 76774, Dec. 28, 1979; 45 FR 7781, Feb. 5, 1980; 47 FR 26822, June 22, 1982; 49 FR 12206, Mar. 29, 1984; 52 FR 12148, Apr. 15, 1987; 54 FR 24331, June 7, 1989; 58 FR 52419, Oct. 8, 1993; 59 FR 23794, May 9, 1994; 60 FR 14628, Mar. 20, 1995; 60 FR 32794, June 23, 1995; 61 FR 20721, May 8, 1996; 66 FR 35842, July 9, 2001]

§ 200.30–5 Delegation of authority to Director of Division of Investment Management.

Pursuant to the provisions of Pub. L. 87–592, 76 Stat. 394 (15 U.S.C. 78d–1, 78d–2), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Division of Investment Management, to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) With respect to the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*):

(1) Except as otherwise provided in this section, to issue notices, under § 270.0–5 of this chapter, with respect to applications for orders under the Act and the rules and regulations thereunder and, with respect to section 8(f) of the Act (15 U.S.C. 80a–8(f)), in cases where no application has been filed, where, upon examination, the matter does not appear to the Director to present significant issues that have not been previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors warrants that the Commission consider the matter.

(2) Except as otherwise provided in this section, to authorize the issuance of orders where a notice, under § 270.0–5 of this chapter, has been issued and no request for a hearing has been received from any interested person

within the period specified in the notice and the Director believes that the matter presents no significant issues that have not been previously settled by the Commission and it does not appear to the Director to be necessary in the public interest or the interest of investors that the Commission consider the matter.

(3) To permit the withdrawal of applications pursuant to the Act (15 U.S.C. 80a–1 *et seq.*)

(4) In connection with the mailing of reports to stockholders and the filing with the Commission of registration statements and of reports:

(i) To grant reasonable extensions of time, upon a showing of good cause and that it would not be contrary to the public interest or inconsistent with the protection of investors; and

(ii) To deny requests for extensions of time, provided the applicant is advised that he can request Commission review of any such denial.

(5) [Reserved]

(6) To authorize the issuance of orders granting confidential treatment pursuant to section 45(a) of the Act (15 U.S.C. 80a–44(a)) where applications for confidential treatment are made regarding matters of disclosure in registration statements filed pursuant to section 8 of the Act (15 U.S.C. 80a–8), or in reports filed pursuant to section 30 of the Act (15 U.S.C. 80a–29), but only when the Commission has previously by order granted confidential treatment to the same information.

(7) To issue notices, pursuant to Rule 0–5(a) (§ 270.0–5(a) of this chapter) with respect to applications for temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 (15 U.S.C. 80a–9(c)), and to conditionally or unconditionally exempt persons, for a temporary period not exceeding 60 days, from section 9(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–9(a)), if, on the basis of the facts then set forth in the application, it appears that:

(i)(A) The prohibitions of section 9(a), as applied to the applicant, may be unduly or disproportionately severe, or (B) the applicant's conduct has been such as not to make it against the public interest or the protection of investors to grant the temporary exemption; and

(ii) Granting the temporary exemption would protect the interests of the investment companies being served by the applicant by allowing time for the orderly consideration of the application for permanent relief or the orderly transition of the applicant's responsibilities to a successor, or both.

(8) To issue—

(i) Notices, pursuant to Rule 0–5(a) (§ 270.0–5(a) of this chapter), with respect to applications for permanent orders under section 9(c) of the Act [15 U.S.C. 80a–9(c)], and, orders, pursuant to paragraph (a)(2) of this section, that exempt conditionally or unconditionally persons from section 9(a) of the Act [15 U.S.C. 80a–9(a)], if, on the basis of the facts then set forth in the application, it appears that:

(A) The prohibitions of section 9(a) of the Act, as applied to the applicant, may be unduly or disproportionately severe, or the applicant's conduct has been such as not to make it against the public interest or the protection of investors to grant the exemption;

(B) The prohibitions arise under section 9(a)(3) of the Act solely because the applicant employs, or will employ, a person who is disqualified under section 9(a) (1) or (2) of the Act; and,

(C) The employee does not and will not serve in any capacity directly related to providing investment advice to, or acting as depositor for, any registered investment company, or acting as principal underwriter for any registered open-end company, registered unit investment trust or registered face amount certificate company.

(ii) Temporary orders under section 9(c) of the Act [15 U.S.C. 80a–9(c)], exempting conditionally or unconditionally persons from section 9(a) of the Act [15 U.S.C. 80a–9(a)], if, on the basis of the application, it appears that:

(A) The prohibitions arise under section 9(a)(3) of the Act solely because the applicant employs a person who is disqualified under section 9(a) (1) or (2) of the Act; and

(B) Applicant meets the requirements of paragraphs (a)(8)(i) (A) and (C) of this section.

(b) With respect to matters pertaining to investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), pooled investment funds or accounts, and the general assets or separate accounts of insurance companies, all arising under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), and the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*), the same functions as are delegated to the Director of the Division of Corporation Finance in regard to companies other than such investment companies in paragraphs (a), (e), and (f) of § 200.30–1.

(b–1) *With respect to the Securities Act of 1933.* (1) To issue notices with respect to applications for orders under section 3(a)(2) exempting from section 5 interests or participations issued in connection with stock bonus, pension, profit-sharing, or annuity plans covering employees some or all of whom are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954 where, upon examination, the matter does not appear to him to present issues not previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors requires that a hearing be held.

(2) To authorize the issuance of orders where a notice has been issued and no request for a hearing has been received from any interested person within the period specified in the notice and the matter involved presents no issue that he believes has not been settled previously by the Commission and it does not appear to him to be necessary in the public interest or the interest of investors that a hearing be held.

(b–2) With respect to post-effective amendments filed pursuant to § 230.485(a) or § 230.486(a) of this chapter:

(1) To suspend the operation of paragraph (a) of such sections and to issue written notices to registrants of such suspensions;

(2) To determine such amendments to be effective within shorter periods of time than the sixtieth day after the filing thereof.

(b–3) With respect to post-effective amendments filed pursuant to § 230.485(b) or § 230.486(b) of this chapter:

(1) To approve additional purposes for post-effective amendments which shall be eligible for immediate effectiveness pursuant to paragraph (b) of such sections.

(2) To suspend the operation of paragraph (b) of such sections and to issue written notices to registrants of such suspensions.

(b–4) With respect to registration statements filed pursuant to paragraph (a) of Rule 487 under the Act (17 CFR 230.487(a)):

(1) To suspend the operation of said paragraph (a) and to issue written notices to registrants of such suspensions.

(b–5) With respect to registration statements filed pursuant to paragraph (a) of rule 488 under the Act (17 CFR 230.488(a)):

(1) To suspend the operation of said paragraphs and to issue written notices to registrants of such suspensions;

(2) To determine such amendments to be effective within shorter periods of time than the thirtieth day after the filing thereof.

(c) With respect to the Securities Act of 1933 and Regulation E thereunder (§ 230.601 *et seq.* of this chapter):

(1) To authorize the offering of securities:

(i) Less than ten days subsequent to the filing with the Commission of a notification on Form 1–E (§ 239.200 of this chapter) pursuant to Rule 604(a) (§ 230.604(a) of this chapter);

(ii) Less than ten days subsequent to the filing of an amendment to a notification on Form 1–E (§ 239.200 of this chapter) pursuant to Rule 604(c) (§ 230.604(c) of this chapter).

(2) To authorize the use of a revised or amended offering circular less than ten days subsequent to the filing thereof pursuant to Rule 605(e) (§ 230.605(e) of this chapter).

(3) To authorize the use of communications specified in paragraphs (a), (b) and (c) of Rule 607 (§ 230.607 of this chapter), less than five days subsequent to the filing thereof.

(4) To permit the withdrawal of any notification, or any exhibit or other

documents filed as a part thereof, pursuant to Rule 604(d) (§ 230.604(d) of this chapter).

(c–1) With respect to the Securities Exchange Act of 1934: (1) To grant and deny applications filed pursuant to section 24(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78x(b)) and Rule 24b–2 thereunder (§ 240.24b–2 of this chapter) for confidential treatment of information filed pursuant to section 13(f) of that Act (15 U.S.C. 78m(f)) and Rule 13f–1 thereunder (§ 240.13f–1 of this chapter).

(2) To revoke a grant of confidential treatment for any such application.

(3) To administer the provisions of § 240.24c-1 of this chapter; provided that access to nonpublic information as defined in such section shall be provided only with the concurrence of the head of the Commission division or office responsible for such information or the files containing such information.

(4) To administer the provisions of section 24(d) of the Act (15 U.S.C. 78x(d)).

(d) To issue certifications to investment companies that are principally engaged in the furnishing of capital to corporations that are principally engaged in the development or exploitation of inventions, technological improvements, new processes, or products not previously generally available, under Section 851(e) of the Internal Revenue Code of 1986 (26 U.S.C. 851(e)), where applications from the investment companies do not present issues that have not been previously settled by the Commission and do not require a hearing.

(e) With respect to the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 to 80b–22):

(1) Pursuant to section 203(c) of the Act (15 U.S.C. 80b–3(c)): To authorize the issuance of orders granting registration of investment advisers within 45 days of the filing of an application for registration as an investment adviser (or within such longer period as to which the applicant consents).

(2) Pursuant to section 203(h) of the Act (15 U.S.C. 80b–3(h)), to authorize the issuance of orders canceling registration of investment advisers, or applications for registration, if such investment advisers or applicants for registration are no longer in existence, not engaged in business as investment advisers, or are prohibited from registering as investment advisers under Section 203A of the Act (15 U.S.C. 80b–3a).

(3) To issue notices, under § 275.0–5 of this chapter, with respect to applications for orders under the Act and the rules and regulations thereunder where, upon examination, the matter does not appear to the Director to present significant issues that have not been previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors warrants that the Commission consider the matter.

(4) To authorize the issuance of orders where a notice, pursuant to § 275.0–5 of this chapter, has been issued, no request for a hearing has been received from any interested person within the period specified in the notice, and the Director believes that the matter presents no significant issues that have not been previously settled by the Commission and it does not appear to the Director to be necessary in the public interest or the interest of investors that the Commission consider the matter.

(5) To permit the withdrawal of applications pursuant to the Act (15 U.S.C. 80b–1 *et seq.*).

(6) Pursuant to Rule 204–2(j)(3)(ii) (§ 275.204–2(j)(3)(ii) of this chapter), to make written demands upon non-resident investment advisers subject to the provisions of such rule to furnish to the Commission true, correct, complete and current copies of any or all books and records which such non-resident investment advisers are required to make, keep current or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act, or any part of such books and records which may be specified in any such demand.

(7) Pursuant to section 203A(d) of the Act (15 U.S.C. 80b–3a(d)), to set the terms of, and grant or deny as appropriate, continuing hardship exemptions under § 275.203–3 of this chapter.

(f) With respect to the Public Utility Holding Company Act of 1935 (15 U.S.C. 79 *et seq.*):

(1) To issue notices with respect to applications or declarations under the following sections of the Act:

(i) Section 2(a)(3), 15 U.S.C. 79(b)(a)(3).

(ii) Section 2(a)(4), 15 U.S.C. 79b(a)(4).

(iii) Section 2(a)(7), 15 U.S.C. 79b(a)(7).

(iv) Section 2(a)(8), 15 U.S.C. 79b(a)(8).

(v) Section 3(a), 15 U.S.C. 79c(a).

(vi) Section 3(b), 15 U.S.C. 79c(b).

(vii) Section 5(d), 15 U.S.C. 79e(d).

(viii) Section 6(b), 15 U.S.C. 79f(b).

(ix) Section 7, 15 U.S.C. 79g.

(x) Section 9(c)(3), 15 U.S.C. 79i(c)(3).

(xi) Section 10, 15 U.S.C. 79j.

(xii) Section 11(e), 15 U.S.C. 79k(e).

(xiii) Section 12(b), 15 U.S.C. 79*l*(b).

(xiv) Section 12(c), 15 U.S.C. 79*l*(c).

(xv) Section 12(d), 15 U.S.C. 79*l*(d).

(xvi) Section 12(e), 15 U.S.C. 79*l*(e).

(xvii) Section 12(f), 15 U.S.C. 79*l*(f).

(xviii) Section 12(g), 15 U.S.C. 79*l*(g).

(xix) Section 13(b), 15 U.S.C. 79m(b).

(xx) Section 13(c), 15 U.S.C. 79m(c).

(xxi) Section 13(d), 15 U.S.C. 79m(d).

(xxii) Section 13(e), 15 U.S.C. 79m(e).

(xxiii) Section 13(f), 15 U.S.C. 79m(f).

(xxiv) Section 32, 15 U.S.C. 79ff.

(xxv) Section 33, 15 U.S.C. 79gg.

(2) To authorize the issuance of orders where a notice has been issued and no request for a hearing has been received from any interested person within the period specified in the notice and the matter involved presents no issue that the director believes has not previously been settled by the Commission and it does not appear to the director to be necessary in the public interest or the interest of investors or consumers that a hearing be held; section 20(c) of the Act (15 U.S.C. 79t(c));

(3) To permit the withdrawal of applications or declarations filed pursuant to the Act (15 U.S.C. 79a *et seq.*);

(4) Upon a showing of good cause and that it would not be contrary to the public interest or inconsistent with the protection of investors or consumers, to grant reasonable extensions of time with respect to the time for the filing with the Commission of registration statements and of reports pursuant to section 20(a) of the Act (15 U.S.C. 79t(a)) and Rules 1(b), 1(c), 2, 24, and 29 (§§ 250.1(b), 250.1(c), 250.2, 250.4, and 250.29 of this chapter) thereunder;

(5) To permit the filing of preliminary registration statements pursuant to section 5(c) of the Act (15 U.S.C. 79e(c));

(6) To authorize the destruction of records pursuant to the provisions of General Instruction 1(f) (§ 257.1(f) of this chapter) to the appendix of the Uniform System of Accounts for Public Utility Holding Companies (§ 257.1 *et seq.* of this chapter) and pursuant to provisions of General Requirement 1(e) (§ 256a.0–1(e) of this chapter) of the Uniform System of Accounts for Mutual Service Companies and Subsidiary Service Companies (§ 256.00–1 *et seq.,* of this chapter);

(7) To authorize the discontinuance of reporting of information otherwise required to be reported under sections 5(b), 13(c), 13(e), 13(f), 14, and 20(a) of the Act (15 U.S.C. 79e(b), 79m(c), 79m(e), 79m(f), 79n, 79t(a));

(8) To grant extensions of time for filing registration statements and reports pursuant to sections 5(b), 13(c), 13(d), 13(f), 14, and 20(a) of the Act (15 U.S.C. 79e(b), 79m(c), 79m(d), 79m(f), 79n, 79t(a)).

(g) Notwithstanding anything in the foregoing:

(1) The Director of the Division of Investment Management shall have the same authority with respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), §§ 230.251–230.263, and §§ 230.651–230.703(T) of this chapter as that delegated to each Regional Director in § 200.30–6 (b) and (c).

(2) In any case in which the Director of the Division of Investment Management believes it appropriate, he may submit the matter to the Commission.

(h) With respect to the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*), and Regulation S–T thereunder (part 232 of this chapter), to grant or deny a request submitted under Regulation S–T to adjust the filing date of an electronic filing.

(i) With respect to the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*) and rule 8b–25 thereunder (§ 270.8b–25), the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange

Act of 1934 (15 U.S.C. 78a *et seq.*), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*), and Regulation S–T thereunder (part 232 of this chapter), to set the terms of, and grant or deny as appropriate, continuing hardship exemptions under rule 202 of Regulation S–T (§ 232.202 of this chapter) from the electronic submission requirements of Regulation S–T (part 232 of this chapter).

(j) With respect to the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) and Regulation S–T (part 232 of this chapter), to grant or deny a request to adjust the filing date of a filing submitted under Regulation S–T.

(k) With respect to the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) and Regulation S–T (part 232 of this chapter), to set the terms of, and grant or deny as appropriate, continuing hardship exemptions pursuant to rule 202 of Regulation S–T (§§ 232.202 of this chapter) from the electronic submission requirements of Regulation S–T (part 232 of this chapter).

[41 FR 29376, July 16, 1976]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 200.30–5 see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 200.30–6 Delegation of authority to Regional Directors.

Pursuant to the provisions of Pub. L. 87–592, 76 Stat. 394, the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to each Regional Director, to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) With respect to the Securities Exchange Act of 1934, 15 U.S.C. 78 *et seq.:*

(1) Pursuant to section 15(b)(2)(C) of the Act (15 U.S.C. 78o(b)(2)(C)):

(i) To delay until the second six month period from registration with the Commission, the inspection of newly registered broker-dealers that have not commenced actual operations within six months of their registration with the Commission; and

(ii) To delay until the second six month period from registration with the Commission, the inspection of newly registered broker-dealers to determine whether they are in compliance with applicable provisions of the Act and rules thereunder, other than financial responsibility rules.

(2) Pursuant to Rule 0–4 (§ 240.0–4 of this chapter), to disclose to the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation and to the state banking authorities, information and documents deemed confidential regarding registered clearing agencies and registered transfer agents; *Provided* That, in matters in which the Commission has entered a formal order of investigation, such disclosure shall be made only with the concurrence of the Director of the Division of Enforcement or his or her delegate, and the General Counsel or his or her delegate.

(b) With respect to the Investment Advisers Act of 1940, 15 U.S.C. 80b–1 *et seq.:* Pursuant to Rule 204–2(j)(3)(ii) (§ 275.204–2(j)(3)(ii) of this chapter), to make written demands upon non-resident investment advisers subject to the provisions of such rule to furnish to the Commission true, correct, complete and current copies of any or all books and records which such non-resident investment advisers are required to make, keep current or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Investment Advisers Act of 1940, or any part of such books and records which may be specified in any such demand.

(c) In nonpublic investigatory proceedings within the responsibility of the Regional Director, to grant requests of persons to procure copies of the transcript of their testimony given pursuant to Rule 6 of the Commission's rules relating to investigations as in effect subsequent to November 16, 1972 (17 CFR 203.6).

(d) To notify the Securities Investor Protection Corporation (''SIPC'') of facts concerning the activities and the operational and financial condition of any registered broker or dealer which is or appears to be a member of SIPC and which is in or approaching financial difficulty within the meaning of section 5 of the Securities Investor

Protection Act of 1970, as amended, 15 U.S.C. 78aaa *et seq.*

(e) Notwithstanding anything in the foregoing, in any case in which the Regional Director believes it appropriate, he may submit the matter to the Commission.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37; secs. 3(b), 19(a), 48 Stat. 75, 85; sec. 209, 48 Stat. 908; c. 122, 59 Stat. 167; Pub. L. 91–565, 84 Stat. 1480; 15 U.S.C. 77c(b), 77s(a), 78d–1, 78n, 80a–37; secs. 2, 17 and 23 thereof (15 U.S.C. 78b, 78q and 78w))

[28 FR 2856, Mar. 22, 1963, as amended at 36 FR 7659, Apr. 23, 1971. Redesignated at 37 FR 16792, Aug. 19, 1972]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §200.30–6 see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 200.30–6a Delegation of authority to District Administrators.

Pursuant to the provisions of Pub. L. 87–592, 76 Stat. 394, 15 U.S.C. 78d–1, the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to each District Administrator, to be performed by him or her or under his or her direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) With respect to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*):

(1) Pursuant to section 15(b)(2)(C) of the Act (15 U.S.C. 78o(b)(2)(C)):

(i) To delay until the second six-month period from registration with the Commission the inspection of newly registered broker-dealers that have not commenced actual operations within six months of their registration with the Commission; and

(ii) To delay until the second six-month period from registration with the Commission the inspection of newly registered broker-dealers to determine whether they are in compliance with applicable provisions of the Act and rules thereunder, other than financial responsibility rules.

(2) Pursuant to Rule 0–4 (§240.0–4 of this chapter), to disclose to the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation and to the state banking authorities, information and documents deemed confidential regarding registered clearing agencies and registered transfer agents, *Provided* That, in matters in which the Commission has entered a formal order of investigation, such disclosure shall be made only with the concurrence of the Director of the Division of Enforcement or his or her delegate and the General Counsel or his or her delegate.

(b) With respect to the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*): Pursuant to Rule 204–2(j)(3)(ii) (§275.204–2(j)(3)(ii) of this chapter), to make written demands upon non-resident investment advisers subject to the provisions of such rule to furnish to the Commission true, correct, complete and current copies of any or all books and records which such non-resident investment advisers are required to make, keep current or preserve pursuant to any provisions of any rule or regulation of the Commission adopted under the Investment Advisers Act of 1940, or any part of such books and records which may be specified in such demand.

(c) In nonpublic investigatory proceedings within the responsibility of the District Administrator, to grant requests of persons to procure copies of the transcript of their testimony given pursuant to Rule 6 of the Commission Rules Relating to Investigations (§203.6 of this chapter).

(d) To notify the Securities Investor Protection Corporation (''SIPC'') of facts concerning the activities and the operational and financial condition of any registered broker or dealer which is or appears to be a member of SIPC and which is in or approaching financial difficulty within the meaning of

Section 4 of the Securities Investor Protection Act of 1970 as amended (15 U.S.C. 78aaa *et seq.*).

(e) Notwithstanding anything in the foregoing, in any case in which the District Administrator believes it appropriate, he or she may submit the matter to the Commission.

[59 FR 5943, Feb. 9, 1994]

§ 200.30–7 Delegation of authority to Secretary of the Commission.

Pursuant to the provisions of Pub. L. 87–592, 76 Stat. 394 (15 U.S.C. 78d–1), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Secretary of the Commission to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) With respect to proceedings conducted pursuant to the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, the Public Utility Holding Company Act of 1935, 15 U.S.C. 79a *et seq.*, the Trust Indenture Act of 1939, 15 U.S.C. 77aaa *et seq.*, the Investment Company Act of 1940, 15 U.S.C. 80a–1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. 80b–1 *et seq.:*

(1) To fix the time and place for hearings and oral arguments before the Commission pursuant to Rule 451 of the Commission's Rules of Practice, § 201.451 of this chapter;

(2) In appropriate cases to extend and reallocate the time prescribed in Rule 451(c) of the Commission's Rules of Practice, § 201.451(c) of this chapter;

(3) To postpone or adjourn hearings or otherwise adjust the date for commencement of hearings before the Commission pursuant to Rule 161 of the Commission's Rules of Practice, § 201.161 of this chapter, and to advance such hearings;

(4) To grant or deny extensions of time within which to file papers with the Commission under Rule 161 of the Commission's Rules of Practice, § 201.161 of this chapter.

(5) To permit the filing of briefs with the Commission exceeding 60 pages in length, pursuant to Rule 450(c) of the Commission's Rules of Practice, § 201.450(c) of this chapter;

(6) To certify records of proceedings upon which are entered orders the subject of review in courts of appeals pursuant to section 9 of the Securities Act of 1933, 15 U.S.C. 77i, section 25 of the Securities Exchange Act of 1934, 15 U.S.C. 78y, section 24 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79x, section 322(a) of the Trust Indenture Act of 1939, 15 U.S.C. 77vvv, section 43 of the Investment Company Act of 1940, 15 U.S.C. 80a–42, and section 213 of the Investment Advisers Act of 1940, 15 U.S.C. 80b–13;

(7) Except where the Commission otherwise directs, to issue findings and orders pursuant to offers of settlement which the Commission has determined should be accepted;

(8) To issue findings and orders taking the remedial action described in the order for proceedings where a respondent expressly consents to such action, fails to appear, or defaults in the filing of an answer required to be filed and to grant a request, based upon a showing of good cause, to vacate an order or default, so as to permit presentation of a defense;

(9) To designate officers of the Commission to serve notices of and orders for proceedings and decisions and orders in such proceedings, the service of which is required by Rules 141 and 150 of the Commission's Rules of Practice, §§ 201.141 and 201.150 of this chapter;

(10) To set the date for sanctions to take effect if an initial decision is not appealed and becomes final pursuant to Rule 360(d) or if an initial decision is affirmed pursuant to Rule 411;

(11) To publish pursuant to Rule 612 of the Commission's Rules of Practice, § 201.612 of this chapter, notices of plans of disgorgement and, if no negative comments are received, to issue orders approving proposed plans of disgorgement pursuant to Rule 613 of the Commission's Rules of Practice, § 201.613 of this chapter. Upon the motion of the staff for good cause shown, to approve the publication of proposed plans of disgorgement that omit plan elements required by Rule 611 of the Commission's Rules of Practice, § 201.611 of this chapter.

(12) To issue orders instituting previously authorized administrative proceedings pursuant to sections 15(b)(4) or (6), 15B, 15C, or 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(4) or (6), 78o–4, 78o–5, or 78q–1), and section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(e) or (f)), based on the entry of an injunction or a criminal conviction, and to issue findings and orders in such cases where a respondent consents to a bar from association.

(b) To order the making of private investigations pursuant to section 21(a) of the Securities Exchange Act of 1934, on request of the Division of Corporation Finance or the Division of Enforcement, with respect to proxy contests subject to section 14 of that Act and regulation 14A thereunder, and tender offers filed pursuant to section 14(d) of the Act.

(c) Notwithstanding anything in the foregoing, in any case in which the Secretary of the Commission believes it appropriate he or she may submit the matter to the Commission.

[35 FR 17989, Nov. 24, 1970. Redesignated at 37 FR 16792, Aug. 19, 1972, and amended at 38 FR 12913, May 17, 1973; 40 FR 46107, Oct. 6, 1975; 43 FR 13377, Mar. 30, 1978; 60 FR 14629, Mar. 20, 1995; 60 FR 32794, June 23, 1995; 61 FR 5939, Feb. 15, 1996; 61 FR 13689, Mar. 28, 1996; 61 FR 15338, Apr. 5, 1996; 67 FR 30326, May 6, 2002]

§ 200.30–8 [Reserved]

§ 200.30–9 Delegation of authority to hearing officers.

Pursuant to the provisions of Section 4A of the Securities Exchange Act of 1934 (15 U.S.C. 78d-1), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, to each Administrative Law Judge (''Judge'') the authority:

(a) To make an initial decision in any proceeding at which the Judge presides in which a hearing is required to be conducted in conformity with the Administrative Procedure Act (5 U.S.C. 557) unless such initial decision is waived by all parties who appear at the hearing and the Commission does not subsequently order that an initial decision nevertheless be made by the Judge, and in any other proceeding in which the Commission directs the Judge to make such a decision; and

(b) To issue, upon entry pursuant to Rule 531 of the Commission's Rules of Practice, § 201.531 of this chapter, of an initial decision on a permanent order, a separate order setting aside, limiting or suspending any temporary sanction, as that term is defined in Rule 101(a)(11) of the Commission's Rules of Practice, § 201.101(a) of this chapter, then in effect in accordance with the terms of the initial decision.

[60 FR 32794, June 23, 1995]

§ 200.30–10 Delegation of authority to Chief Administrative Law Judge.

Pursuant to the provisions of Pub. L. 87–592, 76 Stat. 394 (15 U.S.C. 78d–1), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Chief Administrative Law Judge or to such administrative law judge or administrative law judges as may be designated by the Chief Administrative Law Judge in his absence, or as otherwise designated by the Chairman of the Commission in the absence of the Chief Administrative Law Judge:

(a) With respect to proceedings conducted before an administrative law judge, pursuant to the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, the Public Utility Holding Company Act of 1935, 15 U.S.C. 79a *et seq.*, the Trust Indenture Act of 1939, 15 U.S.C. 77aaa *et seq.*, the Investment Company Act of 1940, 15 U.S.C. 80a–1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. 80b–1 *et seq.:*

(1) After a proceeding has been authorized, to fix the time and place for hearing pursuant to Rule 200 of the Commission's Rules of Practice, § 201.200 of this chapter;

(2) To designate administrative law judges pursuant to Rule 110 of the Commission's Rules of Practice, § 201.110 of this chapter;

(3) To postpone or adjourn hearings or otherwise adjust the date for commencement of hearings pursuant to Rule 161 of the Commission's Rules of Practice, § 201.161 of this chapter, or to advance or cancel such hearings, if necessary;

(4) To grant extensions of time within which to file papers pursuant to

Rule 161 of the Commission's Rules of Practice, § 201.161 of this chapter;

(5) To permit the filing of briefs exceeding 60 pages in length, pursuant to Rule 450(c) of the Commission's Rules of Practice, § 201.450(c) of this chapter;

(6) In the event the designated presiding administrative law judge is unavailable to issue subpenas requiring the attendance and testimony of witnesses and subpenas requiring the production of documentary or other tangible evidence at any designated place of hearing upon request therefor by any party, pursuant to Rule 232 of the Commission's Rules of Practice, 201.232 of this chapter;

(7) Pursuant to sections 15(b)(1)(B), 15B(a)(2)(B), and 19(a)(1)(B) of the Securities Exchange Act of 1934 and section 203(c)(2)(B) of the Investment Advisers Act of 1940 to grant extensions of time for conclusion of proceedings instituted to determine whether applications for registration as a broker or dealer, municipal securities dealer, national securities exchange, registered securities association, or registered clearing agency, or as an investment adviser should be denied.

(b) With respect to proceedings under the Equal Access to Justice Act, 5 U.S.C. 504, to make assignments as provided in § 201.37(b) of this chapter, respecting applications made pursuant to that Act.

(c) Notwithstanding anything in the foregoing, in any case in which the Chief Administrative Law Judge believes it appropriate he or she may submit the matter to the Commission.

(15 U.S.C. 77u, 78d, 78d–1, 78d–2, 76 Stat. 394, as amended, secs. 25(1) and 25(2), 89 Stat. 163)

[37 FR 23827, Nov. 9, 1972, as amended at 41 FR 21183, May 24, 1976; 43 FR 13378, Mar. 30, 1978; 54 FR 53051, Dec. 27, 1989; 60 FR 32794, June 23, 1995]

§ 200.30–11 Delegation of authority to Associate Executive Director of the Office of Filings and Information Services.

Under Pub. L. 87–592, 76 Stat. 394 (15 U.S.C. 78d–1, 78d–2), the Securities and Exchange Commission hereby delegates the following functions to the Associate Executive Director of the Office of Filings and Information Services to be performed by him or her or under his or her direction by such person or persons as the Chairman of the Commission may designate from time to time:

(a) With respect to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*):

(1) Under section 15(b) of the Act (15 U.S.C. 78o(b)):

(i) To authorize the issuance of orders granting registration of brokers or dealers within 45 days of the acceptance of an application for registration as a broker or dealer (or within such longer period as to which the applicant consents);

(ii) To grant registration of brokers or dealers sooner than 45 days after acceptance of an application for registration;

(iii) To authorize the issuance of orders canceling registrations of brokers or dealers, or pending applications for registration, if such brokers or dealers or applicants for registration are no longer in existence or are not engaged in business as brokers or dealers; and

(iv) To determine whether notices of withdrawal from registration on Form BDW shall become effective sooner than the normal 60-day waiting period.

(2) Under section 15B(a) of the Act (15 U.S.C. 78o–4(a)):

(i) To authorize the issuance of orders granting registration of municipal securities dealers within 45 days of the filing of acceptable applications for registration as a municipal securities dealer (or within such longer period as to which the applicant consents); and

(ii) To grant registration of municipal securities dealers sooner than 45 days after receipt by the Commission of acceptable applications for registration.

(3) Under section 15B(c) of the Act (15 U.S.C. 78o–4(c)):

(i) To authorize the issuance of orders canceling registrations of municipal securities dealers, or pending applications for registration, if such municipal securities dealers or applicants for registration are no longer in existence or are not engaged in business as municipal securities dealers; and

(ii) To determine whether notices of withdrawal from registration on Form MSDW shall become effective sooner than the normal 60-day waiting period.

(4) Under section 15C(a) of the Act (15 U.S.C. 78o–5(a)):

(i) To authorize the issuance of orders granting registration of government securities brokers or government securities dealers for which the Commission is the appropriate regulatory agency within 45 days of the acceptance of an application for registration as a government securities broker or government securities dealer (or within such longer period as to which the applicant consents); and

(ii) To grant registration of government securities brokers or government securities dealers for which the Commission is the appropriate regulatory agency sooner than 45 days after acceptance of an application for registration.

(5) Under section 15C(c) of the Act (15 U.S.C. 78o–5(c)):

(i) To authorize the issuance of orders canceling registrations of government securities brokers or government securities dealers registered with the Commission, or pending applications for registration, if such government securities brokers or government securities dealers or applicants for registration are no longer in existence or are not engaged in business as government securities brokers or government securities dealers; and

(ii) To determine whether notices of withdrawal from registration on Form BDW shall become effective sooner than the normal 60-day waiting period.

(6) Under section 17A(c) of the Act (15 U.S.C. 78q–1(c)):

(i) To authorize the issuance of orders granting registration of transfer agents within 45 days of the filing of acceptable applications for registration as a transfer agent (or within such longer period as to which the applicant consents);

(ii) To grant registration of transfer agents sooner than 45 days after receipt by the Commission of acceptable applications for registration;

(iii) To authorize the issuance of orders canceling registrations of transfer agents, or pending applications for registration, if such transfer agents or applicants for registration are no longer in existence or are not engaged in business as transfer agents; and

(iv) To determine whether notices of withdrawal from registration on Form TA–W shall become effective sooner than the normal 60-day waiting period.

(b) With respect to the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*):

(1) Under section 203(c) of the Act (15 U.S.C. 80b–3(c)):

(i) To authorize the issuance of orders granting registration of investment advisers within 45 days of the filing of acceptable applications for registration as an investment adviser (or within such longer period as to which the applicant consents); and

(ii) To grant registration of investment advisers sooner than 45 days after receipt by the Commission of acceptable applications for registration.

(2) Under section 203(h) of the Act (15 U.S.C. 80b–3(h)), to authorize the issuance of orders canceling registrations of investment advisers, or pending applications for registration, if such investment advisers or applicants for registration are no longer in existence or are not engaged in business as investment advisers.

(c) With respect to the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa *et seq.*):

(1) To cause a written notice to be sent by registered or certified mail, upon receipt of a copy of a notice sent by or on behalf of the Securities Investor Protection Corporation that a broker or dealer has failed to timely file any report or information or to pay when due all or any part of an assessment as required under section 10(a) of this Act, to such delinquent member advising such member that it is unlawful for him or her under the provisions of such section of the Act to engage in business as a broker-dealer while in violation of such requirements of the Act and requesting an explanation in writing within ten days stating what he or she intends to do in order to cure such delinquency;

(2) To authorize formerly delinquent brokers or dealers, upon receipt of written confirmation from or on behalf of the Securities Investor Protection Corporation that the delinquencies referred to in paragraph (c)(1) of this section have been cured, and upon having

been advised by the appropriate regional or district office of this Commission and the Division of Enforcement and Division of Market Regulation that there is no objection to such member being authorized to resume business, and upon there appearing to be no unusual or novel circumstances which would warrant direct consideration of the matter by this Commission, to resume business as registered broker-dealers as provided in section 10(a) of this Act.

(d) Notwithstanding anything in the foregoing, in any case in which the Associate Executive Director of the Office of Filings and Information Services believes it appropriate, he or she may submit the matter to the Commission.

(e) To authenticate all Commission documents produced for administrative or judicial proceedings.

(Sec. 1, 76 Stat. 394, 15 U.S.C. 78d–1, 78d–2; sec. 10(a), 84 Stat. 1655, 15 U.S.C. 78jjj(a); sec. 15B, 15 U.S.C. 78o–4(a); sec. 17A, 15 U.S.C. 78q–1(c)(2); 11 U.S.C. 901, 1109(a))

[41 FR 1740, Jan. 12, 1976, as amended at 41 FR 32736, Aug. 5, 1976; 42 FR 56727, Oct. 28, 1977; 49 FR 12686, Mar. 30, 1984; 55 FR 11168, Mar. 27, 1990; 59 FR 5944, Feb. 9, 1994; 60 FR 14629, Mar. 20, 1995; 65 FR 57447, Sept. 22, 2000]

§ 200.30–12 [Reserved]

§ 200.30–13 Delegation of authority to Associate Executive Director of the Office of the Comptroller.

Pursuant to the provisions of Pub. L. 94–29, 89 Stat. 163, Pub. L. 87–592, 76 Stat. 395, 15 U.S.C. 78d–1, 78d–2, the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following function to the Associate Executive Director of the Office of the Comptroller, to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission: The compromise and collection of Federal claims as required by the Federal Claims Collection Act of 1966, 31 U.S.C. 951 *et seq.*, in conformance with standards and procedures jointly promulgated by the Attorney General and Comptroller General, 4 CFR 101.1—105.7.

(Sec. 25, 89 Stat. 163, 15 U.S.C. 78d–1; Sec. 2, 76 Stat. 395 15 U.S.C. 78d–2)

[44 FR 3473, Jan. 17, 1979, as amended at 60 FR 14630, Mar. 20, 1995]

§ 200.30–14 Delegation of authority to the General Counsel.

Pursuant to the provisions of Pub. L. 101–181, 101 Stat. 1254, 101 Stat. 1255, 15 U.S.C. 78d–1, 15 U.S.C. 78d–2, and 5 U.S.C. 552a(d)(2)(B)(ii), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the General Counsel of the Commission, to be performed by him or her or under his or her direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) Grant waivers of imputed disqualification requested pursuant to 17 CFR 200.735–8(d).

(b) Determine whether the Commission will submit, after consultation with any Division or Office of the Commission designated by the Commission, and amicus curiae brief in private litigation on issues previously considered and designated by the Commission as appropriate for the exercise of delegated authority. A list of the issues designated by the Commission as subject to this delegated authority and, where determined by the Commission, the position to be taken on each such issue, may be obtained on request addressed to Securities and Exchange Commission, Washington, DC 20549.

(c) Determine the appropriate disposition of all Freedom of Information Act and confidential treatment appeals in accordance with §§ 200.80(d)(6), 200.80(e)(4), 200.83(e), 200.83(f), and 200.83(h).

(d) Determine the appropriate disposition of all Privacy Act appeals and related matters in accordance with §§ 200.304 (a) and (c); 200.307 (a) and (b); 200.308(a) (4)–(10); 200.308(b) (1)–(4); and 200.309(e) (1) and (2).

(e) File notices of appearance in bankruptcy reorganization cases under section 1109(a) of the Bankruptcy Code involving debtors, the securities of

which are registered or required to be registered under section 12 of the Securities Exchange Act.

(f) Approve non-expert, non-privileged, factual testimony by present or former staff members, and the production of non-privileged documents, when validly subpoenaed; and assert governmental privileges on behalf of the Commission in litigation where the Commission appears as a party or in response to third party subpoenas.

(g)(1) With respect to proceedings conducted pursuant to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*),the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa *et seq.*) and the provisions of Rule 102(e) of the Commission's Rules of Practice (§ 201.102(e) of this chapter);

(i) To consider an application for review of an interlocutory ruling which an administrative law judge has refused to certify, and to deny such application upon determining that the administrative law judge did not err in refusing to certify the matter.

(ii) To consider an interlocutory ruling which an administrative judge has certified, and to affirm such ruling upon determining that such action is appropriate.

(iii) To issue any order pursuant to an initial decision as to any person who has not filed a petition for review within the time provided, or has withdrawn his appeal, where the Commission has not on its own motion ordered that the initial decision be reviewed.

(iv) Except where the Commission otherwise directs, to issue findings and orders pursuant to offers of settlement which the Commission has determined should be accepted.

(v) To grant petitions for review of initial decisions by a hearing officer.

(vi) To grant motions of staff counsel to discontinue administrative proceedings as to a particular respondent who has died or cannot be found, or because of a mistake in the identity of a respondent named in the order for proceedings.

(vii) To grant requests for the submission of late or additional briefs, or the acceptance of affidavits or other material for inclusion in the record or in support of motions or petitions addressed to the Commission.

(viii) To issue an order dismissing an application for review upon the request of the applicant that the application be withdrawn.

(ix) To issue an order dismissing an exemptive application upon the request of the applicant that the application be withdrawn.

(x) To determine motions to consolidate proceedings pending before the Commission.

(xi) To determine whether to permit or require that a record of proceedings be supplemented with additional evidence.

(xii) To determine requests for leave to file an opposition to a petition for review filed pursuant to the provisions of Rule 411 of the Commission's Rules of Practice, § 201.411 of this chapter.

(xiii) To issue a briefing schedule order pursuant to Rule 450 of the Commission's Rules of Practice, § 201.450 of this chapter.

(xiv) To determine motions for expedited briefing schedules.

(xv) To issue an order raising, pursuant to the provisions of Rule 411(d) of the Commission's Rules of Practice, § 201.411(d) of this chapter, any matter relating to whether any sanction, and if so what sanction, is in the public interest.

(2) With respect to proceedings conducted pursuant to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*), the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa *et seq.*) and the provisions of Rule 102(e) of the Commission's Rules of Practice (§ 201.102(e) of this chapter), to issue findings and orders taking the remedial action described in the order for proceedings where the respondents expressly consent to such action, fail to appear or default in the filing of answers required to be filed; or to grant a

request, based upon a showing of good cause, to vacate an order of default, so as to permit presentation of a defense.

(3) With respect to proceedings conducted pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), to issue an order dismissing an application for review of a denial by a self-regulatory organization of an application by a person subject to statutory disqualification to become associated with a member firm upon receipt of notice from the self-regulatory organization that the firm is no longer a member of the self-regulatory organization.

(4) With respect to proceedings under Sections 19 (d), (e) and (f) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d), (e) and (f)), to determine that an application for review under those sections has been abandoned, under the provisions of Rule 420, § 201.420 of this chapter, or otherwise, and to issue an order dismissing the application in such event.

(5) With respect to proceedings conducted or reviewed pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) and the provisions of Rule 102(e) of the Commission's Rules of Practice, § 201.102(e) of this chapter, to determine applications to stay Commission orders pending appeal of those orders to the federal courts and to determine applications to vacate such stays.

(6) With respect to review proceedings pursuant to Sections 19 (d), (e), and (f) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d), (e), and (f)), to determine applications for a stay of action taken by a self-regulatory organization pending Commission review of that action and to determine applications to vacate such stays.

(7) In connection with Commission review of actions taken by self-regulatory organizations, pursuant to Sections 19 (d), (e) and (f) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d), (e) and (f)), to grant or deny requests for oral argument in accordance with the provisions of Rule 451, § 201.451 of this chapter.

(h) Notwithstanding anything in paragraph (g) of this section, the functions described in paragraph (g) of this section are not delegated to the General Counsel with respect to proceedings in which the Chairman or the General Counsel determines that separation of functions requirements or other circumstances would make inappropriate the General Counsel's exercise of such delegated functions. With respect to such proceedings, such functions are delegated to the Executive Assistant to the Chairman pursuant to § 200.30–16 of this chapter.

(i) Notwithstanding anything in paragraph (g) of this section, in any case described in paragraph (g) of this section in which the General Counsel believes it appropriate, he or she may submit the matter to the Commission.

(j) With respect to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*):

(1) To administer the provisions of § 240.24c-1 of this chapter; provided that access to nonpublic information as defined in such section shall be provided only with the concurrence of the head of the Commission division or office responsible for such information or the files containing such information.

(2) To administer the provisions of section 24(d) of the Act (15 U.S.C. 78x(d)).

(k) To refer matters and information concerning possible professional misconduct to state bar associations and other state professional boards or societies.

(l) File applications in district court under Section 21(e)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(e)(1)) to obtain orders commanding persons to comply with Commission orders.

[47 FR 20288, May 12, 1982, as amended at 49 FR 13866, Apr. 9, 1984; 49 FR 43951, Nov. 1, 1984; 53 FR 17458, May 17, 1988; 54 FR 18101, Apr. 27, 1989; 54 FR 33500, Aug. 15, 1989; 58 FR 8541, Feb. 16, 1993; 58 FR 52419, Oct. 8, 1993; 59 FR 39680, Aug. 4, 1994; 60 FR 14630, Mar. 20, 1995; 60 FR 32794, June 23, 1995; 61 FR 56892, Nov. 5, 1996; 65 FR 12469, Mar. 9, 2000; 67 FR 56220, Sept. 3, 2002]

§ 200.30–15 Delegation of authority to Executive Director.

Under Pub. L. 100–181, 101 Stat. 1254 (15 U.S.C. 78d–1, 78d–2), the Securities

and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Executive Director to be performed by him or her or under his or her direction by persons designated by the Chairman of the Commission: To identify and implement additional changes within the Commission that will promote the principles and standards of the National Performance Review and the strategic and quality management approaches described by the Federal Quality Institute's ''Presidential Award for Quality'' or its successor awards.

[60 FR 14630, Mar. 20, 1995]

§ 200.30–16 Delegation of authority to Executive Assistant to the Chairman.

Pursuant to the provisions of Pub. L. 101–181, 101 Stat. 1254, 101 Stat. 1255, 15 U.S.C. 78d–1, and 15 U.S.C. 78d–2, the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Executive Assistant to the Chairman (or to such other person or persons designated pursuant to paragraph (c) of this section), to be performed by such Executive Assistant or under the Executive Assistant's direction by such person or persons as may be designated from time to time by the Chairman of the Commission (or by such other person or persons designated pursuant to paragraph (c) of this section):

(a) The functions otherwise delegated to the General Counsel under § 200.30–14(g) of this chapter, with respect to any proceeding in which the Chairman or the General Counsel has determined, pursuant to § 200.30–14(h) of this chapter, that separation of functions requirements or other circumstances would make inappropriate the General Counsel's exercise of such delegated functions.

(b) Notwithstanding anything in paragraph (a) of this section, in any proceeding described in paragraph (a) of this section in which the Executive Assistant believes it appropriate, the Executive Assistant may submit the matter to the Commission.

(c) Notwithstanding anything in this section, the functions otherwise delegated to the Executive Assistant respecting any proceeding in which the Chairman or the Executive Assistant determines that the Executive Assistant's exercise of such delegated functions would be inappropriate, are hereby delegated to such person or persons, not under the Executive Assistant's supervision, as may be designated by the Chairman.

[54 FR 18102, Apr. 27, 1989, as amended at 59 FR 39681, Aug. 4, 1994]

§ 200.30–17 Delegation of authority to Director of Office of International Affairs.

Pursuant to the provisions of Pub. L. 100–181, 101 Stat. 1254, 1255 (15 U.S.C. 78d-1, 78d-2), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Office of International Affairs to be performed by the Director or under the Director's direction by such other person or persons as may be designated from time to time by the Chairman of the Commission:

(a) To administer the provisions of § 240.24c-1 of this chapter; provided that access to nonpublic information as defined in such section shall be provided only with the concurrence of the head of the Commission division or office responsible for such information or the files containing such information.

(b) To administer the provisions of section 24(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78x(d)).

[58 FR 52419, Oct. 8, 1993]

§ 200.30–18 Delegation of authority to Director of the Office of Compliance Inspections and Examinations.

Pursuant to the provisions of Pub. L. 100–181, 101 Stat. 1254, 1255 (15 U.S.C. 78d–1, 78d–2), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following authority to the Director of the Office of Compliance Inspections and Examinations (''OCIE'') to be performed by the Director or by such other person or persons as may be designated from time to time by the Chairman of the Commission:

(a) To administer the provisions of § 240.24c–1 of this chapter; provided that

access to nonpublic information as defined in such Section shall be provided only with the concurrence of the head of the Commission division or office responsible for such information or the files containing such information.

(b) Pursuant to the Securities Exchange Act of 1934 (''the Exchange Act'') (15 U.S.C. 78a *et seq.*):

(1) To grant and deny applications for confidential treatment filed pursuant to Section 24(b) of the Exchange Act (15 U.S.C. 78x(b)) and Rule 24b–2 thereunder (§ 240.24b–2 of this chapter); and

(2) To revoke a grant of confidential treatment for any such application.

(c) Pursuant to Section 17(b) of the Exchange Act (15 U.S.C. 78q(b)), prior to any examination of a registered clearing agency, registered transfer agent, or registered municipal securities dealer whose appropriate regulatory agency is not the Commission, to notify and consult with the appropriate regulatory agency for such clearing agency, transfer agent, or municipal securities dealer.

(d) Pursuant to Section 17(c)(3) of the Exchange Act (15 U.S.C. 78q(c)(3)), in regard to clearing agencies, transfer agents and municipal securities dealers for which the Commission is not the appropriate regulatory agency:

(1) To notify the appropriate regulatory agency of any examination conducted by the Commission of any such clearing agency, transfer agent, or municipal securities dealer;

(2) To request from the appropriate regulatory agency a copy of the report of any examination of any such clearing agency, transfer agent, or municipal securities dealer conducted by such appropriate regulatory agency and any data supplied to it in connection with such examination; and

(3) To furnish to the appropriate regulatory agency on request a copy of the report of any examination of any such clearing agency, transfer agent, or municipal securities dealer conducted by the Commission and any data supplied to it in connection with such examination.

(e) To administer the provisions of Section 24(d) of the Exchange Act (15 U.S.C. 78x(d)).

(f) To notify the Securities Investor Protection Corporation (''SIPC'') of facts concerning the activities and the operational and financial condition of any registered broker or dealer which is or appears to be a member of SIPC and which is in or approaching financial difficulty within the meaning of Section 5 of the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. 78aa *et seq.*

(g) Pursuant to Section 15(b)(2)(C) of the Exchange Act (15 U.S.C. 78o(b)(2)(C)):

(1) To delay until the second six month period from registration with the Commission the inspection of newly registered broker-dealers that have not commenced actual operations within six months of their registration with the Commission; and

(2) To delay until the second six month period from registration with the Commission the inspection of newly registered broker-dealers to determine whether they are in compliance with applicable provisions of the Exchange Act and rules thereunder, other than financial responsibility rules.

(h) Pursuant to Section 36 of the Exchange Act (15 U.S.C. 78mm) to review and, either unconditionally or on specified terms and conditions, grant, or deny exemptions from rule 17a–25 of the Act (§ 240.17a–25 of this chapter), provided that the Division of Market Regulation is notified of any such granting or denial of an exemption.

(i) With respect to the Investment Advisers Act of 1940 (''Advisers Act'') (15 U.S.C. 80b–1 *et seq.*):

(1) Pursuant to Section 203(h) of the Advisers Act (15 U.S.C.80b–3(h)), to authorize the issuance of orders cancelling registration of investment advisers, or applications for registration, if such investment advisers or applicants for registration are no longer in existence or are not engaged in business as investment advisers; and

(2) Pursuant to Rule 204–2(j)(3)(ii) (§ 275.204–2(j)(3)(ii) of this chapter), to make written demands upon non-resident investment advisers subject to the provisions of such rule to furnish to the Commission true, correct, complete, and current copies of any or all books and records which such non-resident investment advisers are required

to make, keep current, or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Advisers Act, or any part of such books and records which may be specified in any such demand.

(j) Notwithstanding anything in the foregoing, in any case in which the Director of the OCIE believes it appropriate, the Director may submit the matter to the Commission.

[60 FR 39644, Aug. 3, 1995, as amended at 66 FR 35842, July 9, 2001]

Subpart B—Disposition of Commission Business

AUTHORITY: 5 U.S.C. 552b; 15 U.S.C. 78d–1 and 78w.

SOURCE: 42 FR 14692, Mar. 16, 1977, unless otherwise noted.

§ 200.40 Joint disposition of business by Commission meeting.

Any meeting of the Commission that is subject to the provisions of the Government in the Sunshine Act, 5 U.S.C. 552b, shall be held in accordance with subpart I of this part. The Commission's Secretary shall prepare and maintain a Minute Record reflecting the official action taken at such meetings.

[60 FR 17202, Apr. 5, 1995]

§ 200.41 Quorum of the Commission.

A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter pursuant to § 200.60 or are otherwise disqualified from such consideration, is two, two members shall constitute a quorum for purposes of such matter.

[60 FR 17202, Apr. 5, 1995]

§ 200.42 Disposition of business by seriatim Commission consideration.

(a) Whenever the Commission's Chairman, or the Commission member designated as duty officer pursuant to § 200.43, is of the opinion that joint deliberation among the members of the Commission upon any matter is unnecessary in light of the nature of the matter, impracticable, or contrary to the requirements of agency business, but is of the view that such matter should be the subject of a vote of the Commission, such matter may be disposed of by circulation of any relevant materials concerning the matter among all Commission members. Each participating Commission member shall report his or her vote to the Secretary, who shall record it in the Minute Record of the Commission. Any matter circulated for disposition pursuant to this subsection shall not be considered final until each Commission member has reported his or her vote to the Secretary or has reported to the Secretary that the Commissioner does not intend to participate in the matter.

(b) Whenever any member of the Commission so requests, any matter circulated for disposition pursuant to § 200.42(a) shall be withdrawn from circulation and scheduled instead for joint Commission deliberation.

[42 FR 14692, Mar. 16, 1977, as amended at 59 FR 53936, Oct. 27, 1994. Redesignated and amended at 60 FR 17202, Apr. 5, 1995]

§ 200.43 Disposition of business by exercise of authority delegated to individual Commissioner.

(a) *Delegation to duty officer.* (1) Pursuant to the provisions of Pub. L. No. 87–592, 76 Stat. 394, as amended by section 25 of Pub. L. 94–29, 89 Stat. 163, the Commission hereby delegates to an individual Commissioner, to be designated as the Commission's ''duty officer'' by the Chairman of the Commission (or by the Chairman's designee) from time to time, all of the functions of the Commission; *Provided, however,* That no such delegation shall authorize the duty officer (i) to exercise the function of rulemaking, as defined in the Administrative Procedure Act of 1946, as codified, 5 U.S.C. 551 *et seq.,* with reference to general rules as distinguished from rules of particular applicability; (ii) to make any rule, pursuant to section 19(c) of the Securities Exchange Act of 1934; or (iii) to preside at the taking of evidence as described

in section 7(a) of the Administrative Procedure Act, 5 U.S.C. 556(b), except that the duty officer may preside at the taking of evidence with respect to the issuance of a temporary cease-and-desist order as provided by Rule 511(c) of the Commission's Rules of Practice, § 201.511(c) of this chapter.

(2) To the extent feasible, the designation of a duty officer shall rotate, under the administration of the Secretary, on a regular weekly basis among the members of the Commission other than the Chairman.

(b) *Exercise of duty officer authority.* (1) The authority delegated by this rule shall be exercised when, in the opinion of the duty officer, action is required to be taken which, by reason of its urgency, cannot practicably be scheduled for consideration at a Commission meeting. After consideration of a staff recommendation involving such a matter, the duty officer shall forthwith report his or her action thereon to the Secretary.

(2) The duty officer may, when in his or her opinion it would be proper and timely, exercise the authority delegated in this section to initiate by order a nonpublic formal investigative proceeding pursuant to section 19(b) of the Securities Act of 1933 (15 U.S.C. 77s(b)), section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)), section 18(c) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79r(c)), section 42(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–41(b)), section 209(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9(b)), and part 203 (Rules Relating to Investigations) of this title (17 CFR part 203). After consideration of a staff recommendation for initiation by order of a nonpublic formal investigative proceeding, the duty officer shall forthwith report his or her action thereon to the Secretary.

(3) In any consideration of Commission business by a duty officer, the provisions of subpart I herein, § 200.400 *et seq.*, shall not apply, whether or not the duty officer, in exercising his or her authority, consults with, or seeks the advice of, other members of the Commission individually.

(c) *Commission affirmation of duty officer action.* (1) Any action authorized by a duty officer pursuant to § 200.43(a) shall be either (i) circulated to the members of the Commission for affirmation pursuant to § 200.42; or (ii) scheduled for affirmation at a Commission meeting at the earliest practicable date consistent with the procedures in subpart I.

(2)(i) The Commission may, in its discretion, at any time review any unaffirmed action taken by a duty officer, either upon its own initiative or upon the petition of any person affected thereby. The vote of any one member of the Commission, including the duty officer, shall be sufficient to bring any such unaffirmed action taken by a duty officer before the Commission for review.

(ii) A person or party adversely affected by any unaffirmed action taken by a duty officer shall be entitled to seek review by the Commission of the duty officer's unaffirmed actions, but only in the event that the unaffirmed action by the duty officer (A) denies any request for action pursuant to sections 8(a) or 8(c) of the Securities Act of 1933, or the first sentence of section 12(d) of the Securities Exchange Act of 1934; (B) suspends trading in a security pursuant to section 12(k) of the Securities Exchange Act of 1934; or (C) is pursuant to any provision of the Securities Exchange Act of 1934 in a case of adjudication, as defined in section 551 of Title 5, U.S. Code, not required by that Act to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in section 554(a) (1) through (6) of Title 5, United States Code).

(3) Affirmed or unaffirmed action taken by the duty officer shall be deemed to be, for all purposes, the action of the Commission unless and until the Commission directs otherwise. Rule 26 of the Commission's rules of practice, 17 CFR 201.26, shall not apply to duty officer action.

[42 FR 14692, Mar. 16, 1977, as amended at 59 FR 53936, Oct. 27, 1994. Redesignated and amended at 60 FR 17202, Apr. 5, 1995; 60 FR 32795, June 23, 1995]

Subpart C—Canons of Ethics

AUTHORITY: Secs. 19, 28, 48 Stat. 85, 901, as amended, sec. 20, 49 Stat. 833, sec. 319, 53 Stat. 1173, secs. 38, 211, 54 Stat. 841, 855; 15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11.

SOURCE: 25 FR 6725, July 15, 1960, unless otherwise noted.

§ 200.50 Authority.

The Canons of Ethics for Members of the Securities and Exchange Commission were approved by the Commission on July 22, 1958.

§ 200.51 Policy.

It is characteristic of the administrative process that the Members of the Commission and their place in public opinion are affected by the advice and conduct of the staff, particularly the professional and executive employees. It shall be the policy of the Commission to require that employees bear in mind the principles specified in the Canons.

§ 200.52 Copies of the Canons.

The Canons have been distributed to employees of the Commission. In addition, executive and professional employees are issued copies of the Canons upon entrance on duty.

§ 200.53 Preamble.

(a) Members of the Securities and Exchange Commission are entrusted by various enactments of the Congress with powers and duties of great social and economic significance to the American people. It is their task to regulate varied aspects of the American economy, within the limits prescribed by Congress, to insure that our private enterprise system serves the welfare of all citizens. Their success in this endeavor is a bulwark against possible abuses and injustice which, if left unchecked, might jeopardize the strength of our economic institutions.

(b) It is imperative that the members of this Commission continue to conduct themselves in their official and personal relationships in a manner which commands the respect and confidence of their fellow citizens. Members of this Commission shall continue to be mindful of, and strictly abide by, the standards of personal conduct set forth in its regulation regarding Conduct of Members and Employees and Former Members and Employees of the Commission, which is set forth in subpart M of this part 200, most of which has been in effect for many years, and which was originally codified in 1953.

(c) However, in addition to the continued observance of those principles of personal conduct, it is fitting and proper for the members of the Commission to restate and resubscribe to the standards of conduct applicable to its executive, legislative and judicial responsibilities.

[25 FR 6725, July 15, 1960, as amended at 31 FR 13533, Oct. 20, 1966]

§ 200.54 Constitutional obligations.

The members of this Commission have undertaken in their oaths of office to support the Federal Constitution. Insofar as the enactments of the Congress impose executive duties upon the members, they must faithfully execute the laws which they are charged with administering. Members shall also carefully guard against any infringement of the constitutional rights, privileges, or immunities of those who are subject to regulation by this Commission.

§ 200.55 Statutory obligations.

In administering the law, members of this Commission should vigorously enforce compliance with the law by all persons affected thereby. In the exercise of the rulemaking powers delegated this Commission by the Congress, members should always be concerned that the rulemaking power be confined to the proper limits of the law and be consistent with the statutory purposes expressed by the Congress. In the exercise of their judicial functions, members shall honestly, fairly and impartially determine the rights of all persons under the law.

§ 200.56 Personal conduct.

Appointment to the office of member of this Commission is a high honor and requires that the conduct of a member, not only in the performance of the duties of his office but also in his everyday life, should be beyond reproach.

§ 200.57 Relationships with other members.

Each member should recognize that his conscience and those of other members are distinct entities and that differing shades of opinion should be anticipated. The free expression of opinion is a safeguard against the domination of this Commission by less than a majority, and is a keystone of the commission type of administration. However, a member should never permit his personal opinion so to conflict with the opinion of another member as to develop animosity or unfriendliness in the Commission, and every effort should be made to promote solidarity of conclusion.

§ 200.58 Maintenance of independence.

This Commission has been established to administer laws enacted by the Congress. Its members are appointed by the President by and with the advice and consent of the Senate to serve terms as provided by law. However, under the law, this is an independent Agency, and in performing their duties, members should exhibit a spirit of firm independence and reject any effort by representatives of the executive or legislative branches of the government to affect their independent determination of any matter being considered by this Commission. A member should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety; so also he should be above fear of unjust criticism by anyone.

§ 200.59 Relationship with persons subject to regulation.

In all matters before him, a member should administer the law without regard to any personality involved, and with regard only to the issues. Members should not become indebted in any way to persons who are or may become subject to their jurisdiction. No member should accept loans, presents or favors of undue value from persons who are regulated or who represent those who are regulated. In performing their judicial functions, members should avoid discussion of a matter with any person outside this Commission and its staff while that matter is pending. In the performance of his rule-making and administrative functions, a member has a duty to solicit the views of interested persons. Care must be taken by a member in his relationship with persons within or outside of the Commission to separate the judicial and the rule-making functions and to observe the liberties of discussion respectively appropriate. Insofar as it is consistent with the dignity of his official position, he should maintain contact with the persons outside the agency who may be affected by his rule-making functions, but he should not accept unreasonable or lavish hospitality in so doing.

§ 200.60 Qualification to participate in particular matters.

The question in a particular matter rests with that individual member. Each member should weigh carefully the question of his qualification with respect to any matter wherein he or any relatives or former business associates or clients are involved. He should disqualify himself in the event he obtained knowledge prior to becoming a member of the facts at issue before him in a quasi-judicial proceeding, or in other types of proceeding in any matter involving parties in whom he has any interest or relationship directly or indirectly. If an interested person suggests that a member should disqualify himself in a particular matter because of bias or prejudice, the member shall be the judge of his own qualification.

§ 200.61 Impressions of influence.

A member should not, by his conduct, permit the impression to prevail that any person can improperly influence him, that any person unduly enjoys his favor or that he is affected in any way by the rank, position, prestige, or affluence of any person.

§ 200.62 Ex parte communications.

All proceedings required to be determined by the Commission on the record shall be determined by the members solely upon the record and the arguments of the parties or their counsel properly made in the regular course of such proceeding. A member shall at all times comply with the

Commission's Code of Behavior governing ex parte communications between persons outside the Commission and decisional employees, § 200.110 *et seq.*

[28 FR 4446, May 3, 1963]

§ 200.63 Commission opinions.

The opinions of the Commission should state the reasons for the action taken and contain a clear showing that no serious argument of counsel has been disregarded or overlooked. In such manner, a member shows a full understanding of the matter before him, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute some useful precedent to the growth of the law. A member should be guided in his decisions by a deep regard for the integrity of the system of law which he administers. He should recall that he is not a repository of arbitrary power, but is acting on behalf of the public under the sanction of the law.

§ 200.64 Judicial review.

The Congress has provided for review by the courts of the decisions and orders by this Commission. Members should recognize that their obligation to preserve the sanctity of the laws administered by them requires that they pursue and prosecute, vigorously and diligently but at the same time fairly and impartially and with dignity, all matters which they or others take to the courts for judicial review.

§ 200.65 Legislative proposals.

Members must recognize that the changing conditions in a volatile economy may require that they bring to the attention of the Congress proposals to amend, modify or repeal the laws administered by them. They should urge the Congress, whenever necessary, to effect such amendment, modification or repeal of particular parts of the statutes which they administer. In any action a member's motivation should be the common weal and not the particular interests of any particular group.

§ 200.66 Investigations.

The power to investigate carries with it the power to defame and destroy. In determining to exercise their investigatory power, members should concern themselves only with the facts known to them and the reasonable inferences from those facts. A member should never suggest, vote for, or participate in an investigation aimed at a particular individual for reasons of animus, prejudice or vindictiveness. The requirements of the particular case alone should induce the exercise of the investigatory power, and no public pronouncement of the pendency of such an investigation should be made in the absence of reasonable evidence that the law has been violated and that the public welfare demand it.

§ 200.67 Power to adopt rules.

In exercising its rule-making power, this Commission performs a legislative function. The delegation of this power by the Congress imposes the obligation upon the members to adopt rules necessary to effectuate the stated policies of the statute in the interest of all of the people. Care should be taken to avoid the adoption of rules which seek to extend the power of the Commission beyond proper statutory limits. Its rules should never tend to stifle or discourage legitimate business enterprises or activities, nor should they be interpreted so as unduly and unnecessarily to burden those regulated with onerous obligations. On the other hand, the very statutory enactments evidence the need for regulation, and the necessary rules should be adopted or modifications made or rules should be repealed as changing requirements demand without fear or favor.

§ 200.68 Promptness.

Each member should promptly perform the duties with which he is charged by the statutes. The Commission should evaluate continuously its practices and procedures to assure that it promptly disposes of all matters affecting the rights of those regulated. This is particularly desirable in quasi-judicial proceedings. While avoiding arbitrary action in unreasonably or unjustly forcing matters to trial, members should endeavor to hold counsel to

a proper appreciation of their duties to the public, their clients and others who are interested. Requests for continuances of matters should be determined in a manner consistent with this policy.

§ 200.69 Conduct toward parties and their counsel.

Members should be temperate, attentive, patient and impartial when hearing the arguments of parties or their counsel. Members should not condone unprofessional conduct by attorneys in their representation of parties. The Commission should continuously assure that its staff follows the same principles in their relationships with parties and counsel.

§ 200.70 Business promotions.

A member must not engage in any other business, employment or vocation while in office, nor may he ever use the power of his office or the influence of his name to promote the business interests of others.

§ 200.71 Fiduciary relationships.

A member should avoid service as a fiduciary if it would interfere or seem to interfere with the proper performance of his duties, or if the interests of those represented require investments in enterprises which are involved in questions to be determined by him. Such relationships would include trustees, executors, corporate directors, and the like.

§ 200.72 Supervision of internal organization.

Members and particularly the Chairman of the Commission should scrutinize continuously its internal organization in order to assure that such organization handles all matters before it efficiently and expeditiously, while recognizing that changing times bring changing emphasis in the administration of the laws.

Subpart D—Information and Requests

AUTHORITY: 5 U.S.C. 552, as amended, 15 U.S.C. 77f(d), 77s, 77ggg(a), 78m(F)(3), 78w, 79t, 79v(a), 77sss, 80a–37, 80a–44(a), 80a–44(b), 80b–10(a), 80b-11.

Section 200.80 also issued under 5 U.S.C. 552b; 15 U.S.C. 78d–1, 78d–2; 78a *et seq.*; 11 U.S.C. 901, 1109(a).

Section 200.80a also issued under 5 U.S.C. 552b.

Sections 200.80b and 200.80c also issued under 11 U.S.C. 901, 1109(a).

Section 200.82 also issued under 15 U.S.C. 78n.

Section 200.83 also issued under Exec. Order 12,600, 3 CFR, 1987 Comp., p. 235.

§ 200.80 Commission records and information.

(a)(1) *Information published in the* FEDERAL REGISTER. Except as provided in paragraph (b) of this section the following materials are published in the FEDERAL REGISTER for the guidance of the public:

(i) Description of the Commission's central and field organization and the established places at which, the employees from whom, and the methods whereby the public may obtain information, make submittals or requests, or obtain decisions;

(ii) Statements of the general course and method by which the Commission's functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(iii) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(iv) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Commission;

(v) Each amendment, revision, or repeal of the foregoing; and

(vi) The notice of Commission meetings described in § 200.403, but only to the extent, and under the conditions, specified in § 200.403.

(2) *Records available for public inspection and copying; documents published and indexed.* Except as provided in paragraph (b) of this section, the following materials are available for public inspection and copying during normal business hours at the public reference room located at 450 Fifth Street, NW., Room 1024, Washington, DC and at the Northeast and Midwest Regional Offices of the Commission,

and, except for indices, they are published weekly in a document entitled ''SEC Docket'' (see paragraph (e)(8)(ii) of this section):

(i) Final opinions of the Commission, including concurring and dissenting opinions, as well as orders made by the Commission in the adjudication of cases;

(ii) Statements of policy and interpretations which have been adopted by the Commission and are not published in the FEDERAL REGISTER;

(iii) Administrative staff manuals and instructions to staff that affect a member of the public;

(iv) A record of the final votes of each member of the Commission in every Commission proceeding concluded after July 1, 1967;

(v) Current indices (published quarterly or more frequently) providing identifying information to the public as to the materials made available pursuant to paragraphs (a)(2) (i), (ii), and (iii) of this section which have been issued, adopted or promulgated after July 1, 1967, and such other indices as the Commission may determine; and

(vi) Copies and a general index of all records which have been released to any person under the Freedom of Information Act and which, because of the nature of their subject matter, the Commission determines have become or are likely to become the subject matter of subsequent requests for substantially the same records.

(3) Records created on or after November 1, 1996, which are required to be available for public inspection and copying under paragraph (a)(2) of this section, shall be made available on the Internet.

(4) *Other records available upon request.* Except with respect to the records made available under paragraphs (a) (1) and (2) of this section, and subject to the provisions of paragraph (b) of this section, pertaining to nonpublic matters, the Commission, upon request for records which (i) reasonably describes such records and (ii) is made in accordance with the rules set forth in paragraphs (d) and (e) of this section, stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person. A compilation of records generally available at the public reference room at the principal office of the Commission appears below as appendix A to this subpart (17 CFR 200.80a). Most of the records described in appendix A to this section are provided to the public pursuant to the Securities Act of 1933, 15 U.S.C. 77f(d), the Securities Exchange Act of 1934, 15 U.S.C. 78m(f)(3), the Public Utility Holding Company Act of 1935, 15 U.S.C. 79v(a), the Investment Company Act of 1940, 15 U.S.C. 80a–44(a)(b), and the Investment Advisers Act of 1940, 15 U.S.C. 80b–10(a). Arrangements can be made through the Public Reference Branch as explained in paragraph (c) of this section for materials to be copied by the Commission's contract copying service at fees found in appendix E to this section.

(5) *Records available with identifying details deleted.* To the extent required to prevent a clearly unwarranted invasion of personal privacy, identifying details may be deleted from materials made public as set forth in paragraphs (a) (1), (2), and (3), of this section, e.g., apparently defamatory statements made about any person, information received by or given to the Commission in confidence, or any contents of personnel and medical and similar files. In addition, certain materials which are considered to be nonpublic, as described in paragraph (b) of this section may, as authorized by the Commission from time to time, be made available for public inspection and copying in an abridged or summary form or with identifying details deleted.

(b) *Nonpublic matters.* Certain records are nonpublic, but any reasonably segregable portion of a record shall be provided to any person requesting such record in accordance with paragraphs (d) and (e) of this section and after deletion of the portions which are considered nonpublic under paragraph (b) of this section. Except for such reasonably segregable portions of records, the Commission will generally not publish or make available to any person matters that are:

(1)(i) Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy,

and (ii) are in fact properly classified pursuant to such executive order.

(2) Related solely to the internal personnel rules and practices of the Commission or any other agency, including, but not limited to:

(i) Operation rules, guidelines, and manuals of procedure for investigators, attorneys, accountants, and other employees other than those which establish legal requirements to which members of the public are expected to conform; or

(ii) Hiring, termination, promotion, discipline, compensation, or reward of any Commission employee or member, the existence, investigation, or disposition of a complaint against any Commission employee or member, the physical or mental condition of any Commission employee or member, the handling of strictly internal matters, matters which would tend to infringe on the privacy of the staff or members of the Commission, or similar subjects.

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *Provided,* That such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(4) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential, including, but not limited to:

(i) Information contained in letters of comment in connection with registration statements, applications for registration or other material filed with the Commission, replies thereto, and related material which is deemed to have been submitted to the Commission in confidence or to be confidential at the instance of the registrant or person who has filed such material unless the contrary clearly appears; and

(ii) Information contained in any document submitted to or required to be filed with the Commission where the Commission has undertaken formally or informally to receive such submission or filing for its use or the use of specified persons only, such as preliminary proxy material filed pursuant to Rule 14a–6 under the Securities Exchange Act (17 CFR 240.14a–6) or preliminary information statements filed pursuant to Rule 14c–5 (17 CFR 240.14c–5) before definitive material has been filed with the Commission, reports filed pursuant to Rule 316(a) under the Securities Act (17 CFR 230.316(a)), agreements filed pursuant to Rule 15c3–1d(c)(6)(i) under the Securities Exchange Act (17 CFR 240.15c3–1d(c)(6)(i)), schedules filed pursuant to Part II of Form X–17A–5 (17 CFR 249.617) in accordance with Rule 17a–5(b)(3) under the Securities Exchange Act (17 CFR 240.17a–5(b)(3)), statements filed pursuant to Rule 17a–5(k)(1) under the Securities Exchange Act (17 CFR 240.17a–5(k)(1)), and confidential reports filed pursuant to Rules 17a–10 and 17a–12 under the Securities Exchange Act (17 CFR 240.17a–10 and 240.17a–12); and

(iii) Information contained in reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of or in connection with an examination or inspection of the books and records of any person or any other investigation.

(5) Interagency or intra-agency memoranda or letters, including generally records which reflect discussions between or consideration by members of the Commission or members of its staff, or both, of any action taken or proposed to be taken by the Commission or by any member of its staff, and specifically, reports, summaries, analyses, conclusions, or any other work product of members of the Commission or of attorneys, accountants, analysts, or other members of the Commission's staff, prepared in the course of an inspection of the books or records of any person whose affairs are regulated by the Commission, or prepared otherwise in the course of an examination or investigation or related litigation conducted by or on behalf of the Commission, except those which by law would routinely be made available to a party other than an agency in litigation with the Commission.

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, including those concerning all employees of the

Commission and those concerning persons subject to regulation by the Commission.

(7) Records or information compiled for law enforcement purposes to the extent that the production of such records or information:

(i) Could reasonably be expected to interfere with enforcement activities undertaken or likely to be undertaken by the Commission or the Department of Justice, or any United States Attorney, or any Federal, state, local, foreign governmental authority or foreign securities authority, any professional association, or any securities industry self-regulatory organization;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source including a state, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques or procedures or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could be reasonably expected to endanger the life or physical safety of any individual.

(8) Contained in, or related to, any examination, operating, or condition report prepared by, on behalf of, or for the use of, the Commission, any other Federal, state, local, or foreign governmental authority or foreign securities authority, or any securities industry self-regulatory organization, responsible for the regulation or supervision of financial institutions.

(9) Geological and geophysical information and data, including maps, concerning wells.

(c)(1) *Public reference facilities.* In order to disseminate records, including those listed in appendix A to this section, the Commission has a specially staffed and equipped public reference room located at 450 Fifth Street NW., Room 1024, Washington, DC and public reference facilities in its Northeast and Midwest Regional Offices . Copying machines, which are available to requesters on a self-service or contractor-operated basis, can be used to make immediate copies up to 8½×11 inches in size of materials that are available for inspection in the Washington, DC, Northeast and Midwest Regional Offices. Fees and levels of service are set out in the Commission's schedule of fees in appendix E to this section and in information available from the public reference room. The Commission accepts only written requests for copies of documents.

(i) The public reference room in Washington has available for public inspection all of the publicly available records of the Commission as described in paragraph (a) of this section. In addition, upon request, such records will be sent to the Commission's Northeast and Midwest Regional Offices for inspection in the public reference facilities at those offices, if the records are not needed by the Commission or the staff in connection with the performance of official duties. Also upon request, and only when suitable arrangements can be made with respect to the transportation, storage, and inspection of records, records may be sent to any other Commission office for inspection at that office, if the records are not needed by the Commission or the staff in connection with the performance of official duties. When records are sent to another office at the request of a member of the public, the requestor shall be charged all costs incurred by the Commission in transporting the records.

(ii) All regional and district offices of the Commission have available for public examination the materials set forth in paragraph (a)(2) of this section and the *SEC Docket*, *SEC News Digest* and other SEC publications. Blank forms as well as other general information about the operations of the Commission described in paragraph (a)(1) of

this section may also be available at particular regional and district offices.

(iii) In the Northeast and Midwest Regional Offices, microfiche of all recent registration statements filed pursuant to the Securities Act of 1933, registration statements and periodic reports filed pursuant to the Securities Exchange Act of 1934, and periodic reports filed pursuant to the Investment Company Act from 1969 to date are available for inspection and reproduction.

The addresses of the Commission's regional and district offices are:

Northeast Regional Office. 7 World Trade Center, Suite 1300, New York, NY 10048. Office hours—9 a.m. to 5:30 p.m. E.S.T.

Boston District Office—73 Tremont Street, Suite 600, Boston, MA 02108. Office hours—9 a.m. to 5:30 p.m. E.S.T.

Philadelphia District Office—The Curtis Center, Suite 1005 E., 601 Walnut Street, Philadelphia, PA 19106. Office hours—9 a.m. to 5:30 p.m. E.S.T.

Southeast Regional Office. 1401 Brickell Avenue, Suite 200, Miami, FL 33131. Office hours—9 a.m. to 5:30 p.m. E.S.T.

Atlanta District Office—3475 Lenox Road, NE., Suite 1000, Atlanta, GA 30326. Office hours—9 a.m. to 5:30 p.m. E.S.T.

Midwest Regional Office. 500 West Madison Street, Suite 1400, Chicago, IL 60661. Office hours—8:45 a.m. to 5:15 p.m. C.S.T.

Central Regional Office. 1801 California Street, Suite 4800, Denver, CO 80202. Office hours—8 a.m. to 4:30 p.m. M.S.T.

Fort Worth District Office—801 Cherry Street, 19th Floor, Fort Worth, TX 76102. Office hours—8:30 a.m. to 5 p.m. C.S.T.

Salt Lake District Office—500 Key Bank Tower, 50 S. Main Street, Suite 500, Box 79, Salt Lake City, UT 84144. Office hours—8 a.m. to 4:30 p.m. M.S.T.

Pacific Regional Office. 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036. Office hours 8:30 a.m. to 5 p.m. P.S.T.

San Francisco District Office—44 Montgomery Street, Suite 1100, San Francisco, CA 94104. Office hours—8:30 a.m. to 5 p.m. P.S.T.

(2) *Public reference inquiries.* Inquiries concerning the nature and extent of records available at the Commission's public reference room in Washington or at its other public reference facilities may be made in person or in writing. The addresses of all Commission Regional and District Offices are set forth at paragraph (c)(1) of this section. Written inquiries may be addressed to the Securities and Exchange Commission, Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549.

(3) Electronic filings made through the Electronic Data Gathering, Analysis, and Retrieval system are publicly available through the Commission's Web site (http://www.sec.gov).

(d) *Requests for Commission records and copies thereof*—(1) *Time and place of requests for access to Commission records.* Requests for access to records available through the Commission's public reference facilities may be made in person during normal business hours at those facilities or by mail directed to the Public Reference Branch, Securities and Exchange Commission, Washington, DC 20549. In addition, access to agency records not available in the public reference facilities may be requested pursuant to the Freedom of Information Act. Such requests must be in writing, should be clearly and prominently identified by a legend on the first page, such as ''Freedom of Information Act Request'', and should be addressed to the Freedom of Information Act Officer, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413. The request may also be made by facsimile (703–914–1149) or by Internet (foia/pa@sec.gov).

(2) *Requests for copies of records.* Requests for copies of Commission records available through the Commission's public reference facilities, including those listed in appendix A to this section, may be made directly to the appropriate facility either in person or by mail addressed to the Securities and Exchange Commission, Public Reference Branch, Washington, DC 20549. Levels of service and charges for copies are set out in the Commission's schedule of fees in appendix E to this section. Requests for copies of materials to which access has been granted pursuant to a Freedom of Information Act request will be processed pursuant to regulations found in this section in paragraphs (e)(9) and (e)(10) and at charges set out in appendix E to this section.

(3) *Description of requested records.* Each request for Commission records or copies thereof shall reasonably describe the records sought with sufficient specificity with respect to names,

dates and subject matter to permit the records to be located among the records maintained by or for the Commission. A person who has requested Commission records or copies thereof will be promptly advised if the records cannot be located on the basis of the description given and that further identifying information must be provided before his request can be satisfied.

(4) *Normal availability.* Records maintained in the Commission's public reference facilities or copies thereof will normally be made available in keeping with levels of service and fees set out in appendix E to this section. Records requested pursuant to the Freedom of Information Act will be made available as described in paragraphs (e)(9) and (e)(10) of this section.

(5) *Initial determination; multi-track processing, and denials.—(i) Time within which to respond.* When a request complies with the procedures in this section for requesting records under the Freedom of Information Act, a response shall be sent within 20 business days from the date the Office of Freedom of Information and Privacy Act Operations receives the request, except as described in paragraphs (d)(5)(ii) and (d)(5)(iii) of this section. If that Office has identified the requested records, the response shall state that the records are being withheld, in whole or in part, under a specific exemption or are being released.

(ii) *Voluminous records.* The amount of separate and distinct records which are demanded in a single request or the amount of time or work (or both) involved may be such that the review of the records cannot be completed within 20 business days, as prescribed in paragraph (d)(5)(i) of this section. In such a case, the Office of Freedom of Information and Privacy Act Operations shall inform the requester of the approximate volume of the records and give him or her the option of limiting the scope of the request to qualify for 20-day processing or placing the request in the Commission's first-in, first-out (FIFO) system for reviewing voluminous records. In the latter case, the Office will inform the requester of the approximate time when the review will start. The FIFO system allows the Commission to serve all those requesting voluminous records on a first-come, first-served basis, such that all releasable records sought will be released at one time, unless the requester specifically requests that releasable records be released piecemeal as they are processed.

(iii) *Expedited processing.* The Office of Freedom of Information and Privacy Act Operations shall grant a request for expedited processing if the requester demonstrates a compelling need for the records. ''Compelling need'' means that a failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to an individual's life or physical safety or, if the requester is primarily engaged in disseminating information, an urgency to inform the public of actual or alleged Federal government activity. A compelling need shall be demonstrated by a statement, certified to be true and correct to the best of the requester's knowledge and belief. The Office of Freedom of Information and Privacy Act Operations shall notify the requester of the decision to grant or deny the request for expedited treatment within ten business days of the date of the request. A request for records that has been granted expedited processing shall be processed as soon as practicable.

(iv) *Notice of denial.* Any notification of denial of any request for records shall state the name and title or position of the person responsible for the denial of the request, the reason for the decision, and the right of the requester to appeal to the General Counsel. The decision shall estimate the volume of records that are being withheld in their entirety, unless giving such an estimate would harm an interest protected by the applicable exemption. The amount of information redacted shall be indicated on the released portion of the record and, if technically feasible, at the place where the redaction is made.

(v) *Form of releasable records.* Releasable records shall be made available in any form or format requested if they are readily reproducible in that form or format.

(6) *Administrative review.* Any person who has received no response to a request within the period prescribed in paragraph (d)(5) of this section or within an extended period permitted under paragraph (d)(7) of this section, or whose request has been denied under paragraph (d)(5) of this section, may appeal the adverse decision or failure to respond to the General Counsel.

(i) The appeal shall be in writing, shall be clearly and prominently identified on the envelope or other cover and at the top of the first page by a legend such as ''Freedom of Information Act Appeal,'' and shall identify the record in the form in which it was originally requested.

(ii) The appeal must be mailed to the Office of Freedom of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413 or delivered to Room 1418 at that address, and a copy of it must be mailed to the General Counsel, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549 or delivered to Room 1012–B at that address.

(iii) The appeal may include such facts and cite such legal or other authorities as the person submitting the appeal may consider appropriate.

(iv) The General Counsel shall have the authority to grant or deny all appeals, in whole or in part, and to release as an exercise of discretion records exempt from mandatory disclosure under 5 U.S.C. 552(b). In appropriate cases he or she may, in his or her sole and unfettered discretion, refer appeals to the Commission for determination.

(v) A determination with respect to any appeal shall be made within twenty days (excepting Saturdays, Sundays and legal public holidays) after the receipt of such appeal or within such extended period as may be permitted in accordance with paragraph (d)(7) of this section.

(vi) A denial of an appeal in whole or in part shall set forth the basis for the denial, and shall advise the requester that judicial review of the decision is available in accordance with 5 U.S.C. 552(a)(4).

(7) *Extension of time to consider requests and to consider administrative appeals.* In unusual circumstances, as specified in this paragraph, the time limits prescribed in either paragraphs (d) (5) or (6) of this section may be extended by written notice to the person making a request for a record or a copy, setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten business days, except as provided in paragraph (d)(8) of this section. As used in this paragraph, ''unusual circumstances'' means, but only to the extent reasonably necessary to the proper processing of the particular request:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request. (Many records of the Commission are stored in Federal Records Centers in accordance with law—including many of the documents which have been on file with the Commission for more than 2 years—and cannot be made available for several days after a request has been made. Other records may temporarily be located at a regional or district office of the Commission. Any person who has requested for personal examination a record stored at the Federal Records Center or temporarily located in a regional or district office of the Commission will be notified when and where the record will be made available to him. Any person who has ordered a copy of such record will be provided with a copy as soon as practicable). Some records have been disposed of in accordance with the Commission's Records Control Schedule (17 CFR 200.80(f)).

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request. (While every reasonable effort will be made fully to comply with each request as promptly as possible on a first-come, first-served basis, work done to search for, collect and appropriately examine records in response to a request for a large number of records

will be contingent upon the availability of processing personnel in accordance with an equitable allocation of time to all members of the public who have requested or wish to request records.)

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components within the Commission having substantial subject-matter interest therein.

(8) *Inability to meet time limits.* If a request for records cannot be processed within the time prescribed under paragraph (d)(7) of this section, the Commission shall so notify and give the requester an opportunity to modify the request so that it may be processed within that time or to arrange an alternative time for processing the request or a modified request.

(i) *Records in use for another member of the public.* Any record being inspected by or copied for another member of the public will be made available as soon as practicable.

(ii) *Records in use by a member of the Commission or its staff.* Although every effort will be made to make a record in use by a member of the Commission or its staff available when requested, it may occasionally be necessary to delay making such a record available when doing so at the time the request is made would seriously interfere with the work of the Commission or its staff.

(iii) *Missing or lost records.* Any person who has requested a record or copy will be notified if the record sought cannot be found. If he so requests, he will be notified if it should subsequently be located.

(9) *Misdirected written requests.* The Commission cannot assure that a timely or satisfactory response will be given to written requests for inspection or copies of records that are directed to the Commission other than in the manner prescribed in paragraphs (d) (1) and (2) of this section. Any staff member who receives a written request for records should promptly forward the request to the Freedom of Information Act Officer. Misdirected requests for records will be considered to have been received for purposes of paragraph (d) of this section only when they have been actually received by the Freedom of Information Act Officer. The Commission will not entertain any appeal from an alleged denial or failure to comply with a misdirected request, unless it is clearly shown that the request was in fact received by the Freedom of Information Act Officer.

(e) *Fees for records services.* A current schedule of fees for record services, including locating, reviewing, and making records available, attestations and copying, appears in appendix E to this subpart D, 17 CFR 200.80e. Copies of the current schedule of fees may also be obtained upon request made in person, by telephone or by mail from the public reference room or at any regional or district office of the Commission.

(1) *Services provided without charge.* Generally, up to one-half hour of staff time devoted to searching for and reviewing Commission records will be provided without charge. Where a request for records pursuant to the Freedom of Information Act is determined not to serve a commercial purpose as defined in paragraph (e)(10)(ii) of this section, a total of two staff hours of search and review and one hundred pages of duplication as defined in paragraphs (e)(9)(i), (e)(9)(ii) and (e)(9)(iii) of this section, respectively, shall be made available without charge in the form most economical for the government.

(2) *Services for which fees are charged.* For records available through the Commission's public reference facilities, requestors may make arrangements for duplication in accordance with provisions of the Commission's dissemination contract. Copies of that contract, which contain tables of charges, may be inspected in the public reference room, 450 Fifth Street, NW., Room 1024, Washington, DC. A complete schedule of services offered by the contractor and fees charged for those services is available through the Commission's public reference facilities. Fees for services provided in connection with requests made pursuant to the Freedom of Information Act shall be assessed as set out in appendix E to this section and in keeping with guidelines

and procedures described in paragraphs (e)(9) and (e)(10) of this section.

(3) *Requests requiring large expenditures.* A request for Commission records may state that the requesting person is willing to pay fees up to a stated limit for services to be provided in locating, reviewing and making available requested records. In such circumstances, no work will be done that will result in fees beyond the stated limit without further written authorization. If no limit is initially stated by the person requesting records or copies, services in locating and making available the requested records will not be done so as to exceed fees of $28 (exclusive of applicable copying charges) without the express written authorization by the requesting person, and he will be so informed.

(4) *Waiver or reduction of fees.* (i) The Office of Freedom of Information and Privacy Act Operations may waive or reduce search, review, and duplication fees if:

(A) Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(B) Disclosure is not primarily in the commercial interest of the requester.

(ii) The Office of Freedom of Information and Privacy Act Operations will determine whether disclosure is likely to contribute significantly to public understanding of the operations or activities of the government based upon four factors:

(A) Whether the subject of the requested records concerns the operations and activities of the Federal government;

(B) Whether the requested records are meaningfully informative on those operations or activities so that their disclosure would likely contribute to increased public understanding of specific operations or activities of the government;

(C) Whether disclosure will contribute to the understanding of the public at large, rather than the understanding of the requester or a narrow segment of interested persons; and

(D) Whether disclosure would contribute significantly to public understanding of the governmental operations or activities.

(iii) The Office of Freedom of Information and Privacy Act Operations will determine whether disclosure of the requested records is not primarily in the commercial interest of the requester based upon two factors:

(A) Whether disclosure would further any commercial interests of the requester; and

(B) Whether the public interest in disclosure is greater than the requester's commercial interest.

(iv) If only a portion of the requested records satisfies both the requirements for a waiver or reduction of fees, a waiver or reduction of fees will be granted for only that portion.

(v) A request for a waiver or reduction of fees may be a part of a request for records. Such requests should address all the factors identified in paragraphs (e)(4)(ii) and (e)(4)(iii) of this section.

(vi) Denials of requests for a waiver or reduction of fees may be appealed to the General Counsel in accordance with the procedure set forth in paragraph (d)(6) of this section.

(5) *Records obtained from Federal Records Centers.* When, to fill a request for inspection or copying, records are required to be obtained from a Federal Records Center, fees, in addition to those provided on the Commission's current schedule of fees, will be charged to the extent authorized or required by rules or regulations promulgated by the National Archives and Records Administration.

(6) *Attestations.* In addition to any other fees or charges which may apply, a fee will be charged for records attestations as provided in the Commission's current schedule of fees. The seal of the Commission will be affixed to all attestations without additional charge.

(7) *Copying services.* Copies of records filed with or retained by the Commission, or portions thereof, will be provided subject to fees established by agreement between the Commission and a private contractor as set forth in the Commission's current schedule of fees and, where applicable, procedures and guidelines for Freedom of Information Act requests as set out in paragraphs (e)(9) and (e)(10) of this section.

(i) *Facsimile copies.* Requests for facsimile copies may be made either in person at the Commission's Washington, DC, Northeast, or Midwest public reference rooms, or by mail addressed to the Securities and Exchange Commission, Public Reference Room, 450 Fifth Street, NW., room 1024, Washington, DC 20549. The contractor will send copies directly to the purchaser unless attestation is requested. Persons who request copies of documents through the public reference room will be billed by the contractor at regulated prices, and will be billed separately by the Commission for search, review and attestation charges, if any. Copies of documents requested directly from the contractor or from any other information service or vendor are not subject to regulated prices. Special classes of copying services, such as telecopies, not listed herein or in the current schedule of fees posted in the public reference room, are not provided or regulated by the Commission, but may be obtained from private vendors at market prices.

(ii) *Microfiche copies.* A contractor also makes available to the public microfiche copies of certain public documents on file with the Commission, at prices and on terms governed by its contract with the Commission. Microfiche services include subscription microfiche service on an annual basis. Microfiche subscription prices are regulated by the Commission whether requested through the public reference room or directly from the contractor. Certain other microfiche services are provided at prices that are regulated by the Commission only if ordered through the Commission's public reference room. The Commission will accept only subscription requests made in writing, although the contractor may elect to accept subscription requests by telephone. All microfiche subscription charges are payable directly to the contractor, whether placed through the Commission or not. Information concerning the types and cost of regulated microfiche services may be obtained by writing to the Commission at its public reference room located at 450 Fifth Street, NW., room 1024, Washington, DC 20549.

(iii) *Transcripts of public hearings.* Copies of the transcripts of recent public hearings may be obtained from the reporter subject to the fees established annually by contract between the Commission and the reporter. Copies of that contract, which contains tables of charges, may be inspected in the public reference room, 450 Fifth Street, NW., Room 1024, Washington, D.C. and in each regional and district office. Copies of other public transcripts may be obtained, in the manner of other Commission records, subject to the charges referred to in paragraph (e)(7)(i) of this section.

(8) *Releases and publications.* (i) The Commission's decisions, reports, orders, rules and regulations are published initially in the form of releases and distributed.

(ii) The Commission publishes daily the *SEC News Digest,* which summarizes the releases published by the Commission each day, contains Commission announcements, and lists certain filings with the Commission. The Commission publishes weekly the *SEC Docket,* which prints the full text of every Commission release.

(iii) The Commission publishes an annual report to the Congress which sets forth the results of the Commission's operations during the past fiscal year under the various statutes committed to its charge. Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(iv) The Commission also makes other information in the fields of securities and finance, including economic studies, available to the public through the issuance of releases on specific subject matters.

(v) A classification of the releases available from the Commission appears below as appendix B to this section. Other publications available from the Commission are set forth in appendix C to this section. Copies of rules, regulations, and miscellaneous publications set forth in appendix D to this section may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(9) *Fees for services required for processing Freedom of Information Act Requests.* In cases where records are requested pursuant to the Freedom of Information Act and according to procedures set forth in paragraph (d)(1) of this section, fees shall be charged as set out in the Commission's current schedule of fees, appendix E to this section, for services as described in the following:

(i) *Search.* The term ''search'' includes *all* time spent looking for material manually or by using electronic data processing equipment that is responsive to a request, as distinguished from ''review'' as defined at paragraph (e)(9)(ii) of this section. Searching for requested and specifically identified information, as described in paragraph (d)(1) of this section, includes the cost of staff time devoted to the search as indicated in appendix E to this section and direct costs for use of Commission electronic data processing equipment.

(ii) *Review.* The term ''review'' refers to the process of examining documents located in response to a request to determine whether any portion of any document is permitted to be withheld pursuant to provisions of the Freedom of Information Act. It also includes processing any documents for disclosure, *e.g.,* doing all that is necessary to excise material from and otherwise prepare them for release.

(iii) *Duplication.* The term ''duplication'' refers to producing paper or microform copies of records. The Commission shall charge for duplication as established by agreement between the Commission and a private contractor. These charges are currently set out in appendix E to this section. Such charges shall be set so as not to exceed the direct cost that would be incurred by the Commission if it were to perform such services itself, as calculated to include the salary of operators, the cost of reproduction machinery, the cost of material and any other direct costs incurred by the Commission in copying materials responsive to a Freedom of Information Act request.

(iv) *Partial exemption from fee provisions.* No fees shall be charged for the first two hours of search time and the first one hundred pages of materials for requesters described in paragraphs (e)(10)(i) and (e)(10)(iii) of this section.

(v) *Minimum fee.* Fees will not be charged if the normal cost of collecting a fee would be equal to or greater than the fee itself.

(10) *Classification of Freedom of Information Act requesters for purposes of assessing fees.* Parties requesting records pursuant to the Freedom of Information Act will be classified and charged fees described in appendix E to this section as follows:

(i) The following types of requesters shall be charged for duplication of records as described in paragraph (e)(9)(iii) of this section as qualified in paragraph (e)(9)(iv) of this section: Educational institutions requesting information for purposes of scholarly research; non-commercial scientific institutions requesting information for purposes of scientific research; and representatives of the news media requesting information concerning current events or matters of current interest to the general public.

(ii) Commercial requesters, defined as parties other than those mentioned in paragraph (e)(10)(i) of this section who are requesting information to be used in any way which could reasonably be expected to result in corporate or personal financial gain or profit, shall be charged for search, review and duplication of records as described in paragraphs (e)(9)(i), (e)(9)(ii) and (e)(9)(iii), respectively, of this section.

(iii) All parties other than those described in paragraphs (e)(10)(i) and (e)(10)(ii) of this section requesting access to such records shall be charged for search and duplication of records as described in paragraphs (e)(9)(i) and (e)(9)(iii) of this section, respectively, as qualified in paragraph (e)(9)(iv) of this section.

(11) *Appeal of classification.* Classification under the provisions of paragraph (e)(10) of this section may be appealed to the General Counsel in accordance with the procedure set forth in paragraph (d)(6) of this section.

(12) *Aggregation of requests.* If the Freedom of Information Act Officer reasonably believes that a requester or group of requesters acting in concert is attempting to divide one request into a series of requests for the purpose of

evading the assessment of fees, those requests may be aggregated and charges assessed accordingly.

(13) *Advance payment.* The Freedom of Information Act Officer may require advance payment of fees expected to be incurred in connection with a request, but only when the subject requester has failed to make timely payment in the past, or when the estimated processing costs exceed $250.00 and the requester has no previous payment records or has failed to make timely payment in the past. Processing in such cases shall be delayed until advance payment is received and statutory time limits will be appropriately extended.

(14) *Interest on unpaid bills.* On the 31st day following the date of a bill to a requester, the Commission may begin assessing interest on the unpaid amount at the rate prescribed in section 3717 of title 31 of the U.S. Code. Interest will accrue from the date of the bill.

[40 FR 8799, Mar. 3, 1975]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 200.80, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 200.80a Appendix A—Documentary materials available to the public.

[See footnotes at end of table]

Description	Pursuant to section—
Securities Act of 1933	
Registration statement providing financial and other information concerning securities offered for public sale, filed under Regulation C (17 CFR 230.400 *et seq.*).	6
Prospectuses (selling circulars) in connection with registration statement.	10
Periodic reports (annual, quarterly, and current) to keep reasonably current the information in registration statement.	(1)
Requests for extension of time to file information, document, or report.	(2)
Reports of sales of registered securities and use of proceeds thereunder by first time registrants.	19(a), 20(a)
Report by issuers of securities quoted on NASDAQ Inter-Dealer Quotation System.	(1)
Preliminary data (prospectus, circular letters, etc.) to oil offering (Regulation B) (17 CFR 230.300 *et seq.*).	3(b)
Offering sheets for oil or gas rights and royalties under Regulation B for exemption from registration provisions (17 CFR 230.300 *et seq.*).	3(b)
Notifications of exemption from registration filed under Regulation A, E, and F (17 CFR 230.251, 230.601, 230.651 *et seq.*).	3(b)
Offering circulars and written advertisements or other communications under Regulations A, E, and F (17 CFR 230.251, 230.601, 230.651 *et seq.*).	3(b)
Report of sales and use of proceeds (Regulations A and E) (17 CFR 230.251, 230.601 *et seq.*).	3(b)
Consent by non-resident to service of process (Regulation A) (17 CFR 230.251 *et seq.*).	3(b)
Application for relief from disability under Regulations A and F (17 CFR 230.651 *et seq.*).	3(b)
Notice of proposed resale of restricted securities and resale of securities by control persons (17 CFR 230.144).	4(1), 4(4)
Notice of proposed sale by non-controlling person of restricted securities of issuers which do not satisfy all of the conditions of Rule 144 (17 CFR 230.237).	3(b)
Notice of sale of securities by closely held issuers (issuers with 100 or less beneficial owners) other than investment companies, registered or required to be registered under the Investment Company Act of 1940 (17 CFR 230.240).	3(b)

[See footnotes at end of table]

Description	Pursuant to section—
Securities Exchange Act of 1934	
Registration statement (securities listed on a national securities exchange).	12(b)
Registration statement (securities traded over-the-counter).	12(g)
Exemption from section 12(g), 13, 14, 15, or 16.	12(h)
Information by a foreign issuer temporarily exempt from section 12(g).	12(g)(3)
Certification of exchange approving securities for listing and registration.	12(d)
Periodic reports (annual, quarterly and current) to keep current the information in the above registration statements.	13(a)
Request for extension of time to file information, document, or report.	12(b)
Correspondence between the Commission and registrants that are delinquent in filing certain required reports.	13(a), 15(d)
Report by issuers of securities quoted on NASDAQ Inter-Dealer Quotation System.	15(d), 13(a)
Certificate of termination of Registration for a class of security.	(3)
Notices of suspension of trading	12(d)
Application to withdraw or strike a security from listing and registration on a national securities exchange.	12(d)
Notification by an exchange of the admission to trading of a substituted or additional class of security.	12(a)
Definitive proxy soliciting materials filed under Regulation 14A (17 CFR 240.14a–1 *et seq.*).	14(a)

[See footnotes at end of table]

Description	Pursuant to section—
Distribution of information to security holders from whom proxies are not solicited filed under Regulation C (17 CFR 230.400 *et seq.*).	14(c)
Acquisitions, tender offers and solicitations. (17 CFR 240.14d–1 *et seq.*).	13(d), 14(d)
Initial statement of beneficial ownership of equity securities by officers, directors and principal stockholders of issuers having listed equity securities; and changes in such ownership.	16(a)
Application for permission to extend unlisted trading privileges, notification of changes, and notification of termination or suspension.	12(f)
Application for registration as a broker and dealer, and amendments or supplements to such application.	15(b)
Reports of financial condition of registered brokers and dealers.	17
Application for registration as a transfer agent and amendments to such application.	17A(c)
Application for registration as a municipal securities dealer.	15B(a)
Application for registration or exemption as a securities information processor.	11A(b)
Application for registration or exemption as a clearing agency.	17A(b)
Irrevocable appointment of agent for service of process, pleadings and other papers.	23(a)
Notice by non-resident broker or dealer specifying address of place in United States where copies of books and records are located and undertaking to furnish to Commission, upon demand, copies of books and records he is required to maintain.	17
Subordination agreements	15
Initial assessment and information form for registered brokers and dealers not members of a registered national securities association.	15(b)(8)
Annual assessment and information form for registered brokers and dealers not members of a registered national securities association.	15(b)(8)
Reports of market makers and other registered broker-dealers in securities traded on national securities exchanges.	17(a)
Reports by registered brokers and dealers who are OTC Market in Makers in any OTC Margin Securities.	17(a)
Proposed rule changes by all self-regulatory organizations.	19(b)
Notice as to stated policies, practices and interpretations of self-regulatory organizations.	19(b)
Application by an exchange for registration or exemption from registration as a national securities exchange.	6(a)
Annual amendments and supplemental material filed to keep reasonably current the information contained in application for registration or exemption.	6(e)
Record disposal plan of national securities exchanges.	17
Application for listing securities on an exempted exchange.	12(b)

[See footnotes at end of table]

Description	Pursuant to section—
Periodic reports to keep reasonably current the information contained in application for listing securities on exempted exchange.	13
Certification of exempted exchange approving securities for listing.	12(d)
Application for registration as a national securities association or affiliated securities association.	15A
Annual supplement consolidated to keep reasonably current the information in the above application.	15A
Report of changes in membership status of any of its members required of national securities exchanges and registered national securities associations.	17, 19
Application by a national securities association or a broker or dealer for admission or continuance of a broker or dealer as member of a national securities association, notwithstanding a disqualification under section 15A(b)(4).	15A(b)(4)
Application for review of disciplinary action or denial of membership by registered securities association.	15A(g)
Reports on stabilizing activities pertaining to a fixed price offering of securities registered or to be registered under the Securities Act of 1933, or offered or to be offered pursuant to an exemption under Regulation A (17 CFR 230.251 *et seq.*), or being or to be otherwise offered if aggregate offering price exceeds $500,000.	17
Plans by exchanges authorizing payment of special commission in connection with a distribution of securities on exchanges.	10
Suspensions of trading of securities otherwise than on a national securities exchange.	15(c)(5)
Annual and supplemental reports of the Municipal Securities Rulemaking Board.	17

[See footnotes at end of table]

Description	Pursuant to section—
Public Utility Holding Company Act of 1935	
Notification of registration and registration statement by public utility holding companies providing financial and other information concerning the issue and sale of securities.	5(a), 5(b)
Annual reports by registered holding companies to keep reasonably current information in the registration statement.	5(d)
Application for an order of the Commission declaring registrant has ceased to be a holding company.	5(d)
Statement by a person employed or retained by a registered holding company or subsidiary thereof, of subject matter in respect of which retained or employed; and annual statement thereafter.	12(i)
Application for exemption from provisions of the Act and applications for declaratory orders regarding status of company under Act by holding companies, subsidiaries, and other companies.	2(a)(3), 2(a)(4), 2(a)(7)(B), 2(a)(8)(B), 3(a), (b)

[See footnotes at end of table]

Description	Pursuant to section—
Twelve-month statement by bank claiming exemption under the Act.	3(a), (d)
Application for approval of mutual service company or declaration with respect to organization and conduct of business of subsidiary service company.	13(b)
Statement executed by financial institution authorizing representative to serve as officer or director of holding company or subsidiary, filed by representative.	17(c)
Initial statement of beneficial ownership of securities filed by officers and directors of registered public utility holding companies, and changes in such ownership.	17(a)
Annual reports by mutual and subsidiary service companies.	13
Application by interested persons for approval of reorganization plans required in court proceedings for reorganization of registered holding companies and subsidiaries.	11(f)
Application by or on behalf of persons requesting approval of payment of fees, expenses or remuneration for services rendered in connection with a proceeding in reorganization in a U.S. Court involving registered holding companies or subsidiaries.	11(f)
Notices of intention regarding proposed sale of securities and other assets not requiring filing of application or declaration.	11, 12(d), 12(f)
Statements in justification of fees and expenses proposed to be paid.	6(b), 7, 9, 10, 12(d)
Reports to stockholders by registered holding company or subsidiary thereof and annual reports submitted by registered holding company or subsidiary thereof to a State commission covering operations not reported to Federal Power Commission.	14, 15

[See footnotes at end of table]

Description	Pursuant to section—
Trust Indenture Act of 1939	
Statement of eligibility and qualification of corporations or individuals as trustees under qualified indenture under which debt security has been or is to be issued.	305, 307
Application for qualification of indenture under which security (bonds, debentures, notes and similar debt securities) has been or is to be issued.	307
Application for exemption from provisions of the Act in certain cases.	304(c), (d)
Application re conflict of interest of trustees.	310(b)(1)
Reports by indenture trustee to indenture security holders with respect to eligibility and qualification under section 310.	313
Application relative to affiliations between trustees and underwriters.	310(b)(3), 310(b)(6)

[See footnotes at end of table]

Description	Pursuant to section—
Investment Advisers Act of 1940	
Application for registration as investment adviser or to amend or supplement such an application.	203(c), 204
Application for exemption and other relief	206A
Irrevocable appointment of agent for service of process, pleadings and other papers.	211(a)
Notice by non-resident investment adviser specifying address of place in United States where copies of books and records are located, or.	204
Undertaking by non-resident investment adviser to furnish to Commission, upon demand, copies of any books or records he is required to maintain.	204

[See footnotes at end of table]

Description	Pursuant to section—
Investment Company Act of 1940	
Notification of registration of investment company, and registration statement covering an offering of securities of investment company evidencing an interest in a portfolio of securities in which the investment company invests.	8(a), 8(b)
Periodic reports (annual and quarterly) to keep reasonably current the information in above registration statement.	30(a), 30(b)(1)
Periodic or interim reports to security holders of registered investment companies.	30(b)(2)
Application for order of the Commission determining registrant has ceased to be an investment company.	8(f)
Fidelity bond, resolution of board of directors, notice of cancellation or termination of bond for officers and employees of investment companies who have access to its securities or funds.	17(g)
Waiver of indemnification of officers and directors of investment companies.	17(h), 17(i)
Report of independent auditors examining records of investment companies.	17(f)
Application by other than registrant for order of Commission declaring corporate name of registrant is misleading or deceptive.	35(d)
Request by company for certificate to be issued to Secretary of Treasury.	([4])
Proxy soliciting material	20(a)[5]
Initial statement of beneficial ownership of securities by officers, directors and other specified insiders of registered closed-end investment companies, and changes in such ownership.	30(f)

[See footnotes at end of table]

Description	Pursuant to section—
Application for exemption from provisions of the Act and other relief.	2(a)(9), 3(b)(2), 6 (b), (c), (d), 7 (d), 10 (e), (f), 11 (a), (c), 12 (d) (1), (d)(2), 14(a), 15 (a), 16(a), 17 (a), (b), (d), (e), 18(i), 22(d), 23 (b) (5), (c)(3), 24(d), 26(a) (2)(C), 28(c), 35(d), and others.
Statement of transactions—exemption from provisions of section 10(f).	10(f)
Application for an ineligible person to serve as officer, director, etc. of a registered investment company.	9(b)
Request for advisory report of the Commission relating to the reorganization of registered investment company.	25(b)
Report of repurchase of its own securities by a closed-end company.	23(c)
Sales literature regarding securities of certain investment companies.	24(b)
Statement of the Federal Savings and Loan Corporation relating to the exemption of certain issuers.	6(a)(4)
Report submitted pursuant to an order of the Commission.	
Documents and records resulting from derivative or representative law suits.	33

Footnotes:
[1] Section 15(d)—Securities Exchange Act of 1934.
[2] Section 12(b)—Securities Exchange Act of 1934.
[3] Section 12(g)—Securities Exchange Act of 1934.
[4] Section 851(e)(1) of the Internal Revenue Code of 1954 is applicable.
[5] Regulation 14 under the Securities Exchange Act of 1934 is applicable (17 CFR 240.14a–1 *et seq.*).

Miscellaneous

Requests or petitions that a change in the Commission's rules, regulations or forms be made; comments on proposed rules, regulations or forms; issuance, amendment or repeal of rules, regulations or forms promulgated under the various Acts administered by the Commission.

Requests for no-action and interpretative letters and responses thereto.

Transcripts of proceedings in public hearings including testimony, exhibits received in evidence, intermediate decisions, oral arguments, motions, briefs, exceptions.

Commission findings, opinions, orders, rulings and notices issued for public release.

Final opinions of the Commission, including concurring and dissenting opinions, as well as orders made by the Commission in the adjudication of cases.

A record of the final votes of each member of the Commission in every Commission proceedings concluded after July 1, 1967.

Hearings and comments on proposed rules or statements of policy, etc., except where the writer requests that his comments not be made public.

Periodic reports filed by the International Bank for Reconstruction and Development under Regulation BW—Rules 1 to 4, section 15(a) of the Bretton Woods Agreement Act (17 CFR part 285).

Periodic reports filed by the Inter-American Development Bank, pursuant to Regulation IA (17 CFR part 286) adopted pursuant to section 11(a) of the Inter-American Bank Act.

Periodic reports filed by the Asian Development Bank, pursuant to Regulation AD (17 CFR part 287) adopted pursuant to section 11(a) of the Asian Development Bank Act.

Copies of papers filed in court, and papers and documents received from courts, are primarily for the use of the Commission attorneys and other members of the staff. These may not always be complete and accurate and may contain nonpublic staff notations. However, in appropriate situations, with the approval of the Office of the General Counsel, examination of such material may be made or copies obtained as a matter of courtesy.

Statements of policy and interpretations which have been adopted by the Commission and are not published in the FEDERAL REGISTER.

Administrative staff manuals and instructions to the staff that affect a member of the public.

Reports by the Commission to the Congress as a whole.

Notices of Commission meetings announced to the public as described in §200.403; announcements of Commission action to close a meeting, or any portion thereof, as described in §200.404(b) and §200.405(c); and certifications by the General Counsel, pursuant to §200.406, that a Commission meeting, or any portion thereof, may be closed to the public.

[41 FR 44696, Oct. 12, 1976, as amended at 42 FR 14693, Mar. 16, 1977]

§200.80b Appendix B—SEC releases.

Free mailing list distribution of releases has been discontinued by the Commission because of rising costs and staff limitations. However, the texts of all releases under the various Acts, the corporate reorganization releases, and the litigation releases are contained in the SEC Docket, which may be purchased through the Superintendent of Documents as described in §200.80c of this part. The Statistical series releases are contained in the *SEC Monthly Statistical Review*, which also can be obtained by purchase through the Superintendent of Documents.

[40 FR 1009, Jan. 6, 1975, as amended at 49 FR 12686, Mar. 30, 1984; 52 FR 24148, June 29, 1987; 52 FR 48193, Dec. 21, 1987]

§ 200.80c Appendix C—Rules and miscellaneous publications available from the Government Printing Office.

(a) The current rules of the Commission are not published by the Commission in pamphlet form. All SEC public rules and regulations, including its Rules of Practice, are contained in title 17 of the Code of Federal Regulations, which also is available for purchase from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. New rules and rules changes, and other Commission releases, except statistical releases, also are published in the FEDERAL REGISTER as they are adopted.

(b) Copies of the following miscellaneous publications may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Please address to him directly all inquiries, orders and payments concerning the following publications:

1. *Reports.*

SEC Annual Report to the Congress.

2. *Periodicals.*

Official Summary. A monthly summary of securities transactions and holdings reported under the provisions of the Securites Exchange Act of 1934, the Public Utility Holding Company Act of 1935, and the Investment Company Act of 1940 by officers, directors, and certain other persons.

SEC Monthly Statistical Review. A monthy publication containing data on round-lot and odd-lot share volume in stock exchanges, OTC volume in selected securities, block distributions, securities registrations and offerings, net change in corporate securities outstanding, working capital of U.S. corporations, assets of non-insured pension funds, Rule 144 filings and 8K reports.

Directory of Companies Filing Annual Reports with the Securities and Exhange Commission under the Securities Exchange Act of 1934. Published annually. Lists companies alphabetically and classified by industry groups according to the Standard Industrial Classification Manual of the Bureau of the Budget.

[40 FR 1010, Jan. 6, 1975, as amended at 49 FR 12686, Mar. 30, 1984; 52 FR 24148, June 29, 1987; 52 FR 48193, Dec. 21, 1987]

§ 200.80d Appendix D—Other publications available from the Commission.

(a) Limited amounts of the following materials among others are available free of charge upon request to the Commission's Publications Section, Public Reference Branch, 202–272–7460:

Work of the Securities and Exchange Commission.

Blank copies of all forms used under each of the Acts administered by the Commission.

(b) Facsimile copies of other SEC publications which are out of print may be obtained through the Commission's Public Reference Section, at the cost of the copying service to be performed by the commercial copier employed to do the copying. Purchasers of copies will be billed by the copier. An example of the publications which are available in this way is the Litigation Actions and Proceedings Bulletin.

[52 FR 24148, June 29, 1987; 52 FR 48193, Dec. 21, 1987]

§ 200.80e Appendix E—Schedule of fees for records services.

Search and review services: Up to one half hour total—No fee. For each one half hour or fraction thereof of chargeable service—up to GS–11 employee performing service: $8.00; GS–12 or above employee performing service: $14.00.

Attestation with Commission seal: $4.00

Duplication services: The following duplication services are available. The stated time for delivery in each case begins to run only after receipt of the material by the contractor; if files cannot immediately be made available by the Commission, the time of shipment will be affected.

Regular service. Paper copies of original paper copies, or from microfiche accessible to the contractor, will be shipped within seven calendar days after the contractor receives the order and material at $0.24 per page, exclusive of any applicable shipment cost and sales taxes.

Other services. The Commission's dissemination contractor also provides a wide range of additional regulated dissemination services through the Commission's public reference rooms. Two offsite services also are provided at prices that are regulated: microfiche subscriptions and watch services. Information concerning the availability of all dissemination services may be obtained by writing to the Commission's public reference room located at 450 Fifth Street, NW., room 1024, Washington, DC 20549 or calling 202–272–3100. Copies made pursuant to requests submitted to the Commission's public reference room will be filled by the contractor and sent directly to the purchaser, unless attestation is requested. The contractor will bill the purchaser directly for the cost of copies plus postage or other delivery charges, and applicable taxes. Purchasers shall make full payment directly to the contractor for these services. Search, review or attestation

charges will be billed separately by the Commission.

[52 FR 24148, June 29, 1987; 52 FR 48193, Dec. 21, 1987, as amended at 55 FR 41189, Oct. 10, 1990; 57 FR 48970, Oct. 29, 1992; 58 FR 64120, Dec. 6, 1993]

§ 200.80f Appendix F—Records control schedule.

File No.	Type of filing	Retention period
	Securities Act of 1933	
2–33	Registration statements and amendments thereto (Regulation C)	30 years.
2–33	Periodic reports (annual, quarterly, current, and proxy material)	30 years.
9–	Notice of proposed resale of restricted securities and resale of securities by control persons (Form 144).	21 years.
15–	Notice of sale of securities pursuant to Rule 242 (Form 242). (Obsolete)	6 years.
18–	Applications for exemption from section 5 registration for interests or participations issued in connection with Keogh Plans (section 3(a)(2)).	10 years.
19–	Notice of sale of securities pursuant to section 4(6) of the Securities Act of 1933 (Form 4(6)). (Obsolete).	6 years.
20–	Offering sheets for oil or gas royalties—Regulation B (Schedules A, B, C)	15 years.
20–	Reports of sale (accorded confidential treatment) (Form 1–G)	7 years.
20–	Reports after termination of offering (Form 3–G)	7 years.
21–	Notice of sale for offerings under Regulation D and section 4(6) (Form D)	6 years.
24–	Notification of exemption from registration (Regulation A)	Until completion or termination of offering plus 10 years or order of the Commission permanently suspending exemption, whichever comes first.
29–	Report of issuers of sale of securities deemed not to involve any public offering (Form 146). (Obsolete).	6 years.
92–	Application for relief from disability (Regulation A)	Until when final action on appeal is taken plus 10 years.
94–	Notification of exemption for assessment or assessable stock (Regulation F)	10 years.
95–	Notification of exemption for securities issued by a small business investment company (Regulation E).	Until completion or termination of offering plus 5 years or until order of Commission permanently suspending exemption, whichever comes first.
96–	Application for relief from disability (Regulation F)	Until final action on appeal is taken plus 5 years.
98–	Notice of proposed sale by non-controlling person of restricted securities of issuers which do not satisfy all of the conditions of Rule 144.	6 years.
100–	Notification of exemption pursuant to Rule 236	6 years.
	Securities Exchange Act of 1934	
0–1	Registration statements (sections 12(b) and 12(g), exemptions thereunder)	30 years.
0–1	Periodic reports (annual, quarterly, current and proxy materials)	30 years.
3–	Applications for continuance in membership and applications for review of disciplinary actions (self-regulatory organizations).	10 years.
4–281	Consolidated quotation system plan and amendments	For as long as plan remains approved plus 6 years.
4–208	Intermarket trading system plan and amendments	For as long as plan remains approved plus 6 years.
5–	Acquisitions, tender offers and solicitations	20 years.
6–	Reports of beneficial ownership of securities (Forms 3, 4, & 5)	6 years.
7–	Applications for permission to extend unlisted trading privileges and related applications pursuant to Rule 12(f).	10 years.
8–	Applications for registration as broker, dealer, municipal securities broker, or government securities broker or dealer and related reports.	For as long as broker-dealer is registered with the Commission plus 50 years.
8–00–2A	Annual audit report (fiscal or calendar year basis) (Form X–17A–5). (Non-public) Supplemental report detailing Securities Investor Protection Corporation assessment payment or overpayments (Rule 17a–5). (Non-public).	For as long as broker-dealer is registered with the Commission plus 13 years.
8–00–2A–19	Reports of changes in membership of any of its members required of national securities exchanges and registered national securities associations (Form X–17A–19). (Public).	For as long as broker-dealer is registered with the Commission plus 6 years.

File No.	Type of filing	Retention period
8–00–3X	Examination/inspection reports of brokers and dealers, investment companies and investment advisors	
	1. Exam reports:	
	a. Home Office	13 years.
	b. Regional Offices	13 years.
	2. Exam workpapers	13 years.
8–00–9	Uniform application for securities and commodities industry representative and/or agent; certification for associated persons engaged in securities activities outside the jurisdiction of the United States; annual assessment form for registered brokers and dealers not members of a registered national securities association (Forms U–4, SECO 2–F, SECO–4, 5).	For as long as broker-dealer is registered with the Commission plus 50 years.
8–2A10	Annual report of revenue and expenses filed by exchange members, brokers and dealers (Form X–17A–10). (Obsolete).	10 years.
8–2A12	Report by registered brokers and dealers who are over-the-counter market makers in any OTC margin securities (Form X–17A–12).	6 years.
8–2A16(1), –2A16(2)	Notification by qualified market makers at least five business days before such broker-dealers obtain third market maker exempt credit pursuant to Regulation U; and quarterly report by broker and dealer, who during a calendar quarter is or has been qualified as a third market maker (Forms X–17A–16(1); X–17A–16(2)) (Obsolete).	6 years.
8–2A17	Quarterly report filed by every broker-dealer block positioner who has filed a notice pursuant to paragraph (a) of Rule 17a–17 (Form X–17A–17) (Obsolete).	6 years.
10–	Applications by an exchange for registration as a national securities exchange.	For as long as exchange is registered with the Commission plus 6 years.
13–	Applications for listing securities on an exempted exchange, periodic reports	10 years.
14–	Annual reports of issuers having securities listed on an exempted exchange	10 years.
16–	Application for registration as a national securities association or affiliated securities associations.	For as long as association is registered with the Commission plus 6 years.
17–	Reports on stabilizing activities (Form X–17A–1). (Obsolete)	6 years.
23–	Applications for exemption pursuant to paragraph (g) of Rule 11Aa3–1	Until closed plus 6 years.
26–	Plans by exchanges authorizing payment of special commission in connection with a distribution of securities on exchanges (Rule 10b–2(d)).	For as long as exchange is registered with the Commission plus 50 years.
27–	Applications for exemption from section 13(f)	10 years.
28–	Reports by institutional investment managers of information with respect to accounts over which they exercise discretion. (Form 13F).	4 years.
80–	Annual and supplemental reports of Municipal Securities Rulemaking Board (Rule 17a–21).	Indefinitely (contingent).
81–	Exemptions from registration under section 12(g)	10 years.
82–	Exemptions—American depositary receipts	10 years.
83–1	Periodic reports and related correspondence by the Inter-American Development Bank.	3 years.
83–2	Periodic reports by the Asian Development Bank	3 years.
84–	Application for registration as a transfer agent (non-bank) and amendments thereto.	For as long as transfer agent is registered with the Commission plus 50 years.
85–	Application for registration as a transfer agent (bank) and amendments thereto (Form TA–1).	For as long as transfer agent is registered with the Commission plus 50 years.
86–	Application for registration as a municipal securities dealer which is a bank or separately identifiable department or division of a bank (Form MSD).	For as long as municipal securities dealer is registered with the Commission plus 50 years.
87–	Application for registration as a securities information processor and amendments thereto (Form SIP).	For as long as securities information processor is registered with the Commission plus 50 years.
88–	Application for exemption as a securities information processor correspondence.	For as long as securities information processor is registered with the Commission plus 50 years.
89–	Waiver for foreign issuers furnished by American depositary receipts; waiver of information furnished by American depositary receipts regarding foreign issuers for Form F–6; waiver of Rule 12g3–2(b) reporting requirements, annual reports to shareholders, F–6 waiver, proxy.	10 years.
89–	Other waivers for foreign issuers furnished by American depositary receipts.	3 years.
128–8	Reports of disciplinary actions by stock exchanges (Rule 19d–1)	6 years.
205–3c	Reports of disciplinary actions by NASD (Rule 19d–1)	6 years.
500–	Suspension of trading of securities other than on a national securities exchange.	10 years.

File No.	Type of filing	Retention period
600–	Applications for registration as a (non-bank) clearing agency; amendments thereto.	For as long as clearing agency is registered with the Commission plus 50 years.
600–9	Reports of disciplinary actions by clearing agencies (Rule 19d–1)	6 years.
601–	Applications for exemption from registration as a (non-bank) clearing agency.	For as long as clearing agency has reporting requirements with the Commission plus 20 years.
SR	Proposed rule changes and notice as to stated policies and interpretations by self-regulatory organizations.	For as long as self-regulatory organization is registered with the Commission plus 6 years.
XX	Reports for missing, lost or counterfeit securities (Form X–17F–1A)	Indefinitely.
	Public Utility Holding Company Act of 1935	
12–	Statements pursuant to section 12(i) by persons employed or retained by a registered holding company or subsidiary thereof (Forms U–12(I)–A & B).	2 years.
30–	Notification and registration by public utility holding companies, annual supplements.	For as long as holding company has reporting requirements with the Commission plus 10 years.
31–	Statement of exemption from the Act by Commission order	For as long as company relies on exemption plus 10 years.
32–	Exemption of purchaser, assignee, etc. of leased facilities (Form U7D)	Until lease is terminated or cancelled plus 5 years.
33–1	Annual statement by banks holding public utility securities but claiming exemption under Rule 3.	2 years.
34–	Annual statement by banks holding public utility securities but claiming exemption under Rule 3 (Form U–3A3–1).	2 years.
37–	Applications and declarations for authorization of service companies (Form U–13–1).	For as long as service company is part of a registered holding company plus 5 years.
38–	Statement under Rule 70(a)(1) executed by financial authorizing representative to serve as officer/director of holding company, filed by representative.	For as long as officer/director serves plus 3 years.
40–	Certificates of notification by registered holding companies and subsidiaries of security issues exempted from section 6(a) by section 6(b) or exempt under Rule 47(b) and not the subject of an order of the Commission (Form U–6B–2).	3 years.
49–	Annual report by mutual and subsidiary service companies (Form U–13–60)	For as long as service company is part of a registered holding company system plus 15 years.
50–	Order granting or withdrawing exemptions from rules and related correspondence.	Until close plus 3 years.
52–	Application for approval or reorganization under section 11(f)	Until closed plus 3 years.
54–	Divestment of securities, assets or control (section 11(e))	Until closed plus 3 years.
55–	Application for approval of fees incurred in connection with plan under section 11(f).	Until closed plus 3 years.
59–	Simplification of corporate structure, sections 11(b) (1) and (2)	Until closed plus 3 years.
62–	Report by an affiliate service company or one engaged principally in the performance of services (Form U–13E–1).	For as long as service company is part of a registered holding company system plus 4 years.
68–	Declaration with respect to solicitations regarding reorganizations of registered holding companies or subsidiaries subject to Rule 62 (Form U–R–1).	10 years.
69–	Annual statements by holding companies claiming exemption pursuant to Rule 2 (intrastate or predominantly operating companies (Form U–3A–2).	2 years.
70–	Applications and declarations pursuant to sections 6(b), 7, 9, 9(c)(3), 10, 12(b), 12(c), 12(d), 12(f) and applicable rules thereunder (Form U–1).	Until closed plus 3 years.
72–	Report of communication with stockholders	2 years.
	Trust Indenture Act of 1939	
22–	Statements of eligibility and qualification of corporations or individuals as trustees under qualified indenture under which debt security has been or is to be issued and exemptions thereto.	Until indenture is terminated or cancelled plus 30 years.
25–	Applications relative to affiliations between trustees and underwriters (Rule 10b–3).	Until applicable indenture is terminated or cancelled plus 33 years.
93–	Reports of indenture trustee to indenture security holders with respect to eligibility and qualification under Section 310.	1 year.

File No.	Type of filing	Retention period
	Investment Advisers Act of 1940	
801–	Application for registration as investment adviser and related correspondence.	For as long as investment adviser is registered with the Commission plus 9 years.
803–	Application for exemption from registered and other relief	For as long as investment adviser conducts business under an exemption plus 6 years.
	Investment Company Act of 1940	
90–	Notice of sales of securities by closed-end issuers (issuers with 100 or less beneficial owners) other than investment companies, registered or required to be registered.	6 years.
811–	Notifications and registration statements	For as long as registrant is registered with the Commission plus 30 years.
811–	Periodic reports (annual, quarterly, semi-annual, proxy material)	10 years.
812–	Applications for exemption and other relief	10 years.
812–	Application by foreign management investment companies for order permitting registration.	For as long as registrant has reporting requirement with the Commission plus 33 years.
813–	Applications for exemption of an employee's security company (Section (b))	For as long as registrant has reporting requirement with the Commission plus 33 years.
814–	Notice of intent to elect to be subject to sections 55 and 65	2 years from filing date.
814–	Notification of withdrawal of election to be subject to sections 55 through 65	2 years from filing date.
814–	Notification of election to be subject to sections 55 through 65	30 years or for as long as a class of the issuer's equity securities is registered under the Securities Exchange Act of 1934 plus 10 years, whichever comes first.
816–	Request for advisory report re reorganization of registered investment company (17 CFR 270.02), and related correspondence.	6 years.
817–	Report of repurchase of securities by closed-end investment company	6 years.
818–	Sales literature regarding securities of certain investment companies	6 years.
819–	Statement of the Federal Savings and Loan Corporation relating to the exemption of certain issuers.	6 years.
820–	Reports showing that companies have complied with requirements of the rule in purchasing new issues of securities from underwriters.	6 years.
821–	Reports by registered small business investment companies and affiliated banks, with respect to investments.	10 years from date of such action(s).
	Miscellaneous Files and Reports	
3–	Disciplinary proceedings (broker-dealer and investment adviser)	25 years.
3–	Administrative proceeding stop orders	For as long as registrant has reporting requirement with the Commission plus 30 years.
4–	102(e) proceedings (previously 2(e) proceedings) (chaned to 3–)	25 years.
4–	Miscellaneous studies, general conferences, roundtable, etc., authorized by the Commission.	25 years.
111–	Federal government agencies miscellaneous correspondence	30 years.
119–	Securities violation files (information regarding persons against whom actions were reported on charges of violating state or federal laws in the purchase and sale of securities.	Until date of last reported action plus 10 years.
122–2	Members of Congress (inquiries relating to various subjects)	1 year after expiration of term in office.
122–3	Correspondence and other materials between the various Senate Committees and the Commission.	30 years.
122–4	Correspondence and other materials between the various House Committees and the Commission.	30 years.
122–6	Correspondence and other materials between Congressional Commissions and Joint Committees and the Commission.	30 years.
123–13	Correspondence relating to the development of a Canadian Extradition Treaty.	30 years.
124–	Stock exchanges (General Correspondence)	For as long as exchange is registered with the Commission.
124–1	Legislation and Laws: Drafts and comments concerning suggested amendments to the various Acts administered by the Commission.	30 years.
124–6		

File No.	Type of filing	Retention period
124–11		
124–20		
124–7, 124–7a	Subject files—Drafts, comments and correspondence concerning proposed legislation submitted by the Senate and the House to the Commission for comment.	30 years.
124–7b	Drafts of bills not yet reported in Congress that are submitted to the Commission for comment.	30 years.
132–3	General Correspondence—Active companies. Inquiries and complaints concerning companies registered under the various Acts administered by the Commission.	10 years.
132–3	General Correspondence—Inactive companies (no longer required to file reports with the Commission). Inquiries and complaints concerning companies registered under the various Acts administered by the Commission.	6 years.
132–3	General Correspondence—Miscellaneous. Requests for interpretation of rules and regulations under the Acts administered by the Commission.	6 years.
140–	Drafts, internal memoranda, correspondence concerning rules and regulations under each of the Acts administered by the Commission.	30 years.
206–, 207– to 215–, 917–	Reorganization proceedings under Chapters IX, X, XI of the Bankruptcy Act in which the Commission participates.	30 years.
265–	Advisory Committees established by the Commission (correspondence, questionnaires, reports).	30 years.
Confidential treatment materials	Periodic reports and other materials containing contracts, commercial and financial information, disclosure of which would impair the value thereof, submitted under confidential cover.	10 years.
CHR	SEC Chairman's Subject Case Files	20 years.
CHR	SEC Chairman's Chronological Files for Period 1972 to Present	Chairman's tenure in office plus 3 years.
CHR	SEC Chairman's General Subject File	Chairman's tenure in office plus 3 years.
COMM	SEC Commissioners' Files (excluding Chairman), 1934 to Present	Commissioner's tenure in office plus 1 year.
ENF	Investigative Case Files—Closed	Until closed plus 25 years.
ENF	Investigative Case Files—Inactive	Until inactive plus 25 years.
LIT	Litigation files:	
	1. Briefs	25 years.
	2. File contents other than briefs	10 years.
S7	Issuance, amendment or rescission of rules under the various Acts—public comments and views, transcript of hearings, correspondence.	30 years (permanent).
XX	Reports of internal inquiries:	
	1. Supporting documentation	Until date of final action plus 5 years, if no report is issued, or until date of final report plus 5 years.
	2. Final reports	5 years.

[60 FR 50091, Sept. 28, 1995]

§ 200.81 Publication of interpretative, no-action and certain exemption letters and other written communications.

(a) Except as provided in paragraphs (b) and (c) of this section, every letter or other written communication requesting the staff of the Commission to provide interpretative legal advice with respect to any statute administered by the Commission or any rule or regulation adopted thereunder; or requesting a statement that, on the basis of the facts stated in such letter or other communication, the staff would not recommend that the Commission take any enforcement action; or requesting an exemption, on the basis of the facts stated in such letter, from the provisions of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or any rule or regulation thereunder, where the issuance of an order granting such exemption does not require public notice and an opportunity for hearing; together with any written response thereto, shall be made available for inspection and copying by any person as soon as practicable after the response has been sent or given to the person requesting it.

(b) Any person submitting such letter or other written communication may also submit therewith a request that it be accorded confidential treatment for

a specified period of time, not exceeding 120 days from the date the response, together with a statement setting forth the considerations upon which the request for such treatment is based. If the staff determines that the request is reasonable and appropriate it will be granted and the letter or other communication will not be made available for public inspection or copying until the expiration of the specified period. If it appears to the staff that the request for confidential treatment should be denied, the staff shall so advise the person making the request and such person may withdraw the letter or other communication within 30 days thereafter. In such case, no response will be sent or given and the letter or other communication shall remain in the Commission's files but will not be made public. If such letter or other communication is not so withdrawn, it shall be deemed to be available for public inspection and copying together with any written response thereto.

NOTE: All letters or other written communications requesting interpretative advice, a no-action position, or an exemption shall indicate prominently, in a separate caption at the beginning of the request, each section of the Act and each rule to which the request relates. If more than one section or rule is involved, a separate copy of the request shall be submitted for each section or rule involved and an additional copy for the use of the staff of the Commission.

(c) This section shall not apply, however, to letters of comment or other communications relating to the accuracy or adequacy of any registration statement, report, proxy, or information statement or other document filed with the Commission, or relating to the extent to which such statement, report, or document complies with any applicable requirement. Further, this section shall not apply to applications or other written communications filed pursuant to § 240.24b–2 that relate to objections to public disclosure of information filed with the Commission or any exchange.

[35 FR 17779, Nov. 19, 1970, as amended at 53 FR 12413, Apr. 14, 1988; 53 FR 32605, Aug. 26, 1988]

§ 200.82 Public availability of materials filed pursuant to § 240.14a–8(d) and related materials.

Materials filed with the Commission pursuant to Rule 14a–8(d) under the Securities Exchange Act of 1934 (17 CFR 240.14a–8(d)), written communications related thereto received from any person, and each related no-action letter or other written communication issued by the staff of the Commission, shall be made available to any person upon request for inspection or copying.

[37 FR 20558, Sept. 30, 1972]

§ 200.83 Confidential treatment procedures under the Freedom of Information Act.

(a) *Purpose.* This section provides a procedure by which persons submitting information in any form to the Commission can request that the information not be disclosed pursuant to a request under the Freedom of Information Act, 5 U.S.C. 552. This section does not affect the Commission's right, authority, or obligation to disclose information in any other context. This section is procedural only and does not provide rights to any person or alter the rights of any person under the Freedom of Information Act or any other applicable statute or regulation.

(b) *Scope.* The provisions of this section shall apply only where no other statute or Commission rule provides procedures for requesting confidential treatment respecting particular categories of information (*see, e.g.*, 17 CFR 240.24b–2) or where the Commission has not specified that an alternative procedure be utilized in connection with a particular study, report, investigation, or other matter. The provisions of this section shall not apply to any record which is contained in or is part of a personnel, medical or similar file relating to a Commission member or employee which would normally be exempt from disclosure pursuant to section 552(b)(6) of title 5, U.S. Code.

(c) *Written request for confidential treatment to be submitted with information.* (1) Any person who, either voluntarily or pursuant to any requirement of law, submits any information or causes or permits any information to be submitted to the Commission, which information is entitled to confidential

treatment and for which no other specific procedure exists for according confidential treatment, may request that the Commission afford confidential treatment under the Freedom of Information Act to such information for reasons of personal privacy or business confidentiality, or for any other reason permitted by Federal law, and should take all steps reasonably necessary to ensure, as nearly as practicable, that at the time the information is first received by the Commission (i) it is supplied segregated from information for which confidential treatment is not being requested, (ii) it is appropriately marked as confidential, and (iii) it is accompanied by a written request for confidential treatment which specifies the information as to which confidential treatment is requested.

(2) A person who submits a record to the Commission for which he or she seeks confidential treatment must clearly mark each page or segregable portion of each page with the words ''Confidential Treatment Requested by [name]'' and an identifying number and code, such as a Bates-stamped number. In his or her written confidential treatment request, the person must refer to the record by identifying number and code.

(3) In addition to giving a copy of any written request for confidential treatment to the Commission employee receiving the record in question, the person requesting confidential treatment must send a copy of the request (but not the record) by mail to the Office of Freedom of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413. The legend ''FOIA Confidential Treatment Request'' must clearly and prominently appear on the top of the first page of the written request, and the written request must contain the name, address, and telephone number of the person requesting confidential treatment. The person requesting confidential treatment is responsible for informing the Office of Freedom of Information and Privacy Act Operations promptly of any changes in address, telephone number, or representation.

(4) In some circumstances, such as when a person is testifying in the course of a Commission investigation or providing a record requested in the course of a Commission examination or inspection, it may be impracticable to submit a written request for confidential treatment at the time the record is first given to the Commission. In no circumstances can the need to comply with the requirements of this section justify or excuse any delay in submitting any record to the Commission. The person testifying or otherwise submitting the record must inform the Commission employee receiving it, at the time the record is submitted or as soon thereafter as possible, that he or she is requesting confidential treatment. The person must then submit a written confidential treatment request within 30 days from the date of the testimony or the submission of the record. Any confidential treatment request submitted under this paragraph must also comply with paragraph (c)(3) of this section.

(5) Where confidential treatment is requested by the submitter on behalf of another person, the request must identify that person and provide the telephone number and address of that person or the person's responsible representative if the submitter would be unable to provide prompt substantiation of the request at the appropriate time.

(6) No determination on a request for confidential treatment will be made until the Office of Freedom of Information and Privacy Act Operations receives a request for disclosure of the record.

(7) A confidential treatment request will expire ten years from the date the Office of Freedom of Information and Privacy Act Operations receives it, unless that Office receives a renewal request before the confidential treatment request expires. The renewal request must be sent by mail to the Office of Freedom of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, and must clearly identify the record for which confidential treatment is sought. A renewal request will likewise expire ten years from the date that Office receives it,

unless that Office receives another timely renewal request which complies with the requirements of this paragraph.

(8) A confidential treatment request shall be nonpublic. If an action is filed in a Federal court, however, by either the Freedom of Information requester (under 5 U.S.C. 552(a)(4) and § 200.80(d)(6)) or by the confidential treatment requester (under paragraph (e)(5) of this section), the confidential treatment request may become part of the court record.

(d) *Substantiation of request for confidential treatment.* (1) If it is determined that records which are the subject of a request for access under the Freedom of Information Act are also the subject of a request for confidential treatment under this rule and no other grounds appear to exist which would justify the withholding of the records [*e.g.*, Freedom of Information Act Exemption 7(A), 5 U.S.C. 552(b)(7)(A)], the Commission's Freedom of Information Act Officer promptly shall so inform the person requesting confidential treatment or, in the case of a request made on behalf of a person other than the submitter, the person identified as able to provide substantiation, by telephone, facsimile or certified mail and require that substantiation of the request for confidential treatment be submitted in ten calendar days. Failure to submit a written substantiation within ten calendar days from the time of notification, or any extension thereof, may be deemed a waiver of the confidential treatment request and the confidential treatment requester's right to appeal an initial decision denying confidential treatment to the Commission's General Counsel as permitted by paragraph (e) of this section.

(2) Substantiation of a request for confidential treatment shall consist of a statement setting forth, to the extent appropriate or necessary for the determination of the request for confidential treatment, the following information regarding the request:

(i) The reasons, concisely stated and referring to specific exemptive provisions of the Freedom of Information Act, why the information should be withheld from access under the Freedom of Information Act;

(ii) The applicability of any specific statutory or regulatory provisions which govern or may govern the treatment of the information;

(iii) The existence and applicability of any prior determinations by the Commission, other Federal agencies, or a court, concerning confidential treatment of the information;

(iv) The adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including any adverse effect on the business' competitive position;

(v) The measures taken by the business to protect the confidentiality of the commercial or financial information in question and of similar information, prior to, and after, its submission to the Commission;

(vi) The ease or difficulty of a competitor's obtaining or compiling the commercial or financial information;

(vii) Whether the commercial or financial information was voluntarily submitted to the Commission and, if so, whether and how disclosure of the information would tend to impede the availability of similar information to the Commission;

(viii) The extent, if any, to which portions of the substantiation of the request for confidential treatment should be afforded confidential treatment; and

(ix) Such additional facts and such legal and other authorities as the requesting person may consider appropriate.

(e) *Appeal from initial determination that confidential treatment is not warranted.* (1) In a preliminary decision, which shall be sent by mail or facsimile, or both, the Office of Freedom of Information and Privacy Act Operations will inform the confidential treatment requester whether it intends to grant confidentiality in whole or in part and give the requester ten calendar days from the date of the preliminary decision to submit supplemental arguments if the requester disagrees with the preliminary decision. A final decision, which shall also be sent by mail or facsimile, or both, no sooner than ten calendar days from the date of the preliminary decision, shall inform

the Freedom of Information Act requester and the confidential treatment requester of his or her right to appeal an adverse decision to the Commission's General Counsel within ten calendar days from the date of the final decision. Records, which the Freedom of Information and Privacy Act Officer determines to be releasable, may be released to the Freedom of Information Act requester ten calendar days after the date of the final decision. However, if within those ten calendar days, the Freedom of Information and Privacy Act Officer receives an appeal from the confidential treatment requester, he or she shall inform the Freedom of Information Act requester that an appeal is pending and that the records will not be released until the appeal is resolved.

(2) Any appeal of a denial of a request for confidential treatment shall be in writing, and shall be clearly and prominently identified on the envelope or other cover and at the top of the first page by the legend ''FOIA Confidential Treatment Appeal.'' The appeal must be sent by mail to the Office of Freedom of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or by facsimile (703–914–1149). A copy of the appeal must be mailed to the General Counsel, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. The person requesting confidential treatment may supply additional substantiation of the request for confidential treatment in connection with the appeal to the General Counsel.

(3) The General Counsel shall have the authority to consider all appeals from decisions of the Freedom of Information Act Officer with respect to confidential treatment. All appeals taken under this section will be considered by the General Counsel as expeditiously as circumstances permit. Although other procedures may be employed, to the extent possible, the General Counsel will decide the matter on the basis of the affidavits and other documentary evidence submitted by the interested persons and such other information as is brought to the attention of the General Counsel. The General Counsel shall also have the authority to enter and vacate stays under the circumstances set forth in paragraph (e)(5) of this section. In appropriate cases the General Counsel may, in his or her sole and unfettered discretion, refer appeals and questions concerning stays under paragraph (e)(5) of this section to the Commission for decision.

(4) If it is determined that confidential treatment is not warranted with respect to all or any part of the information in question, the person requesting confidential treatment will be so informed by telephone, if possible, with a facsimile or certified mail letter directed to the person's last known address. Disclosure of the information under the Freedom of Information Act will occur ten calendar days after notice to the person requesting confidential treatment, subject to any stay entered pursuant to paragraph (e) (5) of this section.

(5) If within that ten calendar day period the General Counsel has been notified that the person requesting confidential treatment has commenced an action in a Federal court concerning the determination to make such information publicly available, the General Counsel will stay making the public disclosure of the information pending final judicial resolution of the matter. The General Counsel may vacate a stay under this section either on his or her own motion or at the request of a person seeking access to the information under the Freedom of Information Act. If the stay is vacated, the information will be released under the Freedom of Information Act ten calendar days after the person requesting confidential treatment is notified of this action by telephone, if possible, with a facsimile or certified mail letter sent to the person's last known address, unless the court orders otherwise.

(f) *Initial determination that confidential treatment is warranted.* If it is determined by the Commission's Freedom of Information Act Officer that confidential treatment is warranted, the person submitting the information and the person requesting access to the information under the Freedom of Information Act will be so informed by mail. The person requesting access, pursuant to the Freedom of Information Act, will also be informed of the right to appeal the determination to the General

Counsel. Any such appeal must be taken in accordance with the provisions of the Freedom of Information Act and Commission rules thereunder. *See* 17 CFR 200.80(d)(6).

(g) *Confidential treatment request and substantiation as nonpublic.* Any confidential treatment request and substantiation of it shall be nonpublic. If an action is filed in a Federal court, however, by either the Freedom of Information Act requester (under 5 U.S.C. 552(a)(4) and § 200.80(d)(6)) or by the confidential treatment requester (under paragraph(e)(5) of this section), both request and substantiation may become part of the public court record.

(h) *Effect of no prior request for confidentiality.* (1) If access is requested under the Freedom of Information Act to information which is submitted to the Commission on or after October 20, 1980 with respect to which no request for confidential treatment has been made pursuant to either paragraph (c)(1) or (c)(5) of this section, it will be presumed that the submitter of the information has waived any interest in asserting an exemption from disclosure under the Freedom of Information Act for reasons of personal privacy or business confidentiality, or for other reasons.

(2) Notwithstanding paragraph (h)(1) of this section, in appropriate circumstances, any person who would be affected by the public disclosure of information under the Freedom of Information Act may be contacted by Commission personnel to determine whether the person desires to make a request for confidential treatment. Any request for confidential treatment that is asserted in response to such inquiry shall be made in accordance with provisions of this section.

(i) *Extensions of time limits.* Any time limit under this section may be extended in the discretion of the Commission, the Commission's General Counsel, or the Commission's Freedom of Information Act Officer for good cause shown.

(j) *Electronic filings.* Confidential treatment requests shall be submitted in paper format only, whether or not the person making the request is an electronic filer.

(k) In their discretion, the Commission, the Commission's General Counsel, and the Freedom of Information Act Officer may use alternative procedures for considering requests for confidential treatment.

[45 FR 62421, Sept. 19, 1980, as amended at 47 FR 20289, May 12, 1982; 58 FR 14659, Mar. 18, 1993; 65 FR 55184, 55185, Sept. 13, 2000]

Subpart E [Reserved]

Subpart F—Code of Behavior Governing Ex Parte Communications Between Persons Outside the Commission and Decisional Employees

AUTHORITY: 15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11; 5 U.S.C. 557.

§ 200.110 Purpose.

This code is adopted in conformity with section 4 of the Government in the Sunshine Act, Pub. L. 94–409, and is designed to insulate the administrative process from improper influence.

[42 FR 14690, Mar. 16, 1977]

§ 200.111 Prohibitions; application; definitions.

(a) *Prohibited communications.* In any agency proceeding which is subject to this subpart, except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the agency shall make or knowingly cause to be made to any member of the Commission or decisional employee an ex parte communication relevant to the merits of the proceeding; and

(2) No member of the Commission or decisional employee shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding.

(b) *Proceedings to which prohibitions apply.* This subpart shall apply to all proceedings subject to 5 U.S.C. 557(a), including suspension proceedings instituted pursuant to the provisions of Regulations A, B, E, and F of the Securities Act of 1933 (§ 230.251 *et seq.* of this chapter), all review proceedings instituted pursuant to section 19(g) of the

Securities Exchange Act of 1934, and all other proceedings where an evidentiary hearing has been ordered pursuant to a statutory provision or rule of the Commission and where the action of the Commission must be taken on the basis of an evidentiary record. In addition, this subpart shall apply to any other proceeding in which the Commission so orders.

(c) *Period during which prohibitions apply.* (1) The prohibitions in §200.111 (a) shall begin to apply when the Commission issues an order for hearing; *Provided,*

(i) That in suspension proceedings pursuant to Regulations A, B, E and F of the Securities Act of 1933 (§230.251 *et seq.* of this chapter), these prohibitions shall commence when the Commission enters an order temporarily suspending the exemption; and

(ii) That in proceedings under section 19(d) of the Securities Exchange Act of 1934 these prohibitions shall commence from the time that a copy of an application for review has been served by the Secretary upon the self-regulatory organization; and

(iii) In no case shall the prohibitions in §200.111(a) begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his or her acquisition of such knowledge.

(2) The prohibitions in §200.111(a) shall continue until the time to file a petition for rehearing from the final order of the Commission has expired. In the event a petition for rehearing is filed, these prohibitions shall cease if and when the petition for rehearing is denied.

(3) The Commission may, by specific order entered in a particular proceeding, determine that these prohibitions shall commence from some date earlier than the time specified in this paragraph (c) or shall continue until a date subsequent to the time specified herein.

(d) *Definitions.* As used in this subpart:

(1) *Ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all participants to the proceeding is not given, but it shall not include requests for status reports on any matter or proceeding. In addition, an ex parte communication shall not include:

(i) Any written communication of which copies are served by the communicator contemporaneously with the transmittal of the communication in accordance with requirements of Rule 150 of the Commission's Rules of Practice, §201.150 of this chapter, upon all participants to the proceeding (including the interested Division or Office of the Commission); or

(ii) Any oral communication where 48 hours advance written notice is given to all participants to the proceeding (including the interested division of the Commission).

(2) *Participants to the proceeding* means all parties to the proceeding (including the interested Division or Office of the Commission) and any other persons who have been granted limited participation pursuant to the provisions of Rule 210(c) of the Commission's Rules of Practice, §201.210(c) of this chapter.

(3) *Decisional employee* means: (i) The administrative law judge assigned to the proceeding in question; and

(ii) All members of the staff of the Office of Opinions and Review; and

(iii) The legal and executive assistants to members of the Commission; and

(iv) Any employee of the Commission who has been specifically named by order of the administrative law judge or the Commission in the proceeding to assist thereafter in making or recommending a particular decision; and

(v) Any other employee of the Commission who is, or may reasonably be expected to be, involved in the decisional process of the proceeding.

[42 FR 14690, Mar. 16, 1977, as amended at 60 FR 32795, June 23, 1995]

§200.112 Duties of recipient; notice to participants.

(a) *Duties of recipient.* A member of the Commission or decisional employee who receives, or who make or knowingly causes to be made, a communication prohibited by this section, or who receives or makes a communication

which he or she concludes should, in fairness, be brought to the attention of all participants to the proceeding, shall transmit to the Commission's Secretary, who shall place on the public record of the proceeding:

(1) All such written communications; and

(2) Memoranda stating the substance of all such oral communications; and

(3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (a) (1) and (2) of this section.

(b) *Notice to participants.* The Secretary shall send copies of the communication to all participants to the proceeding with respect to which it was made, and shall notify the communicator of the provisions of this code prohibiting ex parte communications. If the communications are from persons other than participants to the proceedings or their agents, and the Secretary determines that it would be too burdensome to send copies of the communications to all participants because: (1) The communications are so voluminous, or (2) the communications are of such borderline relevance to the issues of the proceedings, or (3) the participants to the proceeding are so numerous, the Secretary may, instead, notify the participants that the communications have been received, placed in the file, and are available for examination.

(c) *Post decisional communications.* Any Commission member or decisional employee who receives a communication which would be prohibited by this Code, but for the fact that it was received subsequent to the date when the prohibitions imposed hereby have ceased to apply, shall comply with the provisions of § 200.112(a) with respect to such communication in the event that he or she is to act in a decisional capacity in the same proceeding pursuant to remand where he or she concludes, in fairness, that such communication should be brought to the attention of all participants to the proceeding.

[42 FR 14691 Mar. 16, 1977]

§ 200.113 Opportunity to respond; interception.

(a) *Opportunity to respond.* All participants to a proceeding may respond to any allegations or contentions contained in a prohibited ex parte communication placed in the public record in accordance with § 200.112. Such responses shall be included in the public record.

(b) *Interception of communications.* All written communications addressed to the Commission respecting a proceeding will be deemed to be communications to the staff of the interested division and will be directed to that division by the Commission's mail room. A Commission member or decisional employee may instruct any of his assistants who are nondecisional employees to intercept any communication directed to him which might appear to violate this Code and authorize them either to transmit any such written communication to the staff of the interested division of the Commission, if it appears from the contents of the communication that the intent of the sender is consistent with such action, or to return the communication to the sender.

[28 FR 4447, May 3, 1963, as amended at 42 FR 14691, Mar. 16, 1977]

§ 200.114 Sanctions.

(a) *Discipline of persons practicing before the Commission.* The Commission may, to the extent not prohibited by law, censure, suspend, or revoke the privilege to practice before it of any person who makes, or solicits the making of, an unauthorized ex parte communication.

(b) *Adverse action on claim.* Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subpart, the Commission, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(c) *Discipline of Commission employees.* The Commission may censure, suspend, or dismiss any Commission employee who violates the prohibitions or requirements of this Code.

[28 FR 4447, May 3, 1963, as amended at 42 FR 14691, Mar. 16, 1977]

Subpart G—Plan of Organization and Operation Effective During Emergency Conditions

AUTHORITY: 15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

Section 200.203 is also issued under 15 U.S.C. 78d, 78d–1.

SOURCE: 28 FR 6970, July 9, 1963, unless otherwise noted.

§ 200.200 Purpose.

This subpart describes the plan of organization and operation which will be observed by the Securities and Exchange Commission in discharging its duties and responsibilities in the event of a national emergency as defined in the following section.

(Sec. 4, 48 Stat. 885, as amended; 15 U.S.C. 78d, sec. 1, 76 Stat. 394; 15 U.S.C. 78d–1. Reorganization Plan No. 10 of 1950; 3 CFR, 1949–1953 Comp., p. 1006)

§ 200.201 Emergency conditions, effective date, and duration.

For the purposes of this subpart, emergency conditions shall be deemed to commence at the time of an armed attack upon the United States, its territories and possessions, at the time of official notification of the likelihood or imminence of such attack, or at a time specified by the authority of the President, whichever may first occur, and shall continue until official notification of cessation of such conditions. The provisions of this subpart shall become operative as at the commencement of emergency conditions and continue until cessation of those conditions, or until the Commission shall by notice or order resume its normal organization and operations.

(Sec. 4, 48 Stat. 885, as amended; 15 U.S.C. 78d, sec. 1, 76 Stat. 394; 15 U.S.C. 78d–1. Reorganization Plan No. 10 of 1950; 3 CFR, 1949–1953 Comp., p. 1006)

§ 200.202 Offices, and information and submittals.

(a) During emergency conditions, the location or headquarters of the Commission shall be as designated by the Chairman or his successor. The location of each Regional and District Office of the Commission, if different from the normal location, shall be as designated by the Chairman of the Commission or his successor, or in the absence of communications with him, by the Regional Director or District Administrator for the area or his acting successor.

(b) During emergency conditions, all formal or informal requests, filings, reports or other submittals shall be delivered to the Commission at designated offices or addressed to the Securities and Exchange Commission, Official Mail and Messenger Service, United States Post Office Department, Washington 25, DC.

(Sec. 4, 48, Stat. 885, as amended; 15 U.S.C. 78d, sec. 1, 76 Stat. 394; 15 U.S.C. 78d–1. Reorganization Plan No. 10 of 1950; 3 CFR, 1949–1953 Comp., p. 1006)

[28 FR 6970, July 9, 1963, as amended at 59 FR 5944, Feb. 9, 1994]

§ 200.203 Organization, and delegations of authority.

(a) During emergency conditions, the respective functions and responsibilities of the Commissioners, the Chairman of the Commission, and the staff members shall be, to the extent possible, as set forth in Subpart A of this part (§ 200.1 *et seq.*).

(b) Action for and in the name of the Commission taken pursuant to this subpart by one or more Commissioners or by a successor as designated in this section shall mean and include the delegated authority to act for the unavailable or incapacitated Commissioners.

(c) Pursuant to the statutes governing the Commission, to Reorganization Plan No. 10 of 1950, and to Pub. L. 100–181, section 308(b), 101 Stat. 1249 (1987), the following automatic delegation of authority is made to provide continuity in the event of an emergency:

(1) In the absence or incapacity of the Chairman of the Commission during an emergency of the nature contemplated by this subpart, the authority of the

Chairman to govern the affairs of the Commission and to act for the Commission, as provided for by laws and by delegations from the Commission, will pass to the surviving successor highest on the following list until such time as a duly appointed Chairman of the Commission is available:

(i) The Commissioners in order of seniority.

(ii) The General Counsel.

(iii) The Executive Director.

(iv) The Executive Assistant to the Chairman.

(v) The Division Directors in order of seniority.

(vi) The Regional Directors in order of seniority.

(vii) The District Administrators in order of seniority.

(2) If and when a commissioner previously incapacitated or otherwise unavailable, again becomes available, he shall thereupon have all the powers and functions he would have had if he had not been incapacitated or otherwise unavailable.

(d) Actions taken for and in the name of the Commission as described above shall be effective immediately or as specified by the successor acting, but shall be subject to reconsideration by the Commissioners when the Commission has been reconstituted and is functioning.

(e) Except as may be determined otherwise by the Chairman or his successor, the duties of each head of a division or office of the Commission shall be discharged, in the absence or incapacity of such person during the emergency conditions, by the available staff member next in line of succession. The head of each division or office shall designate the line of succession within his division or office. If no such designation has been made or the designatee is unavailable, such duties shall be assumed by the available subordinate officer or employee in the particular division or office who is highest in grade and in the event that there is more than one such person, in length of service with the Commission.

(Sec. 4, 48 Stat. 885, as amended; 15 U.S.C. 78d, sec. 1, 76 Stat. 394; 15 U.S.C. 78d–1. Reorganization Plan No. 10 of 1950; 3 CFR, 1949–1953 Comp., p. 1006)

[28 FR 6970, July 9, 1963, as amended at 28 FR 7672, July 27, 1963; 28 FR 14493, Dec. 31, 1963; 54 FR 40862, Oct. 4, 1989; 59 FR 5945, Feb. 9, 1994]

§ 200.204 Personnel, fiscal, and service functions.

In the absence of unavailability of the appropriate staff officer or his successor, authority to effect temporary appointments of such additional officers and employees, to classify and allocate positions to their proper grades, to issue travel orders, and to effect emergency purchases of supplies, equipment and services shall be exercised by the respective Regional Directors and District Administrators, their deputies, or staff in line of succession, as may be required for the discharge of the lawful duties of the respective offices.

(Sec. 4, 48 Stat. 885, as amended; 15 U.S.C. 78d, sec. 1, 76 Stat. 394; 15 U.S.C. 78d–1, Reorganization Plan No. 10 of 1950; 3 CFR, 1949–1953 Comp., p. 1006)

[28 FR 6970, July 9, 1963, as amended at 59 FR 5945, Feb. 9, 1994]

§ 200.205 Effect upon existing Commission organization, delegations, and rules.

Except as otherwise provided herein, all outstanding Commission organizational statements, delegations of authority, orders, rules and regulations shall remain in force and effect during emergency conditions, subject to all lawful requirements and such changes as may be authorized by or in the name of the Chairman or the Commission.

(Sec. 4, 48 Stat. 885, as amended; 15 U.S.C. 78d, sec. 1, 76 Stat. 394, 15 U.S.C. 78d–1. Reorganization Plan No. 10 of 1950; 3 CFR, 1949–1953 Comp., p. 1006)

Subpart H—Regulations Pertaining to the Privacy of Individuals and Systems of Records Maintained by the Commission

AUTHORITY: 5 U.S.C. 552a(f), unless otherwise noted.

Section 200.312 is also issued under Pub. L. 93–579, sec. k, 5 U.S.C. 552a(k).

Section 200.313 is also issued under Pub. L. 93–579, sec. j, 5 U.S.C. 552a(j) and sec. k, 5 U.S.C. 552a(k).

SOURCE: 40 FR 44068, Sept. 24, 1975, unless otherwise noted.

§ 200.301 Purpose and scope.

(a) The Privacy Act of 1974, Pub. L. 93–579, 88 Stat. 1896, is based, in part, on the finding by Congress that ''in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.'' To achieve this objective the Act, among other things, provides, with some exceptions, that Federal agencies shall advise an individual upon request whether records maintained by the agency in a system of records pertain to the individual and shall grant the individual access to such records. The Act further provides that individuals may request amendments or corrections to records pertaining to them that are maintained by the agency, and that the agency shall either grant the requested amendments or set forth fully its reasons for refusing to do so.

(b) The Securities and Exchange Commission, pursuant to subsection (f) of the Privacy Act, adopts the following rules and procedures to implement the provisions of the Act summarized above, and other provisions of the Act. These rules and procedures are applicable to all requests for information, access or amendment to records pertaining to an individual that are contained in any system of records that is maintained by the Commission.

§ 200.302 Definitions.

The following definitions shall apply for purposes of this subpart:

(a) The terms *individual, maintain, record, system of records,* and *routine use* are defined for purposes of these rules as they are defined in 5 U.S.C. 552a(a)(2), (a)(3), (a)(4), (a)(5), and (a)(6).

(b) *Commission* means the Securities and Exchange Commission.

§ 200.303 Times, places and requirements for requests pertaining to individual records in a record system and for the identification of individuals making requests for access to the records pertaining to them.

(a) *Place to make request.* Any request by an individual to be advised whether any system of records maintained by the Commission and named by the individual contains a record pertaining to him or her, or any request by an individual for access to a record pertaining to him or her that is contained in a system of records maintained by the Commission, shall be submitted by mail to the Privacy Act Officer, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or by facsimile (703–914–1149). All requests will be required to be put in writing and signed by the individual making the request. In the case of requests for access that are made by mail, the envelope should be clearly marked ''Privacy Act Request.''

(1) *Information to be included in requests.* Each request by an individual concerning whether the Commission maintains in a system of records a record that pertains to him, or for access to any record pertaining to the individual that is maintained by the Commission in a system of records, shall include such information as will assist the Commission in identifying those records as to which the individual is seeking information or access. Where practicable, the individual should identify the system of records that is the subject of his request by reference to the Commission's notices of systems of records, which are published in the FEDERAL REGISTER, as required by section (e)(4) of the Privacy Act, 5 U.S.C. 552a(e)(4). Where a system of records is compiled on the basis of a specific identification scheme, the individual should include in his request the identification number or other identifier assigned to him. In the event the individual does not know the specific identifier assigned to him, he shall provide other information, including his

full name, address, date of birth and subject matter of the record, to aid in processing his request. If additional information is required before a request can be processed, the individual shall be so advised.

(2) *Verification of identity*. When the fact of the existence of a record is not required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, as amended, or when a record as to which access has been requested is not required to be disclosed under that Act, the individual seeking the information or requesting access to the record shall be required to verify his or her identity before access will be granted or information given. For this purpose, individuals shall appear at the Office of Freedom of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, during normal business hours of 9 a.m. to 4:30 p.m. e.s.t., Monday through Friday, or at one of the Commission's Regional or District Offices. The addresses and business hours of those offices are listed below:

Northeast Regional Office. 7 World Trade Center, Suite 1300, New York, NY 10048. Office hours—9 a.m. to 5:30 p.m. E.S.T.

Boston District Office—73 Tremont Street, Sixth Floor, Suite 600, Boston, MA 02108. Office hours—9 a.m. to 5:30 p.m. E.S.T.

Philadelphia District Office—The Curtis Center, Suite 1005 E., 601 Walnut Street, Philadelphia, PA 19106. Office hours—9 a.m. to 5:30 p.m. E.S.T.

Southeast Regional Office. 1401 Brickell Avenue, Suite 200, Miami, FL 33131. Office hours—9:00 a.m. to 5:30 p.m. E.S.T.

Atlanta District Office—3475 Lenox Road, NE., Suite 1000, Atlanta, GA 30326. Office hours—9 a.m. to 5:30 p.m. E.S.T.

Midwest Regional Office. 500 West Madison Street, Suite 1400, Chicago, IL 60661. Office hours—8:45 a.m. to 5:15 p.m. C.S.T.

Central Regional Office. 1801 California Street, Suite 4800, Denver, CO 80202. Office hours—8 a.m. to 4:30 p.m. M.S.T.

Fort Worth District Office—801 Cherry Street, 19th Floor, Fort Worth, TX 76102. Office hours—8:30 a.m. to 5 p.m. C.S.T.

Salt Lake District Office—500 Key Bank Tower, 50 S. Main Street, Suite 500, Box 79, Salt Lake City, UT 84144. Office hours—8 a.m. to 4:30 p.m. M.S.T.

Pacific Regional Office. 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036. Office hours 8:30 a.m. to 5 p.m. P.S.T.

San Francisco District Office—44 Montgomery Street, Suite 1100, San Francisco, CA 94104. Office hours—8:30 a.m. to 5 p.m. P.S.T.

None of the Commission's Offices are open on Saturday, Sunday or the following legal holidays: New Year's Day, Martin Luther King, Jr.'s Birthday, President's Day, Memorial Day, Independence Day, Labor Day, Veterans' Day, Columbus Day, Thanksgiving Day or Christmas Day.

(3) *Methods for verifying identity—appearance in person*. An individual seeking information as to records pertaining to him or access to those records shall furnish documentation that may reasonably be relied on to establish the individual's identity. Such documentation might include a valid birth certificate, driver's license, employee or military identification card, or medicare card.

(4) *Method for verifying identity by mail*. Where an individual cannot appear at one of the Commission's Offices to verify his or her identity, he or she must submit, along with the request for information or access, a statement attesting to his or her identity. Where access is being sought, the statement shall include a representation that the requested records pertain to the individual and a statement that the individual is aware that knowingly and willfully requesting or obtaining records pertaining to an individual from the Commission under false pretenses is a criminal offense. This statement shall be a sworn statement, or in lieu of a sworn statement, an individual may submit an unsworn statement to the same effect if it is signed by him or her as true under penalty of perjury, dated, and in substantially the following form:

(i) If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.''

Executed on (date)_____

(Signature)

(ii) If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.''

Executed on (date)_____

(Signature)

(5) *Additional procedures for verifying identity.* When it appears appropriate, there may be made such other arrangements for the verification of identity as are reasonable under the circumstances and appear to be effective to prevent unauthorized disclosure of, or access to, individual records.

(b) *Acknowledgement of requests for information pertaining to individual records in a record system or for access to individual records.* (1) Except where an immediate acknowledgement is given for requests made in person, the receipt of a request for information pertaining to individual records in a record system will be acknowledged within 10 days after the receipt of such request. Requests will be processed as promptly as possible and a response to such requests will be given within 30 days (excluding Saturdays, Sundays, and legal holidays) unless, within the 30 day period and for cause shown, the individual making the request is notified in writing that a longer period is necessary.

(2) When an individual appears in person at the Office of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or at one of its Regional or District Offices to request access to records pertaining to him, and such individual provides the required information and verification of identity, the Commission's staff, if practicable, will indicate at that time whether it is likely that the individual will be given access to the records and, if so, when and under what circumstances such access will be given. In the case of requests received by mail, whenever practicable, acknowledgement of the receipt of the request will be given within 10 days after receipt (excluding Saturdays, Sundays, and legal holidays). The acknowledgement will indicate, if practicable, whether or not access likely will be granted and, if so, when and under what circumstances.

[40 FR 44068, Sept. 24, 1975, as amended at 41 FR 44698, Oct. 12, 1976; 47 FR 26819, June 22, 1982; 52 FR 2677, Jan. 26, 1987; 54 FR 40862, Oct. 4, 1989; 54 FR 50307, Dec. 5, 1989; 59 FR 5945, Feb. 9, 1994; 59 FR 12543, Mar. 17, 1994; 65 FR 55185, 55186, Sept. 13, 2000]

§ 200.304 Disclosure of requested records.

(a) *Initial review.* Requests by individuals for access to records pertaining to them will be referred to the Commission's Privacy Act Officer who initially will determine whether access will be granted, *Provided, however,* That a Director of a staff Division of the Commission or Office head, other than the General Counsel, whose zone of responsibility relates to the record requested (see 17 CFR 200.13 et seq.), may make a determination that access is not lawfully required to be granted and should not be granted, in which case he, and not the Privacy Act Officer, shall make the required notification to the individual making the request.

(b) *Grant of request for access.* (1) If it is determined that a request for access to records pertaining to an individual will be granted, the individual will be advised by mail that access will be given at the designated Office of the Commission or a copy of the requested record will be provided by mail if the individual shall so indicate. Where the individual requests that copies of the record be mailed to him or requests copies of a record upon reviewing it at a Commission Office, the individual shall pay the cost of making the requested copies, as set forth in § 200.310 of this subpart.

(2) In granting access to an individual to a record pertaining to him, such steps shall be taken by the Commission's staff as are necessary to prevent the unauthorized disclosure at the same time of information pertaining to individuals other than the person making the request or of other information that does not pertain to the individual.

(c) *Denial of request for access.* If it is determined that access will not be granted, the individual making the request will be notified of that fact and given the reasons why access is being denied. The individual also will be advised (1) of his right to seek review by the General Counsel of the intital decision to deny access, in accordance with the procedures set forth in § 200.308 of this subpart; and (2) of his right ultimately to obtain judicial review pursuant to 5 U.S.C. 552a(g)(1)(A) of a final denial of access by the General Counsel.

(d) *Time for acting on requests for access.* Access to a record pertaining to an individual normally will be granted or denied within 30 days (excluding Saturdays, Sundays and legal holidays) after the receipt of the request for access unless the individual making the request is notified in writing within the 30 day period that, for good cause shown, a longer time is required. In such cases, the individual making the request shall be informed in writing of the difficulties encountered and an indication shall be given as to when it is anticipated that access may be granted or denied.

(e) *Authorization to allow designated person to review and discuss records pertaining to another individual.* An individual who is granted access to records pertaining to him, and who appears at a Commission Office to review the records, may be accompanied by another person of his choosing. Where the records as to which access has been granted are not required to be disclosed under provisions of the Freedom of Information Act 5 U.S.C. 552, as amended, the individual requesting the records, before being granted access, shall execute a written statement, signed by him and the person accompanying him, which specifically authorizes the latter individual to review and discuss the records. If such authorization has not been given as described, the person who has accompanied the individual making the request will be excluded from any review or discussion of the records.

(f) *Exclusion for certain records.* Nothing contained in these rules shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(5 U.S.C. 552a(f); sec. 19, Securities Act of 1933, 48 Stat. 85, as amended; sec. 23, Securities Exchange Act of 1934, 48 Stat. 901, as amended; sec. 20, Public Utility Holding Company Act of 1935, 49 Stat. 833; sec. 319, Trust Indenture Act of 1939, 53 Stat. 1173; sec. 38, Investment Company Act of 1940, 54 Stat. 841; sec. 211, Investment Advisers Act of 1940, 54 Stat. 855 (15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11))

[40 FR 44068, Sept. 24, 1975, as amended at 49 FR 13866, Apr. 9, 1984]

§ 200.305 Special procedure: Medical records.

(a) *Statement of physician or mental health professional.* When an individual requests access to records pertaining to him that include medical and/or psychological information, the Commission, if it deems it necessary under the particular circumstances, may require the individual to submit with the request a signed statement by his physician or a mental health professional indicating that, in their opinion, disclosure of the requested records or information directly to the individual will not have an adverse effect on the individual.

(b) *Designation of physician or mental health professional to receive records.* If the Commission believes, in good faith, that disclosure of medical and/or psychological information directly to an individual could have an adverse effect on that individual, the individual may be asked to designate in writing a physician or mental health professional to whom he would like the records to be disclosed, and disclosure that otherwise would be made to the individual will instead be made to the designated physician or mental health professional.

§ 200.306 Requests for amendment or correction of records.

(a) *Place to make requests.* A written request by an individual to amend or correct records pertaining to him or her may be hand delivered during normal business hours to the SEC, Operations Center, Room 1418, 6432 General Green Way, Alexandria, VA 22312–2414, or be sent by mail to the Office of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or by facsimile (703–914–1149).

(1) *Information to be included in requests.* Each request to amend or correct a Commission record shall reasonably describe the record sought to be amended or corrected. Such description should include, for example, relevant names, dates and subject matter to permit the record to be located among the records maintained by the Commission. An individual who has requested that a record pertaining to him be amended or corrected will be advised

promptly if the record cannot be located on the basis of the description given and that further identifying information is necessary before his request can be processed. An initial evaluation of a request presented in person will be made immediately to ensure that the request is complete and to indicate what, if any, additional information will be required. Verification of the individual's identity as set forth in §200.303(a) (2), (3), (4) and (5) may also be required.

(2) *Basis for amendment or correction.* An individual requesting an amendment or correction to a record pertaining to him shall specify the substance of the amendment or correction and set forth facts and provide such materials that would support his contention that the record pertaining to him as maintained by the Commission is not accurate, timely or complete, or that the record is not necessary and relevant to accomplish a statutory purpose of the Commission as authorized by law or by Executive Order of the President.

(b) *Acknowledgement of requests for amendment or correction.* Receipt of a request to amend or correct a record pertaining to an individual normally will be acknowledged in writing within 10 days after such request has been received. When a request to amend or correct is made in person, the individual making the request will be given a written acknowledgement when the request is presented. The acknowledgement will describe the request received and indicate when it is anticipated that action will be taken on the request. No acknowledgement will be sent when the request for amendment or correction will be reviewed, and an initial decision made, within 10 days from the date the request is received.

[40 FR 44068, Sept. 24, 1975, as amended at 47 FR 26819, June 22, 1982; 65 FR 55186, Sept. 13, 2000]

§200.307 Review of requests for amendment or correction.

(a) *Initial review.* As in the case of requests for access, requests by individuals for amendment or correction to records pertaining to them will be referred to the Commission's Privacy Act Officer for an initial determination, except that such requests may be considered by a Division Director or Office Head (other than the General Counsel) as set forth in §200.304(a) of this subpart.

(b) *Standards to be applied in reviewing requests.* In reviewing requests to amend or correct records, the Privacy Act Officer, or Division or Office head, will be guided by the criteria set forth in 5 U.S.C. 552a(e)(1), i.e., that records maintained by the Commission shall contain only such information as is necessary and relevant to accomplish a statutory purpose of the Commission as required by statute or Executive Order of the President and that such information also be accurate, timely, and complete. These criteria will be applied whether the request is to add material to a record or to delete information from a record.

(c) *Time for acting on requests.* Initial review of a request by an individual to amend or correct a record pertaining to him shall be completed as promptly as is reasonably possible and normally within 30 days (excluding Saturdays, Sundays and legal holidays) from the date the request was received, unless unusual circumstances preclude completion of review within that time. If the anticipated completion date indicated in the acknowledgement cannot be met, the individual requesting the amendment will be advised in writing of the delay and the reasons therefor, and also advised when action is expected to be completed.

(d) *Grant of requests to amend or correct records.* If a request to amend or correct a record is granted in whole or in part, the Privacy Act Officer will: (1) Advise the individual making the request in writing of the extent to which it has been granted; (2) amend or correct the record accordingly; and (3) where an accounting of disclosures of the record has been kept pursuant to 5 U.S.C. 552a(c), advise all previous recipients of the record of the fact that the record has been amended or corrected and the substance of the amendment or correction.

(e) *Denial of requests to amend or correct records.* If an individual's request to amend or correct a record pertaining to him is denied in whole or in part, the Privacy Act Officer will:

(1) Promptly advise the individual making the request in writing of the extent to which the request has been denied;

(2) State the reasons for the denial of the request;

(3) Describe the procedures established by the Commission to obtain further review within the Commission of the request to amend or correct, including the name and address of the person to whom the appeal is to be addressed; and

(4) Inform the individual that the Privacy Act Officer will provide information and assistance to the individual in perfecting an appeal of the initial decision.

(5 U.S.C. 552a(f); sec. 19, Securities Act of 1933, 48 Stat. 85, as amended; sec. 23, Securities Exchange Act of 1934, 48 Stat. 901, as amended; sec. 20, Public Utility Holding Company Act of 1935, 49 Stat. 833; sec. 319, Trust Indenture Act of 1939, 53 Stat. 1173; sec. 38, Investment Company Act of 1940, 54 Stat. 841; sec. 211, Investment Advisers Act of 1940, 54 Stat. 855 (15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11))

[40 FR 44068, Sept. 24, 1975, as amended at 49 FR 13866, Apr. 9, 1984]

§ 200.308 Appeal of initial adverse agency determination as to access or as to amendment or correction.

(a) *Administrative review.* Any person who has been notified pursuant to § 200.304(c) that his request for access to records pertaining to him has been denied, or pursuant to Section 307(e) of this subpart that his request for amendment or correction has been denied in whole or in part, or who has received no response to a request for access or to amend within 30 days (excluding Saturdays, Sundays and legal holidays) after his request was received by the Office of Information and Privacy Act Operations (or within such extended period as may be permitted in accordance with §§ 200.304(d) and 200.307(c) of this subpart), may appeal the adverse determination or failure to respond to the General Counsel.

(1) The appeal shall be in writing and shall describe the record in issue and set forth the proposed amendment or correction and the reasons therefor.

(2) The appeal shall be delivered or sent by mail to the Office of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or by facsimile (703–914–1149).

(3) The applicant, if he wishes, may state such facts and cite such legal or other authorities as he may consider appropriate in support of his application.

(4) The General Counsel will make a determination with respect to any appeal within 30 days after the receipt of such appeal (excluding Saturdays, Sundays and legal holidays), unless for good cause shown, the General Counsel shall extend that period. If such an extension is made, the individual who is appealing shall be advised in writing of the extension, the reasons therefor, and the anticipated date when the appeal will be decided.

(5) In considering an appeal from a denial of a request to amend or correct a record, the General Counsel shall apply the same standards as set forth in § 200.307(b).

(6) If the General Counsel shall conclude that access should be granted, he or she shall issue an order granting access and instructing the Privacy Act Officer to comply with § 200.304(b).

(7) If the General Counsel shall conclude that the request to amend or correct the record should be granted in whole or in part, he or she shall issue an order granting the requested amendment or correction in whole or in part and instructing the Privacy Act Officer to comply with the requirements of § 200.307(d) of this subpart, to the extent applicable.

(8) If the General Counsel affirms the initial decision denying access, he or she shall issue an order denying access and advising the individual seeking access of (i) The order; (ii) the reasons for denying access; and (iii) the individual's right to obtain judicial review of the decision pursuant to 5 U.S.C. 552a(g)(1)(B).

(9) If the General Counsel determines that the decision of the Privacy Act Officer denying a request to amend or correct a record should be upheld, he or she shall issue an order denying the request and the individual shall be advised of

(i) The order refusing to amend or correct the record and the reasons therefor;

(ii) His or her right to file a concise statement setting forth his or her disagreement with the General Counsel's decision not to amend or correct the record;

(iii) The procedures for filing such a statement of disagreement with the General Counsel;

(iv) The fact that any such statement of disagreement will be made available to anyone to whom the record is disclosed, together with, if the General Counsel deems it appropriate, a brief statement setting forth the General Counsel's reasons for refusing to amend or correct;

(v) The fact that prior recipients of the record in issue will be provided with the statement of disagreement and the General Counsel's statement, if any, to the extent that an accounting of such disclosures has been maintained pursuant to 5 U.S.C. 552a(c); and

(vi) The individual's right to seek judicial review of the General Counsel's refusal to amend or correct, pursuant to 5 U.S.C. 552a(g)(1)(A).

(10) In appropriate cases the General Counsel may, in his or her sole and unfettered discretion, refer matters requiring administrative review of initial decisions to the Commission for determination and the issuance, where indicated, of orders.

(b) *Statement of disagreement.* As noted in paragraph (a)(9)(ii) of this section, an individual may file with the General Counsel a statement setting forth his disagreement with the General Counsel's denial of his request to amend or correct a record.

(1) Such statement of disagreement shall be delivered or sent by mail to the Office of Freedom of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or by facsimile (703–914–1149), within 30 days after receipt by the individual of the General Counsel's order denying the amendment or correction. For good cause shown this period can be extended for a reasonable time.

(2) Such statement of disagreement shall concisely state the basis for the individual's agreement. Generally a statement should be no more than two pages in length, except an individual may submit a slightly longer statement if it is necessary to set forth his disagreement effectively. Unduly lengthy or irrelevant materials will be returned to the individual by the General Counsel for appropriate revisions before they become a permanent part of the individual's record.

(3) The record about which a statement of disagreement has been filed will clearly note which part of the record is disputed and the General Counsel will provide copies of the statement of disagreement and, if the General Counsel deems it appropriate, provide a concise statement of his or her reasons for refusing to amend or correct the record, to persons or other agencies to whom the record has been or will be disclosed.

(4) In appropriate cases, the General Counsel may, in his or her sole and unfettered discretion, refer matters concerning statements of disagreement to the Commission for disposition.

(5 U.S.C. 552a(f); sec. 19, Securities Act of 1933, 48 Stat. 85, as amended; sec. 23, Securities Exchange Act of 1934, 48 Stat. 901, as amended; sec. 20, Public Utility Holding Company Act of 1935, 49 Stat. 833; sec. 319, Trust Indenture Act of 1939, 53 Stat. 1173; sec. 38, Investment Company Act of 1940, 54 Stat. 841; sec. 211, Investment Advisers Act of 1940, 54 Stat. 855 (15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11))

[40 FR 44068, Sept. 24, 1975, as amended at 42 FR 40190, Aug. 9, 1977; 47 FR 26819, June 22, 1982; 49 FR 13866, Apr. 9, 1984; 65 FR 55186, Sept. 13, 2000]

§ 200.309 General provisions.

(a) *Extensions of time.* Pursuant to §§ 200.303(b), 200.304(d), 200.307(c) and 200.308(a)(4) of this subpart, the time within which a request for information, access or amendment by an individual with respect to records maintained by the Commission that pertain to him normally would be processed may be extended for good cause shown or because of unusual circumstances. As used in these rules, *good cause* and *unusual circumstances* shall include, but only to the extent reasonably necessary to the proper processing of a particular request:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the Office processing the

request. Many records of the Commission are stored in Federal Records Centers in accordance with law—including many of the documents which have been on file with the Commission for more than 2 years—and cannot be made available promptly. Other records may temporarily be located at a Regional or District Office of the Commission. Any person who has requested for personal examination a record stored at the Federal Records Center or temporarily located in a Regional or District Office of the Commission will be notified when the record will be made available to him.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which may be demanded in a single request. While every reasonable effort will be made fully to comply with each request as promptly as possible on a first-come, first-served basis, work done to search for, collect and appropriately examine records in response to a request for a large number of records will be contingent upon the availability of processing personnel in accordance with an equitable allocation of time to all members of the public who have requested or wish to request records.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components within the Commission having substantial subject-matter interest therein.

(b) *Effective date of action.* Whenever it is provided in this Subpart that an acknowledgement or response to a request will be given by specific times, deposit in the mails of such acknowledgement or response by that time, addressed to the person making the request, will be deemed full compliance.

(c) *Records in use by a member of the Commission or its staff.* Although every effort will be made to make a record in use by a member of the Commission or its staff available when requested, it may occasionally be necessary to delay making such a record available when doing so at the time the request is made would seriously interfere with the work of the Commission or its staff.

(d) *Missing or lost records.* Any person who has requested a record or a copy of a record pertaining to him will be notified if the record sought cannot be found. If he so requests, he will be notified if the record subsequently is found.

(e) *Oral requests; misdirected written requests*—(1) *Telephone and other oral requests.* Before responding to any request by an individual for information concerning whether records maintained by the Commission in a system of records pertain to him or to any request for access to records by an individual, such request must be in writing and signed by the individual making the request. The General Counsel will not entertain any appeal from an alleged denial or failure to comply with an oral request. Any person who has orally requested information or access to records pertaining to him that he believes to have been improperly denied to him should resubmit his request in appropriate written form in order to obtain proper consideration and, if need be, administrative review.

(2) *Misdirected written requests.* The Commission cannot assure that a timely or satisfactory response will be given to written requests for information, access or amendment by an individual with respect to records pertaining to him that are directed to the Commission other than in a manner prescribed in §§ 200.303(a), 200.306(a), 200.308(a)(2), and 200.310 of this subpart. Any staff member who receives a written request for information, access or amendment should promptly forward the request to the Privacy Act Officer. Misdirected requests for records will be considered to have been received by the Commission only when they have been actually received by the Privacy Act Officer in cases under § 200.308(a)(2). The General Counsel will not entertain any appeal from an alleged denial or failure to comply with a misdirected request, unless it is clearly shown that

the request was in fact received by the Privacy Act Officer.

(5 U.S.C. 552a(f); sec. 19, Securities Act of 1933, 48 Stat. 85, as amended; sec. 23, Securities Exchange Act of 1934, 48 Stat. 901, as amended; sec. 20, Public Utility Holding Company Act of 1935, 49 Stat. 833; sec. 319, Trust Indenture Act of 1939, 53 Stat. 1173; sec. 38, Investment Company Act of 1940, 54 Stat. 841; sec. 211, Investment Advisers Act of 1940, 54 Stat. 855 (15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11))

[40 FR 44068, Sept. 24, 1975, as amended at 49 FR 13867, Apr. 9, 1984; 59 FR 5945, Feb. 9, 1994]

§ 200.310 Fees.

(a) A request by an individual for copies of a record pertaining to him or her that is maintained by the Commission may be sent by mail to the Office of Freedom of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or by facsimile (703–914–1149). There will be no charge assessed to the individual for the Commission's expense involved in searching for or reviewing the record. Copies of the Commission's records will be provided by a commercial copier or by the Commission at rates established by a contract between the copier and the Commission.

(b) *Waiver or reduction of fees.* Whenever the Privacy Act Officer determines that good cause exists to grant a request for reduction or waiver of fees for copying documents, he or she may reduce or waive any such fees.

(Pub. L. 87–592, 76 Stat. 394, 15 U.S.C. 78d–1, 78d–2; Pub. L. 93–502; 11 U.S.C. 901, 1109(a))

[42 FR 56727, Oct. 28, 1977, as amended at 47 FR 26819, June 22, 1982; 49 FR 12686, Mar. 30, 1984; 50 FR 50287, Dec. 10, 1985; 65 FR 55186, Sept. 13, 2000]

§ 200.311 Penalties.

Title 18 U.S.C. 1001 makes it a criminal offense, subject to a maximum fine of $10,000, or imprisonment for not more than 5 years or both, to knowingly and willingly make or cause to be made any false or fradulent statements or representations in any matter within the jurisdiction of any agency of the United States. 5 U.S.C. 552a(i) makes it a misdemeanor punishable by a fine of not more than $5,000 for any person knowingly and willfully to request or obtain any record concerning an individual from the Commission under false pretenses. 5 U.S.C. 552a(i) (1) and (2) provide criminal penalties for certain violations of the Privacy Act by officers and employees of the Commission.

§ 200.312 Specific exemptions.

Pursuant to section (k) of the Privacy Act of 1974, the Chairman of the Securities and Exchange Commission, with the concurrence of the Commission, has deemed it necessary to promulgate the following exemptions to specified provisions of the Privacy Act:

(a) Pursuant to, and limited by 5 U.S.C. 552a(k)(2), the following systems of records maintained by the Commission shall be exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) and 17 CFR 200.303, 200.304, and 200.306, insofar as they contain investigatory materials compiled for law enforcement purposes:

(1) Enforcement Files;

(2) Office of General Counsel Working Files;

(3) Office of the Chief Accountant Working Files;

(4) Name-Relationship Index System;

(5) Rule 102(e) of the Commission's Rules of Practice—Appearing or Practicing Before the Commission; and

(6) Agency Correspondence Tracking System.

(b) Pursuant to 5 U.S.C. 552a(k)(5), the systems of records containing the Commission's (1) Office of Personnel Code of Conduct and Employee Performance Files and (2) Personnel Security Files shall be exempt from sections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of the Privacy Act, 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f), and 17 CFR 200.303, 200.304, and 200.306 insofar as they contain investigatory material compiled to determine an individual's suitability, eligibility, and qualifications for Federal civilian employment or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an

implied promise that the identity of the source would be held in confidence.

(Pub. L. 93–579, Sec. k, 5 U.S.C. 552a(k))

[40 FR 44073, Sept. 24, 1975, as amended at 52 FR 2677, Jan. 26, 1987; 54 FR 24332, June 7, 1989; 54 FR 46373, Nov. 3, 1989; 60 FR 32795, June 23, 1995; 65 FR 55186, Sept. 13, 2000]

§ 200.313 Inspector General exemptions.

(a) Pursuant to section (j) of the Privacy Act of 1974, the Chairman of the Securities and Exchange Commission, with the concurrence of the Commission, has deemed it necessary to promulgate the following exemptions to specified provisions of the Privacy Act:

(1) Pursuant to, and limited by 5 U.S.C. 552a(j)(2), the system of records maintained by the Office of Inspector General of the Commission that contains the Investigative Files shall be exempted from the provisions of 5 U.S.C. 552a, except subsections (b), (c) (1) and (2), (e)(4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i), and 17 CFR 200.303, 200.304, 200.306, 200.307, 200.308, 200.309 and 200.310, insofar as the system contains information pertaining to criminal law enforcement investigations.

(2) [Reserved]

(b) Pursuant to section (k) of the Privacy Act of 1974, the Chairman of the Securities and Exchange Commission, with the concurrence of the Commission, has deemed it necessary to promulgate the following exemptions to specified provisions of the Privacy Act:

(1) Pursuant to, and limited by 5 U.S.C. 552a(k)(2), the system of records maintained by the Office of Inspector General of the Commission that contains the Investigative Files shall be exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) and 17 CFR 200.303, 200.304, and 200.306, insofar as it contains investigatory materials compiled for law enforcement purposes.

(2) [Reserved]

[55 FR 19872, May 14, 1990]

Subpart I—Regulations Pertaining to Public Observation of Commission Meetings

AUTHORITY: 5 U.S.C. 552b, unless otherwise noted. Section 200.410 also is issued under 29 U.S.C. 794.

SOURCE: 42 FR 14693, Mar. 16, 1977, unless otherwise noted.

§ 200.400 Open meetings.

Except as otherwise provided in this subpart, meetings of the Commission shall be open to public observation.

§ 200.401 Definitions.

As used in this subpart:

(a) *Meeting* means the joint deliberations of at least the number of individual members of the Securities and Exchange Commission required to take action on behalf of the Commission where such deliberations determine or result in the joint conduct or disposition of official Commission business, but does not include deliberations required or permitted by § 200.42 or § 200.43 (respecting seriatim and duty officer disposition of Commission business, respectively), or by §§ 200.403, 200.404, or 200.405 (respecting whether particular Commission deliberations shall be open or closed and related matters).

(b) *Portion of a meeting* means the consideration during a meeting of a particular topic or item separately identified in the notice of Commission meetings described in § 200.403.

(c) *Open*, when used in the context of a Commission meeting or a portion thereof, means that the public may attend and observe the deliberations of the Commission during such meeting or portion of a meeting, consistent with the provisions of § 200.410 (respecting decorum at meetings and other related matters).

(d) *Closed*, when used in the context of a Commission meeting or a portion thereof, means that the public may not attend or observe the deliberations of the Commission during such meeting or portion of a meeting.

(e) *Announce*, and *make publicly available*, when used in the context of the

dissemination of information, mean, in addition to any specific method of publication described in this subpart, that a document containing the information in question will be posted for public inspection in, or adjacent to, the lobby of the Commission's headquarters offices, and will be available to the public through the Commission's Public Reference Section and the Commission's Office of Public Affairs, all in Washington, DC

(f) The term *likely to,* as used in § 200.402, illustrating the circumstances under which Commission meetings may be closed, and the circumstances in which information may be deleted from the notice of Commission meetings, means that it is more probable than not that the discussion of Commission business, or publication of information, reasonably could encompass matters which the Commission is authorized, by the Government in the Sunshine Act, Pub. L. 94–409, as implemented by this subpart, to consider or discuss at a closed meeting (or a closed portion of a meeting).

(g) The term *financial institution,* as used in § 200.402(a), authorizing the closure of certain Commission meetings, includes, but is not limited to, banks, savings and loan associations, credit unions, brokers and dealers in securities or commodities, exchanges dealing in securities or commodities, national securities associations, investment companies, investment advisers, securities industry self-regulatory organizations subject to 15 U.S.C. 78s, and institutional managers as defined in 15 U.S.C. 78m(f).

(h) The term *person* includes, but is not limited to, any corporation, partnership, company, association, joint stock corporation, business trust, unincorporated organization, government, political subdivision, agency, or instrumentality of a government.

[42 FR 14693, Mar. 16, 1977, as amended at 60 FR 17202, Apr. 5, 1995]

§ 200.402 Closed meetings.

(a) *Nonpublic matters.* Pursuant to the general or special procedures for closing Commission meetings, as set forth in § 200.404 or § 200.405, respectively, a meeting, or any portion thereof, shall be closed to public observation where the Commission determines that such meeting, or a portion thereof, is likely to:

(1) Disclose matters specifically authorized under criteria established by an executive order to be kept secret in the interests of national defense or foreign policy, and in fact properly classified pursuant to such executive order.

(2) Relate solely to the internal personnel rules and practices of the Commission or any other agency, including, but not limited to, discussion concerning:

(i) Operation rules, guidelines, and manuals of procedure for investigators, attorneys, accountants, and other employees, other than those rules, guidelines, and manuals which establish legal requirements to which members of the public are expected to conform; or

(ii) Hiring, termination, promotion, discipline, compensation, or reward of any Commission employee or member, the existence, investigation, or disposition of a complaint against any Commission employee or member, the physical or mental condition of any Commission employee or member, the handling of strictly internal matters, which would tend to infringe on the privacy of the staff or members of the Commission, or similar subjects.

(3) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *Provided,* That such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(4) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential, including, but not limited to:

(i) Information contained in letters of comment in connection with registration statements, applications for registration or other material filed with the Commission, replies thereto, and related material which is deemed to have been submitted to the Commission in confidence or to be confidential at the instance of the registrant or person who has filed such material unless the contrary clearly appears; and

(ii) Information contained in any document submitted to or required to be filed with the Commission where the Commission has undertaken formally or informally to receive such submission or filing for its use or the use of specified persons only, such as preliminary proxy material filed pursuant to Rule 14a–6 under the Securities Exchange Act (17 CFR 240.14a–6), reports filed pursuant to Rule 316(a) under the Securities Act (17 CFR 230.316(a)), agreements filed pursuant to Rule 15c3–1 under the Securities Exchange Act, 17 CFR 240.15c3–1, schedules filed pursuant to Part I of Form X–17A–5 (17 CFR 249.617) in accordance with Rule 17a–5(b)(3) under the Securities Exchange Act (17 CFR 240.17a–5(b)(3)), statements filed pursuant to Rule 17a–5(k)(1) under the Securities Exchange Act (17 CFR 240.17a–5(k)(1)), confidential reports filed pursuant to Rules 17a–9, 17a–10, 17a–12 and 17a–16 under the Securities Exchange Act (17 CFR 240.17a–9, 240.17a–10, 240.17a–12, and 240.17a–16), and any information filed with the Commission and confidential pursuant to section 45 of the Investment Company Act of 1940, 15 U.S.C. 80a–44, or Rule 45a–1 thereunder (17 CFR 270.45a–1); and

(iii) Information contained in reports, summaries, analyses, letters, of memoranda arising out of, in anticipation of, or in connection with, an examination or inspection of the books and records of any person or any other investigation.

(5) Involve accusing any person of a crime, or formally censuring any person, including, but not limited to, consideration of whether to:

(i) Institute, continue, or conclude administrative proceedings or any formal or informal investigation or inquiry, whether public or nonpublic, against or involving any person, alleging a violation of any provision of the federal securities laws, or the rules and regulations thereunder, or any other statute or rule a violation of which is punishable as a crime; or

(ii) Commence, participate in, or terminate judicial proceedings alleging a violation of any provision of the federal securities laws, or the rules and regulations thereunder, or any other statute or rule a violation of which is punishable as a crime; or

(iii) Issue a report or statement discussing the conduct of any person and the relationship of that conduct to possible violations of any provision of the federal securities laws, or the rules and regulations thereunder, or any other statute or rule a violation of which is punishable as a crime; or

(iv) Transmit, or disclose, with or without recommendation, any Commission memorandum, file, document, or record to the Department of Justice, a United States Attorney, any federal, state, local, or foreign governmental authority or foreign securities authority, any professional association, or any securities industry self-regulatory organization, in order that the recipient may consider the institution of proceedings against any person or the taking of any action that might involve accusing any person of a crime or formally censuring any person; or

(v) Seek from, act upon, or act jointly with respect to, any information, file, document, or record where such action could lead to accusing any person of a crime or formally censuring any person by any entity described in paragraph (a)(5)(iv) of this section.

(6) Disclose information of a personal nature, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

(7)(i) Disclose investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, to the extent that the production of such records would:

(A) Interfere with enforcement activities undertaken, or likely to be undertaken, by the Commission or the Department of Justice, or any United States Attorney, or any Federal, State, local, or foreign governmental authority or foreign securities authority, any professional association, or any securities industry self-regulatory organization;

(B) Deprive a person of a right to a fair trial or an impartial adjudication;

(C) Constitute an unwarranted invasion of personal privacy;

(D) Disclose the identity of a confidential source and, in the case of a

record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(E) Disclose investigative techniques and procedures; or

(F) Endanger the life or physical safety of law enforcement personnel.

(ii) The term *investigatory records* includes, but is not limited to, all documents, records, transcripts, evidentiary materials of any nature, correspondence, related memoranda, or work product concerning any examination, any investigation (whether formal or informal), or any related litigation, which pertains to, or may disclose, the possible violation by any person of any provision of any statute, rule, or regulation administered by the Commission, by any other Federal, State, local, or foreign governmental authority or foreign securities authority, by any professional association, or by any securities industry self-regulatory organization. The term *investigatory records* also includes all written communications from, or to, any person complaining or otherwise furnishing information respecting such possible violations, as well as all correspondence or memoranda in connection with such complaints or information.

(8) Disclose information contained in, or related to, any examination, operating, or condition report prepared by, on behalf of, or for the use of, the Commission, any other federal, state, local, or foreign governmental authority or foreign securities authority, or any securities industry self-regulatory organization, responsible for the regulation or supervision of financial institutions.

(9) Disclose information the premature disclosure of which would be likely to

(i)(A) Lead to significant financial speculation in currencies, securities, or commodities, including, but not limited to, discussions concerning the proposed or continued suspension of trading in any security, or the possible investigation of, or institution of activity concerning, any person with respect to conduct involving or affecting publicly-traded securities, or

(B) Significantly endanger the stability of any financial institution; or

(ii) Significantly frustrate the implementation, or the proposed implementation, of any action by the Commission, any other federal, state, local or foreign governmental authority, any foreign securities authority, or any securities industry self-regulatory organization: *Provided, however,* That this paragraph (a)(9)(ii) shall not apply in any instance where the Commission has already disclosed to the public the precise content or nature of its proposed action, or where the Commission is expressly required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal.

(10) Specifically concern the Commission's consideration of, or its actual: Issuance of a subpoena (whether by the Commission directly or by any Commission employee or member); participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration; or initiation, conduct, or disposition of a particular case of formal adjudication pursuant to the procedures in 5 U.S.C. 554, or otherwise involving a determination on the record after opportunity for a hearing; including, but not limited to, matters involving

(i) The institution, prosecution, adjudication, dismissal, settlement, or amendment of any administrative proceeding, whether public or nonpublic; or

(ii) The commencement, settlement, defense, or prosecution of any judicial proceeding to which the Commission, or any one or more of its members or employees, is or may become a party; or

(iii) The commencement, conduct, termination, status, or disposition of any inquiry, investigation, or proceedings to which the power to issue subpoenas is, or may become, attendant; or

(iv) The discharge of the Commission's responsibilities involving litigation under any statute concerning the subject of bankruptcy; or

(v) The participation by the Commission (or any employee or member

thereof) in, or involvement with, any civil judicial proceeding or any administrative proceeding, whether as a party, as amicus curiae, or otherwise; or

(vi) The disposition of any application for a Commission order of any nature where the issuance of such an order would involve a determination on the record after opportunity for a hearing.

(b) *Interpretation of exemptions.* The examples set forth §200.402(a)(1) through (10) of particular matters which may be the subject of closed Commission deliberations are to be construed as illustrative, but not as exhaustive, of the scope of those exemptions.

(c) *Public interest determination.* Notwithstanding the provisions of §200.402(a) (concerning the closing of Commission meetings), but subject to the provisions of §200.409(a) (respecting the right of certain persons to petition for the closing of a Commission meeting), the Commission may conduct any meeting or portion of a meeting in public where the Commission determines, in its discretion, that the public interest renders it appropriate to open such a meeting.

(d) *Nonpublic matter in announcements.* The Commission may delete from the notice of Commission meetings described in §200.403, from the announcements concerning closed meetings described in §§200.404(b) and 200.405(c), and from the General Counsel's certification described in §200.406, any information or description the publication of which would be likely to disclose matters of the nature described in §200.402(a) (concerning the closing of Commission meetings).

(Pub. L. 94–409, 90 Stat. 1241)

[42 FR 14693, Mar. 16, 1977; 47 FR 37077, Aug. 25, 1982, as amended at 54 FR 24332, June 7, 1989]

§200.403 Notice of Commission meetings.

(a) *Content of notice.* (1) In the case of open meetings, or meetings closed pursuant to the procedures specified in §200.404, the Commission shall announce the items to be considered. For each such item, the announcement shall include:

(i) A brief description of the generic or precise subject matter to be discussed;

(ii) The date, place, and approximate time at which the Commission will consider the matter;

(iii) Whether the meeting, or the various portions thereof, shall be open or closed; and

(iv) The name and telephone number of the Commission official designated to respond to requests for information concerning the meeting at which the matter is to be considered.

(2) Every announcement of a Commission meeting described in this subsection, or any amended announcement described in paragraph (c), shall be transmitted to the FEDERAL REGISTER for publication.

(b) *Time of notice.* The announcement of Commission meetings referred to in paragraph (a) shall be made publicly available (and submitted immediately thereafter to the FEDERAL REGISTER for publication) at least one week prior to the consideration of any item listed therein, except where a majority of the members of the Commission determine, by a recorded vote, that Commission business requires earlier consideration of the matter. In the event of such a determination, the announcement shall be made publicly available (and submitted to the FEDERAL REGISTER) at the earliest practicable time.

(c) *Amendments to notice.* (1)(i) The time or place of a meeting may be changed following any public announcement that may be required by paragraph (a). In the event of such action, the Commission shall announce the change at the earliest practicable time.

(ii) The subject matter of a meeting, or the determination of the Commission to open or close a meeting (or a portion of a meeting), may be changed following any public announcement that may be required by paragraph (a), if (A) a majority of the entire membership of the Commission determines, by a recorded vote, that Commission business so requires and that no earlier announcement of the change was possible; and (B) the Commission publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(2) Notwithstanding the provisions of this paragraph (c), matters which have been announced for Commission consideration may be deleted, or continued in whole or in part to the next scheduled Commission meeting, without notice.

(d) *Notice of meetings closed pursuant to special procedure.* In the case of meetings closed pursuant to the special procedures set forth in §200.405, the Commission shall make publicly available, in whole or in summary form,

(1) A brief description of the general subject matter considered or to be considered, and

(2) The date, place, and approximate time at which the Commission will, or did, consider the matter. The announcement described in this subsection shall be made publicly available at the earliest practicable time, and may be combined, in whole or in part, with the announcement described in paragraph (a).

NOTE: The Commission intends, to the extent convenient, to adhere to the following schedule in organizing its weekly agenda: Closed meetings to consider matters concerning the enforcement of the federal securities laws and the conduct of related investigations will generally be held on Tuesdays and on Thursday afternoons. An open meeting will generally be held each Thursday morning to consider matters of any appropriate nature. On Wednesdays, either open or closed meetings, or both, will generally be held according to the requirements of the Commission's agenda for the week in question. Normally, no meetings will be scheduled on Mondays, Fridays, Saturdays, Sundays, or legal holidays.

The foregoing tentative general schedule is set forth for the guidance of the public, but is not, in any event, binding upon the Commission. In every case, the scheduling of Commission meetings shall be determined by the demands of Commission business, consistent with the requirements of this subpart I. When feasible, the Commission will endeavor to announce the subject matter of all then-contemplated open meetings during a particular month at least one week prior to the commencement of that month.

When and if convenient after the conclusion of a closed Commission meeting, the Commission will endeavor to make publicly available a notice describing (subject to the provision in §200.402(d) regarding nonpublic matter in announcements) the items considered at that meeting and any action taken thereon.

§200.404 General procedure for determination to close meeting.

(a) *Action to close meeting.* Action to close a meeting pursuant to §200.402(a) or (c) shall be taken only upon a vote of a majority of the entire membership of the Commission. A separate vote of the Commission members shall be taken with respect to each Commission meeting a portion or portions of which are proposed to be closed to the public pursuant to §200.402(a), or with respect to any information which is proposed to be withheld under §200.402(d); *Provided, however,* That a single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed, or with respect to any information concerning such series of meetings, so long as each meeting in such series relates to the same matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each Commission member participating in such vote shall be recorded and no proxies shall be allowed.

(b) *Announcement of action to close meeting.* Within one day of any vote pursuant to paragraph (a) of this section or §200.409(a) (relating to review of Commission determinations to open a meeting), the Commission shall make publicly available:

(1) A written record reflecting the vote of each participating member of the Commission on the question; and

(2) In the case of a meeting or portion thereof to be closed to the public, a written explanation of the Commission's action closing the meeting or a portion thereof, together with a list describing generically or specifically the persons expected to attend the meeting and their affiliation; and

(3) For every closed meeting, the certification executed by the Commission's General Counsel as described in §200.406.

§200.405 Special procedure for determination to close meeting.

(a) *Finding.* Based, in part, on a review of several months of its meetings, as well as the legislative history of the Sunshine Act, the Commission finds that a majority of its meetings may

properly be closed to the public pursuant to § 200.402(a) (4), (8), (9)(i), or (10), or any combination thereof.

(b) *Action to close meeting.* The Commission may, by recorded vote of a majority of its members at the commencement of any meeting or portion thereof, determine to close any meeting or a portion thereof properly subject to being closed pursuant to § 200.402(a) (4), (8), (9)(i), or (10), or any combination thereof. The procedure described in this rule may be utilized notwithstanding the fact that a meeting or portion thereof properly subject to being closed pursuant to § 200.402(a) (4), (8), (9)(i), or (10), or any combination thereof, could also be closed pursuant to § 200.402(a) (1), (2), (3), (5), (6), (7), or (9)(ii), or any combination thereof.

(c) *Announcement of action to close meeting.* In the case of a meeting or a portion of a meeting closed pursuant to this rule, as soon as practicable the Commission shall make publicly available:

(1) A written record reflecting the vote of each participating member of the Commission to close the meeting; and

(2) The certification described in § 200.406, executed by the Commission's General Counsel.

§ 200.406 Certification by the General Counsel.

For every Commission meeting closed pursuant to § 200.402(a) (1) through (10), the General Counsel of the Commission (or, in his or her absence, the attorney designated by General Counsel pursuant to § 200.21) shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision.

§ 200.407 Transcripts, minutes, and other documents concerning closed Commission meetings.

(a) *Record of closed meetings.* Except as provided in § 200.407(b), the Commission's Secretary shall prepare a complete transcript or electronic recording adequate to record fully the proceedings of each closed meeting, or closed portion of a meeting.

(b) *Minutes of closed meetings.* In the case of a meeting, or portion of a meeting, closed to the public pursuant to § 200.402(a) (8), (9)(i), or (10), the Secretary may, in his or her discretion or at the direction of the Commission, prepare either the transcript or recording described in § 200.407(a), or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each participating Commission member on the question). All documents specifically considered by the Commission in connection with any action shall be identified in such minutes are maintained.

(c) *Retention of certificate and statement.* The Secretary shall retain a copy of every certification executed by the General Counsel pursuant to § 200.406, together with a statement from the presiding officer of the meeting, or portion of a meeting to which the certification applies, setting forth the time and place of the meeting, and the persons present.

(d) *Minute Record.* Nothing herein shall affect the provisions of §§ 200.13a and 200.40 requiring the Secretary to prepare and maintain a Minute Record reflecting the official actions of the Commission.

§ 200.408 Public access to transcripts and minutes of closed Commission meetings; record retention.

(a) *Public access to record.* Within twenty days (excluding Saturdays, Sundays, and legal holidays) of the receipt by the Commission's Freedom of Information Act Officer of a written request, or within such extended period as may be agreeable to the person making the request, the Secretary shall make available for inspection by any person in the Commission's Public Reference Room, the transcript, electronic recording, or minutes (as required by § 200.407 (a) or (b)) of the discussion of any item on the agenda, except for such item or items as the Freedom of Information Act Officer determines to involve matters which may be withheld under § 200.402 or otherwise. Copies of such transcript, or minutes, or a transcription of such recording disclosing

the identity of each speaker, shall be furnished to any person at the actual cost of duplication, as set forth in §200.80e, and, if a transcript is prepared, the actual cost of such transcription.

(b) *Review of deletion from record.* Any person who has been notified that the Freedom of Information Act Officer has determined to withhold any transcript, recording, or minute, or portion thereof, which was the subject of a request for access pursuant to §200.402(a), or any person who has not received a response to his or her own request within the 20 days specified in §200.408(a), may appeal the adverse determination or failure to respond by applying for an order of the Commission determining and directing that the transcript, recording or minute, or deleted portion thereof, be made available. Such application shall be in writing and should be directed to the Secretary, Securities and Exchange Commission, Washington, DC 20549. The applicant shall state such facts and cite such legal or other authorities as the applicant may consider appropriate. The Commission shall make a determination with respect to any appeal pursuant to this subsection within 20 days (excepting Saturdays, Sundays and legal public holidays) after the receipt of such appeal, or within such extended period as may be agreeable to the person making the request. The Commission may determine to withhold any record that is exempt from disclosure pursuant to §200.402(a), although it may disclose a record, even if exempt, if, in its discretion, it determines it to be appropriate to do so.

(c) *Retention of record.* The Commission, by its Secretary, shall retain a complete verbatim copy of the transcript, or a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion was held, whichever occurs later.

§200.409 Administrative appeals.

(a) *Review of determination to open meeting.* Following any announcement stating that the Commission intends to open a meeting or a portion thereof, any person whose interests may be directly and substantially affected by the disposition of the matter to be discussed at such meeting may make a request, directed to the Commission's Secretary, that the meeting, or relevant portion thereof, be closed pursuant to §200.402(a) (5), (6), or (7). The Secretary shall circulate such a request to the members of the Commission, along with a supporting statement provided by the requestor setting forth the requestor's interest in the matter and the reasons why the requestor believes that the meeting (or portion thereof) should be closed, and the Commission, upon the request of any one of its members, shall vote by recorded vote on whether to close such meeting or portion.

(b) *Review of determination to close meeting.* Following any announcement that the Commission intends to close a meeting or a portion thereof, any person may make written or telegraphic request, directed to the Commission's Secretary, that the meeting or a portion thereof be open. Such a request shall set forth the requestor's interest in the matter and the reasons why the requestor believes that the meeting (or a portion thereof) should be open to the public. The Secretary shall circulate such a request and supporting statement to the members of the Commission, and the Commission, upon the request of any one of its members, shall vote whether to open such a meeting or a portion thereof.

§200.410 Miscellaneous.

(a) *Unauthorized activities; maintenance of decorum.* Nothing in this subpart shall authorize any member of the public to be heard at, or otherwise participate in, any Commission meeting, or to photograph or record by videotape or similar device any Commission meeting or portion thereof. The Commission may exclude any person from attendance at any meeting whenever necessary to preserve decorum, or where appropriate or necessary for

health or safety reasons, or where necessary to terminate behavior unauthorized by this paragraph (a). Any person desiring to sound-record an open Commission meeting shall notify the Commission's Secretary of his intention to do so at least 48 hours in advance of the meeting in question. Any person desiring to photograph or videotape the Commission's proceedings may apply to the Secretary for permission to do so at least 48 hours in advance of the meeting in question. The Commission's determination to permit photography or videotaping at any meeting is confined to its exclusive discretion, and will be granted only if such activities will not result in undue disruption of Commission proceedings.

(b) *Suspension of open meeting.* Subject to the satisfaction of any procedural requirements which may be required by this subpart, nothing in this subpart shall preclude the Commission from directing that the room be cleared of spectators, temporarily or permanently, whenever it appears that the discussion during an open Commission meeting is likely to involve any matter described in § 200.402(a) (respecting closed meetings).

(c) *Access to Commission documents.* Except as expressly provided, nothing in this subpart shall authorize any person to obtain access to any document not otherwise available to the public or not required to be disclosed pursuant to subpart D. Access to documents considered or mentioned at Commission meetings may only be obtained subject to the procedures set forth in, and the provisions of, subpart D.

(d) *Access to public meetings.* Any member of the public who plans to attend a public meeting of the Commission, and who requires an auxiliary aid such as a sign language interpreter, should contact the Commission's Selective Placement Coordinator, Office of Personnel at (202) 272–7065 or TDD number (202) 272–2552, prior to the meeting to make the necessary arrangements. The Selective Placement Coordinator will take all reasonable steps to accommodate requests made in advance of the scheduled meeting date.

[42 FR 14693, Mar. 16, 1977, as amended at 44 FR 32366, June 6, 1979; 55 FR 10235, Mar. 20, 1990]

Subpart J—Classification and Declassification of National Security Information and Material

AUTHORITY: Sec. 19, Securities Act of 1933, as amended, 48 Stat. 84, 15 U.S.C. 77s. E.O. 12356, 47 FR 14874, Apr. 6, 1982. Information Security Oversight Office Directive No. 1 (47 FR 27836, June 25, 1982).

SOURCE: 44 FR 65737, Nov. 15, 1979, unless otherwise noted.

§ 200.500 Purpose.

This part establishes general policies and procedures for the classification, declassification and safeguarding of national security information which is generated, processed and/or stored by the Commission, and supplements Executive Order 12356, April 6, 1982 (47 FR 14874), and Information Security Oversight Office Directive No. 1, June 25, 1982 (47 FR 27836).

[47 FR 47236, Oct. 25, 1982]

§ 200.501 Applicability.

This part applies to the handling of, and public access to, national security information and classified documents in the Commission's possession. Such documents no longer in the Commission's possession will be handled by the agency having possession, or in accordance with guidelines developed in consultation with the Archivist.

§ 200.502 Definition.

As used in this part: *Foreign government information* means either (a) information provided to the United States by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, express or implied, that the information, the source of the information, or both, are to be held in confidence, or (b) information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments or an international organization of governments or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence.

[47 FR 47236, Oct. 25, 1982]

§ 200.503 Senior agency official.

The Executive Director of the Commission is designated the senior agency official responsible for conducting an oversight program to ensure effective implementation of Executive Order 12356. Any complaints or suggestions regarding the Commission's information security program should be directed to the Office of the Executive Director, Securities and Exchange Commission, Attn: Information Security Program, 450 5th Street, NW., Washington, DC 20549.

(a) The Deputy Executive Director is the Senior Agency Official for purposes of the Paperwork Reduction Act of 1980. In this capacity, the Deputy Executive Director will carry out all responsibilities required by the Act (Pub. L. 96–511, 3506(b)), as well as serving as *Agency Clearance Officer* for purposes of the publication of notices in the FEDERAL REGISTER.

(b) [Reserved]

(11 U.S.C. 901, 1109(a))

[47 FR 47236, Oct. 25, 1982, as amended at 49 FR 12686, Mar. 30, 1984; 51 FR 5315, Feb. 13, 1986]

§ 200.504 Oversight Committee.

An Oversight Committee is established, under the chairmanship of the Executive Director, with the following responsibilities:

(a) Establish a security education program to familiarize Commission and other personnel who have access to classified information with the provisions of Executive Order 12065, and encourage Commission personnel to challenge those classification decisions they believe to be improper.

(b) Establish controls to insure that classified information is used, processed, stored, reproduced, and transitted only under conditions that will provide adequate protection and prevent access by unauthorized persons.

(c) Establish procedures which require that a demonstrable need, under section 4–1 of Executive Order 12065, for access to classified information be established before administrative clearance procedures are initiated, as well as other appropriate procedures to prevent unnecessary access to classified information.

(d) Act on all suggestions and complaints concerning Commission administration of its information security program.

(e) Establish procedures within the Commission to insure the orderly and effective referral of requests for declassification of documents in the Commission's possession.

(f) Review on an annual basis all practices for safeguarding information and to eliminate those practices which are duplicative or unnecessary.

(g) Recommend to the Chairman of the Commission appropriate administrative action to correct abuse or violation of any provision of Executive Order 12356.

(h) Consider and decide other questions concerning classification and declassification that may be brought before it.

(i) Develop special contingency plans for the protection of classified information used in or near hostile or potentially hostile areas.

(j) Promptly notify the Director of the Information Security Oversight Office whenever an officer or employee of the United States Government or its contractors, licensees or grantees knowingly, willfully or negligently (1) discloses to unauthorized persons information properly classified under Executive Order 12356 or predecessor orders or (2) classifies or continues the classification of information in violation of Executive Order 12356 or predecessor orders.

[44 FR 65737, Nov. 15, 1979, as amended at 47 FR 47236, Oct. 25, 1982; 51 FR 5315, Feb. 13, 1986]

§ 200.505 Original classification.

(a) No Commission Member or employee has the authority to classify any information on an original basis.

(b) If a Commission employee originates information that appears to require classification, the employee shall immediately notify the Secretary and protect the information accordingly.

(c) If the Executive Director believes the information warrants classification, it shall be sent to an agency with original classification authority over

the subject matter, or to the information Security Oversight Office, for determination.

[44 FR 65737, Nov. 15, 1979, as amended at 51 FR 5315, Feb. 13, 1986]

§ 200.506 Derivative classification.

Any document that includes paraphrases, restatements, or summaries of, or incorporates in new form, information that is already classified shall be assigned the same level of classification as the source; if, however, the basic information appears to have been so changed that no classification, or a lower classification than originally assigned, should be used, the appropriate official of the originating agency or office of origin who has the authority to upgrade, downgrade or declassify the information must be consulted prior to assigning a different classification to the information.

[47 FR 47236, Oct. 25, 1982]

§ 200.507 Declassification dates on derivative documents.

(a) A document that derives its classification from information classified under Executive Order 12356 of predecessor orders shall be marked with the date or event assigned to that source information for its automatic declassification or for review of its continued need for classification.

(b) A derivative document that derives its classification from the approved use of the classification guide of another agency shall bear the declassification date required by the provisions of that classification guide.

[47 FR 47236, Oct. 25, 1982]

§ 200.508 Requests for mandatory review for declassification.

(a) Requests for mandatory review of a Commission document for declassification may be made by any United States citizen or permanent resident alien, including Commission employees, or a Federal agency, or a State or local government. The request shall be in writing and shall be sent to the Office of the Executive Director, Attn: Mandatory Review Request, Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549.

(b) The request shall describe the material sufficiently to enable the Commission to locate it. Requests with insufficient description of the material will be returned to the requester for further information.

(c) Within 5 days of receiving a request for declassification, the Commission shall acknowledge its receipt. If the document was derivatively classified by the Commission or originally classified by another agency, the request and the document shall be forwarded promptly to the agency with original classification authority together with the Commission's recommendation to withhold any of the information where appropriate. The requester shall be notified of the referral.

(d) If the request requires the provision of services by the Commission, fair and equitable fees may be charged under title 5 of the Independent Offices Appropriation Act, 65 Stat. 290, 31 U.S.C. 483a.

[44 FR 65737, Nov. 15, 1979, as amended at 47 FR 47237, Oct. 25, 1982; 51 FR 5315, Feb. 13, 1986]

§ 200.509 Challenge to classification by Commission employees.

Commission employees who have reasonable cause to believe that information is classified unnecessarily, improperly, or for an inappropriate period of time, may challenge those classification decisions through mandatory review or other appropriate procedures as established by the Oversight Committee. Commission employees who challenge classification decisions may request that their identity not be disclosed.

§ 200.510 Access by historical researchers.

(a) Persons outside the executive branch performing historical research may have access to information over which the Commission has classification jurisdiction for the period requested (but not longer than 2 years unless renewed for an additional period of less than 2 years) if the Executive Director determines in writing that access to the information will be consistent with the interests of national security.

(b) The person seeking access to classified information must agree in writing:

(1) To be subject to a national agency check;

(2) To protect the classified information in accordance with the provisions of Executive Order 12356; and

(3) Not to publish or otherwise reveal to unauthorized persons any classified information.

[44 FR 65737, Nov. 15, 1979, as amended at 47 FR 47237, Oct. 25, 1982; 51 FR 5315, Feb. 13, 1986]

§ 200.511 Access by former Presidential appointees.

(a) Former Commission Members appointed by the President may have access to classified information or documents over which the Commission has jurisdiction that they originated, reviewed, signed, or received while in public office, if the Executive Director determines in writing that access to the information will be consistent with the interest of nation security.

(b) The person seeking access to classified information must agree in writing:

(1) To be subject to a national agency check;

(2) To protect the classified information in accordance with the provisions of Executive Order 12356; and

(3) Not to publish or otherwise reveal to unauthorized persons any classified information.

[44 FR 65737, Nov. 15, 1979, as amended at 47 FR 47237, Oct. 25, 1982; 51 FR 5315, Feb. 13, 1986]

Subpart K—Regulations Pertaining to the Protection of the Environment

AUTHORITY: 15 U.S.C. 78w(a)(2).

SOURCE: 44 FR 41177, July 16, 1979, unless otherwise noted.

§ 200.550 Purpose.

This subpart sets forth the procedures the Commission will follow to ensure compliance with the goals of the National Environmental Policy Act (*NEPA*) and with the procedures required by NEPA in the event that the Commission should take action subject to such procedural requirements.

§ 200.551 Applicability.

(a) Compliance with the procedures set forth in §§ 200.552 through 200.554 shall be appropriate where Commission action taken with respect to security transactions subject to sections 6(b) and 7 of the Public Utility Holding Company Act of 1935 and acquisitions subject to sections 9 and 10 of that Act involves major Federal action significantly affecting the quality of the human environment.

(b) In addition to the foregoing, in the event of extraordinary circumstances in which a Commission action not specified in paragraph (a) of this section may involve major Federal action significantly affecting the quality of the human environment, the Commission shall follow the procedures set forth in §§ 200.552 through 200.554, unless doing so would be inconsistent with its statutory authority under the Federal securities laws.

§ 200.552 NEPA planning.

Where it is reasonably foreseeable by the Commission that it may be required to act on a matter specified in § 200.551 and that matter is likely to involve major Federal action significantly affecting the quality of the human environment, the Commission shall:

(a) Advise the relevant persons as to information respecting the environment, if any, which may later be required to be submitted for Commission consideration should Commission action become necessary;

(b) Consult on any environmental factors involved with individuals, organizations, and state and local authorities interested in the planned action; and

(c) Begin implementing the procedures set forth in §§ 200.553 and 200.554 as soon as possible, *Provided*, That such procedures are not inconsistent with the Commission's authority under the Federal securities laws.

§ 200.553 Draft, final and supplemental impact statements.

If the Commission determines that the requirements of section 102(2)(C) of

NEPA for preparation of an environmental impact statement are applicable in connection with a proposed Commission action, it shall prepare such statement generally in accordance with the procedures specified in 40 CFR parts 1500–1508, particularly part 1502 concerning impact statement preparation and content, § 1505.1 concerning decision-making procedures, and § 1501.6 concerning the function of cooperating agencies, to the extent that such procedures do not conflict with the Commission's statutory responsibilities and authority under the Federal securities laws.

§ 200.554 Public availability of information.

(a) Any environmental assessment or impact statement, and Commission responses pertaining to formal rulemaking proceedings or adjudicatory proceedings, shall be made part of the record in any such proceedings. In the case of formal adjudicatory proceedings, this shall be done in accordance with Rule 460 of the Commission's Rules of Practice, § 201.460 of this chapter. In the case of formal rulemaking proceedings, this shall be done in accordance with the Commission's rules respecting such proceedings.

(b) The location of publicly available environmental impact statements will be 450 Fifth Street, NW., Room 1024, Washington, DC

(c) Interested persons may obtain information regarding and status reports on specific environmental impact statements and environmental assessments by contacting the division or office within the Commission which has responsibility for the particular proposed action.

[44 FR 41177, July 16, 1979, as amended at 47 FR 26819, June 22, 1982; 60 FR 32795, June 23, 1995]

Subpart L—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Securities and Exchange Commission

AUTHORITY: 29 U.S.C. 794.

SOURCE: 53 FR 25885, July 8, 1988, unless otherwise noted.

§ 200.601 Purpose.

The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 200.602 Application.

This regulation (§§ 200.601–200.670) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 200.603 Definitions.

For purposes of this regulation, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf

of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this regulation by § 200.640.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of

1978 (Pub. L. 95–602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810). As used in this regulation, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 200.604–200.609 [Reserved]

§ 200.610 Self-evaluation.

(a) The agency shall, by September 6, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this regulation and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 200.611 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 200.612–200.629 [Reserved]

§ 200.630 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this regulation.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 200.631–200.639 [Reserved]

§ 200.640 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§ 200.641–200.648 [Reserved]

§ 200.649 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 200.650, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 200.650 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would

result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 200.650(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 200.650(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of § 200.650(a) (2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by November 7, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by September 6, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 6, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 200.651 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 200.652–200.659 [Reserved]

§ 200.660 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 200.660 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 200.661–200.669 [Reserved]

§ 200.670 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Equal Employment Opportunity Manager shall be responsible for coordinating implementation of this section. Complaints may be sent to the EEO Manager, 450 Fifth Street NW., Washington, DC 20549.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete

complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §200.670(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[53 FR 25882 and 25885, July 8, 1988, as amended at 53 FR 25882, July 8, 1988]

§§ 200.671–200.699 [Reserved]

Subpart M—Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission

AUTHORITY: 15 U.S.C. 77s, 78w, 79t, 77sss, 80a–37, 80b–11; E.O. 11222, 3 CFR, 1964–1965 Comp.; 5 CFR 735.104 unless otherwise noted.

SOURCE: 45 FR 36064, May 29, 1980, unless otherwise noted.

§200.735–1 Purpose.

This subpart sets forth the standards of ethical conduct required of members, employees and special Government employees, and former members and employees of the Securities and Exchange Commission. It is a further revision of a comprehensive conduct regulation first adopted by the Commission in 1953 ''to restate the ethical principles which it believes should govern and have governed the conduct of members and employees and former members and employees of the Commission.''[1] This revision is necessary to provide members, employees, special Government employees and former Commission members and employees with a comprehensive statement of standards of conduct which are dictated by applicable Federal law, Executive orders, and the Commission's own requirements.

§200.735–2 Policy.

(a) The Securities and Exchange Commission has been entrusted by

[1] The last major revision of the Conduct Regulation was done in 1966 to implement Executive Order 11222, May 8, 1965, and part 735 of the Civil Service Commission regulations (5 CFR part 735) adopted pursuant thereto. It also contains references to the several applicable statutes governing employee conduct, particularly Pub. L. 87–849 (76 Stat. 1119, 18 U.S.C. 201 *et seq.*), and the ''Code of Ethics for Government Service,'' House Concurrent Resolution 175, 85th Congress, 2d session (72 Stat. B 12).

Congress with the protection of the public interest in a highly significant area of our national economy. In view of the effect which Commission action frequently has on the general public, it is important that members, employees and special Government employees maintain unusually high standards of honesty, integrity, impartiality and conduct. They must be constantly aware of the need to avoid situations which might result either in actual or apparent misconduct or conflicts of interest and to conduct themselves in their official relationships in a manner which commands the respect and confidence of their fellow citizens.

(b) For these reasons, members, employees and special Government employees should at all times abide by the standards of conduct set forth in this subpart, the canons of ethics for members of the Securities and Exchange Commission (subpart C of this part 200) and, in the case of a professional person, the ethical standards applicable to the profession of such person.

§ 200.735–3 General provisions.

(a)(1) In considering the prohibitions of this section, members and employees must constantly be aware that the provisions here enumerated set forth standards of conduct which are broader than the specific applications stated in the rules which follow. Therefore, members and employees should look to these general prohibitions when assessing the advisability of a particular course of conduct. The broadly stated provisions of this rule are aimed at eliminating the appearance of impropriety as well as any actual wrongdoing.

(2) Accordingly, a member or employee should avoid any action, whether or not specifically prohibited by law or regulation (including the provisions of this subpart), which would result in or might create appearance of, among other things:

(i) Using public office for private gain;

(ii) Giving preferential treatment to any organization or person;

(iii) Losing complete independence or impartiality;

(iv) Making a Government decision outside official channels; or

(v) Affecting adversely the confidence of the public in the integrity of the Government.

(3) While provisions applicable to all employees of the Commission are outlined in this regulation, certain Offices or Divisions for management reasons may require more stringent regulations in certain areas. These may be imposed by Division Directors, Office Heads or Regional Administrators with the consent of the Chairman and the approval of the Office of Government Ethics. Should such additional regulations be imposed, all employees affected must be notified ten days before the effective date of the restriction or at the time of their employment.

(b) A member or employee of the Commission shall not:

(1) Engage, directly or indirectly, in any personal business transaction or private arrangement for personal profit the opportunity for which arises because of his or her official position or authority, or that is based upon confidential or nonpublic information which he or she gains by reason of such position or authority.[2]

(2) Solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, service, or any other

[2] Detailed provisions regarding outside or private employment and transactions in securities and commodities are set forth in §§ 200.735–4 and 200.735–5, respectively. Further provisions regarding use and disclosure of confidential information are set forth in paragraph (b) of this section and in the note appended thereto.

Members of the Commission are subject also to the following prohibition in section 4(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78d(a)): ''* * * No Commissioner shall engage in any other business, vocation, or employment than that of serving as Commissioner, nor shall any Commissioner participate, directly or indirectly, in any stock market operations or transactions of a character subject to regulation by the Commission pursuant to this title * * *.'' This does not preclude Commissioners from engaging in securities transactions. *See* Opinion letter dated February 11, 1975, sent by the Office of the General Counsel to David Reich, Ethics Counselor at the Civil Service Commission. In addition, members of the Commission are subject to the requirements of Executive Order 11222 of May 8, 1965.

thing of monetary value from any person with whom he or she transacts business on behalf of the United States:

(i) Who has, or is seeking to obtain, contractual or other business or financial relations with the Commission;

(ii) Who conducts operations or activities regulated by the Commission; or

(iii) Who has interests that may be substantially affected by the performance or non-performance of his or her official duty.

(3) The restrictions of paragraph (b)(2) of this section do not prohibit members and employees from the following:

(i) The acceptance of food and refreshments, not lavish in kind, offered free in the course of a meeting or other group function, not connected with an inspection or investigation, at which attendance is desirable because it will assist the member or employee in performing his or her official duties. Members shall determine for themselves and their staffs the propriety of accepting such invitations. Division Directors, Office Heads, and Regional Administrators are authorized to make such determinations for themselves and their subordinates. Staff members are required to advise their Division Director, Office Head, or Regional Administrator of invitations received from entities described in paragraph (b)(2) of this section.

(ii) The acceptance of items of value when the circumstances make it clear that it is family or personal relationships rather than the business of the persons concerned which govern and are the motivating factors.

(iii) The acceptance of unsolicited advertising or promotional material, such as pens, pencils, notepads, calendars and other items of modest value.

(iv) The acceptance of meals and refreshments as provided to all panelists, when participating as a panelist in an educational program.

(v) The acceptance of gifts given for participation in an educational program when they are (A) of modest value; or (B) provided to all participants in the program; or (C) in the nature of a remembrance traditional to the particular sponsor institution.

(vi) For purposes of this subpart, *person* means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company; or any other organization or institution or anyone who acts for such a person in a representative capacity.[3]

(4) Solicit contributions from another employee for a gift to an employee in a superior official position. An employee in a superior official position shall not accept a gift presented as a contribution from employees receiving less salary than himself or herself. An employee shall not make a donation as a gift to an employee in a superior official position (5 U.S.C. 7351). However, this paragraph does not prohibit the occasional giving of gifts of modest value to an employee in a superior position or the receipt of such gifts by a superior or the use of completely voluntary contributions of nominal amounts by employees within the Commission to establish funds for the limited purpose of providing token remembrances or gifts of modest value to an employee in a superior position on special occasions.

(5) Accept from a foreign government a gift, decoration or other thing of more than minimal value except in accordance with the provisions of 5 U.S.C. 7342.

(6) Discuss or entertain a proposal for future employment by any person outside the Government with whom he or

[3] Members and employees of the Commission are subject also to provisions of the Federal criminal code which prohibit, (1) any officer or employee of the United States from asking, accepting or receiving any money or other thing of value in connection with any matter before him or her in his or her official capacity, (18 U.S.C. 203); and (2) the compensation of government employees for services to the government by entities other than the United States (18 U.S.C. 209). In addition, members are prohibited by 5 CFR 735.203(c) from receiving compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Commission or which draws substantially on official data or ideas which have not become part of the body of public information. *See also* 17 CFR 200.735–4.

she is personally and substantially involved in transacting business on behalf of the United States.%thnsp;[4]

(i) If an employee wishes to discuss future employment with another Government agency, this fact should be disclosed to the employee's Division Director, Office Head or Regional Administrator prior to any discussion regarding employment, if at that time the employee is representing the Commission in a particular matter in which the other agency is taking a position adverse to the Commission.

(7)(i) Divulge to any unauthorized person or release in advance of authorization for its release[5] any nonpublic Commission document, or any information contained in any such document or any confidential information: (A) In contravention of the rules and regulations of the Commission promulgated under 5 U.S.C. 552, 552a and 552b; or (B) in circumstances where the Commission has determined to accord such information confidential treatment.

(ii) Except where the Commission or the General Counsel, pursuant to delegated authority, has previously granted approval or in relation to a Commission administrative proceeding or a judicial proceeding in which the Commission, or a present or former Commissioner, or present or former member of the staff, represented by Commission counsel, is a party, any officer, employee or former officer or employee who is served with a subpoena requiring the disclosure of confidential or non-public information or documents shall, unless the Commission or the General Counsel, pursuant to delegated authority, authorizes the disclosure of such information or documents, respectfully decline to disclose the information or produce the documents called for, basing his or her refusal on this paragraph.

(iii) Any member, employee or former member or employee who is served with such a subpoena not covered by the exceptions in paragraph (b)(7)(ii) of this section shall promptly advise the General Counsel of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear upon the desirability in the public interest of making available such information or documents.[6] The Commission or the General Counsel, pursuant to delegated authority, shall authorize the disclosure of non-expert, non-privileged, factual staff testimony and the production of non-privileged documents when validly subpoenaed.

(8) Act in any official matter with respect to which there exists a personal interest incompatible with an unbiased exercise of official judgment.[7]

(9) Have direct or indirect personal, business or financial affairs which conflict or appear to conflict with his or her official duties and responsibilities.

(10)(i) Use, or allow the use of, directly or indirectly, Government property of any kind, including property leased to the Government, for other than officially approved activities. *Officially approved activities* for the purpose of this section are those activities which are part of an employee's official duties or are approved by the employee's Division Director, Office Head or

[4] Detailed provisions regarding negotiations for future employment are set forth in § 200.735–7.

[5] In Section 171 of the Commission's Manual of Administrative Regulations the Commission's policy on making available nonpublic information to Federal, State and foreign government authorities, national securities exchanges and national securities associations is outlined.

[6] Detailed prohibitions regarding disclosure or use of confidential or nonpublic information are set forth in Rule 122 (17 CFR 230.122) under the Securities Act of 1933; section 24(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78x) and Rule 0–4 (17 CFR 240.0–4); and Rule 24(b)(2) (17 CFR 240.24b–2), thereunder; section 22(c) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79y) and Rule 104 thereunder (17 CFR 250.104); section 45(a)(1) of the Investment Company Act, and section 210(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–10). *But see*, section 171 of the Administrative Manual which authorizes the staff to divulge certain nonpublic information without Commission approval (n. 5, *supra*).

[7] Section 200.735–6 of this subpart provides a procedure for relieving employees from assignments in certain cases, including those covered by paragraph (b)(5) of this section.

Regional Administrator as being sufficiently related to the employee's official duties, or important to the interests of the Commission to warrant the use of Commission facilities for their accomplishment. Division Directors, Office Heads and Regional Administrators may, for their own activities meeting the same criteria, obtain the concurrence of the Executive Director.

(ii) An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him or her.

(11) Participate, while on Government-owned or leased property or while on duty for the Government, in any gambling activity, including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket.

(12) Engage in unlawful or unethical conduct, or other conduct prejudicial to the Government.

[45 FR 36064, May 29, 1980; 45 FR 40975, June 17, 1980, as amended at 50 FR 23287, June 3, 1985; 53 FR 17458, May 17, 1988; 54 FR 33500, Aug. 15, 1989]

§ 200.735–4 Outside employment and activities.

(a) No member or employee shall permit his or her name to be associated in any way with any legal, accounting or other professional firm or office.[8]

(b)(1) No employee shall have any outside or private employment, activity, or affiliation incompatible with concurrent employment by the Commission. Incompatible activities include but are not limited to

(i) Employment or association with any securities exchange, association of securities dealers, or other self-regulatory organization either registered under the Securities Exchange Act of 1934 or otherwise involved with the securities industry, any registered broker, dealer, registered municipal securities dealer, public utility holding company, investment company, investment adviser, securities information processor, transfer agent, clearing agency or other persons who are subject to regulation by the Commission, or where the facts relating to a particular employment would create an appearance of impropriety, because the employment is directly or indirectly related to the issuance, sale, purchase or investment of securities;

(ii) Legal, accounting, or engineering work for compensation involving matters in which the Federal government may be significantly interested;

(iii) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in or create the appearance of conflicts of interest;

(iv) Outside employment or activity which impairs the employee's mental or physical capacity to perform his or her Commission duties and responsibilities in an acceptable manner;

(2) For the purposes of this paragraph (b), the private employment of an employee's spouse, or other member of his or her immediate household with any securities exchange, association of securities dealers, or other self-regulatory organization either registered under the Securities Exchange Act of 1934 or otherwise involved in the securities industry, any registered broker, dealer, registered municipal securities dealer, public utility holding company, investment company, investment adviser, securities information processor, transfer agent, clearing agency or other persons who are subject to regulation by the Commission, or where the particular employment is directly related to the issuance, sale, purchase or investment of securities is deemed to be incompatible with the employee's concurrent employment by the Commission if the duties and activities incident to such employment relate directly to the official activities of the Commission employee, except as determined otherwise by the Commission in a specific case.

(i) *Member of his or her immediate household* is defined for the purposes of

[8] With respect to members, this paragraph supplements the statutory prohibition against outside employment contained in section 4(a) of the Securities Exchange Act of 1934, quoted in footnote 2. Except as otherwise indicated, the remaining provisions of this section are not made applicable to members in view of the provisions of section 4(a) of the Securities Exchange Act of 1934.

this paragraph as a resident of the employee's household who is related to the employee by blood or marriage.

(3) No employee shall accept or perform outside employment prohibited by law, regulations of the Office of Personnel Management or the rules in this subpart.

(4) No employee shall receive any salary or anything of monetary value from a private source as compensation for his or her services to the Government (18 U.S.C. 209), except as otherwise provided by law.

(5) The Commission encourages employees to engage in teaching, lecturing, and writing activities with or without compensation.[9] In participating in such activities, employees should be guided by the following:

(i) No teaching, lecturing, or writing should be engaged in if prohibited by law, Executive order, Office of Personnel Management regulations, or the rules in this subpart.

(ii) No teaching, lecturing, or writing should be engaged in (including for the purpose of the special preparation of a person or class of persons for an examination of the Office of Personnel Management or Board of Examiners for the Foreign Service) that depends on information filed with the Commission, or obtained by the Commission in an investigation or otherwise, or generated within the Commission which is nonpublic, unless the Commission gives formal approval for the use of such nonpublic information on the basis that the use thereof is in the public interest.[10]

(6)(i) Subject to the specific prohibition and requirements set forth below, the Commission may accept payment or reimbursement in cash or in kind, for travel and subsistence expenses actually incurred by Commission members and employees, while on official duty status, in connection with the participation of such members and employees in conferences, proceedings, meetings, seminars, and educational programs concerning the functions and responsibilities of the Commission and related topics.

(ii)(A) The Commission shall accept no payment or reimbursement for expenses described in paragraph (b)(6)(i) of this section from or in connection with a conference sponsored by:

(*1*) A person directly required to file reports or registration statements with the Commission, or

(*2*) A person directly or indirectly regulated by the Commission, or

(*3*) Any association or other group composed predominantly of persons regulated by the Commission, *Provided, however,* That the Chairman may authorize the Commission to accept payment or reimbursement from such a group. In determining whether to authorize such payment or reimbursement, the Chairman shall consider the benefits to the Commission and the public of participation in the particular program and the possibility of any appearance of impropriety.

(B) For purposes of this section, the phrase *person regulated by the Commission* means all persons whose activities are directly regulated by, or who are required to register with, the Commission, including but not limited to, such persons as brokers or dealers in securities, national securities exchanges, national securities associations, investment companies, investment advisers, public utility holding companies, and any self-regulatory organization, as that term is defined in section 3 of the Securities Exchange Act of 1934, 15 U.S.C. 78(c).

(iii)(A) Subordinate members of the staff who are invited to participate in programs which offer payment or reimbursement meeting the criteria of paragraph (b)(6)(i) of this section must, prior to participation, obtain the written approval of their Division Director, Office Head, or Regional Administrator to participate in the program and the

[9] As to employees, while the receipt of honoraria is discouraged (*See* 17 CFR 200.735–4(b)(7)), that rule is not applicable to the receipt of compensation for teaching.

[10] Since members of the Commission are covered by section 401(a) of Executive Order 11222, they are prohibited by Civil Service Regulations (5 CFR 735.203(c)) from receiving compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of their agencies, or which draws substantially on official data or ideas which have not become part of the body of public information.

[11] [Reserved]

written approval of the Chairman, if paragraph (b)(6)(ii)(A)(*3*) of this section applies. If paragraph (b)(6)(ii)(A)(*3*) of this section does not apply, the Executive Director shall determine in writing whether the Commission will accept the payment or reimbursement.

(*1*) In acting on requests to participate, Division Directors, Office Heads, and Regional Administrators shall consider: (*i*) The benefit to the Commission and the public of participation; (*ii*) the expertise of the proposed participant; and (*iii*) the appropriate allocation of resources.

(*2*) In determining whether the Commission shall accept payment or reimbursement, the Executive Director shall consider the possibility of any appearance of impropriety.

(B) Division Directors, Office Heads, and Regional Administrators must, prior to participation, obtain the written approval of the Chairman, if paragraph (b)(6)(ii)(A)(*3*) of this section applies. If paragraph (b)(6)(ii)(A)(*3*) of this section does not apply, the Executive Director shall determine, in writing, considering the possibility of any appearance of impropriety, whether the Commission will accept the payment or reimbursement. Division Directors, Office Heads, and Regional Administrators shall make the determinations specified in paragraph (b)(6)(iii)(A)(*1*) of this section as to their own participation.

(C) Except if paragraph (b)(6)(ii)(A)(*3*) of this section applies, each Commissioner shall determine for himself or herself whether payment or reimbursement for his or her expenses incident to participation in programs meeting the criteria of paragraph (b)(6)(i) of this section should be accepted by the Commission. Notice of each decision shall be sent to the Executive Director.

(D) Whenever it is determined, pursuant to paragraphs (b)(6)(iii) (A), (B), or (C) of this section that the Commission will accept a particular payment or reimbursement, the Executive Director shall forward notice of that decision to the Public Reference Room, Washington, DC, for insertion in a public file.

(iv) Payment or reimbursement shall not be accepted for expenses which are unreasonable or lavish.

(v) On a quarterly basis, the Commission shall publish in the *SEC Docket* a compilation of payments and reimbursements accepted.

(vi) The Commission's acceptance from any person of payment or reimbursement for the expenses of a spouse or traveling companion accompanying a member or employee is prohibited. If a staff member wishes to participate in a program which offers payment or reimbursement meeting the criteria of paragraph (b)(6)(i) of this section and acceptance would not be prohibited by paragraph (b)(6)(ii) of this section, but is denied approval in accordance with paragraphs (b)(6)(iii)(A) or (B) of this section, or wishes to accept reimbursement for the travel expenses of his or her spouse or traveling companion, the staff member may participate in the program and accept such reimbursement personally, *Provided,* That:

(A) No reimbursement for travel expenses may be accepted from a person who does, or is seeking to do, business with the Commission, is regulated directly or indirectly by the Commission, is registered with the Commission, or has interests which may be substantially affected by the official's performance or non-performance of his or her official duties.

(B) No reimbursement may be accepted for the travel expenses of an employee's spouse or traveling companion unless the prior written approval of the General Counsel is obtained. Under appropriate circumstances, such as programs where participants are expected to engage in social activities, the General Counsel may approve acceptance upon written application.

(C) A copy of the General Counsel's approval and notice of the amount of payment or reimbursement accepted from the sponsor must be sent to the Executive Director for inclusion in the public file in accordance with paragraph (b)(6)(iii)(D) of this section.

(D) Such staff member's participation and travel occur only while on annual leave, approved in accord with regular leave procedures. *Note* 7 CFR 200.735–4(e)(2)(ii).

(vii) Members or employees who are participating in a program meeting the criteria of paragraph (b)(6)(i) of this section, which is sponsored by a person

determined by the Secretary of the Treasury to be a tax-exempt organization pursuant to 26 U.S.C. 501(c)(3), and for which reimbursement for the member's or employee's participation will be accepted by the Commission, may, while on official duty, accept from the sponsoring entity *bona fide* reimbursement for actual expenses for travel and necessary subsistence for a spouse or traveling companion *Provided* that the procedures detailed in paragraphs (d)(6)(vi) (A)–(C) of this section are followed.

(7) The provisions of this paragraph (b) and § 200.735–3(b)(2) do not preclude a member or employee from:

(i) Participation in the activities of national or State political parties not proscribed by law;

(ii) Participation in the affairs of, or acceptance of an award for a meritorious public contribution or achievement given by, a charitable, religious, professional, social, fraternal, nonprofit educational, recreational, public service, or civic organization.

(8)(i) As a matter of general policy, the Commission discourages the acceptance of honoraria or similar fees and payments which are given for publications, speeches or lectures based on the official duties of the employee. In accord with this policy, no member or employee may accept such an honorarium unless written approval is obtained in advance from the Commission's General Counsel, subject to the general review of the Commission. Requests for such approval should be submitted to the General Counsel in writing and should include a statement in support of the request.

(ii) Honoraria which are most likely to be deemed acceptable are those which appear to be remuneration for teaching. An employee may not, under any circumstances, accept an honorarium from any person from whom reimbursement for travel expenses is prohibited by paragraph (b)(6)(ii) of this section. In any event an employee may not accept an excessive honorarium as described in 2 U.S.C. 441(i). This section does not preclude the acceptance of a modest gift for participation as a speaker, as provided in Rule 3.

(c) No employee shall appear in court or on a brief in a representative capacity (with or without compensation) or otherwise accept or perform legal, accounting, engineering, or similar professional work, unless specifically authorized to do so by the Commission. Acceptance of a forwarding fee shall be deemed to be within the foregoing prohibition. As a matter of general policy, outside or private professional work or practice by the staff is discouraged and only in unusual cases or circumstances will it be authorized. However, the Commission encourages its employees, in off-duty hours and consistent with official responsibilities, to participate, without compensation, in programs to provide legal or other appropriate assistance and representation to indigents.[12] Such participation may include limited appearances in court and on briefs when required in connection with such programs. However, such participation may not involve any activities which are prohibited by law, Executive orders, Office of Personnel Management regulations, or this subpart M.[13] For example, 18 U.S.C. 205 prohibits a Federal employee from appearing in court in a matter in which the United States has an interest

[12] As a matter of policy, the Commission encourages members of its staff to participate in matters involving improvement to their communities and service to indigent persons, provided that the necessary approval is obtained in advance. However, in no case will approval be given to participate in matters involving securities.

[13] Attention is called to Title 18, United States Code, sections 201 through 209 which provide, among other things, that Federal employees are prohibited from acting as agent or attorney in prosecuting any claim against the United States or from aiding and assisting in any way, except as otherwise permitted in the discharge of official duties, in the prosecution or support of any such claim, or from receiving any gratuity, or any share of an interest in any claim from any claimant against the United States; and from directly or indirectly receiving or agreeing to receive any compensation whatever for services rendered or to be rendered to any persons in relation to any matter in which the United States is a party or directly or indirectly interested. 18 U.S.C. 205 contains an exception from the foregoing restrictions for acting as agent or attorney, without compensation, for government employees who are the subject of disciplinary, loyalty or other personnel-type proceedings, in connection with these proceedings.

(other than on behalf of the United States), without regard to compensation.

(1) The provisions of this paragraph (c) and § 200.735–3(b)(2) do not preclude an employee from:

(i) Acting without compensation as agent or attorney (A) for a Commission employee who is sued or is under investigation in connection with his or her official duties; (B) for any Commission employee who is the subject of disciplinary, loyalty or other personnel administrative proceedings in connection with those proceedings; or (C) for any Commission employee who raises claims or against whom allegations of wrongdoing are made pursuant to the Commission's Equal Opportunity regulations, if such representation is not inconsistent with the faithful performance of the employee's duties.[14]

(2) [Reserved]

(d) No member or employee shall hold office in or be a director of any company which has public security holders, except not for profit corporations, savings and loan associations, and similar institutions, whose securities are exempted under section 3(a)(4) or 3(a)(5) of the Securities Act of 1933 (15 U.S.C. 77c(a)(4), 77c(a)(5)).

(e)(1) As paragraph (b)(5) of this section indicates, the Commission encourages employees to engage in teaching, lecturing and writing activities.[15] It is understood, however, that Commission employees in their teaching, writing and lecturing shall not

(i) Use confidential or nonpublic information;

(ii) Make comments on pending litigation in which the Commission is participating as a party or *amicus curiae;* or

(iii) Make comments on rulemaking proceedings pending before the Commission which would adversely affect the operations of the Commission.

(2) To assist employees in conforming to these requirements the following procedure for reviewing writings prior to publication, or prepared speeches prior to delivery, has been established:

(i) Employees must submit proposed publications or prepared speeches relating to the Commission, or the statutes or rules it administers, to the General Counsel for review. Employees will be notified as promptly as possible, with due regard to publication deadlines, but in any event within 30 days of receipt of the written document, whether such document conforms to the requirements of this Rule.

(ii) A determination by the General Counsel that a proposed publication conforms to the requirements of the rule will not involve adoption of, or concurrence in, the views expressed. Therefore, such publication or speech shall include at an appropriate place or by way of footnote, or otherwise, the following disclaimer of responsibility:

> The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues upon the staff of the Commission.

In appropriate cases, the above disclaimer may be modified by the General Counsel or the Commission to reflect the circumstances of an individual case. In addition, any publication or speech which reflects positions taken by the Commission shall set forth those positions accurately and, if it contains differences with Commission positions, it shall clearly state that such positions are those of the employee.

(f) An employee who intends to accept or perform any outside or private employment or professional work shall obtain necessary authorization in advance of such acceptance or performance. A request for such authorization shall be submitted to the Division Director, Office Head or Regional Administrator concerned, together with all pertinent facts regarding the proposed employment, such as the name of the employer, the nature of the work to be

[14] This is adapted from the provision in 18 U.S.C. 205 and expresses the Commission's general policy which favors the representation of fellow employees without compensation. However, it may be necessary to look to other regulations for specific provisions regarding such representation.

[15] This paragraph (e), requiring review of prepared speeches or writings relating to the Commission, does not apply to teaching activities.

performed, its estimated duration, and the fee or compensation to be received. Division Directors, Office Heads and Regional Administrators have been delegated the authority to approve routine requests for outside employment. The approving official shall forward to the Director of Personnel a copy of each request showing the date of approval. Requests of a non-routine nature should be forwarded to the Director of Personnel.

(g) The Director of Personnel, or his designee, is authorized to approve or disapprove requests for outside or private employment under this rule, except as to those cases which, in his judgment, should be considered and decided by the Commission. An employee may appeal a disapproved request to the Commission. The written appeal, submitted through the Director of Personnel, shall give reasons why the proposed outside or private employment is consistent with this rule. The Director of Personnel may not approve proposed outside or private employment which is absolutely prohibited by these rules. The Commission may, in a particular case, approve such employment.[16]

(Pub. L. 98–38)

[45 FR 36064, May 29, 1980; 45 FR 40975, June 17, 1980; 48 FR 39216, Aug. 30, 1983; 50 FR 45603, Nov. 1, 1985]

§ 200.735–5 Securities transactions.

(a)(1) This section applies to all transactions effected by or on behalf of a member or employee. This includes transactions for the accounts of other persons effected by the member or employee, directly or indirectly, under a power of attorney or otherwise. In addition, a member or employee is considered to have sufficient interest in the securities transactions of his or her spouse or unemancipated minor child or other member of his or her immediate household so that transactions effected by or on behalf of such persons must be reported and are subject to all the terms of this section.

(i) Except, this section shall not apply to securities transactions of a legally separated spouse living apart from the member or employee, including transactions for the benefit of a minor child, if the member or employee has no power to control and does not, in fact, advise or control with regard to such transactions. If the member or employee has knowledge of securities held by a separated spouse or for the benefit of a minor child, the disqualification provisions of Rule 6, 17 CFR 200.735–6, and 18 U.S.C. 208 are applicable.

(ii) For purposes of this section *member of his or her immediate household* means a resident of the member's or employee's household who is related to the employee by blood or marriage or who is in the legal care and/or custody of the employee by reason of adoption, prospective adoption or guardianship.

(2) Members and employees are prohibited from recommending or suggesting the purchase or sale of securities:

(i) Based on non-public information gained in the course of employment; or

(ii) Which a member or employee could not purchase because of the restrictions of this rule, in any circumstance in which the member or employee could reasonably expect to benefit from the recommendation, or to anyone over whom the member or employee has or may have control or substantial influence.

(b)(1) No member or employee shall effect or cause to be effected any transaction in a security except for bona fide investment purposes. Therefore, all securities purchased by a member or employee must be held for a minimum of six months. Except, this holding period is not applicable to

(i) Securities sold for less than the purchase price pursuant to a stop-loss order entered at the time of purchase and submitted to the Office of Personnel with the report of purchase;

(ii) Money market fund shares;[17]

(iii) Securities purchased by a member or employee prior to entrance on duty with the Commission;

[16] The Commission does not favor the granting of waivers from the provision of this subsection.

[17] For purposes of this rule a *money market fund* is defined as an open end investment company whose investment policy calls for investment of at least 80% of its assets in debt securities maturing in 13 months or less.

(iv) Debt securities with an initial term of less than six months which are held to term;

(v) Shares of a unit investment trust having a term of less than six months; or

(vi) The transferring of funds within a *family* of registered investment companies.

(2) For purposes of this provision a *family* means any two or more registered investment companies which share the same investment adviser or principal underwriter and hold themselves out to investors as related companies for purposes of investment and investor services.

(c) No member or employee shall effect any purchase or sale of an option, future contract, or option on a future contract involving a security or group of securities.

(d) No member or employee shall

(1) Carry securities on margin;

(2) Borrow funds or securities, with or without collateral, for the purpose of purchasing or carrying securities with the proceeds, unless the prior approval of the Commission has been secured; or

(3) Sell a security which he or she does not own, or consummate a sale by the delivery of a security borrowed by or for such member's or employee's account.

(e)(1) Except as provided in this paragraph (e) or paragraph (f) below, members and employees are prohibited from purchasing or selling any security which is the subject of a registration statement filed under the Security Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), or a letter of notification filed under Regulation A, or any security of the same issuer while such a registration statement or letter of notification is pending or during the first 60 days after its effective date. This prohibition shall not apply to:

(i) A security which is the subject of a pending registration statement filed on Forms S–2, S–3, S–8, F–2, F–3, 8–A, or 8–B; or

(ii) Offerings, except initial public offerings, of shares by an investment company, other than a closed-end investment company, or to offerings by a registered separate account (as defined in section 1(a)(37) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(37)) which become effective pursuant to 17 CFR 230.485(b).

(2) Securities of a unit investment trust whose registration statements become effective pursuant to 17 CFR 230.487 may be purchased immediately upon effectiveness of the registration statement.

(3) Securities which are registered for delayed distribution pursuant to 17 CFR 230.415 may be purchased 60 days after the registration becomes effective. The subsequent filing of a pricing amendment or sticker does not revive the prohibition on purchase.

(f) A member or employee may sell a security which is referred to in paragraph (e) of this section only if:

(1) The member or employee certifies that he or she has no information which is not publicly available concerning or relating to the issuer; and

(2) The employee's Division Director, Office Head or Regional Administrator certifies that the employee has not participated in the registration processing. Members, Division Directors, Office Heads, and Regional Administrators are required to submit such certification on their own behalf to the Director of the Office of Personnel.

(g) No member or employee shall purchase any security which to his or her knowledge is involved in any pending investigation by the Commission, or in any proceeding before the Commission, or to which the Commission is a party.

(h) No member or employee shall purchase any security of any company which is in a receivership or bankruptcy proceeding in which the Commission has filed a notice of appearance.

(i) No member or employee shall purchase securities of:

(1) Any holding company registered under section 5 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79e), or any subsidiary thereof, or

(2) Any company, if its status under such Act, or the applicability of any provision of the Act to it, is known by the employee to be under consideration.

(j) The restrictions imposed in paragraphs (e), (g), (h), and (i) of this section do not apply;

(1) To the exercise of a privilege to convert or exchange securities;

(2) To the exercise of rights accruing unconditionally by virtue of ownership of other securities (as distinguished from a contingent right to acquire securities not subscribed for by others);

(3) To the acquisition and exercise of rights in order to round out fractional shares;

(4) To the acceptance of stock dividends on securities already owned; to the reinvestment, under a reinvestment program, of cash dividends on a security already owned; or the participation in a periodic investment plan for the purchase of a security when the original purchase was consistent with the provisions of this rule; or

(5) Investments in funds established pursuant to the Federal Employees Retirement System.

(k) Members and employees holding a Senior Executive Service position in the Division of Investment Management or the Office of Compliance Inspections and Examinations may make discretionary investments in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a *et seq.*, provided that the registered investment company is diversified pursuant to section 5(b)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a–5(b)(1). The Directors of the Division of Investment Management and the Office of Compliance Inspections and Examinations, in consultation with the Office of the General Counsel, shall determine in writing whether Senior Executive Service positions in their respective Division or Office whose duties do not include fund matters also may invest in non-diversified registered investment companies.

(l) No member or employee shall have a beneficial interest in any broker, dealer or investment adviser through ownership of securities or otherwise. However, if a corporation acquires or establishes a subsidiary or affiliate subject to regulation by the Commission (*regulated entity*),

(1) A member or employee may retain his or her existing holdings in the corporation, provided the security was originally acquired in compliance with the provisions of this rule or prior to entry on duty with the Commission.

(2) Purchases of the corporation's shares will be permitted so long as the regulated entity subsidiary or affiliate provides less than 10% of the corporation's gross revenue. Except for reinvestment of cash dividends, additional purchases are prohibited when the regulated entity provides 10% or more of the corporation's gross revenues.

(3) A member or employee who owns shares in a corporation with a regulated entity subsidiary or affiliate is disqualified from participating in any matter including rulemaking which affects the regulated entity unless the disqualification is waived in accordance with the provisions of Rule 6, of this section, 17 CFR 200.735–6, and 18 U.S.C. 208(b).

(m)(1) Annually, in accordance with the procedures adopted by the Director of Personnel, every member and employee shall furnish the Director of Personnel with a complete list of all securities in which he or she has an interest. Employees having no interests in securities and required to so state.

(2) Except as provided in paragraphs (m)(3) and (m)(4) of this section, members and employees shall report every acquisition or sale of any security within five business days of the transaction date or date confirmation is received. (Reports submitted by employees in field offices must be placed in the mails within five business days of the transaction date or date the confirmation is received for each transaction.)

(3) After the initial purchase of shares in a mutual fund, employees shall report holdings in that mutual fund only on the annual statement.

(4) Changes in holdings, other than by purchase, which do not affect disqualification, such as those resulting from the automatic reinvestment of dividends, stock splits, stock dividends or reclassifications, may be reported on the annual statement rather than when notification of the transaction is received. But, the acquisition of holdings by, for example, gifts, inheritance or spin-offs, which may result in additional disqualifications pursuant to Rule 6 of this section, 17 CFR 200.735–6, and 18 U.S.C. 208 shall be reported

within five days of the receipt of the notice of the change in holdings.

(n) At the time of taking the oath of office, or prior thereto if requested by the Director of Personnel, a new member or employee shall provide to the Office of Personnel, as requested, information relating to—

(1) Securities owned by or held for the benefit of him or her, or his or her spouse or unemancipated minor child, or a member of his or her immediate household, or by any trust or estate of which he or she is a trustee or other fiduciary or beneficiary, or by any person for whom he or she effects transactions under a power of attorney or otherwise;

(2) Accounts with securities firms;

(3) Close relatives (i.e. children, parents, grandparents, siblings, aunts, uncles, or like relations of a spouse), who are partners or officers of securities firms, investment advisers, or registered public utility holding companies or their affiliates;

(4) The holding of office in or being a director of any company which has public security holders; and

(5) Such other information as may be required by the Director of Personnel.

Employees are required to advise the Office of Personnel of changes in the foregoing information within ten business days of the time the new information is learned.

(o) Paragraphs (b), (m), and (n) of this section do not apply to personal notes, individual real estate mortgages, securities issued by the U.S. Government or its agencies, and securities issued by building and loan associations or cooperatives.

(p) Any member or employee who is a trustee or other fiduciary or a beneficiary of a trust or estate holding securities not exempted by paragraph (o) of this section, shall report the existence and nature of such trust or estate to the Director of Personnel. The transactions of such trust or estate, which is not a qualified blind trust, shall be subject to all the provisions of this section except if the member or employee did not create the trust, is solely a beneficiary, has no power to control, and does not in fact control or advise with respect to the investments of the trust or estate, unless the Commission shall otherwise direct in view of the circumstances of the particular case.

(q) The Director of Personnel, or his designee, is authorized to require the disposition of securities acquired as a result of a violation of the provisions of this section, whether unintentional or not. Repeated violations shall be reported to the Commission for appropriate action.

(r) Any member or employee who believes that the application of any of the provisions of this rule will result in undue hardship in a particular case may make a written application to the Commission (through the Director of Personnel) setting out, in detail, the reasons for that belief and requesting a waiver. However, as a matter of policy the Commission favors a strict interpretation of the provisions of this rule.

[53 FR 18553, May 24, 1988, as amended at 59 FR 43464, Aug. 24, 1994; 60 FR 52626, Oct. 10, 1995]

§ 200.735–6 Action in case of personal interest.

Any employee assigned to work on any application, filing or matter of a company (a) in which he or she or his or her spouse or his or her minor unemancipated child then owns any securities or has a personal interest, including a continuing financial interest in a pension or retirement plan, shared income, or other arrangement, as a result of any current or prior employment or business or professional association; or (b) with which he or she has been employed or associated in the past 5 years; or (c) which was a client of a firm with which he or she had been associated, shall immediately advise his or her Division Director or other Office Head or Regional Administrator of the fact. Division Directors, Office Heads and Regional Administrators are authorized to direct the reporting employee to continue with the assignment in question where this appears in the interest of the Government, taking into account (1) the prohibitions stated in § 200.735–3(b) (7) and (8); (2) the general desirability of avoiding situations that require a question of conflict of interest to be resolved; (3) the extent to which the employee's activities will be supervised; and (4) the difficulty of

assigning the matter to some other employee. Where the employee in question is not relieved of the assignment, his or her written report concerning the nature of his or her interest shall be forwarded to the Director of Personnel with a notation that he or she has been directed to continue the assignment, together with such explanation, if any, as may seem appropriate. In the event that a Division Director, Office Head or Regional Administrator deems that he or she has, himself or herself, such a personal interest in an application, filing or matter of a company as may raise a question as to his or her disinterestedness, he or she may delegate his or her responsibility with regard thereto to a subordinate, but in that event shall submit a brief memorandum of the circumstances to the Director of Personnel.[18]

[45 FR 36064, May 29, 1980; 45 FR 40975, June 17, 1980]

§ 200.735–7 Negotiation for employment.

(a) An employee may not negotiate employment with anyone outside the Commission with whom he or she is personally transacting business in any matter on behalf of the Commission or the United States, or while he or she is immediately or personally engaged in representing the Commission in any matter in which the prospective employer is a participant or witness or counsel for such a person, whether or not such a person takes a substantive position in an adversary proceeding in opposition to the Commission's position.

(b) An employee who wishes to negotiate employment with another Government agency at a time when he or she is representing the Commission in a particular matter in which the other Government agency is taking a position adverse to the Commission should disclose this intention to his or her Division Director, Office Head or Regional Administrator prior to taking any action.

(c) No employee shall undertake to act personally on behalf of the Commission in any capacity in a matter[19] that, to his or her knowledge, affects even indirectly any person or organization outside the Commission with whom he or she is discussing or entertaining any proposal for future employment, except pursuant to the direction of the Commission, his or her Division Director, Office Head, or Regional Administrator, as provided in §200.735–6. *See* footnote 18.

§ 200.735–8 Practice by former members and employees of the Commission.

(a)(1) No person shall appear in a representative capacity before the Commission in a particular matter if such person, or one participating with him or her in the particular matter, participated personally and substantially in that matter while he or she was a member or employee of the Commission.[20] As used in this rule, a *matter*

[18] 18 U.S.C. 208, provides among other things, that a member or employee is prohibited from participating personally and substantially in any matter in which to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as an officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. This section (of the Criminal Code) does not apply if the employee has received a written determination made by an authorized official that the interest is not so substantial as to be deemed likely to affect the integrity of the employee's service. Note: Members of the Commission may follow the procedural provision contained in Part V, Section 503 of the Executive Order 11222.

[19] Employees should bear in mind that in this connection the word *matter* is construed very broadly. See 200.735–8 and footnote 20, thereto, *infra*.

[20] As used in this paragraph, a single investigation or formal proceeding, or both if they are related, shall be presumed to constitute a particular matter for at least 2 years irrespective of changes in the issues. However, in cases of proceedings in which the issues change from time to time, such as proceedings involving compliance with section 11 of the Public Utility Holding Company Act (15 U.S.C. 79k), this paragraph shall not be construed as prohibiting appearance in such a proceeding, more than two years after ceasing to be a member or employee of the Commission, unless it appears to the Commission that there is such an identity of particular issues or pertinent facts as to make

Continued

means a discrete and isolatable transaction or set of transactions between identifiable parties.[21]

(2) No person who has been a member or employee shall, within 2 years after his or her employment has ceased, assist, by personal presence, a person appearing in a representative capacity before the Commission in any matter in which he or she participated personally and substantially while a member or employee of the Commission at any time within a period of 1 year prior to the termination of such responsibility.

(3) No person who has been a member or an employee shall, within 2 years after his or her employment has ceased, appear in a representative capacity before the Commission in any matter which was under his or her official responsibility as a member or employee of the Commission at any time within a period of 1 year prior to the termination of such responsibility. The term *official responsibility* as defined in 18 U.S.C. 202 means the ''direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.''

(4) No employee in a position which is designated by the Director of the Office of Government Ethics shall, within one year after his or her employment has ceased, appear in a representative capacity before the Commission or communicate with the Commission or its employees with the intent to influence.[22] This restriction does not apply to members who ceased employment before July 1, 1979, or to employees who ceased employment prior to February 28, 1980.

(b)(1) Any former member or employee of the Commission who, within 2 years after ceasing to be such, is employed or retained as the representative of any person outside the Government in any matter in which it is contemplated that he or she will appear before the Commission, or communicate with the Commission or its employees, shall, within ten days of such retainer or employment, or of the time when appearance before, or communication with the Commission or its employees is first contemplated, file with the Secretary of the Commission a statement which includes:

(i) A description of the contemplated representation;

(ii) An affirmative representation that the former employee while on the Commission's staff had neither personal and substantial responsibility nor official responsibility for the matter which is the subject of the representation; and

(iii) The name of the Commission Division or Office in which the person had been employed.

(2) Employment of a recurrent character may be covered by a single comprehensive statement. Each such statement should include an appropriate caption indicating that it is filed pursuant to this section. The reporting requirements of this paragraph do not apply to

(i) Communications incidental to court appearances in litigation involving the Commission; and

(ii) Oral communications concerning ministerial or informational matters or requests for oral advice not otherwise prohibited by paragraph (a) of this section.

(c) As used in this section, the term *appear before the commission* means physical presence before the Commission or its employees in either a formal or informal setting or the conveyance

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it likely that confidential information, derived while a member or employee of the Commission, would have continuing relevance to the proceeding, so as to make participation therein by the former member or employee of the Commission unethical or prejudicial to the interests of the Commission.

[21] This definition is taken from Formal Opinion 342 of the ABA Ethics Committee. The opinion states that ''work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR9–101B (which states 'a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee') from subsequent private employment involving the same regulation procedures, or points of law * * *.''

[22] This prohibition appears in the Ethics in Government Act of 1978. Pub. L. 95–521.

of material in connection with a formal appearance or application to the Commission. As used in this section the term *communication with intent to influence* does not encompass communications which are not for the purpose of influencing the Commission or any of its employees or which, at the time of the filings, are reasonably believed not to involve any potential controversy. As used in this section, the term *representative* or *representative capacity* shall include not only the usual type of representation by an attorney, etc., but also representation of a corporation in the capacity of an officer, director or controlling stockholder thereof.

(d)(1) Partners or associates of any person disqualified from appearing or practicing before the Commission in a particular matter by paragraph (a)(1) of this section are also disqualified. Such partners or associates (the *firm*) may request a waiver of this prohibition from the Commission by writing a letter to the General Counsel of the commission setting forth the facts of the proposed representation and the individual's disqualification. In appropriate situations, a firm may request a generic waiver with respect to a number of different matters. Upon the advice of the Office of the General Counsel, the Commission, or the General Counsel exercising delegated authority, will advise the requestor of the Commission's response.

(2) Waivers ordinarily will be granted where the firm makes a satisfactory representation that it has adopted screening measures which will effectively isolate the individual lawyer disqualified under paragraph (a)(1) of this section from participating in the particular matter or matters and from sharing in any fees attributable to it. It will be considered significant for purposes of this determination that:

(i) The firm had a pre-existing securities law practice prior to the arrival of the disqualified attorney;

(ii) The matter was previously the subject of consideration by the firm or the client was already advised by the firm;

(iii) In cases where the matter or client became the subject of consideration by the firm subsequent to the firm's employment of the lawyer individually disqualified, that the matter was not brought to the firm because of the disqualified attorney.

(3) Notwithstanding the existence or non-existence of any of these factors, no waiver will be issued if the proposed representation would create a significant appearance of impropriety or would otherwise adversely affect the interests of the government.[23] All proceedings with respect to waivers shall be a matter of public record except to the extent that such public disclosure might violate attorney-client privilege or breach the attorney's obligation to preserve the confidences and secrets of this or her clients, reveal the existence of ongoing private investigations, interfere with law enforcement proceedings, or otherwise be inconsistent with the public interest.

(e) Persons in doubt as to the applicability of any portion of this section may apply for an advisory ruling of the Commission.[24]

[45 FR 36064, May 29, 1980, as amended at 50 FR 23669, June 5, 1985]

§ 200.735–9 Indebtedness.

(a) The Securities and Exchange Commission considers the indebtedness of its members and employees to be essentially a matter of their own concern and will not be placed in the position of acting as a collection agency or of determining the validity or amount of contested debts. Nevertheless, failure on the part of an employee without good reason and in a proper and timely manner to honor debts acknowledged by him or her to be valid, or reduced to judgment by a court, or to make or to

[23] For example, no waiver will be granted if, during the course of representing a client who has an interest with respect to a matter before the Commission, a firm employs, or accepts as a partner, a member of the staff or of the Commission who at any time during the course of that representation had direct and substantial responsibility for the same matter, and whose departure would result in a significant adverse impact upon that matter at the Commission.

[24] Attention of former members and employees is directed to Formal Opinion 342 of the Committee on Ethics of the American Bar Association, 62 A.B.A.J. 517 (1975) and to 18 U.S.C. 207.

adhere to satisfactory arrangements for the settlement thereof, may be a cause for disciplinary action. In this connection each member and employee is expected to meet his or her responsibilities for payment of Federal, State and local taxes. For purposes of this section, *in a proper and timely manner* means in a manner which the agency determines does not, under the circumstances, reflect adversely on the Government as his or her employer.

(b) Compensation due members and employees is subject to garnishment for child support and alimony obligations. (42 U.S.C. 659).

§ 200.735–10 Miscellaneous statutory provisions.

Each member and employee is responsible for acquainting himself or herself with each statute that relates to his or her ethical and other conduct as a member or employee of the Commission and of the Government, including the statutory provisions listed below. Violations of any of these statutes are deemed to be violations of the rules in this subpart M as well.

(a) House Concurrent Resolution 175, 85th Congress, 2d Session, 72 Stat. B12, the ''Code of Ethics for Government Service.''

(b) Chapter 11 of title 18 U.S.C., relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibition against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibition against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) disclosure of confidential information (18 U.S.C. 1905).

(f) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(g) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(h) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(i) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(j) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(k) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(l) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(m) The prohibition against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(n) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(o) The prohibition against political activities in subchapter III of chapter 73 of title 5 U.S.C. and 18 U.S.C. 602, 603, 607, and 608.

(p) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

§ 200.735–11 Statement of employment and financial interests.

(a) Members and employees in the Senior Executive Service or Grades GS–16 through GS–18 are required to file a financial disclosure report as provided by title II of the Ethics in Government Act of 1978, Pub. L. 95–521. Members and such employees need not also file the statement of employment and financial interests required by the following provisions.

(b) Prior to the time of entry on duty, or upon designation to a position set forth in paragraph (c) of this section, such employee shall submit to the Director of Personnel a statement, on the official form made available for this purpose through the Office of Personnel, setting forth the following information:[25]

[25] In addition to the information required by this Rule, all employees are required by Rule 5 to file annually with the Director of Personnel a listing of their securities holdings.

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions with or in which the employee, his or her spouse, unemancipated minor child or other member of his or her immediate household has—

(i) Any connection as an employee, officer, owner, director, member, trustee, partner, adviser or consultant; or

(ii) Any continuing financial interest, through a pension or retirement plan, shared income, or other arrangement as a result of any current or prior employment or business or professional association.

(iii) Any financial interest through the ownership of stock, stock options, bonds, securities, or other arrangements including trusts.

(2) A list of the names of the employee's creditors and the creditors of his or her spouse, unemancipated minor child or other member of his or her immediate household, other than those creditors to whom any such person may be indebted by reason of a mortgage on property which he or she occupies as a personal residence, or to whom such person may be indebted for current and ordinary household and living expenses such as those incurred for household furnishings, vacations, an automobile, education, or the like.

(3) A list of the employee's interests and those of his or her spouse, unemancipated minor child, or other member of his or her immediate household in real property or rights in lands, other than property which he or she occupies as a personal residence.

(4) For the purpose of this section, *member of his or her immediate household* means a resident of the employee's household who is related to the employee by blood or marriage.

(5) In the instance where a spouse is not a *member of the employee's immediate household*, and the employee certifies he or she neither derives nor expects to derive any economic benefit from the holdings of the spouse, the Director of Personnel may waive the requirement of reporting the interests of such spouse.

(c) Except as to employees noted in paragraph (a) of this section, statements of employment and financial interests are required of the following:

(1) All employees in grade GS–15.

(2) Incumbents of the following positions, regardless of grade:

(i) Executive Staff. (A) Legal Assistants to the Chairman and to each Commissioner; (B) Special Counsels to the Chairman.

(ii) Employees serving under SEC Fellowship Programs.

(iii) All employees engaged in any aspect of Government contracting or procurement activities.

(iv) Division, Office, Directorate

(A) Directors

(B) Deputies

(C) Associates

(D) Assistants

(E) Chief Counsels

(v) Regional Offices

(A) Administrators

(B) Associate Administrators

(C) Assistant Administrators

(D) Attorneys-in-Charge of Branch Offices

(E) Chief Enforcement Attorneys

(d) Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in a supplementary statement as of May 15 of each year. If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this paragraph, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflict-of-interest provisions of section 208 of title 18 U.S.C., or of this Conduct Regulation.

(e) If any information required to be included on a statement of employment and financial interest or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his or her behalf.

(f) Paragraph (c) of this section does not require an employee to submit any information relating to his or her connection with, or interest in, a non-profit educational, charitable, religious,

professional, social, fraternal, recreational, public service, civic, or political organization, or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed *business enterprises* and are required to be included in an employee's statement of employment and financial interests.

(g) Statements of employment and financial interests filed pursuant to paragraph (c) of this section shall be sent to the Director of Personnel in a sealed envelope marked ''Confidential Employment and Financial Interests.'' They shall be maintained in a confidential file. Only those officials of the Commission whose participation is necessary for the carrying out of the purpose of this Conduct Regulation may have access to such statements and no information may be disclosed from them except as the Commission or the Office of Personnel Management may determine for good cause shown.

(h) In accordance with the requirements of the Ethics in Government Act of 1978, Pub. L. 95–521, the Director of Personnel or the Assistant Director of Personnel shall review the financial disclosure reports filed pursuant to that Act.

(i) The Director of Personnel or the Assistant Director of Personnel shall examine the statements of employment and financial interests filed pursuant to paragraph (c) of this section to determine whether conflicts of interest or apparent conflicts of interest on the part of employees exist. An employee shall be afforded the opportunity to explain any conflict or appearance of conflict. When the Director or Assistant Director of Personnel, in consultation with appropriate superiors of the employee involved, is unable to resolve a conflict or appearance of conflict, he or she shall report the matter to the Commission through the Counselor for the Commission designated under § 200.735–15(a).

(j) The Counselor for the Commission shall examine statements filed by the Director of Personnel and the Assistant Director of Personnel.

(k) Except as otherwise provided in paragraph (a) of this section the statement of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order or regulation. The submission of a statement by an employee does not permit him or her or any other person to participate in a matter in which his or her or the other person's participation is prohibited by law, order or regulation.

(l) An employee has the right to ask for a review through the Commission's grievance procedure outlined in section 771, Part II, Manual of Administrative Regulations, of a complaint that his or her position has been improperly included under the provisions of this section as one requiring the submission of a statement of employment and financial interests.

[45 FR 36064, May 29, 1980; 45 FR 40975, June 17, 1980]

§ 200.735–12 Special Government employees.

(a) Special Government employee means a person defined in section 18 U.S.C. 202 as a *special Government employee*. All of the provisions of this Conduct Regulation are applicable to special Government employees, except that in specific appropriate cases the Commission may exempt such employees from, or modify the applicability of, any portion of any provision of the Conduct Regulation.

(b) In no event will the Commission waive a provision of the Conduct Regulation which would permit a special Government employee to:

(1) Use his or her Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he or she has family, business, or financial ties.

(2) Use inside information obtained as a result of his or her Government employment for private gain for himself or herself or another person either by direct action on his or her part or by counsel, recommendation, or suggestion to another person, particularly one with whom he or she has family,

business, or financial ties. For purposes of this paragraph, *inside information* means information obtained under Government authority which has not become part of the body of public information.

(3) Use his or her Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself or herself or another person, particularly one with whom he or she has family, business, or financial ties.

(4) Receive or solicit from a person having business with the Commission anything of value as a gift, gratuity, loan, entertainment, or favor for himself or herself or another person, particularly one with whom he or she has family, business or financial ties.

(c) Prior to entrance on duty, each special Government employee shall submit to the Director of Personnel a statement of employment and financial interests which contains such information as the Director of Personnel determines is relevant in the light of the duties the special Government employee is to perform and, if appropriate, the financial disclosure report as provided by title II of the Ethics in Government Act of 1978, Pub. L. 95–521. It shall be kept current throughout the period of employment by the filing of supplementary statements in accordance with the requirements of §200.735–11(d). Statements shall be on the official form made available for this purpose through the Office of Personnel.

(d) The Commission may waive the requirement of paragraph (c) of this section in the case of a special Government employee who is not a *consultant* or an *expert*, as those terms are defined in chapter 304 of the Federal Personnel Manual (5 CFR 735.304), if the duties of the position are determined to be at a level of responsibility which does not require the submission of such statement to protect the integrity of the Commission.

§200.735–13 Disciplinary and other remedial action.

(a) Knowing participation in a violation of this subpart by persons not within the scope of the foregoing rules in this subpart shall likewise be deemed improper conduct and in contravention of Commission rules. Departure from any of the rules in this subpart by employees or special Government employees without specific approval may be cause for appropriate remedial and/or disciplinary action or, in the case of former members, employees, and special Government employees, for disqualification from appearing and practicing before the Commission, which may be in addition to any penalty prescribed by law.

(b) When there has been a departure from any of the rules of this subpart without specific approval or when a conflict of interest or an apparent conflict of interest on the part of an employee or special Government employee arises, the Director of Personnel may order immediate action to end such conflict or appearance of conflict of interest. Remedial action may include, but is not limited to (1) changes in assigned duties; (2) divestment by the employee or special Government employee of his conflicting interest; (3) disciplinary action; or (4) disqualification for a particular assignment. Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, Executive Orders, and regulations. The Director of Personnel may refer any recommended action to the Commission. The employee may obtain review by the Commission of any action ordered to be taken by the Director of Personnel. During the period of review, unless otherwise directed by the Commission, the action ordered by the Director of Personnel is stayed.

(c) Former members or employees who violate the post-employment restriction provisions of 18 U.S.C. 207(a), (b) or (c), which parallel the provisions of Rule 8(a), *supra*, will be subject to an administrative enforcement proceeding as set forth in Rule 102(e) of the Commission's Rules of Practice, §201.102(e) of this chapter, except that, when proceedings are brought to determine if violations of post-employment restrictions have occurred, denial of the privilege of appearing and practicing before the Commission will be based on a finding of violation of the provisions of Rule 8(a) and 18 U.S.C. 207 (a), (b) and (c). Procedures applicable to such administrative proceedings are to be

found in the Commission's Rules of Practice, 17 CFR 201.100 *et seq.*

[45 FR 36064, May 29, 1980, as amended at 60 FR 32795, June 23, 1995]

§ 200.735–14 Employees on leave of absence.

The provisions of the rules in this subpart relative to employees of the Commission are applicable to employees on a leave with pay or a leave without pay status other than extended military service.

§ 200.735–15 Interpretive and advisory service.

(a) The General Counsel shall be designated *Counselor for the Commission* and shall serve as the Commission's delegate to the Office of Personnel Management on matters covered by the rules in this subpart. The General Counsel shall be responsible for coordinating the Commission's counseling services provided under this section and for assuring that counseling and interpretations on questions of conflicts of interest and other matters covered by the rules in this subpart are available to all members and employees.

(b) There shall be designated as Deputy Counselors the Director of Personnel, the Administrator of each regional office, and the person in charge of each branch office. The General Counsel or his or her designee shall provide guidance to the Deputy Counselors for the purpose of achieving uniform interpretations of this subpart.

(c) A member, employee, or former member or employee may obtain advice or guidance on the application of the rules in this subpart from any Deputy Counselor or the General Counsel. In addition, any former member or employee seeking advice or an interpretation relating to the Ethics in Government Act shall submit his or her request to the General Counsel.

(d) The General Counsel and Deputy Counselors will treat information they receive pursuant to requests for advice or guidance under this Rule on a confidential basis, except that information they receive indicating a possible past violation of any provision of this Conduct Regulation or of the law will be brought to the attention of appropriate persons.

(e) The Director of Personnel shall furnish a copy of this Conduct Regulation (subpart M) to each member, employee and special Government employee immediately upon his or her entrance on duty and shall thereafter, annually, and at such other times as circumstances warrant, bring to the attention of each member, employee and special Government employee this Conduct Regulation (subpart M) and all revisions thereof.

(f) The Director of Personnel shall notify each member, employee and special Government employee at the time of entrance on duty, and from time to time thereafter, of the availability of counseling services and of how and where these services are available.

§ 200.735–16 Delegation.

Any official responsibility assigned to a person in a particular position pursuant to this subpart may be delegated by such person to any other person.

§ 200.735–17 Administration of the conduct regulation.

Under the general direction of the Executive Director, the Director of Personnel is responsible for the day-to-day administration of this conduct regulation except where otherwise provided.

§ 200.735–18 Requests for waivers.

Unless a different procedure is specifically prescribed in a rule of this part, an employee may submit a request for a waiver, modification or postponement of a requirement included in this part to the Chairman. Such waiver, modification or postponement may be granted if it is determined by the Chairman that such waiver, modification of postponement would not adversely affect the interest of the Commission or the United States. Any such waiver, modification or postponement granted by the Chairman shall be made available to the public. The Chairman may submit any request made pursuant to this rule to the Commission for its consideration. Any Commission action on such request shall be made public only in the

discretion of the Commission. Requirements included in this part which implement any provision of Federal law, regulation or Executive Order generally applicable to the Executive Branch shall not be waived under this provision.

Subpart N—Commission Information Collection Requirements Under the Paperwork Reduction Act: OMB Control Numbers

AUTHORITY: 44 U.S.C. 3506; 44 U.S.C. 3507.

SOURCE: 67 FR 14634, Mar. 27, 2002, unless otherwise noted.

§ 200.800 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose:* This subpart collects and displays the control numbers assigned to information collection requirements of the Commission by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, 44 U.S.C. 3500 *et seq.* This subpart displays current OMB control numbers for those information collection requirements of the Commission that are rules and regulations and codified in 17 CFR either in full text or incorporated by reference with the approval of the Director of the Office of the Federal Register.

(b) *Display.*

Information collection requirement	17 CFR part or section where identified and described	Current OMB Control No.
Regulation S–X	PART 210	3235–0009
Regulation S–B	PART 228	3235–0417
Regulation S–K	PART 229	3235–0071
Rule 154	230.154	3235–0495
Rule 155	230.155	3235–0549
Rule 236	230.236	3235–0095
Rule 237	230.237	3235–0528
Regulation A	230.251 thru 230.263	3235–0286
Regulation C	230.400 thru 230.494	3235–0074
Rule 425	230.425	3235–0521
Rule 477	230.477	3235–0550
Rule 489	230.489	3235–0411
Rule 498	230.498	3235–0488
Regulation D	230.501 thru 230.506	3235–0076
Regulation E	230.601 thru 230.610a	3235–0232
Rule 604	230.604	3235–0232
Rule 605	230.605	3235–0232
Rule 609	230.609	3235–0233
Rule 701	230.701	3235–0522
Regulation S	230.901 thru 230.905	3235–0357
Regulation S–T	Part 232	3235–0424
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201.1002 Adjustment of civil monetary penalties—2001.

TABLE II TO SUBPART E—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

AUTHORITY: 15 U.S.C. 77s, 78w, 78x, 79t, 77sss, 80a–37 and 80b–11; 5 U.S.C. 504(c)(1).

SOURCE: 47 FR 610, Jan. 6, 1982, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Regulations Pertaining to the Equal Access to Justice Act

§ 201.31 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called *the Act* in this subpart B), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called *adversary adjudications*) before the Commission. An eligible party may receive an award when it prevails over the Commission, unless the Commission's position was substantially justified or special circumstances make an award unjust. The rules in this subpart describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the

Commission will use in ruling on those applications.

[54 FR 53051, Dec. 27, 1989]

§ 201.32 When the Act applies.

The Act applies to adversary adjudications described in § 201.33 pending or commenced before the Commission on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in these rules, has been filed with the Commission within 30 days after August 5, 1985. Proceedings which have been substantially concluded are not deemed pending under these rules although officially pending for purposes such as concluding remedial actions found in Commission orders or private undertakings.

[54 FR 53051, Dec. 27, 1989]

§ 201.33 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by the Commission. These are on the record adjudications under 5 U.S.C. 554 in which the position of an Office or Division of the Commission as a party, not including *amicus* participation, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. *See* appendix, 17 CFR 201.60.

(b) The fact that the Commission has not identified a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.34 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks it seeks an award. The term *party* is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or public or private organization with a new worth of not more than $7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an *individual* rather than a *sole owner of an unincorporated business* if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other

interest, will be considered an affiliate for purposes of this subpart, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.35 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the Office or Division over which the applicant has prevailed was substantially justified. The position of the Office or Division includes, in addition to the position taken by the Office or Division in the adversary adjudication, the action or failure to act by the Office or Division upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant is on counsel for an Office or Division of the Commission, which must show that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.36 Allowable fees and expenses.

(a) Subject to the limitation of paragraph (b), awards will be based on rates customarily charged, in the locale of the hearing, by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award of the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the reasonable rate at which the Commission pays witnesses with similar expertise. However, an award may also include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.37 Delegations of authority.

(a) The Commission may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases.

(b) Unless the Commission shall order otherwise, applications for awards of fees and expenses made pursuant to this subject shall be assigned by the Chief Administrative Law Judge

to an administrative law judge for determination.

[54 FR 53051, Dec. 27, 1989]

§ 201.41 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant, the proceeding for which an award is sought and contain the information required in this subpart. The application shall show that the applicant has prevailed and specify the position(s) of the opposing Office or Division in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.42 Net worth exhibit.

(a) Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 201.34(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The administrative law judge or the Commission may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that exhibit in accordance with 17 CFR 201.190.

[47 FR 610, Jan. 6, 1982, as amended at 60 FR 32795, June 23, 1995]

§ 201.43 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The applicant may be required to provide

vouchers, receipts, or other substantiation for any fees or expenses claimed.

§ 201.44 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Commission's final disposition of the proceeding.

(b) For purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the Commission and to the courts.

(c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53052, Dec. 27, 1989]

§ 201.51 Filing and service of documents.

Any application for an award or other document related to an application shall be filed and served in the same manner as other papers in proceedings under the Commission's Rules of Practice. In addition, a copy of each application for fees and expenses shall be served on the General Counsel of the Commission.

§ 201.52 Answer to application.

(a) Within 30 days after service of an application, counsel representing the Office or Division of the Commission may file an answer to the application. Unless the Office or Division of the Commission counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If counsel for the Office or Division of the Commission and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted upon request by agency counsel and the applicant.

(c) The answer shall explain any objections to the award requested and identify the facts relied on in support of that position. If the answer is based on any alleged facts not already in the record of the proceeding, it shall include supporting affidavits or a request for further proceedings under § 201.55.

§ 201.53 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 201.55.

§ 201.54 Settlement.

The applicant and counsel for the Office or Division of the Commission may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded, in accordance with the Commission's standard settlement procedure. See 17 CFR 201.240. If a prevailing party and counsel for the Office or Division of the Commission agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed settlement provides that each side shall bear its own expenses, and the settlement is accepted, no application may be filed.

[54 FR 53052, Dec. 27, 1989, as amended at 60 FR 32795, June 23, 1995]

§ 201.55 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or counsel for the Office or Division of the Commission, or on his or her own initiative, the administrative law judge may order further proceedings, such as an

informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses) an evidentiary hearing. The administrative law judge may order all proceedings that are otherwise available under Rule 8(d) of the Commission's Rules of Practice. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the Commission's position was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request for further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53052, Dec. 27, 1989]

§ 201.56 Decision.

The administrative law judge shall issue an initial decision on the application promptly after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the Commission's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

§ 201.57 Commission review.

In accordance with the procedures set forth in 17 CFR 201.410 and 201.411, either the applicant or counsel for the Office or Division of the Commission may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative. If neither the applicant nor counsel for the Division or Office of the Commission seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the administrative law judge for further proceedings.

[47 FR 610, Jan. 6, 1982, as amended at 60 FR 32795, June 23, 1995]

§ 201.58 Judicial review.

Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 201.59 Payment of award.

An applicant seeking payment of an award shall submit to the Comptroller of the Commission a copy of the Commission's final decision granting the award, accompanied by a sworn statement that the applicant will not seek review of the decision in the United States courts. The Commission will pay the amount awarded to the applicant as authorized by law, unless judicial review of the award has been sought by the applicant.

[54 FR 53052, Dec. 27, 1989]

§ 201.60 [Reserved]

Subpart C—Procedures Pertaining to the Payment of Bounties Pursuant to Subsection 21A(e) of the Securities Exchange Act of 1934

AUTHORITY: 15 U.S.C. 78u–1 and 78w.

SOURCE: 54 FR 28799, July 10, 1989, unless otherwise noted.

§ 201.61 Scope of subpart.

Section 21A of the Securities Exchange Act of 1934 authorizes the courts to impose civil penalties for certain violations of that Act. Subsection 21A(e) permits the Commission to award bounties to persons who provide

information that leads to the imposition of such penalties. Any such determination, including whether, to whom, or in what amount to make payments, is in the sole discretion of the Commission. This subpart sets forth procedures regarding applications for the award of bounties pursuant to subsection 21A(e). Nothing in this subpart shall be deemed to limit the discretion of the Commission with respect to determinations under subsection 21A(e) or to subject any such determination to judicial review.

§ 201.62 Application required.

No person shall be eligible for the payment of a bounty under subsection 21A(e) of the Securities Exchange Act of 1934 unless such person has filed a written application that meets the requirements of this subpart and, upon request, provides such other information as the Commission or its staff deems relevant to the application.

§ 201.63 Time and place of filing.

Each application pursuant to this subpart and each amendment thereto must be filed within one hundred and eighty days after the entry of the court order requiring the payment of the penalty that is subject to the application. Such applications and amendments shall be addressed to: Office of the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

§ 201.64 Form of application and information required.

Each application pursuant to this subpart shall be identified as an Application for Award of a Bounty and shall contain a detailed statement of the information provided by the applicant that the applicant believes led or may lead to the imposition of a penalty. Except as provided by Rule 65 of this subpart, each application shall state the identity and mailing address of, and be signed by, the applicant. When the application is not the means by which the applicant initially provides such information, the application shall contain: The dates and times upon which, and the means by which, the information was provided; the identity of the Commission staff members to whom the information was provided; and, if the information was provided anonymously, sufficient further information to confirm that the person filing the application is the same person who provided the information to the Commission.

§ 201.65 Identity and signature.

Applications pursuant to this subpart may omit the identity, mailing address, and signature of the applicant; *provided*, that such identity, mailing address and signature are submitted by an amendment to the application. Any such amendment must be filed within one hundred and eighty days after the entry of the court order requiring the payment of the penalty that is subject to the application.

§ 201.66 Notice to applicants.

The Commission will notify each person who files an application that meets the requirements of this subpart, at the address specified in such application, of the Commission's determination with respect to such person's application. Nothing in this subpart shall be deemed to entitle any person to any other notice from the Commission or its staff.

§ 201.67 Applications by legal guardians.

An application pursuant to this subpart may be filed by an executor, administrator, or other legal representative of a person who provides information that may be subject to a bounty payment, or by the parent or guardian of such a person if that person is a minor. Certified copies of the letters testamentary, letters of administration, or other similar evidence showing the authority of the legal representative to file the application must be annexed to the application.

§ 201.68 No promises of payment.

No person is authorized under this subpart to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any bounty or the amount thereof.

Subpart D—Rules of Practice

AUTHORITY: 15 U.S.C. 77f, 77g, 77h, 77h-1, 77j, 77s, 77u, 78c(b), 78d-1, 78d-2, 78*l*, 78m, 78n,

78*o*(d), 78*o*-3, 78s, 78u-2, 78u-3, 78v, 78w, 79c, 79s, 79t, 79z-5a, 77sss, 77ttt, 80a-8, 80a-9, 80a-37, 80a-38, 80a-39, 80a-40, 80a-41, 80a-44, 80b-3, 80b-9, 80b-11, and 80b-12 unless otherwise noted.

SOURCE: 60 FR 32796, June 23, 1995, unless otherwise noted.

GENERAL RULES

§ 201.100 Scope of the rules of practice.

(a) Unless provided otherwise, these Rules of Practice govern proceedings before the Commission under the statutes that it administers.

(b) These rules do not apply to:

(1) Investigations, except where made specifically applicable by the Rules Relating to Investigations, part 203 of this chapter; or

(2) Actions taken by the duty officer pursuant to delegated authority under 17 CFR 200.43.

[60 FR 32796, June 23, 1995; 60 FR 46499, Sept. 7, 1995]

§ 201.101 Definitions.

(a) For purposes of these Rules of Practice, unless explicitly stated to the contrary:

(1) *Commission* means the United States Securities and Exchange Commission, or a panel of Commissioners constituting a quorum of the Commission, or a single Commissioner acting as duty officer pursuant to 17 CFR 200.43;

(2) *Counsel* means any attorney representing a party or any other person representing a party pursuant to § 201.102(b);

(3) *Disciplinary proceeding* means an action pursuant to § 201.102(e);

(4) *Enforcement proceeding* means an action, initiated by an order instituting proceedings, held for the purpose of determining whether or not a person is about to violate, has violated, has caused a violation of, or has aided or abetted a violation of any statute or rule administered by the Commission, or whether to impose a sanction as defined in Section 551(10) of the Administrative Procedure Act, 5 U.S.C. 551(10);

(5) *Hearing officer* means an administrative law judge, a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, or any other person duly authorized to preside at a hearing;

(6) *Interested division* means a division or an office assigned primary responsibility by the Commission to participate in a particular proceeding;

(7) *Order instituting proceedings* means an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing;

(8) *Party* means the interested division, any person named as a respondent in an order instituting proceedings, any applicant named in the caption of any order, persons entitled to notice in a stop order proceeding as set forth in § 201.200(a)(2) or any person seeking Commission review of a decision;

(9) *Proceeding* means any agency process initiated by an order instituting proceedings; or by the filing, pursuant to § 201.410, of a petition for review of an initial decision by a hearing officer; or by the filing, pursuant to § 201.420, of an application for review of a self-regulatory organization determination; or by the filing, pursuant to § 201.430, of a notice of intention to file a petition for review of a determination made pursuant to delegated authority;

(10) *Secretary* means the Secretary of the Commission; and

(11) *Temporary sanction* means a temporary cease-and-desist order or a temporary suspension of the registration of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or transfer agent pending final determination whether the registration shall be revoked.

(b) [Reserved]

§ 201.102 Appearance and practice before the Commission.

A person shall not be represented before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this section or as otherwise permitted by the Commission or a hearing officer.

(a) *Representing oneself.* In any proceeding, an individual may appear on his or her own behalf.

(b) *Representing others.* In any proceeding, a person may be represented by an attorney at law admitted to

practice before the Supreme Court of the United States or the highest court of any State (as defined in Section 3(a)(16) of the Exchange Act, 15 U.S.C. 78c(a)(16)); a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of a state commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state.

(c) *Former Commission employees.* Former employees of the Commission must comply with the restrictions on practice contained in the Commission's Conduct Regulation, Subpart M, 17 CFR 200.735.

(d) *Designation of address for service; notice of appearance; power of attorney; withdrawal.* (1) *Representing oneself.* When an individual first makes any filing or otherwise appears on his or her own behalf before the Commission or a hearing officer in a proceeding as defined in § 201.101(a), he or she shall file with the Commission, or otherwise state on the record, and keep current, an address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours.

(2) *Representing others.* When a person first makes any filing or otherwise appears in a representative capacity before the Commission or a hearing officer in a proceeding as defined in § 201.101(a), that person shall file with the Commission, and keep current, a written notice stating the name of the proceeding; the representative's name, business address and telephone number; and the name and address of the person or persons represented.

(3) *Power of attorney.* Any individual appearing or practicing before the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his or her authority to act in such capacity.

(4) *Withdrawal.* Withdrawal by any individual appearing in a representative capacity shall be permitted only by order of the Commission or the hearing officer. A motion seeking leave to withdraw shall state with specificity the reasons for such withdrawal.

(e) *Suspension and disbarment.* (1) *Generally.* The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter:

(i) Not to possess the requisite qualifications to represent others; or

(ii) To be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or

(iii) To have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

(iv) With respect to persons licensed to practice as accountants, ''improper professional conduct'' under § 201.102(e)(1)(ii) means:

(A) Intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; or (B) Either of the following two types of negligent conduct:

(*1*) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted.

(*2*) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

(2) *Certain professionals and convicted persons.* Any attorney who has been suspended or disbarred by a court of the United States or of any State; or any person whose license to practice as an accountant, engineer, or other professional or expert has been revoked or suspended in any State; or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission. A disbarment, suspension, revocation or conviction within the meaning of this section shall be

deemed to have occurred when the disbarring, suspending, revoking or convicting agency or tribunal enters its judgment or order, including a judgment or order on a plea of nolo contendere, regardless of whether an appeal of such judgment or order is pending or could be taken.

(3) *Temporary suspensions.* An order of temporary suspension shall become effective upon service on the respondent. No order of temporary suspension shall be entered by the Commission pursuant to paragraph (e)(3)(i) of this section more than 90 days after the date on which the final judgment or order entered in a judicial or administrative proceeding described in paragraph (e)(3)(i)(A) or (e)(3)(i)(B) of this section has become effective, whether upon completion of review or appeal procedures or because further review or appeal procedures are no longer available.

(i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney, accountant, engineer, or other professional or expert who has been by name:

(A) Permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or

(B) Found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

(ii) Any person temporarily suspended from appearing and practicing before the Commission in accordance with paragraph (e)(3)(i) of this section may, within 30 days after service upon him or her of the order of temporary suspension, petition the Commission to lift the temporary suspension. If no petition has been received by the Commission within 30 days after service of the order, the suspension shall become permanent.

(iii) Within 30 days after the filing of a petition in accordance with paragraph (e)(3)(ii) of this section, the Commission shall either lift the temporary suspension, or set the matter down for hearing at a time and place designated by the Commission, or both, and, after opportunity for hearing, may censure the petitioner or disqualify the petitioner from appearing or practicing before the Commission for a period of time or permanently. In every case in which the temporary suspension has not been lifted, every hearing held and other action taken pursuant to this paragraph (e)(3) shall be expedited in accordance with §201.500. If the hearing is held before a hearing officer, the time limits set forth in §201.531 will govern review of the hearing officer's initial decision.

(iv) In any hearing held on a petition filed in accordance with paragraph (e)(3)(ii) of this section, the staff of the Commission shall show either that the petitioner has been enjoined as described in paragraph (e)(3)(i)(A) of this section or that the petitioner has been found to have committed or aided and abetted violations as described in paragraph (e)(3)(i)(B) of this section and that showing, without more, may be the basis for censure or disqualification. Once that showing has been made, the burden shall be upon the petitioner to show cause why he or she should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. In any such hearing, the petitioner may not contest any finding made against him or her or fact admitted by him or her in the judicial or administrative proceeding upon which the proceeding under this paragraph (e)(3) is predicated. A person who has consented to the entry of a permanent injunction as described in paragraph (e)(3)(i)(A) of this section without admitting the facts set forth in the complaint shall be presumed for all purposes under this paragraph (e)(3) to have been enjoined by reason of the misconduct alleged in the complaint.

(4) *Filing of prior orders.* Any person appearing or practicing before the

Commission who has been the subject of an order, judgment, decree, or finding as set forth in paragraph (e)(3) of this section shall promptly file with the Secretary a copy thereof (together with any related opinion or statement of the agency or tribunal involved). Failure to file any such paper, order, judgment, decree or finding shall not impair the operation of any other provision of this section.

(5) *Reinstatement.* (i) An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown.

(ii) Any person suspended under paragraph (e)(2) of this section shall be reinstated by the Commission, upon appropriate application, if all the grounds for application of the provisions of that paragraph are subsequently removed by a reversal of the conviction or termination of the suspension, disbarment, or revocation. An application for reinstatement on any other grounds by any person suspended under paragraph (e)(2) of this section may be filed at any time and the applicant shall be accorded an opportunity for a hearing in the matter; however, such suspension shall continue unless and until the applicant has been reinstated by order of the Commission for good cause shown.

(6) *Other proceedings not precluded.* A proceeding brought under paragraph (e)(1), (e)(2) or (e)(3) of this section shall not preclude another proceeding brought under these same paragraphs.

(7) *Public hearings.* All hearings held under this paragraph (e) shall be public unless otherwise ordered by the Commission on its own motion or after considering the motion of a party.

(f) *Practice defined.* For the purposes of these Rules of Practice, practicing before the Commission shall include, but shall not be limited to:

(1) Transacting any business with the Commission; and

(2) The preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other professional or expert.

[60 FR 32796, June 23, 1995, as amended at 63 FR 57122, Oct. 26, 1998]

§ 201.103 Construction of rules.

(a) The Rules of Practice shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.

(b) In any particular proceeding, to the extent that there is a conflict between these rules and a procedural requirement contained in any statute, or any rule or form adopted thereunder, the latter shall control.

(c) For purposes of these rules:

(1) Any term in the singular includes the plural, and any term in the plural includes the singular, if such use would be appropriate;

(2) Any use of a masculine, feminine, or neuter gender encompasses such other genders as would be appropriate; and

(3) Unless the context requires otherwise, counsel for a party may take any action required or permitted to be taken by such party.

§ 201.104 Business hours.

The Headquarters office of the Commission, at 450 Fifth Street, N.W., Washington, D.C. 20549, is open each day, except Saturdays, Sundays, and Federal legal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect in Washington, D.C. Federal legal holidays consist of New Year's Day; Birthday of Martin Luther King, Jr.; Presidents Day; Memorial Day; Independence Day; Labor Day; Columbus Day; Veterans Day; Thanksgiving Day; Christmas Day; and any other day appointed as a holiday in Washington, D.C. by the President or the Congress of the United States.

§ 201.110 Presiding officer.

All proceedings shall be presided over by the Commission or, if the Commission so orders, by a hearing officer. When the Commission designates that

the hearing officer shall be an administrative law judge, the Chief Administrative Law Judge shall select, pursuant to 17 CFR 200.30–10, the administrative law judge to preside.

§201.111 Hearing officer: Authority.

The hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557. The powers of the hearing officer include, but are not limited to, the following:

(a) Administering oaths and affirmations;

(b) Issuing subpoenas authorized by law and revoking, quashing, or modifying any such subpoena;

(c) Receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(d) Regulating the course of a proceeding and the conduct of the parties and their counsel;

(e) Holding prehearing and other conferences as set forth in §201.221 and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(f) Recusing himself or herself upon motion made by a party or upon his or her own motion;

(g) Ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(h) Subject to any limitations set forth elsewhere in these rules, considering and ruling upon all procedural and other motions;

(i) Preparing an initial decision as provided in §201.360;

(j) Upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission; and

(k) Informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods.

§201.112 Hearing officer: Disqualification and withdrawal.

(a) *Notice of disqualification.* At any time a hearing officer believes himself or herself to be disqualified from considering a matter, the hearing officer shall issue a notice stating that he or she is withdrawing from the matter and setting forth the reasons therefor.

(b) *Motion for withdrawal.* Any party who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and shall continue to preside over the proceeding.

§201.120 Ex parte communications.

(a) Except to the extent required for the disposition of *ex parte* matters as authorized by law, the person presiding over an evidentiary hearing may not:

(1) Consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Commission.

(b) The Commission's code of behavior regarding *ex parte* communications between persons outside the Commission and decisional employees, 17 CFR 200.110 through 200.114, governs other prohibited communications during a proceeding conducted under the Rules of Practice.

§201.121 Separation of functions.

Any Commission officer, employee or agent engaged in the performance of investigative or prosecutorial functions for the Commission in a proceeding as defined in §201.101(a) may not, in that proceeding or one that is factually related, participate or advise

in the decision, or in Commission review of the decision pursuant to Section 557 of the Administrative Procedure Act, 5 U.S.C. 557, except as a witness or counsel in the proceeding.

§ 201.140 Commission orders and decisions: Signature and availability.

(a) *Signature required.* All orders and decisions of the Commission shall be signed by the Secretary or any other person duly authorized by the Commission.

(b) *Availability for inspection.* Each order and decision shall be available for inspection by the public from the date of entry, unless the order or decision is nonpublic. A nonpublic order or decision shall be available for inspection by any person entitled to inspect it from the date of entry.

(c) *Date of entry of orders.* The date of entry of a Commission order shall be the date the order is signed. Such date shall be reflected in the caption of the order, or if there is no caption, in the order itself.

§ 201.141 Orders and decisions: Service of orders instituting proceeding and other orders and decisions.

(a) *Service of an order instituting proceedings.* (1) *By whom made.* The Secretary, or another duly authorized officer of the Commission, shall serve a copy of an order instituting proceedings on each person named in the order as a party. The Secretary may direct an interested division to assist in making service.

(2) *How made.* (i) *To individuals.* Notice of a proceeding shall be made to an individual by delivering a copy of the order instituting proceedings to the individual or to an agent authorized by appointment or by law to receive such notice. *Delivery* means—handing a copy of the order to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of the order addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt; or giving confirmed telegraphic notice.

(ii) *To corporations or entities.* Notice of a proceeding shall be made to a person other than a natural person by delivering a copy of the order instituting proceedings to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive such notice, by any method specified in paragraph (a)(2)(i) of this section.

(iii) *Upon persons registered with the Commission.* In addition to any other method of service specified in paragraph (a)(2) of this section, notice may be made to a person currently registered with the Commission as a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent by sending a copy of the order addressed to the most recent business address shown on the person's registration form by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of attempted delivery.

(iv) *Upon persons in a foreign country.* Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (a)(2) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

(v) *In stop order proceedings.* Notwithstanding any other provision of paragraph (a)(2) of this section, in proceedings pursuant to Sections 8 or 10 of the Securities Act of 1933, 15 U.S.C. 77h or 77j, or Sections 305 or 307 of the Trust Indenture Act of 1939, 15 U.S.C. 77eee or 77ggg, notice of the institution of proceedings shall be made by personal service or confirmed telegraphic notice, or a waiver obtain pursuant to paragraph (a)(4) of this section.

(3) *Certificate of service.* The Secretary shall place in the record of the proceeding a certificate of service identifying the party given notice, the method of service, the date of service, the address to which service was made and the person who made service. If service is made in person, the certificate shall

state, if available, the name of the individual to whom the order was given. If service is made by U.S. Postal Service certified, registered or Express Mail, the certificate shall be accompanied by a confirmation of receipt or of attempted delivery, as required. If service is made to an agent authorized by appointment to receive service, the certificate shall be accompanied by evidence of the appointment.

(4) *Waiver of service.* In lieu of service as set forth in paragraph (a)(2) of this section, the party may be provided a copy of the order instituting proceedings by first class mail or other reliable means if a waiver of service is obtained from the party and placed in the record.

(b) *Service of orders or decisions other than an order instituting proceedings.* Written orders or decisions issued by the Commission or by a hearing officer shall be served promptly on each party pursuant to any method of service authorized under paragraph (a) of this section or §201.150(c). Service of orders or decisions by the Commission, including those entered pursuant to delegated authority, shall be made by the Secretary or, as authorized by the Secretary, by a member of an interested division. Service of orders or decisions issued by a hearing officer shall be made by the Secretary or the hearing officer.

§201.150 Service of papers by parties.

(a) *When required.* In every proceeding as defined in §201.101(a), each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in the proceeding in accordance with the provisions of this section; provided, however, that absent an order to the contrary, no service shall be required for motions which may be heard *ex parte.*

(b) *Upon a person represented by counsel.* Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to §201.102, service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Commission or the hearing officer.

(c) *How made.* Service shall be made by delivering a copy of the filing. *Delivery* means:

(1) Personal service—handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein;

(2) Mailing the papers through the U.S. Postal Service by first class, registered, or certified mail or Express Mail delivery addressed to the person;

(3) Sending the papers through a commercial courier service or express delivery service; or

(4) Transmitting the papers by facsimile machine where the following conditions are met:

(i) The persons serving each other by facsimile transmission have agreed to do so in a writing, signed by each party, which specifies such terms as they deem necessary with respect to facsimile machine telephone numbers to be used, hours of facsimile machine operation, the provision of non-facsimile original or copy, and any other such matters; and

(ii) Receipt of each document served by facsimile is confirmed by a manually signed receipt delivered by facsimile machine or other means agreed to by the parties.

(d) *When service is complete.* Personal service, service by U.S. Postal Service Express Mail or service by a commercial courier or express delivery service is complete upon delivery. Service by mail is complete upon mailing. Service by facsimile is complete upon confirmation of transmission by delivery of a manually signed receipt.

§201.151 Filing of papers with the Commission: Procedure.

(a) *When to file.* All papers required to be served by a party upon any person shall be filed with the Commission at the time of service or promptly thereafter. Papers required to be filed with

the Commission must be received within the time limit, if any, for such filing.

(b) *Where to file.* Filing of papers with the Commission shall be made by filing them with the Secretary. When a proceeding is assigned to a hearing officer, a person making a filing with the Secretary shall promptly provide to the hearing officer a copy of any such filing, provided, however, that the hearing officer may direct or permit filings to be made with him or her, in which event the hearing officer shall note thereon the filing date and promptly provide the Secretary with either the original or a copy of any such filings.

(c) *To whom to direct the filing.* Unless otherwise provided, where the Commission has assigned a case to a hearing officer, all motions, objections, applications or other filings made during a proceeding prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of briefs with the Commission, shall be directed to and decided by the hearing officer.

(d) *Certificate of service.* Papers filed with the Commission or a hearing officer shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service and the mailing address or facsimile telephone number to which service was made, if not made in person. If the method of service to any party is different from the method of service to any other party or the method for filing with the Commission, the certificate shall state why a different means of service was used.

§ 201.152 Filing of papers: Form.

(a) *Specifications.* Papers filed in connection with any proceeding as defined in § 201.101(a) shall:

(1) Be on one grade of unglazed white paper measuring 8½×11 inches, except that, to the extent that the reduction of larger documents would render them illegible, such documents may be filed on larger paper;

(2) Be typewritten or printed in either 10- or 12-point typeface or otherwise reproduced by a process that produces permanent and plainly legible copies;

(3) Include at the head of the paper, or on a title page, the name of the Commission, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(4) Be paginated with left hand margins at least 1 inch wide, and other margins of at least 1 inch;

(5) Be double-spaced, with single-spaced footnotes and single-spaced indented quotations; and

(6) Be stapled, clipped or otherwise fastened in the upper left corner.

(b) *Signature required.* All papers must be dated and signed as provided in § 201.153.

(c) *Suitability for recordkeeping.* Documents which, in the opinion of the Commission, are not suitable for computer scanning or microfilming may be rejected.

(d) *Number of copies.* An original and three copies of all papers shall be filed.

(e) *Form of briefs.* All briefs containing more than 10 pages shall include a table of contents, an alphabetized table of cases, a table of statutes, and a table of other authorities cited, with references to the pages of the brief wherein they are cited.

(f) *Scandalous or impertinent matter.* Any scandalous or impertinent matter contained in any brief or pleading or in connection with any oral presentation in a proceeding may be stricken on order of the Commission or the hearing officer.

§ 201.153 Filing of papers: Signature requirement and effect.

(a) *General requirements.* Following the issuance of an order instituting proceedings, every filing of a party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's business address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing.

(b) *Effect of signature.* (1) The signature of a counsel or party shall constitute a certification that:

(i) the person signing the filing has read the filing;

(ii) to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(iii) the filing is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of adjudication.

(2) If a filing is not signed, the hearing officer or the Commission shall strike the filing, unless it is signed promptly after the omission is called to the attention of the person making the filing.

§201.154 Motions.

(a) *Generally*. Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon. All written motions shall be served in accordance with §201.150, be filed in accordance with §201.151, meet the requirements of §201.152, and be signed in accordance with §201.153. The Commission or the hearing officer may order that an oral motion be submitted in writing. Unless otherwise ordered by the Commission or the hearing officer, if a motion is properly made to the Commission concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Commission. No oral argument shall be heard on any motion unless the Commission or the hearing officer otherwise directs.

(b) *Opposing and reply briefs*. Except as provided in §201.401, briefs in opposition to a motion shall be filed within five days after service of the motion. Reply briefs shall be filed within three days after service of the opposition.

(c) *Length limitation*. A brief in support of or opposition to a motion shall not exceed 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. Requests for leave to file briefs in excess of 10 pages are disfavored.

§201.155 Default; motion to set aside default.

(a) A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails:

(1) To appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) To cure a deficient filing within the time specified by the commission or the hearing officer pursuant to §201.180(b).

(b) A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Commission, at any time, may for good cause shown set aside a default.

§201.160 Time computation.

(a) *Computation*. In computing any period of time prescribed in or allowed by these Rules of Practice or by order of the Commission, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or Federal legal holiday (as defined in §201.104), in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal legal holiday. Intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed for service by mail in paragraph (b) of this section. If on the day a filing is to be made, weather or other conditions have

caused the Secretary's office or other designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a Federal legal holiday.

(b) *Additional time for service by mail.* If service is made by mail, three days shall be added to the prescribed period for response.

§ 201.161 Extensions of time, postponements and adjournments.

(a) *Availability.* Except as otherwise provided by law, the Commission, at any time, or the hearing officer, at any time prior to the filing of his or her initial decision or, if no initial decision is to be filed, at any time prior to the closing of the record, may, for good cause shown, extend or shorten any time limits prescribed by these Rules of Practice for the filing of any papers and may, consistent with paragraph (b) of this section, postpone or adjourn any hearing.

(b) *Limitations on postponements, adjournments and extensions.* A hearing shall begin at the time and place ordered, provided that, within the limits provided by statute, the Commission or the hearing officer may for good cause shown postpone the commencement of the hearing or adjourn a convened hearing for a reasonable period of time or change the place of hearing.

(1) *Additional considerations.* In considering a motion for postponement of the start of a hearing, adjournment once a hearing has begun, or extensions of time for filing papers, the hearing officer or the Commission shall consider, in addition to any other factors:

(i) The length of the proceeding to date;

(ii) The number of postponements, adjournments or extensions already granted;

(iii) The stage of the proceedings at the time of the request; and

(iv) Any other such matters as justice may require.

(2) *Time limit.* Postponements, adjournments or extensions of time for filing papers shall not exceed 21 days unless the Commission or the hearing officer states on the record or sets forth in a written order the reasons why a longer period of time is necessary.

§ 201.180 Sanctions.

(a) *Contemptuous conduct*—(1) *Subject to exclusion or suspension.* Contemptuous conduct by any person before the Commission or a hearing officer during any proceeding, including any conference, shall be grounds for the Commission or the hearing officer to:

(i) Exclude that person from such hearing or conference, or any portion thereof; and/or

(ii) Summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding.

(2) *Review procedure.* A person excluded from a hearing or conference, or a counsel summarily suspended from practice for the duration or any portion of a proceeding, may seek review of the exclusion or suspension by filing with the Commission, within three days of the exclusion or suspension order, a motion to vacate the order. The Commission shall consider such motion on an expedited basis as provided in § 201.500.

(3) *Adjournment.* Upon motion by a party represented by counsel subject to an order of exclusion or suspension, an adjournment shall be granted to allow the retention of new counsel. In determining the length of an adjournment, the Commission or hearing officer shall consider, in addition to the factors set forth in § 201.161, the availability of co-counsel for the party or of other members of a suspended counsel's firm.

(b) *Deficient filings; leave to cure deficiencies.* The Commission or the hearing officer may reject, in whole or in part, any filing that fails to comply with any requirements of these Rules of Practice or of any order issued in the proceeding in which the filing was made. Any such filings shall not be part of the record. The Commission or the hearing officer may direct a party to cure any deficiencies and to resubmit the filing within a fixed time period.

(c) *Failure to make required filing or to cure deficient filing.* The Commission or the hearing officer may enter a default pursuant to § 201.155, dismiss the case,

decide the particular matter at issue against that person, or prohibit the introduction of evidence or exclude testimony concerning that matter if a person fails:

(1) To make a filing required under these Rules of Practice; or

(2) To cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to paragraph (b) of this section.

§201.190 Confidential treatment of information in certain filings.

(a) *Application.* An application for confidential treatment pursuant to the provisions of Clause 30 of Schedule A of the Securities Act of 1933, 15 U.S.C. 77aa(30), and Rule 406 thereunder, 17 CFR 230.406; Section 24(b)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78x(b)(2), and Rule 24b–2 thereunder, 17 CFR 240.24b–2; Section 22(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79v(b), and Rule 104 thereunder, 17 CFR 250.104; Section 45(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–44(a), and Rule 45a–1 thereunder, 17 CFR 270.45a–1; or Section 210(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–10(a), shall be filed with the Secretary. The application shall be accompanied by a sealed copy of the materials as to which confidential treatment is sought.

(b) *Procedure for supplying additional information.* The applicant may be required to furnish in writing additional information with respect to the grounds for objection to public disclosure. Failure to supply the information so requested within 14 days from the date of receipt by the applicant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the information to which the additional information relates, unless the Commission or the hearing officer shall otherwise order for good cause shown at or before the expiration of such 14-day period.

(c) *Confidentiality of materials pending final decision.* Pending the determination of the application for confidential treatment, transcripts, non-final orders including an initial decision, if any, and other materials in connection with the application shall be placed under seal; shall be for the confidential use only of the hearing officer, the Commission, the applicant, and any other parties and counsel; and shall be made available to the public only in accordance with orders of the Commission.

(d) *Public availability of orders.* Any final order of the Commission denying or sustaining an application for confidential treatment shall be made public. Any prior findings or opinions relating to an application for confidential treatment under this section shall be made public at such time as the material as to which confidentiality was requested is made public.

§201.191 Adjudications not required to be determined on the record after notice and opportunity for hearing.

(a) *Scope of the rule.* This rule applies to every case of adjudication, as defined in 5 U.S.C. 551, pursuant to any statute which the Commission administers, where adjudication is not required to be determined on the record after notice and opportunity for hearing and which the Commission has not chosen to determine on the record after notice and opportunity for hearing.

(b) *Procedure.* In every case of adjudication under paragraph (a) of this section, the Commission shall give prompt notice of any adverse action or final disposition to any person who has requested the Commission to make (or not to make) any such adjudication, and furnish to any such person a written statement of reasons therefor. Additional procedures may be specified in rules relating to specific types of such adjudications. Where any such rule provides for the publication of a Commission order, notice of the action or disposition shall be deemed to be given by such publication.

(c) *Contents of the record.* If the Commission provides notice and opportunity for the submission of written comments by parties to the adjudication or, as the case may be, by other interested persons, written comments received on or before the closing date for comments, unless accorded confidential treatment pursuant to statute or rule of the Commission, become a part of the record of the adjudication. The Commission, in its discretion, may

accept and include in the record written comments filed with the Commission after the closing date.

§ 201.192 Rulemaking: Issuance, amendment and repeal of rules of general application.

(a) *By petition.* Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary. Such petition shall include a statement setting forth the text or the substance of any proposed rule or amendment desired or specifying the rule the repeal of which is desired, and stating the nature of his or her interest and his or her reasons for seeking the issuance, amendment or repeal of the rule. The Secretary shall acknowledge, in writing, receipt of the petition and refer it to the appropriate division or office for consideration and recommendation. Such recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate. The Secretary shall notify the petitioner of the action taken by the Commission.

(b) *Notice of proposed issuance, amendment or repeal of rules.* Except where the Commission finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, whenever the Commission proposes to issue, amend, or repeal any rule or regulation of general application other than an interpretive rule; general statement of policy; or rule of agency organization, procedure, or practice; or any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, there shall first be published in the FEDERAL REGISTER a notice of the proposed action. Such notice shall include:

(1) A statement of the time, place, and nature of the rulemaking proceeding, with particular reference to the manner in which interested persons shall be afforded the opportunity to participate in such proceeding;

(2) Reference to the authority under which the rule is proposed; and

(3) The terms or substance of the proposed rule or a description of the subjects and issues involved.

§ 201.193 Applications by barred individuals for consent to associate.

PRELIMINARY NOTE

This rule governs applications to the Commission by certain persons, barred by Commission order from association with brokers, dealers, municipal securities dealers, government securities brokers, government securities dealers, investment advisers, investment companies or transfer agents, for consent to become so associated. Applications made pursuant to this section must show that the proposed association would be consistent with the public interest. In addition to the information specifically required by the rule, applications should be supplemented, where appropriate, by written statements of individuals (other than the applicant) who are competent to attest to the applicant's character, employment performance, and other relevant information. Intentional misstatements or omissions of fact may constitute criminal violations of 18 U.S.C. 1001 *et seq.* and other provisions of law.

The nature of the supervision that an applicant will receive or exercise as an associated person with a registered entity is an important matter bearing upon the public interest. In meeting the burden of showing that the proposed association is consistent with the public interest, the application and supporting documentation must demonstrate that the proposed supervision, procedures, or terms and conditions of employment are reasonably designed to prevent a recurrence of the conduct that led to imposition of the bar. As an associated person, the applicant will be limited to association in a specified capacity with a particular registered entity and may also be subject to specific terms and conditions.

Normally, the applicant's burden of demonstrating that the proposed association is consistent with the public interest will be difficult to meet where the applicant is to be supervised by, or is to supervise, another barred individual. In addition, where an applicant wishes to become the sole proprietor of a registered entity and thus is seeking Commission consent notwithstanding an absence of supervision, the applicant's burden will be difficult to meet.

In addition to the factors set forth in paragraph (d) of this section, the Commission will consider the nature of the findings that resulted in the bar when making its determination as to whether the proposed association is consistent with the public interest. In this regard, attention is directed to Rule 5(e) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(e). Among other things, Rule 5(e) sets forth the Commission's policy "not to permit a * * * respondent [in an administrative proceeding] to consent to * * * [an] order that imposes a

sanction while denying the allegations in the * * * order for proceedings.'' Consistent with the rationale underlying that policy, and in order to avoid the appearance that an application made pursuant to this section was granted on the basis of such denial, the Commission will not consider any application that attempts to reargue or collaterally attack the findings that resulted in the Commission's bar order.

(a) *Scope of rule.* Applications for Commission consent to associate, or to change the terms and conditions of association, with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent may be made pursuant to this section where a Commission order bars the individual from association with a registered entity and:

(1) Such barred individual seeks to become associated with an entity that is not a member of a self-regulatory organization; or

(2) The order contains a proviso that application may be made to the Commission after a specified period of time.

(b) *Form of application.* Each application shall be supported by an affidavit, manually signed by the applicant, that addresses the factors set forth in paragraph (d) of this section. One original and three copies of the application shall be filed pursuant to §§201.151, 201.152 and 201.153. Each application shall include as exhibits:

(1) A copy of the Commission order imposing the bar;

(2) An undertaking by the applicant to notify immediately the Commission in writing if any information submitted in support of the application becomes materially false or misleading while the application is pending;

(3) The following forms, as appropriate:

(i) A copy of a completed Form U–4, where the applicant's proposed association is with a broker-dealer or municipal securities dealer;

(ii) A copy of a completed Form MSD–4, where the applicant's proposed association is with a bank municipal securities dealer;

(iii) The information required by Form ADV, 17 CFR 279.1, with respect to the applicant, where the applicant's proposed association is with an investment adviser;

(iv) The information required by Form TA–1, 17 CFR 249b.100, with respect to the applicant, where the applicant's proposed association is with a transfer agent; and

(4) A written statement by the proposed employer that describes:

(i) The terms and conditions of employment and supervision to be exercised over such applicant and, where applicable, by such applicant;

(ii) The qualifications, experience, and disciplinary records of the proposed supervisor(s) of the applicant;

(iii) The compliance and disciplinary history, during the two years preceding the filing of the application, of the office in which the applicant will be employed; and

(iv) The names of any other associated persons in the same office who have previously been barred by the Commission, and whether they are to be supervised by the applicant.

(c) *Required showing.* The applicant shall make a showing satisfactory to the Commission that the proposed association would be consistent with the public interest.

(d) *Factors to be addressed.* The affidavit required by paragraph (b) of this section shall address each of the following:

(1) The time period since the imposition of the bar;

(2) Any restitution or similar action taken by the applicant to recompense any person injured by the misconduct that resulted in the bar;

(3) The applicant's compliance with the order imposing the bar;

(4) The applicant's employment during the period subsequent to imposition of the bar;

(5) The capacity or position in which the applicant proposes to be associated;

(6) The manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant;

(7) Any relevant courses, seminars, examinations or other actions completed by the applicant subsequent to imposition of the bar to prepare for his or her return to the securities business; and

(8) Any other information material to the application.

(e) *Notification to applicant and written statement.* In the event an adverse recommendation is proposed by the staff with respect to an application made pursuant to this section, the applicant shall be so advised and provided with a written statement of the reasons for such recommendation. The applicant shall then have 30 days to submit a written statement in response.

(f) *Concurrent applications.* The Commission will not consider any application submitted pursuant to this section if any other application for consent to associate concerning the same applicant is pending before any self-regulatory organization.

INITIATION OF PROCEEDINGS AND PREHEARING RULES

§ 201.200 Initiation of proceedings.

(a) *Order instituting proceedings: Notice and opportunity for hearing.* (1) *Generally.* Whenever an order instituting proceedings is issued by the Commission, appropriate notice thereof shall be given to each party to the proceeding by the Secretary or another duly designated officer of the Commission. Each party shall be given notice of any hearing within a time reasonable in light of the circumstances, in advance of the hearing; provided, however, no prior notice need be given to a respondent if the Commission has authorized the Division of Enforcement to seek a temporary sanction *ex parte.*

(2) *Stop order proceedings: Additional persons entitled to notice.* Any notice of a proceeding relating to the issuance of a stop order suspending the effectiveness of a registration statement pursuant to Section 8(d) of the Securities Act of 1933, 15 U.S.C. 77h(d), shall be sent to or served on the issuer; or, in the case of a foreign government or political subdivision thereof, sent to or served on the underwriter; or, in the case of a foreign or territorial person, sent to or served on its duly authorized representative in the United States named in the registration statement, properly directed in the case of telegraphic notice to the address given in such statement. In addition, if such proceeding is commenced within 90 days after the registration statement has become effective, notice of the proceeding shall be given to the agent for service named on the facing sheet of the registration statement and to each other person designated on the facing sheet of the registration statement as a person to whom copies of communications to such agent are to be sent.

(b) *Content of order.* The order instituting proceedings shall:

(1) State the nature of any hearing;

(2) State the legal authority and jurisdiction under which the hearing is to be held;

(3) Contain a short and plain statement of the matters of fact and law to be considered and determined, unless the order directs an answer pursuant to § 201.220 in which case the order shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto; and

(4) State the nature of any relief or action sought or taken.

(c) *Time and place of hearing.* The time and place for any hearing shall be fixed with due regard for the public interest and the convenience and necessity of the parties, other participants, or their representatives.

(d) *Amendment to order instituting proceedings.* (1) *By the Commission.* Upon motion by a party, the Commission may, at any time, amend an order instituting proceedings to include new matters of fact or law.

(2) *By the hearing officer.* Upon motion by a party, the hearing officer may, at any time prior to the filing of an initial decision or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission, amend an order instituting proceedings to include new matters of fact or law that are within the scope of the original order instituting proceedings.

(e) *Publication of notice of public hearings.* Unless otherwise ordered by the Commission, notice of any public hearing shall be given general circulation by release to the public, by publication in the *SEC News Digest* and, where directed, by publication in the FEDERAL REGISTER.

§201.201 Consolidation of proceedings.

By order of the Commission or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings. The Commission or the hearing officer may make such orders concerning the conduct of such proceedings as it deems appropriate to avoid unnecessary cost or delay. Consolidation shall not prejudice any rights under these Rules of Practice and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred. For purposes of this section, no distinction is made between joinder and consolidation of proceedings.

§201.202 Specification of procedures by parties in certain proceedings.

(a) *Motion to specify procedures.* In any proceeding other than an enforcement or disciplinary proceeding or a proceeding to review a determination by a self-regulatory organization pursuant to §§201.420 and 201.421, a party may, at any time up to 20 days prior to the start of a hearing, make a motion to specify the procedures necessary or appropriate for the proceeding, with particular reference to:

(1) Whether there should be an initial decision by a hearing officer;

(2) Whether any interested division of the Commission may assist in the preparation of the Commission's decision; and

(3) Whether there should be a 30-day waiting period between the issuance of the Commission's order and the date it is to become effective.

(b) *Objections; effect of failure to object.* Any other party may object to the procedures so specified, and such party may specify such additional procedures as it considers necessary or appropriate. In the absence of such objection or such specification of additional procedures, such other party may be deemed to have waived objection to the specified procedures.

(c) *Approval required.* Any proposal pursuant to paragraph (a) of this section, even if not objected to by any party, shall be subject to the written approval of the hearing officer.

(d) *Procedure upon agreement to waive an initial decision.* If an initial decision is waived pursuant to paragraph (a) of this section, the hearing officer shall notify the Secretary and, unless the Commission directs otherwise within 14 days, no initial decision shall be issued.

§201.210 Parties, limited participants and amici curiae.

(a) *Parties in an enforcement or disciplinary proceeding or a proceeding to review a self-regulatory organization determination*— (1) *Generally.* No person shall be granted leave to become a party or non-party participant on a limited basis in an enforcement or disciplinary proceeding or a proceeding to review a determination by a self-regulatory organization pursuant to §§201.420 and 201.421, except as authorized by paragraph (c) of this section.

(2) *Disgorgement proceedings.* In an enforcement proceeding, a person may state his or her views with respect to a proposed plan of disgorgement or file a proof of claim pursuant to §201.612.

(b) *Intervention as a party.* (1) *Generally.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding or a proceeding to review a self-regulatory organization determination, any person may seek leave to intervene as a party by filing a motion setting forth the person's interest in the proceeding. No person, however, shall be admitted as a party to a proceeding by intervention unless it is determined that leave to participate pursuant to paragraph (c) of this section would be inadequate for the protection of his or her interests.

(i) In a proceeding under the Public Utility Holding Company Act of 1935, any representative of interested consumers or security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors or consumers, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

(ii) In a proceeding under the Investment Company Act of 1940, any representative of interested security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of

investors, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

(2) *Intervention as of right.* (i) In proceedings under the Public Utility Holding Company Act of 1935, any interested representative, agency, authority or instrumentality of the United States or any interested State, State commission, municipality or other political subdivision of a state shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

(ii) In proceedings under the Investment Company Act of 1940, any interested State or State agency shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

(c) *Leave to participate on a limited basis.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding or a proceeding to review a self-regulatory organization determination, any person may seek leave to participate on a limited basis as a non-party participant as to any matter affecting the person's interests. In any enforcement proceeding or disciplinary proceeding, an authorized representative of the United States Department of Justice, an authorized representative of a United States Attorney, or an authorized representative of any criminal prosecutorial authority of any State or any other political subdivision of a State may seek leave to participate on a limited basis as a non-party participant as provided in paragraph (c)(3) of this section.

(1) *Procedure.* Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. Leave to participate pursuant to this paragraph (c) may include such rights of a party as the hearing officer may deem appropriate. Persons granted leave to participate shall be served in accordance with § 201.150; provided, however, that a party to the proceeding may move that the extent of notice of filings or other papers to be provided to persons granted leave to participate be limited, or may move that the persons granted leave to participate bear the cost of being provided copies of any or all filings or other papers. Persons granted leave to participate shall be bound, except as may be otherwise determined by the hearing officer, by any stipulation between the parties to the proceeding with respect to procedure, including submission of evidence, substitution of exhibits, corrections of the record, the time within which briefs or exceptions may be filed or proposed findings and conclusions may be submitted, the filing of initial decisions, the procedure to be followed in the preparation of decisions and the effective date of the Commission's order in the case. Where the filing of briefs or exceptions or the submission of proposed findings and conclusions are waived by the parties to the proceedings, a person granted leave to participate pursuant to this paragraph (c) shall not be permitted to file a brief or exceptions or submit proposed findings and conclusions except by leave of the Commission or of the hearing officer.

(2) *Certain persons entitled to leave to participate.* The hearing officer is directed to grant leave to participate under this paragraph (c) to any person to whom it is proposed to issue any security in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the Commission is authorized to approve the terms and conditions of such issuance and exchange after a hearing upon the fairness of such terms and conditions.

(3) *Leave to participate in certain Commission proceedings by a representative of the United States Department of Justice, a United States Attorney's Office, or a criminal prosecutorial authority of any State or any other political subdivision of a State.* The Commission or the hearing officer may grant leave to participate on a limited basis to an authorized representative of the United States Department of Justice, an authorized representative of a United States Attorney, or an authorized representative of any criminal prosecutorial authority of any State or any other political subdivision of a State for the purpose of

requesting a stay during the pendency of a criminal investigation or prosecution arising out of the same or similar facts that are at issue in the pending Commission enforcement or disciplinary proceeding. Upon a showing that such a stay is in the public interest or for the protection of investors, the motion for stay shall be favored. A stay granted under this paragraph (c)(3) may be granted for such a period and upon such conditions as the Commission or the hearing officer deems appropriate.

(d) *Amicus participation*—(1) *Availability.* An amicus brief may be filed only if:

(i) A motion for leave to file the brief has been granted;

(ii) The brief is accompanied by written consent of all parties;

(iii) The brief is filed at the request of the Commission or the hearing officer; or

(iv) The brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth.

(2) *Procedure.* An amicus brief may be filed conditionally with the motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support, unless the Commission or hearing officer, for cause shown, grants leave for a later filing. In the event that a later filing is allowed, the order granting leave to file shall specify when an opposing party may reply to the brief. A motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons.

(e) *Permission to state views.* Any person may make a motion seeking leave to file a memorandum or make an oral statement of his or her views. Any such communication may be included in the record; provided, however, that unless offered and admitted as evidence of the truth of the statements therein made, any assertions of fact submitted pursuant to the provisions of this paragraph (e) will be considered only to the extent that the statements therein made are otherwise supported by the record.

(f) *Modification of participation provisions.* The Commission or the hearing officer may, by order, modify the provisions of this section which would otherwise be applicable, and may impose such terms and conditions on the participation of any person in any proceeding as it may deem necessary or appropriate in the public interest.

[60 FR 32796, June 23, 1995, as amended at 63 FR 63405, Nov. 13, 1998]

§201.220 Answer to allegations.

(a) *When required.* In its order instituting proceedings, the Commission may require any party to file an answer to each of the allegations contained therein. Even if not so ordered, any party in any proceeding may elect to file an answer. Any other person granted leave by the Commission or the hearing officer to participate on a limited basis in such proceedings pursuant to §201.210(c) may be required to file an answer.

(b) *When to file.* Except where a different period is provided by rule or by order, a party required to file an answer as provided in paragraph (a) of this section shall do so within 20 days after service upon the party of the order instituting proceedings. Persons granted leave to participate on a limited basis in the proceeding pursuant to §201.210(c) may file an answer within a reasonable time, as determined by the Commission or the hearing officer. If the order instituting proceedings is amended, the Commission or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

(c) *Contents; effect of failure to deny.* Unless otherwise directed by the hearing officer or the Commission, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A

defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer. Any allegation not denied shall be deemed admitted.

(d) *Motion for more definite statement.* A party may file with an answer a motion for a more definite statement of specified matters of fact or law to be considered or determined. Such motion shall state the respects in which, and the reasons why, each such matter of fact or law should be required to be made more definite. If the motion is granted, the order granting such motion shall set the periods for filing such a statement and any answer thereto.

(e) *Amendments.* A party may amend its answer at any time by written consent of each adverse party or with leave of the Commission or the hearing officer. Leave shall be freely granted when justice so requires.

(f) *Failure to file answer: default.* If a party respondent fails to file an answer required by this section within the time provided, such person may be deemed in default pursuant to §201.155(a). A party may make a motion to set aside a default pursuant to §201.155(b).

201.221 Prehearing conference.

(a) *Purposes of conference.* The purposes of a prehearing conference include, but are not limited to:

(1) Expediting the disposition of the proceeding;

(2) Establishing early and continuing control of the proceeding by the hearing officer; and

(3) Improving the quality of the hearing through more thorough preparation.

(b) *Procedure.* On his or her own motion or at the request of a party, the hearing officer may, in his or her discretion, direct counsel or any party to meet for an initial, final or other prehearing conference. Such conferences may be held with or without the hearing officer present as the hearing officer deems appropriate. Where such a conference is held outside the presence of the hearing officer, the hearing officer shall be advised promptly by the parties of any agreements reached. Such conferences also may be held with one or more persons participating by telephone or other remote means.

(c) *Subjects to be discussed.* At a prehearing conference consideration may be given and action taken with respect to any and all of the following:

(1) Simplification and clarification of the issues;

(2) Exchange of witness and exhibit lists and copies of exhibits;

(3) Stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;

(4) Matters of which official notice may be taken;

(5) The schedule for exchanging prehearing motions or briefs, if any;

(6) The method of service for papers other than Commission orders;

(7) Summary disposition of any or all issues;

(8) Settlement of any or all issues;

(9) Determination of hearing dates;

(10) Amendments to the order instituting proceedings or answers thereto;

(11) Production of documents as set forth in §201.230, and prehearing production of documents in response to subpoenas duces tecum as set forth in §201.232;

(12) Specification of procedures as set forth in §201.202; and

(13) Such other matters as may aid in the orderly and expeditious disposition of the proceeding.

(d) *Required prehearing conference.* Except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate, at least one prehearing conference should be held.

(e) *Prehearing orders.* At or following the conclusion of any conference held pursuant to this section, the hearing officer shall enter a ruling or order which recites the agreements reached and any procedural determinations made by the hearing officer.

(f) *Failure to appear: default.* Any person who is named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed and who fails to appear, in person or through a representative, at a prehearing conference of which he or she has been duly notified may be deemed in default pursuant to

§ 201.155(a). A party may make a motion to set aside a default pursuant to § 201.155(b).

[60 FR 32796, June 23, 1995, as amended at 63 FR 63405, Nov. 13, 1998]

§ 201.222 Prehearing submissions.

(a) *Submissions generally.* The hearing officer, on his or her own motion, or at the request of a party or other participant, may order any party, including the interested division, to furnish such information as deemed appropriate, including any or all of the following:

(1) An outline or narrative summary of its case or defense;

(2) The legal theories upon which it will rely;

(3) Copies and a list of documents that it intends to introduce at the hearing; and

(4) A list of witnesses who will testify on its behalf, including the witnesses' names, occupations, addresses and a brief summary of their expected testimony.

(b) *Expert witnesses.* Each party who intends to call an expert witness shall submit, in addition to the information required by paragraph (a)(4) of this section, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, and a list of publications authored or co-authored by the expert.

§ 201.230 Enforcement and disciplinary proceedings: Availability of documents for inspection and copying.

For purposes of this section, the term *documents* shall include writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained.

(a) *Documents to be available for inspection and copying.* (1) Unless otherwise provided by this section, or by order of the Commission or the hearing officer, the Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings. Such documents shall include:

(i) Each subpoena issued;

(ii) Every other written request to persons not employed by the Commission to provide documents or to be interviewed;

(iii) The documents turned over in response to any such subpoenas or other written requests;

(iv) All transcripts and transcript exhibits;

(v) Any other documents obtained from persons not employed by the Commission; and

(vi) Any final examination or inspection reports prepared by the Office of Compliance Inspections and Examinations, the Division of Market Regulation, or the Division of Investment Management.

(2) Nothing in this paragraph (a) shall limit the right of the Division to make available any other document, or shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena.

(b) *Documents that may be withheld.* (1) The Division of Enforcement may withhold a document if:

(i) The document is privileged;

(ii) The document is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this section, or is otherwise attorney work product and will not be offered in evidence;

(iii) The document would disclose the identity of a confidential source; or

(iv) The hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.

(c) *Withheld document list.* The hearing officer may require the Division of

Enforcement to submit for review a list of documents withheld pursuant to paragraphs (b)(1) through (b)(4) of this section or to submit any document withheld, and may determine whether any such document should be made available for inspection and copying.

(d) *Timing of inspection and copying.* Unless otherwise ordered by the Commission or the hearing officer, the Division of Enforcement shall commence making documents available to a respondent for inspection and copying pursuant to this section no later than 14 days after the respondent files an answer. In a proceeding in which a temporary cease-and-desist order is sought pursuant to § 201.510 or a temporary suspension of registration is sought pursuant to § 201.520, documents shall be made available no later than the day after service of the decision as to whether to issue a temporary cease-and-desist order or temporary suspension order.

(e) *Place of inspection and copying.* Documents subject to inspection and copying pursuant to this section shall be made available to the respondent for inspection and copying at the Commission office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A respondent shall not be given custody of the documents or leave to remove the documents from the Commission's offices pursuant to the requirements of this section other than by written agreement of the Division of Enforcement. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(f) *Copying costs and procedures.* The respondent may obtain a photocopy of any documents made available for inspection. The respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made by the Division of Enforcement at the request of the respondent will be at the rate charged pursuant to the fee schedule at 17 CFR 200.80e for copies. The respondent shall be given access to the documents at the Commission's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) *Issuance of investigatory subpoenas after institution of proceedings.* The Division of Enforcement shall promptly inform the hearing officer and each party if investigatory subpoenas are issued under the same investigation file number or pursuant to the same order directing private investigation (''formal order'') under which the investigation leading to the institution of proceedings was conducted. The hearing officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings and that any relevant documents that may be obtained through the use of investigatory subpoenas in a continuing investigation are made available to each respondent for inspection and copying on a timely basis.

(h) *Failure to make documents available—harmless error.* In the event that a document required to be made available to a respondent pursuant to this section is not made available by the Division of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required, unless the respondent shall establish that the failure to make the document available was not harmless error.

[60 FR 32796, June 23, 1995; 60 FR 46499, Sept. 7, 1995]

§ 201.231 Enforcement and disciplinary proceedings: Production of witness statements.

(a) *Availability.* Any respondent in an enforcement or disciplinary proceeding may move that the Division of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) *Failure to produce—harmless error.* In the event that a statement required to be made available for inspection and copying by a respondent is not turned over by the Division of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

§201.232 Subpoenas.

(a) *Availability; procedure.* In connection with any hearing ordered by the Commission, a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses at the designated time and place of hearing, and subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place. Unless made on the record at a hearing, requests for issuance of a subpoena shall be made in writing and served on each party pursuant to §201.150. A person whose request for a subpoena has been denied or modified may not request that any other person issue the subpoena.

(1) *Unavailability of hearing officer.* In the event that the hearing officer assigned to a proceeding is unavailable, the party seeking issuance of the subpoena may seek its issuance from the first available of the following persons: The Chief Administrative Law Judge, the law judge most senior in service as a law judge, the duty officer, any other member of the Commission, or any other person designated by the Commission to issue subpoenas. Requests for issuance of a subpoena made to the Commission, or any member thereof, must be submitted to the Secretary, not to an individual Commissioner.

(2) *Signing may be delegated.* A hearing officer may authorize issuance of a subpoena, and may delegate the manual signing of the subpoena to any other person authorized to issue subpoenas.

(b) *Standards for issuance.* Where it appears to the person asked to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the person requested to issue the subpoena determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the person issuing the subpoena may inquire of the other participants whether they will stipulate to the facts sought to be proved.

(c) *Service.* Service shall be made pursuant to the provisions of §201.150 (b) through (d). The provisions of this paragraph (c) shall apply to the issuance of subpoenas for purposes of investigations, as required by 17 CFR 203.8, as well as hearings.

(d) *Tender of fees required.* When a subpoena compelling the attendance of a person at a hearing or deposition is issued at the instance of anyone other than an officer or agency of the United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and mileage specified by paragraph (f) of this section.

(e) *Application to quash or modify.* (1) *Procedure.* Any person to whom a subpoena is directed or who is an owner, creator or the subject of the documents that are to be produced pursuant to a subpoena may, prior to the time specified therein for compliance, but in no event more than 15 days after the date of service of such subpoena, request that the subpoena be quashed or modified. Such request shall be made by application filed with the Secretary and served on all parties pursuant to §201.150. The party on whose behalf the subpoena was issued may, within five days of service of the application, file an opposition to the application. If a hearing officer has been assigned to the proceeding, the application to quash shall be directed to that hearing officer for consideration, even if the subpoena was issued by another person.

(2) *Standards governing application to quash or modify.* If compliance with the subpoena would be unreasonable, oppressive or unduly burdensome, the

hearing officer or the Commission shall quash or modify the subpoena, or may order return of the subpoena only upon specified conditions. These conditions may include but are not limited to a requirement that the party on whose behalf the subpoena was issued shall make reasonable compensation to the person to whom the subpoena was addressed for the cost of copying or transporting evidence to the place for return of the subpoena.

(f) *Witness fees and mileage.* Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear.

§ 201.233 Depositions upon oral examination.

(a) *Procedure.* Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

(b) *Required finding when ordering a deposition.* In the discretion of the Commission or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, and that the taking of a deposition will serve the interests of justice.

(c) *Contents of order.* An order for deposition shall designate by name a deposition officer. The designated officer may be the hearing officer or any other person authorized to administer oaths by the laws of the United States or of the place where the deposition is to be held. An order for deposition also shall state:

(1) The name of the witness whose deposition is to be taken;

(2) The scope of the testimony to be taken;

(3) The time and place of the deposition;

(4) The manner of recording, preserving and filing the deposition; and

(5) The number of copies, if any, of the deposition and exhibits to be filed upon completion of the deposition.

(d) *Procedure at depositions.* A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(e) *Objections to questions or evidence.* Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted by the deposition officer upon the deposition, but a deposition officer other than the hearing officer shall not have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence before the deposition officer shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(f) *Filing of depositions.* The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

(g) *Payment.* The cost of the transcript shall be paid by the party requesting the deposition.

§201.234 Depositions upon written questions.

(a) *Availability*. Depositions may be taken and submitted on written questions upon motion of any party. The motion shall include the information specified in §201.233(a). A decision on the motion shall be governed by the provisions of §201.233(b).

(b) *Procedure*. Written questions shall be filed with the motion. Within 10 days after service of the motion and written questions, any party may file objections to such written questions and any party may file cross-questions. When a deposition is taken pursuant to this section no persons other than the witness, counsel to the witness, the deposition officer, and, if the deposition officer does not act as reporter, a reporter, shall be present at the examination of the witness. No party shall be present or represented unless otherwise permitted by order. The deposition officer shall propound the questions and cross-questions to the witness in the order submitted.

(c) *Additional requirements*. The order for deposition, filing of the deposition, form of the deposition and use of the deposition in the record shall be governed by paragraphs (c) through (g) of §201.233, except that no cross-examination shall be made.

§201.235 Introducing prior sworn statements of witnesses into the record.

(a) At a hearing, any person wishing to introduce a prior, sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefor. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement may be granted if:

(1) The witness is dead;

(2) The witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(3) The witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(4) The party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena; or,

(5) In the discretion of the Commission or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

(b) [Reserved]

§201.240 Settlement.

(a) *Availability*. Any person who is notified that a proceeding may or will be instituted against him or her, or any party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.

(b) *Procedure*. An offer of settlement shall state that it is made pursuant to this section; shall recite or incorporate as a part of the offer the provisions of paragraphs (c) (4) and (5) of this section; shall be signed by the person making the offer, not by counsel; and shall be submitted to the interested division.

(c) *Consideration of offers of settlement*. (1) Offers of settlement shall be considered by the interested division when time, the nature of the proceedings, and the public interest permit.

(2) Where a hearing officer is assigned to a proceeding, the interested division and the party submitting the offer may request that the hearing officer express his or her views regarding the appropriateness of the offer of settlement. A request for the hearing officer to express his or her views on an offer of settlement or otherwise to participate in a settlement conference constitutes a waiver by the persons making the request of any right to claim bias or prejudgment by the hearing officer based on the views expressed.

(3) The interested division shall present the offer of settlement to the Commission with its recommendation, except that, if the division's recommendation is unfavorable, the offer shall not be presented to the Commission unless the person making the offer so requests.

(4) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer:

(i) All hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) The filing of proposed findings of fact and conclusions of law;

(iii) Proceedings before, and an initial decision by, a hearing officer;

(iv) All post-hearing procedures; and

(v) Judicial review by any court.

(5) By submitting an offer of settlement the person further waives:

(i) Such provisions of the Rules of Practice or other requirements of law as may be construed to prevent any member of the Commission's staff from participating in the preparation of, or advising the Commission as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) Any right to claim bias or prejudgment by the Commission based on the consideration of or discussions concerning settlement of all or any part of the proceeding.

(6) If the Commission rejects the offer of settlement, the person making the offer shall be notified of the Commission's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(5) of this section with respect to any discussions concerning the rejected offer of settlement.

(7) Final acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Commission.

§ 201.250 Motion for summary disposition.

(a) After a respondent's answer has been filed and, in an enforcement or a disciplinary proceeding, documents have been made available to that respondent for inspection and copying pursuant to § 201.230, the respondent, or the interested division may make a motion for summary disposition of any or all allegations of the order instituting proceedings with respect to that respondent. If the interested division has not completed presentation of its case in chief, a motion for summary disposition shall be made only with leave of the hearing officer. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to § 201.323.

(b) The hearing officer shall promptly grant or deny the motion for summary disposition or shall defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. If it appears that a party, for good cause shown, cannot present by affidavit prior to hearing facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion. A hearing officer's decision to deny leave to file a motion for summary disposition is not subject to interlocutory appeal.

(c) The motion for summary disposition, supporting memorandum of points and authorities, and any declarations, affidavits or attachments shall not exceed 35 pages in length.

RULES REGARDING HEARINGS

§ 201.300 Hearings.

Hearings for the purpose of taking evidence shall be held only upon order of the Commission. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

§ 201.301 Hearings to be public.

All hearings, except hearings on applications for confidential treatment filed pursuant to § 201.190, hearings held to consider a motion for a protective order pursuant to § 201.322, and hearings on *ex parte* application for a temporary cease-and-desist order, shall be public unless otherwise ordered by the Commission on its own motion or the motion of a party. No hearing shall be nonpublic where all respondents request that the hearing be made public.

§ 201.302 Record of hearings.

(a) *Recordation.* Unless ordered otherwise by the hearing officer or the Commission, all hearings shall be recorded and a written transcript thereof shall be prepared.

(b) *Availability of a transcript.* Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings, and transcripts subject to a protective order pursuant to § 201.322, shall be available for purchase only by parties; provided, however, that any person compelled to submit data or evidence in a hearing may purchase a copy of his or her own testimony.

(c) *Transcript correction.* Prior to the filing of post-hearing briefs or proposed findings and conclusions, or within such earlier time as directed by the Commission or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation pursuant to § 201.324, or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

§ 201.310 Failure to appear at hearings: Default.

Any person named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed who fails to appear at a hearing of which he or she has been duly notified may be deemed to be in default pursuant to § 201.155(a). A party may make a motion to set aside a default pursuant to § 201.155(b).

§ 201.320 Evidence: Admissibility.

The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

§ 201.321 Evidence: Objections and offers of proof.

(a) *Objections.* Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Commission, however, unless raised:

(1) Pursuant to interlocutory review in accordance with § 201.400;

(2) In a proposed finding or conclusion filed pursuant to § 201.340; or

(3) In a petition for Commission review of an initial decision filed in accordance with § 201.410.

(b) *Offers of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Excluded material shall be retained pursuant to § 201.350(b).

§ 201.322 Evidence: Confidential information, protective orders.

(a) *Procedure.* In any proceeding as defined in § 201.101(a), a party, any person who is the owner, subject or creator of a document subject to subpoena or which may be introduced as evidence, or any witness who testifies at a hearing may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information. The motion should include a general summary or extract of the documents without revealing confidential details. If the movant seeks a protective order against disclosure to other parties as well as the public, copies of the documents shall not be served on other parties. Unless the documents are unavailable, the movant shall file for *in camera* inspection a sealed copy of the documents as to which the order is sought.

(b) *Basis for issuance.* Documents and testimony introduced in a public hearing are presumed to be public. A motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.

(c) *Requests for additional information supporting confidentiality.* A movant under paragraph (a) of this section may be required to furnish in writing additional information with respect to the grounds for confidentiality. Failure to supply the information so requested within five days from the date of receipt by the movant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the documents to which the additional information relates, unless the Commission or the hearing officer shall otherwise order for good cause shown at or before the expiration of such five-day period.

(d) *Confidentiality of documents pending decision.* Pending a determination of a motion under this section, the documents as to which confidential treatment is sought and any other documents that would reveal the confidential information in those documents shall be maintained under seal and shall be disclosed only in accordance with orders of the Commission or the hearing officer. Any order issued in connection with a motion under this section shall be public unless the order would disclose information as to which a protective order has been granted, in which case that portion of the order that would reveal the protected information shall be nonpublic.

§ 201.323 Evidence: Official notice.

Official notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. If official notice is requested or taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to establish the contrary.

§ 201.324 Evidence: Stipulations.

The parties may, by stipulation, at any stage of the proceeding agree upon any pertinent facts in the proceeding. A stipulation may be received in evidence and, when received, shall be binding on the parties to the stipulation.

§ 201.325 Evidence: Presentation under oath or affirmation.

A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

§ 201.326 Evidence: Presentation, rebuttal and cross-examination.

In any proceeding in which a hearing is required to be conducted on the record after opportunity for hearing in accord with 5 U.S.C. 556(a), a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Commission or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, in any other proceeding shall be determined by the Commission or the hearing officer in each proceeding.

§ 201.340 Proposed findings, conclusions and supporting briefs.

(a) *Opportunity to file.* Before an initial decision is issued, each party shall have an opportunity, reasonable in light of all the circumstances, to file in writing proposed findings and conclusions together with, or as a part of, its brief.

(b) *Procedure.* Proposed findings of fact must be supported by citations to specific portions of the record. If successive filings are directed, the proposed findings and conclusions of the party assigned to file first shall be set forth in serially numbered paragraphs, and any counter statement of proposed findings and conclusions must, in addition to any other matter, indicate those paragraphs of the proposals already filed as to which there is no dispute. A reply brief may be filed by the party assigned to file first, or, where simultaneous filings are directed, reply

briefs may be filed by each party, within the period prescribed therefor by the hearing officer. No further briefs may be filed except with leave of the hearing officer.

(c) *Time for filing.* In any proceeding in which an initial decision is to be issued:

(1) At the end of each hearing, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which proposed findings and conclusions and supporting briefs are to be filed. The party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth in the order the reasons why the different period is necessary.

(2) The total period within which all such proposed findings and conclusions and supporting briefs and any counter statements of proposed findings and conclusions and reply briefs are to be filed shall be no longer than 90 days after the close of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth in an order the reasons why the different period is necessary.

§201.350 Record in proceedings before hearing officer; retention of documents; copies.

(a) *Contents of the record.* The record shall consist of:

(1) The order instituting proceedings, each notice of hearing and any amendments;

(2) Each application, motion, submission or other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(3) Each stipulation, transcript of testimony and document or other item admitted into evidence;

(4) Each written communication accepted by the hearing officer pursuant to §201.210;

(5) With respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under §201.112, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(6) All motions, briefs and other papers filed on interlocutory appeal;

(7) All proposed findings and conclusions;

(8) Each written order issued by the hearing officer or Commission; and

(9) Any other document or item accepted into the record by the hearing officer.

(b) *Retention of documents not admitted.* Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any such documents until the later of the date upon which a Commission order ending the proceeding becomes final, or the conclusion of any judicial review of the Commission's order.

(c) *Substitution of copies.* A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this section.

§201.351 Transmittal of documents to Secretary; record index; certification.

(a) *Transmittal from hearing officer to Secretary of partial record index.* The hearing officer may, at any time, transmit to the Secretary motions, exhibits or any other original documents filed with or accepted into evidence by the hearing officer, together with an index of such documents. The hearing officer, may, by order, require the interested division or other persons to assist in promptly transporting such documents from the hearing location to the Office of the Secretary.

(b) *Preparation, certification of record index.* Promptly after the close of the hearing, the hearing officer shall transmit to the Secretary an index of the originals of any motions, exhibits or any other documents filed with or accepted into evidence by the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, or if no initial decision is to be prepared, within 30 days of the close of the hearing, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any person may file proposed corrections to the record index

with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised record index. If an initial decision is to be issued, the initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

(c) *Final transmittal of record items to the Secretary.* After the close of the hearing, the hearing officer shall transmit to the Secretary originals of any motions, exhibits or any other documents filed with, or accepted into evidence by, the hearing officer, or any other portions of the record that have not already been transmitted to the Secretary. Prior to service of the initial decision by the Secretary, or if no initial decision is to be issued, within 60 days of the close of the hearing, the Secretary shall inform the hearing officer if any portions of the record are not in the Secretary's custody.

§ 201.360 Initial decision of hearing officer.

(a) *When required.* Unless the Commission directs otherwise, the hearing officer shall prepare an initial decision in any proceeding in which the Commission directs a hearing officer to preside at a hearing, provided, however, that an initial decision may be waived by the parties with the consent of the hearing officer pursuant to § 201.202.

(b) *Content.* An initial decision shall include: Findings and conclusions, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof. The initial decision shall also state the time period, not to exceed 21 days after service of the decision, except for good cause shown, within which a petition for review of the initial decision may be filed. The reasons for any extension of time shall be stated in the initial decision. The initial decision shall also include a statement that, as provided in paragraph (d) of this section:

(1) The initial decision shall become the final decision of the Commission as to each party unless a party files a petition for review of the initial decision or the Commission determines on its own initiative to review the initial decision as to a party; and

(2) If a party timely files a petition for review or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

(c) *Filing, service and publication.* The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties and shall promptly publish notice of the filing thereof in the *SEC News Digest*. Thereafter, the Secretary shall publish the initial decision in the *SEC Docket*; provided, however, that in nonpublic proceedings no notice shall be published unless the Commission otherwise directs.

(d) *When final.* (1) Unless a party or an aggrieved person entitled to review files a petition for review in accordance with the time limit specified in the initial decision, or unless the Commission on its own initiative orders review pursuant to § 201.411, an initial decision shall become the final decision of the Commission.

(2) If a petition for review is timely filed by a party or an aggrieved person entitled to review, or if the Commission upon its own initiative has ordered review of a decision with respect to a party or a person aggrieved who would be entitled to review, the initial decision shall not become final as to that party or person.

(e) *Order of finality.* In the event that the initial decision becomes the final decision of the Commission with respect to a party, the Commission shall issue an order that the decision has become final as to that party. The order of finality shall state the date on which sanctions, if any, take effect. Notice of the order shall be published in the *SEC News Digest* and the *SEC Docket*.

APPEAL TO THE COMMISSION AND COMMISSION REVIEW

§201.400 Interlocutory review.

(a) *Availability.* The Commission will not review a hearing officer's ruling prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. The Commission may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this section if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Commission may, at any time, on its own motion, direct that any matter be submitted to it for review.

(b) *Expedited consideration.* Interlocutory review of a hearing officer's ruling shall be expedited in every way, consistent with the Commission's other responsibilities.

(c) *Certification process.* A ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer and shall specify the material relevant to the ruling involved. The hearing officer shall not certify a ruling unless:

(1) His or her ruling would compel testimony of Commission members, officers or employees or the production of documentary evidence in their custody; or

(2) Upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that:

(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) An immediate review of the order may materially advance the completion of the proceeding.

(d) *Proceedings not stayed.* The filing of an application for review or the grant of review shall not stay proceedings before the hearing officer unless he or she, or the Commission, shall so order. The Commission will not consider the motion for a stay unless the motion shall have first been made to the hearing officer.

§201.401 Issuance of stays.

(a) *Procedure.* A request for a stay shall be made by written motion, filed pursuant to §201.154, and served on all parties pursuant to §201.150. The motion shall state the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. Portions of the record relevant to the relief sought, if available to the movant, shall be filed with the motion. The Commission may issue a stay based on such motion or on its own motion.

(b) *Scope of relief.* The Commission may grant a stay in whole or in part, and may condition relief under this section upon such terms, or upon the implementation of such procedures, as it deems appropriate.

(c) *Stay of a Commission order.* A motion for a stay of a Commission order may be made by any person aggrieved thereby who would be entitled to review in a federal court of appeals. A motion seeking to stay the effectiveness of a Commission order pending judicial review may be made to the Commission at any time during which the Commission retains jurisdiction over the proceeding.

(d) *Stay of an action by a self-regulatory organization*—(1) *Availability.* A motion for a stay of an action by a self-regulatory organization for which the Commission is the appropriate regulatory agency, for which action review may be sought pursuant to §201.420, may be made by any person aggrieved thereby.

(2) *Summary entry.* A stay may be entered summarily, without notice and opportunity for hearing.

(3) *Expedited consideration.* Where the action complained of has already taken effect and the motion for stay is filed within 10 days of the effectiveness of the action, or where the action complained of, will, by its terms, take effect within five days of the filing of the motion for stay, the consideration of and decision on the motion for a stay shall be expedited in every way, consistent with the Commission's other responsibilities. Where consideration will be expedited, persons opposing the motion for a stay may file a statement in opposition within two days of service of the motion unless the Commission,

by written order, shall specify a different period.

§ 201.410 Appeal of initial decisions by hearing officers.

(a) *Petition for review; when available.* In any proceeding in which an initial decision is made by a hearing officer, any party, and any other person who would have been entitled to judicial review of the decision entered therein if the Commission itself had made the decision, may file a petition for review of the decision with the Commission.

(b) *Procedure.* The petition for review of an initial decision shall be filed with the Commission within such time after service of the initial decision as prescribed by the hearing officer pursuant to § 201.360(b). The petition shall set forth the specific findings and conclusions of the initial decision as to which exception is taken, together with supporting reasons for each exception. Supporting reasons may be stated in summary form. Any exception to an initial decision not stated in the petition for review, or in a previously filed proposed finding made pursuant to § 201.340, may, at the discretion of the Commission, be deemed to have been waived by the petitioner.

(c) *Financial disclosure statement requirement.* Any person who files a petition for review of an initial decision that asserts that person's inability to pay either disgorgement, interest or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in § 201.630(b).

(d) *Opposition to review.* A party may seek leave to file a brief in opposition to a petition for review within five days of the filing of the petition. The Commission will grant leave, or order the filing of an opposition on its own motion, only if it determines that briefing will significantly aid the decisional process. A brief in opposition shall identify those issues which do not warrant consideration by the Commission and shall state succinctly the reasons therefore.

(e) *Prerequisite to judicial review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review of a final order entered pursuant to such decision.

§ 201.411 Commission consideration of initial decisions by hearing officers.

(a) *Scope of review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.

(b) *Standards for granting review pursuant to a petition for review*—(1) *Mandatory review.* After a petition for review has been filed, the Commission shall review any initial decision that:

(i) Denies any request for action pursuant to Section 8(a) or Section 8(c) of the Securities Act of 1933, 15 U.S.C. 77h(a), (c), or the first sentence of Section 12(d) of the Exchange Act, 15 U.S.C. 78*l*(d);

(ii) Suspends trading in a security pursuant to Section 12(k) of the Exchange Act, 15 U.S.C. 78l(k); or

(iii) Is in a case of adjudication (as defined in 5 U.S.C. 551) not required to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in 5 U.S.C. 554(a) (1) through (6)).

(2) *Discretionary review.* The Commission may decline to review any other decision. In determining whether to grant review, the Commission shall consider whether the petition for review makes a reasonable showing that:

(i) A prejudicial error was committed in the conduct of the proceeding; or

(ii) The decision embodies:

(A) A finding or conclusion of material fact that is clearly erroneous; or

(B) A conclusion of law that is erroneous; or

(C) An exercise of discretion or decision of law or policy that is important and that the Commission should review.

(c) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any initial decision, or a portion of any initial decision, within

21 days after the end of the period established for filing a petition for review pursuant to §201.410(b) or any brief in opposition to a petition for review permitted pursuant to §201.410(d). A party who does not intend to file a petition for review, and who desires the Commission's determination whether to order review on its own initiative to be made in a shorter time, may make a motion for an expedited decision, accompanied by a written statement that the party waives its right to file a petition for review. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Limitations on matters reviewed.* Review by the Commission of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to §201.450(a). On notice to all parties, however, the Commission may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) *Summary affirmance.* The Commission may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Commission.

(f) *Failure to obtain a majority.* In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result.

§201.420 Appeal of determinations by self-regulatory organizations.

(a) *Application for review; when available.* An application for review by the Commission may be filed by any person who is aggrieved by a self-regulatory organization determination as to which a notice is required to be filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1). Such determinations include any:

(1) Final disciplinary sanction;

(2) Denial or conditioning of membership or participation;

(3) Prohibition or limitation in respect to access to services offered by that self-regulatory organization or a member thereof; or

(4) Bar from association.

(b) *Procedure.* An application for review may be filed with the Commission pursuant to §201.151 within 30 days after notice of the determination was filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1), and received by the aggrieved person applying for review. The application shall be served by the applicant on the self-regulatory organization. The application shall identify the determination complained of, set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor and state an address where the applicant can be served with the record index. The application shall be accompanied by the notice of appearance required by §201.102(d).

(c) *Determination not stayed.* Filing an application for review with the Commission pursuant to paragraph (b) of this section shall not operate as a stay of the complained of determination made by the self-regulatory organization unless the Commission otherwise orders either pursuant to a motion filed in accordance with §201.401 or on its own motion.

(d) *Certification of the record; service of the index.* Fourteen days after receipt of an application for review or a Commission order for review, the self-regulatory organization shall certify and file with the Commission one copy of the record upon which the action complained of was taken, and shall file with the Commission three copies of an index to such record, and shall serve upon each party one copy of the index.

§201.421 Commission consideration of determinations by self-regulatory organizations.

(a) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any determination by a self-regulatory organization that could be subject to an application for review

pursuant to § 201.420(a) within 40 days after notice thereof was filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1).

(b) *Supplemental briefing.* The Commission may at any time prior to issuance of its decision raise or consider any matter that it deems material, whether or not raised by the parties. Notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties shall be given where the Commission believes that such briefing would significantly aid the decisional process.

§ 201.430 Appeal of actions made pursuant to delegated authority.

(a) *Scope of rule.* Any person aggrieved by an action made by authority delegated in §§ 200.30–1 through 200.30–18 of this chapter may seek review of the action pursuant to paragraph (b) of this section.

(b) *Procedure*—(1) *Notice of intention to petition for review.* A party or any person aggrieved by an action made pursuant to delegated authority may seek Commission review of the action by filing a written notice of intention to petition for review within five days after actual notice to the party of the action or service of notice of the action pursuant to § 201.141(b), whichever is earlier. The notice shall identify the petitioner and the action complained of, and shall be accompanied by a notice of appearance pursuant to § 201.102(d).

(2) *Petition for review.* Within five days after the filing of a notice of intention to petition for review pursuant to paragraph (b)(1) of this section, the person seeking review shall file a petition for review containing a clear and concise statement of the issues to be reviewed and the reasons why review is appropriate. The petition shall include exceptions to any findings of fact or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such record as may exist. These reasons may be stated in summary form.

(c) *Prerequisite to judicial review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an action made by authority delegated in §§ 200.30–1 through 200.30–18 of this chapter is a prerequisite to the seeking of judicial review of a final order entered pursuant to such an action.

[60 FR 32796, June 23, 1995; 60 FR 46500, Sept. 7, 1995]

§ 201.431 Commission consideration of actions made pursuant to delegated authority.

(a) *Scope of review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to authority delegated in §§ 200.30–1 through 200.30–18 of this chapter.

(b) *Standards for granting review pursuant to a petition for review*—(1) *Mandatory review.* After a petition for review has been filed, the Commission shall review any action that it would be required to review pursuant to § 201.411(b)(1) if the action was made as the initial decision of a hearing officer.

(2) *Discretionary review.* The Commission may decline to review any other action. In determining whether to grant review, the Commission shall consider the factors set forth in § 201.411(b)(2).

(c) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any action made pursuant to delegated authority at any time, provided, however, that where there are one or more parties to the matter, such review shall not be ordered more than ten days after the action. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Required items in an order for review.* In an order granting a petition for review or directing review on the Commission's own initiative, the Commission shall set forth the time within which any party or other person may file a statement in support of or in opposition to the action made by delegated authority and shall state whether a stay shall be granted, if none is in effect, or shall be continued, if in effect pursuant to paragraph (e) of this section.

(e) *Automatic stay of delegated action.* An action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission. Upon filing with the Commission of a notice of intention to petition for review, or upon notice to the Secretary of the vote of a Commissioner that a matter be reviewed, an action made pursuant to delegated authority shall be stayed until the Commission orders otherwise, provided, however, there shall be no automatic stay of an action:

(1) To grant a stay of action by the Commission or a self-regulatory organization as authorized by 17 CFR 200.30–14(g) (5)–(6); or

(2) To commence a subpoena enforcement proceeding as authorized by 17 CFR 200.30–4(a)(10).

(f) *Effectiveness of stay or of Commission decision to modify or reverse a delegated action.* As against any person who shall have acted in reliance upon any action at a delegated level, any stay or any modification or reversal by the Commission of such action shall be effective only from the time such person receives actual notice of such stay, modification or reversal.

[60 FR 32796, June 23, 1995; 60 FR 46500, Sept. 7, 1995]

§201.450 Briefs filed with the Commission.

(a) *Briefing schedule order.* Other than review ordered pursuant to §201.431, if review of a determination is mandated by statute, rule, or judicial order or the Commission determines to grant review as a matter of discretion, the Commission shall issue a briefing schedule order directing the party or parties to file opening briefs and specifying particular issues, if any, as to which briefing should be limited or directed. Unless otherwise provided, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs shall be filed within 14 days after the date opposition briefs are due. No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Commission. The briefing schedule order shall be issued:

(1) At the time the Commission orders review on its own initiative pursuant to §§201.411 or 201.421, or orders interlocutory review on its own motion pursuant to §201.400(a); or

(2) Within 21 days, or such longer time as provided by the Commission, after:

(i) The last day permitted for filing a petition for review pursuant to §201.410(b) or a brief in opposition to a petition for review pursuant to §201.410(d);

(ii) Receipt by the Commission of an index to the record of a determination of a self-regulatory organization filed pursuant to §201.420(d);

(iii) Receipt by the Commission of the mandate of a court of appeals with respect to a judicial remand; or

(iv) Certification of a ruling for interlocutory review pursuant to §201.400(c).

(b) *Contents of briefs.* Briefs shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties.

(c) *Length limitation.* Opening and opposition briefs shall not exceed 50 pages and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum, except with leave of the Commission.

§201.451 Oral argument before the Commission.

(a) *Availability.* The Commission, on its own motion or the motion of a party or any other aggrieved person entitled to Commission review, may order oral argument with respect to any matter. Motions for oral argument with respect to whether to affirm all or

part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Commission will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Commission determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

(b) *Procedure.* Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Commission shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. The grant or denial of a motion for oral argument shall be made promptly after the filing of the last brief called for by the briefing schedule. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Commission, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

(c) *Time allowed.* Unless the Commission orders otherwise, not more than one half-hour per side will be allowed for oral argument. The Commission may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided equally among persons on a single side, provided, however, that by mutual agreement they may reallocate their time among themselves. A request for additional time must be made by motion filed reasonably in advance of the date fixed for argument.

(d) *Participation of Commissioners.* A member of the Commission who was not present at the oral argument may participate in the decision of the proceeding, provided that the member has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

§ 201.452 Additional evidence.

Upon its own motion or the motion of a party, the Commission may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. The Commission may accept or hear additional evidence, may remand the proceeding to a self-regulatory organization, or may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

§ 201.460 Record before the Commission.

The Commission shall determine each matter on the basis of the record.

(a) *Contents of the record.*

(1) In proceedings for final decision before the Commission other than those reviewing a determination by a self-regulatory organization, the record shall consist of:

(i) All items part of the record below in accordance with § 201.350;

(ii) Any petitions for review, cross-petitions or oppositions; and

(iii) All briefs, motions, submissions and other papers filed on appeal or review.

(2) In a proceeding for final decision before the Commission reviewing a determination by a self-regulatory organization, the record shall consist of:

(i) The record certified pursuant to § 201.420(d) by the self-regulatory organization;

(ii) Any application for review; and

(iii) Any submissions, moving papers, and briefs filed on appeal or review.

(b) *Transmittal of record to Commission.* Within 14 days after the last date set for filing briefs or such later date as the Commission directs, the Secretary shall transmit the record to the Commission.

(c) *Review of documents not admitted.* Any document offered in evidence but excluded by the hearing officer or the Commission and any document marked for identification but not offered as an exhibit shall not be considered a part

of the record before the Commission on appeal but shall be transmitted to the Commission by the Secretary if so requested by the Commission. In the event that the Commission does not request the document, the Secretary shall retain the document not admitted into the record until the later of:

(1) The date upon which the Commission's order becomes final, or

(2) The conclusion of any judicial review of that order.

§201.470 Reconsideration.

(a) *Scope of rule.* A party or any person aggrieved by a determination in a proceeding may file a motion for reconsideration of a final order issued by the Commission.

(b) *Procedure.* A motion for reconsideration shall be filed within 10 days after service of the order complained of on each party, or within such time as the Commission may prescribe upon motion of the person seeking reconsideration, if made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought. Except with permission of the Commission, a motion for reconsideration shall not exceed 15 pages. No responses to a motion for reconsideration shall be filed unless requested by the Commission.

§201.490 Receipt of petitions for judicial review pursuant to 28 U.S.C. 2112(a)(1).

The Commission officer and office designated pursuant to 28 U.S.C. 2112(a)(1) to receive copies of petitions for review of Commission orders from the persons instituting review in a court of appeals, are the Secretary and the Office of the Secretary at the Commission's Headquarters. Ten copies of each petition shall be submitted. Each copy shall state on its face that it is being submitted to the Commission pursuant to 28 U.S.C. 2112 by the person or persons who filed the petition in the court of appeals.

RULES RELATING TO TEMPORARY ORDERS AND SUSPENSIONS

§201.500 Expedited consideration of proceedings.

Consistent with the Commission's or the hearing officer's other responsibilities, every hearing shall be held and every decision shall be rendered at the earliest possible time in connection with:

(a) An application for a temporary sanction, as defined in §201.101(a), or a proceeding to determine whether a temporary sanction should be made permanent;

(b) A motion or application to review an order suspending temporarily the effectiveness of an exemption from registration pursuant to Regulations A, B, E or F under the Securities Act, §§230.258, 230.336, 230.610 or 230.656 of this chapter; or,

(c) A motion to or petition to review an order suspending temporarily the privilege of appearing before the Commission under §201.102(e)(3), or a sanction under §201.180(a)(1).

§201.510 Temporary cease-and-desist orders: Application process.

(a) *Procedure.* A request for entry of a temporary cease-and-desist order shall be made by application filed by the Division of Enforcement. The application shall set forth the statutory provision or rule that each respondent is alleged to have violated; the temporary relief sought against each respondent, including whether the respondent would be required to take action to prevent the dissipation or conversion of assets; and whether the relief is sought *ex parte.*

(b) *Accompanying documents.* The application shall be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein, a memorandum of points and authorities, a proposed order imposing the temporary relief sought, and, unless relief is sought *ex parte,* a proposed notice of hearing and order to show cause whether the temporary relief should be imposed. If a proceeding for a permanent cease-and-desist order has not already been commenced, a proposed order instituting proceedings to

determine whether a permanent cease-and-desist order should be imposed shall also be filed with the application.

(c) *With whom filed.* The application shall be filed with the Secretary or, if the Secretary is unavailable, with the duty officer. In no event shall an application be filed with an administrative law judge.

(d) *Record of proceedings.* Hearings, including *ex parte* presentations made by the Division of Enforcement pursuant to § 201.513, shall be recorded or transcribed pursuant to § 201.302.

§ 201.511 Temporary cease-and-desist orders: Notice; procedures for hearing.

(a) *Notice: how given.* Notice of an application for a temporary cease-and-desist order shall be made by serving a notice of hearing and order to show cause pursuant to § 201.141(b) or, where timely service of a notice of hearing pursuant to § 201.141(b) is not practicable, by any other means reasonably calculated to give actual notice that a hearing will be held, including telephonic notification of the general subject matter, time, and place of the hearing. If an application is made *ex parte*, pursuant to § 201.513, no notice to a respondent need be given prior to the Commission's consideration of the application.

(b) *Hearing before the Commission.* Except as provided in paragraph (d) of this section, hearings on an application for a temporary cease-and-desist order shall be held before the Commission.

(c) *Presiding officer: designation.* The Chairman shall preside or designate a Commissioner to preside at the hearing. If the Chairman is absent or unavailable at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate another Commissioner to preside.

(d) *Procedure at hearing.* (1) The presiding officer shall have all those powers of a hearing officer set forth in § 201.111 and shall rule on the admissibility of evidence and other procedural matters, including, but not limited to whether oral testimony will be heard; the time allowed each party for the submission of evidence or argument; and whether post-hearing submission of briefs, proposed findings of fact and conclusions of law will be permitted and if so, the procedures for submission; provided, however, that the person presiding may consult with other Commissioners participating in the hearing on these or any other question of procedure.

(2) Each Commissioner present at the hearing shall be afforded a reasonable opportunity to ask questions of witnesses, if any, or of counsel.

(3) A party or witness may participate by telephone. Alternative means of remote access, including a video link, shall be permitted in the Commission's discretion. Factors the Commission may consider in determining whether to permit alternative means of remote access include, but are not limited to, whether allowing an alternative means of access will delay the hearing, whether the alternative means is reliable, and whether the party proposing its use has made arrangements to pay for its cost.

(4) After a hearing has begun, the Commission may, on its own motion, or the motion of a party, assign a hearing officer to preside at the taking of oral testimony or other evidence and to certify the record of such testimony or other evidence to the Commission within a fixed period of time. No recommended or initial decision shall be made by such a hearing officer.

§ 201.512 Temporary cease-and-desist orders: Issuance after notice and opportunity for hearing.

(a) *Basis for issuance.* A temporary cease-and-desist order shall be issued only if the Commission determines that the alleged violation or threatened violation specified in an order instituting proceedings whether to enter a permanent cease-and-desist order pursuant to Securities Act Section 8A(a), 15 U.S.C. 77h–1(a), Exchange Act Section 21C(a), 15 U.S.C. 78u–3(a), Investment Company Act Section 9(f)(1), 15 U.S.C. 80a–9(f)(1), or Investment Advisers Act Section 203(k)(1), 15 U.S.C. 80b–3(k)(1), or the continuation thereof,

is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of proceedings on the permanent cease-and-desist order.

(b) *Content, scope and form of order.* Every temporary cease-and-desist order granted shall:

(1) Describe the basis for its issuance, including the alleged or threatened violations and the harm that is likely to result without the issuance of an order;

(2) Describe in reasonable detail, and not by reference to the order instituting proceedings or any other document, the act or acts the respondent is to take or refrain from taking; and

(3) Be indorsed with the date and hour of issuance.

(c) *Effective upon service.* A temporary cease-and-desist order is effective upon service upon the respondent.

(d) *Service: how made.* Service of a temporary cease-and-desist order shall be made pursuant to §201.141(a). The person who serves the order shall promptly file a declaration of service identifying the person served, the method of service, the date of service, the address to which service was made and the person who made service; provided, however, failure to file such a declaration shall have no effect on the validity of the service.

(e) C*ommission review.* At any time after the respondent has been served with a temporary cease-and-desist order, the respondent may apply to the Commission to have the order set aside, limited or suspended. The application shall set forth with specificity the facts that support the request.

§201.513 Temporary cease-and-desist orders: Issuance without prior notice and opportunity for hearing.

In addition to the requirements for issuance of a temporary cease-and-desist order set forth in §201.512, the following requirements shall apply if a temporary cease-and-desist order is to be entered without prior notice and opportunity for hearing:

(a) *Basis for issuance without prior notice and opportunity for hearing.* A temporary cease-and-desist order may be issued without notice and opportunity for hearing only if the Commission determines, from specific facts in the record of the proceeding, that notice and hearing prior to entry of an order would be impracticable or contrary to the public interest.

(b) *Content of the order.* An *ex parte* temporary cease-and-desist order shall state specifically why notice and hearing would have been impracticable or contrary to the public interest.

(c) *Hearing before the Commission.* If a respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the Commission to have the order set aside, limited, or suspended, and if the application is made within 10 days after the date on which the order was served, may request a hearing on such application. The Commission shall hold a hearing and render a decision on the respondent's application at the earliest possible time. The hearing shall begin within two days of the filing of the application unless the applicant consents to a longer period or the Commission, by order, for good cause shown, sets a later date. The Commission shall render a decision on the application within five calendar days of its filing, provided, however, that the Commission, by order, for good cause shown, may extend the time within which a decision may be rendered for a single period of five calendar days, or such longer time as consented to by the applicant. If the Commission does not render its decision within 10 days of the respondent's application or such longer time as consented to by the applicant, the temporary order shall be suspended until a decision is rendered.

(d) *Presiding officer, procedure at hearing.* Procedures with respect to the selection of a presiding officer and the conduct of the hearing shall be in accordance with §201.511.

§201.514 Temporary cease-and-desist orders: Judicial review; duration.

(a) *Availability of judicial review.* Judicial review of a temporary cease-and-

desist order shall be available as provided in Section 8A(d)(2) of the Securities Act, 15 U.S.C. 77h–1(d)(2), Section 21C(d)(2) of the Exchange Act, 15 U.S.C. 78u–3(d)(2), Section 9(f)(4)(B) of the Investment Company Act, 15 U.S.C. 80a–9(f)(4)(B), or Section 203(k)(4)(B) of the Investment Advisers Act, 15 U.S.C. 80b–3(k)(4)(B).

(b) *Duration.* Unless set aside, limited, or suspended, either by order of the Commission, a court of competent jurisdiction, or a hearing officer acting pursuant to § 201.531, or by operation of § 201.513, a temporary cease-and-desist order shall remain effective and enforceable until the earlier of:

(1) The completion of the proceedings whether a permanent order shall be entered; or

(2) 180 days, or such longer time as consented to by the respondent, after issuance of a briefing schedule order pursuant to § 201.540(b), if an initial decision whether a permanent order should be entered is appealed.

§ 201.520 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: Application.

(a) *Procedure.* A request for suspension of a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or transfer agent pending a final determination whether the registration shall be revoked shall be made by application filed by the Division of Enforcement. The application shall set forth the statutory provision or rule that each respondent is alleged to have violated and the temporary suspension sought as to each respondent.

(b) *Accompanying documents.* The application shall be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein, a memorandum of points and authorities, a proposed order imposing the temporary suspension of registration sought, and a proposed notice of hearing and order to show cause whether the temporary suspension of registration should be imposed. If a proceeding to determine whether to revoke the registration permanently has not already been commenced, a proposed order instituting proceedings to determine whether a permanent sanction should be imposed shall also be filed with the application.

(c) *With whom filed.* The application shall be filed with the Secretary or, if the Secretary is unavailable, with the duty officer. In no event shall an application be filed with an administrative law judge.

(d) *Record of hearings.* All hearings shall be recorded or transcribed pursuant to § 201.302.

§ 201.521 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: Notice and opportunity for hearing on application.

(a) *How given.* Notice of an application to suspend a registration pursuant to § 201.520 shall be made by serving a notice of hearing and order to show cause pursuant to § 201.141(b) or, where timely service of a notice of hearing pursuant to § 201.141(b) is not practicable, by any other means reasonably calculated to give actual notice that a hearing will be held, including telephonic notification of the general subject matter, time, and place of the hearing.

(b) *Hearing: before whom held.* Except as provided in paragraph (d) of this section, hearings on an application to suspend a registration pursuant to § 201.520 shall be held before the Commission.

(c) *Presiding officer: designation.* The Chairman shall preside or designate a Commissioner to preside at the hearing. If the Chairman is absent or unavailable at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate another Commissioner to preside.

(d) *Procedure at hearing.* (1) The presiding officer shall have all those powers of a hearing officer set forth in § 201.111 and shall rule on the admissibility of evidence and other procedural matters, including, but not limited to whether oral testimony will be heard; the time allowed each party for the submission of evidence or argument; and whether post-hearing submission of briefs, proposed findings of fact and conclusions of law will be permitted

and if so, the procedures for submission; provided, however, that the person presiding may consult with other Commissioners participating in the hearing on these or any other question of procedure.

(2) Each Commissioner present at the hearing shall be afforded a reasonable opportunity to ask questions of witnesses, if any, or counsel.

(3) A party or witness may participate by telephone. Alternative means of remote access, including a video link, shall be permitted in the Commission's discretion. Factors the Commission may consider in determining whether to permit alternative means of remote access include, but are not limited to, whether allowing an alternative means of access will delay the hearing, whether the alternative means is reliable, and whether the party proposing its use has made arrangements to pay for its cost.

(4) After a hearing has begun, the Commission may, on its own motion or the motion of a party, assign a hearing officer to preside at the taking of oral testimony or other evidence and to certify the record of such testimony or other evidence to the Commission within a fixed period of time. No recommended or initial decision shall be made.

§201.522 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: Issuance and review of order.

(a) *Basis for issuance.* An order suspending a registration, pending final determination as to whether the registration shall be revoked shall be issued only if the Commission finds that the suspension is necessary or appropriate in the public interest or for the protection of investors.

(b) *Content, scope and form of order.* Each order suspending a registration shall:

(1) Describe the basis for its issuance, including the alleged or threatened violations and the harm that is likely to result without the issuance of an order;

(2) Describe in reasonable detail, and not by reference to the order instituting proceedings or any other document, the act or acts the respondent is to take or refrain from taking; and

(3) Be indorsed with the date and hour of issuance.

(c) *Effective upon service.* An order suspending a registration is effective upon service upon the respondent.

(d) *Service: how made.* Service of an order suspending a registration shall be made pursuant to §201.141(a). The person who serves the order shall promptly file a declaration of service identifying the person served, the method of service, the date of service, the address to which service was made and the person who made service; provided, however, failure to file such a declaration shall have no effect on the validity of the service.

(e) *Commission review.* At any time after the respondent has been served with an order suspending a registration, the respondent may apply to the Commission or the hearing officer to have the order set aside, limited, or suspended. The application shall set forth with specificity the facts that support the request.

§201.523 [Reserved]

§201.524 Suspension of registrations: Duration.

Unless set aside, limited or suspended by order of the Commission, a court of competent jurisdiction, or a hearing officer acting pursuant to §201.531, an order suspending a registration shall remain effective and enforceable until the earlier of:

(a) The completion of the proceedings whether the registration shall be permanently revoked; or

(b) 180 days, or such longer time as consented to by the respondent, after issuance of a briefing schedule order pursuant to §201.540(b), if an initial decision whether the registration shall be permanently revoked is appealed.

§201.530 Initial decision on permanent order: Timing for submitting proposed findings and preparation of decision.

Unless otherwise ordered by the Commission or hearing officer, if a temporary cease-and-desist order or suspension of registration order is in effect, the following time limits shall

apply to preparation of an initial decision as to whether such order should be made permanent:

(a) Proposed findings and conclusions and briefs in support thereof shall be filed 30 days after the close of the hearing;

(b) The record in the proceedings shall be served by the Secretary upon the hearing officer three days after the date for the filing of the last brief called for by the hearing officer; and

(c) The initial decision shall be filed with the Secretary at the earliest possible time, but in no event more than 30 days after service of the record, unless the hearing officer, by order, shall extend the time for good cause shown for a period not to exceed 30 days.

§ 201.531 Initial decision on permanent order: Effect on temporary order.

(a) *Specification of permanent sanction.* If, at the time an initial decision is issued, a temporary sanction is in effect as to any respondent, the initial decision shall specify:

(1) Which terms or conditions of a temporary cease-and-desist order, if any, shall become permanent; and

(2) Whether a temporary suspension of a respondent's registration, if any, shall be made a permanent revocation of registration.

(b) *Modification of temporary order.* If any temporary sanction shall not become permanent under the terms of the initial decision, the hearing officer shall issue a separate order setting aside, limiting or suspending the temporary sanction then in effect in accordance with the terms of the initial decision. The hearing officer shall decline to suspend a term or condition of a temporary cease-and-desist order if it is found that the continued effectiveness of such term or condition is necessary to effectuate any term of the relief ordered in the initial decision, including the payment of disgorgement, interest or penalties. An order modifying temporary sanctions shall be effective 14 days after service. Within one week of service of the order modifying temporary sanctions any party may seek a stay or modification of the order from the Commission pursuant to § 201.401.

§ 201.540 Appeal and Commission review of initial decision making a temporary order permanent.

(a) *Petition for review.* Any person who seeks Commission review of an initial decision as to whether a temporary sanction shall be made permanent shall file a petition for review pursuant to § 201.410, provided, however, that the petition must be filed within 10 days after service of the initial decision.

(b) *Review procedure.* If the Commission determines to grant or order review, it shall issue a briefing schedule order pursuant to § 201.450. Unless otherwise ordered by the Commission, opening briefs shall be filed within 21 days of the order granting or ordering review, and opposition briefs shall be filed within 14 days after opening briefs are filed. Reply briefs shall be filed within seven days after opposition briefs are filed. Oral argument, if granted by the Commission, shall be held within 90 days of the issuance of the briefing schedule order.

§ 201.550 Summary suspensions pursuant to Exchange Act Section 12(k)(1)(A).

(a) *Petition for termination of suspension.* Any person adversely affected by a suspension pursuant to Section 12(k)(1)(A) of the Exchange Act, 15 U.S.C. 78*l*(k)(1)(A), who desires to show that such suspension is not necessary in the public interest or for the protection of investors may file a sworn petition with the Secretary, requesting that the suspension be terminated. The petition shall set forth the reasons why the petitioner believes that the suspension of trading should not continue and state with particularity the facts upon which the petitioner relies.

(b) *Commission consideration of a petition.* The Commission, in its discretion, may schedule a hearing on the matter, request additional written submissions, or decide the matter on the facts presented in the petition and any other relevant facts known to the Commission. If the petitioner fails to cooperate with, obstructs, or refuses to permit the making of an examination by the Commission, such conduct shall be grounds to deny the petition.

RULES REGARDING DISGORGEMENT AND PENALTY PAYMENTS

§201.600 Interest on sums disgorged.

(a) *Interest required.* Prejudgment interest shall be due on any sum required to be paid pursuant to an order of disgorgement. The disgorgement order shall specify each violation that forms the basis for the disgorgement ordered; the date which, for purposes of calculating disgorgement, each such violation was deemed to have occurred; the amount to be disgorged for each such violation; and the total sum to be disgorged. Prejudgment interest shall be due from the first day of the month following each such violation through the last day of the month preceding the month in which payment of disgorgement is made. The order shall state the amount of prejudgment interest owed as of the date of the disgorgement order and that interest shall continue to accrue on all funds owed until they are paid.

(b) *Rate of interest.* Interest on the sum to be disgorged shall be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), and shall be compounded quarterly. The Commission or the hearing officer may, by order, specify a lower rate of prejudgment interest as to any funds which the respondent has placed in an escrow or otherwise guaranteed for payment of disgorgement upon a final determination of the respondent's liability. Escrow and other guarantee arrangements must be approved by the Commission or the hearing officer prior to entry of the disgorgement order.

§201.601 Prompt payment of disgorgement, interest and penalties.

(a) *Timing of payments.* Unless otherwise provided, funds due pursuant to an order by the Commission requiring the payment of disgorgement, interest or penalties shall be paid no later than 21 days after service of the order, and funds due pursuant to an order by a hearing officer shall be paid on the first day after the order becomes final pursuant to §201.360.

(b) *Stays.* A stay of any order requiring the payment of disgorgement, interest or penalties may be sought at any time pursuant to §201.401.

§201.610 Submission of proposed plan of disgorgement.

The Commission or the hearing officer may, at any time, order any party to submit a plan for the administration and distribution of disgorgement funds. Unless ordered otherwise, the Division of Enforcement shall submit a proposed plan no later than 60 days after funds or other assets have been turned over by the respondent pursuant to a Commission disgorgement order and any appeals of the disgorgement order have been waived or completed, or appeal is no longer available.

§201.611 Contents of plan of disgorgement; provisions for payment.

(a) *Required plan elements.* Unless otherwise ordered, a plan for the administration of a disgorgement fund shall include the following elements:

(1) Procedures for the receipt of additional funds, including the specification of an account where funds will be held and the instruments in which the funds may be invested;

(2) Specification of categories of persons potentially eligible to receive proceeds from the fund;

(3) Procedure for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund;

(4) Procedures for making and approving claims, procedures for handling disputed claims and a cut-off date for the making of claims;

(5) A proposed date for the termination of the fund, including provision for the disposition of any funds not otherwise distributed;

(6) Procedures for the administration of the fund, including selection, compensation and, as necessary, indemnification of a fund administrator to oversee the fund, process claims, prepare accountings, file tax returns and, subject to the approval of the Commission, make distributions from the fund to investors; and

(7) Such other provisions as the Commission or the hearing officer may require.

(b) *Payment to registry of the court or court-appointed receiver.* Subject to such

conditions as the Commission or the hearing officer shall deem appropriate, a plan of disgorgement may provide for payment of disgorgement funds into a court registry or to a court-appointed receiver in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

(c) *Payment to the United States Treasury under certain circumstances.* When, in the opinion of the Commission or the hearing officer, the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors, the plan may provide that the funds shall be paid directly to the general fund of the United States Treasury.

§ 201.612 Notice of proposed plan of disgorgement and opportunity for comment by non-parties.

Notice of a proposed plan of disgorgement shall be published in the *SEC News Digest,* in the *SEC Docket,* and in such other publications as the Commission or the hearing officer may require. The notice shall specify how copies of the proposed plan may be obtained and shall state that persons desiring to comment on the proposed plan may submit their views, in writing, to the Commission.

§ 201.613 Order approving, modifying or disapproving proposed plan of disgorgement.

At any time more than 30 days after publication of notice of a proposed plan of disgorgement, the hearing officer or the Commission shall, by order, approve, approve with modifications, or disapprove the proposed plan. In the discretion of the Commission or the hearing officer, a proposed plan of disgorgement that is substantially modified prior to adoption may be republished for an additional comment period pursuant to § 201.612. The order approving or disapproving the plan should be entered within 30 days after the end of the final period allowed for comments on the proposed plan unless the Commission or the hearing officer, by written order, allows a longer period for good cause shown.

§ 201.614 Administration of plan of disgorgement.

(a) *Appointment and removal of administrator.* The Commission or the hearing officer shall have discretion to appoint any person, including a Commission employee, as administrator of a plan of disgorgement and to delegate to that person responsibility for administering the plan. A respondent may be required or permitted to administer or assist in administering a plan of disgorgement, subject to such terms and conditions as the Commission or the hearing officer deem appropriate to ensure the proper distribution of funds. An administrator may be removed at any time by order of the Commission or hearing officer.

(b) *Administrator to post bond.* If the administrator is not a Commission employee, the administrator shall be required to obtain a bond in the manner prescribed by 11 U.S.C. 322, in an amount to be approved by the Commission. The cost of the bond may be paid for as a cost of administration. The Commission may waive posting of a bond for good cause shown.

(c) *Administrator's fees.* If the administrator is a Commission employee, no fee shall be paid to the administrator for his or her services. If the administrator is not a Commission employee, he or she may file an application for fees for completed services, and upon approval by the Commission or a hearing officer, may be paid a reasonable fee for those services. Any objections thereto shall be filed within 21 days of service of the application on the parties.

(d) *Source of funds.* Unless otherwise ordered, fees and other expenses of administering the plan of disgorgement shall be paid first from the interest earned on disgorged funds, and if the interest is not sufficient, then from the corpus.

(e) *Accountings.* During the first 10 days of each calendar quarter, or as otherwise directed by the Commission or the hearing officer, the administrator shall file an accounting of all

monies earned or received and all monies spent in connection with the administration of the plan of disgorgement. A final accounting shall be submitted for approval of the Commission or hearing officer prior to discharge of the administrator and cancellation of the administrator's bond, if any.

(f) *Amendment.* A plan may be amended upon motion by any party or the plan administrator or upon the Commission's or hearing officer's own motion.

§201.620 Right to challenge order of disgorgement.

Other than in connection with the opportunity to submit comments as provided in §201.612, no person shall be granted leave to intervene or to participate in a proceeding or otherwise to appear to challenge an order of disgorgement; or an order approving, approving with modifications, or disapproving a plan of disgorgement; or any determination relating to a plan of disgorgement based solely upon that person's eligibility or potential eligibility to participate in a disgorgement fund or based upon any private right of action such person may have against any person who is also a respondent in an enforcement proceeding.

§201.630 Inability to pay disgorgement, interest or penalties.

(a) *Generally.* In any proceeding in which an order requiring payment of disgorgement, interest or penalties may be entered, a respondent may present evidence of an inability to pay disgorgement, interest or a penalty. The Commission may, in its discretion, or the hearing officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest.

(b) *Financial disclosure statement.* Any respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn financial disclosure statement and to keep the statement current. The financial statement shall show the respondent's assets, liabilities, income or other funds received and expenses or other payments, from the date of the first violation alleged against that respondent in the order instituting proceedings, or such later date as specified by the Commission or a hearing officer, to the date of the order requiring the disclosure statement to be filed. By order, the Commission or the hearing officer may prescribe the use of the Disclosure of Assets and Financial Information Form (*see* Form D–A at §209.1 of this chapter) or any other form, may specify other time periods for which disclosure is required, and may require such other information as deemed necessary to evaluate a claim of inability to pay.

(c) *Confidentiality.* Any respondent submitting financial information pursuant to this section or §201.410(c) may make a motion, pursuant to §201.322, for the issuance of a protective order against disclosure of the information submitted to the public or to any parties other than the Division of Enforcement. Prior to a ruling on the motion, no party receiving information as to which a motion for a protective order has been made may transfer or convey the information to any other person without the prior permission of the Commission or the hearing officer.

(d) *Service required.* Notwithstanding any provision of §201.322, a copy of the financial disclosure statement shall be served on the Division of Enforcement.

(e) *Failure to file required financial information: sanction.* Any respondent who, after making a claim of inability to pay either disgorgement, interest or a penalty, fails to file a financial disclosure statement when such a filing has been ordered or is required by rule may, in the discretion of the Commission or the hearing officer, be deemed to have waived the claim of inability to pay. No sanction pursuant to §§201.155 or 201.180 shall be imposed for a failure to file such a statement.

INFORMAL PROCEDURES AND SUPPLEMENTARY INFORMATION CONCERNING ADJUDICATORY PROCEEDINGS

§201.900 Informal Procedures and Supplementary Information Concerning Adjudicatory Proceedings.

(a) *Guidelines for the timely completion of proceedings.*(1) Timely resolution of adjudicatory proceedings is one factor

in assessing the effectiveness of the adjudicatory program in protecting investors, promoting public confidence in the securities markets and assuring respondents a fair hearing. Establishment of guidelines for the timely completion of key phases of contested administrative proceedings provides a standard for both the Commission and the public to gauge the Commission's adjudicatory program on this criterion. The Commission has directed that, to the extent possible:

(i) An administrative law judge's initial decision should be filed with the Secretary within 10 months of issuance of the order instituting proceedings.

(ii) A decision by the Commission on review of an interlocutory matter should be completed within 45 days of the date set for filing the final brief on the matter submitted for review.

(iii) A decision by the Commission on a motion to stay a decision that has already taken effect or that will take effect within five days of the filing of the motion, should be issued within five days of the date set for filing of the opposition to the motion for a stay. If the decision complained of has not taken effect, the Commission's decision should be issued within 45 days of the date set for filing of the opposition to the motion for a stay.

(iv) A decision by the Commission with respect to an appeal from the initial decision of a hearing officer, a review of a determination by a self-regulatory organization, or a remand of a prior Commission decision by a court of appeals should be issued within 11 months from the date the petition for review, application for review, or mandate of the court is filed.

(2) The guidelines in this paragraph (a) do not create a requirement that each portion of a proceeding or the entire proceeding be completed within the periods described. Among other reasons, a proceeding at either the hearing stage or on review by the Commission may require additional time because it is unusually complex or because the record is exceptionally long. In addition, fairness is enhanced if the Commission's deliberative process is not constrained by an inflexible schedule. In some proceedings, deliberation may be delayed by the need to consider more urgent matters, to permit the preparation of dissenting opinions, or for other good cause. The guidelines will be used by the Commission as one of several criteria in monitoring and evaluating its adjudicatory program. The guidelines will be examined periodically, and, if necessary, readjusted in light of changes in the pending caseload and the available level of staff resources.

(b) *Reports to the Commission on pending cases.* The administrative law judges, the Secretary and the General Counsel have each been delegated authority to issue certain orders or adjudicate certain proceedings. *See* 17 CFR 200.30–1 *et seq.* Proceedings are also assigned to the General Counsel for the preparation of a proposed order or opinion which will then be recommended to the Commission for consideration. In order to improve accountability by and to the Commission for management of the docket, the Commission has directed that confidential status reports with respect to all filed adjudicatory proceedings shall be made periodically to the Commission. These reports will be made through the Secretary, with a minimum frequency established by the Commission. In connection with these periodic reports, if a proceeding assigned to an administrative law judge or pending before the Commission has not been concluded within 30 days of the guidelines established in paragraph (a) of this section, the Chief Administrative Law Judge or the General Counsel, respectively, shall specifically apprise the Commission of that fact, and shall describe the procedural posture of the case, project an estimated date for conclusion of the proceeding, and provide such other information as is necessary to enable the Commission to determine whether additional steps are necessary to reach a fair and timely resolution of the matter.

(c) *Publication of information concerning the pending case docket.* Ongoing disclosure of information about the adjudication program caseload increases awareness of the importance of the program, facilitates oversight of the program and promotes confidence in the efficiency and fairness of the program

by investors, securities industry participants, self-regulatory organizations and other members of the public. The Commission has directed the Secretary to publish in the *SEC Docket* in the first and seventh months of each fiscal year summary statistical information about the status of pending adjudicatory proceedings and changes in the Commission's caseload over the prior six months. The report will include the number of cases pending before the administrative law judges and the Commission at the beginning and end of the six-month period. The report will also show increases in the caseload arising from new cases being instituted, appealed or remanded to the Commission and decreases in the caseload arising from the disposition of proceedings by issuance of initial decisions, issuance of final decisions issued on appeal of initial decisions, other dispositions of appeals of initial decisions, final decisions on review of self-regulatory organization determinations, other dispositions on review of self-regulatory organization determinations, and decisions with respect to stays or interlocutory motions. For each category of decision, the report shall also show the median age of the cases at the time of the decision and the number of cases decided within the guidelines for the timely completion of adjudicatory proceedings.

TABLE I TO SUBPART D—ADVERSARY ADJUDICATIONS CONDUCTED BY THE COMMISSION UNDER 5 U.S.C. 554

SECURITIES EXCHANGE ACT OF 1934

Section 11A(b)(6), 15 U.S.C. 78k–1(b)(6) (suspension or revocation of registration, or censure of a securities information processor).

Section 11A(c)(3)(A), 15 U.S.C. 78k–1(c)(3)(A) (prohibition of transactions by brokers and dealers in registered securities other than on a national securities exchange).

Section 12(j), 15 U.S.C. 78*l*(j) (suspensions of effective date or revocation of registration of a security).

Section 15(b)(4), 15 U.S.C. 78*o*(b)(4) (suspension or revocation of registration, or censure of a broker or dealer).

Section 15(b)(6)(A), 15 U.S.C. 78*o*(b)(6)(A) (censure, suspension or bar an associate of a broker or a dealer).

Section 15B(c)(2), 15 U.S.C. 78*o*–4(c)(2) (suspension or revocation of registration, or censure of a municipal securities dealer).

Section 15B(c)(4), 15 U.S.C. 78*o*–4(c)(4) (censure, suspension or bar of an associate of a municipal securities broker or dealer).

Section 15B(c)(8), 15 U.S.C. 78*o*–4(c)(8) (removal or censure of member of the Municipal Securities Rulemaking Board).

Section 15C(c)(1)(A), 15 U.S.C. 78*o*–5(c)(1)(A) (suspension or revocation of registration, or censure of a government securities broker or dealer).

Section 15C(c)(1)(C), 15 U.S.C. 78*o*–5(c)(1)(C) (censure, suspension or bar of an associate of a government securities broker or dealer).

Section 17A(c)(3), 15 U.S.C. 78q–1(c)(3) (deny registration, censure, place limitation on, suspend, or revoke registration of a transfer agent).

Section 17A(c)(4)(C), 15 U.S.C. 78q–1(c)(4)(C) (censure, place limitations on, suspend or bar certain persons associated or seeking to associate with a transfer agent).

Section 19(h)(1), 15 U.S.C. 78s(h)(1) (suspension or revocation of registration, or censure of a self-regulatory organization).

Section 19(h)(2), 15 U.S.C. 78s(h)(2) (suspension or expulsion of a member of a self-regulatory organization).

Section 19(h)(3), 15 U.S.C. 78s(h)(3) (suspension or bar of a person from being associated with a national securities exchange or registered securities association).

Section 19(h)(4), 15 U.S.C. 78s(h)(4) (removal or censure of a director or officer of a self-regulatory organization).

Section 21B(a), 15 U.S.C. 78u–2(a) (imposition of civil penalties against any person for violation of the federal securities laws).

INVESTMENT COMPANY ACT OF 1940

Section 9(d)(1), 15 U.S.C. 80a–9(d)(1) (imposition of civil penalties against any person for violation of the federal securities laws).

INVESTMENT ADVISERS ACT OF 1940

Section 203(e), 15 U.S.C. 80b–3(e) (suspension or revocation of registration, or censure of an investment adviser).

Section 203(f), 15 U.S.C. 80b–3(f) (censure, suspension, or bar of an associate of an investment adviser).

Section 203(i)(1), 15 U.S.C. 80b–3(i)(1) (imposition of civil penalties against any person for violation of the federal securities laws).

TABLE II TO SUBPART D—CROSS-REFERENCE SHOWING LOCATION OF RULES OF PRACTICE ADOPTED IN 1955 WITH FORMER RULES OF PRACTICE, RELATED RULES, AND STATUTORY PROVISIONS

New rules (17 CFR 201)	Former rules/Act §
100	1.
101	none.
102	2.
102(d)(4)	none.

New rules (17 CFR 201)	Former rules/Act §
103(a)–(c)	none.
104	5.
110	11(b).
111	11(d)–(e), 16(g).
112	11(c).
120	5 U.S.C. 554(d).
121	5 U.S.C. 554(d).
140(a)	22(h).
140(b)–(c)	22(k).
141(a)	6(a), (b), (f).
141(b)	23(d).
150(a)	23(a).
150(b)	2(d), (h).
150(c)	23(b).
150(d)	23(c).
151	12(b), 22(a).
152(a)–(e)	22(a)–(h).
152(f)	20(d).
153	7(f).
154	11(e).
155	12(d).
160	22(j), 23(b).
161	13.
180(a)	2(f).
180(b)–(c)	none.
190	25.
191	27, 28.
192	4.
193	29.
200(a)(1)	6(a), (b).
200(a)(2)	6(f).
200(b), (c)	6(a), (b).
200(d)	6(d).
200(e)	6(c).
201	10.
202	8(b), (c).
210	9.
220	7(a)–(e).
221(a)–(c), (e)	8(d)
221(d)	none.
221(f)	6(e).
222(a)	8(d).
222(b)	none.
230	none.
231(a)	11–1.
231(b)	none.
232(a)–(d)	14(b).
232(e)–(f)	14(b)(2), (c).
233	15(a)–(e).
234	15(g).
235	15(f).
240	8(a).
250	11(e).
300	11(a)–(b).
301	11(b).
302(a)	11(f).
302(b)	25(d).
302(c)	20(c).
310	6(e).
320	14(a).
321(a)	11(e).
321(b)	none.
322	none.
323	14(d).
324	none.
325	14(a).
326	14(a).
340	16(d)–(e).
350	20(a)–(b).
351	20(a)(4).
360(a)	16(b).
360(b)	16(a).
360(c)	16(f).
360(d), (e)	17(f).
400	12(a).
401	12(c).
401(d)(2)	15 U.S.C. 78s(d)(2).
410(a)	17(a).
410(b)	17(b).
410(c)	none.
410(d)	none.
410(e)	17(h).
411(a)	17(g)(2).
411(b)	17(d).
411(c)	17(c).
411(d)	17(g)(1).
411(e)	17(d).
411(f)	17(g)(3).
420(a), (b), (d)	17 CFR 240.19d–3(b).
420(c)	15 U.S.C. 78s(d)(2).
420(d)	58.
421(a)	15 U.S.C. 78s(e)–(f).
421(b)–(c)	none.
430	26(a), (c).
431(a)	none.
431(b)	26(b).
431(c)	26(d).
431(d)–(f)	26(e).
450(a)	17(e).
450(b)	18, 17 CFR 240.19d–3(c)–(g).
450(c)	22(d).
451	21.
452	21(d).
460	20, 21(c).
470	21(e).
490	23(e).
500	none.
510	none.
511	none.
512	none.
513	none.
514	none.
520	none.
521	none.
522	none.
524	none.
530	19.
531	none.
540	none.
550	17 CFR 202.8.
600	none.
601	none.
610	none.
611	none.
612	none.
613	none.
614	none.
620	none.
630	none.
900	none.

TABLE III TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF FORMER RULES OF PRACTICE AND RELATED RULES WITH RULES OF PRACTICE ADOPTED IN 1995

Former rules	New rules (17 CFR 201)
1	100.
2	102.
2(d), (h)	150(b).
2(f)	180(a).
3 [reserved]	n/a.
4	192.

Former rules	New rules (17 CFR 201)
5	104.
6(a)	200(b).
6(a),(b),(f)	141(a).
6(a), (b)	200(a)(1).
6(b)	200(c).
6(c), (d)	200(d), (e).
6(e)	221(f), 310.
6(f)	200(a)(2).
7(a)–(e)	220.
7(f)	153.
8(a)	240.
8(b)–(c)	202.
8(d)	221, 222(a).
9	210.
10	201.
11(a)–(b)	300.
11(b)	110, 301.
11(c)	112.
11(d), (e)	111.
11(e)	154, 250, 321(a).
11(f)	302(a).
11–1	231(a).
12(a)	400.
12(b)	151(c).
12(c)	401.
12(d)	155.
13	161.
14(a)	320, 325, 326.
14(b)	232(a)–(d).
14(b)(2), (c)	232(e)–(f).
14(d)	323.
15(a)–(e)	233.
15(f)	235.
15(g)	234.
16(a)	360(b).
16(b)	360(a).
16(c) [reserved]	n/a.
16(d)–(e)	340.
16(f)	351, 360(c).
16(g)	111.
17(a)	410(a).
17(b)	410(b).
17(c)	411(c).
17(d)	411(b), (e).
17(e)	450(a), (d).
17(f)	360(d), (e).
17(g)	411(d), (a), (f).
17(h)	410(e).
18	450(b).
19	530.
20(a)–(b)	350, 351, 460.
20(c)	302(c).
20(d)	152(f).
21	451.
21(c)	460.
21(d)	452.
21(e)	470.
22(a)	151(a)–(c), 152.
22(b) [reserved]	n/a.
22(c)	152(d).
22(d)	152(e), 450(c).
22(e)–(g)	152(a)–(c).
22(h)	140(a).
22(i)	none.
22(j), (k)	160, 140(c).
22(k)	140(b).
23(a)	150(a).
23(b)	150(c), 160.
23(c)	150(d).
23(d)	141(b).
23(e)	490.
24	17 CFR 228.10(f), 17 CFR 229.10(d).
25	190.
25(d)	302(b).
26(a), (c)	430.
26(b)	431(b).
26(d)	431(c).
26(e)	431(d)–(f).
27	191.
28	191.
29	193.
17 CFR 202.8	550.
17 CFR 240.19d–2	401(a)–(b), (d).
17 CFR 240.19d–3(a)	420,421.
17 CFR 240.19d–3(b)	420(a), (b), (d).
17 CFR 240.19d–3(c)–(d)	450, 180(c).
17 CFR 240.19d–3(e)	452.
17 CFR 240.19d–3(f)	451.
17 CFR 240.19d–3(g)	100.

Subpart E—Adjustment of Civil Monetary Penalties

AUTHORITY: Pub. L. 104–134, 110 Stat. 1321.

SOURCE: 61 FR 57774, Nov. 8, 1996, unless otherwise noted.

§ 201.1001 Adjustment of civil monetary penalties—1996.

As required by the Debt Collection Improvement Act of 1996, the maximum amounts of all civil monetary penalties under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940 are adjusted for inflation in accordance with Table I to this subpart. The adjustments set forth in Table I apply to violations occurring after December 9, 1996 and before February 2, 2001.

[66 FR 8762, Feb. 2, 2001]

TABLE 1 TO SUBPART E—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. code citation	Civil monetary penalty description	Year penalty amount was last set by law	Original statutory maximum penalty amount	Adjusted maximum penalty amount
SECURITIES AND EXCHANGE COMMISSION:				

U.S. code citation	Civil monetary penalty description	Year penalty amount was last set by law	Original statutory maximum penalty amount	Adjusted maximum penalty amount
15 USC 77t(d)	FOR NATURAL PERSON	1990	$5,000	$5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	500,000	550,000
15 USC 78ff(b)	EXCHANGE ACT/FAILURE TO FILE INFORMATION DOCUMENTS, REPORTS.	1936	100	110
15 USC 78ff(c)(1)(B).	FOREIGN CORRUPT PRACTICES—ANY ISSUER	1988	10,000	11,000
15 USC 78ff(c)(2)(C).	FOREIGN CORRUPT PRACTICES—ANY AGENT OR STOCKHOLDER ACTING ON BEHALF OF ISSUER.	1988	10,000	11,000
15 USC 78u–1(a)(3).	INSIDER TRADING—CONTROLLING PERSONS	1988	1,000,000	1,100,000
15 USC 78u–2	FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES TO OTHERS/GAINS TO SELF.	1990	100,000	110,000
	FOR ANY OTHER PERSONS/SUBSTANTIAL LOSSES TO OTHERS/GAIN TO SELF.	1990	500,000	550,000
15 USC 78u(d)(3).	FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	500,000	550,000
15 USC 80a–9(d).	FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES TO OTHERS/GAINS TO SELF.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES TO OTHER/GAINS TO SELF.	1990	500,000	550,000
15 USC 80a–41(e).	FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	500,000	550,000
15 USC 80b–3(i).	FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES TO OTHERS/GAIN TO SELF.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES TO OTHERS/GAIN TO SELF.	1990	500,000	550,000
15 USC 80b–9(e).	FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	500,000	550,000

§ 201.1002 Adjustment of civil monetary penalties—2001.

As required by the Debt Collection Improvement Act of 1996, the maximum amounts of all civil monetary penalties under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940 are adjusted for inflation in accordance with Table II to this subpart. The adjustments set forth in Table II apply to violations occurring after February 2, 2001.

[66 FR 8762, Feb. 2, 2001]

TABLE II TO SUBPART E—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Civil monetary penalty description	Year penalty amount was last adjusted	Maximum penalty amount pursuant to 1996 adjustment	Adjusted maximum penalty amount
Securities and Exchange Commission:				
15 USC 77t(d)	For natural person	1996	$5,500	$6,500
	For any other person	1996	55,000	60,000
	For natural person/fraud	1996	55,000	60,000
	For any other person/fraud	1996	275,000	300,000
	For natural person/substantial losses or risk of losses to others.	1996	110,000	120,000
	For any other person/substantial losses or risk of losses to others.	1996	550,000	600,000
15 USC 78ff(b)	Exchange Act/failure to file information documents, reports.	1996	110	110
15 USC 78ff(c)(1)(B)	Foreign Corrupt Practices—any issuer	1996	11,000	11,000
15 USC 78ff(c)(2)(C)	Foreign Corrupt Practices—any agent or stockholder acting on behalf of issuer.	1996	11,000	11,000
15 USC 78u–1(a)(3)	Insider Trading—controlling person	1996	1,100,000	1,200,000
15 USC 78u–2	For natural person	1996	5,500	6,500
	For any other person	1996	55,000	60,000
	For natural person/fraud	1996	55,000	60,000
	For any other person/fraud	1996	275,000	300,000
	For natural person/substantial losses to others/gains to self.	1996	110,000	120,000
	For any other person/substantial losses to others/gain to self.	1996	550,000	600,000
15 USC 78u(d)(3)	For natural person	1996	5,500	6,500
	For any other person	1996	55,000	60,000
	For natural person/fraud	1996	55,000	60,000
	For any other person/fraud	1996	275,000	300,000
	For natural person/substantial losses or risk of losses to others.	1996	110,000	120,000
	For any other person/substantial losses or risk of losses to others.	1996	550,000	600,000
15 USC 80a–9(d)	For natural person	1996	5,500	$6,500
	For any other person	1996	55,000	60,000
	For natural person/fraud	1996	55,000	60,000
	For any other person/fraud	1996	275,000	300,000
	For natural person/substantial losses to others/gains to self.	1996	110,000	120,000
	For any other person/substantial losses to others/gain to self.	1996	550,000	600,000
15 USC 80a–41(e)	For natural person	1996	5,500	6,500
	For any other person	1996	55,000	60,000
	For natural person/fraud	1996	55,000	60,000
	For any other person/fraud	1996	275,000	300,000
	For natural person/substantial losses or risk of losses to others.	1996	110,000	120,000
	For any other person/substantial losses or risk of losses to others.	1996	550,000	600,000
15 USC 80b–3(i)	For natural person	1996	5,500	6,500
	For any other person	1996	55,000	60,000
	For natural person/fraud	1996	55,000	60,000
	For any other person/fraud	1996	275,000	300,000
	For natural person/substantial losses to others/gains to self.	1996	110,000	120,000

U.S. Code citation	Civil monetary penalty description	Year penalty amount was last adjusted	Maximum penalty amount pursuant to 1996 adjustment	Adjusted maximum penalty amount
	For any other person/substantial losses to others/gain to self.	1996	550,000	600,000
15 USC 80b–9(e)	For natural person	1996	5,500	6,500
	For any other person	1996	55,000	60,000
	For natural person/fraud	1996	55,000	60,000
	For any other person/fraud	1996	275,000	300,000
	For natural person/substantial losses or risk of losses to others.	1996	110,000	120,000
	For any other person/substantial losses or risk of losses to others.	1996	550,000	600,000

[66 FR 8762, Feb. 2, 2001]

PART 202—INFORMAL AND OTHER PROCEDURES

Sec.
202.1 General.
202.2 Pre-filing assistance and interpretative advice.
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202.7 Submittals.
202.8 Small entity compliance guides.
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AUTHORITY: 15 U.S.C. 77s, 77t, 78d-1, 78u, 78w, 78ll(d), 79r, 79t, 77sss, 77uuu, 80a-37, 80a-41, 80b-9, and 80b-11, unless otherwise noted.

Section 202.5 is also issued under sec. 20, 48 Stat. 86, sec. 21, 48 Stat. 899, sec. 18, 49 Stat. 831, sec. 321, 53 Stat. 1174, sec. 1, 76 Stat. 394, 15 U.S.C. 77t, 78u, 79r, 77uuu, 80a–4l, 80b–9, 78d–1.

Section 202.9 is also issued under section 223, 110 Stat. 859 (Mar. 29, 1996).9

SOURCE: 25 FR 6736, July 15, 1960, unless otherwise noted.

§ 202.1 General.

(a) The statutes administered by the Commission provide generally (1) for the filing with it of certain statements, such as registration statements, periodic and ownership reports, and proxy solicitation material, and for the filing of certain plans of reorganization, applications and declarations seeking Commission approvals; (2) for Commission determination through formal procedures of matters initiated by private parties or by the Commission; (3) for the investigation and examination of persons and records where necessary to carry out the purposes of the statutes and for enforcement of statutory provisions; and (4) for the adoption of rules and regulations where necessary to effectuate the purposes of the statutes.

(b) In addition to the Commission's rules of practice set forth in part 201 of this chapter, the Commission has promulgated rules and regulations pursuant to the several statutes it administers (parts 230, 240, 250, 260, 270 and 275 of this chapter). These parts contain substantive provisions and include as well numerous provisions detailing the procedure for meeting specific standards embodied in the statutes. The Commission's rules and regulations under each of the statutes are available in pamphlet form upon request to the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(c) The statutes and the published rules, regulations and forms thereunder prescribe the course and method of formal procedures to be followed in Commission proceedings. These are supplemented where feasible by certain informal procedures designed to aid the public and facilitate the execution of the Commission's functions. There follows a brief description of procedures generally followed by the Commission which have not been formalized in rules.

(d) The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members

of the public dealing with the Commission. While opinions expressed by members of the staff do not constitute an official expression of the Commission's views, they represent the views of persons who are continuously working with the provisions of the statute involved. And any statement by the director, associate director, assistant director, chief accountant, chief counsel, or chief financial analyst of a division can be relied upon as representing the views of that division. In certain instances an informal statement of the views of the Commission may be obtained. The staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.

§ 202.2 Pre-filing assistance and interpretative advice.

The staff of the Commission renders interpretative and advisory assistance to members of the general public, prospective registrants, applicants and declarants. For example, persons having a question regarding the availability of an exemption may secure informal administrative interpretations of the applicable statute or rule as they relate to the particular facts and circumstances presented. Similarly, persons contemplating filings with the Commission may receive advice of a general nature as to the preparation thereof, including information as to the forms to be used and the scope of the items contained in the forms. Inquiries may be directed to an appropriate officer of the Commission's staff. In addition, informal discussions with members of the staff may be arranged whenever feasible, at the Commission's central office or, except in connection with matters under the Public Utility Holding Company Act of 1935 and certain matters under the Investment Company Act of 1940, at one of its regional or district offices.

[25 FR 6736, July 15, 1960, as amended at 59 FR 5945, Feb. 9, 1994]

§ 202.3 Processing of filings.

(a) Registration statements, proxy statements, letters of notification, periodic reports, applications for qualification of indentures, and similar documents filed with the Commission under the Securities Act of 1933 and the Trust Indenture Act of 1939, and certain filings under the Securities Exchange Act of 1934 and the Public Utility Holding Company Act of 1935 are routed to the Division of Corporation Finance, which passes initially on the adequacy of disclosure and recommends the initial action to be taken. If the filing appears to afford inadequate disclosure, as for example through omission of material information or through violation of accepted accounting principles and practices, the usual practice is to bring the deficiency to the attention of the person who filed the document by letter from the Assistant Director assigned supervision over the particular filing, and to afford a reasonable opportunity to discuss the matter and make the necessary corrections. This informal procedure is not generally employed when the deficiencies appear to stem from careless disregard of the statutes and rules or a deliberate attempt to conceal or mislead or where the Commission deems formal proceedings necessary in the public interest. If an electronic filing is not prepared in accordance with the requirements of the current EDGAR Filer Manual, the filing may be suspended and the filer so notified. Reasonable opportunity will be afforded the filer to make the necessary corrections or resubmit the filing as needed. Where it appears that the filing affords adequate disclosure, acceleration of its effectiveness when appropriate normally will be granted. A similar procedure is followed with respect to filings under the Investment Company Act of 1940 and certain filings relating to investment companies under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Trust Indenture Act of 1939, which are routed to the Division of Investment Management, and filings under the Public Utility Holding Company Act of 1935 which are also routed to the Division of Investment Management. A similar procedure is also followed in

the Commission's Regional Offices with respect to registration statements on Forms SB–1 and SB–2 (17 CFR 239.9 and 239.10) and related filings under the Trust Indenture Act of 1939.

(b)(1) Applications for registration as brokers, dealers, investment advisers, municipal securities dealers and transfer agents are submitted to the Office of Filings and Information Services where they are examined to determine whether all necessary information has been supplied and whether all required financial statements and other documents have been furnished in proper form. Defective applications may be returned with a request for correction or held until corrected before being accepted as a filing. The files of the Commission and other sources of information are considered to determine whether any person connected with the applicant appears to have engaged in activities which would warrant commencement of proceedings on the question of denial of registration. The staff confers with applicants and makes suggestions in appropriate cases for amendments and supplemental information. Where it appears appropriate in the public interest and where a basis therefore exists, denial proceedings may be instituted. Within 45 days of the date of the filing of a broker-dealer, investment adviser or municipal securities dealer application (or within such longer period as to which the applicant consents), the Commission shall by order grant registration or institute proceedings to determine whether registration should be denied. An application for registration as a transfer agent shall become effective within 30 days after receipt of the application (or within such shorter period as the Commission may determine). The Office of Filings and Information Services is also responsible for the processing and substantive examination of statements of beneficial ownership of securities and changes in such ownership filed under the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, and the Investment Company Act of 1940, and for the examination of reports filed pursuant to § 230.144 of this chapter.

(2) Applications for registration as national securities exchanges, or exemption from registration as exchanges by reason of such exchanges' limited volume of transactions filed with the Commission are routed to the Division of Market Regulation, which examines these applications to determine whether all necessary information has been supplied and whether all required financial statements and other documents have been furnished in proper form. Defective applications may be returned with a request for correction or held until corrected before being accepted as a filing. The files of the Commission and other sources of information are considered to determine whether any person connected with the applicant appears to have engaged in activities which would warrant commencement of proceedings on the question of denial of registration. The staff confers with applicants and makes suggestions in appropriate cases for amendments and supplemental information. Where it appears appropriate in the public interest and where a basis therefore exists, denial proceedings may be instituted. Within 90 days of the date of publication of a notice of the filing of an application for registration as a national securities exchange, or exemption from registration by reason of such exchanges' limited volume of transactions (or within such longer period as to which the applicant consents), the Commission shall by order grant registration, or institute proceedings to determine whether registration should be denied as provided in § 240.19(a)(1) of this chapter.

(3) Notice forms for registration as national securities exchanges pursuant to Section 6(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(g)(1)) filed with the Commission are routed to the Division of Market Regulation, which examines these notices to determine whether all necessary information has been supplied and whether all other required documents have been furnished in proper form. Defective notices may be returned with a request

for correction or held until corrected before being accepted as a filing.

[41 FR 44699, Oct. 12, 1976, as amended at 44 FR 21567, Apr. 10, 1979; 49 FR 12686, Mar. 30, 1984; 57 FR 18216, Apr. 29, 1992; 58 FR 15004, Mar. 18, 1993; 59 FR 5945, Feb. 9, 1994; 63 FR 70916, Dec. 22, 1998; 64 FR 19451, April 21, 1999; 66 FR 43741, Aug. 20, 2001]

§202.3a Instructions for filing fees.

Payment of filing fees specified by the following rules shall be made according to the directions listed in this part: §230.111 (17 CFR 230.111), §240.0–9 (17 CFR 240–0.9), §260.7a-10 (17 CFR 260.7a-10), and §270.0–8 (17 CFR 270.0–8). All such fees payable by electronic filers (§232.11(e) of this chapter), including those pertaining to documents filed in paper pursuant to a hardship exemption, shall be remitted to the U.S. Treasury designated lockbox depository at the Mellon Bank in Pittsburgh, Pennsylvania, by wire transfer, mail or hand delivery. Fees payable by paper filers may be either remitted to the lockbox depository, or remitted directly to the Commission at 450 Fifth Street NW., Washington DC 20549. Personal checks cannot be accepted for payment of fees. To ensure proper posting, all filers must include their assigned CIK account numbers on fee payments. If a third party submits a fee payment, the fee payment must specify the account number to which the fee is to be applied. Filing fees paid pursuant to Section 6(b) of the Securities Act of 1933, including fees paid pursuant to section 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–24(f)) or pursuant to Section 307(b) of the Trust Indenture Act of 1939 should be designated as ''restricted,'' except that filing fees paid with respect to registration statements filed pursuant to Rule 462(b) (§230.462(b) of this chapter) should be designated as ''unrestricted.'' Specific instructions on the various methods of making fee payments to the lockbox depository are as follows:

(a) *Wire transfer:* Those who wish to wire fee payments may use any bank or wire transfer service to initiate the transaction. All remitters must follow standard Federal Reserve instructions to ensure that fees transferred are received and identifiable. Specific information required for transmission to the Mellon Bank is listed below. Where an item is in BOLDFACE TYPE, the entry should be made exactly as indicated. Where an item is in *italics*, the filer-specific information should be included.

(1) Receiving Bank's ABA Number (field two); 043000261

(2) Type Code (field three): 1040

(3) Name of registrant and name of payor, if different (field nine): ORG=*registrant's name/payor's name (if different)*

(4) Receiving Bank's Name (field ten): MELLONBANK

(5) Transaction Code (field eleven): CTR/

(6) Beneficiary of payment (field twelve): BNF=SEC/AC–9108739/WRE

(7) Reference for Beneficiary (field thirteen): RFB=*account number to which the fee is to be applied*

(8) Payment Details (field fourteen): To designate funds as restricted: OBI=R, Otherwise: OBI=N.

(b) *Mail and hand delivery:* Checks and money orders are to be made payable to the Securities and Exchange Commission, omitting the name or title of any official of the Commission. The account number and a notation of ''R'' (restricted), as applicable, are to be written on the front of the check or money order. Fees transmitted by mail must be addressed to the Securities and Exchange Commission, Post Office Box 360055M, Pittsburgh, Pennsylvania 15252. Fees that are hand delivered must be brought to the Mellon Bank, 27th floor, Three Mellon Bank Center, Fifth Avenue at William Penn Way, Pittsburgh, PA. Hand deliveries will be accepted weekdays from 7:30 a.m. to 4:00 p.m. (eastern time). No deliveries can be made on Federal holidays. All hand deliveries must be in a sealed envelope, with the Commission's lockbox number, 360055M, and the Commission's account number, 910–8739, written on the outside. Cash payments must be accompanied by a separate sheet of paper providing the same information specified for checks and money orders.

[58 FR 15010, Mar. 18, 1993, as amended at 60 FR 26613, May 17, 1995; 61 FR 49959, Sept. 24, 1996; 62 FR 47938, Sept. 12, 1997]

§ 202.4 Facilitating administrative hearings.

(a) Applications, declarations, and other requests involving formal Commission action after opportunity for hearing are scrutinized by the appropriate division for conformance with applicable statutory standards and Commission rules and generally the filing party is advised of deficiencies. Prior to passing upon applications and declarations the Commission receives the views of all interested persons at public hearings whenever appropriate; hence, any applicant or declarant seeking Commission approval of proposed transactions by a particular time should file his application or declaration in time to allow for the presentation and consideration of such views.

(b) After the staff has had an opportunity to study an application or declaration, interested persons may informally discuss the problems therein raised to the extent that time and the nature of the case permit (e.g., consideration is usually given to whether the proceeding is contested and if so to the nature of the contest). In such event, the staff will, to the extent feasible, advise as to the nature of the issues raised by the filing, the necessity for any amendments to the documents filed, the type of evidence it believes should be presented at the hearing and, in some instances, the nature, form, and contents of documents to be submitted as formal exhibits. The staff will, in addition, generally advise as to Commission policy in past cases which dealt with the same subject matter as the filing under consideration.

(c) During the course of the hearings, the staff is generally available for informal discussions to reconcile bona fide divergent views not only between itself and other persons interested in the proceedings, but among all interested persons; and, when circumstances permit, an attempt is made to narrow, if possible, the issues to be considered at the formal hearing.

(d) In some instances the Commission in the order accompanying its findings and opinion reserves jurisdiction over certain matters relating to the proceeding, such as payment of fees and expenses, accounting entries, terms and conditions relating to securities to be issued, and other matters. In such cases, upon receipt of satisfactory information and data the Commission considers whether further hearing is required before releasing jurisdiction.

§ 202.5 Enforcement activities.

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. The Commission may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or the rules of a self-regulatory organization of which the person is a member or participant. Unless otherwise ordered by the Commission, the investigation or examination is nonpublic and the reports thereon are for staff and Commission use only.

(b) After investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution. The Commission may also, on some occasions, refer the matter to, or grant requests for access to its files made by, domestic and foreign governmental authorities or foreign securities authorities, self-regulatory organizations such as stock exchanges or the National Association of Securities Dealers, Inc., and other persons or entities.

(c) Persons who become involved in preliminary or formal investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the

staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding. Submissions by interested persons should be forwarded to the appropriate Division Director, Regional Director, or District Administrator with a copy to the staff members conducting the investigation and should be clearly referenced to the specific investigation to which they relate. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

(d) In instances where the staff has concluded its investigation of a particular matter and has determined that it will not recommend the commencement of an enforcement proceeding against a person, the staff, in its discretion, may advise the party that its formal investigation has been terminated. Such advice if given must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation of the particular matter.

(e) The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

(f) In the course of the Commission's investigations, civil lawsuits, and administrative proceedings, the staff, with appropriate authorization, may discuss with persons involved the disposition of such matters by consent, by settlement, or in some other manner. It is the policy of the Commission, however, that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him. This policy reflects the fact that neither the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.

[25 FR 6736, July 15, 1960, as amended at 37 FR 23829, Nov. 9, 1972; 37 FR 25224, Nov. 29, 1972; 44 FR 50835, Aug. 30, 1979; 46 FR 47532, Sept. 29, 1981; 47 FR 26822, June 22, 1982; 54 FR 24332, June 7, 1989; 59 FR 5945, Feb. 9, 1994]

§ 202.6 Adoption, revision, and rescission of rules and regulations of general application.

(a) The procedure followed by the Commission in connection with the adoption, revision, and rescission of rules of general application necessarily varies in accordance with the nature of the rule, the extent of public interest therein, and the necessity for speed in its adoption. Rules relating to Commission organization, procedure and management, for example, are generally adopted by the Commission without affording public discussion thereof. On the other hand, in the adoption of substantive rules materially affecting an industry or a segment of the public, such as accounting rules, every feasible effort is made in advance of adoption

to receive the views of persons to be affected. In such cases, proposals for the adoption, revision, or rescission of rules are initiated either by the Commission or by members of the public, and to the extent practicable, the practices set forth in paragraph (b) of this section are observed.

(b) After preliminary consideration by the Commission a draft of the proposed rule is published in the FEDERAL REGISTER and mailed to interested persons (e.g., other interested regulatory bodies, principal registrants or persons to be affected, stock exchanges, professional societies and leading authorities on the subject concerned and other persons requesting such draft) for comments. Unless accorded confidential treatment pursuant to statute or rule of the Commission, written comments filed with the Commission on or before the closing date for comments become a part of the public record upon the proposed rule. The Commission, in its discretion, may accept and include in the public record written comments received by the Commission after the closing date.

(c) Following analysis of comments received, the rule may be adopted in the form published or in a revised form in the light of such comments. In some cases, a revised draft is prepared and published and, where appropriate, an oral hearing may be held before final action upon the proposal. Any interested person may appear at the hearing and/or may submit written comment for consideration in accordance with the Commission's notice of the rulemaking procedure to be followed. The rule in the form in which it is adopted by the Commission is publicly released and is published in the FEDERAL REGISTER.

(Sec. 19(a), 48 Stat. 908; sec. 23(a), 48 Stat. 901; sec. 20(a), 49 Stat. 833; sec. 319(a), 53 Stat. 1173; sec. 38(a), 54 Stat. 841; sec. 211(a), 54 Stat. 855; (15 U.S.C. 77s(a), 78w(a), 78t(a), 77sss(a), 80a–37(a), 80b–11(a))

[25 FR 6736, July 15, 1960, as amended at 44 FR 35208, June 19, 1979]

§ 202.7 Submittals.

(a) All required statements, reports, applications, etc. must be filed with the principal office of the Commission unless otherwise specified in the Commission's rules, schedules and forms. Reports by exchange members, brokers and dealers required by § 240.17a–5 of this chapter under the Securities Exchange Act of 1934 must be filed with the appropriate regional or district office as provided in § 230.255(a) of this chapter under the Securities Act of 1933, and with the principal office of the Commission and the appropriate regional or district office as provided under § 240.17a–5(a) *et seq.* of this chapter under the Securities Exchange Act of 1934.

(b) *Electronic filings.* All documents required to be filed in electronic format with the Commission pursuant to the federal securities laws or the rules and regulations thereunder shall be filed at the principal office in Washington, DC via EDGAR by delivery to the Commission of a magnetic tape or diskette, or by direct transmission.

[41 FR 44699, Oct. 12, 1976, as amended at 58 FR 14659, Mar. 18, 1993; 59 FR 5945, Feb. 9, 1994]

§ 202.8 Small entity compliance guides.

The following small entity compliance guides are available to the public from the Commission's Publications Room and regional offices:

(a) *Q & A: Small Business and the SEC.*[1]

(b) *The Work of the SEC.*[1]

(c) *Broker-Dealer Registration Package.*

(d) *Investment Adviser Registration Package.*

(e) *Investment Company Registration Package.*

(f) *Examination Information for Broker-Dealers, Transfer Agents, Investment Advisers and Investment Companies.*

[62 FR 4105, Jan. 28, 1997]

§ 202.9 Small entity enforcement penalty reduction policy.

The Commission's policy with respect to whether to reduce or assess civil money penalties against a small entity is:

(a) The Commission will consider on a case-by-case basis whether to reduce or not assess civil money penalties against a small entity. In determining

[1] These items are also available on the Securities and Exchange Commission Web site on the Internet, http://www.sec.gov.

whether to reduce or not assess penalties against a specific small entity, the following considerations will apply:

(1) Except as provided in paragraph (a)(3) of this section, penalty reduction will not be available for any small entity if:

(i) The small entity was subject previously to an enforcement action;

(ii) Any of the small entity's violations involved willful or criminal conduct; or

(iii) The small entity did not make a good faith effort to comply with the law.

(2) In considering whether the Commission will reduce or refrain from assessing a civil money penalty, the Commission may consider:

(i) The egregiousness of the violations;

(ii) The isolated or repeated nature of the violations;

(iii) The violator's state of mind when committing the violations;

(iv) The violator's history (if any) of legal or regulatory violations;

(v) The extent to which the violator cooperated during the investigation;

(vi) Whether the violator has engaged in subsequent remedial efforts to mitigate the effects of the violation and to prevent future violations;

(vii) The degree to which a penalty will deter the violator or others from committing future violations; and

(viii) Any other relevant fact.

(3) The Commission also may consider whether to reduce or not assess a civil money penalty against a small entity, including a small entity otherwise excluded from this policy under paragraphs (a)(1) (i)–(iii) of this section, if the small entity can demonstrate to the Commission's satisfaction that it is financially unable to pay the penalty, immediately or over a reasonable period of time, in whole or in part.

(4) For purposes of this policy, an entity qualifies as ''small'' if it is a small business or small organization as defined by Commission rules adopted for the purpose of compliance with the Regulatory Flexibility Act.[1] An entity not included in these definitions will be considered ''small'' for purposes of this policy if it meets the total asset amount that applies to issuers as set forth in §230.157a of this chapter.[2]

(b) This policy does not create a right or remedy for any person. This policy shall not apply to any remedy that may be sought by the Commission other than civil money penalties, whether or not such other remedy may be characterized as penal or remedial.

[62 FR 16079, Apr. 4, 1997]

PART 203—RULES RELATING TO INVESTIGATIONS

Subpart A—In General

Sec.
203.1 Application of the rules of this part.
203.2 Information obtained in investigations and examinations.
203.3 Suspension and disbarment.

Subpart B—Formal Investigative Proceedings

203.4 Applicability of §§203.4 through 203.8.
203.5 Non-public formal investigative proceedings.
203.6 Transcripts.
203.7 Rights of witnesses.
203.8 Service of subpoenas.

AUTHORITY: 15 U.S.C 77s, 78w, 79t, 77sss, 80a-37, 80b-11, unless otherwise noted.

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[1] Pursuant to the Reg. Flex. Act, 5 U.S.C. §601(3), the Commission has adopted appropriate definitions of ''small business'' for purposes of the Reg. Flex. Act. *See* 17 CFR 270.0–10, 275.0–7, 240.0–10, 230.157, 250.110, and 260.0–7. The Commission recently proposed amendments to certain of these definitions. *Definitions of ''Small Business'' or ''Small Organization'' Under the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, and the Securities Act of 1933,* Securities Act Rel. No. 7383, 62 FR 4106 (Jan. 28, 1997). The Commission extended the comment period for the proposed amendments to April 30, 1997, 62 FR 13356 (Mar. 20, 1997). Based on an analysis of the language and legislative history of the Reg. Flex. Act, Congress does not appear to have intended that Act to apply to natural persons (as opposed to individual proprietorships) or to foreign entities. The Commission understands that staff at the Small Business Administration have taken the same position.

[2] At present, this threshold is $5 million. Thus, non-regulated entities, such as general partnerships, privately held corporations or professional service organizations, with assets of $5 million or less may qualify for penalty-reduction.

SOURCE: 29 FR 3620, Mar. 21, 1964, unless otherwise noted.

Subpart A—In General

§ 203.1 Application of the rules of this part.

The rules of this part apply only to investigations conducted by the Commission. They do not apply to adjudicative or rulemaking proceedings.

§ 203.2 Information obtained in investigations and examinations.

Information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public, but the Commission approves the practice whereby officials of the Divisions of Enforcement, Corporation Finance, Market Regulation and Investment Management and the Office of International Affairs at the level of Assistant Director or higher, and officials in Regional Offices at the level of Assistant Regional Director or District Administrator or higher, may engage in and may authorize members of the Commission's staff to engage in discussions with persons identified in § 240.24c-1(b) of this chapter concerning information obtained in individual investigations or examinations, including formal investigations conducted pursuant to Commission order.

[58 FR 52419, Oct. 8, 1993, as amended at 59 FR 5945, Feb. 9, 1994]

§ 203.3 Suspension and disbarment.

The provisions of § 201.102(e) of this chapter (Rule 102(e) of the Commission's rules of practice) are hereby made specifically applicable to all investigations.

[29 FR 3620, Mar. 21, 1964, as amended at 60 FR 32823, June 23, 1995]

Subpart B—Formal Investigative Proceedings

§ 203.4 Applicability of §§ 203.4 through 203.8.

(a) Sections 203.4 through 203.8 shall be applicable to a witness who is sworn in a proceeding pursuant to a Commission order for investigation or examination, such proceeding being hereinafter referred to as a *formal investigative proceeding.*

(b) Formal investigative proceedings may be held before the Commission, before one or more of its members, or before any officer designated by it for the purpose of taking testimony of witnesses and received other evidence. The term *officer conducting the investigation* shall mean any of the foregoing.

§ 203.5 Non-public formal investigative proceedings.

Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public.

§ 203.6 Transcripts.

Transcripts, if any, of formal investigative proceedings shall be recorded solely by the official reporter, or by any other person or means designated by the officer conducting the investigation. A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however,* That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

(15 U.S.C. 78d–1)

[37 FR 25166, Nov. 28, 1972]

§ 203.7 Rights of witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or testimony at a formal investigative proceeding shall, upon request, be shown the Commission's order of investigation. Copies of formal orders of investigation shall not be furnished, for their retention, to such persons requesting the same except with the express approval of officials in the Regional or District Offices at the level of Assistant Regional Director or District Administrator or higher, or officials in the Division or Divisions conducting or supervising the investigation at the

level of Assistant Director or higher. Such approval shall not be given unless the person granting such approval, in his or her discretion, is satisfied that there exist reasons consistent both with the protection of privacy of persons involved in the investigation and with the unimpeded conduct of the investigation.

(b) Any person compelled to appear, or who appears by request or permission of the Commission, in person at a formal investigative proceeding may be accompanied, represented and advised by counsel, as defined in §201.101(a) of this chapter (Rule 101(a) of the Commission's rules of practice): *Provided*, however, That all witnesses shall be sequestered, and unless permitted in the discretion of the officer conducting the investigation no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding.

(c) The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any formal investigative proceeding and to have this attorney (1) advise such person before, during and after the conclusion of such examination, (2) question such person briefly at the conclusion of the examination to clarify any of the answers such person has given, and (3) make summary notes during such examination solely for the use of such person.

(d) Unless otherwise ordered by the Commission, in any public formal investigative proceeding, if the record shall contain implications of wrongdoing by any person, such person shall have the right to appear on the record; and in addition to the rights afforded other witnesses hereby, he shall have a reasonable opportunity of cross-examination and production of rebuttal testimony or documentary evidence. *Reasonable* shall mean permitting persons as full an opportunity to assert their position as may be granted consistent with administrative efficiency and with avoidance of undue delay. The determination of reasonableness in each instance shall be made in the discretion of the officer conducting the investigation.

(e) The officer conducting the investigation may report to the Commission any instances where any witness or counsel has been guilty of dilatory, obstructionist or contumacious conduct during the course of an investigation or any other instance of violation of these rules. The Commission will thereupon take such further action as the circumstances may warrant, including suspension or disbarment of counsel from further appearance or practice before it, in accordance with §201.2(e) of this chapter (Rule 2(e) of the Commission's rules of practice), or exclusion from further participation in the particular investigation.

[29 FR 3620, Mar. 21, 1964, as amended at 52 FR 12148, Apr. 15, 1987; 59 FR 5945, Feb. 9, 1994; 60 FR 32823, June 23, 1995]

§203.8 Service of subpoenas.

Service of subpoenas issued in formal investigative proceedings shall be effected in the manner prescribed by Rule 232(c) of the Commission's Rules of Practice, §201.232(c) of this chapter.

[29 FR 3620, Mar. 21, 1964, as amended at 60 FR 32823, June 23, 1995]

PART 204—RULES RELATING TO DEBT COLLECTION

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Subpart A—Administrative Offset

AUTHORITY: 31 U.S.C. 3716, 31 CFR 901.3.

SOURCE: 58 FR 64370, Dec. 7, 1993, unless otherwise noted.

§ 204.1 Applicability and scope.

(a) The procedures authorized for administrative offset are contained in Section 10 of the Debt Collection Act (codified at 31 U.S.C. 3716). The Act requires that notice procedures be observed by the agency. The debtor is also afforded an opportunity to inspect and copy government records pertaining to the claim, enter into an agreement for repayment, and to a review of the claim (if requested). Like salary offset, agencies may cooperate with one another in order to effectuate recovery of the claim.

(b) The provisions of this subpart apply to the collection of debts owed to the United States arising from transactions with the Securities and Exchange Commission (Commission). These regulations are consistent with the Debt Collection Act and the Federal Claims Collection Standards on administrative offset issued jointly by the Department of Justice and the Department of the Treasury (31 CFR 901.3).

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54130, Oct. 26, 2001]

§ 204.2 Definitions.

(a) *Administrative offset* as defined in 31 U.S.C. 3701(a)(1) means withholding funds payable by the United States (including funds payable by the United States on behalf of a State government) to, or held by the United States for, a person to satisfy a claim.

(b) *Person* includes a natural person or persons, profit or nonprofit corporation, partnership, association, trust, estate, consortium, or other entity which is capable of owing a debt to the United States Government except that agencies of the United States, or of any State or local government shall be excluded.

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54130, Oct. 26, 2001]

§ 204.3 General.

(a) The Chairperson (or designee) may initiate administrative offset with regard to debts owed by a person to another agency of the United States Government, upon receipt of a request from the head of another agency or his or her designee, and a certification that the debt exists and that the person has been afforded the necessary due process rights.

(b) The Chairperson (or designee) may notify the Department of the Treasury of delinquent debts for purposes of administrative offset, and may request another agency which holds funds payable to a Commission debtor to offset that debt against the funds held; the Commission will provide certification that:

(1) The debt is past due and legally enforceable; and

(2) The person has been afforded the necessary due process rights.

(c) No collection by administrative offset shall be made on any debt that

has been outstanding for more than 10 years unless facts material to the Government's right to collect the debt were not known, and reasonably could not have been known, by the official or officials responsible for discovering the debt. This limitation does not apply to debts reduced to judgment.

(d) Administrative offset under this subpart may not be initiated against:

(1) A debt in which administrative offset of the type of debt involved is explicitly provided for or prohibited by another statute;

(2) Debts owed by other agencies of the United States or by any State or local Government; or

(3) Debts arising under the Internal Revenue Code of 1954; the Social Security Act; or the tariff laws of the United States.

(e) The procedures for administrative offset in this subpart do not apply to the offset of Federal salaries under 5 U.S.C. 5514 or Federal tax refunds under 31 U.S.C. 3720A and 31 CFR 285.2.

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54130, Oct. 26, 2001]

§204.4 Demand for payment—notice.

(a) Before offset is made, a written notice will be sent to the debtor. This notice will include:

(1) The type and amount of the debt;

(2) The date when payment is due (not less than thirty days from the date of mailing or hand delivery of the notice);

(3) The agency's intention to collect the debt by administrative offset, including asking the assistance of other Federal agencies to help in the offset whenever possible, if the debtor has not made payment by the payment due date or has not made an arrangement for payment by the payment due date;

(4) The right of the debtor to inspect and copy the Commission's records related to the claim;

(5) The right of the debtor to request a review of the determination of indebtedness and, in the circumstances described in §204.7, to request an oral hearing from the Commission's designee; and

(6) The right of the debtor to enter into a written agreement with the agency to repay the debt in some other way.

(b) Claims for payment of travel advances and employee training expenses require notification prior to administrative offset as described in this section. Because no oral hearing is required, notice of the right to a hearing need not be included in the notification.

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54130, Oct. 26, 2001]

§204.5 Debtor's failure to respond.

If the debtor fails to respond to the notice described in §204.4(a) by the proposed effective date specified in the notice, the Commission may take further action under this section or under the Federal Claims Collection Standards (31 CFR 901.3). The commission may collect by administrative offset if the debtor:

(a) Has not made payment by the payment due date;

(b) Has not requested a review of the claim within the agency as set out in §204.6; or

(c) Has not made an arrangement for payment by the payment due date.

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54130, Oct. 26, 2001]

§204.6 Agency review.

(a) To the extent that a debt owed has not been established by judicial or administrative order, a debtor may request a hearing concerning the existence or amount of the debt or the terms of repayment. With respect to debts established by a judicial or administrative order, a debtor may request a hearing concerning the payment or other discharge of the debt. A request to review a disputed debt must be submitted to the Commission official who provided notification within 30 calendar days of the receipt of the written notice described in §204.4(c).

(b) The Commission will provide a copy of the record to the debtor and advise him/her to furnish available evidence to support his or her position. Upon receipt of the evidence, the written record of indebtedness will be reviewed and the debtor will be informed of the results of that review.

(c) Pending the resolution of a dispute by the debtor, transactions in any of the debtor's accounts maintained by

the Commission may be temporarily suspended. Depending on the type of transaction, the suspension could preclude its payment, removal, or transfer, as well as prevent the payment of interest or discount due thereon. Should the dispute be resolved in the debtor's favor, the suspension will be immediately lifted.

(d) During the review period, interest, penalties, and administrative costs will continue to accrue.

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§ 204.7 Hearing.

(a) A debtor will be provided a reasonable opportunity for an oral hearing by the Commission's designee when:

(1) (i) By statute, consideration must be given to a request to waive the indebtedness;

(ii) The debtor requests waiver of the indebtedness; and

(iii) The waiver determination rests on an issue of credibility or veracity; or

(2) The debtor requests reconsideration and the Commission's designee determines that the question of indebtedness cannot be resolved by reviewing the documentary evidence.

(b) In cases where an oral hearing is provided to the debtor, the Commission's designee will conduct the hearing, and provide the debtor with a written decision 30 days after the hearing.

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§ 204.8 Written agreement for repayment.

If the debtor requests a repayment agreement in place of offset, the Commission has discretion to determine whether to accept a repayment agreement in place of offset. If the debt is delinquent and the debtor has not disputed its existence or amount, the Commission will not accept a repayment agreement in place of offset unless the debtor is able to establish that offset would cause undue financial hardship or be unjust. No repayment arrangement will be considered unless the debtor submits a financial statement, executed under penalty of perjury, reflecting the debtor's assets, liabilities, income, and expenses. The financial statement must be submitted within ten business days of the Commission's request for the statement. At the Commission's option, a confess-judgment note or bond of indemnity with surety may be required for installment agreements. Notwithstanding the provisions of this section, any reduction or compromise of a claim will be governed by the Debt Collection Act, 31 U.S.C. 3711–3720E, and the Federal Claims Collection Standards, 31 CFR 900.1–904.4.

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§ 204.9 Administrative offset procedures.

(a) If the debtor does not exercise the right to request a review within the time specified in § 204.4, or if as a result of the review, it is determined that the debt is due and no written agreement is executed, then administrative offset shall be ordered in accordance with this subpart without further notice.

(b) *Travel advance.* The Commission will deduct outstanding advances provided to Commission travelers from other amounts owed the traveler by the agency whenever possible and practicable. Monies owed by an employee for outstanding travel advances that cannot be deducted from other travel amounts due that employee will be collected through salary offset as described in subpart B of this part.

(c) *Requests for offset to the Department of the Treasury or other Federal agencies.* The Chairperson (or his or her designee) may notify the Department of the Treasury of delinquent debts for purposes of administrative offset, and may request that a debt owed to the Commission be administratively offset against funds due and payable to a debtor by another Federal agency. In requesting administrative offset, the Commission, as creditor, will certify in writing to the Federal agency holding funds of the debtor that:

(1) The debtor owes the past due and legally enforceable debt; and

(2) The debtor has been afforded the necessary due process rights.

(d) *Requests for offset from other Federal agencies.* Any Federal agency may request that funds due and payable to

its debtor by the Commission be administratively offset in order to collect a debt owed to such Federal agency by the debtor. The Commission shall initiate the requested offset only upon:

(1) Receipt of written certification from the crecitor agency that:

(i) The debtor owes the past due and legally enforceable debt; and

(ii) The debtor has been afforded the necessary due process rights.

(2) A determination by the Commission that collection by offset against funds payable by the Commission would be in the best interest of the United States as determined by the facts and circumstances of the particular case, and that such offset would not otherwise be contrary to law.

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§ 204.10 [Reserved]

§ 204.11 Jeopardy procedure.

The Commission may effect an administrative offset against a payment to be made to the debtor prior to the completion of the procedures required by § 204.4(a) if failure to take the offset would substantially jeopardize the Commission's ability to collect the debt, and the time available before the payment is to be made does not reasonably permit the completion of those procedures. Such prior offset shall be promptly followed by the completion of those procedures. Amounts recovered by offset but later found not to be owed to the Commission shall be promptly refunded. This section applies only to administrative offset pursuant to 31 CFR 901.3(c), and does not apply when debts are referred to the Department of the Treasury for mandatory centralized administrative offset under 31 CFR 901.3(b)(1).

[58 FR 64370, Dec. 7, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§§ 204.12–204.29 [Reserved]

Subpart B—Salary Offset

AUTHORITY: 5 U.S.C. 5514, 5 CFR 550.1104.

SOURCE: 58 FR 38520, July 19, 1993, unless otherwise noted.

§ 204.30 Purpose and scope.

(a) This regulation provides procedures for the collection by administrative offset against a federal employee's current pay account without his/her consent under 5 U.S.C. 5514 to satisfy certain debts owed to the Commission. This regulation does not apply when the employee consents to recovery from his/her current pay account.

(b) This regulation does not preclude an employee from requesting a waiver or questioning the amount or validity of a debt by submitting a claim to the General Accounting Office in accordance with procedures prescribed by the General Accounting Office.

(c) This Salary Offset plan is for internal use and Government-wide claims collections. 5 CFR 550.1104(a). This regulation implements 5 U.S.C. 5514; 5 CFR part 550, subpart K.

§ 204.31 Excluded debts or claims.

This regulation does not apply to:

(a) Debts or claims arising under the Internal Revenue Code of 1954 as amended (26 U.S.C. 1), or the tariff laws of the United States.

(b) Any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute, such as travel advances in 5 U.S.C. 5705 and employee training expenses in 5 U.S.C. 4108.

[58 FR 38520, July 19, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§ 204.32 Definitions.

The following definitions apply to this regulation:

Chairman means the Chairman of the Securities and Exchange Commission.

Commission means the Securities and Exchange Commission.

Creditor agency means the agency to which the debt is owed.

Debt means an amount owed to the United States from sources which include but are not necessarily limited to, erroneous payments made to employees such as overpayment of benefits, salary or other allowances; loans when insured or guaranteed by the United States; and other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayment,

penalties, damages, interest, fines and forfeitures (except those arising under the Uniform Code of Military Justice) and all other similar sources.

Disposable pay means the amount that remains from an employee's federal pay after required deductions for federal, state and local income taxes; Social Security taxes, including Medicare taxes; federal retirement programs; premiums for life and health insurance benefits; and such other deductions that are required by law to be withheld. (See 5 CFR 581.105(b) through (f) for items required by law to be withheld, and therefore excluded from disposable pay for the purposes of this regulation.)

Employee means a current employee of the Securities and Exchange Commission, or other agency, including an active duty member or reservist in the U.S. Armed Forces or a former employee (or former active duty member or Reservist in the Armed Forces) with a current pay account.

FCCS means the Federal Claims Collection Standards jointly published by the Justice Department and the Department of the Treasury at 31 CFR parts 900–904.

Hearing official means an individual responsible for conducting any hearing with respect to the existence or amount of a debt claimed, and who renders a decision on the basis of such hearing. A hearing official may not be under the Chairman's supervision or control, except that nothing in this regulation shall be construed to prohibit the appointment of an administrative law judge.

Pay means basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an individual not entitled to basic pay, other authorized pay.

Program official means, for the purpose of implementing this offset regulation, the Comptroller or designee.

Salary offset means an administrative offset to collect a debt under 5 U.S.C. 5514 by deduction(s), at one or more officially established pay intervals, from the current pay account of an employee, without his or her consent.

Waiver means the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to an agency as permitted or required by 5 U.S.C. 5584, 10 U.S.C. 2774, 32 U.S.C. 716, 5 U.S.C. 8346(b), or any other law.

[58 FR 38520, July 19, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§ 204.33 Pre-offset notice.

A program official must provide an employee with written notice at least 30 calendar days prior to offseting his/her salary. A program official need not notify an employee of: any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay, it the amount to be recovered was accumulated over four pay periods or less; a routine intra-agency adjustment of pay that is made to correct an overpayment of pay attributable to clerical or administrative errors or delays in processing pay documents, if the overpayment occurred within the four pay periods preceding the adjustment and, at the time of such adjustment, or as soon thereafter as practical, the individual is provided written notice of the nature and the amount of the adjustment and point of contact for contesting such adjustment; or any adjustment to collect a debt amounting to $50 or less, if, at the time of such adjustment, or as soon thereafter as practical, the individual is provided written notice of the nature and the amount of the adjustment and a point of contact for contesting such adjustment. When required, the written notice must include the following:

(a) The nature, origin and amount of the indebtedness determined by the Commission to be due;

(b) The intention of the Commission to collect the debt through deductions from the employee's current disposable pay account;

(c) The frequency and amount of the intended deductions (stated as a fixed dollar amount or as a percentage of pay, not to exceed 15 percent of disposable pay) and the intention to continue the deductions until the debt is paid in full or otherwise resolved;

(d) An explanation of the Commission's policy concerning interest, penalties, and administrative costs, including a statement that such assessments must be made unless excused in accordance with the FCCS;

(e) The employee's right to inspect and copy Commission records relating to the debt (if copies of such records are not attached), or if the employee or his or her representative cannot personally inspect the records, the right to request and receive a copy of such records. The Commission will respond to a request for inspection and/or copying as soon as practicable;

(f) The opportunity, under terms agreeable to the Commission, to enter into a written agreement to establish a schedule for repayment in lieu of offset. The agreement must be in writing, signed by both the employee and the Commission, and documented in the Commission's files (31 CFR 901.3(b));

(g) The employee's right to a hearing conducted by an official arranged by the Commission if a petition is filed as prescribed by § 204.35, Petition for pre-offset hearing. Such hearing official will be either an administrative law judge or at the chief administrative law judge's discretion, another hearing official who is also not under the control of the head of the agency;

(h) The method and time period for petitioning for a hearing, including a statement that the timely filing of a petition for hearing will stay the commencement of collection proceedings;

(i) If a hearing is requested, the hearing official will issue a final decision, based on information presented to the hearing official, at the earliest practicable date, but no later than 60 days after the petition for the hearing is filed unless the employee requests and the hearing official, for good cause or in the interests of justice, deems it necessary to extend that time period (5 CFR 550.1104(d)(10));

(j) That any knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(1) Disciplinary procedures appropriate under 5 U.S.C. chapter 75, 5 CFR part 752, or any other applicable statutes or regulations;

(2) Penalties under the False Claims Act, 31 U.S.C. 3729–3731, or any other applicable statutory authority; and/or

(3) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002, or any other applicable statutory authority.

(k) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made;

(l) The employee's right to a prompt refund if amounts paid or deducted by salary offset are later waived or found not owed to the United States, unless otherwise provided by law or contract; and

(m) The specific address to which all correspondence shall be directed regarding the debt.

[58 FR 38520, July 19, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§ 204.34 Employee response.

(a) *Introduction.* An employee must respond to a pre-offset notice, if at all, within 15 calendar days following receipt, in one or more of the ways discussed in § 204.34, Employee response, and § 204.35, Petition for pre-offset hearing. Where applicable, the employee bears the burdens of proof and persuasion.

(b) Responses must be submitted in writing to the program official who signed the pre-offset notice. A timely response will stay the commencement of collection by salary offset, at least until the issuance of a written decision. (See § 204.37, Extensions of time). Failure to submit a timely response will be treated as an admission of indebtedness, and will result in salary offset in accordance with the terms specified in the pre-offset notice.

(c) A response filed after expiration of the 15 day period may be accepted if the employee can show that the delay was due to circumstances beyond his or her control or failure to receive notice of the time limit (unless otherwise aware of it).

(d) *Voluntary repayment agreement.* An employee may request to enter into a voluntary written agreement for repayment of the debt in lieu of offset. It is within the discretion of the program official whether to enter into such an agreement, and if so, upon what terms.

Voluntary deductions may exceed 15 percent of the employee's disposable pay. If an agreement is reached, the agreement must be in writing, and must be signed by both the employee and the program official. A signed copy must be sent to the Comptroller's office. The program official shall notify the employee in writing of its decision not to accept the proposed voluntary repayment schedule before making any deductions from the employee's salary.

(e) *Waiver.* Any request for waiver of the debt must be accompanied by evidence that the waiver is authorized by law.

(f) *Reconsideration.* An employee may request reconsideration of the existence or amount of the debt or the offset schedule as reflected in the pre-offset notice. The request must be accompanied by a detailed narrative and supporting documentation as to why the offset decision is erroneous and/or why the offset schedule imposes an undue hardship.

§ 204.35 Petition for pre-offset hearing.

(a) The employee may petition for a pre-offset hearing. The petition must state with specificity why the employee believes the agency's determination is in error. To the extent that a debt has not been established by judicial or administrative order, a debtor may request a pre-offset hearing concerning the existence or amount of the debt or the terms of repayment. With respect to debts established by a judicial or administrative order, a debtor may request a pre-offset hearing concerning the payment or other discharge of the debt.

(b) The petition must fully identify and explain, with reasonable specificity, all the facts, evidence and witnesses, if any, that the employee believes support his or her position. The petition must be signed by the employee.

[58 FR 38520, July 19, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§ 204.36 Granting of a pre-offset hearing.

(a) If the employee timely requests a pre-offset hearing or the timeliness is waived, the program official must:

(1) arrange for a hearing official. If the hearing official is an administrative law judge, he or she shall be designated by the Chief Administrative Law Judge as set forth in 17 CFR 200.310(a)(2); and

(2) provide the hearing official with a copy of all records on which the determination of the debt and any involuntary repayment schedule are based.

(b) The hearing official shall notify the employee by personal service, by first class, registered or certified mail, or by a reliable commercial courier or overnight delivery service whether the employee is entitled to an oral or ''paper'' (i.e., a review on the written record) hearing. (See 31 CFR 901.3(e).) Within 20 calendar days of receipt of this notice the employee shall provide the hearing official with a full description of all relevant facts, documentary evidence, and witnesses which the employee believes support his or her position. The hearing official may extend the time for the employee to respond to the notice for good cause shown.

(c) If an oral hearing is scheduled, the hearing official shall notify the program official and the employee in writing of the date, time and location of the hearing. The place for the hearing shall be fixed by the hearing official with due regard for the public interest and the convenience and necessity of the parties, the participants, or their representatives.

(d) If the employee is entitled to an oral hearing, but requests to have the hearing based only on the written submissions, the employee must notify the hearing official and the program official at least 3 calendar days before the date of the oral hearing. The hearing official may waive the 3-day requirement for good cause.

(e) Failure of the employee to appear at the oral hearing may result in dismissal of the petition and affirmation of the program official's decision.

[58 FR 38520, July 19, 1993, as amended at 66 FR 54131, Oct. 26, 2001]

§ 204.37 Extensions of time.

The hearing official may for good cause or in the interests of justice postpone the commencement of the hearing, adjourn a convened hearing

for a reasonable period of time or extend or shorten any other time limits prescribed under this section. This extension is not intended to abridge the 30 day initial notice or extend the 60 day decision requirement other than as provided for in 5 CFR 550.1104(d)(10).

§ 204.38 Pre-offset hearing.

(a) The hearing official shall determine the form and content of hearings granted under this section, pursuant to 31 CFR 901.3(e). All oral hearings shall be on the record. Except as otherwise ordered by the hearing official, hearings shall be recorded or transcribed verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to the discretion and approval of the hearing official, and a transcript thereof shall be made.

(b) Oral hearings are informal in nature. The Commission, represented by an attorney from the Office of General Counsel, and accompanied by a program official and the employee, and/or the employee's representative, orally shall explain their respective positions using relevant documentation. The employee may testify on his or her own behalf, subject to cross examination. Other witnesses may be called to testify where the hearing official determines the testimony to be relevant and not redundant. The Federal Rules of Evidence serve as a guideline, but are not controlling. The employee bears the burdens of proof and persuasion.

(c) The hearing official shall:

(1) Conduct a fair and impartial hearing;

(2) Preside over the course of the hearing, maintain decorum and avoid delay in the disposition of the hearing; and

(3) Issue a decision in accordance with § 204.39, Written decision, on the basis of the oral hearing and the written record.

(d) Oral hearings are normally open to the public. However, the hearing official may close all or any portion of the hearing at either the request of either party or upon the hearing official's initiative when doing so is in the best interest[s] of the employee or the public.

(e) Oral hearings may be conducted by conference call at the request of the employee or at the discretion of the hearing official.

(f) *Pre-offset ''paper'' hearing.* If a hearing is to be held only upon written submissions, the hearing official shall issue a decision based solely upon the written record.

[58 FR 38520, July 19, 1993, as amended at 66 FR 54132, Oct. 26, 2001]

§ 204.39 Written decision.

(a) *If pre-offset hearing is held.* Within 60 days of the filing of the employee's petition for a pre-offset hearing, the hearing official will issue a written decision setting forth the basis of his/her findings in accordance with 5 CFR 550.1104(g)(3).

(b) If the employee challenges the pre-offset notice under § 204.34, Employee response and/or § 204.35, Petition for pre-offset hearing, without requesting a hearing or a hearing is denied, the program official must notify the employee of his/her final determination in writing before offset can begin. The agency's execution of a voluntary repayment agreement satisfies this requirement.

§ 204.40 Deductions.

(a) When deductions may begin:

(1) If a pre-offset hearing is held, deductions shall be made in accordance with the hearing official's decision.

(2) If parties execute a voluntary repayment agreement, deductions shall be made in accordance with the terms of that agreement.

(3) If the employee requests a waiver or reconsideration or the program official refuses to accept a proposed alternate repayment schedule, deductions shall be made in accordance with the program official's written decision.

(4) If the employee consents to the terms and conditions set forth in the Commission's Pre-offset Notice or fails to respond in timely fashion to the Pre-offset Notice, or waives his/her right to a hearing without otherwise challenging the terms of the Pre-offset Notice, deductions shall be made in accordance with the terms and conditions set forth therein.

(b) *Retired or separated employees.* If the employee retires, resigns, or is terminated before the debt is fully repaid, the remaining indebtedness will be offset pursuant to 31 U.S.C. 3716 and the FCCS.

(1) To the extent possible, the remaining indebtedness will be liquidated from any final payment due the former employee as of the date of separation (e.g., final salary payment, lump-sum leave, etc.). See § 204.40d(3), Offset deductions from final salary and/or lump-sum leave payment.

(2) Thereafter, the remaining indebtedness will be recovered from later payments of any kind due the former employee from the United States. See the FCCS.

(c) *Method of collection and source of deduction.* The method of collecting debts under these regulations shall be by salary offset. Deductions will be made from the employee's current disposable pay account except as provided for in § 204.34b, Employee response.

(d) *Amount and duration of deductions.* Debts must be collected in one lump sum where possible. If the employee demonstrates financial hardship to the Commission's satisfaction or the amount of the debt exceeds 15 percent of the indebted employee's current disposable pay, collection must be made in installments over a period not greater than the anticipated period of active employment, except as provided in Section 34b, Employee Response.

(1) Installment deductions will be made over the shortest period possible. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay.

(2) The amount deducted for any period will not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount. Installment payment of less than $100 per pay period will he accepted only in the most unusual circumstances.

(3) Offset deductions from final salary and/or lump-sum leave payment. Such an offset deduction may exceed 15 percent of an employee's final salary and/or lump-sum leave payment pursuant to 31 U.S.C. 3716, 64 CG 907.

(e) Interest, penalties and administrative costs on debts under this part will be assessed and/or waived according to the provisions of 31 CFR 901.9.

[58 FR 38520, July 19, 1993, as amended at 66 FR 54132, Oct. 26, 2001]

§ 204.41 Non-waiver of rights.

An employee's involuntary payment of all or any portion of a debt being collected under 5 U.S.C. 5514 shall not be construed as a waiver of any rights that the employee may have under 5 U.S.C. 5514 or any other provision of contract or law, unless there are statutory or contractual provisions to the contrary.

§ 204.42 Refunds.

(a) The Commission will refund promptly to the appropriate individual amounts offset under this regulation when:

(1) A debt is waived or otherwise found not owing the United States (unless expressly prohibited by statute or regulation); or

(2) The Commission is directed by an administrative or judicial order to refund amounts deducted from the employee's current pay.

(b) Refunds do not bear interest unless required or permitted by law or contract.

§ 204.43 Coordinating offset with another federal agency.

(a) *Responsibility of the Commission as the Creditor Agency.* When possible, salary offset through the centralized administrative offset procedures in 5 CFR 550.1108 shall be attempted before applying the procedures in this section. If centralized administrative offset is not possible, the Commission shall request recovery from the current paying agency. Upon completion of the procedures established in these regulations and pursuant to 5 U.S.C. 5514, 5 CFR 550.1109 the Commission must:

(1) Certify, in writing, that the employee owes the debt, the amount and basis of the debt, the date on which payment(s) is due, the date the Government's right to collect the debt first accrued and that the Commission's regulations implementing 5 U.S.C. 5514 have been approved by OPM.

(2) If the collection must be made in installments, the Commission also must advise the paying agency of the amount or percentage of disposable pay to be collected in each installment, and if the Commission wishes, the number and the commencing date of the installments (if a date other than the next officially established pay period is required).

(3) Advise the paying agency of the actions taken pursuant to 5 U.S.C. 5514(b) and give the date(s) the action(s) was taken (unless the employee has consented to the salary offset in writing or signed a statement acknowledging receipt of the required procedures and the written consent or statement is forwarded to the paying agency).

(4) Except as otherwise provided in this paragraph (a)(4), the Commission must submit a debt claim containing the information specified in paragraphs (a)(1) through (3) of this section and an installment agreement (or other instruction on the payment schedule), if applicable, to the employee's paying agency.

(5) If the employee is in the process of separating, the Commission must submit its debt claim to the employee's paying agency for collection as provided in 5 CFR 550.1104(l). Pursuant to 5 CFR 1101, the paying agency must certify the total amount of its collection and notify the creditor agency and employee. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the paying agency has fully complied with the provisions of this section. The Commission must submit a properly certified claim to the agency responsible for making such payments before the collection can be made.

(6) If the employee is already separated and all payments due from his or her former paying agency have been paid, the Commission may request, unless otherwise prohibited, that money due and payable to the employee from the Civil Service Retirement and Disability Fund (5 CFR 831.1801) or other similar funds, be administratively offset to collect the debt (See 31 U.S.C. 3716 and the FCCS).

(7) When an employee transfers to another paying agency, the Commission shall not repeat the due process procedures described in 5 U.S.C. 5514 and subpart B of this part to resume the collection. The Commission must review the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency. The Commission must submit a properly certified claim to the new paying agency before collection can be resumed.

(b) *Responsibility of the Commission as the paying agency*—(1) *Complete claim*. When the Commission receives a properly certified claim from a creditor agency, deductions should be scheduled to begin at the next officially established pay interval. The Commission must notify the employee in writing that the Commission has received a certified debt claim from the creditor agency (including the amount) and the date salary offset will begin and the amount of such deductions.

(2) *Incomplete claim*. When the Commission receives an incomplete certification of debt from a creditor agency, the Commission must return the debt claim with notice that procedures under 5 U.S.C. 5514 and subpart B of this part must be provided and a properly certified debt claim received before action will be taken to collect from the employee's current pay account.

(3) *Review*. The Commission is not authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(4) *Employees who transfer from one paying agency to another*. If, after the creditor agency has submitted the debt claim to the Commission and before the Commission collects the debt in full, the employee transfers to another agency, the Commission must certify the total amount collected on the debt. One copy of the certification must be furnished to the employee and one copy

to the creditor agency along with notice of the employee's transfer.

(c) *Responsibility of the Program Official.* (1) The Program Official shall coordinate debt collections and shall, as appropriate:

(i) Arrange for a hearing upon proper petition by a federal employee; and

(ii) Prescribe, upon consultation with the General Counsel, such practices and procedures as may be necessary to carry out the intent of this regulation.

(2) The Program Official shall be responsible for:

(i) Ensuring that each certification of debt sent to a paying agency is consistent with the pre-offset notice (§ 204.33, Pre-offset notice).

(ii) Obtaining hearing officials from other agencies pursuant to § 204.36, Granting of a pre-offset hearing.

(iii) Ensuring that hearings are properly scheduled.

[58 FR 38520, July 19, 1993, as amended at 66 FR 54132, Oct. 26, 2001]

§ 204.44 Interest, penalties, and administrative costs.

Charges may be assessed for interest, penalties, and administrative costs in accordance with the Federal Claims Collection Standards, 31 CFR 901.9.

[58 FR 38520, July 19, 1993, as amended at 66 FR 54132, Oct. 26, 2001]

Subpart C—Tax Refund Offset

AUTHORITY: 31 U.S.C. 3720A, 31 CFR 285.2(c).

SOURCE: 58 FR 64372, Dec. 7, 1993, unless otherwise noted.

§ 204.50 Purpose.

This subpart establishes procedures for the Commission's referral of past-due legally enforceable debts to the Department of the Treasury's Financial Management Service (FMS) for offset against the income tax refunds of the debtor.

[66 FR 54132, Oct. 26, 2001]

§ 204.51 [Reserved]

§ 204.52 Notification of intent to collect.

(a) *Notification before tax refund offset.* Reduction of an income tax refund will be made only after the Commission makes a determination that an amount is owed and past-due and gives or makes a reasonable attempt to give the debtor 60 days written notice of the intent to collect by tax refund offset.

(b) *Contents of notice.* The Commission's notice of intent to collect by tax refund offset (Notice of Intent) will state:

(1) The amount of the debt;

(2) That unless the debt is repaid within 60 days from the date of the Commission's Notice of Intent, the Commission intends to collect the debt by requesting a reduction of any amounts payable to the debtor as a Federal income tax refund by an amount equal to the amount of the debt and all accumulated interest and other charges;

(3) A mailing address for forwarding any written correspondence and a contact name and a telephone number for any questions; and

(4) That the debtor may present evidence to the Commission that all or part of the debt is not past due or legally enforceable by:

(i) Sending a written request for a review of the evidence to the address provided in the notice;

(ii) Stating in the request the amount disputed and the reasons why the debtor believes that the debt is not past due or is not legally enforceable; and

(iii) Including in the request any documents that the debtor wishes to be considered or stating that the additional information will be submitted within the remainder of the 60-day period.

(c) To the extent that a debt owed has not been established by judicial or administrative order, a debtor may dispute the existence or amount of the debt or the terms of repayment. With respect to debts established by a judicial or administrative order, Commission review will be limited to issues concerning the payment or other discharge of the debt.

[58 FR 64372, Dec. 7, 1993, as amended at 66 FR 54132, Oct. 26, 2001; 66 FR 56383, Nov. 7, 2001]

§ 204.53 [Reserved]

§ 204.54 Commission action as a result of consideration of evidence submitted in response to the notice of intent.

(a) *Consideration of evidence.* If, as a result of the Notice of Intent, the Commission receives notice that the debtor will submit additional evidence or receives additional evidence from the debtor within the prescribed time period, tax refund offset will be stayed until the Commission can:

(1) Consider the evidence presented by the debtor; and

(2) Determine whether or not all or a portion of the debt is still past due and legally enforceable; and

(3) Notify the debtor of its determination.

(b) *Commission action on the debt.* (1) The Commission will notify the debtor of its intent to refer the debt to the IRS for offset against the debtor's Federal income tax refund if it sustains its decision that the debt is past-due and legally enforceable. The Commission will also notify the debtor whether the amount of the debt remains the same or is modified; and

(2) The Commission will not refer the debt to the IRS for offset against the debtor's Federal income tax refund if it reverses its decision that the debt is past due and legally enforceable.

[58 FR 64372, Dec. 7, 1993, as amended at 66 FR 54132, Oct. 26, 2001]

§ 204.55 Change in notification to Financial Management Service.

After the Commission sends FMS notification of an individual's liability for a debt, the Commission will promptly notify FMS of any change in the notification, if the Commission:

(a) Determines that an error has been made with respect to the information contained in the notification;

(b) Receives a payment or credits a payment to the account of the debtor named in the notification that reduces the amount of the debt referred to FMS for offset; or

(c) If the debt amount is otherwise incorrect, except that the amount of a debt referred to FMS will not be increased unless the Commission has complied with the due process requirements of this subpart and the Federal Claims Collection Standards as to the amount of the increase.

[66 FR 54132, Oct. 26, 2001]

§ 204.56 Administrative charges.

To the extent permitted by law, all administrative charges incurred in connection with the referral of the debts for tax refund offset will be assessed on the debt and thus increase the amount of the offset.

[66 FR 54132, Oct. 26, 2001]

§§ 204.57–204.59 [Reserved]

Subpart D—Administrative Wage Garnishment

AUTHORITY: 31 U.S.C. 3720D, 31 CFR 285.11(f).

SOURCE: 66 FR 54132, Oct. 26, 2001, unless otherwise noted.

§ 204.60 Purpose.

This subpart provides procedures for the Commission to collect money from a debtor's disposable pay by means of administrative wage garnishment to satisfy a delinquent nontax debt owed to the United States.

§ 204.61 Scope.

(a) The receipt of payments pursuant to this subpart does not preclude the Commission from pursuing other debt collection remedies, including the offset of Federal payments to satisfy a delinquent nontax debt owed to the United States. The Commission may pursue such debt collection remedies separately or in conjunction with administrative wage garnishment.

(b) This subpart does not apply to the collection of delinquent nontax debt owed to the United States from the wages of Federal employees from their Federal employment. Federal pay is subject to the Federal salary offset procedures set forth in 5 U.S.C. 5514 and other applicable laws.

§ 204.62 Definitions.

The following definitions apply to this subpart:

Debt or *delinquent nontax debt* means any money, funds or property that has

been determined to be owed to the Commission by an individual that has not been paid by the date specified in the demand or order for payment, or applicable agreement. For purposes of this subpart, the terms ''debt'' and ''claim'' are synonymous.

Disposable pay means that part of the debtor's compensation (including, but not limited to, salary, bonuses, commissions, and vacation pay) from an employer remaining after the deduction of health insurance premiums and any amounts required by law to be withheld. For purposes of this subpart, ''amounts required by law to be withheld'' include amounts for deductions such as social security taxes and withholding taxes, but do not include any amount withheld pursuant to a court order.

Employer means a person or entity that employs the services of others and that pays their wages or salaries. The term employer includes, but is not limited to, State and local Governments, but does not include an agency of the Federal Government.

Garnishment means the process of withholding amounts from an employee's disposable pay and the paying of those amounts to a creditor in satisfaction of a withholding order.

Withholding order means any order for withholding or garnishment of pay issued by an agency, or judicial or administrative body. For purposes of this subpart, the terms ''wage garnishment order'' and ''garnishment order'' have the same meaning as ''withholding order.''

§ 204.63 Notice.

(a) At least 30 days before the initiation of garnishment proceedings, the Commission will mail, by first class mail to the debtor's last known address, a written notice informing the debtor of:

(1) The nature and amount of the debt;

(2) The Commission's intention to initiate proceedings to collect the debt through deductions from pay until the debt and all accumulated interest, penalties and administrative costs are paid in full; and

(3) An explanation of the debtor's rights, including those set forth in paragraph (b) of this section, and the time frame within which the debtor may exercise these rights.

(b) The debtor will be afforded the opportunity:

(1) To inspect and copy records related to the debt;

(2) To enter into a written repayment agreement with the Commission, under terms agreeable to the Commission; and

(3) To the extent that a debt owed has not been established by judicial or administrative order, to request a hearing concerning the existence or amount of the debt or the terms of the debt's repayment schedule. With respect to debts established by a judicial or administrative order, a debtor may request a hearing concerning the payment or other discharge of the debt. The debtor is not entitled to a hearing concerning the terms of the proposed repayment schedule if these terms have been established by written agreement under paragraph (b)(2) of this section.

(c) The notice required by this section may be included with the Commission's demand letter required by subpart A of this part.

(d) The Commission will keep a copy of the certificate of service indicating the date of mailing of the notice.

§ 204.64 Hearing.

(a) *Request for hearing.* The Commission will order a hearing, which at the Commission's option may be oral or written, if the debtor submits a written request for a hearing concerning, for debts not previously established by judicial or administrative order, the existence or amount of the debt or the terms of the repayment schedule (for repayment schedules established other than by written agreement under § 204.63(b)(2)), or for debts established by judicial or administrative order, the payment or other discharge of the debt.

(b) *Type of hearing or review.* (1) For purposes of this subpart, whenever the Commission is required to afford a debtor a hearing, the Commission will provide the debtor with a reasonable opportunity for an oral hearing when the Commission determined that the issues in dispute cannot be resolved by review of the documentary evidence, for example, when the validity of the

claim turns on the issue of credibility or veracity.

(2) If the Commission determines that an oral hearing is appropriate, the time and location of the hearing shall be established by the Commission. An oral hearing may, at the debtor's option, be conducted either in-person or by telephone conference. All travel expenses incurred by the debtor in connection with an in-person hearing will be borne by the debtor. All telephonic charges incurred during the hearing will be the responsibility of the agency.

(3) In those cases when an oral hearing is not required by this section, the Commission will nevertheless accord the debtor a ''paper hearing,'' that is, the Commission will decide the issues in dispute based upon a review of the written record.

(c) *Effect of timely request.* Subject to paragraph (l) of this section, if the debtor's written request is received by the Commission on or before the 15th business day following the mailing of the notice of the Commission's intent to seek garnishment, the Commission will not issue a withholding order until the debtor has been provided the requested hearing, and a decision in accordance with paragraphs (i) and (j) of this section has been rendered.

(d) *Failure to timely request a hearing.* If the debtor's written request is received by the agency after the 15th business day following the mailing of the notice of the Commission's intent to seek garnishment, the Commission shall provide a hearing to the debtor. However, the Commission will not delay issuance of a withholding order unless the Commission determines that the delay in filing the request was caused by factors over which the debtor had no control, or the Commission receives information that the Commission believes justifies a delay or cancellation of the withholding order.

(e) *Hearing official.* All hearings shall be presided over by the Commission, or if the Commission so orders, by a hearing official. When the Commission designates that the hearing official shall be an administrative law judge, the Chief Administrative Law Judge shall select, pursuant to 17 CFR 200.30–10, the administrative law judge to preside.

(f) *Procedure.* After the debtor requests a hearing, the hearing official shall notify the debtor of:

(1) The date and time of a telephonic hearing;

(2) The date, time, and location of an in-person oral hearing; or

(3) The deadline for the submission of evidence for a written hearing.

(g) *Burden of proof.* (1) The Commission will have the burden of going forward to prove the existence or amount of the debt.

(2) Thereafter, if the debtor disputes the existence or amount of the debt, the debtor must prove by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. In addition, the debtor may present evidence that the terms of the repayment schedule are unlawful, would cause a financial hardship to the debtor, or that collection of the debt may not be pursued due to operation of law.

(h) *Record.* The hearing official will maintain a record of any hearing provided under this section. A hearing is not required to be a formal evidentiary-type hearing, however, witnesses who testify in oral hearings will do so under oath or affirmation.

(i) *Date of decision.* The hearing official shall issue a written opinion stating his or her decision, as soon as practicable, but not later than sixty (60) days after the date on which the request for such hearing was received by the Commission. If the Commission is unable to provide the debtor with a hearing and a decision is not rendered within sixty (60) days after the receipt of the request for such hearing:

(1) A withholding order will not be issued until the hearing is held and a decision rendered; or

(2) If a withholding order had previously been issued to the debtor's employer, the withholding order will be suspended beginning on the 61st day after the receipt of the hearing request and continuing until a hearing is held and a decision is rendered.

(j) *Content of decision.* The written decision shall include:

(1) A summary of the facts presented;

(2) The findings, analysis and conclusions; and

(3) The terms of any repayment schedules, if applicable.

(k) *Finality of agency action.* Unless the Commission on its own initiative orders review of a decision by a hearing official pursuant to 17 CFR 201.431(c), a decision by a hearing official shall become the final decision of the Commission for the purpose of judicial review under the Administrative Procedure Act.

(l) *Failure to appear.* In the absence of good cause shown, a debtor who fails to appear at a scheduled hearing will be deemed as not having timely filed a request for a hearing.

§ 204.65 Wage garnishment order.

(a) Unless the Commission receives information that the Commission believes justifies a delay or cancellation of the withholding order, the Commission will send, by first class mail, a withholding order to the debtor's employer within 30 days after the debtor fails to make a timely request for a hearing (*i.e.,* within 15 business days after the mailing of the notice of the Commission's intent to seek garnishment) or, if a timely request for a hearing is made by the debtor, within 30 days after a decision to issue a withholding order becomes final.

(b) The withholding order sent to the employer will be in the form prescribed by the Secretary of the Treasury, on the Commission's letterhead, and signed by the Chairperson or his or her delegatee. The order will contain the information necessary for the employer to comply with the withholding order. This information includes the debtor's name, address, and social security number, as well as instructions for withholding and information as to where payments should be sent.

(c) The Commission will keep a copy of the certificate of service indicating the date of mailing of the order.

(d) *Certification by employer.* Along with the withholding order, the Commission will send to the employer a certification in a form prescribed by the Secretary of the Treasury. The employer shall complete and return the certification to the Commission within the time frame prescribed in the instructions to the form. The certification will address matters such as information about the debtor's employment status and disposable pay available for withholding.

(e) *Amounts withheld.* (1) After receipt of the garnishment order issued under this section, the employer shall deduct from all disposable pay paid to the applicable debtor during each pay period the amount of garnishment described in paragraph (e)(2) of this section.

(2) Subject to the provisions of paragraphs (e)(3) and (e)(4) of this section, the amount of garnishment shall be the lesser of:

(i) The amount indicated on the garnishment order up to 15% of the debtor's disposable pay; or

(ii) The amount set forth in 15 U.S.C. 1673(a)(2) (Restriction on Garnishment). The amount set forth at U.S.C. 1673(a)(2) is the amount by which the debtor's disposable pay exceeds an amount equivalent to thirty times the minimum wage *See* 29 CFR 870.10.

(3) When a debtor's pay is subject to withholding orders with priority, the following shall apply:

(i) Unless otherwise provided by Federal law, withholding orders issued under this section shall be paid in the amounts set forth under paragraph (e)(2) of this section and shall have priority over other withholding orders which are served later in time. However, withholding orders for family support shall have priority over withholding orders issued under this section.

(ii) If amounts are being withheld from a debtor's pay pursuant to a withholding order served on an employer before a withholding order issued pursuant to this section, or if a withholding order for family support is served on an employer at any time, the amounts withheld pursuant to the withholding order issued under this section shall be the lesser of:

(A) The amount calculated under paragraph (e)(2) of this section; or

(B) An amount equal to 25% of the debtor's disposable pay less the amount(s) withheld under the withholding order(s) with priority.

(iii) If a debtor owes more than one debt to the Commission, the Commission may issue multiple withholding orders. The total amount garnished from the debtor's pay for such orders

will not exceed the amount set forth in paragraph (e)(2) of this section.

(4) An amount greater than that set forth in paragraphs (e)(2) and (e)(3) of this section may be withheld upon the written consent of the debtor.

(5) The employer shall promptly pay to the Commission all amounts withheld in accordance with the withholding order issued pursuant to this section.

(6) An employer shall not be required to vary its normal pay and disbursement cycles in order to comply with the withholding order.

(7) Any assignment or allotment by the employee of the employee's earnings shall be void to the extent it interferes with or prohibits execution of the withholding order under this section, except for any assignment or allotment made pursuant to a family support judgment or order.

(8) The employer shall withhold the appropriate amount from the debtor's wages for each pay period until the employer receives notification from the Commission to discontinue wage withholding. The garnishment order shall indicate a reasonable period of time within which the employer is required to commence wage withholding.

(f) *Exclusions from garnishment.* The Commission will not garnish the wages of a debtor it knows has been involuntarily separated from employment until the debtor has been reemployed continuously for at least 12 months. The debtor has the burden of informing the Commission of the circumstances surrounding an involuntary separation from employment.

(g) *Financial hardship.* (1) A debtor whose wages are subject to a wage withholding order under this section, may, at any time, request a review by the Commission of the amount garnished, based on materially changed circumstances such as disability, divorce, or catastrophic illness which result in financial hardship.

(2) A debtor requesting a review under this section shall submit the basis for claiming that the current amount of garnishment results in a financial hardship to the debtor, along with supporting documentation.

(3) If a financial hardship is found, the Commission will downwardly adjust, by an amount and for a period of time agreeable to the Commission, the amount garnished to reflect the debtor's financial condition. The Commission will notify the employer of any adjustments to the amounts to be withheld.

(h) *Ending garnishment.* (2) Once the Commission has fully recovered the amounts owed by the debtor, including interest, penalties, and administrative costs consistent with the Federal Claims Collection Standards (31 CFR 901.9), the Commission will send the debtor's employer notification to discontinue wage withholding.

(2) At least annually, the Commission will review its debtors' accounts to ensure that garnishment has been terminated for accounts that have been paid in full.

(i) *Actions prohibited by the employer.* The Debt Collection Act prohibits an employer from discharging, refusing to employ, or taking disciplinary action against the debtor due to the issuance of a withholding order under this section (31 U.S.C. 3720D(e)).

(j) *Refunds.* (1) If a hearing official determines that a debt is not legally due and owing to the United States, the Commission shall promptly refund any amount collected by means of administrative wage garnishment.

(2) Unless required by Federal law or contract, refunds under this section shall not bear interest.

(k) *Right of action.* The Commission may sue any employer for any amount that the employer fails to withhold from wages owed and payable to an employee in accordance with this section. However, a suit will not be filed before the termination of the collection action involving a particular debtor, unless earlier filing is necessary to avoid expiration of any applicable statute of limitations. For purposes of this section, ''termination of the collection action'' occurs when the agency has terminated collection action in accordance with the Federal Claims Collection Standards (31 CFR 903.1–903.5) or other applicable standards. In any event, termination of the collection action will have been deemed to occur if the Commission has not received any payments to satisfy the debt from the particular debtor whose wages were

subject to garnishment, in whole or in part, for a period of one (1) year.

Subpart E—Miscellaneous: Credit Bureau Reporting, Collection Services

AUTHORITY: 31 U.S.C. 3701, 3711, 3718.

SOURCE: 58 FR 64373, Dec. 7, 1993, unless otherwise noted.

§ 204.75 Collection services.

Section 13 of the Debt Collection Act (31 U.S.C. 3718) authorizes agencies to enter into contracts for collection services to recover debts owed the United States. The Act requires that certain provisions be contained in such contracts, including:

(a) The agency retains the authority to resolve a dispute, including the authority to terminate a collection action or refer the matter to the Attorney General for civil remedies; and

(b) The contractor is subject to the Privacy Act of 1974, as it applies to private contractors, as well as subject to State and Federal laws governing debt collection practices.

§ 204.76 Use of credit bureau or consumer reporting agencies.

(a) The Commission may report delinquent debts to consumer reporting agencies (See 31 U.S.C. 3701(a)(3), 3711). Sixty days prior to release of information to a consumer reporting agency, the debtor shall be notified, in writing, of the intent to disclose the existence of the debt to a consumer reporting agency. Such notice of intent may be a separate correspondence or included in correspondence demanding direct payment. The notice shall be in conformance with 31 U.S.C. 3711(e) and the Federal Claims Collection Standards. The Commission shall provide, in this notice, the debtor with:

(1) An opportunity to inspect and copy agency records pertaining to the debt;

(2) An opportunity for an administrative review of the legal enforceability or past due status of the debt;

(3) An opportunity to enter into a repayment agreement on terms satisfactory to the Commission to prevent the Commission from reporting the debt as overdue to consumer reporting agencies, and provide deadlines and method for requesting this relief;

(4) An explanation of the rate of interest that will accrue on the debt, that all costs incurred to collect the debt will be charged to the debtor, the authority for assessing these costs, and the manner in which the Commission will calculate the amount of these cost;

(5) An explanation that the Commission will report the debt to the consumer reporting agencies to the detriment of the debtor's credit rating; and

(6) A description of the collection actions that the agency may take in the future if those presently proposed actions do not result in repayment of the loan obligation, including the filing of a lawsuit against the borrower by the agency and assignment of the debt for collection by offset against Federal income tax refunds or the filing of a lawsuit against the debtor by the Federal Government.

(b) The information that may be disclosed to the consumer reporting agency is limited to:

(1) The debtor's name, address, social security number or taxpayer identification number, and any other information necessary to establish the identity of the individual;

(2) The amount, status, and history of the claim; and

(3) The Commission program or activity under which the claim arose.

[58 FR 64373, Dec. 7, 1993, as amended at 66 FR 54135, Oct. 26, 2001]

§ 204.77 Referrals to collection agencies.

(a) The Commission has authority to contract for collection services to recover delinquent debts in accordance with 31 U.S.C. 3718(a) and the Federal Claims Collection Standards (31 CFR 901.5).

(b) The Commission will use private collection agencies where it determines that their use is in the best interest of the Government. Where the Commission determines that there is a need to contract for collection services, the contract will provide that:

(1) The authority to resolve disputes, compromise claims, suspend or terminate collection action, or refer the

matter to the Department of Justice for litigation or to take any other action under this part will be retained by the Commission;

(2) Contractors are subject to the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. 552a(m) and to applicable Federal and State laws and regulations pertaining to debt collection practices, such as the Fair Debt Collection Practices Act, 15 U.S.C. 1692;

(3) The contractor is required to strictly account for all amounts collected;

(4) The contractor must agree that uncollectible accounts shall be returned with appropriate documentation to enable Commission to determine whether to pursue collection through litigation or to terminate collection; and

(5) The contractor must agree to provide any data in its files requested by the Commission upon returning the account to the Commission for subsequent referral to the Department of Justice for litigation.

[58 FR 64373, Dec. 7, 1993, as amended at 66 FR 54135, Oct. 26, 2001]

PART 205—STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

Sec.
205.1 Purpose and scope.
205.2 Definitions.
205.3 Issuer as client.
205.4 Responsibilities of supervisory attorneys.
205.5 Responsibilities of a subordinate attorney.
205.6 Sanctions and discipline.
205.7 No private right of action.

AUTHORITY: 15 U.S.C. 77s, 78d–3, 78w, 80a–37, 80a–38, 80b–11, 7202, 7245, and 7262.

SOURCE: 68 FR 6320, Feb. 6, 2003, unless otherwise noted.

EFFECTIVE DATE NOTE: At 68 FR 6320, Feb. 6, 2003, part 205 was added, effective August 5, 2003.

§ 205.1 Purpose and scope.

This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

§ 205.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Appearing and practicing* before the Commission:

(1) Means:

(i) Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or

(ii) Is a non-appearing foreign attorney.

(b) *Appropriate response* means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;

(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or

(3) That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to § 205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:

(i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or

(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

(c) *Attorney* means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

(d) *Breach of fiduciary duty* refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

(e) *Evidence of a material violation* means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

(f) *Foreign government issuer* means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a *et seq.*, Schedule B).

(g) *In the representation of an issuer* means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

(h) *Issuer* means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term ''issuer'' includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

(i) *Material violation* means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.

(j) *Non-appearing foreign attorney* means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

(k) *Qualified legal compliance committee* means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, ''interested persons'' as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under § 205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in § 205.3(b)(4));

(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

(l) *Reasonable* or *reasonably* denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

(m) *Reasonably believes* means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

(n) *Report* means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

§ 205.3 Issuer as client.

(a) *Representing an issuer.* An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) *Duty to report evidence of a material violation.* (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such

evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, ''interested persons'' as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, ''interested persons'' as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19))).

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and

(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the

investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or

(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

(c) *Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee.* (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under §205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

(d) *Issuer confidences.* (1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous

record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

§ 205.4 Responsibilities of supervisory attorneys.

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in § 205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in § 205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under § 205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

§ 205.5 Responsibilities of a subordinate attorney.

(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with § 205.3 if the subordinate attorney reports to his or her supervising attorney under § 205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by § 205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under § 205.3(b) has failed to comply with § 205.3.

§ 205.6 Sanctions and discipline.

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether

the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

§205.7 No private right of action.

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

PART 209—FORMS PRESCRIBED UNDER THE COMMISSION'S RULES OF PRACTICE

Sec.

209.0–1 Availability of forms.
209.1 Form D–A: Disclosure of assets and financial information.

AUTHORITY: 15 U.S.C. 77h–1, 77u, 78u–2, 78u–3, 78v, 78w, 80a–9, 80a–37, 80a–38, 80a39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, and 80b–12, unless otherwise noted.

SOURCE: 60 FR 32823, June 23, 1995, unless otherwise noted.

§209.0–1 Availability of forms.

(a) This part identifies and describes the forms for use under the Securities and Exchange Commission's Rules of Practice, part 201 of this chapter.

(b) Any person may obtain a copy of any form prescribed for use in this part by written request to the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Any person may inspect the forms at this address and at the Commission's regional and district offices. (See §200.11 of this chapter for the addresses of the SEC regional and district offices.)

§209.1 Form D–A: Disclosure of assets and financial information.

(a) Rules 410 and 630 of the Rules of Practice (17 CFR 201.410 and 201.630) provide that under certain circumstances a respondent who asserts or intends to assert an inability to pay disgorgement, interest or penalties may be required to disclose certain financial information. Unless otherwise ordered, this form may be used by individuals required to supply such information.

(b) The respondent filing Form D–A is required promptly to notify the Commission of any material change in the answer to any question on this form.

(c) Form D–A may not be withheld from the interested division. A respondent making financial information disclosures on this form after the institution of proceedings may make a motion, pursuant to Rule 322 of the Commission's Rules of Practice (17 CFR 201.322), for the issuance of a protective order to limit disclosure to the public or parties other than the interested division of the information submitted on Form D–A. A request for a protective order allows the requester an opportunity to justify the need for confidentiality. The making of a motion for a protective order, however, does not guarantee that disclosure will be limited.

(d) No party receiving information for which a motion for a protective order has been made may transfer or convey the information to any other person prior to a ruling on the motion without the prior permission of the Commission or a hearing officer.

(e) A person making financial information disclosures on Form D–A prior to the institution of proceedings, in connection with an offer of settlement or otherwise, may request confidential treatment of the information pursuant to the Freedom of Information Act. *See*

the Commission's Freedom of Information Act (''FOIA'') regulations, 17 CFR 200.83. A request for confidential treatment allows the requester an opportunity to substantiate the need for confidentiality. No determination as to the validity of any request for confidential treatment will be made until a request for disclosure of the information under FOIA is received.

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

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AUTHORITY: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77aa(25), 77aa(26), 78j–1, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 210 appear at 57 FR 36501, Aug. 13, 1992 and 57 FR 47409, Oct. 16, 1992.

ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S–T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S–T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

APPLICATION OF REGULATION S–X (17 CFR PART 210)

§ 210.1–01 Application of Regulation S–X (17 CFR part 210).

(a) This part (together with the Financial Reporting Releases (part 211 of this chapter)) sets forth the form and content of and requirements for financial statements required to be filed as a part of:

(1) Registration statements under the Securities Act of 1933 (part 239 of this chapter), except as otherwise specifically provided in the forms which are to be used for registration under this Act;

(2) Registration statements under section 12 (subpart C of part 249 of this chapter), annual or other reports under sections 13 and 15(d) (subparts D and E of part 249 of this chapter), and proxy and information statements under section 14 of the Securities Exchange Act of 1934 except as otherwise specifically provided in the forms which are to be used for registration and reporting under these sections of this Act;

(3) Registration statements and annual reports filed under the Public Utility Holding Company Act of 1935 (part 259 of this chapter) by public utility holding companies registered under such Act; and

(4) Registration statements and shareholder reports under the Investment Company Act of 1940 (part 274 of this chapter), except as otherwise specifically provided in the forms which are to be used for registration under this Act.

(b) The term *financial statements* as used in this part shall be deemed to include all notes to the statements and all related schedules.

(c) In addition to filings pursuant to the Federal securities laws, § 210.4–10 applies to the preparation of accounts by persons engaged, in whole or in part, in the production of crude oil or natural gas in the United States pursuant to section 503 of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6383) (*EPCA*) and section 1(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 796), as amended by section 505 of EPCA.

[37 FR 14593, July 21, 1972, as amended at 43 FR 40712, Sept. 12, 1978; 45 FR 63680, Sept. 25, 1980; 45 FR 63687, Sept. 25, 1980; 46 FR 36124, July 14, 1981; 50 FR 25214, June 18, 1985]

§ 210.1–02 Definitions of terms used in Regulation S–X (17 CFR part 210).

Unless the context otherwise requires, terms defined in the general rules and regulations or in the instructions to the applicable form, when used in Regulation S–X (this part 210), shall have the respective meanings given in such instructions or rules. In addition, the following terms shall have the meanings indicated in this section unless the context otherwise requires.

(a) *Accountant's report.* The term *accountant's report,* when used in regard to financial statements, means a document in which an independent public or certified public accountant indicates the scope of the audit (or examination) which he has made and sets forth his opinion regarding the financial statements taken as a whole, or an assertion to the effect that an overall opinion cannot be expressed. When an overall opinion cannot be expressed, the reasons therefor shall be stated.

(b) *Affiliate.* An *affiliate* of, or a person *affiliated* with, a specific person is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(c) *Amount.* The term *amount,* when used in regard to securities, means the principal amount if relating to evidences of indebtedness, the number of shares if relating to shares, and the number of units if relating to any other kind of security.

(d) *Audit (or examination).* The term *audit* (or *examination*), when used in regard to financial statements, means an examination of the financial statements by an independent accountant in accordance with generally accepted auditing standards, as may be modified or supplemented by the Commission, for the purpose of expressing an opinion thereon.

(e) *Bank holding company.* The term *bank holding company* means a person

which is engaged, either directly or indirectly, primarily in the business of owning securities of one or more banks for the purpose, and with the effect, of exercising control.

(f) *Certified.* The term *certified,* when used in regard to financial statements, means examined and reported upon with an opinion expressed by an independent public or certified public accountant.

(g) *Control.* The term *control* (including the terms *controlling, controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.

(h) *Development stage company.* A company shall be considered to be in the development stage if it is devoting substantially all of its efforts to establishing a new business and either of the following conditions exists: (1) Planned principal operations have not commenced. (2) Planned principal operations have commenced, but there has been no significant revenue therefrom.

(i) *Equity security.* The term *equity security* means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right.

(j) *Fifty-percent-owned person.* The term *50-percent-owned person,* in relation to a specified person, means a person approximately 50 percent of whose outstanding voting shares is owned by the specified person either directly, or indirectly through one or more intermediaries.

(k) *Fiscal year.* The term *fiscal year* means the annual accounting period or, if no closing date has been adopted, the calendar year ending on December 31.

(l) *Foreign business.* A business that is majority owned by persons who are not citizens or residents of the United States and is not organized under the laws of the United States or any state thereof, and either:

(1) More than 50 percent of its assets are located outside the United States; or

(2) The majority of its executive officers and directors are not United States citizens or residents.

(m) *Insurance holding company.* The term *insurance holding company* means a person which is engaged, either directly or indirectly, primarily in the business of owning securities of one or more insurance companies for the purpose, and with the effect, of exercising control.

(n) *Majority-owned subsidiary.* The term *majority-owned subsidiary* means a subsidiary more than 50 percent of whose outstanding voting shares is owned by its parent and/or the parent's other majority-owned subsidiaries.

(o) *Material.* The term *material,* when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters about which an average prudent investor ought reasonably to be informed.

(p) *Parent.* A *parent* of a specified person is an affiliate controlling such person directly, or indirectly through one or more intermediaries.

(q) *Person.* The term *person* means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization.

(r) *Principal holder of equity securities.* The term *principal holder of equity securities,* used in respect of a registrant or other person named in a particular statement or report, means a holder of record or a known beneficial owner of more than 10 percent of any class of equity securities of the registrant or other person, respectively, as of the date of the related balance sheet filed.

(s) *Promoter.* The term *promoter* includes:

(1) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer;

(2) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the

issuer or 10 percent or more of the proceeds from the sale of any class of securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

(t) *Registrant.* The term *registrant* means the issuer of the securities for which an application, a registration statement, or a report is filed.

(u) *Related parties.* The term *related parties* is used as that term is defined in the Glossary to Statement of Financial Accounting Standards No. 57, ''Related Party Disclosures.''

(v) *Share.* The term *share* means a share of stock in a corporation or unit of interest in an unincorporated person.

(w) *Significant subsidiary.* The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the following conditions:

(1) The registrant's and its other subsidiaries' investments in and advances to the subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year (for a proposed business combination to be accounted for as a pooling of interests, this condition is also met when the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated); or

(2) The registrant's and its other subsidiaries' proportionate share of the total assets (after intercompany eliminations) of the subsidiary exceeds 10 percent of the total assets of the registrants and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(3) The registrant's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principle of the subsidiary exceeds 10 percent of such income of the registrant and its subsidiaries consolidated for the most recently completed fiscal year.

COMPUTATIONAL NOTE: For purposes of making the prescribed income test the following guidance should be applied:

1. When a loss has been incurred by either the parent and its subsidiaries consolidated or the tested subsidiary, but not both, the equity in the income or loss of the tested subsidiary should be excluded from the income of the registrant and its subsidiaries consolidated for purposes of the computation.

2. If income of the registrant and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

3. Where the test involves combined entities, as in the case of determining whether summarized financial data should be presented, entities reporting losses shall not be aggregated with entities reporting income.

(x) *Subsidiary.* A *subsidiary* of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries.

(y) *Totally held subsidiary.* The term *totally held subsidiary* means a subsidiary (1) substantially all of whose outstanding equity securities are owned by its parent and/or the parent's other totally held subsidiaries, and (2) which is not indebted to any person other than its parent and/or the parent's other totally held subsidiaries, in an amount which is material in relation to the particular subsidiary, excepting indebtedness incurred in the ordinary course of business which is not overdue and which matures within 1 year from the date of its creation, whether evidenced by securities or not. Indebtedness of a subsidiary which is secured by its parent by guarantee, pledge, assignment, or otherwise is to be excluded for purposes of paragraph (x)(2) of this section.

(z) *Voting shares.* The term *voting shares* means the sum of all rights, other than as affected by events of default, to vote for election of directors and/or the sum of all interests in an unincorporated person.

(aa) *Wholly owned subsidiary.* The term *wholly owned subsidiary* means a subsidiary substantially all of whose outstanding voting shares are owned

by its parent and/or the parent's other wholly owned subsidiaries.

(bb) *Summarized financial information.* (1) Except as provided in paragraph (aa)(2), *summarized financial information* referred to in this regulation shall mean the presentation of summarized information as to the assets, liabilities and results of operations of the entity for which the information is required. Summarized financial information shall include the following disclosures:

(i) Current assets, noncurrent assets, current liabilities, noncurrent liabilities, and, when applicable, redeemable preferred stocks (see §210.5–02.28) and minority interests (for specialized industries in which classified balance sheets are normally not presented, information shall be provided as to the nature and amount of the major components of assets and liabilities);

(ii) Net sales or gross revenues, gross profit (or, alternatively, costs and expenses applicable to net sales or gross revenues), income or loss from continuing operations before extraordinary items and cumulative effect of a change in accounting principle, and net income or loss (for specialized industries, other information may be substituted for sales and related costs and expenses if necessary for a more meaningful presentation); and

(2) Summarized financial information for unconsolidated subsidiaries and 50 percent or less owned persons referred to in and required by §210.10–01(b) for interim periods shall include the information required by paragraph (aa)(1)(ii) of this section.

(Secs. 7 and 19a of the Securities Act, 15 U.S.C. 77g, 77s(a), 77aa(25)(26); secs. 12, 13, 14, 15(d), and 23(a) of the Securities ExchangeAct of 1934, 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a), secs. 5(b), 10(a), 14, 20(a) of the Public Utility Holding Company Act, 15 U.S.C. 79e(a), 79n, 79t(a); secs. 8, 20, 30, 31(c), 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–8, 80a–20, 80a–29, 80a–30(c), 80a–37(a))

[37 FR 14593, July 21, 1972, as amended at 38 FR 6066, Mar. 6, 1973; 39 FR 17931, May 22, 1974; 40 FR 55835, Dec. 2, 1975; 45 FR 63668, Sept. 25, 1980; 46 FR 56178, Nov. 16, 1981; 47 FR 29836, July 9, 1982; 50 FR 25214, June 18, 1985; 50 FR 49531, Dec. 3, 1985; 59 FR 65636, Dec. 20, 1994; 62 FR 12749, Mar. 18, 1997]

QUALIFICATIONS AND REPORTS OF ACCOUNTANTS

SOURCE: Sections 210.2–01 to 210.2–05 appear at 37 FR 14594, July 21, 1972, unless otherwise noted.

§210.2–01, Note Qualifications of accountants.

Preliminary Note to §210.2–01

1. Section 210.2–01 is designed to ensure that auditors are qualified and independent of their audit clients both in fact and in appearance. Accordingly, the rule sets forth restrictions on financial, employment, and business relationships between an accountant and an audit client and restrictions on an accountant providing certain non-audit services to an audit client.

2. Section 210.2–01(b) sets forth the general standard of auditor independence. Paragraphs (c)(1) to (c)(5) reflect the application of the general standard to particular circumstances. The rule does not purport to, and the Commission could not, consider all circumstances that raise independence concerns, and these are subject to the general standard in §210.2–01(b). In considering this standard, the Commission looks in the first instance to whether a relationship or the provision of a service: creates a mutual or conflicting interest between the accountant and the audit client; places the accountant in the position of auditing his or her own work; results in the accountant acting as management or an employee of the audit client; or places the accountant in a position of being an advocate for the audit client.

3. These factors are general guidance only and their application may depend on particular facts and circumstances. For that reason, §210.2–01 provides that, in determining whether an accountant is independent, the Commission will consider all relevant facts and circumstances. For the same reason, registrants and accountants are encouraged to consult with the Commission's Office of the Chief Accountant before entering into relationships, including relationships involving the provision of services, that are not explicitly described in the rule.

(a) The Commission will not recognize any person as a certified public accountant who is not duly registered and in good standing as such under the laws of the place of his residence or principal office. The Commission will not recognize any person as a public accountant who is not in good standing and entitled to practice as such under the laws of the place of his residence or principal office.

(b) The Commission will not recognize an accountant as independent, with respect to an audit client, if the accountant is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement. In determining whether an accountant is independent, the Commission will consider all relevant circumstances, including all relationships between the accountant and the audit client, and not just those relating to reports filed with the Commission.

(c) This paragraph sets forth a nonexclusive specification of circumstances inconsistent with paragraph (b) of this section.

(1) *Financial relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant has a direct financial interest or a material indirect financial interest in the accountant's audit client, such as:

(i) *Investments in audit clients.* An accountant is not independent when:

(A) The accounting firm, any covered person in the firm, or any of his or her immediate family members, has any direct investment in an audit client, such as stocks, bonds, notes, options, or other securities. The term *direct investment* includes an investment in an audit client through an intermediary if:

(*1*) The accounting firm, covered person, or immediate family member, alone or together with other persons, supervises or participates in the intermediary's investment decisions or has control over the intermediary; or

(*2*) The intermediary is not a diversified management investment company, as defined by section 5(b)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a–5(b)(1), and has an investment in the audit client that amounts to 20% or more of the value of the intermediary's total investments.

(B) Any partner, principal, shareholder, or professional employee of the accounting firm, any of his or her immediate family members, any close family member of a covered person in the firm, or any group of the above persons has filed a Schedule 13D or 13G (17 CFR 240.13d–101 or 240.13d–102) with the Commission indicating beneficial ownership of more than five percent of an audit client's equity securities or controls an audit client, or a close family member of a partner, principal, or shareholder of the accounting firm controls an audit client.

(C) The accounting firm, any covered person in the firm, or any of his or her immediate family members, serves as voting trustee of a trust, or executor of an estate, containing the securities of an audit client, unless the accounting firm, covered person in the firm, or immediate family member has no authority to make investment decisions for the trust or estate.

(D) The accounting firm, any covered person in the firm, any of his or her immediate family members, or any group of the above persons has any material indirect investment in an audit client. For purposes of this paragraph, the term *material indirect investment* does not include ownership by any covered person in the firm, any of his or her immediate family members, or any group of the above persons of 5% or less of the outstanding shares of a diversified management investment company, as defined by section 5(b)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a–5(b)(1), that invests in an audit client.

(E) The accounting firm, any covered person in the firm, or any of his or her immediate family members:

(*1*) Has any direct or material indirect investment in an entity where:

(*i*) An audit client has an investment in that entity that is material to the audit client and has the ability to exercise significant influence over that entity; or

(*ii*) The entity has an investment in an audit client that is material to that entity and has the ability to exercise significant influence over that audit client;

(*2*) Has any material investment in an entity over which an audit client has the ability to exercise significant influence; or

(*3*) Has the ability to exercise significant influence over an entity that has the ability to exercise significant influence over an audit client.

(ii) *Other financial interests in audit client.* An accountant is not independent when the accounting firm, any covered person in the firm, or any of his or her immediate family members has:

(A) *Loans/debtor-creditor relationship.* Any loan (including any margin loan) to or from an audit client, or an audit client's officers, directors, or record or beneficial owners of more than ten percent of the audit client's equity securities, except for the following loans obtained from a financial institution under its normal lending procedures, terms, and requirements:

(*1*) Automobile loans and leases collateralized by the automobile;

(*2*) Loans fully collateralized by the cash surrender value of an insurance policy;

(*3*) Loans fully collateralized by cash deposits at the same financial institution; and

(*4*) A mortgage loan collateralized by the borrower's primary residence provided the loan was not obtained while the covered person in the firm was a covered person.

(B) *Savings and checking accounts.* Any savings, checking, or similar account at a bank, savings and loan, or similar institution that is an audit client, if the account has a balance that exceeds the amount insured by the Federal Deposit Insurance Corporation or any similar insurer, except that an accounting firm account may have an uninsured balance provided that the likelihood of the bank, savings and loan, or similar institution experiencing financial difficulties is remote.

(C) *Broker-dealer accounts.* Brokerage or similar accounts maintained with a broker-dealer that is an audit client, if:

(*1*) Any such account includes any asset other than cash or securities (within the meaning of ''security'' provided in the Securities Investor Protection Act of 1970 (''SIPA'') (15 U.S.C. 78aaa *et seq.*));

(*2*) The value of assets in the accounts exceeds the amount that is subject to a Securities Investor Protection Corporation advance, for those accounts, under Section 9 of SIPA (15 U.S.C. 78fff-3); or

(*3*) With respect to non-U.S. accounts not subject to SIPA protection, the value of assets in the accounts exceeds the amount insured or protected by a program similar to SIPA.

(D) *Futures commission merchant accounts.* Any futures, commodity, or similar account maintained with a futures commission merchant that is an audit client.

(E) *Credit cards.* Any aggregate outstanding credit card balance owed to a lender that is an audit client that is not reduced to $10,000 or less on a current basis taking into consideration the payment due date and any available grace period.

(F) *Insurance products.* Any individual policy issued by an insurer that is an audit client unless:

(*1*) The policy was obtained at a time when the covered person in the firm was not a covered person in the firm; and

(*2*) The likelihood of the insurer becoming insolvent is remote.

(G) *Investment companies.* Any financial interest in an entity that is part of an investment company complex that includes an audit client.

(iii) *Exceptions.* Notwithstanding paragraphs (c)(1)(i) and (c)(1)(ii) of this section, an accountant will not be deemed not independent if:

(A) *Inheritance and gift.* Any person acquires an unsolicited financial interest, such as through an unsolicited gift or inheritance, that would cause an accountant to be not independent under paragraph (c)(1)(i) or (c)(1)(ii) of this section, and the financial interest is disposed of as soon as practicable, but no later than 30 days after the person has knowledge of and the right to dispose of the financial interest.

(B) *New audit engagement.* Any person has a financial interest that would cause an accountant to be not independent under paragraph (c)(1)(i) or (c)(1)(ii) of this section, and:

(*1*) The accountant did not audit the client's financial statements for the immediately preceding fiscal year; and

(*2*) The accountant is independent under paragraph (c)(1)(i) and (c)(1)(ii) of this section before the earlier of:

(*i*) Signing an initial engagement letter or other agreement to provide audit, review, or attest services to the audit client; or

(*ii*) Commencing any audit, review, or attest procedures (including planning the audit of the client's financial statements).

(C) *Employee compensation and benefit plans.* An immediate family member of a person who is a covered person in the firm only by virtue of paragraphs (f)(11)(iii) or (f)(11)(iv) of this section has a financial interest that would cause an accountant to be not independent under paragraph (c)(1)(i) or (c)(1)(ii) of this section, and the acquisition of the financial interest was an unavoidable consequence of participation in his or her employer's employee compensation or benefits program, provided that the financial interest, other than unexercised employee stock options, is disposed of as soon as practicable, but no later than 30 days after the person has the right to dispose of the financial interest.

(iv) *Audit clients' financial relationships.* An accountant is not independent when:

(A) *Investments by the audit client in the accounting firm.* An audit client has, or has agreed to acquire, any direct investment in the accounting firm, such as stocks, bonds, notes, options, or other securities, or the audit client's officers or directors are record or beneficial owners of more than 5% of the equity securities of the accounting firm.

(B) *Underwriting.* An accounting firm engages an audit client to act as an underwriter, broker-dealer, market-maker, promoter, or analyst with respect to securities issued by the accounting firm.

(2) *Employment relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant has an employment relationship with an audit client, such as:

(i) *Employment at audit client of accountant.* A current partner, principal, shareholder, or professional employee of the accounting firm is employed by the audit client or serves as a member of the board of directors or similar management or governing body of the audit client.

(ii) *Employment at audit client of certain relatives of accountant.* A close family member of a covered person in the firm is in an accounting role or financial reporting oversight role at an audit client, or was in such a role during any period covered by an audit for which the covered person in the firm is a covered person.

(iii) *Employment at audit client of former employee of accounting firm.* A former partner, principal, shareholder, or professional employee of an accounting firm is in an accounting role or financial reporting oversight role at an audit client, unless the individual:

(A) Does not influence the accounting firm's operations or financial policies;

(B) Has no capital balances in the accounting firm; and

(C) Has no financial arrangement with the accounting firm other than one providing for regular payment of a fixed dollar amount (which is not dependent on the revenues, profits, or earnings of the accounting firm):

(*1*) Pursuant to a fully funded retirement plan, rabbi trust, or, in jurisdictions in which a rabbi trust does not exist, a similar vehicle; or

(*2*) In the case of a former professional employee who was not a partner, principal, or shareholder of the accounting firm and who has been disassociated from the accounting firm for more than five years, that is immaterial to the former professional employee.

(iv) *Employment at accounting firm of former employee of audit client.* A former officer, director, or employee of an audit client becomes a partner, principal, shareholder, or professional employee of the accounting firm, unless the individual does not participate in, and is not in a position to influence, the audit of the financial statements of the audit client covering any period during which he or she was employed by or associated with that audit client.

(3) *Business relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accounting firm or any covered person in the firm has any direct or material indirect business relationship with an audit client, or with persons associated with the

audit client in a decision-making capacity, such as an audit client's officers, directors, or substantial stockholders. The relationships described in this paragraph do not include a relationship in which the accounting firm or covered person in the firm provides professional services to an audit client or is a consumer in the ordinary course of business.

(4) *Non-audit services.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant provides the following non-audit services to an audit client:

(i) *Bookkeeping or other services related to the audit client's accounting records or financial statements.*

(A) Any service involving:

(*1*) Maintaining or preparing the audit client's accounting records;

(*2*) Preparing the audit client's financial statements that are filed with the Commission or form the basis of financial statements filed with the Commission; or

(*3*) Preparing or originating source data underlying the audit client's financial statements.

(B) Notwithstanding paragraph (c)(4)(i)(A) of this section, the accountant's independence will not be impaired when the accountant provides these services:

(*1*) In emergency or other unusual situations, provided the accountant does not undertake any managerial actions or make any managerial decisions; or

(*2*) For foreign divisions or subsidiaries of an audit client, provided that:

(*i*) The services are limited, routine, or ministerial;

(*ii*) It is impractical for the foreign division or subsidiary to make other arrangements;

(*iii*) The foreign division or subsidiary is not material to the consolidated financial statements;

(*iv*) The foreign division or subsidiary does not have employees capable or competent to perform the services;

(*v*) The services performed are consistent with local professional ethics rules; and

(*vi*) The fees for all such services collectively (for the entire group of companies) do not exceed the greater of 1% of the consolidated audit fee or $10,000.

(ii) *Financial information systems design and implementation.*

(A) Directly or indirectly operating, or supervising the operation of, the audit client's information system or managing the audit client's local area network.

(B) Designing or implementing a hardware or software system that aggregates source data underlying the financial statements or generates information that is significant to the audit client's financial statements taken as a whole, unless:

(*1*) The audit client's management has acknowledged in writing to the accounting firm and the audit client's audit committee, or if there is no such committee then the board of directors, the audit client's responsibility to establish and maintain a system of internal accounting controls in compliance with section 13(b)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(b)(2));

(*2*) The audit client's management designates a competent employee or employees, preferably within senior management, with the responsibility to make all management decisions with respect to the design and implementation of the hardware or software system;

(*3*) The audit client's management makes all management decisions with respect to the design and implementation of the hardware or software system including, but not limited to, decisions concerning the systems to be evaluated and selected, the controls and system procedures to be implemented, the scope and timetable of system implementation, and the testing, training, and conversion plans;

(*4*) The audit client's management evaluates the adequacy and results of the design and implementation of the hardware or software system; and

(*5*) The audit client's management does not rely on the accountant's work as the primary basis for determining the adequacy of its internal controls and financial reporting systems.

(C) Nothing in this paragraph (c)(4)(ii) shall limit services an accountant performs in connection with

the assessment, design, and implementation of internal accounting controls and risk management controls, provided the auditor does not act as an employee or perform management functions.

(iii) *Appraisal or valuation services or fairness opinions.*

(A) Any appraisal service, valuation service, or any service involving a fairness opinion for an audit client, where it is reasonably likely that the results of these services, individually or in the aggregate, would be material to the financial statements, or where the results of these services will be audited by the accountant during an audit of the audit client's financial statements.

(B) Notwithstanding paragraph (c)(4)(iii)(A) of this section, the accountant's independence will not be impaired when:

(*1*) The accounting firm's valuation expert reviews the work of the audit client or a specialist employed by the audit client, and the audit client or the specialist provides the primary support for the balances recorded in the client's financial statements;

(*2*) The accounting firm's actuaries value an audit client's pension, other post-employment benefit, or similar liabilities, provided that the audit client has determined and taken responsibility for all significant assumptions and data;

(*3*) The valuation is performed in the context of the planning and implementation of a tax-planning strategy or for tax compliance services; or

(*4*) The valuation is for non-financial purposes where the results of the valuation do not affect the financial statements.

(iv) *Actuarial services.*

(A) Any actuarially-oriented advisory service involving the determination of insurance company policy reserves and related accounts for the audit client, unless:

(*1*) The audit client uses its own actuaries or third-party actuaries to provide management with the primary actuarial capabilities;

(*2*) Management accepts responsibility for any significant actuarial methods and assumptions; and

(*3*) The accountant's involvement is not continuous.

(B) Subject to complying with paragraph (c)(4)(iv)(A)(*1*)–(*3*) of this section, the accountant's independence will not be impaired if the accountant:

(*1*) Assists management to develop appropriate methods, assumptions, and amounts for policy and loss reserves and other actuarial items presented in financial reports based on the audit client's historical experience, current practice, and future plans;

(*2*) Assists management in the conversion of financial statements from a statutory basis to one conforming with generally accepted accounting principles;

(*3*) Analyzes actuarial considerations and alternatives in federal income tax planning; or

(*4*) Assists management in the financial analysis of various matters, such as proposed new policies, new markets, business acquisitions, and reinsurance needs.

(v) *Internal audit services.* Either of:

(A) Internal audit services in an amount greater than 40% of the total hours expended on the audit client's internal audit activities in any one fiscal year, unless the audit client has less than $200 million in total assets. (For purposes of this paragraph, the term *internal audit services* does not include operational internal audit services unrelated to the internal accounting controls, financial systems, or financial statements.); or

(B) Any internal audit services, or any operational internal audit services unrelated to the internal accounting controls, financial systems, or financial statements, for an audit client, unless:

(*1*) The audit client's management has acknowledged in writing to the accounting firm and the audit client's audit committee, or if there is no such committee then the board of directors, the audit client's responsibility to establish and maintain a system of internal accounting controls in compliance with section 13(b)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(b)(2));

(*2*) The audit client's management designates a competent employee or employees, preferably within senior management, to be responsible for the internal audit function;

(*3*) The audit client's management determines the scope, risk, and frequency of internal audit activities, including those to be performed by the accountant;

(*4*) The audit client's management evaluates the findings and results arising from the internal audit activities, including those performed by the accountant;

(*5*) The audit client's management evaluates the adequacy of the audit procedures performed and the findings resulting from the performance of those procedures by, among other things, obtaining reports from the accountant; and

(*6*) The audit client's management does not rely on the accountant's work as the primary basis for determining the adequacy of its internal controls.

(vi) *Management functions.* Acting, temporarily or permanently, as a director, officer, or employee of an audit client, or performing any decision-making, supervisory, or ongoing monitoring function for the audit client.

(vii) *Human resources.*

(A) Searching for or seeking out prospective candidates for managerial, executive, or director positions;

(B) Engaging in psychological testing, or other formal testing or evaluation programs;

(C) Undertaking reference checks of prospective candidates for an executive or director position;

(D) Acting as a negotiator on the audit client's behalf, such as determining position, status or title, compensation, fringe benefits, or other conditions of employment; or

(E) Recommending, or advising the audit client to hire, a specific candidate for a specific job (except that an accounting firm may, upon request by the audit client, interview candidates and advise the audit client on the candidate's competence for financial accounting, administrative, or control positions).

(viii) *Broker-dealer services.* Acting as a broker-dealer, promoter, or underwriter, on behalf of an audit client, making investment decisions on behalf of the audit client or otherwise having discretionary authority over an audit client's investments, executing a transaction to buy or sell an audit client's investment, or having custody of assets of the audit client, such as taking temporary possession of securities purchased by the audit client.

(ix) *Legal services.* Providing any service to an audit client under circumstances in which the person providing the service must be admitted to practice before the courts of a United States jurisdiction.

(5) *Contingent fees.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant provides any service or product to an audit client for a contingent fee or a commission, or receives a contingent fee or commission from an audit client.

(d) *Quality controls.* An accounting firm's independence will not be impaired solely because a covered person in the firm is not independent of an audit client provided:

(1) The covered person did not know of the circumstances giving rise to the lack of independence;

(2) The covered person's lack of independence was corrected as promptly as possible under the relevant circumstances after the covered person or accounting firm became aware of it; and

(3) The accounting firm has a quality control system in place that provides reasonable assurance, taking into account the size and nature of the accounting firm's practice, that the accounting firm and its employees do not lack independence, and that covers at least all employees and associated entities of the accounting firm participating in the engagement, including employees and associated entities located outside of the United States.

(4) For an accounting firm that annually provides audit, review, or attest services to more than 500 companies with a class of securities registered with the Commission under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), a quality control system will not provide such reasonable assurance unless it has at least the following features:

(i) Written independence policies and procedures;

(ii) With respect to partners and managerial employees, an automated system to identify their investments in

securities that might impair the accountant's independence;

(iii) With respect to all professionals, a system that provides timely information about entities from which the accountant is required to maintain independence;

(iv) An annual or on-going firm-wide training program about auditor independence;

(v) An annual internal inspection and testing program to monitor adherence to independence requirements;

(vi) Notification to all accounting firm members, officers, directors, and employees of the name and title of the member of senior management responsible for compliance with auditor independence requirements;

(vii) Written policies and procedures requiring all partners and covered persons to report promptly to the accounting firm when they are engaged in employment negotiations with an audit client, and requiring the firm to remove immediately any such professional from that audit client's engagement and to review promptly all work the professional performed related to that audit client's engagement; and

(viii) A disciplinary mechanism to ensure compliance with this section.

(e) *Transition and grandfathering.*

(1) *Transition.*

(i) *Appraisal or valuation services or fairness opinions and internal audit services.* Until August 5, 2002, providing to an audit client the non-audit services set forth in paragraphs (c)(4)(iii) and (c)(4)(v) of this section will not impair an accountant's independence with respect to the audit client if performing those services did not impair the accountant's independence under pre-existing requirements of the Commission, the Independence Standards Boards, or the accounting profession in the United States.

(ii) *Other financial interests and employment relationships.* Until May 7, 2001, having the financial interests set forth in paragraph (c)(1)(ii) of this section or the employment relationships set forth in paragraph (c)(2) of this section will not impair an accountant's independence with respect to the audit client if having those financial interests or employment relationships did not impair the accountant's independence under pre-existing requirements of the Commission, the Independence Standards Board, or the accounting profession in the United States.

(iii) *Quality controls.* Until December 31, 2002, paragraph (d)(4) of this section shall not apply to offices of the accounting firm located outside of the United States.

(2) *Grandfathering.* Financial interests included in paragraphs (c)(1)(ii)(A) and (c)(1)(ii)(F) of this section and employment relationships included in paragraph (c)(2) of this section in existence on May 7, 2001, and contracts for the provision of services described in paragraph (c)(4)(ii) of this section in existence on February 5, 2001 will not be deemed to impair an accountant's independence if they did not impair the accountant's independence under pre-existing requirements of the Commission, the Independence Standards Board, or the accounting profession in the United States.

(3) *Settling financial arrangements with former professionals.* To the extent not required by pre-existing requirements of the Commission, the Independence Standards Board, or the accounting profession in the United States, the requirement in paragraph (c)(2)(iii) of this section to settle financial arrangements with former professionals applies to situations that arise after the effective date of this section.

(f) *Definitions of terms.* For purposes of this section:

(1) *Accountant,* as used in paragraphs (b) through (e) of this section, means a certified public accountant or public accountant performing services in connection with an engagement for which independence is required. References to the accountant include any accounting firm with which the certified public accountant or public accountant is affiliated.

(2) *Accounting firm* means an organization (whether it is a sole proprietorship, incorporated association, partnership, corporation, limited liability company, limited liability partnership, or other legal entity) that is engaged in the practice of public accounting and furnishes reports or other documents filed with the Commission or otherwise prepared under the securities

laws, and all of the organization's departments, divisions, parents, subsidiaries, and associated entities, including those located outside of the United States. Accounting firm also includes the organization's pension, retirement, investment, or similar plans.

(3) *Accounting role or financial reporting oversight role* means a role in which a person is in a position to or does:

(i) Exercise more than minimal influence over the contents of the accounting records or anyone who prepares them; or

(ii) Exercise influence over the contents of the financial statements or anyone who prepares them, such as when the person is a member of the board of directors or similar management or governing body, chief executive officer, president, chief financial officer, chief operating officer, general counsel, chief accounting officer, controller, director of internal audit, director of financial reporting, treasurer, vice president of marketing, or any equivalent position.

(4) *Affiliate of the audit client* means:

(i) An entity that has control over the audit client, or over which the audit client has control, or which is under common control with the audit client, including the audit client's parents and subsidiaries;

(ii) An entity over which the audit client has significant influence, unless the entity is not material to the audit client;

(iii) An entity that has significant influence over the audit client, unless the audit client is not material to the entity; and

(iv) Each entity in the investment company complex when the audit client is an entity that is part of an investment company complex.

(5) *Audit and professional engagement period* includes both:

(i) The period covered by any financial statements being audited or reviewed (the ''audit period''); and

(ii) The period of the engagement to audit or review the audit client's financial statements or to prepare a report filed with the Commission (the ''professional engagement period''):

(A) The professional engagement period begins when the accountant either signs an initial engagement letter (or other agreement to review or audit a client's financial statements) or begins audit, review, or attest procedures, whichever is earlier; and

(B) The professional engagement period ends when the audit client or the accountant notifies the Commission that the client is no longer that accountant's audit client.

(iii) For audits of the financial statements of foreign private issuers, the ''audit and professional engagement period'' does not include periods ended prior to the first day of the last fiscal year before the foreign private issuer first filed, or was required to file, a registration statement or report with the Commission, provided there has been full compliance with home country independence standards in all prior periods covered by any registration statement or report filed with the Commission.

(6) *Audit client* means the entity whose financial statements or other information is being audited, reviewed, or attested and any affiliates of the audit client, other than, for purposes of paragraph (c)(1)(i) of this section, entities that are affiliates of the audit client only by virtue of paragraph (f)(4)(ii) or (f)(4)(iii) of this section.

(7) *Audit engagement team* means all partners, principals, shareholders, and professional employees participating in an audit, review, or attestation engagement of an audit client, including those conducting concurring or second partner reviews and all persons who consult with others on the audit engagement team during the audit, review, or attestation engagement regarding technical or industry-specific issues, transactions, or events.

(8) *Chain of command* means all persons who:

(i) Supervise or have direct management responsibility for the audit, including at all successively senior levels through the accounting firm's chief executive;

(ii) Evaluate the performance or recommend the compensation of the audit engagement partner; or

(iii) Provide quality control or other oversight of the audit.

(9) *Close family members* means a person's spouse, spousal equivalent, parent, dependent, nondependent child, and sibling.

(10) *Contingent fee* means, except as stated in the next sentence, any fee established for the sale of a product or the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such product or service. Solely for the purposes of this section, a fee is not a ''contingent fee'' if it is fixed by courts or other public authorities, or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies. Fees may vary depending, for example, on the complexity of services rendered.

(11) *Covered persons in the firm* means the following partners, principals, shareholders, and employees of an accounting firm:

(i) The ''audit engagement team'';

(ii) The ''chain of command'';

(iii) Any other partner, principal, shareholder, or managerial employee of the accounting firm who has provided ten or more hours of non-audit services to the audit client for the period beginning on the date such services are provided and ending on the date the accounting firm signs the report on the financial statements for the fiscal year during which those services are provided, or who expects to provide ten or more hours of non-audit services to the audit client on a recurring basis; and

(iv) Any other partner, principal, or shareholder from an ''office'' of the accounting firm in which the lead audit engagement partner primarily practices in connection with the audit.

(12) *Group* means two or more persons who act together for the purposes of acquiring, holding, voting, or disposing of securities of a registrant.

(13) *Immediate family members* means a person's spouse, spousal equivalent, and dependents.

(14) *Investment company complex.*

(i) ''Investment company complex'' includes:

(A) An investment company and its investment adviser or sponsor;

(B) Any entity controlled by or controlling an investment adviser or sponsor in paragraph (f)(14)(i)(A) of this section, or any entity under common control with an investment adviser or sponsor in paragraph (f)(14)(i)(A) of this section if the entity:

(*1*) Is an investment adviser or sponsor; or

(*2*) Is engaged in the business of providing administrative, custodian, underwriting, or transfer agent services to any investment company, investment adviser, or sponsor; and

(C) Any investment company or entity that would be an investment company but for the exclusions provided by section 3(c) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(c)) that has an investment adviser or sponsor included in this definition by either paragraph (f)(14)(i)(A) or (f)(14)(i)(B) of this section.

(ii) An investment adviser, for purposes of this definition, does not include a sub-adviser whose role is primarily portfolio management and is subcontracted with or overseen by another investment adviser.

(iii) Sponsor, for purposes of this definition, is an entity that establishes a unit investment trust.

(15) *Office* means a distinct sub-group within an accounting firm, whether distinguished along geographic or practice lines.

(16) *Rabbi trust* means an irrevocable trust whose assets are not accessible to the accounting firm until all benefit obligations have been met, but are subject to the claims of creditors in bankruptcy or insolvency.

[37 FR 14594, July 21, 1972, as amended at 48 FR 9521, Mar. 7, 1983; 65 FR 76082, Dec. 5, 2000]

EFFECTIVE DATE NOTE: At 68 FR 6044, Feb. 5, 2003, § 210.2–01 was amended by revising paragraphs (c)(2)(iii), (4), (e)(1), (f)(1), (f)(3), and (f)(7), adding paragraphs (c)(6), (c)(7), (c)(8), and (f)(17), removing (e) heading and paragraph (e)(2), and redesignating paragraph (e)(3) as (e)(2), effective May 6, 2003. For the convenience of the user, the added and revised text is set forth as follows:

§ 210.2–01 Qualifications of accountants.

* * * * *

(c) * * *

(2) *Employment relationships.* * * *

(i) * * *

(ii) * * *

(iii) *Employment at audit client of former employee of accounting firm.*

(A) A former partner, principal, shareholder, or professional employee of an accounting firm is in an accounting role or financial reporting oversight role at an audit client, unless the individual:

(*1*) Does not influence the accounting firm's operations or financial policies;

(*2*) Has no capital balances in the accounting firm; and

(*3*) Has no financial arrangement with the accounting firm other than one providing for regular payment of a fixed dollar amount (which is not dependent on the revenues, profits, or earnings of the accounting firm):

(*i*) Pursuant to a fully funded retirement plan, rabbi trust, or, in jurisdictions in which a rabbi trust does not exist, a similar vehicle; or

(*ii*) In the case of a former professional employee who was not a partner, principal, or shareholder of the accounting firm and who has been disassociated from the accounting firm for more than five years, that is immaterial to the former professional employee; and

(B) A former partner, principal, shareholder, or professional employee of an accounting firm is in a financial reporting oversight role at an issuer (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(f)), except an issuer that is an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), unless the individual:

(1) Employed by the issuer was not a member of the audit engagement team of the issuer during the one year period preceding the date that audit procedures commenced for the fiscal period that included the date of initial employment of the audit engagement team member by the issuer;

(2) For purposes of paragraph (c)(2)(iii)(B)(*1*) of this section, the following individuals are not considered to be members of the audit engagement team:

(i) Persons, other than the lead partner and the concurring partner, who provided ten or fewer hours of audit, review, or attest services during the period covered by paragraph (c)(2)(iii)(B)(*1*) of this section;

(ii) Individuals employed by the issuer as a result of a business combination between an issuer that is an audit client and the employing entity, provided employment was not in contemplation of the business combination and the audit committee of the successor issuer is aware of the prior employment relationship; and

(iii) Individuals that are employed by the issuer due to an emergency or other unusual situation provided that the audit committee determines that the relationship is in the interest of investors;

(3) For purposes of paragraph (c)(2)(iii)(B)(*1*) of this section, audit procedures are deemed to have commenced for a fiscal period the day following the filing of the issuer's periodic annual report with the Commission covering the previous fiscal period; or

(C) A former partner, principal, shareholder, or professional employee of an accounting firm is in a financial reporting oversight role with respect to an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), if:

(*1*) The former partner, principal, shareholder, or professional employee of an accounting firm is employed in a financial reporting oversight role related to the operations and financial reporting of the registered investment company at an entity in the investment company complex, as defined in (f)(14) of this section, that includes the registered investment company; and

(*2*) The former partner, principal, shareholder, or professional employee of an accounting firm employed by the registered investment company or any entity in the investment company complex was a member of the audit engagement team of the registered investment company or any other registered investment company in the investment company complex during the one year period preceding the date that audit procedures commenced that included the date of initial employment of the audit engagement team member by the registered investment company or any entity in the investment company complex.

(*3*) For purposes of paragraph (c)(2)(iii)(C)(*2*) of this section, the following individuals are not considered to be members of the audit engagement team:

(*i*) Persons, other than the lead partner and concurring partner, who provided ten or fewer hours of audit, review or attest services during the period covered by paragraph (c)(2)(iii)(C)(*2*) of this section;

(*ii*) Individuals employed by the registered investment company or any entity in the investment company complex as a result of a business combination between a registered investment company or any entity in the investment company complex that is an audit client and the employing entity, provided employment was not in contemplation of the business combination and the audit committee of the registered investment company is aware of the prior employment relationship; and

(*iii*) Individuals that are employed by the registered investment company or any entity in the investment company complex due to an emergency or other unusual situation provided that the audit committee determines that the relationship is in the interest of investors.

(*4*) For purposes of paragraph (c)(2)(iii)(C)(*2*) of this section, audit procedures are deemed to have commenced the day following the filing of the registered investment company's periodic annual report with the Commission.

* * * * *

(4) *Non-audit services.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant provides the following non-audit services to an audit client:

(i) *Bookkeeping or other services related to the accounting records or financial statements of the audit client.* Any service, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements, including:

(A) Maintaining or preparing the audit client's accounting records;

(B) Preparing the audit client's financial statements that are filed with the Commission or that form the basis of financial statements filed with the Commission; or

(C) Preparing or originating source data underlying the audit client's financial statements.

(ii) *Financial information systems design and implementation.* Any service, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements, including:

(A) Directly or indirectly operating, or supervising the operation of, the audit client's information system or managing the audit client's local area network; or

(B) Designing or implementing a hardware or software system that aggregates source data underlying the financial statements or generates information that is significant to the audit client's financial statements or other financial information systems taken as a whole.

(iii) *Appraisal or valuation services, fairness opinions, or contribution-in-kind reports.* Any appraisal service, valuation service, or any service involving a fairness opinion or contribution-in-kind report for an audit client, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements.

(iv) *Actuarial services.* Any actuarially-oriented advisory service involving the determination of amounts recorded in the financial statements and related accounts for the audit client other than assisting a client in understanding the methods, models, assumptions, and inputs used in computing an amount, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements.

(v) *Internal audit outsourcing services.* Any internal audit service that has been outsourced by the audit client that relates to the audit client's internal accounting controls, financial systems, or financial statements, for an audit client unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements.

(vi) *Management functions.* Acting, temporarily or permanently, as a director, officer, or employee of an audit client, or performing any decision-making, supervisory, or ongoing monitoring function for the audit client.

(vii) *Human resources.* (A) Searching for or seeking out prospective candidates for managerial, executive, or director positions;

(B) Engaging in psychological testing, or other formal testing or evaluation programs;

(C) Undertaking reference checks of prospective candidates for an executive or director position;

(D) Acting as a negotiator on the audit client's behalf, such as determining position, status or title, compensation, fringe benefits, or other conditions of employment; or

(E) Recommending, or advising the audit client to hire, a specific candidate for a specific job (except that an accounting firm may, upon request by the audit client, interview candidates and advise the audit client on the candidate's competence for financial accounting, administrative, or control positions).

(viii) *Broker-dealer, investment adviser, or investment banking services.* Acting as a broker-dealer (registered or unregistered), promoter, or underwriter, on behalf of an audit client, making investment decisions on behalf of the audit client or otherwise having discretionary authority over an audit client's investments, executing a transaction to buy or sell an audit client's investment, or having custody of assets of the audit client, such as taking temporary possession of securities purchased by the audit client.

(ix) *Legal services.* Providing any service to an audit client that, under circumstances in which the service is provided, could be provided only by someone licensed, admitted, or otherwise qualified to practice law in the jurisdiction in which the service is provided.

(x) *Expert services unrelated to the audit.* Providing an expert opinion or other expert service for an audit client, or an audit client's legal representative, for the purpose of advocating an audit client's interests in litigation or in a regulatory or administrative proceeding or investigation. In any litigation or regulatory or administrative proceeding or investigation, an accountant's independence shall not be deemed to be impaired if the accountant provides factual accounts, including in testimony, of work performed or explains the positions taken or conclusions reached during the performance

of any service provided by the accountant for the audit client.

* * * * *

(6) *Partner rotation.* (i) Except as provided in paragraph (c)(6)(ii) of this section, an accountant is not independent of an audit client when:

(A) Any audit partner as defined in paragraph (f)(7)(ii) of this section performs:

(*1*) The services of a lead partner, as defined in paragraph (f)(7)(ii)(A) of this section, or concurring partner, as defined in paragraph (f)(7)(ii)(B) of this section, for more than five consecutive years; or

(*2*) One or more of the services defined in paragraphs (f)(7)(ii)(C) and (D) of this section for more than seven consecutive years;

(B) Any audit partner:

(*1*) Within the five consecutive year period following the performance of services for the maximum period permitted under paragraph (c)(6)(i)(A)(*1*) of this section, performs for that audit client the services of a lead partner, as defined in paragraph (f)(7)(ii)(A) of this section, or concurring partner, as defined in paragraph (f)(7)(ii)(B) of this section, or a combination of those services, or

(*2*) Within the two consecutive year period following the performance of services for the maximum period permitted under paragraph (c)(6)(i)(A)(*2*) of this section, performs one or more of the services defined in paragraph (f)(7)(ii) of this section.

(ii) Any accounting firm with less than five audit clients that are issuers (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(f))) and less than ten partners shall be exempt from paragraph (c)(6)(i) of this section *provided* the Public Company Accounting Oversight Board conducts a review at least once every three years of each of the audit client engagements that would result in a lack of auditor independence under this paragraph.

(iii) For purposes of paragraph (c)(6)(i) of this section, an audit client that is an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), does not include an affiliate of the audit client that is an entity in the same investment company complex, as defined in paragraph (f)(14) of this section, except for another registered investment company in the same investment company complex. For purposes of calculating consecutive years of service under paragraph (c)(6)(i) of this section with respect to investment companies in an investment company complex, audits of registered investment companies with different fiscal year-ends that are performed in a continuous 12-month period count as a single consecutive year.

(7) *Audit committee administration of the engagement.* An accountant is not independent of an issuer (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(f))), other than an issuer that is an Asset-Backed Issuer as defined in §240.13a–14(g) and §240.15d–14(g) of this chapter, or an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), other than a unit investment trust as defined by section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4(2)), unless:

(i) In accordance with Section 10A(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(i)) either:

(A) Before the accountant is engaged by the issuer or its subsidiaries, or the registered investment company or its subsidiaries, to render audit or non-audit services, the engagement is approved by the issuer's or registered investment company's audit committee; or

(B) The engagement to render the service is entered into pursuant to pre-approval policies and procedures established by the audit committee of the issuer or registered investment company, *provided* the policies and procedures are detailed as to the particular service and the audit committee is informed of each service and such policies and procedures do not include delegation of the audit committees responsibilities under the Securities Exchange Act of 1934 to management; or

(C) With respect to the provision of services other than audit, review or attest services the pre-approval requirement is waived if:

(*1*) The aggregate amount of all such services provided constitutes no more than five percent of the total amount of revenues paid by the audit client to its accountant during the fiscal year in which the services are provided;

(*2*) Such services were not recognized by the issuer or registered investment company at the time of the engagement to be non-audit services; and

(*3*) Such services are promptly brought to the attention of the audit committee of the issuer or registered investment company and approved prior to the completion of the audit by the audit committee or by one or more members of the audit committee who are members of the board of directors to whom authority to grant such approvals has been delegated by the audit committee.

(ii) A registered investment company's audit committee also must pre-approve its accountant's engagements for non-audit services with the registered investment company's investment adviser (not including a sub-adviser whose role is primarily portfolio management and is sub-contracted or overseen by another investment adviser) and any entity controlling, controlled by, or under common control with the investment adviser that provides ongoing services to the registered investment company in accordance

with paragraph (c)(7)(i) of this section, if the engagement relates directly to the operations and financial reporting of the registered investment company, except that with respect to the waiver of the pre-approval requirement under paragraph (c)(7)(i)(C) of this section, the aggregate amount of all services provided constitutes no more than five percent of the total amount of revenues paid to the registered investment company's accountant by the registered investment company, its investment adviser and any entity controlling, controlled by, or under common control with the investment adviser that provides ongoing services to the registered investment company during the fiscal year in which the services are provided that would have to be pre-approved by the registered investment company's audit committee pursuant to this section.

(8) *Compensation.* An accountant is not independent of an audit client if, at any point during the audit and professional engagement period, any audit partner earns or receives compensation based on the audit partner procuring engagements with that audit client to provide any products or services other than audit, review or attest services. Any accounting firm with fewer than ten partners and fewer than five audit clients that are issuers (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(f))) shall be exempt from the requirement stated in the previous sentence.

* * * * *

(e)(1) *Transition and grandfathering.* Provided the following relationships did not impair the accountant's independence under pre-existing requirements of the Commission, the Independence Standards, Board, or the accounting profession in the United States, the existence of the relationship on May 6, 2003 will not be deemed to impair an accountant's independence:

(i) Employment relationships that commenced at the issuer prior to May 6, 2003 as described in paragraph (c)(2)(iii)(B) of this section.

(ii) Compensation earned or received, as described in paragraph (c)(8) of this section during the fiscal year of the accounting firm that includes the effective date of this section.

(iii) Until May 6, 2004, the provision of services described in paragraph (c)(4) of this section provided those services are pursuant to contracts in existence on May 6, 2003.

(iv) The provision of services by the accountant under contracts in existence on May 6, 2003 that have not been pre-approved by the audit committee as described in paragraph (c)(7) of this section.

(v) Until the first day of the issuer's fiscal year beginning after May 6, 2003 by a ''lead'' partner and other audit partner (other than the ''concurring'' partner) providing services in excess of those permitted under paragraph (c)(6) of this section. An accountant's independence will not be deemed to be impaired until the first day of the issuer's fiscal year beginning after May 6, 2004 by a ''concurring'' partner providing services in excess of those permitted under paragraph (c)(6) of this section. For the purposes of calculating periods of service under paragraph (c)(6) of this section:

(A) For the ''lead'' and ''concurring'' partner, the period of service includes time served as the ''lead'' or ''concurring'' partner prior to May 6, 2003; and

(B) For audit partners other than the ''lead'' partner or ''concurring'' partner, and for audit partners in foreign firms, the period of service does not include time served on the audit engagement team prior to the first day of issuer's fiscal year beginning on or after May 6, 2003.

* * * * *

(f) * * *

(1) *Accountant,* as used in paragraphs (b) through (e) of this section, means a registered public accounting firm, certified public accountant or public accountant performing services in connection with an engagement for which independence is required. References to the accountant include any accounting firm with which the certified public accountant or public accountant is affiliated.

* * * * *

(3)(i) *Accounting role* means a role in which a person is in a position to or does exercise more than minimal influence over the contents of the accounting records or anyone who prepares them.

(ii) *Financial reporting oversight role* means a role in which a person is in a position to or does exercise influence over the contents of the financial statements or anyone who prepares them, such as when the person is a member of the board of directors or similar management or governing body, chief executive officer, president, chief financial officer, chief operating officer, general counsel, chief accounting officer, controller, director of internal audit, director of financial reporting, treasurer, or any equivalent position.

* * * * *

(7)(i) *Audit engagement team* means all partners, principals, shareholders and professional employees participating in an audit, review, or attestation engagement of an audit client, including audit partners and all persons who consult with others on the audit engagement team during the audit, review,

or attestation engagement regarding technical or industry-specific issues, transactions, or events.

(ii) *Audit partner* means a partner or persons in an equivalent position, other than a partner who consults with others on the audit engagement team during the audit, review, or attestation engagement regarding technical or industry-specific issues, transactions, or events, who is a member of the audit engagement team who has responsibility for decision-making on significant auditing, accounting, and reporting matters that affect the financial statements, or who maintains regular contact with management and the audit committee and includes the following:

(A) The lead or coordinating audit partner having primary responsibility for the audit or review (the ''lead partner'');

(B) The partner performing a second level of review to provide additional assurance that the financial statements subject to the audit or review are in conformity with generally accepted accounting principles and the audit or review and any associated report are in accordance with generally accepted auditing standards and rules promulgated by the Commission or the Public Company Accounting Oversight Board (the ''concurring or reviewing partner'');

(C) Other audit engagement team partners who provide more than ten hours of audit, review, or attest services in connection with the annual or interim consolidated financial statements of the issuer or an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8); and

(D) Other audit engagement team partners who serve as the ''lead partner'' in connection with any audit or review related to the annual or interim financial statements of a subsidiary of the issuer whose assets or revenues constitute 20% or more of the assets or revenues of the issuer's respective consolidated assets or revenues.

* * * * *

(17) *Audit committee* means a committee (or equivalent body) as defined in section 3(a)(58) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(58)).

§ 210.2–02 Accountants' reports.

(a) *Technical requirements.* The accountant's report:

(1) Shall be dated;

(2) Shall be signed manually;

(3) Shall indicate the city and State where issued; and

(4) Shall identify without detailed enumeration the financial statements covered by the report.

(b) *Representations as to the audit.* The accountant's report:

(1) Shall state whether the audit was made in accordance with generally accepted auditing standards; and

(2) Shall designate any auditing procedures deemed necessary by the accountant under the circumstances of the particular case, which have been omitted, and the reasons for their omission. Nothing in this rule shall be construed to imply authority for the omission of any procedure which independent accountants would ordinarily employ in the course of an audit made for the purpose of expressing the opinions required by paragraph (c) of this section.

(c) *Opinion to be expressed.* The accountant's report shall state clearly:

(1) The opinion of the accountant in respect of the financial statements covered by the report and the accounting principles and practices reflected therein; and

(2) the opinion of the accountant as to the consistency of the application of the accounting principles, or as to any changes in such principles which have a material effect on the financial statements.

(d) *Exceptions.* Any matters to which the accountant takes exception shall be clearly identified, the exception thereto specifically and clearly stated, and, to the extent practicable, the effect of each such exception on the related financial statements given. (See section 101 of the Codification of Financial Reporting Policies.)

(e) Paragraph (e) of this section applies only to registrants that are providing financial statements in a filing for a period with respect to which Arthur Andersen LLP or a foreign affiliate of Arthur Andersen LLP (''Andersen'') issued an accountants' report. Notwithstanding any other Commission rule or regulation, a registrant that cannot obtain an accountants' report that meets the technical requirements of paragraph (a) of this section after reasonable efforts may include in the document a copy of the latest signed and dated accountants' report issued by Andersen for such period in satisfaction of that requirement, if prominent disclosure that the report is

a copy of the previously issued Andersen accountants' report and that the report has not been reissued by Andersen is set forth on such copy.

[37 FR 14594, July 21, 1972, as amended at 41 FR 35479, Aug. 23, 1976; 45 FR 63668, Sept. 25, 1980; 50 FR 25215, June 18, 1985; 67 FR 13533, Mar. 22, 2002]

§ 210.2–03 Examination of financial statements by foreign government auditors.

Notwithstanding any requirements as to examination by independent accountants, the financial statements of any foreign governmental agency may be examined by the regular and customary auditing staff of the respective government if public financial statements of such governmental agency are customarily examined by such auditing staff.

§ 210.2–04 Examination of financial statements of persons other than the registrant.

If a registrant is required to file financial statements of any other person, such statements need not be examined if examination of such statements would not be required if such person were itself a registrant.

§ 210.2–05 Examination of financial statements by more than one accountant.

If, with respect to the examination of the financial statements, part of the examination is made by an independent accountant other than the principal accountant and the principal accountant elects to place reliance on the work of the other accountant and makes reference to that effect in his report, the separate report of the other accountant shall be filed. However, notwithstanding the provisions of this section, reports of other accountants which may otherwise be required in filings need not be presented in annual reports to security holders furnished pursuant to the proxy and information statement rules under the Securities Exchange Act of 1934 [§§ 240.14a–3 and 240.14c–3].

[46 FR 40872, Aug. 13, 1981]

§ 210.2–06 Retention of audit and review records.

(a) For a period of seven years after an accountant concludes an audit or review of an issuer's financial statements to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, or of the financial statements of any investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), the accountant shall retain records relevant to the audit or review, including workpapers and other documents that form the basis of the audit or review, and memoranda, correspondence, communications, other documents, and records (including electronic records), which:

(1) Are created, sent or received in connection with the audit or review, and

(2) Contain conclusions, opinions, analyses, or financial data related to the audit or review.

(b) For the purposes of paragraph (a) of this section, *workpapers* means documentation of auditing or review procedures applied, evidence obtained, and conclusions reached by the accountant in the audit or review engagement, as required by standards established or adopted by the Commission or by the Public Company Accounting Oversight Board.

(c) Memoranda, correspondence, communications, other documents, and records (including electronic records) described in paragraph (a) of this section shall be retained whether they support the auditor's final conclusions regarding the audit or review, or contain information or data, relating to a significant matter, that is inconsistent with the auditor's final conclusions regarding that matter or the audit or review. Significance of a matter shall be determined based on an objective analysis of the facts and circumstances. Such documents and records include, but are not limited to, those documenting a consultation on or resolution of differences in professional judgment.

(d) For the purposes of paragraph (a) of this section, the term *issuer* means an issuer as defined in section 10A(f) of

the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(f)).

[68 FR 4872, Jan. 30, 2003]

§210.2–07 Communication with audit committees.

(a) Each registered public accounting firm that performs for an audit client that is an issuer (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(f))), other than an issuer that is an Asset-Backed Issuer as defined in §240.13a–14(g) and §240.15d–14(g) of this chapter, or an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), other than a unit investment trust as defined by section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4(2)), any audit required under the securities laws shall report, prior to the filing of such audit report with the Commission (or in the case of a registered investment company, annually, and if the annual communication is not within 90 days prior to the filing, provide an update, in the 90 day period prior to the filing, of any changes to the previously reported information), to the audit committee of the issuer or registered investment company:

(1) All critical accounting policies and practices to be used;

(2) All alternative treatments within Generally Accepted Accounting Principles for policies and practices related to material items that have been discussed with management of the issuer or registered investment company, including:

(i) Ramifications of the use of such alternative disclosures and treatments; and

(ii) The treatment preferred by the registered public accounting firm;

(3) Other material written communications between the registered public accounting firm and the management of the issuer or registered investment company, such as any management letter or schedule of unadjusted differences;

(4) If the audit client is an investment company, all non-audit services provided to any entity in an investment company complex, as defined in §210.2–01 (f)(14), that were not pre-approved by the registered investment company's audit committee pursuant to §210.2–01 (c)(7).

(b) [Reserved]

[68 FR 6048, Feb. 5, 2003]

EFFECTIVE DATE NOTE: At 68 FR 6048, Feb. 5, 2003, §210.2–07 was added, effective May 6, 2003.

GENERAL INSTRUCTIONS AS TO FINANCIAL STATEMENTS

SOURCE: Sections 210.3–01 to 210.3–16 appear at 45 FR 63687, Sept. 25, 1980, unless otherwise noted.

NOTE: These instructions specify the balance sheets and statements of income and cash flows to be included in disclosure documents prepared in accordance with Regulation S–X. Other portions of Regulation S–X govern the examination, form and content of such financial statements, including the basis of consolidation and the schedules to be filed. The financial statements described below shall be audited unless otherwise indicated.

For filings under the Securities Act of 1933, attention is directed to §230.411(b) regarding incorporation by reference to financial statements and to section 10(a)(3) of the Act regarding information required in the prospectus.

For filings under the Securities Exchange Act of 1934, attention is directed to §240.12b–23 regarding incorporation by reference and §240.12b–36 regarding use of financial statements filed under other acts.

[45 FR 63687, Sept. 25, 1980, as amended at 57 FR 45292, Oct. 1, 1992]

§210.3–01 Consolidated balance sheets.

(a) There shall be filed, for the registrant and its subsidiaries consolidated, audited balance sheets as of the end of each of the two most recent fiscal years. If the registrant has been in existence for less than one fiscal year, there shall be filed an audited balance sheet as of a date within 135 days of the date of filing the registration statement.

(b) If the filing, other than a filing on Form 10–K and Form 10–KSB or Form 10 and Form 10–SB, is made within 45 days after the end of the registrant's fiscal year and audited financial statements for the most recent fiscal year are not available, the balance sheets may be as of the end of the two preceding fiscal years and the filing shall include an additional balance sheet as of an interim date at least as current

as the end of the registrant's third fiscal quarter of the most recently completed fiscal year.

(c) The instruction in paragraph (b) is also applicable to filings, other than on Form 10–K and Form 10–KSB or Form 10 and Form 10–SB, made after 45 days but within the number of days of the end of the registrant's fiscal year specified in paragraph (i) of this section: *Provided,* That the following conditions are met:

(1) The registrant files annual, quarterly and other reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 and all reports due have been filed;

(2) For the most recent fiscal year for which audited financial statements are not yet available the registrant reasonably and in good faith expects to report income, after taxes but before extraordinary items and cumulative effect of a change in accounting principle; and

(3) For at least one of the two fiscal years immediately preceding the most recent fiscal year the registrant reported income, after taxes by before extraordinary items and cumulative effect of a change in accounting principle.

(d) For filings made after 45 days but within the number of days of the end of the registrant's fiscal year specified in paragraph (i) of this section where the conditions set forth in paragraph (c) of this section are not met, the filing must include the audited balance sheets required by paragraph (a) of this section.

(e) For filings made after the number of days specified in paragraph (i) of this section, the filing shall also include a balance sheet as of an interim date within the following number of days of the date of filing:

(1) For accelerated filers (as defined in § 240.12b–2 of this chapter):

(i) 135 days for fiscal years ending on or after December 15, 2002 and before December 15, 2004;

(ii) 130 days for fiscal years ending on or after December 15, 2004 and before December 15, 2005; and

(iii) 125 days for fiscal years ending on or after December 15, 2005; and

(2) 135 days for all other registrants.

(f) Any interim balance sheet provided in accordance with the requirements of this section may be unaudited and need not be presented in greater detail than is required by § 210.10–01. Notwithstanding the requirements of this section, the most recent interim balance sheet included in a filing shall be at least as current as the most recent balance sheet filed with the Commission on Form 10–Q and Form 10–QSB.

(g) For filings by registered management investment companies, the requirements of § 210.3–18 shall apply in lieu of the requirements of this section.

(h) Any foreign private issuer, other than a registered management investment company or an employee plan, may file the financial statements required by Item 8.A of Form 20–F (§ 249.220 of this chapter) in lieu of the financial statements specified in this rule.

(i)(1) For purposes of paragraph (c) and (d) of this section, the number of days shall be:

(i) For accelerated filers (as defined in § 240.12b–2 of this chapter):

(A) 90 days for fiscal years ending on or after December 15, 2002 and before December 15, 2003;

(B) 75 days for fiscal years ending on or after December 15, 2003 and before December 15, 2004; and

(C) 60 days for fiscal years ending on or after December 15, 2004; and

(ii) 90 days for all other registrants.

(2) For purposes of paragraph (e) of this section, the number of days shall be:

(i) For accelerated filers (as defined in § 240.12b–2 of this chapter):

(A) 134 days subsequent to the end of the registrant's most recent fiscal year for fiscal years ending on or after December 15, 2002 and before December 15, 2004;

(B) 129 days subsequent to the end of the registrant's most recent fiscal year for fiscal years ending on or after December 15, 2004 and before December 15, 2005; and

(C) 124 days subsequent to the end of the registrant's most recent fiscal year for fiscal years ending on or after December 15, 2005; and

(ii) 134 days subsequent to the end of the registrant's most recent fiscal year for all other registrants.

[45 FR 63687, Sept. 25, 1980, as amended at 46 FR 12491, Feb. 17, 1981; 46 FR 36124, July 14, 1981; 50 FR 49531, Dec. 3, 1985; 56 FR 30053, July 1, 1991; 64 FR 53908, Oct. 5, 1999; 67 FR 58503, Sept. 16, 2002]

§210.3–02 Consolidated statements of income and changes in financial positions.

(a) There shall be filed, for the registrant and its subsidiaries consolidated and for its predecessors, audited statements of income and cash flows for each of the three fiscal years preceding the date of the most recent audited balance sheet being filed or such shorter period as the registrant (including predecessors) has been in existence.

(b) In addition, for any interim period between the latest audited balance sheet and the date of the most recent interim balance sheet being filed, and for the corresponding period of the preceding fiscal year, statements of income and cash flows shall be provided. Such interim financial statements may be unaudited and need not be presented in greater detail than is required by §210.10–01.

(c) For filings by registered management investment companies, the requirements of §210.3–18 shall apply in lieu of the requirements of this section.

(d) Any foreign private issuer, other than a registered management investment company or an employee plan, may file the financial statements required by Item 8.A of Form 20–F (§249.220 of this chapter) in lieu of the financial statements specified in this rule.

[45 FR 63687, Sept. 25, 1980, as amended at 46 FR 12491, Feb. 17, 1981; 46 FR 36125, July 14, 1981; 50 FR 49531, Dec. 3, 1985; 56 FR 30053, July 1, 1991; 57 FR 45292, Oct. 1, 1992; 64 FR 53908, Oct. 5, 1999]

§210.3–03 Instructions to income statement requirements.

(a) The statements required shall be prepared in compliance with the applicable requirements of this regulation.

(b) If the registrant is engaged primarily (1) in the generation, transmission or distribution of electricity, the manufacture, mixing, transmission or distribution of gas, the supplying or distribution of water, or the furnishing of telephone or telegraph service; or (2) in holding securities of companies engaged in such businesses, it may at its option include statements of income and cash flows (which may be unaudited) for the twelve-month period ending on the date of the most recent balance sheet being filed, in lieu of the statements of income and cash flows for the interim periods specified.

(c) If a period or periods reported on include operations of a business prior to the date of acquisition, or for other reasons differ from reports previously issued for any period, the statements shall be reconciled as to sales or revenues and net income in the statement or in a note thereto with the amounts previously reported: *Provided, however,* That such reconciliations need not be made (1) if they have been made in filings with the Commission in prior years or (2) the financial statements which are being retroactively adjusted have not previously been filed with the Commission or otherwise made public.

(d) Any unaudited interim financial statements furnished shall reflect all adjustments which are, in the opinion of management, necessary to a fair statement of the results for the interim periods presented. A statement to that effect shall be included. Such adjustments shall include, for example, appropriate estimated provisions for bonus and profit sharing arrangements normally determined or settled at year-end. If all such adjustments are of a normal recurring nature, a statement to that effect shall be made; otherwise, there shall be furnished information describing in appropriate detail the nature and amount of any adjustments other than normal recurring adjustments entering into the determination of the results shown.

(e) Disclosures regarding segments required by generally accepted accounting principles shall be provided for each year for which an audited statement of income is provided. To the extent that the segment information presented pursuant to this instruction complies with the provisions

of Item 101 of Regulation S–K, the disclosures may be combined by cross referencing to or from the financial statements.

[45 FR 63687, Sept. 25, 1980. Redesignated at 47 FR 29836, July 9, 1982, and amended at 50 FR 25215, June 18, 1985; 50 FR 49532, Dec. 3, 1985; 57 FR 45292, Oct. 1, 1992; 64 FR 1734, Jan 12, 1999]

§ 210.3–04 Changes in other stockholders' equity.

An analysis of the changes in each caption of other stockholders' equity presented in the balance sheets shall be given in a note or separate statement. This analysis shall be presented in the form of a reconciliation of the beginning balance to the ending balance for each period for which an income statement is required to be filed with all significant reconciling items described by appropriate captions. State separately the adjustments to the balance at the beginning of the earliest period presented for items which were retroactively applied to periods prior to that period. With respect to any dividends, state the amount per share and in the aggregate for each class of shares.

(Secs. 7 and 19a of the Securities Act, 15 U.S.C. 77g, 77s(a), 77aa(25)(26); secs. 12, 13, 14, 15(d), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a), secs. 5(b), 10(a), 14, 20(a) of the Public Utility Holding Company Act, 15 U.S.C. 79e(a), 79n, 79t(a); secs. 8, 20, 30, 31(c), 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–8, 80a–20, 80a–29, 80a–30(c), 80a–37(a))

[47 FR 29836, July 9, 1982]

§ 210.3–05 Financial statements of businesses acquired or to be acquired.

(a) *Financial statements required.* (1) Financial statements prepared and audited in accordance with this regulation should be furnished for the periods specified in paragraph (b) below if any of the following conditions exist:

(i) Consummation of a business combination accounted for as a purchase has occurred or is probable (for purposes of this rule, the term *purchase* encompasses the purchase of an interest in a business accounted for by the equity method); or

(ii) Consummation of a business combination to be accounted for as a pooling of interests is probable.

(2) For purposes of determining whether the provisions of this rule apply, the determination of whether a *business* has been acquired should be made in accordance with the guidance set forth in § 210.11–01(d).

(3) Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the registrant have been filed shall be treated under this section as if they are a single business combination. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, businesses shall be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one business is conditional on the acquisition of each other business; or

(iii) Each acquisition is conditioned on a single common event.

(4) This rule shall not apply to a business which is totally held by the registrant prior to consummation of the transaction.

(b) *Periods to be presented.* (1) If securities are being registered to be offered to the security holders of the business to be acquired, the financial statements specified in §§ 210.3–01 and 210.3–02 shall be furnished for the business to be acquired, except as provided otherwise for filings on Form N–14, S–4 or F–4 (§§ 239.23, 239.25 or 239.34 of this chapter). The financial statements covering fiscal years shall be audited except as provided in Item 14 of Schedule 14A (§ 240.14a–101 of this chapter) with respect to certain proxy statements or in registration statements filed on Forms N–14, S–4 or F–4 (§§ 239.23, 239.25 or 239.34 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the business acquired or to be acquired shall be filed for the periods specified in this paragraph (b)(2) or such shorter period as the business has been in existence. The periods for which such financial statements are to

be filed shall be determined using the conditions specified in the definition of significant subsidiary in §210.1–02(w) as follows:

(i) If none of the conditions exceeds 20 percent, financial statements are not required. However, if the aggregate impact of the individually insignificant businesses acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%, financial statements covering at least the substantial majority of the businesses acquired shall be furnished. Such financial statements shall be for at least the most recent fiscal year and any interim periods specified in §§210.3–01 and 210.3–02.

(ii) If any of the conditions exceeds 20 percent, but none exceed 40 percent, financial statements shall be furnished for at least the most recent fiscal year and any interim periods specified in §§210.3–01 and 210.3–02.

(iii) If any of the conditions exceeds 40 percent, but none exceed 50 percent, financial statements shall be furnished for at least the two most recent fiscal years and any interim periods specified in §§210.3–01 and 210.3–02.

(iv) If any of the conditions exceeds 50 percent, the full financial statements specified in §§210.3–01 and 210.3–02 shall be furnished. However, financial statements for the earliest of the three fiscal years required may be omitted if net revenues reported by the acquired business in its most recent fiscal year are less than $25 million.

(3) The determination shall be made by comparing the most recent annual financial statements of each such business, or group of related businesses on a combined basis, to the registrant's most recent annual consolidated financial statements filed at or prior to the date of acquisition. However, if the registrant made a significant acquisition subsequent to the latest fiscal year-end and filed a report on Form 8–K (§249.308 of this chapter) which included audited financial statements of such acquired business for the periods required by this section and the pro forma financial information required by §210.11, such determination may be made by using pro forma amounts for the latest fiscal year in the report on Form 8–K (§249.308 of this chapter) rather than by using the historical amounts of the registrant. The tests may not be made by ''annualizing'' data.

(4) Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows:

(i) Registration statements not subject to the provisions of §230.419 of this chapter (Regulation C) and proxy statements need not include separate financial statements of the acquired or to be acquired business if it does not exceed any of the conditions of significance in the definition of significant subsidiary in §210.1–02 at the 50 percent level, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to §230.424(b) of this chapter, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business combination, and the financial statements have not previously been filed by the registrant.

(ii) An issuer, other than a foreign private issuer required to file reports on Form 6–K, that omits from its initial registration statement financial statements of a recently consummated business combination pursuant to paragraph (b)(4)(i) of this section shall furnish those financial statements and any pro forma information specified by Article 11 of this chapter under cover of Form 8–K (§249.308 of this chapter) no later than 75 days after consummation of the acquisition.

(iii) Separate financial statements of the acquired business need not be presented once the operating results of the acquired business have been reflected in the audited consolidated financial statements of the registrant for a complete fiscal year unless such financial statements have not been previously filed or unless the acquired business is of such significance to the registrant that omission of such financial statements would materially impair an investor's ability to understand the historical financial results of the registrant. For example, if, at the date of acquisition, the acquired business met at least one of the conditions in the

definition of significant subsidiary in § 210.1–02 at the 80 percent level, the income statements of the acquired business should normally continue to be furnished for such periods prior to the purchase as may be necessary when added to the time for which audited income statements after the purchase are filed to cover the equivalent of the period specified in § 210.3–02.

(iv) A separate audited balance sheet of the acquired business is not required when the registrant's most recent audited balance sheet required by § 210.3–01 is for a date after the date the acquisition was consummated.

(c) *Financial statements of foreign business.* If the business acquired or to be acquired is a foreign business, financial statements of the business meeting the requirements of Item 17 of Form 20–F (§ 249.220f of this chapter) will satisfy this section.

(Secs. 7 and 19a of the Securities Act, 15 U.S.C. 77g, 77s(a), 77aa(25)(26); secs. 12, 13, 14, 15(d), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a), secs. 5(b), 10(a), 14, 20(a) of the Public Utility Holding Company Act, 15 U.S.C. 79e(a), 79n, 79t(a); secs. 8, 20, 30, 31(c), 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–8, 80a–20, 80a–29, 80a–30(c), 80a–37(a))

[47 FR 29836, July 9, 1982, as amended at 50 FR 49532, Dec. 3, 1985; 51 FR 42056, Nov. 20, 1986; 59 FR 65636, Dec. 20, 1994; 61 FR 54514, Oct. 18, 1996]

§ 210.3–06 Financial statements covering a period of nine to twelve months.

Except with respect to registered investment companies, the filing of financial statements covering a period of 9 to 12 months shall be deemed to satisfy a requirement for filing financial statements for a period of 1 year where:

(a) The issuer has changed its fiscal year;

(b) The issuer has made a significant business acquisition for which financial statements are required under § 210.3–05 of this chapter and the financial statements covering the interim period pertain to the business being acquired; or

(c) The Commission so permits pursuant to § 210.3–13 of this chapter.

Where there is a requirement for filing financial statements for a time period exceeding one year but not exceeding three consecutive years (with not more than 12 months included in any period reported upon), the filing of financial statements covering a period of nine to 12 months shall satisfy a filing requirement of financial statements for one year of that time period only if the conditions described in either paragraph (a), (b), or (c) of this section exist and financial statements are filed that cover the full fiscal year or years for all other years in the time period.

[54 FR 10315, Mar. 13, 1989]

§§ 210.3–07—210.3–08 [Reserved]

§ 210.3–09 Separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons.

(a) If any of the conditions set forth in § 210.1–02(w), substituting 20 percent for 10 percent in the tests used therein to determine a significant subsidiary, are met for a majority-owned subsidiary not consolidated by the registrant or by a subsidiary of the registrant, separate financial statements of such subsidiary shall be filed. Similarly, if either the first or third condition set forth in § 210.1–02(w), substituting 20 percent for 10 percent, is met by a 50 percent or less owned person accounted for by the equity method either by the registrant or a subsidiary of the registrant, separate financial statements of such 50 percent or less owned person shall be filed.

(b) Insofar as practicable, the separate financial statements required by this section shall be as of the same dates and for the same periods as the audited consolidated financial statements required by §§ 210.3–01 and 3–02. However, these separate financial statements are required to be audited only for those fiscal years in which either the first or third condition set forth in § 210.1–02(w), substituting 20 percent for 10 percent, is met. For purposes of a filing on Form 10–K (§ 249.310 of this chapter):

(1) If the registrant is an accelerated filer (as defined in § 240.12b–2 of this chapter) but the 50 percent or less owned person is not an accelerated filer, the required financial statements may be filed as an amendment to the

report within 90 days, or within six months if the 50 percent or less owned person is a foreign business, after the end of the registrant's fiscal year.

(2) If the fiscal year of any 50 percent or less owned person ends within the *registrant's number of filing days* before the date of the filing, or if the fiscal year ends after the date of the filing, the required financial statements may be filed as an amendment to the report within the *subsidiary's number of filing days*, or within six months if the 50 percent or less owned person is a foreign business, after the end of such subsidiary's or person's fiscal year.

(3) The term *registrant's number of filing days* means:

(i) If the registrant is an accelerated filer:

(A) 90 days for fiscal years ending on or after December 15, 2002 and before December 15, 2003;

(B) 75 days for fiscal years ending on or after December 15, 2003 and before December 15, 2004; and

(C) 60 days for fiscal years ending on or after December 15, 2004; and

(ii) If the registrant is not an accelerated filer, 90 days.

(4) The term *subsidiary's number of filing days* means:

(i) If the 50 percent or less owned person is an accelerated filer:

(A) 90 days for fiscal years ending on or after December 15, 2002 and before December 15, 2003;

(B) 75 days for fiscal years ending on or after December 15, 2003 and before December 15, 2004; and

(C) 60 days for fiscal years ending on or after December 15, 2004; and

(ii) If the 50 percent or less owned person is not an accelerated filer, 90 days.

(c) Notwithstanding the requirements for separate financial statements in paragraph (a) of this section, where financial statements of two or more majority-owned subsidiaries not consolidated are required, combined or consolidated statements of such subsidiaries may be filed subject to principles of inclusion and exclusion which clearly exhibit the financial position, cash flows and results of operations of the combined or consolidated group. Similarly, where financial statements of two or more 50 percent or less owned persons are required, combined or consolidated statements of such persons may be filed subject to the same principles of inclusion or exclusion referred to above.

(d) If the 50 percent or less owned person is a foreign business, financial statements of the business meeting the requirements of Item 17 of Form 20–F (§249.220f of this chapter) will satisfy this section.

[46 FR 56179, Nov. 16, 1981, as amended at 47 FR 29837, July 9, 1982; 57 FR 45292, Oct. 1, 1992; 59 FR 65636, Dec. 20, 1994; 67 FR 58504, Sept. 16, 2002]

§210.3–10 Financial statements of guarantors and issuers of guaranteed securities registered or being registered.

(a)(1) *General rule.* Every issuer of a registered security that is guaranteed and every guarantor of a registered security must file the financial statements required for a registrant by Regulation S–X.

(2) *Operation of this rule.* Paragraphs (b), (c), (d), (e) and (f) of this section are exceptions to the general rule of paragraph (a)(1) of this section. Only one of these paragraphs can apply to a single issuer or guarantor. Paragraph (g) of this section is a special rule for recently acquired issuers or guarantors that overrides each of these exceptions for a specific issuer or guarantor. Paragraph (h) of this section defines the following terms used in this section: 100% owned, full and unconditional, annual report, quarterly report, no independent assets or operations, minor, finance subsidiary and operating subsidiary. Paragraph (i) of this section states the requirements for preparing the condensed consolidating financial information required by paragraphs (c), (d), (e) and (f) of this section.

NOTE TO PARAGRAPH (a)(2). Where paragraphs (b), (c), (d), (e) and (f) of this section specify the filing of financial statements of the parent company, the financial statements of an entity that is not an issuer or guarantor of the registered security cannot be substituted for those of the parent company.

(3) *Foreign private issuers.* Where any provision of this section requires compliance with §§ 210.3–01 and 3–02, a foreign private issuer may comply by providing financial statements for the periods specified by Item 8.A of Form 20–F (§ 249.220f of this chapter).

(b) *Finance subsidiary issuer of securities guaranteed by its parent company.* When a finance subsidiary issues securities and its parent company guarantees those securities, the registration statement, parent company annual report, or parent company quarterly report need not include financial statements of the issuer if:

(1) The issuer is 100% owned by the parent company guarantor;

(2) The guarantee is full and unconditional;

(3) No other subsidiary of the parent company guarantees the securities; and

(4) The parent company's financial statements are filed for the periods specified by §§ 210.3–01 and 210.3–02 and include a footnote stating that the issuer is a 100%-owned finance subsidiary of the parent company and the parent company has fully and unconditionally guaranteed the securities. The footnote also must include the narrative disclosures specified in paragraphs (i)(9) and (i)(10) of this section.

NOTE TO PARAGRAPH (b). Paragraph (b) is available if a subsidiary issuer satisfies the requirements of this paragraph but for the fact that, instead of the parent company guaranteeing the security, the subsidiary issuer co-issued the security, jointly and severally, with the parent company. In this situation, the narrative information required by paragraph (b)(4) must be modified accordingly.

(c) *Operating subsidiary issuer of securities guaranteed by its parent company.* When an operating subsidiary issues securities and its parent company guarantees those securities, the registration statement, parent company annual report, or parent company quarterly report need not include financial statements of the issuer if:

(1) The issuer is 100% owned by the parent company guarantor;

(2) The guarantee is full and unconditional;

(3) No other subsidiary of the parent company guarantees the securities; and

(4) The parent company's financial statements are filed for the periods specified by §§ 210.3–01 and 210.3–02 and include, in a footnote, condensed consolidating financial information for the same periods with a separate column for:

(i) The parent company;

(ii) The subsidiary issuer;

(iii) Any other subsidiaries of the parent company on a combined basis;

(iv) Consolidating adjustments; and

(v) The total consolidated amounts.

NOTES TO PARAGRAPH (c).

1. Instead of the condensed consolidating financial information required by paragraph (c)(4), the parent company's financial statements may include a footnote stating, if true, that the parent company has no independent assets or operations, the guarantee is full and unconditional, and any subsidiaries of the parent company other than the subsidiary issuer are minor. The footnote also must include the narrative disclosures specified in paragraphs (i)(9) and (i)(10) of this section.

2. If the alternative disclosure permitted by Note 1 to this paragraph is not applicable because the parent company has independent assets or operations, the condensed consolidating financial information described in paragraph (c)(4) may omit the column for ''any other subsidiaries of the parent company on a combined basis'' if those other subsidiaries are minor.

3. Paragraph (c) is available if a subsidiary issuer satisfies the requirements of this paragraph but for the fact that, instead of the parent company guaranteeing the security, the subsidiary issuer co-issued the security, jointly and severally, with the parent company. In this situation, the narrative information required by paragraph (i)(8) of this section must be modified accordingly.

(d) *Subsidiary issuer of securities guaranteed by its parent company and one or more other subsidiaries of that parent company.* When a subsidiary issues securities and both its parent company and one or more other subsidiaries of that parent company guarantee those securities, the registration statement, parent company annual report, or parent company quarterly report need not include financial statements of the issuer or any subsidiary guarantor if:

(1) The issuer and all subsidiary guarantors are 100% owned by the parent company guarantor;

(2) The guarantees are full and unconditional;

(3) The guarantees are joint and several; and

(4) The parent company's financial statements are filed for the periods specified by §§210.3–01 and 210.3–02 and include, in a footnote, condensed consolidating financial information for the same periods with a separate column for:

(i) The parent company;

(ii) The subsidiary issuer;

(iii) The guarantor subsidiaries of the parent company on a combined basis;

(iv) Any other subsidiaries of the parent company on a combined basis;

(v) Consolidating adjustments; and

(vi) The total consolidated amounts.

NOTES TO PARAGRAPH (d).

1. Paragraph (d) applies in the same manner whether the issuer is a finance subsidiary or an operating subsidiary.

2. The condensed consolidating financial information described in paragraph (d)(4) may omit the column for ''any other subsidiaries of the parent company on a combined basis'' if those other subsidiaries are minor.

3. Paragraph (d) is available if a subsidiary issuer satisfies the requirements of this paragraph but for the fact that, instead of the parent company guaranteeing the security, the subsidiary issuer co-issued the security, jointly and severally, with the parent company. In this situation, the narrative information required by paragraph (i)(8) of this section must be modified accordingly.

4. If all of the requirements in paragraph (d) are satisfied except that the guarantee of a subsidiary is not joint and several with, as applicable, the parent company's guarantee or the guarantees of the parent company and the other subsidiaries, then each subsidiary guarantor whose guarantee is not joint and several need not include separate financial statements, but the condensed consolidating financial information should include a separate column for each guarantor whose guarantee is not joint and several.

5. Instead of the condensed consolidating financial information required by paragraph (d)(4), the parent company's financial statements may include a footnote stating, if true, that the parent company has no independent assets or operations, the subsidiary issuer is a 100% owned finance subsidiary of the parent company, the parent company has guaranteed the securities, all of the parent company's subsidiaries other than the subsidiary issuer have guaranteed the securities, all of the guarantees are full and unconditional, and all of the guarantees are joint and several. The footnote also must include the narrative disclosures specified in paragraphs (i)(9) and (i)(10) of this section.

(e) *Single subsidiary guarantor of securities issued by the parent company of that subsidiary.* When a parent company issues securities and one of its subsidiaries guarantees those securities, the registration statement, parent company annual report, or parent company quarterly report need not include financial statements of the subsidiary guarantor if:

(1) The subsidiary guarantor is 100% owned by the parent company issuer;

(2) The guarantee is full and unconditional;

(3) No other subsidiary of that parent guarantees the securities; and

(4) The parent company's financial statements are filed for the periods specified by §§210.3–01 and 210.3–02 and include, in a footnote, condensed consolidating financial information for the same periods with a separate column for:

(i) The parent company;

(ii) The subsidiary guarantor;

(iii) Any other subsidiaries of the parent company on a combined basis;

(iv) Consolidating adjustments; and

(v) The total consolidated amounts.

NOTES TO PARAGRAPH (e).

1. Paragraph (e) applies in the same manner whether the guarantor is a finance subsidiary or an operating subsidiary.

2. Instead of the condensed consolidating financial information required by paragraph (e)(4), the parent company's financial statements may include a footnote stating, if true, that the parent company has no independent assets or operations, the guarantee is full and unconditional, and any subsidiaries of the parent company other than the subsidiary guarantor are minor. The footnote also must include the narrative disclosures specified in paragraphs (i)(9) and (i)(10) of this section.

3. If the alternative disclosure permitted by Note 2 to this paragraph is not applicable because the parent company has independent assets or operations, the condensed consolidating financial information described in paragraph (e)(4) may omit the column for ''any other subsidiaries of the parent company on a combined basis'' if those other subsidiaries are minor.

4. If, instead of guaranteeing the subject security, a subsidiary co-issues the security jointly and severally with its parent company, this paragraph (e) does not apply. Instead, the appropriate financial information requirement would depend on whether the subsidiary is a finance subsidiary or an operating subsidiary. If the subsidiary is a finance subsidiary, paragraph (b) applies. If

the subsidiary is an operating company, paragraph (c) applies.

(f) *Multiple subsidiary guarantors of securities issued by the parent company of those subsidiaries.* When a parent company issues securities and more than one of its subsidiaries guarantee those securities, the registration statement, parent company annual report, or parent company quarterly report need not include financial statements of the subsidiary guarantors if:

(1) Each of the subsidiary guarantors is 100% owned by the parent company issuer;

(2) The guarantees are full and unconditional;

(3) The guarantees are joint and several; and

(4) The parent company's financial statements are filed for the periods specified by §§ 210.3–01 and 210.3–02 and include, in a footnote, condensed consolidating financial information for the same periods with a separate column for:

(i) The parent company;

(ii) The subsidiary guarantors on a combined basis;

(iii) Any other subsidiaries of the parent company on a combined basis;

(iv) Consolidating adjustments; and

(v) The total consolidated amounts.

NOTES TO PARAGRAPH (f).

1. Instead of the condensed consolidating financial information required by paragraph (f)(4), the parent company's financial statements may include a footnote stating, if true, that the parent company has no independent assets or operations, the guarantees are full and unconditional and joint and several, and any subsidiaries of the parent company other than the subsidiary guarantors are minor. The footnote also must include the narrative disclosures specified in paragraphs (i)(9) and (i)(10) of this section.

2. If the alternative disclosure permitted by Note 1 to this paragraph is not applicable because the parent company has independent assets or operations, the condensed consolidating financial information described in paragraph (f)(4) may omit the column for ''any other subsidiaries of the parent company on a combined basis'' if those other subsidiaries are minor.

3. If any of the subsidiary guarantees is not joint and several with the guarantees of the other subsidiaries, then each subsidiary guarantor whose guarantee is not joint and several need not include separate financial statements, but the condensed consolidating financial information must include a separate column for each subsidiary guarantor whose guarantee is not joint and several.

(g) *Recently acquired subsidiary issuers or subsidiary guarantors.*

(1) The Securities Act registration statement of the parent company must include the financial statements specified in paragraph (g)(2) of this section for any subsidiary that otherwise meets the conditions in paragraph (c), (d), (e) or (f) of this section for omission of separate financial statements if:

(i) The subsidiary has not been included in the audited consolidated results of the parent company for at least nine months of the most recent fiscal year; and

(ii) The net book value or purchase price, whichever is greater, of the subsidiary is 20% or more of the principal amount of the securities being registered.

(2) Financial statements required.

(i) Audited financial statements for a subsidiary described in paragraph (g)(1) of this section must be filed for the subsidiary's most recent fiscal year preceding the acquisition. In addition, unaudited financial statements must be filed for any interim periods specified in §§ 210.3–01 and 210.3–02.

(ii) The financial statements must conform to the requirements of Regulation S–X (§§ 210.1–01 through 12–29), except that supporting schedules need not be filed. If the subsidiary is a foreign business, financial statements of the subsidiary meeting the requirements of Item 17 of Form 20–F (§ 249.220f) will satisfy this item.

(3) Instructions to paragraph (g).

(i) The significance test of paragraph (g)(1)(ii) of this section should be computed using net book value of the subsidiary as of the most recent fiscal year end preceding the acquisition.

(ii) Information required by this paragraph (g) is not required to be included in an annual report or quarterly report.

(iii) Acquisitions of a group of subsidiary issuers or subsidiary guarantors that are related prior to their acquisition shall be aggregated for purposes of applying the 20% test in paragraph (g)(1)(ii) of this section. Subsidiaries shall be deemed to be related prior to their acquisition if:

(A) They are under common control or management;

(B) The acquisition of one subsidiary is conditioned on the acquisition of each subsidiary; or

(C) The acquisition of each subsidiary is conditioned on a single common event.

(h) *Definitions.* For the purposes of this section:

(1) A subsidiary is ''100% owned'' if all of its outstanding voting shares are owned, either directly or indirectly, by its parent company. A subsidiary not in corporate form is 100% owned if the sum of all interests are owned, either directly or indirectly, by its parent company other than:

(i) Securities that are guaranteed by its parent and, if applicable, other 100%-owned subsidiaries of its parent; and

(ii) Securities that guarantee securities issued by its parent and, if applicable, other 100%-owned subsidiaries of its parent.

(2) A guarantee is ''full and unconditional,'' if, when an issuer of a guaranteed security has failed to make a scheduled payment, the guarantor is obligated to make the scheduled payment immediately and, if it doesn't, any holder of the guaranteed security may immediately bring suit directly against the guarantor for payment of all amounts due and payable.

(3) *Annual report* refers to an annual report on Form 10–K, Form 10–KSB, or Form 20–F (§§249.310, 249.310b, or 249.220f of this chapter).

(4) *Quarterly report* refers to a quarterly report on Form 10–Q or Form 10–QSB (§§249.308a or 249.308b of this chapter).

(5) A parent company has no independent assets or operations if each of its total assets, revenues, income from continuing operations before income taxes, and cash flows from operating activities (excluding amounts related to its investment in its consolidated subsidiaries) is less than 3% of the corresponding consolidated amount.

(6) A subsidiary is minor if each of its total assets, stockholders' equity, revenues, income from continuing operations before income taxes, and cash flows from operating activities is less than 3% of the parent company's corresponding consolidated amount.

NOTE TO PARAGRAPH (h)(6). When considering a group of subsidiaries, the definition applies to each subsidiary in that group individually and to all subsidiaries in that group in the aggregate.

(7) A subsidiary is a finance subsidiary if it has no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the security being registered and any other securities guaranteed by its parent company.

(8) A subsidiary is an operating subsidiary if it is not a finance subsidiary.

(i) Instructions for preparation of the condensed consolidating financial information required by paragraphs (c), (d), (e) and (f) of this section.

(1) Follow the general guidance in §210.10–01 for the form and content for condensed financial statements and present the financial information in sufficient detail to allow investors to determine the assets, results of operations and cash flows of each of the consolidating groups;

(2) The financial information should be audited for the same periods that the parent company financial statements are required to be audited;

(3) The parent company column should present investments in all subsidiaries under the equity method;

(4) The parent company's basis shall be ''pushed down'' to the applicable subsidiary columns to the extent that push down would be required or permitted in separate financial statements of the subsidiary;

(5) All subsidiary issuer or subsidiary guarantor columns should present the following investments in subsidiaries under the equity method:

(i) Non-guarantor subsidiaries;

(ii) Subsidiary issuers or subsidiary guarantors that are not 100% owned or whose guarantee is not full and unconditional;

(iii) Subsidiary guarantors whose guarantee is not joint and several with the guarantees of the other subsidiaries; and

(iv) Subsidiary guarantors with differences in domestic or foreign laws that affect the enforceability of the guarantees;

(6) Provide a separate column for each subsidiary issuer or subsidiary guarantor that is not 100% owned, whose guarantee is not full and unconditional, or whose guarantee is not joint and several with the guarantees of other subsidiaries. Inclusion of a separate column does not relieve that issuer or guarantor from the requirement to file separate financial statements under paragraph (a) of this section. However, paragraphs (b) through (f) of this section will provide this relief if the particular paragraph is satisfied except that the guarantee is not joint and several;

(7) Provide separate columns for each guarantor by legal jurisdiction if differences in domestic or foreign laws affect the enforceability of the guarantees;

(8) Include the following disclosure, if true:

(i) Each subsidiary issuer or subsidiary guarantor is 100% owned by the parent company;

(ii) All guarantees are full and unconditional; and

(iii) Where there is more than one guarantor, all guarantees are joint and several;

(9) Disclose any significant restrictions on the ability of the parent company or any guarantor to obtain funds from its subsidiaries by dividend or loan;

(10) Provide the disclosures prescribed by § 210.4–08(e)(3) with respect to the subsidiary issuers and subsidiary guarantors;

(11) The disclosure:

(i) May not omit any financial and narrative information about each guarantor if the information would be material for investors to evaluate the sufficiency of the guarantee;

(ii) Shall include sufficient information so as to make the financial information presented not misleading; and

(iii) Need not repeat information that would substantially duplicate disclosure elsewhere in the parent company's consolidated financial statements; and

(12) Where the parent company's consolidated financial statements are prepared on a comprehensive basis other than U.S. Generally Accepted Accounting Principles, reconcile the information in each column to U.S. Generally Accepted Accounting Principles to the extent necessary to allow investors to evaluate the sufficiency of the guarantees. The reconciliation may be limited to the information specified by Item 17 of Form 20–F (§ 249.220f of this chapter). The reconciling information need not duplicate information included elsewhere in the reconciliation of the consolidated financial statements.

[65 FR 51707, Aug. 24, 2000]

§ 210.3–11 Financial statements of an inactive registrant.

If a registrant is an inactive entity as defined below, the financial statements required by this regulation for purposes of reports pursuant to the Securities Exchange Act of 1934 may be unaudited. An inactive entity is one meeting all of the following conditions:

(a) Gross receipts from all sources for the fiscal year are not in excess of $100,000;

(b) The registrant has not purchased or sold any of its own stock, granted options therefor, or levied assessments upon outstanding stock,

(c) Expenditures for all purposes for the fiscal year are not in excess of $100,000;

(d) No material change in the business has occurred during the fiscal year, including any bankruptcy, reorganization, readjustment or succession or any material acquisition or disposition of plants, mines, mining equipment, mine rights or leases; and

(e) No exchange upon which the shares are listed, or governmental authority having jurisdiction, requires the furnishing to it or the publication of audited financial statements.

§ 210.3–12 Age of financial statements at effective date of registration statement or at mailing date of proxy statement.

(a) If the financial statements in a filing are as of a date the number of days specified in paragraph (g) of this section or more prior to the date the filing is expected to become effective or proposed mailing date in the case of a proxy statement, the financial statements shall be updated, except as specified in the following paragraphs, with a balance sheet as of an interim date within the number of days specified in

paragraph (g) of this section and with statements of income and cash flows for the interim period between the end of the most recent fiscal year and the date of the interim balance sheet provided and for the corresponding period of the preceding fiscal year. Such interim financial statements may be unaudited and need not be presented in greater detail than is required by §210.10–01. Notwithstanding the above requirements, the most recent interim financial statements shall be at least as current as the most recent financial statements filed with the Commission on Form 10–Q and Form 10–QSB.

(b) Where the anticipated effective date of a filing, or in the case of a proxy statement the proposed mailing date, falls within the number of days subsequent to the end of the fiscal year specified in paragraph (g) of this section, the filing need not include financial statements more current than as of the end of the third fiscal quarter of the most recently completed fiscal year unless the audited financial statements for such fiscal year are available or unless the anticipated effective date or proposed mailing date falls after 45 days subsequent to the end of the fiscal year and the registrant does not meet the conditions prescribed under paragraph (c) of §210.3–01. If the anticipated effective date or proposed mailing date falls after 45 days subsequent to the end of the fiscal year and the registrant does not meet the conditions prescribed under paragraph (c) of §210.3–01, the filing must include audited financial statements for the most recently completed fiscal year.

(c) Where a filing is made near the end of a fiscal year and audited financial statements for that fiscal year are not included in the filing, the filing shall be updated with such audited financial statements if they become available prior to the anticipated effective date, or proposed mailing date in the case of a proxy statement.

(d) The age of the registrant's most recent audited financial statements included in a registration statement filed under the Securities Act of 1933 or filed on Form 10 and Form 10–SB (17 CFR 249.210) under the Securities Exchange Act of 1934 shall not be more than one year and 45 days old at the date the registration statement becomes effective if the registration statement relates to the security of an issuer that was not subject, immediately prior to the time of filing the registration statement, to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934.

(e) For filings by registered management investment companies, the requirements of §210.3–18 shall apply in lieu of the requirements of this section.

(f) Any foreign private issuer may file financial statements whose age is specified in Item 8.A of Form 20–F (§249.220f of this chapter). Financial statements of a foreign business which are furnished pursuant to §§210.3–05 or 210.3–09 because it is an acquired business or a 50 percent or less owned person may be of the age specified in Item 8.A of Form 20–F.

(g)(1)For purposes of paragraph (a) of this section, the number of days shall be:

(i) For accelerated filers (as defined in §240.12b–2 of this chapter):

(A) 135 days for fiscal years ending on or after December 15, 2002 and before December 15, 2004;

(B) 130 days for fiscal years ending on or after December 15, 2004 and before December 15, 2005; and

(C) 125 days for fiscal years ending on or after December 15, 2005; and

(ii) 135 days for all other registrants.

(2) For purposes of paragraph (b) of this section, the number of days shall be:

(i) For accelerated filers (as defined in §240.12b–2 of this chapter):

(A) 90 days for fiscal years ending on or after December 15, 2002 and before December 15, 2003;

(B) 75 days for fiscal years ending on or after December 15, 2003 and before December 15, 2004; and

(C) 60 days for fiscal years ending on or after December 15, 2004; and

(ii) 90 days for all other registrants.

[45 FR 62687, Sept. 25, 1980, as amended at 46 FR 12491, Feb. 17, 1981; 46 FR 36125, July 14, 1981; 47 FR 54767, Dec. 6, 1982; 54 FR 10316, Mar. 13, 1989; 56 FR 30053, July 1, 1991; 57 FR 45292, Oct. 1, 1992; 59 FR 65636, Dec. 20, 1994; 64 FR 53909, Oct. 5, 1999; 67 FR 58504, Sept. 16, 2002]

§ 210.3–13 Filing of other financial statements in certain cases.

The Commission may, upon the informal written request of the registrant, and where consistent with the protection of investors, permit the omission of one or more of the financial statements herein required or the filing in substitution therefor of appropriate statements of comparable character. The Commission may also by informal written notice require the filing of other financial statements in addition to, or in substitution for, the statements herein required in any case where such statements are necessary or appropriate for an adequate presentation of the financial condition of any person whose financial statements are required, or whose statements are otherwise necessary for the protection of investors.

§ 210.3–14 Special instructions for real estate operations to be acquired.

(a) If, during the period for which income statements are required, the registrant has acquired one or more properties which in the aggregate are significant, or since the date of the latest balance sheet required has acquired or proposes to acquire one or more properties which in the aggregate are significant, the following shall be furnished with respect to such properties:

(1) Audited income statements (not including earnings per unit) for the three most recent fiscal years, which shall exclude items not comparable to the proposed future operations of the property such as mortgage interest, leasehold rental, depreciation, corporate expenses and Federal and state income taxes: *Provided, however,* That such audited statements need be presented for only the most recent fiscal year if

(i) The property is not acquired from a related party;

(ii) Material factors considered by the registrant in assessing the property are described with specificity in the filing with regard to the property, including sources of revenue (including, but not limited to, competition in the rental market, comparative rents, occupancy rates) and expense (including, but not limited to, utility rates, ad valorem tax rates, maintenance expenses, capital improvements anticipated); and

(iii) The registrant indicates in the appropriate filing that, after reasonable inquiry, the registrant is not aware of any material factors relating to that specific property other than those discussed in response to paragraph (a)(1)(ii) of this section that would cause the reported financial information not to be necessarily indicative of future operating results.

NOTE: The discussion of material factors considered should be combined with that required by Item 15 of Form S–11.

(2) If the property is to be operated by the registrant, there shall be furnished a statement showing the estimated taxable operating results of the registrant based on the most recent twelve month period including such adjustments as can be factually supported. If the property is to be acquired subject to a net lease the estimated taxable operating results shall be based on the rent to be paid for the first year of the lease. In either case, the estimated amount of cash to be made available by operations shall be shown. There shall be stated in an introductory paragraph the principal assumptions which have been made in preparing the statements of estimated taxable operating results and cash to be made available by operations.

(3) If appropriate under the circumstances, there shall be given in tablular form for a limited number of years the estimated cash distribution per unit showing the portion thereof reportable as taxable income and the portion representing a return of capital together with an explanation of annual variations, if any. If taxable net income per unit will become greater than the cash available for distribution per unit, that fact and approximate year of occurrence shall be stated, if significant.

(b) Information required by this section is not required to be included in a filing on Form 10–K and Form 10–KSB.

(Secs. 7, 10, 19(a), 48 Stat. 78, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 8, 68 Stat 685; sec. 308(a)(2), 90 Stat. 57; secs. 13, 15(d), 23(a), 48 Stat. 894, 895, 901; sec. 203(a), 49 Stat. 704; secs. 3, 8, 49 Stat. 1377, 1379; secs. 4, 6, 78 Stat. 570–574; sec. 2, 82 Stat. 454; secs. 1, 2, 84 Stat. 1497; secs. 10, 18, 89 Stat. 119, 155; sec. 308(b), 90 Stat. 57; secs. 202–204, 91 Stat. 1494, 1498–1500; 15 U.S.C. 77g, 77j, 77s(a), 78m, 78o(d), 78w(a))

[45 FR 63687, Sept. 25, 1980, as amended at 47 FR 25122, June 10, 1982]

§210.3–15 Special provisions as to real estate investment trusts.

(a)(1) The income statement prepared pursuant to §210.5–03 shall include the following additional captions between those required by §210.5–03.15 and 16: (i) Income or loss before gain or loss on sale of properties, extraordinary items and cumulative effects of accounting changes, and (ii) gain or loss on sale of properties, less applicable income tax.

(2) The balance sheet required by §210.5–02 shall set forth in lieu of the captions required by §210.5–02.31(a)(3): (i) The balance of undistributed income from other than gain or loss on sale of properties and (ii) accumulated undistributed net realized gain or loss on sale of properties. The information specified in §210.3–04 shall be modified similarly.

(b) The trust's status as a *real estate investment trust* under applicable provisions of the Internal Revenue Code as amended shall be stated in a note referred to in the appropriate statements. Such note shall also indicate briefly the principal present assumptions on which the trust has relied in making or not making provisons for Federal income taxes.

(c) The tax status of distributions per unit shall be stated (e.g., ordinary income, capital gain, return of capital).

[45 FR 63687, Sept. 25, 1980, as amended at 50 FR 49532, Dec. 3, 1985]

§210.3–16 Financial statements of affiliates whose securities collateralize an issue registered or being registered.

(a) For each of the registrant's affiliates whose securities constitute a substantial portion of the collateral for any class of securities registered or being registered, there shall be filed the financial statements that would be required if the affiliate were a registrant and required to file financial statements. However, financial statements need not be filed pursuant to this section for any person whose statements are otherwise separately included in the filing on an individual basis or on a basis consolidated with its subsidiaries.

(b) For the purposes of this section, securities of a person shall be deemed to constitute a substantial portion of collateral if the aggregate principal amount, par value, or book value of the securities as carried by the registrant, or the market value of such securities, whichever is the greatest, equals 20 percent or more of the principal amount of the secured class of securities.

[65 FR 51710, Aug. 24, 2000]

§210.3–17 Financial statements of natural persons.

(a) In lieu of the financial statements otherwise required, a natural person may file an unaudited balance sheet as of a date within 90 days of date of filing and unaudited statements of income for each of the three most recent fiscal years.

(b) Financial statements conforming with the instructions as to financial statements of subsidiaries not consolidated and 50 percent or less owned persons under §210.3–09(a) shall be separately presented for: (1) Each business owned as a sole proprietor, (2) each partnership, business trust, unincorporated association, or similar business organization of which the person holds a controlling interest and (3) each corporation of which the person, directly or indirectly, owns securities representing more than 50 percent of the voting power.

(c) Separate financial statements may be omitted, however, for each corporation, business trust, unincorporated association, or similar business organization if the person's total investment in such entity does not exceed 5 percent of his total assets *and* the person's total income from such entity does not exceed 5 percent of his

gross income; *Provided*, that the person's aggregate investment in and income from all such omitted entities shall not exceed 15 percent of his total assets and gross income, respectively.

[46 FR 12491, Feb. 17, 1981, as amended at 50 FR 25215, June 18, 1985]

§ 210.3–18 Special provisions as to registered management investment companies and companies required to be registered as management investment companies.

(a) For filings by registered management investment companies, the following financial statements shall be filed:

(1) An audited balance sheet or statement of assets and liabilities as of the end of the most recent fiscal year;

(2) An audited statement of operations for the most recent fiscal year conforming to the requirements of § 210.6–07.

(3) An audited statement of cash flows for the most recent fiscal year if necessary to comply with generally accepted accounting principles. (Further references in this rule to the requirement for such statement are likewise applicable only to the extent that they are consistent with the requirements of generally accepted accounting principles.)

(4) Audited statements of changes in net assets conforming to the requirements of § 210.6–09 for the two most recent fiscal years.

(b) If the filing is made within 60 days after the end of the registrant's fiscal year and audited financial statements for the most recent fiscal year are not available, the balance sheet or statement of assets and liabilities may be as of the end of the preceding fiscal year and the filing shall include an additional balance sheet or statement of assets and liabilities as of an interim date within 245 days of the date of filing. In addition, the statements of operations and cash flows (if required by generally accepted accounting principles) shall be provided for the preceding fiscal year and the statement of changes in net assets shall be provided for the two preceding fiscal years and each of the statements shall be provided for the interim period between the end of the preceding fiscal year and the date of the most recent balance sheet or statement of assets and liabilities being filed. Financial statements for the corresponding period of the preceding fiscal year need not be provided.

(c) If the most current balance sheet or statement of assets and liabilities in a filing is as of a date 245 days or more prior to the date the filing is expected to become effective, the financial statements shall be updated with a balance sheet or statement of assets and liabilities as of an interim date within 245 days. In addition, the statements of operations, cash flows, and changes in net assets shall be provided for the interim period between the end of the most recent fiscal year for which a balance sheet or statement of assets and liabilities is presented and the date of the most recent interim balance sheet or statement of assets and liabilities filed.

(d) Interim financial statements provided in accordance with these requirements may be unaudited but shall be presented in the same detail as required by §§ 210.6–01 to 210.6–10. When unaudited financial statements are presented in a registration statement, they shall include the statement required by § 210.3–03(d).

(Secs. 7 and 19a of the Securities Act, 15 U.S.C. 77g, 77s(a), 77aa(25)(26); secs. 12, 13, 14, 15(d), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a), secs. 5(b), 10(a), 14, 20(a) of the Public Utility Holding Company Act, 15 U.S.C. 79e(a), 79n, 79t(a); secs. 8, 20, 30, 31(c), 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–8, 80a–20, 80a–29, 80a–30(c), 80a–37(a))

[46 FR 36125, July 14, 1981; 46 FR 46795, Sept. 22, 1981, as amended at 47 FR 29837, July 9, 1982; 47 FR 56838, Dec. 21, 1982; 57 FR 45292, Oct. 1, 1992]

§ 210.3–19 [Reserved]

§ 210.3–20 Currency for financial statements of foreign private issuers.

(a) A foreign private issuer, as defined in § 230.405 of this chapter, shall state amounts in its primary financial statements in the currency which it deems appropriate.

(b) The currency in which amounts in the financial statements are stated shall be disclosed prominently on the face of the financial statements. If

dividends on publicly-held equity securities will be declared in a currency other than the reporting currency, a note to the financial statements shall identify that currency. If there are material exchange restrictions or controls relating to the issuer's reporting currency, the currency of the issuer's domicile, or the currency in which the issuer will pay dividends, prominent disclosure of this fact shall be made in the financial statements. If the reporting currency is not the U.S. dollar, dollar-equivalent financial statements or convenience translations shall not be presented, except a translation may be presented of the most recent fiscal year and any subsequent interim period presented using the exchange rate as of the most recent balance sheet included in the filing, except that a rate as of the most recent practicable date shall be used if materially different.

(c) If the financial statements of a foreign private issuer are stated in a currency of a country that has experienced cumulative inflationary effects exceeding a total of 100 percent over the most recent three year period, and have not been recast or otherwise supplemented to include information on a historical cost/constant currency or current cost basis prescribed or permitted by appropriate authoritative standards, the issuer shall present supplementary information to quantify the effects of changing prices upon its financial position and results of operations.

(d) Notwithstanding the currency selected for reporting purposes, the issuer shall measure separately its own transactions, and those of each of its material operations (*e.g.*, branches, divisions, subsidiaries, joint ventures, and similar entities) that is included in the issuer's consolidated financial statements and not located in a hyperinflationary environment, using the particular currency of the primary economic environment in which the issuer or the operation conducts its business. Assets and liabilities so determined shall be translated into the reporting currency at the exchange rate at the balance sheet date; all revenues, expenses, gains, and losses shall be translated at the exchange rate existing at the time of the transaction or, if appropriate, a weighted average of the exchange rates during the period; and all translation effects of exchange rate changes shall be included as a separate component (''cumulative translation adjustment'') of shareholder's equity. For purposes of this paragraph, the currency of an operation's primary economic environment is normally the currency in which cash is primarily generated and expended; a hyperinflationary environment is one that has cumulative inflation of approximately 100% or more over the most recent three year period. Departures from the methodology presented in this paragraph shall be quantified pursuant to Item 17(c)(2) of Form 20–F (§249.220f of this chapter).

(e) The issuer shall state its primary financial statements in the same currency for all periods for which financial information is presented. If the financial statements are stated in a currency that is different from that used in financial statements previously filed with the Commission, the issuer shall recast its financial statements as if the newly adopted currency had been used since at least the earliest period presented in the filing. The decision to change and the reason for the change in the reporting currency shall be disclosed in a note to the financial statements in the period in which the change occurs.

[59 FR 65631, Dec. 20, 1994, as amended at 64 FR 53908, Oct. 5, 1999]

CONSOLIDATED AND COMBINED FINANCIAL STATEMENTS

§210.3A–01 Application of §210.3A–01 to §210.3A–05.

Sections 210.3A–01 to 210.3A–05 shall govern the presentation of consolidated and combined financial statements.

[44 FR 19386, Apr. 3, 1979. Redesignated at 45 FR 63687, Sept. 25, 1980, and amended at 50 FR 25215, June 18, 1985]

§210.3A–02 Consolidated financial statements of the registrant and its subsidiaries.

In deciding upon consolidation policy, the registrant must consider what financial presentation is most meaningful in the circumstances and should follow in the consolidated financial

statements principles of inclusion or exclusion which will clearly exhibit the financial position and results of operations of the registrant. There is a presumption that consolidated statements are more meaningful than separate statements and that they are usually necessary for a fair presentation when one entity directly or indirectly has a controlling financial interest in another entity. Other particular facts and circumstances may require combined financial statements, an equity method of accounting, or valuation allowances in order to achieve a fair presentation. In any case, the disclosures required by § 210.3A–03 should clearly explain the accounting policies followed by the registrant in this area, including the circumstances involved in any departure from the normal practice of consolidating majority owned subsidiaries and not consolidating entities that are less than majority owned. Among the factors that the registrant should consider in determining the most meaningful presentation are the following:

(a) *Majority ownership:* Generally, registrants shall consolidate entities that are majority owned and shall not consolidate entities that are not majority owned. The determination of *majority ownership* requires a careful analysis of the facts and circumstances of a particular relationship among entities. In rare situations, consolidation of a majority owned subsidiary may not result in a fair presentation, because the registrant, in substance, does not have a controlling financial interest (for example, when the subsidiary is in legal reorganization or in bankruptcy, or when control is likely to be temporary). In other situations, consolidation of an entity, notwithstanding the lack of technical majority ownership, is necessary to present fairly the financial position and results of operations of the registrant, because of the existence of a parent-subsidiary relationship by means other than record ownership of voting stock.

(b) *Different fiscal periods:* Generally, registrants shall not consolidate any entity whose financial statements are as of a date or for periods substantially different from those of the registrant. Rather, the earnings or losses of such entities should be reflected in the registrant's financial statements on the equity method of accounting. However:

(1) A difference in fiscal periods does not of itself justify the exclusion of an entity from consolidation. It ordinarily is feasible for such entity to prepare, for consolidation purposes, statements for a period which corresponds with or closely approaches the fiscal year of the registrant. Where the difference is not more than 93 days, it is usually acceptable to use, for consolidation purposes, such entity's statements for its fiscal period. Such difference, when it exists, should be disclosed as follows: the closing date of the entity should be expressly indicated, and the necessity for the use of different closing dates should be briefly explained. Furthermore, recognition should be given by disclosure or otherwise to the effect of intervening events which materially affect the financial position or results of operations.

(2) Notwithstanding the 93-day provision specified in paragraph (b)(1) of this section, in connection with the retroactive combination of financial statements of entities following a *pooling of interests*, the financial statements of the constituents may be combined even if their respective fiscal periods do not end within 93 days, except that the financial statements for the latest fiscal year shall be recast to dates which do not differ by more than 93 days, if practicable. Disclosure shall be made of the periods combined and of the sales or revenues, net income before extraordinary items and net income of any interim periods excluded from or included more than once in results of operations as a result of such recasting.

(c) *Bank Holding Company Act:* Registrants shall not consolidate any subsidiary or group of subsidiaries of a registrant subject to the Bank Holding Company Act of 1956 as amended as to which (1) a decision requiring divestiture has been made, or (2) there is substantial likelihood that divestiture will be necessary in order to comply with provisions of the Bank Holding Company Act.

(d) *Foreign subsidiaries:* Due consideration shall be given to the propriety of consolidating with domestic corporations foreign subsidiaries which are operated under political, economic or

currency restrictions. If consolidated, disclosure should be made as to the effect, insofar as this can reasonably be determined, of foreign exchange restrictions upon the consolidated financial position and operating results of the registrant and its subsidiaries.

[51 FR 17330, May 12, 1986]

§210.3A–03 Statement as to principles of consolidation or combination followed.

(a) A brief description of the principles followed in consolidating or combining the separate financial statements, including the principles followed in determining the inclusion or exclusion of (1) subsidiaries in consolidated or combined financial statements and (2) companies in consolidated or combined financial statements, shall be stated in the notes to the respective financial statements.

(b) As to each consolidated financial statement and as to each combined financial statement, if there has been a change in the persons included or excluded in the corresponding statement for the preceding fiscal period filed with the Commission which has a material effect on the financial statements, the persons included and the persons excluded shall be disclosed. If there have been any changes in the respective fiscal periods of the persons included made during the periods of the report which have a material effect on the financial statements, indicate clearly such changes and the manner of treatment.

[37 FR 14597, July 21, 1972. Redesignated at 45 FR 63687, Sept. 25, 1980, and 46 FR 56179, Nov. 16, 1981]

§210.3A–04 Intercompany items and transactions.

In general, there shall be eliminated intercompany items and transactions between persons included in the (a) consolidated financial statements being filed and, as appropriate, (b) unrealized intercompany profits and losses on transactions between persons for which financial statements are being filed and persons the investment in which is presented in such statements by the equity method. If such eliminations are not made, a statement of the reasons and the methods of treatment shall be made.

[37 FR 14597, July 21, 1972. Redesignated at 46 FR 56179, Nov. 16, 1981]

§210.3A–05 Special requirements as to public utility holding companies.

There shall be shown in the consolidated balance sheet of a public utility holding company the difference between the amount at which the parent's investment is carried and the underlying book equity of subsidiaries as at the respective dates of acquisition.

[37 FR 14597, July 21, 1972. Redesignated at 45 FR 63687, Sept. 25, 1980, and 46 FR 56179, Nov. 16, 1981]

RULES OF GENERAL APPLICATION

SOURCE: Sections 210.4–01 to 210.4–10 appear at 45 FR 63669, Sept. 25, 1980, unless otherwise noted.

§210.4–01 Form, order, and terminology.

(a) Financial statements should be filed in such form and order, and should use such generally accepted terminology, as will best indicate their significance and character in the light of the provisions applicable thereto. The information required with respect to any statement shall be furnished as a minimum requirement to which shall be added such further material information as is necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

(1) Financial statements filed with the Commission which are not prepared in accordance with generally accepted accounting principles will be presumed to be misleading or inaccurate, despite footnote or other disclosures, unless the Commission has otherwise provided. This article and other articles of Regulation S–X provide clarification of certain disclosures which must be included in any event, in financial statements filed with the Commission.

(2) In all filings of foreign private issuers (see §230.405 of this chapter), except as stated otherwise in the applicable form, the financial statements may be prepared according to a comprehensive body of accounting principles other than those generally accepted in

the United States if a reconciliation to United States generally accepted accounting principles and the provisions of Regulation S–X of the type specified in Item 18 of Form 20–F (§ 249.220f of this chapter) is also filed as part of the financial statements. Alternatively, the financial statements may be prepared according to United States generally accepted accounting principles.

(b) All money amounts required to be shown in financial statements may be expressed in whole dollars or multiples thereof, as appropriate: *Provided,* That, when stated in other than whole dollars, an indication to that effect is inserted immediately beneath the caption of the statement or schedule, at the top of the money columns, or at an appropriate point in narrative material.

(c) Negative amounts (red figures) shall be shown in a manner which clearly distinguishes the negative attribute. When determining methods of display, consideration should be given to the limitations of reproduction and microfilming processes.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78*l*, 78m, 78*o*(d), 78w(a), 80a–8, 80a–29, 80a–30(c), 80a–37(a))

[45 FR 63669, Sept. 25, 1980, as amended at 47 FR 54767, Dec. 6, 1982]

§ 210.4–02 Items not material.

If the amount which would otherwise be required to be shown with respect to any item is not material, it need not be separately set forth. The combination of insignificant amounts is permitted.

§ 210.4–03 Inapplicable captions and omission of unrequired or inapplicable financial statements.

(a) No caption should be shown in any financial statement as to which the items and conditions are not present.

(b) Financial statements not required or inapplicable because the required matter is not present need not be filed.

(c) The reasons for the omission of any required financial statements shall be indicated.

§ 210.4–04 Omission of substantially identical notes.

If a note covering substantially the same subject matter is required with respect to two or more financial statements relating to the same or affiliated persons, for which separate sets of notes are presented, the required information may be shown in a note to only one of such statements: *Provided,* That a clear and specific reference thereto is made in each of the other statements with respect to which the note is required.

§ § 210.4–05—210.04–06 [Reserved]

§ 210.4–07 Discount on shares.

Discount on shares, or any unamortized balance thereof, shall be shown separately as a deduction from the applicable account(s) as circumstances require.

§ 210.4–08 General notes to financial statements.

If applicable to the person for which the financial statements are filed, the following shall be set forth on the face of the appropriate statement or in appropriately captioned notes. The information shall be provided for each statement required to be filed, except that the information required by paragraphs (b), (c), (d), (e) and (f) shall be provided as of the most recent audited balance sheet being filed and for paragraph (j) as specified therein. When specific statements are presented separately, the pertinent notes shall accompany such statements unless cross-referencing is appropriate.

(a) *Principles of consolidation or combination.* With regard to consolidated or combined financial statements, refer to §§ 210.3A–01 to 3A–08 for requirements for supplemental information in notes to the financial statements.

(b) *Assets subject to lien.* Assets mortgaged, pledged, or otherwise subject to

lien, and the approximate amounts thereof, shall be designated and the obligations collateralized briefly identified.

(c) *Defaults.* The facts and amounts concerning any default in principal, interest, sinking fund, or redemption provisions with respect to any issue of securities or credit agreements, or any breach of covenant of a related indenture or agreement, which default or breach existed at the date of the most recent balance sheet being filed and which has not been subsequently cured, shall be stated in the notes to the financial statements. If a default or breach exists but acceleration of the obligation has been waived for a stated period of time beyond the date of the most recent balance sheet being filed, state the amount of the obligation and the period of the waiver.

(d) *Preferred shares.* (1) Aggregate preferences on involuntary liquidation, if other than par or stated value, shall be shown parenthetically in the equity section of the balance sheet.

(2) Disclosure shall be made of any restriction upon retained earnings that arises from the fact that upon involuntary liquidation the aggregate preferences of the preferred shares exceeds the par or stated value of such shares.

(e) *Restrictions which limit the payment of dividends by the registrant.* (1) Describe the most significant restrictions, other than as reported under paragraph (d) of this section, on the payment of dividends by the registrant, indicating their sources, their pertinent provisions, and the amount of retained earnings or net income restricted or free of restrictions.

(2) Disclose the amount of consolidated retained earnings which represents undistributed earnings of 50 percent or less owned persons accounted for by the equity method.

(3) The disclosures in paragraphs (e)(3) (i) and (ii) in this section shall be provided when the restricted net assets of consolidated and unconsolidated subsidiaries and the parent's equity in the undistributed earnings of 50 percent or less owned persons accounted for by the equity method together exceed 25 percent of consolidated net assets as of the end of the most recently completed fiscal year. For purposes of this test, restricted net assets of subsidiaries shall mean that amount of the registrant's proportionate share of net assets (after intercompany eliminations) reflected in the balance sheets of its consolidated and unconsolidated subsidiaries as of the end of the most recent fiscal year which may not be transferred to the parent company in the form of loans, advances or cash dividends by the subsidiaries without the consent of a third party (i.e., lender, regulatory agency, foreign government, etc.). Not all limitations on transferability of assets are considered to be restrictions for purposes of this test, which considers only specific third party restrictions on the ability of subsidiaries to transfer funds outside of the entity. For example, the presence of subsidiary debt which is secured by certain of the subsidiary's assets does not constitute a restriction under this rule. However, if there are any loan provisions prohibiting dividend payments, loans or advances to the parent by a subsidiary, these are considered restrictions for purposes of computing restricted net assets. When a loan agreement requires that a subsidiary maintain certain working capital, net tangible asset, or net asset levels, or where formal compensating arrangements exist, there is considered to be a restriction under the rule because the lender's intent is normally to preclude the transfer by dividend or otherwise of funds to the parent company. Similarly, a provision which requires that a subsidiary reinvest all of its earnings is a restriction, since this precludes loans, advances or dividends in the amount of such undistributed earnings by the entity. Where restrictions on the amount of funds which may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary shall be used. Redeemable preferred stocks (§210.5–02.28) and minority interests shall be deducted in computing net assets for purposes of this test.

(i) Describe the nature of any restrictions on the ability of consolidated subsidiaries and unconsolidated subsidiaries to transfer funds to the registrant in the form of cash dividends,

loans or advances (i.e., borrowing arrangements, regulatory restraints, foreign government, etc.).

(ii) Disclose separately the amounts of such restricted net assets for unconsolidated subsidiaries and consolidated subsidiaries as of the end of the most recently completed fiscal year.

(f) *Significant changes in bonds, mortgages and similar debt.* Any significant changes in the authorized or issued amounts of bonds, mortgages and similar debt since the date of the latest balance sheet being filed for a particular person or group shall be stated.

(g) *Summarized financial information of subsidiaries not consolidated and 50 percent or less owned persons.* (1) The summarized information as to assets, liabilities and results of operations as detailed in § 210.1–02(bb) shall be presented in notes to the financial statements on an individual or group basis for:

(i) Subsidiaries not consolidated; or

(ii) For 50 percent or less owned persons accounted for by the equity method by the registrant or by a subsidiary of the registrant, if the criteria in § 210.1–02(w) for a significant subsidiary are met:

(A) Individually by any subsidiary not consolidated or any 50% or less owned person; or

(B) On an aggregated basis by any combination of such subsidiaries and persons.

(2) Summarized financial information shall be presented insofar as is practicable as of the same dates and for the same periods as the audited consolidated financial statements provided and shall include the disclosures prescribed by § 210.1–02(bb). Summarized information of subsidiaries not consolidated shall not be combined for disclosure purposes with the summarized information of 50 percent or less owned persons.

(h) *Income tax expense.* (1) Disclosure shall be made in the income statement or a note thereto, of (i) the components of income (loss) before income tax expense (benefit) as either domestic or foreign; (ii) the components of income tax expense, including (A) taxes currently payable and (B) the net tax effects, as applicable, of timing differences (indicate separately the amount of the estimated tax effect of each of the various types of timing differences, such as depreciation, warranty costs, etc., where the amount of each such tax effect exceeds five percent of the amount computed by multiplying the income before tax by the applicable statutory Federal income tax rate; other differences may be combined.)

NOTE: Amounts applicable to United States Federal income taxes, to foreign income taxes and the other income taxes shall be stated separately for each major component. Amounts applicable to foreign income (loss) and amounts applicable to foreign or other income taxes which are less than five percent of the total of income before taxes or the component of tax expense, respectively, need not be separately disclosed. For purposes of this rule, foreign income (loss) is defined as income (loss) generated from a registrant's foreign operations, i.e., operations that are *located outside* of the registrant's home country.

(2) Provide a reconciliation between the amount of reported total income tax expense (benefit) and the amount computed by multiplying the income (loss) before tax by the applicable statutory Federal income tax rate, showing the estimated dollar amount of each of the underlying causes for the difference. If no individual reconciling item amounts to more than five percent of the amount computed by multiplying the income before tax by the applicable statutory Federal income tax rate, and the total difference to be reconciled is less than five percent of such computed amount, no reconciliation need be provided unless it would be significant in appraising the trend of earnings. Reconciling items that are individually less than five percent of the computed amount may be aggregated in the reconciliation. The reconciliation may be presented in percentages rather than in dollar amounts. Where the reporting person is a foreign entity, the income tax rate in that person's country of domicile should normally be used in making the above computation, but different rates should not be used for subsidiaries or other segments of a reporting entity. When the rate used by a reporting person is other than the United States Federal corporate income tax rate, the

rate used and the basis for using such rate shall be disclosed.

(3) Paragraphs (h) (1) and (2) of this section shall be applied in the following manner to financial statements which reflect the adoption of Statement of Financial Accounting Standards 109, Accounting for Income Taxes.

(i) The disclosures required by paragraph (h)(1)(ii) of this section and by the parenthetical instruction at the end of paragraph (h)(1) of this section and by the introductory sentence of paragraph (h)(2) of this section shall not apply.

(ii) The instructional note between paragraphs (h) (1) and (2) of this section and the balance of the requirements of paragraphs (h) (1) and (2) of this section shall continue to apply.

(i) *Warrants or rights outstanding.* Information with respect to warrants or rights outstanding at the date of the related balance sheet shall be set forth as follows:

(1) Title of issue of securities called for by warrants or rights.

(2) Aggregate amount of securities called for by warrants or rights outstanding.

(3) Date from which warrants or rights are exercisable.

(4) Price at which warrant or right is exercisable.

(j) [Reserved]

(k) *Related party transactions which affect the financial statements.* (1) Related party transactions should be identified and the amounts stated on the face of the balance sheet, income statement, or statement of cash flows.

(2) In cases where separate financial statements are presented for the registrant, certain investees, or subsidiaries, separate disclosure shall be made in such statements of the amounts in the related consolidated financial statements which are (i) eliminated and (ii) not eliminated. Also, any intercompany profits or losses resulting from transactions with related parties and not eliminated and the effects thereof shall be disclosed.

(l) [Reserved]

(m) *Repurchase and reverse repurchase agreements*—(1) *Repurchase agreements (assets sold under agreements to repurchase).* (i) If, as of the most recent balance sheet date, the carrying amount (or market value, if higher than the carrying amount or if there is no carrying amount) of the securities or other assets sold under agreements to repurchase (*repurchase agreements*) exceeds 10% of total assets, disclose separately in the balance sheet the aggregate amount of liabilities incurred pursuant to repurchase agreements including accrued interest payable thereon.

(ii)(A) If, as of the most recent balance sheet date, the carrying amount (or market value, if higher than the carrying amount) of securities or other assets sold under repurchase agreements, other than securities or assets specified in paragraph (m)(1)(ii)(B) of this section, exceeds 10% of total assets, disclose in an appropriately captioned footnote containing a tabular presentation, segregated as to type of such securities or assets sold under agreements to repurchase (e.g., U.S. Treasury obligations, U.S. Government agency obligations and loans), the following information as of the balance sheet date for each such agreement or group of agreements (other than agreements involving securities or assets specified in paragraph (m)(1)(ii)(B) of this section) maturing (*1*) overnight; (*2*) term up to 30 days; (*3*) term of 30 to 90 days; (*4*) term over 90 days and (*5*) demand:

(*i*) The carrying amount and market value of the assets sold under agreement to repurchase, including accrued interest plus any cash or other assets on deposit under the repurchase agreements; and

(*ii*) The repurchase liability associated with such transaction or group of transactions and the interest rate(s) thereon.

(B) For purposes of paragraph (m)(1)(ii)(A) of this section only, do not include securities or other assets for which unrealized changes in market value are reported in current income or which have been obtained under reverse repurchase agreements.

(iii) If, as of the most recent balance sheet date, the amount at risk under repurchase agreements with any individual counterparty or group of related counterparties exceeds 10% of stockholders' equity (or in the case of investment companies, net asset value), disclose the name of each such

counterparty or group of related counterparties, the amount at risk with each, and the weighted average maturity of the repurchase agreements with each. The amount at risk under repurchase agreements is defined as the excess of carrying amount (or market value, if higher than the carrying amount or if there is no carrying amount) of the securities or other assets sold under agreement to repurchase, including accrued interest plus any cash or other assets on deposit to secure the repurchase obligation, over the amount of the repurchase liability (adjusted for accrued interest). (Cash deposits in connection with repurchase agreements shall not be reported as unrestricted cash pursuant to rule 5–02.1.)

(2) *Reverse repurchase agreements (assets purchased under agreements to resell).* (i) If, as of the most recent balance sheet date, the aggregate carrying amount of *reverse repurchase agreements* (securities or other assets purchased under agreements to resell) exceeds 10% of total assets: (A) Disclose separately such amount in the balance sheet; and (B) disclose in an appropriately captioned footnote: (*1*) The registrant's policy with regard to taking possession of securities or other assets purchased under agreements to resell; and (*2*) whether or not there are any provisions to ensure that the market value of the underlying assets remains sufficient to protect the registrant in the event of default by the counterparty and if so, the nature of those provisions.

(ii) If, as of the most recent balance sheet date, the amount at risk under reverse repurchase agreements with any individual counterparty or group of related counterparties exceeds 10% of stockholders' equity (or in the case of investment companies, net asset value), disclose the name of each such counterparty or group of related counterparties, the amount at risk with each, and the weighted average maturity of the reverse repurchase agreements with each. The amount at risk under reverse repurchase agreements is defined as the excess of the carrying amount of the reverse repurchase agreements over the market value of assets delivered pursuant to the agreements by the counterparty to the registrant (or to a third party agent that has affirmatively agreed to act on behalf of the registrant) and not returned to the counterparty, exept in exchange for their approximate market value in a separate transaction.

(n) *Accounting policies for certain derivative instruments.* Disclosures regarding accounting policies shall include descriptions of the accounting policies used for derivative financial instruments and derivative commodity instruments and the methods of applying those policies that materially affect the determination of financial position, cash flows, or results of operation. This description shall include, to the extent material, each of the following items:

(1) A discussion of each method used to account for derivative financial instruments and derivative commodity instruments;

(2) The types of derivative financial instruments and derivative commodity instruments accounted for under each method; (3) The criteria required to be met for each accounting method used, including a discussion of the criteria required to be met for hedge or deferral accounting and accrual or settlement accounting (*e.g.,* whether and how risk reduction, correlation, designation, and effectiveness tests are applied);

(4) The accounting method used if the criteria specified in paragraph (n)(3) of this section are not met;

(5) The method used to account for terminations of derivatives designated as hedges or derivatives used to affect directly or indirectly the terms, fair values, or cash flows of a designated item;

(6) The method used to account for derivatives when the designated item matures, is sold, is extinguished, or is terminated. In addition, the method used to account for derivatives designated to an anticipated transaction, when the anticipated transaction is no longer likely to occur; and

(7) Where and when derivative financial instruments and derivative commodity instruments, and their related gains and losses, are reported in the statements of financial position, cash flows, and results of operations.

INSTRUCTIONS TO PARAGRAPH (N): 1. For purposes of this paragraph (n), derivative financial instruments and derivative commodity instruments (collectively referred to as ''derivatives'') are defined as follows:

(i) *Derivative financial instruments* have the same meaning as defined by generally accepted accounting principles (see, *e.g.,* Financial Accounting Standards Board (''FASB''), *Statement of Financial Accounting Standards No. 119, ''Disclosure about Derivative Financial Instruments and Fair Value of Financial Instruments,''* (''FAS 119'') paragraphs 5–7, (October 1994)), and include futures, forwards, swaps, options, and other financial instruments with similar characteristics.

(ii) *Derivative commodity instruments* include, to the extent such instruments are not derivative financial instruments, commodity futures, commodity forwards, commodity swaps, commodity options, and other commodity instruments with similar characteristics that are permitted by contract or business custom to be settled in cash or with another financial instrument. For purposes of this paragraph, settlement in cash includes settlement in cash of the net change in value of the derivative commodity instrument (*e.g.,* net cash settlement based on changes in the price of the underlying commodity).

2. For purposes of paragraphs (n)(2), (n)(3), (n)(4), and (n)(7), the required disclosures should address separately derivatives entered into for trading purposes and derivatives entered into for purposes other than trading. For purposes of this paragraph, *trading purposes* has the same meaning as defined by generally accepted accounting principles (see, *e.g.,* FAS 119, paragraph 9a (October 1994)).

3. For purposes of paragraph (n)(6), *anticipated transactions* means transactions (other than transactions involving existing assets or liabilities or transactions necessitated by existing firm commitments) an enterprise expects, but is not obligated, to carry out in the normal course of business (see, *e.g.,* FASB, *Statement of Financial Accounting Standards No. 80, ''Accounting for Futures Contracts,''* paragraph 9, (August 1984)).

4. Registrants should provide disclosures required under paragraph (n) in filings with the Commission that include financial statements of fiscal periods ending after June 15, 1997.

[45 FR 63669, Sept. 25, 1980, as amended at 46 FR 56179, Nov. 16, 1981; 50 FR 25215, June 18, 1985; 50 FR 49532, Dec. 3, 1985; 51 FR 3770, Jan. 30, 1986; 57 FR 45293, Oct. 1, 1992; 59 FR 65636, Dec. 20, 1994; 62 FR 6063, Feb. 10, 1997]

§210.4–9 [Reserved]

§210.4–10 Financial accounting and reporting for oil and gas producing activities pursuant to the Federal securities laws and the Energy Policy and Conservation Act of 1975.

This section prescribes financial accounting and reporting standards for registrants with the Commission engaged in oil and gas producing activities in filings under the Federal securities laws and for the preparation of accounts by persons engaged, in whole or in part, in the production of crude oil or natural gas in the United States, pursuant to section 503 of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6383) (*EPCA*) and section 11(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 796) (*ESECA*), as amended by section 505 of EPCA. The application of this section to those oil and gas producing operations of companies regulated for ratemaking purposes on an individual-company-cost-of-service basis may, however, give appropriate recognition to differences arising because of the effect of the ratemaking process.

Exemption. Any person exempted by the Department of Energy from any record-keeping or reporting requirements pursuant to section 11(c) of ESECA, as amended, is similarly exempted from the related provisions of this section in the preparation of accounts pursuant to EPCA. This exemption does not affect the applicability of this section to filings pursuant to the Federal securities laws.

DEFINITIONS

(a) *Definitions.* The following definitions apply to the terms listed below as they are used in this section:

(1) *Oil and gas producing activities.* (i) Such activities include:

(A) The search for crude oil, including condensate and natural gas liquids, or natural gas (*oil and gas*) in their natural states and original locations.

(B) The acquisition of property rights or properties for the purpose of further exploration and/or for the purpose of removing the oil or gas from existing reservoirs on those properties.

(C) The construction, drilling and production activities necessary to retrieve oil and gas from its natural reservoirs, and the acquisition, construction, installation, and maintenance of field gathering and storage systems—including lifting the oil and gas to the surface and gathering, treating, field processing (as in the case of processing gas to extract liquid hydrocarbons) and field storage. For purposes of this section, the oil and gas production function shall normally be regarded as terminating at the outlet valve on the lease or field storage tank; if unusual physical or operational circumstances exist, it may be appropriate to regard the production functions as terminating at the first point at which oil, gas, or gas liquids are delivered to a main pipeline, a common carrier, a refinery, or a marine terminal.

(ii) Oil and gas producing activities do not include:

(A) The transporting, refining and marketing of oil and gas.

(B) Activities relating to the production of natural resources other than oil and gas.

(C) The production of geothermal steam or the extraction of hydrocarbons as a by-product of the production of geothermal steam or associated geothermal resources as defined in the Geothermal Steam Act of 1970.

(D) The extraction of hydrocarbons from shale, tar sands, or coal.

(2) *Proved oil and gas reserves.* Proved oil and gas reserves are the estimated quantities of crude oil, natural gas, and natural gas liquids which geological and engineering data demonstrate with reasonable certainty to be recoverable in future years from known reservoirs under existing economic and operating conditions, i.e., prices and costs as of the date the estimate is made. Prices include consideration of changes in existing prices provided only by contractual arrangements, but not on escalations based upon future conditions.

(i) Reservoirs are considered proved if economic producibility is supported by either actual production or conclusive formation test. The area of a reservoir considered proved includes (A) that portion delineated by drilling and defined by gas-oil and/or oil-water contacts, if any, and (B) the immediately adjoining portions not yet drilled, but which can be reasonably judged as economically productive on the basis of available geological and engineering data. In the absence of information on fluid contacts, the lowest known structural occurrence of hydrocarbons controls the lower proved limit of the reservoir.

(ii) Reserves which can be produced economically through application of improved recovery techniques (such as fluid injection) are included in the *proved* classification when successful testing by a pilot project, or the operation of an installed program in the reservoir, provides support for the engineering analysis on which the project or program was based.

(iii) Estimates of proved reserves do not include the following: (A) Oil that may become available from known reservoirs but is classified separately as *indicated additional reserves*; (B) crude oil, natural gas, and natural gas liquids, the recovery of which is subject to reasonable doubt because of uncertainty as to geology, reservoir characteristics, or economic factors; (C) crude oil, natural gas, and natural gas liquids, that may occur in undrilled prospects; and (D) crude oil, natural gas, and natural gas liquids, that may be recovered from oil shales, coal, gilsonite and other such sources.

(3) *Proved developed oil and gas reserves.* Proved developed oil and gas reserves are reserves that can be expected to be recovered through existing wells with existing equipment and operating methods. Additional oil and gas expected to be obtained through the application of fluid injection or other improved recovery techniques for supplementing the natural forces and mechanisms of primary recovery should be included as *proved developed reserves* only after testing by a pilot project or after the operation of an installed program has confirmed through production response that increased recovery will be achieved.

(4) *Proved undeveloped reserves.* Proved undeveloped oil and gas reserves are reserves that are expected to be recovered from new wells on undrilled acreage, or from existing

wells where a relatively major expenditure is required for recompletion. Reserves on undrilled acreage shall be limited to those drilling units offsetting productive units that are reasonably certain of production when drilled. Proved reserves for other undrilled units can be claimed only where it can be demonstrated with certainty that there is continuity of production from the existing productive formation. Under no circumstances should estimates for proved undeveloped reserves be attributable to any acreage for which an application of fluid injection or other improved recovery technique is contemplated, unless such techniques have been proved effective by actual tests in the area and in the same reservoir.

(5) *Proved properties.* Properties with proved reserves.

(6) *Unproved properties.* Properties with no proved reserves.

(7) *Proved area.* The part of a property to which proved reserves have been specifically attributed.

(8) *Field.* An area consisting of a single reservoir or multiple reservoirs all grouped on or related to the same individual geological structural feature and/or stratigraphic condition. There may be two or more reservoirs in a field that are separated vertically by intervening impervious, strata, or laterally by local geologic barriers, or by both. Reservoirs that are associated by being in overlapping or adjacent fields may be treated as a single or common operational field. The geological terms *structural feature* and *stratigraphic condition* are intended to identify localized geological features as opposed to the broader terms of basins, trends, provinces, plays, areas-of-interest, etc.

(9) *Reservoir.* A porous and permeable underground formation containing a natural accumulation of producible oil and/or gas that is confined by impermeable rock or water barriers and is individual and separate from other reservoirs.

(10) *Exploratory well.* A well drilled to find and produce oil or gas in an unproved area, to find a new reservoir in a field previously found to be productive of oil or gas in another reservoir, or to extend a known reservoir. Generally, an exploratory well is any well that is not a development well, a service well, or a stratigraphic test well as those items are defined below.

(11) *Development well.* A well drilled within the proved area of an oil or gas reservoir to the depth of a stratigraphic horizon known to be productive.

(12) *Service well.* A well drilled or completed for the purpose of supporting production in an existing field. Specific purposes of service wells include gas injection, water injection, steam injection, air injection, saltwater disposal, water supply for injection, observation, or injection for insitu combustion.

(13) *Stratigraphic test well.* A drilling effort, geologically directed, to obtain information pertaining to a specific geologic condition. Such wells customarily are drilled without the intention of being completed for hydrocarbon production. This classification also includes tests identified as core tests and all types of expendable holes related to hydrocarbon exploration. Stratigraphic test wells are classified as (i) *exploratory-type,* if not drilled in a proved area, or (ii) *development-type,* if drilled in a proved area.

(14) *Acquisition of properties.* Costs incurred to purchase, lease or otherwise acquire a property, including costs of lease bonuses and options to purchase or lease properties, the portion of costs applicable to minerals when land including mineral rights is purchased in fee, brokers' fees, recording fees, legal costs, and other costs incurred in acquiring properties.

(15) *Exploration costs.* Costs incurred in identifying areas that may warrant examination and in examining specific areas that are considered to have prospects of containing oil and gas reserves, including costs of drilling exploratory wells and exploratory-type stratigraphic test wells. Exploration costs may be incurred both before acquiring the related property (sometimes referred to in part as prospecting costs) and after acquiring the property. Principal types of exploration costs, which include depreciation and applicable operating costs of support equipment and facilities and other costs of exploration activities, are:

(i) Costs of topographical, geographical and geophysical studies, rights of access to properties to conduct those studies, and salaries and other expenses of geologists, geophysical crews, and others conducting those studies. Collectively, these are sometimes referred to as geological and geophysical or *G&G* costs.

(ii) Costs of carrying and retaining undeveloped properties, such as delay rentals, ad valorem taxes on properties, legal costs for title defense, and the maintenance of land and lease records.

(iii) Dry hole contributions and bottom hole contributions.

(iv) Costs of drilling and equipping exploratory wells.

(v) Costs of drilling exploratory-type stratigraphic test wells.

(16) *Development costs.* Costs incurred to obtain access to proved reserves and to provide facilities for extracting, treating, gathering and storing the oil and gas. More specifically, development costs, including depreciation and applicable operating costs of support equipment and facilities and other costs of development activities, are costs incurred to:

(i) Gain access to and prepare well locations for drilling, including surveying well locations for the purpose of determining specific development drilling sites, clearing ground, draining, road building, and relocating public roads, gas lines, and power lines, to the extent necessary in developing the proved reserves.

(ii) Drill and equip development wells, development-type stratigraphic test wells, and service wells, including the costs of platforms and of well equipment such as casing, tubing, pumping equipment, and the wellhead assembly.

(iii) Acquire, construct, and install production facilities such as lease flow lines, separators, treaters, heaters, manifolds, measuring devices, and production storage tanks, natural gas cycling and processing plants, and central utility and waste disposal systems.

(iv) Provide improved recovery systems.

(17) *Production costs.* (i) Costs incurred to operate and maintain wells and related equipment and facilities, including depreciation and applicable operating costs of support equipment and facilities and other costs of operating and maintaining those wells and related equipment and facilities. They become part of the cost of oil and gas produced. Examples of production costs (sometimes called lifting costs) are:

(A) Costs of labor to operate the wells and related equipment and facilities.

(B) Repairs and maintenance.

(C) Materials, supplies, and fuel consumed and supplies utilized in operating the wells and related equipment and facilities.

(D) Property taxes and insurance applicable to proved properties and wells and related equipment and facilities.

(E) Severance taxes.

(ii) Some support equipment or facilities may serve two or more oil and gas producing activities and may also serve transportation, refining, and marketing activities. To the extent that the support equipment and facilities are used in oil and gas producing activities, their depreciation and applicable operating costs become exploration, development or production costs, as appropriate. Depreciation, depletion, and amortization of capitalized acquisition, exploration, and development costs are not production costs but also become part of the cost of oil and gas produced along with production (lifting) costs identified above.

SUCCESSFUL EFFORTS METHOD

(b) A reporting entity that follows the successful efforts method shall comply with the accounting and financial reporting disclosure requirements of Statement of Financial Accounting Standards No. 19, as amended.

FULL COST METHOD

(c) *Application of the full cost method of accounting.* A reporting entity that follows the full cost method shall apply that method to all of its operations and to the operations of its subsidiaries, as follows:

(1) *Determination of cost centers.* Cost centers shall be established on a country-by-country basis.

(2) *Costs to be capitalized.* All costs associated with property acquisition, exploration, and development activities

(as defined in paragraph (a) of this section) shall be capitalized within the appropriate cost center. Any internal costs that are capitalized shall be limited to those costs that can be directly identified with acquisition, exploration, and development activities undertaken by the reporting entity for its own account, and shall not include any costs related to production, general corporate overhead, or similar activities.

(3) *Amortization of capitalized costs.* Capitalized costs within a cost center shall be amortized on the unit-of-production basis using proved oil and gas reserves, as follows:

(i) Costs to be amortized shall include (A) all capitalized costs, less accumulated amortization, other than the cost of properties described in paragraph (ii) below; (B) the estimated future expenditures (based on current costs) to be incurred in developing proved reserves; and (C) estimated dismantlement and abandonment costs, net of estimated salvage values.

(ii) The cost of investments in unproved properties and major development projects may be excluded from capitalized costs to be amortized, subject to the following:

(A) All costs directly associated with the acquisition and evaluation of unproved properties may be excluded from the amortization computation until it is determined whether or not proved reserves can be assigned to the properties, subject to the following conditions:

(*1*) Until such a determination is made, the properties shall be assessed at least annually to ascertain whether impairment has occurred. Unevaluated properties whose costs are individually significant shall be assessed individually. Where it is not practicable to individually assess the amount of impairment of properties for which costs are not individually significant, such properties may be grouped for purposes of assessing impairment. Impairment may be estimated by applying factors based on historical experience and other data such as primary lease terms of the properties, average holding periods of unproved properties, and geographic and geologic data to groupings of individually insignificant properties and projects. The amount of impairment assessed under either of these methods shall be added to the costs to be amortized.

(*2*) The costs of drilling exploratory dry holes shall be included in the amortization base immediately upon determination that the well is dry.

(*3*) If geological and geophysical costs cannot be directly associated with specific unevaluated properties, they shall be included in the amortization base as incurred. Upon complete evaluation of a property, the total remaining excluded cost (net of any impairment) shall be included in the full cost amortization base.

(B) Certain costs may be excluded from amortization when incurred in connection with major development projects expected to entail significant costs to ascertain the quantities of proved reserves attributable to the properties under development (e.g., the installation of an offshore drilling platform from which development wells are to be drilled, the installation of improved recovery programs, and similar major projects undertaken in the expectation of significant additions to proved reserves). The amounts which may be excluded are applicable portions of (*1*) the costs that relate to the major development project and have not previously been included in the amortization base, and (*2*) the estimated future expenditures associated with the development project. The excluded portion of any common costs associated with the development project should be based, as is most appropriate in the circumstances, on a comparison of either (*i*) existing proved reserves to total proved reserves expected to be established upon completion of the project, or (*ii*) the number of wells to which proved reserves have been assigned and total number of wells expected to be drilled. Such costs may be excluded from costs to be amortized until the earlier determination of whether additional reserves are proved or impairment occurs.

(C) Excluded costs and the proved reserves related to such costs shall be transferred into the amortization base on an ongoing (well-by-well or property-by-property) basis as the project

is evaluated and proved reserves established or impairment determined. Once proved reserves are established, there is no further justification for continued exclusion from the full cost amortization base even if other factors prevent immediate production or marketing.

(iii) Amortization shall be computed on the basis of physical units, with oil and gas converted to a common unit of measure on the basis of their approximate relative energy content, unless economic circumstances (related to the effects of regulated prices) indicate that use of units of revenue is a more appropriate basis of computing amortization. In the latter case, amortization shall be computed on the basis of current gross revenues (excluding royalty payments and net profits disbursements) from production in relation to future gross revenues, based on current prices (including consideration of changes in existing prices provided only by contractual arrangements), from estimated production of proved oil and gas reserves. The effect of a significant price increase during the year on estimated future gross revenues shall be reflected in the amortization provision only for the period after the price increase occurs.

(iv) In some cases it may be more appropriate to depreciate natural gas cycling and processing plants by a method other than the unit-of-production method.

(v) Amortization computations shall be made on a consolidated basis, including investees accounted for on a proportionate consolidation basis. Investees accounted for on the equity method shall be treated separately.

(4) *Limitation on capitalized costs.* (i) For each cost center, capitalized costs, less accumulated amortization and related deferred income taxes, shall not exceed an amount (the cost center ceiling) equal to the sum of:

(A) The present value of estimated future net revenues computed by applying current prices of oil and gas reserves (with consideration of price changes only to the extent provided by contractual arrangements) to estimated future production of proved oil and gas reserves as of the date of the latest balance sheet presented, less estimated future expenditures (based on current costs) to be incurred in developing and producing the proved reserves computed using a discount factor of ten percent and assuming continuation of existing economic conditions; plus

(B) the cost of properties not being amortized pursuant to paragraph (i)(3)(ii) of this section; plus

(C) the lower of cost or estimated fair value of unproven properties included in the costs being amortized; less

(D) income tax effects related to differences between the book and tax basis of the properties referred to in paragraphs (i)(4)(i) (B) and (C) of this section.

(ii) If unamortized costs capitalized within a cost center, less related deferred income taxes, exceed the cost center ceiling, the excess shall be charged to expense and separately disclosed during the period in which the excess occurs. Amounts thus required to be written off shall not be reinstated for any subsequent increase in the cost center ceiling.

(5) *Production costs.* All costs relating to production activities, including workover costs incurred solely to maintain or increase levels of production from an existing completion interval, shall be charged to expense as incurred.

(6) *Other transactions.* The provisions of paragraph (h) of this section, ''Mineral property conveyances and related transactions if the successful efforts method of accounting is followed,'' shall apply also to those reporting entities following the full cost method except as follows:

(i) *Sales and abandonments of oil and gas properties.* Sales of oil and gas properties, whether or not being amortized currently, shall be accounted for as adjustments of capitalized costs, with no gain or loss recognized, unless such adjustments would significantly alter the relationship between capitalized costs and proved reserves of oil and gas attributable to a cost center. For instance, a significant alteration would not ordinarily be expected to occur for sales involving less than 25 percent of the reserve quantities of a given cost center. If gain or loss is recognized on such a sale, total capitalization costs

within the cost center shall be allocated between the reserves sold and reserves retained on the same basis used to compute amortization, unless there are substantial economic differences between the properties sold and those retained, in which case capitalized costs shall be allocated on the basis of the relative fair values of the properties. Abandonments of oil and gas properties shall be accounted for as adjustments of capitalized costs; that is, the cost of abandoned properties shall be charged to the full cost center and amortized (subject to the limitation on capitalized costs in paragraph (b) of this section).

(ii) *Purchases of reserves.* Purchases of oil and gas reserves in place ordinarily shall be accounted for as additional capitalized costs within the applicable cost center; however, significant purchases of production payments or properties with lives substantially shorter than the composite productive life of the cost center shall be accounted for separately.

(iii) *Partnerships, joint ventures and drilling arrangements.* (A) Except as provided in paragraph (i)(6)(i) of this section, all consideration received from sales or transfers of properties in connection with partnerships, joint venture operations, or various other forms of drilling arrangements involving oil and gas exploration and development activities (e.g., carried interest, turnkey wells, management fees, etc.) shall be credited to the full cost account, except to the extent of amounts that represent reimbursement of organization, offering, general and administrative expenses, etc., that are identifiable with the transaction, if such amounts are currently incurred and charged to expense.

(B) Where a registrant organizes and manages a limited partnership involved only in the purchase of proved developed properties and subsequent distribution of income from such properties, management fee income may be recognized provided the properties involved do not require aggregate development expenditures in connection with production of existing proved reserves in excess of 10% of the partnership's recorded cost of such properties. Any income not recognized as a result of this limitation would be credited to the full cost account and recognized through a lower amortization provision as reserves are produced.

(iv) *Other services.* No income shall be recognized in connection with contractual services performed (e.g. drilling, well service, or equipment supply services, etc.) in connection with properties in which the registrant or an affiliate (as defined in §210.1–02(b)) holds an ownership or other economic interest, except as follows:

(A) Where the registrant acquires an interest in the properties in connection with the service contract, income may be recognized to the extent the cash consideration received exceeds the related contract costs plus the registrant's share of costs incurred and estimated to be incurred in connection with the properties. Ownership interests acquired within one year of the date of such a contract are considered to be acquired in connection with the service for purposes of applying this rule. The amount of any guarantees or similar arrangements undertaken as part of this contract should be considered as part of the costs related to the properties for purposes of applying this rule.

(B) Where the registrant acquired an interest in the properties at least one year before the date of the service contract through transactions unrelated to the service contract, and that interest is unaffected by the service contract, income from such contract may be recognized subject to the general provisions for elimination of intercompany profit under generally accepted accounting principles.

(C) Notwithstanding the provisions of paragraphs (i)(6)(iv) (A) and (B) of this section, no income may be recognized for contractual services performed on behalf of investors in oil and gas producing activities managed by the registrant or an affiliate. Furthermore, no income may be recognized for contractual services to the extent that the consideration received for such services represents an interest in the underlying property.

(D) Any income not recognized as a result of these rules would be credited to the full cost account and recognized

through a lower amortization provision as reserves are produced.

(7) *Disclosures.* Reporting entities that follow the full cost method of accounting shall disclose all of the information required by paragraph (k) of this section, with each cost center considered as a separate geographic area, except that reasonable groupings may be made of cost centers that are not significant in the aggregate. In addition:

(i) For each cost center for each year that an income statement is required, disclose the total amount of amortization expense (per equivalent physical unit of production if amortization is computed on the basis of physical units or per dollar of gross revenue from production if amortization is computed on the basis of gross revenue).

(ii) State separately on the face of the balance sheet the aggregate of the capitalized costs of unproved properties and major development projects that are excluded, in accordance with paragraph (i)(3) of this section, from the capitalized costs being amortized. Provide a description in the notes to the financial statements of the current status of the significant properties or projects involved, including the anticipated timing of the inclusion of the costs in the amortization computation. Present a table that shows, by category of cost, (A) the total costs excluded as of the most recent fiscal year; and (B) the amounts of such excluded costs, incurred (*1*) in each of the three most recent fiscal years and (*2*) in the aggregate for any earlier fiscal years in which the costs were incurred. Categories of cost to be disclosed include acquisition costs, exploration costs, development costs in the case of significant development projects and capitalized interest.

INCOME TAXES

(d) *Income taxes.* Comprehensive interperiod income tax allocation by a method which complies with generally accepted accounting principles shall be followed for intangible drilling and development costs and other costs incurred that enter into the determination of taxable income and pretax accounting income in different periods.

(Secs. 6, 7, 8, 10, and 19(a) (15 U.S.C. 77f, 77g, 77h, 77j, 77s) of the Securities Act of 1933; secs. 12, 13, 15(d) and 23(a) (15 U.S.C. 78l, 78m, 78o(d), 78w), of the Securities Exchange Act of 1934; secs. 5(b), 14, and 20(a) (15 U.S.C. 79e, 79n, 79t) of the Public Utility Holding Company Act of 1935; secs. 8, 30, 31(c) and 38(a) (15 U.S.C. 80a–8, 80a–29, 80a–30(c), 80a–37(a)) of the Investment Company Act of 1940; sec. 503 (42 U.S.C. 6383) of the Energy Policy and Conservation Act of 1975; secs. 5, 6, 7, 8, 10, 19(a) and Schedule A e(25) and (26) (15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77s(a) and 77aa (25) and (26)) of the Securities Act of 1933; secs. 12, 13, 14, 15(d) and 23(a) (15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a)) of the Securities Exchange Act of 1934; secs. 5(b), 14 and 20(a) (15 U.S.C. 79e(b), 79n, 79t(a)) of the Public Utility Holding Company Act of 1935 and sec. 503 (42 U.S.C. 6383) of the Energy Policy and Conservation Act of 1975)

[43 FR 60405, Dec. 27, 1978, as amended at 43 FR 60417, Dec. 27, 1978; 44 FR 57036, 57038, Oct. 9, 1979; 45 FR 27749, Apr. 24, 1980. Redesignated and amended at 45 FR 63669, Sept. 25, 1980; 47 FR 57913, Dec. 29, 1982; 48 FR 44200, Sept. 28, 1983; 49 FR 18473, May 1, 1984; 57 FR 45293, Oct. 1, 1992; 61 FR 30401, June 14, 1996]

COMMERCIAL AND INDUSTRIAL COMPANIES

§ 210.5–01 Application of §§ 210.5–01 to 210.5–04.

Sections 210.5–01 to 210.5–04 shall be applicable to financial statements filed for all persons except—

(a) Registered investment companies (see §§ 210.6–01 to 210.6–10).

(b) Employee stock purchase, savings and similar plans (see §§ 210.6A–01 to 210.6A–05).

(c) Insurance companies (see §§ 210.7–01 to 210.7–05).

(d) Bank holding companies and banks (see §§ 210.9–01 to 210.9–07).

(e) Brokers and dealers when filing Form X–17A–5 [249.617] (see §§ 240.17a–5 and 240.17a–10 under the Securities Exchange Act of 1934).

[50 FR 49533, Dec. 3, 1985]

§ 210.5–02 Balance sheets.

The purpose of this rule is to indicate the various line items and certain additional disclosures which, if applicable, and except as otherwise permitted by the Commission, should appear on the face of the balance sheets or related

notes filed for the persons to whom this article pertains (see §210.4–01(a)).

ASSETS AND OTHER DEBITS

Current Assets, when appropriate

[See §210.4–05]

1. *Cash and cash items.* Separate disclosure shall be made of the cash and cash items which are restricted as to withdrawal or usage. The provisions of any restrictions shall be described in a note to the financial statements. Restrictions may include legally restricted deposits held as compensating balances against short-term borrowing arrangements, contracts entered into with others, or company statements of intention with regard to particular deposits; however, time deposits and short-term certificates of deposit are not generally included in legally restricted deposits. In cases where compensating balance arrangements exist but are not agreements which legally restrict the use of cash amounts shown on the balance sheet, describe in the notes to the financial statements these arrangements and the amount involved, if determinable, for the most recent audited balance sheet required and for any subsequent unaudited balance sheet required in the notes to the financial statements. Compensating balances that are maintained under an agreement to assure future credit availability shall be disclosed in the notes to the financial statements along with the amount and terms of such agreement.

2. *Marketable securities.* The accounting and disclosure requirements for current marketable equity securities are specified by generally accepted accounting principles. With respect to all other current marketable securities, state, parenthetically or otherwise, the basis of determining the aggregate amount shown in the balance sheet, along with the alternatives of the aggregate cost or the aggregate market value at the balance sheet date.

3. *Accounts and notes receivable.* (a) State separately amounts receivable from (1) customers (trade); (2) related parties (see §210.4–08(k)); (3) underwriters, promoters, and employees (other than related parties) which arose in other than the ordinary course of business; and (4) others.

(b) If the aggregate amount of notes receivable exceeds 10 percent of the aggregate amount of receivables, the above information shall be set forth separately, in the balance sheet or in a note thereto, for accounts receivable and notes receivable.

(c) If receivables include amounts due under long-term contracts (see §210.5–02.6(d)), state separately in the balance sheet or in a note to the financial statements the following amounts:

(1) Balances billed but not paid by customers under retainage provisions in contracts.

(2) Amounts representing the recognized sales value of performance and such amounts that had not been billed and were not billable to customers at the date of the balance sheet. Include a general description of the prerequisites for billing.

(3) Billed or unbilled amounts representing claims or other similar items subject to uncertainty concerning their determination or ultimate realization. Include a description of the nature and status of the principal items comprising such amount.

(4) With respect to (1) through (3) above, also state the amounts included in each item which are expected to be collected after one year. Also state, by year, if practicable, when the amounts of retainage (see (1) above) are expected to be collected.

4. *Allowances for doubtful accounts and notes receivable.* The amount is to be set forth separately in the balance sheet or in a note thereto.

5. *Unearned income.*

6. *Inventories.* (a) State separately in the balance sheet or in a note thereto, if practicable, the amounts of major classes of inventory such as: (1) Finished goods; (2) inventoried costs relating to long-term contracts or programs (see (d) below and §210.4–05); (3) work in process (see §210.4–05); (4) raw materials; and (5) supplies. If the method of calculating a LIFO inventory does not allow for the practical determination of amounts assigned to major classes of inventory, the amounts of those classes may be stated under cost flow assumptions other that LIFO with the excess of such total amount over the agggregate LIFO amount shown as a deduction to arrive at the amount of the LIFO inventory.

(b) The basis of determining the amounts shall be stated.

If *cost* is used to determine any portion of the inventory amounts, the description of this method shall include the nature of the cost elements included in inventory. Elements of *cost* include, among other items, retained costs representing the excess of manufacturing or production costs over the amounts charged to cost of sales or delivered or in-process units, initial tooling or other deferred startup costs, or general and administrative costs.

The method by which amounts are removed from inventory (e.g., *average cost, first-in, first-out, last-in, first-out, estimated average cost per unit*) shall be described. If the estimated average cost per unit is used as a basis to determine amounts removed from inventory under a total program or similar basis of accounting, the principal assumptions (including, where meaningful, the aggregate number of units expected to be delivered under the program, the number of units

delivered to date and the number of units on order) shall be disclosed.

If any general and administrative costs are charged to inventory, state in a note to the financial statements the aggregate amount of the general and administrative costs incurred in each period and the actual or estimated amount remaining in inventory at the date of each balance sheet.

(c) If the LIFO inventory method is used, the excess of replacement or current cost over stated LIFO value shall, if material, be stated parenthetically or in a note to the financial statements.

(d) For purposes of §§210.5–02.3 and 210.5–02.6, long-term contracts or programs include (1) all contracts or programs for which gross profits are recognized on a percentage-of-completion method of accounting or any variant thereof (e.g., delivered unit, cost to cost, physical completion), and (2) any contracts or programs accounted for on a completed contract basis of accounting where, in either case, the contracts or programs have associated with them material amounts of inventories or unbilled receivables and where such contracts or programs have been or are expected to be performed over a period of more than twelve months. Contracts or programs of shorter duration may also be included, if deemed appropriate.

For all long-term contracts or programs, the following information, if applicable, shall be stated in a note to the financial statements:

(i) The aggregate amount of manufacturing or production costs and any related deferred costs (e.g., initial tooling costs) which exceeds the aggregate estimated cost of all in-process and delivered units on the basis of the estimated average cost of all units expected to be produced under long-term contracts and programs not yet complete, as well as that portion of such amount which would not be absorbed in cost of sales based on existing firm orders at the latest balance sheet date. In addition, if practicable, disclose the amount of deferred costs by type of cost (e.g., initial tooling, deferred production, etc.).

(ii) The aggregate amount representing claims or other similar items subject to uncertainty concerning their determination or ultimate realization, and include a description of the nature and status of the principal items comprising such aggregate amount.

(iii) The amount of progress payments netted against inventory at the date of the balance sheet.

7. *Prepaid expenses.*

8. *Other current assets.* State separately, in the balance sheet or in a note thereto, any amounts in excess of five percent of total current assets.

9. *Total current assets, when appropriate.*

10. *Securities of related parties.* (See §210.4–08(k).)

11. *Indebtedness of related parties—not current.* (See §210.4–08(k).)

12. *Other investments.* The accounting and disclosure requirements for non-current marketable equity securities are specified by generally accepted accounting principles. With respect to other security investments and any other investment, state, parenthetically or otherwise, the basis of determining the aggregate amounts shown in the balance sheet, along with the alternate of the aggregate cost or aggregate market value at the balance sheet date.

13. *Property, plant and equipment.*

(a) State the basis of determining the amounts.

(b) Tangible and intangible utility plant of a public utility company shall be segregated so as to show separately the original cost, plant acquisition adjustments, and plant adjustments, as required by the system of accounts prescribed by the applicable regulatory authorities. This rule shall not be applicable in respect to companies which are not required to make such a classification.

14. *Accumulated depreciation, depletion, and amortization of property, plant and equipment.* The amount is to be set forth separately in the balance sheet or in a note thereto.

15. *Intangible assets.* State separately each class of such assets which is in excess of five percent of the total assets, along with the basis of determining the respective amounts. Any significant addition or deletion shall be explained in a note.

16. *Accumulated depreciation and amortization of intangible assets.* The amount is to be set forth separately in the balance sheet or in a note thereto.

17. *Other assets.* State separately, in the balance sheet or in a note thereto, any other item not properly classed in one of the preceding asset captions which is in excess of five percent to total assets. Any significant addition or deletion should be explained in a note. With respect to any significant deferred charge, state the policy for deferral and amortization.

18. *Total assets.*

LIABILITIES AND STOCKHOLDERS' EQUITY

Current Liabilities, When Appropriate (See §210.4–05)

19. *Accounts and notes payable.* (a) State separately amounts payable to (1) banks for borrowings; (2) factors or other financial institutions for borrowings; (3) holders of commercial paper; (4) trade creditors; (5) related parties (see §210.4–08(k)); (6) underwriters, promoters, and employees (other than related parties); and (7) others. Amounts applicable to (1), (2) and (3) may be stated separately in the balance sheet or in a note thereto.

(b) The amount and terms (including commitment fees and the conditions under which

lines may be withdrawn) of unused lines of credit for short-term financing shall be disclosed, if significant, in the notes to the financial statements. The weighted average interest rate on short term borrowings outstanding as of the date of each balance sheet presented shall be furnished in a note. The amount of these lines of credit which support a commercial paper borrowing arrangement or similar arrangements shall be separately identified.

20. *Other current liabilities.* State separately, in the balance sheet or in a note thereto, any item in excess of 5 percent of total current liabilities. Such items may include, but are not limited to, accrued payrolls, accrued interest, taxes, indicating the current portion of deferred income taxes, and the current portion of long-term debt. Remaining items may be shown in one amount.

21. *Total current liabilities, when appropriate.*

Long-Term Debt

22. *Bonds, mortgages and other long-term debt, including capitalized leases.* (a) State separately, in the balance sheet or in a note thereto, each issue or type of obligation and such information as will indicate (see §210.4–06):

(1) The general character of each type of debt including the rate of interest; (2) the date of maturity, or, if maturing serially, a brief indication of the serial maturities, such as ''maturing serially from 1980 to 1990''; (3) if the payment of principal or interest is contingent, an appropriate indication of such contingency; (4) a brief indication of priority; and (5) if convertible, the basis. For amounts owed to related parties, see §210.4–08(k).

(b) The amount and terms (including commitment fees and the conditions under which commitments may be withdrawn) of unused commitments for long-term financing arrangements that would be disclosed under this rule if used shall be disclosed in the notes to the financial statements if significant.

23. *Indebtedness to related parties—noncurrent.* Include under this caption indebtedness to related parties as required under §210.4–08(k).

24. *Other liabilities.* State separately, in the balance sheet or in a note thereto, any item not properly classified in one of the preceding liability captions which is in excess of 5 percent of total liabilities.

25. *Commitments and contingent liabilities.*

26. *Deferred credits.* State separately in the balance sheet amounts for (a) deferred income taxes, (b) deferred tax credits, and (c) material items of deferred income.

Minority Interests

27. *Minority interests in consolidated subsidiaries.* State separately in a note the amounts represented by preferred stock and the applicable dividend requirements if the preferred stock is material in relation to the consolidated stockholders' equity.

Redeemable Preferred Stocks

28. *Preferred stocks subject to mandatory redemption requirements or whose redemption is outside the control of the issuer.* (a) Include under this caption amounts applicable to any class of stock which has any of the following characteristics: (1) it is redeemable at a fixed or determinable price on a fixed or determinable date or dates, whether by operation of a sinking fund or otherwise; (2) it is redeemable at the option of the holder; or (3) it has conditions for redemption which are not solely within the control of the issuer, such as stocks which must be redeemed out of future earnings. Amounts attributable to preferred stock which is not redeemable or is redeemable solely at the option of the issuer shall be included under §210.5–02.29 unless it meets one or more of the above criteria.

(b) State on the face of the balance sheet the title of each issue, the carrying amount, and redemption amount. (If there is more than one issue, these amounts may be aggregated on the face of the balance sheet and details concerning each issue may be presented in the note required by paragraph (c) below.) Show also the dollar amount of any shares subscribed but unissued, and show the deduction of subscriptions receivable therefrom. If the carrying value is different from the redemption amount, describe the accounting treatment for such difference in the note required by paragraph (c) below. Also state in this note or on the face of the balance sheet, for each issue, the number of shares authorized and the number of shares issued or outstanding, as appropriate (See §210.4–07).

(c) State in a separate note captioned ''Redeemable Preferred Stocks'' (1) a general description of each issue, including its redemption features (e.g. sinking fund, at option of holders, out of future earnings) and the rights, if any, of holders in the event of default, including the effect, if any, on junior securities in the event a required dividend, sinking fund, or other redemption payment(s) is not made; (2) the combined aggregate amount of redemption requirements for all issues each year for the five years following the date of the latest balance sheet; and (3) the changes in each issue for each period for which an income statement is required to be filed. (See also §210.4–08(d).)

(d) Securities reported under this caption are not to be included under a general heading ''stockholders' equity'' or combined in a total with items described in captions 29, 30 or 31 which follow.

Non-Redeemable Preferred Stocks

29. *Preferred stocks which are not redeemable or are redeemable solely at the option of the issuer.* State on the face of the balance sheet, or if more than one issue is outstanding state in a note, the title of each issue and the dollar amount thereof. Show also the dollar amount of any shares subscribed but unissued, and show the deduction of subscriptions receivable therefrom. State on the face of the balance sheet or in a note, for each issue, the number of shares authorized and the number of shares issued or outstanding, as appropriate (see § 210.4–07). Show in a note or separate statement the changes in each class of preferred shares reported under this caption for each period for which an income statement is required to be filed. (See also § 210.4–08(d).)

Common Stocks

30. *Common stocks.* For each class of common shares state, on the face of the balance sheet, the number of shares issued or outstanding, as appropriate (see § 210.4–07), and the dollar amount thereof. If convertible, this fact should be indicated on the face of the balance sheet. For each class of common shares state, on the face of the balance sheet or in a note, the title of the issue, the number of shares authorized, and, if convertible, the basis of conversion (see also § 210.4–08(d)). Show also the dollar amount of any common shares subscribed but unissued, and show the deduction of subscriptions receivable therefrom. Show in a note or statement the changes in each class of common shares for each period for which an income statement is required to be filed.

Other Stockholders' Equity

31. *Other stockholders' equity.* (a) Separate captions shall be shown for (1) additional paid-in capital, (2) other additional capital and (3) retained earnings (i) appropriated and (ii) unappropriated. (See § 210.4–08(e).) Additional paid-in capital and other additional capital may be combined with the stock caption to which it applies, if appropriate.

(b) For a period of at least 10 years subsequent to the effective date of a quasi-reorganization, any description of retained earnings shall indicate the point in time from which the new retained earnings dates and for a period of at least three years shall indicate, on the face of the balance sheet, the total amount of the deficit eliminated.

32. *Total liabilities and stockholders' equity.*

(Secs. 7 and 19a of the Securities Act, 15 U.S.C. 77g, 77s(a), 77aa(25)(26); secs. 12, 13, 14, 15(d), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a), secs. 5(b), 10(a), 14, 20(a) of the Public Utility Holding Company Act, 15 U.S.C. 79e(a), 79n, 79t(a); secs. 8, 20, 30, 31(c), 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–8, 80a–20, 80a–29, 80a–30(c), 80a–37(a))

[45 FR 63671, Sept. 25, 1980, as amended at 46 FR 43412, Aug. 28, 1981; 47 FR 29837, July 9, 1982; 50 FR 25215, June 18, 1985; 50 FR 49533, Dec. 3, 1985; 59 FR 65636, Dec. 20, 1994]

§ 210.5–03 Income statements.

(a) The purpose of this rule is to indicate the various line items which, if applicable, and except as otherwise permitted by the Commission, should appear on the face of the income statements filed for the persons to whom this article pertains (see § 210.4–01(a)).

(b) If income is derived from more than one of the subcaptions described under § 210.5–03.1, each class which is not more than 10 percent of the sum of the items may be combined with another class. If these items are combined, related costs and expenses as described under § 210.5–03.2 shall be combined in the same manner.

1. *Net sales and gross revenues.* State separately:

(a) Net sales of tangible products (gross sales less discounts, returns and allowances), (b) operating revenues of public utilities or others; (c) income from rentals; (d) revenues from services; and (e) other revenues. Amounts earned from transactions with related parties shall be disclosed as required under § 210.4–08(k). A public utility company using a uniform system of accounts or a form for annual report prescribed by federal or state authorities, or a similar system or report, shall follow the the general segregation of operating revenues and operating expenses reported under § 210.5–03.2 prescribed by such system or report. If the total of sales and revenues reported under this caption includes excise taxes in an amount equal to 1 percent or more of such total, the amount of such excise taxes shall be shown on the face of the statement parenthetically or othewise.

2. *Costs and expenses applicable to sales and revenues.*

State separately the amount of (a) cost of tangible goods sold, (b) operating expenses of public utilities or others, (c) expenses applicable to rental income, (d) cost of services, and (e) expenses applicable to other revenues. Merchandising organizations, both wholesale and retail, may include occupancy and buying costs under caption 2(a). Amounts of costs and expenses incurred from transactions with related parties shall be disclosed as required under §210.4–08(k).

3. *Other operating costs and expenses.* State separately any material amounts not included under caption 2 above.

4. *Selling, general and administrative expenses.*

5. *Provision for doubtful accounts and notes.*

6. *Other general expenses.* Include items not normally included in caption 4 above. State separately any material item.

7. *Non-operating income.*

State separately in the income statement or in a note thereto amounts earned from (a) dividends, (b) interest on securities, (c) profits on securities (net of losses), and (d) miscellaneous other income. Amounts earned from transactions in securities of related parties shall be disclosed as required under §210.4–08(k). Material amounts included under miscellaneous other income shall be separately stated in the income statement or in a note thereto, indicating clearly the nature of the transactions out of which the items arose.

8. *Interest and amortization of debt discount and expense.*

9. *Non-operating expenses.*

State separately in the income statement or in a note thereto amounts of (a) losses on securities (net of profits) and (b) miscellaneous income deductions. Material amounts included under miscellaneous income deductions shall be separately stated in the income statement or in a note thereto, indicating clearly the nature of the transactions out of which the items arose.

10. *Income or loss before income tax expense and appropriate items below.*

11. *Income tax expense.* Include under this caption only taxes based on income (see §210.4–08(h)).

12. *Minority interest in income of consolidated subsidiaries.*

13. *Equity in earnings of unconsolidated subsidiaries and 50 percent or less owned persons.* State, parenthetically or in a note, the amount of dividends received from such persons. If justified by the circumstances, this item may be presented in a different position and a different manner (see §210.4–01(a)).

14. *Income or loss from continuing operations.*

15. *Discontinued operations.*

16. *Income or loss before extraordinary items and cumulative effects of changes in accounting principles.*

17. *Extraordinary items, less applicable tax.*

18. *Cumulative effects of changes in accounting principles.*

19. *Net income or loss.*

20. *Earnings per share data.*

[45 FR 63671, Sept. 25, 1980, as amended at 45 FR 76977, Nov. 21, 1980; 50 FR 25215, June 18, 1985]

§210.5–04 What schedules are to be filed.

(a) Except as expressly provided otherwise in the applicable form:

(1) The schedules specified below in this Section as Schedules II and III shall be filed as of the date of the most recent audited balanced sheet for each person or group.

(2) Schedule II shall be filed for each period for which an audited income statement is required to be filed for each person or group.

(3) Schedules I and IV shall be filed as of the date and for periods specified in the schedule.

(b) When information is required in schedules for both the registrant and the registrant and its subsidiaries consolidated it may be presented in the form of a single schedule: *Provided,* That items pertaining to the registrant are separately shown and that such single schedule affords a properly summarized presentation of the facts. If the information required by any schedule (including the notes thereto) may be shown in the related financial statement or in a note thereto without making such statement unclear or confusing, that procedure may be followed and the schedule omitted.

(c) The schedules shall be examined by the independent accountant if the related financial statements are so examined.

Schedule I—Condensed financial information of registrant. The schedule prescribed by §210.12–04 shall be filed when the restricted net assets (§210.4–08(e)(3)) of consolidated subsidiaries exceed 25 percent of consolidated net assets as of the end of the most recently completed fiscal year. For purposes of the above test, restricted net assets of consolidated subsidiaries shall mean that amount of the registrant's proportionate share of net assets of consolidated subsidiaries (after intercompany eliminations) which as of the end of the most recent fiscal year may not be transferred to the parent company by subsidiaries in the form of loans, advances or cash dividends without

the consent of a third party (i.e., lender, regulatory agency, foreign government, etc.). Where restrictions on the amount of funds which may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary shall be used. Redeemable preferred stocks (§ 210.5–02.28) and minority interests shall be deducted in computing net assets for purposes of this test.

Schedule II—Valuation and qualifying accounts. The schedule prescribed by § 210.12–09 shall be filed in support of valuation and qualifying accounts included in each balance sheet but not included in Schedule VI. (See § 210.4–02.)

Schedule III—Real estate and accumulated depreciation. The schedule prescribed by § 210.12–28 shall be filed for real estate (and the related accumulated depreciation) held by persons a substantial portion of whose business is that of acquiring and holding for investment real estate or interests in real estate, or interests in other persons a substantial portion of whose business is that of acquiring and holding real estate or interests in real estate for investment. Real estate used in the business shall be excluded from the schedule.

Schedule IV—Mortgage loans on real estate. The schedule prescribed by § 210.12–29 shall be filed by persons specified under Schedule XI for investments in mortgage loans on real estate.

Schedule V—Supplemental Information Concerning Property-casualty Insurance Operations. The schedule prescribed by § 210.12–18 shall be filed when a registrant, its subsidiaries or 50%-or-less-owned equity basis investees, have liabilities for property-casualty (''P/C'') insurance claims. The required information shall be presented as of the same dates and for the same periods for which the information is reflected in the audited consolidated financial statements required by §§ 210.3–01 and 3–02. The schedule may be omitted if reserves for unpaid P/C claims and claims adjustment expenses of the registrant and its consolidated subsidiaries, its unconsolidated subsidiaries and its 50%-or-less-owned equity basis investees did not, in the aggregate, exceed one-half of common stockholders' equity of the registrant and its consolidated subsidiaries as of the beginning of the fiscal year. For purposes of this test only the proportionate share of the registrant and its other subsidiaries in the reserves for unpaid claims and claim adjustment expenses of 50%-or-less-owned equity basis investees taken in the aggregate after intercompany eliminations shall be taken into account.

[45 FR 63671, Sept. 25, 1980, as amended at 46 FR 48137, Oct. 1, 1981; 46 FR 56180, Nov. 16, 1981; 49 FR 47598, Dec. 6, 1984; 50 FR 25215, June 18, 1985; 59 FR 65636, Dec. 20, 1994]

REGISTERED INVESTMENT COMPANIES

SOURCE: Sections 210.6–01 to 210.6–10 appear at 47 FR 56838, Dec. 21, 1982, unless otherwise noted.

§ 210.6–01 Application of §§ 210.6–01 to 210.6–10.

Sections 210.6–01 to 210.6–10 shall be applicable to financial statements filed for registered investment companies.

§ 210.6–02 Definition of certain terms.

The following terms shall have the meaning indicated in this rule unless the context otherwise requires. (Also see § 210.1–02 of this part.)

(a) *Affiliate.* The term *affiliate* means an *affiliated person* as defined in section 2(a)(3) of the Investment Company Act of 1940 unless otherwise indicated. The term *control* has the meaning in section 2(a)(9) of that Act.

(b) *Value.* As used in §§ 210.6–01 to 210.6–10, the term *value* shall have the meaning given in section 2(a)(41)(B) of the Investment Company Act of 1940.

(c) *Balance sheets; statements of net assets.* As used in §§ 210.6–01 to 210.6–10, the term *balance sheets* shall include statements of assets and liabilities as well as statements of net assets unless the context clearly indicates the contrary.

(d) *Qualified assets.* (1) For companies issuing face-amount certificates subsequent to December 31, 1940 under the provisions of section 28 of the Investment Company Act of 1940, the term *qualified assets* means qualified investments as that term is defined in section 28(b) of the Act. A statement to that effect shall be made in the balance sheet.

(2) For other companies, the term *qualified assets* means cash and investments which such companies do maintain or are required, by applicable governing legal instruments, to maintain in respect of outstanding face-amount certificates.

(3) Loans to certificate holders may be included as qualified assets in an amount not in excess of certificate reserves carried on the books of account in respect of each individual certificate upon which the loans were made.

§210.6–03 Special rules of general application to registered investment companies.

The financial statements filed for persons to which §§210.6–01 to 210.6–10 are applicable shall be prepared in accordance with the following special rules in addition to the general rules in §§210.1–01 to 210.4–10 (Articles 1, 2, 3, and 4). Where the requirements of a special rule differ from those prescribed in a general rule, the requirements of the special rule shall be met.

(a) *Content of financial statements.* The financial statements shall be prepared in accordance with the requirements of this part (Regulation S–X) notwithstanding any provision of the articles of incorporation, trust indenture or other governing legal instruments specifying certain accounting procedures inconsistent with those required in §§210.6–01 to 210.6–10.

(b) *Audited financial statements.* Where, under Article 3 of this part, financial statements are required to be audited, the independent accountant shall have been selected and ratified in accordance with section 32 of the Investment Company Act of 1940.

(c) *Consolidated and combined statements.* (1) Consolidated and combined statements filed for registered investment companies shall be prepared in accordance with §§210.3A–01 to 210.3A–05 (Article 3A) except that (i) statements of the registrant may be consolidated only with the statements of subsidiaries which are investment companies; (ii) a consolidated statement of the registrant and any of its investment company subsidiaries shall not be filed unless accompanied by a consolidating statement which sets forth the individual statements of each significant subsidiary included in the consolidated statement: *Provided, however,* That a consolidating statement need not be filed if all included subsidiaries are totally held; and (iii) consolidated or combined statements filed for subsidiaries not consolidated with the registrant shall not include any investment companies unless accompanied by consolidating or combining statements which set forth the individual statements of each included investment company which is a significant subsidiary.

(2) If consolidating or combining statements are filed, the amounts included under each caption in which financial data pertaining to affiliates is required to be furnished shall be subdivided to show separately the amounts: (i) Eliminated in consolidation; and (ii) not eliminated in consolidation.

(d) *Valuation of assets.* The balance sheets of registered investment companies, other than issuers of face-amount certificates, shall reflect all investments at value, with the aggregate cost of each category of investment reported under §§210.6–04.1, 6–04.2 and 6–04.3 and of the total investments reported under §210.6–04.4 or §210.6–05.1 shown parenthetically. State in a note the methods used in determining value of investments. As required by section 28(b) of the Investment Company Act of 1940, *qualified* assets of face-amount certificate companies shall be valued in accordance with certain provisions of the Code of the District of Columbia. For guidance as to valuation of securities, see §§404.03 to 404.05 of the Codification of Financial Reporting Policies.

(e) *Qualified assets.* State in a note the nature of any investments and other assets maintained or required to be maintained, by applicable legal instruments, in respect of outstanding face-amount certificates. If the nature of the qualifying assets and amount thereof are not subject to the provisions of section 28 of the Investment Company Act of 1940, a statement to that effect shall be made.

(f) *Restricted securities.* State in a note unless disclosed elsewhere the following information as to investment securities which cannot be offered for public sale without first being registered under the Securities Act of 1933 (restricted securities):

(1) The policy of the person with regard to acquisition of restricted securities.

(2) The policy of the person with regard to valuation of restricted securities. Specific comments shall be given as to the valuation of an investment in one or more issues of securities of a company or group of affiliated companies if any part of such investment is restricted and the aggregate value of

the investment in all issues of such company or affiliated group exceeds five percent of the value of total assets. (As used in this paragraph, the term *affiliated* shall have the meaning given in § 210.6–02(a) of this part.)

(3) A description of the person's rights with regard to demanding registration of any restricted securities held at the date of the latest balance sheet.

(g) *Income recognition*. Dividends shall be included in income on the ex-dividend date; interest shall be accured on a daily basis. Dividends declared on short positions existing on the record date shall be recorded on the ex-dividend date and included as an expense of the period.

(h) *Federal income taxes.* The company's status as a *regulated investment company* as defined in subtitle A, chapter 1, subchapter M of the Internal Revenue Code, as amended, shall be stated in a note referred to in the appropriate statements. Such note shall also indicate briefly the principal assumptions on which the company relied in making or not making provisions for income taxes. However, a company which retains realized capital gains and designates such gains as a distribution to shareholders in accordance with section 852(b)(3)(D) of the Internal Revenue Code shall, on the last day of its taxable year (and not earlier), make provision for taxes on such undistributed capital gains realized during such year.

(i) *Issuance and repurchase by a registered investment company of its own securities.* Disclose for each class of the company's securities:

(1) The number of shares, units, or principal amount of bonds sold during the period of report, the amount received therefor, and, in the case of shares sold by closed-end management investment companies, the difference, if any, between the amount received and the net asset value or preference in involuntary liquidation (whichever is appropriate) of securities of the same class prior to such sale; and

(2) The number of shares, units, or principal amount of bonds repurchased during the period of report and the cost thereof. Closed-end management investment companies shall furnish the following additional information as to securities repurchased during the period of report:

(i) As to bonds and preferred shares, the aggregate difference between cost and the face amount or preference in involuntary liquidation and, if applicable net assets taken at value as of the date of repurchase were less than such face amount or preference, the aggregate difference between cost and such net asset value;

(ii) As to common shares, the weighted average discount per share, expressed as a percentage, between cost of repurchase and the net asset value applicable to such shares at the date of repurchases.

The information required by paragraphs (h)(i)(2) (i) and (ii) of this section may be based on reasonable estimates if it is impracticable to determine the exact amounts involved.

(j) *Series companies.* (1) The information required by this part shall, in the case of a person which in essence is comprised of more than one separate investment company, be given as if each class or series of such investment company were a separate investment company; this shall not prevent the inclusion, at the option of such person, of information applicable to other classes or series of such person on a comparative basis, except as to footnotes which need not be comparative.

(2) If the particular class or series for which information is provided may be affected by other classes or series of such investment company, such as by the offset of realized gains in one series with realized losses in another, or through contingent liabilities, such situation shall be disclosed.

(k) *Certificate reserves.* (1) For companies issuing face-amount certificates subsequent to December 31, 1940 under the provisions of section 28 of the Investment Company Act of 1940, balance sheets shall reflect reserves for outstanding certificates computed in accordance with the provisions of section 28(a) of the Act.

(2) For other companies, balance sheets shall reflect reserves for outstanding certificates determined as follows:

(i) For certificates of the installment type, such amount which, together

with the lesser of future payments by certificate holders as and when accumulated at a rate not to exceed 3½ per centum per annum (or such other rate as may be appropriate under the circumstances of a particular case) compounded annually, shall provide the minimum maturity or face amount of the certificate when due.

(ii) For certificates of the fully-paid type, such amount which, as and when accumulated at a rate not to exceed 3½ per centum per annum (or such other rate as may be appropriate under the circumstances of a particular case) compounded annually, shall provide the amount or amounts payable when due.

(iii) Such amount or accrual therefor, as shall have been credited to the account of any certificate holder in the form of any credit, or any dividend, or any interest in addition to the minimum maturity or face amount specified in the certificate, plus any accumulations on any amount so credited or accrued at rates required under the terms of the certificate.

(iv) An amount equal to all advance payments made by certificate holders, plus any accumulations thereon at rates required under the terms of the certificate.

(v) Amounts for other appropriate contingency reserves, for death and disability benefits or for reinstatement rights on any certificate providing for such benefits or rights.

(l) *Inapplicable captions.* Attention is directed to the provisions of §§210.4–02 and 210.4–03 which permit the omission of separate captions in financial statements as to which the items and conditions are not present, or the amounts involved not significant. However, amounts involving directors, officers, and affiliates shall nevertheless be separately set forth except as otherwise specifically permitted under a particular caption.

§210.6–04 Balance sheets.

This rule is applicable to balance sheets filed by registered investment companies except for persons who substitute a statement of net assets in accordance with the requirements specified in §210.6–05, and issuers of face-amount certificates which are subject to the special provisions of §210.6–06 of this part. Balance sheets filed under this rule shall comply with the following provisions:

ASSETS

1. *Investments in securities of unaffiliated issuers.*

2. *Investments in and advances to affiliates.* State separately investments in and advances to: (a) Controlled companies and (b) other affiliates.

3. *Investments—other than securities.* State separately each major category.

4. *Total investments.*

5. *Cash.* Include under this caption cash on hand and demand deposits. Provide in a note to the financial statements the information required under §210.5–02.1 regarding restrictions and compensating balances.

6. *Receivables.* (a) State separately amounts receivable from (1) sales of investments; (2) subscriptions to capital shares; (3) dividends and interest; (4) directors and officers; and (5) others.

(b) If the aggregate amount of notes receivable exceeds 10 percent of the aggregate amount of receivables, the above information shall be set forth separately, in the balance sheet or in a note thereto, for accounts receivable and notes receivable.

7. *Deposits for securities sold short and open option contracts.* State separately amounts held by others in connection with: (a) Short sales and (b) open option contracts.

8. *Other assets.* State separately (a) prepaid and deferred expenses; (b) pension and other special funds; (c) organization expenses; and (d) any other significant item not properly classified in another asset caption.

9. *Total assets.*

LIABILITIES

10. *Accounts payable and accrued liabilities.* State separately amounts payable for: (a) Securities sold short; (b) open option contracts written; (c) other purchases of securities; (d) capital shares reedeemed; (e) dividends or other distributions on capital shares; and (f) others. State separately the amount of any other liabilities which are material. Securities sold short and open option contracts written shall be stated at value.

11. *Deposits for securities loaned.* State the value of securities loaned and indicate the nature of the collateral received as security for the loan, including the amount of any cash received.

12. *Other liabilities.* State separately (a) amounts payable for investment advisory, management and service fees; and (b) the total amount payable to: (1) Officers and directors; (2) controlled companies; and (3) other affiliates, excluding any amounts owing to noncontrolled affiliates which arose

in the ordinary course of business and which are subject to usual trade terms.

13. *Notes payable, bonds and similar debt.* (a) State separately amounts payable to: (1) Banks or other financial institutions for borrowings; (2) controlled companies; (3) other affiliates; and (4) others, showing for each category amounts payable within one year and amounts payable after one year.

(b) Provide in a note the information required under § 210.5–02.19(b) regarding unused lines of credit for short-term financing and § 210.5–02.22(b) regarding unused commitments for long-term financing arrangements.

14. *Total liabilities.*

15. *Commitments and contingent liabilities.*

NET ASSETS

16. *Units of capital.* (a) Disclose the title of each class of capital shares or other capital units, the number authorized, the number outstanding, and the dollar amount thereof.

(b) Unit investment trusts, including those which are issuers of periodic payment plan certificates, also shall state in a note to the financial statements: (1) The total cost to the investors of each class of units or shares; (2) the adjustment for market depreciation or appreciation; (3) other deductions from the total cost to the investors for fees, loads and other charges, including an explanation of such deductions; and (4) the net amount applicable to the investors.

17. *Accumulated undistributed income (loss).* Disclose:

(a) The accumulated undistributed investment income-net,

(b) accumulated undistributed net realized gains (losses) on investment transactions, and (c) net unrealized appreciation (depeciation) in value of investments at the balance sheet date.

18. *Other elements of capital.* Disclose any other elements of capital or residual interests appropriate to the capital structure of the reporting entity.

19. *Net assets applicable to outstanding units of capital.* State the net asset value per share.

§ 210.6–05 Statements of net assets.

In lieu of the balance sheet otherwise required by § 210.6–04 of this part, persons may substitute a statement of net assets if at least 95 percent of the amount of the person's total assets are represented by investments in securities of unaffiliated issuers. If presented in such instances, a statement of net assets shall consist of the following:

STATEMENTS OF NET ASSETS

1. A schedule of investments in securities of unaffiliated issuers as prescribed in § 210.12–12.

2. The excess (or deficiency) of other assets over (under) total liabilities stated in one amount, except that any amounts due from or to officers, directors, controlled persons, or other affiliates, excluding any amounts owing to noncontrolled affiliates which arose in the ordinary course of business and which are subject to usual trade terms, shall be stated separately.

3. Disclosure shall be provided in the notes to the financial statements for any item required under §§ 210.6–04.10 to 210.6–04.13.

4. The balance of the amounts captioned as *net assets.* The number of outstanding shares and net asset value per share shall be shown parenthetically.

5. The information required by (i) § 210.6–04.16, (ii) § 210.6–04.17 and (iii) § 210.6–04.18 shall be furnished in a note to the financial statements.

§ 210.6–06 Special provisions applicable to the balance sheets of issuers of face-amount certificates.

Balance sheets filed by issuers of face-amount certificates shall comply with the following provisions:

ASSETS

1. *Investments.* State separately each major category: such as, real estate owned, first mortgage loans on real estate, other mortgage loans on real estate, investments in securities of unaffiliated issuers, and investments in and advances to affiliates.

2. *Cash.* Include under this caption cash on hand and demand deposits. Provide in a note to the financial statements the information required under § 210.5–02.1 regarding restrictions and compensating balances.

3. *Receivables.* (a) State separately amounts receivable from (1) sales of investments; (2) dividends and interest; (3) directors and officers; and (4) others.

(b) If the aggregate amount of notes receivable exceeds 10 percent of the aggregate amount of receivables, the above information shall be set forth separately, in the balance sheet or in a note thereto, for accounts receivable and notes receivable.

4. *Total qualified assets.* State in a note to the financial statements the amount of qualified assets on deposit classified as to general categories of assets and as to general types of depositories, such as banks and states, together with a statement as to the purpose of the deposits.

5. *Other assets.* State separately: (a) Investments in securities of unaffiliated issuers not included in qualifying assets in item 1 above; (b) investments in and advances to affiliates not included in qualifying assets in item 1 above; and (c) any other significant item not properly classified in another asset caption.

6. *Total assets.*

LIABILITIES

7. *Certificate reserves.* Issuers of face-amount certificates shall state separately reserves for: (a) Certificates of the installment type; (b) certificates of the fully-paid type; (c) advance payments; (d) additional amounts accrued for or credited to the account of certificate holders in the form of any credit, dividend, or interest in addition to the minimum amount specified in the certificate; and (e) other certificate reserves. State in an appropriate manner the basis used in determining the reserves, including the rates of interest of accumulation.

8. *Notes payable, bonds and similar debt.* (a) State separately amounts payable to: (1) Banks or other financial institutions for borrowings; (2) controlled companies; (3) other affiliates; and (4) others, showing for each category amounts payable within one year and amounts payable after one year.

(b) Provide in a note the information required under §210.5–02.19(b) regarding unused lines of credit for short-term financing and §210.5–02.22(b) regarding unused commitments for long-term financing arrangements.

9. *Accounts payable and accrued liabilities.* State separately (a) amounts payable for investment advisory, management and service fees; and (b) the total amount payable to: (1) Officers and directors; (2) controlled companies; and (3) other affiliates, excluding any amounts owing to noncontrolled affiliates which arose in the ordinary course of business and which are subject to usual trade terms. State separately the amount of any other liabilities which are material.

10. *Total liabilities.*

11. *Commitments and contingent liabilities.*

STOCKHOLDERS' EQUITY

12. *Capital shares.* Disclose the title of each class of capital shares or other capital units, the number authorized, the number outstanding and the dollar amount thereof. Show also the dollar amount of any capital shares subscribed but unissued, and show the deduction for subscriptions receivable therefrom.

13. *Other elements of capital.* (a) Disclose any other elements of capital or residual interests appropriate to the capital structure of the reporting entity.

(b) A summary of each account under this caption setting forth the information prescribed in §210.3–04 shall be given in a note or separate statement for each period in which a statement of operations is presented.

14. *Total liabilities and stockholders' equity.*

§210.6–07 Statements of operations.

Statements of operations filed by registered investment companies, other than issuers of face-amount certificates subject to the special provisions of §210.6–08 of this part, shall comply with the following provisions:

STATEMENTS OF OPERATIONS

1. *Investment income.* State separately income from: (a) dividends; (b) interest on securities; and (c) other income. If income from investments in or indebtedness of affiliates is included hereunder, such income shall be segregated under an appropriate caption subdivided to show separately income from: (1) Controlled companies; and (2) other affiliates. If non-cash dividends are included in income, the bases of recognition and measurement used in respect to such amounts shall be disclosed. Any other category of income which exceeds five percent of the total shown under this caption shall be stated separately.

2. *Expenses.* (a) State separately the total amount of investment advisory, management and service fees, and expenses in connection with research, selection, supervision, and custody of investments. Amounts of expenses incurred from transactions with affiliated persons shall be disclosed together with the identity of and related amount applicable to each such person accounting for five percent or more of the total expenses shown under this caption together with a description of the nature of the affiliation. Expenses incurred within the person's own organization in connection with research, selection and supervision of investments shall be stated separately. Reductions or reimbursements of management or service fees shall be shown as a negative amount or as a reduction of total expenses shown under this caption.

(b) State separately any other expense item the amount of which exeeds five percent of the total expenses shown under this caption.

(c) A note to the financial statements shall include information concerning management and service fees, the rate of fee, and the base and method of computation. State separately the amount and a description of any fee reductions or reimbursements representing: (1) Expense limitation agreements or commitments; and (2) offsets received from broker-dealers showing separately for each amount received or due from (i) unaffiliated persons; and (ii) affiliated persons. If no management or service fees were incurred for a period, state the reason therefor.

(d) If any expenses were paid otherwise than in cash, state the details in a note.

(e) State in a note to the financial statements the amount of brokerage commissions (including dealer markups) paid to affiliated broker-dealers in connection with purchase and sale of investment securities. Open-end management companies shall state in a note the net amounts of sales charges deducted from the proceeds of sale of capital shares

which were retained by any affiliated principal underwriter or other affiliated broker-dealer.

(f) State separately all amounts paid in accordance with a plan adopted under rule 12b–1 of the Investment Company Act of 1940 [17 CFR 270.12b–1]. Reimbursement to the fund of expenses incurred under such plan (12b–1 expense reimbursement) shall be shown as a negative amount and deducted from current 12b–1 expenses. If 12b–1 expense reimbursements exceed current 12b–1 costs, such excess shall be shown as a negative amount used in the calculation of total expenses under this caption.

(g)(1) *Brokerage/Service Arrangements.* If a broker-dealer or an affiliate of the broker-dealer has, in connection with directing the person's brokerage transactions to the broker-dealer, provided, agreed to provide, paid for, or agreed to pay for, in whole or in part, services provided to the person (other than brokerage and research services as those terms are used in section 28(e) of the Securities Exchange Act of 1934 [15 U.S.C. 78bb(e)]), include in the expense items set forth under this caption the amount that would have been incurred by the person for the services had it paid for the services directly in an arms-length transaction.

(2) *Expense Offset Arrangements.* If the person has entered into an agreement with any other person pursuant to which such other person reduces, or pays a third party which reduces, by a specified or reasonably ascertainable amount, its fees for services provided to the person in exchange for use of the person's assets, include in the expense items set forth under this caption the amount of fees that would have been incurred by the person if the person had not entered into the agreement.

(3) *Financial Statement Presentation.* Show the total amount by which expenses are increased pursuant to paragraphs (1) and (2) of this paragraph 2.(g) as a corresponding reduction in total expenses under this caption. In a note to the financial statements, state separately the total amounts by which expenses are increased pursuant to paragraphs (1) and (2) of this paragraph 2.(g), and list each category of expense that is increased by an amount equal to at least 5 percent of total expenses. If applicable, the note should state that the person could have employed the assets used by another person to produce income if it had not entered into an arrangement described in paragraph 2.(g)(2) of this section.

3. *Interest and amortization of debt discount and expense.* Provide in the body of the statements or in the footnotes, the average dollar amount of borrowings and the average interest rate.

4. *Investment income before income tax expense.*

5. *Income tax expense.* Include under this caption only taxes based on income.

6. *Investment income-net.*

7. *Realized and unrealized gain (loss) on investments-net.* (a) State separately the net realized gain or loss on transactions in: (1) Investment securities of unaffiliated issuers, (2) investment securities of affiliated issuers, and (3) investments other than securities.

(b) Distributions of realized gains by other investment companies shall be shown separately under this caption.

(c) State separately: (1) The gain or loss from expiration or closing of option contracts written, (2) the gain or loss on closed short positions in securities, and (3) other realized gain or loss. Disclose in a note to the financial statements the number and associated dollar amounts as to option contracts written: (i) At the beginning of the period; (ii) during the period; (iii) expired during the period; (iv) closed during the period; (v) exercised during the period; (vi) balance at end of the period.

(d) State separately the amount of the net increase or decrease during the period in the unrealized appreciation or depreciation in the value of investment securities and other investments held at the end of the period.

(e) State separately any: (1) Federal income taxes and (2) other income taxes applicable to realized and unrealized gain (loss) on investments, distinguishing taxes payable currently from deferred income taxes.

8. *Net gain (loss) on investments.*

9. *Net increase (decrease) in net assets resulting from operations.*

[47 FR 56838, Dec. 21, 1982, as amended at 52 FR 23172, June 18, 1987; 59 FR 65636, Dec. 20, 1994; 60 FR 38923, July 28, 1995]

§ 210.6–08 Special provisions applicable to the statements of operations of issuers of face-amount certificates.

Statements of operations filed by issuers of face-amount certificates shall comply with the following provisions:

STATEMENTS OF OPERATIONS

1. *Investment income.* State separately income from: (a) Interest on mortgages; (b) interest on securities; (c) dividends; (d) rental income; and (e) other investment income. If income from investments in or indebtedness of affiliates is included hereunder, such income shall be segregated under an appropriate caption subdivided to show separately income from: (1) Controlled companies; and (2) other affiliates. If non-cash dividends are included in income, the bases of recognition and measurement used in respect to such amounts shall be disclosed. Any other category of income which exceeds five percent

of the total shown under this caption shall be stated separately.

2. *Investment expenses.* (a) State separately the total amount of investment advisory, management and service fees, and expenses in connection with research, selection, supervision, and custody of investments. Amounts of expenses incurred from transactions with affiliated persons shall be disclosed together with the identity of and related amount applicable to each such person accounting for five percent or more of the total expenses shown under this caption together with a description of the nature of the affiliation. Expenses incurred within the person's own organization in connection with research, selection and supervision of investments shall be stated separately. Reductions or reimbursements of management or service fees shall be shown as a negative amount or as a reduction of total expenses shown under this caption.

(b) State separately any other expense item the amount of which exceeds five percent of the total expenses shown under this caption.

(c) A note to the financial statements shall include information concerning management and service fees, the rate of fee, and the base and method of computation. State separately the amount and a description of any fee reductions or reimbursements representing: (1) Expense limitation agreements or commitments; and (2) offsets received from broker-dealers showing separately for each amount received or due from: (i) Unaffiliated persons; and (ii) affiliated persons. If no management or service fees were incurred for a period, state the reason therefor.

(d) If any expenses were paid otherwise than in cash, state the details in a note.

(e) State in a note to the financial statements the amount of brokerage commissions (including dealer markups) paid to affiliated broker-dealers in connection with purchase and sale of investment securities.

3. *Interest and amortization of debt discount and expense.*

4. *Provision for certificate reserves.* State separately any provision for additional credits, or dividends, or interests, in addition to the minimum maturity or face amount specified in the certificates. State also in an appropriate manner reserve recoveries from surrenders or other causes.

5. *Investment income before income tax expense.*

6. *Income tax expense.* Include under this caption only taxes based on income.

7. *Investment income-net.*

8. *Realized gain (loss) on investments-net.*

(a) State separately the net realized gain or loss on transactions in: (1) Investment securities of unaffiliated issuers, (2) investment securities of affiliated issuers, and (3) other investments.

(b) Distributions of capital gains by other investment companies shall be shown separately under this caption.

(c) State separately any: (1) Federal income taxes and (2) other income taxes applicable to realized gain (loss) on investments, distinguishing taxes payable currently from deferred income taxes.

9. *Net income or loss.*

§210.6–09 Statements of changes in net assets.

Statements of changes in net assets filed for persons to whom this article is applicable shall comply with the following provisions:

STATEMENTS OF CHANGES IN NET ASSESTS

1. *Operations.* State separately: (a) Investment income-net as shown by §210.6–07.6; (b) realized gain (loss) on investments-net of any Federal or other income taxes applicable to such amounts; (c) increase (decrease) in unrealized appreciation or depreciation-net of any Federal or other income taxes applicable to such amounts; and (d) net increase (decrease) in net assets resulting from operations as shown by §210.6–07.9.

2. *Net equalization charges and credits.* State the net amount of accrued undivided earnings separately identified in the price of capital shares issued and repurchased.

3. *Distributions to shareholders.* State separately distributions to shareholders from: (a) Investment income-net; (b) realized gain from investment transactions-net; and (c) other sources.

4. *Capital share transactions.* (a) State the increase or decrease in net assets derived from the net change in the number of outstanding shares or units.

(b) Disclose in the body of the statements or in the notes, for each class of the person's shares, the number and value of shares issued in reinvestment of dividends as well as the number of dollar amounts received for shares sold and paid for shares redeemed.

5. *Total increase (decrease).*

6. *Net assets at the beginning of the period.*

7. *Net assets at the end of the period.* Disclose parenthetically the balance of undistributed net investment income included in net assets at the end of the period.

§210.6–10 What schedules are to be filed.

(a) When information is required in schedules for both the person and its subsidiaries consolidated, it may be presented in the form of a single schedule, provided that items pertaining to the registrant are separately shown and that such single schedule affords a properly summarized presentation of

the facts. If the information required by any schedule (including the notes thereto) is shown in the related financial statement or in a note thereto without making such statement unclear or confusing, that procedure may be followed and the schedule omitted.

(b) The schedules shall be examined by an independent accountant if the related financial statements are so examined.

(c) *Management investment companies.* Except as otherwise provided in the applicable form: (1) The schedules specified below in this rule shall be filed for management investment companies as of the dates of the most recent audited balance sheet and any subsequent unaudited statement being filed for each person or group.

Schedule I—Investments in securities of unaffiliated issuers. The schedule prescribed by § 210.12–12 shall be filed in support of caption 1 of each balance sheet.

Schedule II—Investments—other than securities. The schedule prescribed by § 210.12–13 shall be filed in support of caption 3 of each balance sheet. This schedule may be omitted if the investments, other than securities, at both the beginning and end of the period amount to less than one percent of the value of total investments (§ 210.6–04.4).

Schedule III—Investments in and advances to affiliates. The schedule prescribed by § 210.12–14 shall be filed in support of caption 2 of each balance sheet.

Schedule IV—Investments—securities sold short. The schedule prescribed by § 210.12–12A shall be filed in support of caption 10(a) of each balance sheet.

Schedule V—Open option contracts written. The schedule prescribed by § 210.12–12B shall be filed in support of caption 10(b) of each balance sheet.

(d) *Unit investment trusts.* Except as otherwise provided in the applicable form:

(1) Schedules I and II, specified below in this section, shall be filed for unit investment trusts as of the dates of the most recent audited balance sheet and any subsequent unaudited statement being filed for each person or group.

(2) Schedule III, specified below in this section, shall be filed for unit investment trusts for each period for which a statement of operations is required to be filed for each person or group.

Schedule I—Investment in securities. The schedule prescribed by § 210.12–12 shall be filed in support of caption 1 of each balance sheet (§ 210.6–04).

Schedule II—Allocation of trust assets to series of trust shares. If the trust assets are specifically allocated to different series of trust shares, and if such allocation is not shown in the balance sheet in columnar form or by the filing of separate statements for each series of trust shares, a schedule shall be filed showing the amount of trust assets, indicated by each balance sheet filed, which is applicable to each series of trust shares.

Schedule III—Allocation of trust income and distributable funds to series of trust shares. If the trust income and distributable funds are specifically allocated to different series of trust shares and if such allocation is not shown in the statement of operations in columnar form or by the filing of separate statements for each series of trust shares, a schedule shall be submitted showing the amount of income and distributable funds, indicated by each statement of operations filed, which is applicable to each series of trust shares.

(e) *Face-amount certificate investment companies.* Except as otherwise provided in the applicable form:

(1) Schedules I, V and X, specified below, shall be filed for face-amount certificate investment companies as of the dates of the most recent audited balance sheet and any subsequent unaudited statement being filed for each person or group.

(2) All other schedules specified below in this seciton shall be filed for face-amount certificate investment companies for each period for which a statement of operations is filed, except as indicated for Schedules III and IV.

Schedule I—Investment in securities of unaffiliated issuers. The schedule prescribed by § 210.12–21 shall be filed in support of caption 1 and, if applicable, caption 5(a) of each balance sheet. Separate schedules shall be furnished in support of each caption, if applicable.

Schedule II—Investments in and advances to affiliates and income thereon. The schedule prescribed by § 210.12–22 shall be filed in support of captions 1 and 5(b) of each balance sheet and caption 1 of each statement of operations. Separate schedules shall be furnished in support of each caption, if applicable.

Schedule III—Mortage loans on real estate and interest earned on mortages. The schedule prescribed by § 210.12–23 shall be filed in support of captions 1 and 5(c) of each balance sheet and caption 1 of each statement of operations, except that only the information required by column G and note 8 of the schedule need be furnished in support of

statements of operations for years for which related balance sheets are not required.

Schedule IV—Real estate owned and rental income. The schedule prescribed by §210.12–24 shall be filed in support of captions 1 and 5(a) of each balance sheet and caption 1 of each statement of operations for rental income included therein, except that only the information required by columns H, I and J, and item ''Rent from properties sold during the period'' and note 4 of the schedule need be furnished in support of statements of operations for years for which related balance sheets are not required.

Schedule V—Qualified assets on deposit. The schedule prescribed by §210.12–27 shall be filed in support of the information required by caption 4 of §210.6–06 as to total amount of qualified assets on deposit.

Schedule VI—Certificate reserves. The schedule prescribed by §210.12–26 shall be filed in support of caption 7 of each balance sheet.

Schedule VII—Valuation and qualifying accounts. The schedule prescribed by §210.12–09 shall be filed in support of all other reserves included in the balance sheet.

[47 FR 56838, Dec. 21, 1982, as amended at 59 FR 65636, Dec. 20, 1994]

EMPLOYEE STOCK PURCHASE, SAVINGS AND SIMILAR PLANS

§210.6A–01 Application of §§210.6A–01 to 210.6A–05.

(a) Sections 210.6A–01 to 210.6A–05 shall be applicable to financial statements filed for employee stock purchase, savings and similar plans.

(b) [Reserved]

[47 FR 56843, Dec. 21, 1982]

§210.6A–02 Special rules applicable to employee stock purchase, savings and similar plans.

The financial statements filed for persons to which this article is applicable shall be prepared in accordance with the following special rules in addition to the general rules in §§210.1–01 to 210.4–10. Where the requirements of a special rule differ from those prescribed in a general rule, the requirements of the special rule shall be met.

(a) *Investment programs.* If the participating employees have an option as to the manner in which their deposits and contributions may be invested, a description of each investment program shall be given in a footnote or otherwise. The number of employees under each investment program shall be stated.

(b) *Net asset value per unit.* Where appropriate, the number of units and the net asset value per unit shall be given by footnote or otherwise.

(c) *Federal income taxes.* (1) If the plan is not subject to Federal income taxes, a note shall so state indicating briefly the principal assumptions on which the plan relied in not making provision for such taxes.

(2) State the Federal income tax status of the employee with respect to the plan.

(d) *Valuation of assets.* The statement of financial condition shall reflect all investments at value, showing cost parenthetically. For purposes of this rule, the term *value* shall mean (1) market value for those securities having readily available market quotations and (2) fair value as determined in good faith by the trustee(s) for the plan (or by the person or persons who exercise similar responsibilities) with respect to other securities and assets.

[47 FR 56843, Dec. 21, 1982]

§210.6A–03 Statements of financial condition.

Statements of financial condition filed under this rule shall comply with the following provisions:

PLAN ASSETS

1. *Investments in securities of participating employers.* State separately each class of securities of the participating employer or employers.

2. *Investments in securities of unaffiliated issuers.*

(a) *United States Government bonds and other obligations.* Include only direct obligations of the United States Government.

(b) *Other securities.* State separately (1) marketable securities and (2) other securities.

3. *Investments. Other than securities.* State separately each major class.

4. *Dividends and interest receivable.*

5. *Cash.*

6. *Other assets.* State separately (a) total of amounts due from participating employers or any of their directors, officers and principal holders of equity securities; (b) total of amounts due from trustees or managers of the plan; and (c) any other significant amounts.

LIABILITIES AND PLAN EQUITY

7. *Liabilities.* State separately (a) total of amounts payable to participating employers; (b) total of amounts payable to participating

employees; and (c) any other significant amounts.

8. *Reserves and other credits.* State separately each significant item and describe each such item by using an appropriate caption or by a footnote referred to in the caption.

9. *Plan equity at close of period.*

[27 FR 7870, Aug. 9, 1962. Redesignated at 47 FR 56843, Dec. 21, 1982]

§ 210.6A–04 Statements of income and changes in plan equity.

Statements of income and changes in plan equity filed under this rule shall comply with the following provisions:

1. *Net investment income.*

(a) *Income.* State separately income from (1) cash dividends; (2) interest, and (3) other sources. Income from investments in or indebtedness of participating employers shall be segregated under the appropriate subcaption.

(b) *Expenses.* State separately any significant amounts.

(c) *Net investment income.*

2. *Realized gain or loss on investments.* (a) State separately the net of gains or losses arising from transactions in (1) investments in securities of the participating employer or employers; (2) other investments in securities; and (3) other investments.

(b) State in a footnote or otherwise for each category of investment in paragraph (a) above the aggregate cost, the aggregate proceeds and the net gain or loss. State the principle followed in determining the cost of securities sold, e.g., *average cost* or *first-in, first-out.*

3. *Unrealized appreciation or depreciation of investments.* (a) State the amount of increase or decrease in unrealized appreciation or depreciation of investments during the period.

(b) State in a footnote or otherwise the amount of unrealized appreciation or depreciation of investments at the beginning of the period of report, at the end of the period of report, and the increase or decrease during the period.

4. *Contributions and deposits.* (a) State separately (1) total of amounts deposited by participating employees, and (2) total of amounts contributed by the participating employer or employers.

(b) If employees of more than one employer participate in the plan, state in tabular form in a footnote or otherwise the amount contributed by each employer and the deposits of the employees of each such employer.

5. *Withdrawals, lapses and forfeitures.* State separately (a) balances of employees' accounts withdrawn, lapsed or forfeited during the period; (b) amounts disbursed in settlement of such accounts; and (c) disposition of balances remaining after settlement specified in (b).

6. *Plan equity at beginning of period.*

7. *Plan equity at end of period.*

[27 FR 7870, Aug. 9, 1962. Redesignated at 47 FR 56843, Dec. 21, 1982]

§ 210.6A–05 What schedules are to be filed.

(a) Schedule I, specified below, shall be filed as of the most recent audited statement of financial condition and any subsequent unaudited statement of financial condition being filed. Schedule II shall be filed as of the date of each statement of financial condition being filed. Schedule III shall be filed for each period for which a statement of income and changes in plan equity is filed. All schedules shall be audited if the related statements are audited.

Schedule I—Investments. A schedule substantially in form prescribed by § 210.12–12 shall be filed in support of captions 1, 2 and 3 of each statement of financial condition unless substantially all of the information is given in the statement of financial condition by footnote or otherwise.

Schedule II—Allocation of plan assets and liabilities to investment program. If the plan provides for separate investment programs with separate funds, and if the allocation of assets and liabilities to the several funds is not shown in the statement of financial condition in columnar form or by the submission of separate statements for each fund, a schedule shall be submitted showing the allocation of each caption of each statement of financial condition filed to the applicable fund.

Schedule III—Allocation of plan income and changes in plan equity to investment programs. If the plan provides for separate investment programs with separate funds, and if the allocation of income and changes in plan equity to the several funds is not shown in the statement of income and changes in plan equity in columnar form or by the submission of separate statements for each fund, a schedule shall be submitted showing the allocation of each caption of each statement of income and changes in plan equity filed to the applicable fund.

(b) [Reserved]

[45 FR 63676, Sept. 25, 1980. Redesignated at 47 FR 56843, Dec. 21, 1982, and amended at 50 FR 25215, June 18, 1985]

INSURANCE COMPANIES

AUTHORITY: Secs. 6, 7, 8, 10, 12, 13, 15, 19, 23 (15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78l, 78m,

78o(d), 78w, 79e, 79n, 79t, 80a–8, 80a–29, 80a–30(c), 80(a)).

SOURCE: Sections 210.7–01 to 210.7–05 appears at 46 FR 54335, Nov. 2, 1981, unless otherwise noted.

§ 210.7–01 Application of §§ 210.7–01 to 210.7–05.

This article shall be applicable to financial statements filed for insurance companies.

§ 210.7–02 General requirement.

(a) The requirements of the general rules in §§ 210.1–01 to 210.4–10 (Articles 1, 2, 3, 3A and 4) shall be applicable except where they differ from requirements of §§ 210.7–01 to 210.7–05.

(b) Financial statements filed for mutual life insurance companies and wholly owned stock insurance company subsidiaries of mutual life insurance companies may be prepared in accordance with statutory accounting requirements. Financial statements prepared in accordance with statutory accounting requirements may be condensed as appropriate, but the amounts to be reported for net gain from operations (or net income or loss) and total capital and surplus (or surplus as regards policyholders) shall be the same as those reported on the corresponding Annual Statement.

§ 210.7–03 Balance sheets.

(a) The purpose of this rule is to indicate the various items which, if applicable, and except as otherwise permitted by the Commission, should appear on the face of the balance sheets and in the notes thereto filed for persons to whom this article pertains. (See § 210.4–01(a).)

ASSETS

1. *Investments—other than investments in related parties.*

(a) *Fixed maturities.*

(b) *Equity securities.*

(c) *Mortgage loans on real estate.*

(d) *Investment real estate.*

(e) *Policy loans.*

(f) *Other long-term investments.*

(g) *Short-term investments.*

(h) *Total investments.*

NOTES: (1) State parenthetically or otherwise in the balance sheet (a) the basis of determining the amounts shown in the balance sheet and (b) as to fixed maturities and equity securities either aggregate cost or aggregate value at the balance sheet date, whichever is the alternate amount of the carrying value in the balance sheet. Consideration shall be given to the discussion of ''Valuation of Securities'' in § 404.03 of the Codification of Financial Reporting Policies.

(2) Include under fixed maturities: bonds, notes, marketable certificates of deposit with maturities beyond one year, and redeemable preferred stocks. Include under equity securities: common stocks and nonredeemable preferred stocks.

(3) State separately in the balance sheet or in a note thereto the amount of accumulated depreciation and amortization deducted from investment real estate. Subcaption (d) shall not include real estate acquired in settling title claims, mortgage guaranty claims, and similar insurance claims. Real estate acquired in settling claims shall be included in caption 10, ''Other Assets,'' or shown separately, if material.

(4) Include under subcaption (g) investments maturing within one year, such as commercial paper maturing within one year, marketable certificates of deposit maturing within one year, savings accounts, time deposits and other cash accounts and cash equivalents earning interest. State in a note any amounts subject to withdrawal or usage restrictions. (See § 210.5–02.1.)

(5) State separately in a note the amount of any class of investments included in subcaption (f) if such amount exceeds ten percent of stockholders' equity.

(6) State in a note the name of any person in which the total amount invested in the person and its affiliates, included in the above subcaptions, exceeds ten percent of total stockholders' equity. For this disclosure, include in the amount invested in a person and its affiliates the aggregate of indebtedness and stocks issued by such person and its affiliates that is included in the several subcaptions above, and the amount of any real estate included in subcaption (d) that was purchased or acquired from such person and its affiliates. Indicate the amount included in each subcaption. An investment in bonds and notes of the United States Government or of a United States Government agency or authority which exceeds ten percent of total stockholders' equity need not be reported.

(7) State in a note the amount of investments included under each subcaption (a), (c), (d) and (f) which have been non-income producing for the twelve months preceding the balance sheet date.

2. *Cash.* Cash on hand or on deposit that is restricted as to withdrawal or usage shall be disclosed separately on the balance sheet. The provisions of any restrictions shall be

described in a note to the financial statements. Restrictions may include legally restricted deposits held as compensating balances against short-term borrowing arrangements, contracts entered into with others, or company statements of intention with regard to particular deposits. In cases where compensating balance arrangements exist but are not agreements which legally restrict the use of cash amounts shown on the balance sheet, describe in the notes to the financial statements these arrangements and the amount involved, if determinable, for the most recent audited balance sheet required. Compensating balances that are maintained under an agreement to assure future credit availability shall be disclosed in the notes to the financial statements along with the amount and terms of the agreement.

3. *Securities and indebtedness of related parties.* State separately (a) investments in related parties and (b) indebtedness from such related parties. (See § 210.4–08(k).)

4. *Accrued investment income.*

5. *Accounts and notes receivable.* Include under this caption (a) amounts receivable from agents and insureds, (b) uncollected premiums and (c) other receivables. State separately in the balance sheet or in a note thereto any category of other receivable which is in excess of five percent of total assets. State separately in the balance sheet or in a note thereto the amount of allowance for doubtful accounts that was deducted.

6. *Reinsurance recoverable on paid losses.*

7. *Deferred policy acquisition costs.*

8. *Property and equipment.* (a) State the basis of determining the amounts.

(b) State separately in the balance sheet or in a note thereto the amount of accumulated depreciation and amortization of property and equipment.

9. *Title plant.*

10. *Other assets.* State separately in the balance sheet or in a note thereto any other asset the amount of which exceeds five percent of total assets.

11. *Assets held in separate accounts.* Include under this caption the aggregate amount of assets used to fund liabilities related to variable annuities, pension funds and similar activities. The aggregate liability shall be included under caption 18. Describe in a note to the financial statements the general nature of the activities being reported on in the separate accounts.

12. *Total assets.*

LIABILITIES AND STOCKHOLDERS' EQUITY

13. *Policy liabilities and accruals.* (a) State separately in the balance sheet the amounts of (1) future policy benefits and losses, claims and loss expenses, (2) unearned preminums and (3) other policy claims and benefits payable.

(b) State in a note to the financial statements the basis of assumptions (interest rates, mortality, withdrawals) for future policy benefits and claims and settlements which are stated at present value.

(c) Information shall be given in a note concerning the general nature of reinsurance transactions, including a description of the significant types of reinsurance agreements executed. The information provided shall include (1) the nature of the contingent liability in connection with insurance ceded and (2) the nature and effect of material nonrecurring reinsurance transactions.

14. *Other policyholders' funds.* (a) Include amounts of supplementary contracts without life contingencies, policyholders' dividend accumulations, undistributed earnings on participating business, dividends to policyholders and retrospective return premiums (not included elsewhere) and any similar items. State separately in the balance sheet or in a note thereto any item the amount of which is in excess of five percent of total liabilities.

(b) State in a note to the financial statements the relative significance of participating insurance expressed as percentages of (1) insurance in force and (2) premium income; and the method by which earnings and dividends allocable to such insurance is determined.

15. *Other liabilities.* (a) Include under this caption such items as accrued payrolls, accrued interest and taxes. State separately in the balance sheet or in a note thereto any item included in other liabilities the amount of which exceeds five percent of total liabilities.

(b) State separately in the balance sheet or in a note thereto the amount of (1) income taxes payable and (2) deferred income taxes. Disclose separately the amount of deferred income taxes applicable to unrealized appreciation of equity securities.

16. *Notes payable, bonds, mortgages and similar obligations, including capitalized leases.* (a) State separately in the balance sheet the amounts of (1) short-term debt and (2) long-term debt including capitalized leases.

(b) The disclosure required by § 210.5–02.19(b) shall be given if the aggregate of short-term borrowings from banks, factors and other financial institutions and commercial paper issued exceeds five percent of total liabilities.

(c) The disclosure requirements of § 210.5–02.22 shall be followed for long-term debt.

17. *Indebtedness to related parties.* (See § 210.4–0.8(k).)

18. *Liabilities related to separate accounts.* [See caption 11.]

19. *Commitments and contingent liabilities.*

MINORITY INTERESTS

20. *Minority interests in consolidated subsidiaries.* The disclosure requirements of § 210.5–02.27 shall be followed.

REDEEMABLE PREFERRED STOCKS

21. *Preferred stocks subject to mandatory redemption requirements or whose redemption is outside the control of the issuer.* The classification and disclosure requirements of §210.5–02.28 shall be followed.

NONREDEEMABLE PREFERRED STOCKS

22. *Preferred stocks which are not redeemable or are redeemable solely at the option of the issuer.* The classification and disclosure requirements of §210.5–02.29 shall be followed.

COMMON STOCKS

23. *Common stocks.* The classification and disclosure requirements of §210.5–02.30 shall be followed.

OTHER STOCKHOLDERS' EQUITY

24. *Other stockholders' equity.* (a) Separate captions shall be shown for (1) additional paid-in capital, (2) other additional capital, (3) unrealized appreciation or depreciation of equity securities less applicable deferred income taxes, (4) retained earnings (i) appropriated and (ii) unappropriated. (See §210.4–08(e).) Additional paid-in capital and other additional capital may be combined with the stock caption to which they apply, if appropriate.

(b) The classification and disclosure requirements of §210.5–02.31(b) and (c) shall be followed for (1) dating and effect of a quasi-reorganization and (2) summaries of each stockholder's equity account.

(c) State in a note the following information separately for (1) life insurance legal entities, and (2) property and liability insurance legal entities: the amount of statutory stockholders' equity as of the date of each balance sheet presented and the amount of statutory net income or loss for each period for which an income statement is presented.

25. *Total liabilities and stockholders' equity.*

[46 FR 54335, Nov. 2, 1981, as amended at 50 FR 25215, June 18, 1985]

§210.7–04 Income statements.

The purpose of this rule is to indicate the various items which, if applicable, should appear on the face of the income statements and in the notes thereto filed for persons to whom this article pertains. (See §210.4–01(a).)

REVENUES

1. *Premiums.* Include premiums from reinsurance assumed and deduct premiums on reinsurance ceded. Where applicable, the amounts included in this caption should represent premiums earned.

2. *Net investment income.* State in a note to the financial statements, in tabular form, the amounts of (a) investment income from each category of investments listed in the subcaptions of §210.7–03.1 that exceeds five percent of total investment income, (b) total investment income, (c) applicable expenses, and (d) net investment income.

3. *Realized investment gains and losses.* Disclose the following amounts:

(a) Net realized investment gains and losses, which shall be shown separately regardless of size.

(b) Indicate in a footnote the registrant's policy with respect to whether investment income and realized gains and losses allocable to policyholders and separate accounts are included in the investment income and realized gain and loss amounts reported in the income statement. If the income statement includes investment income and realized gains and losses allocable to policyholders and separate accounts, indicate the amounts of such allocable investment income and realized gains and losses and the manner in which the insurance enterprise's obligation with respect to allocation of such investment income and realized gains and losses is otherwise accounted for in the financial statements.

(c) The method followed in determining the cost of investments sold (e.g., ''average cost,'' ''first-in, first-out,'' or ''identified certificate'') shall be disclosed.

(d) For each period for which an income statement is filed, include in a note an analysis of realized and unrealized investment gains and losses on fixed maturities and equity securities. For each period, state separately for fixed maturities [see §210.7–03.1(a)] and for equity securities [see §210.7–03.1(b)] the following amounts:

(1) Realized investment gains and losses, and

(2) The change during the period in the difference between value and cost.

The change in the difference between value and cost shall be given for both categories of investments even though they may be shown on the related balance sheet on a basis other than value.

4. *Other income.* Include all revenues not included in captions 1 and 2 above. State separately in the statement any amounts in excess of five percent of total revenue, and disclose the nature of the transactions from which the items arose.

BENEFITS, LOSSES AND EXPENSES

5. *Benefits, claims, losses and settlement expenses.*

6. *Policyholders' share of earnings on participating policies, dividends and similar items.* (See §210.7–03.14(b).)

7. *Underwriting, acquisition and insurance expenses.* State separately in the income statement or in a note thereto (a) the amount included in this caption representing deferred policy acquisition costs amortized

to income during the period, and (b) the amount of other operating expenses. State separately in the income statement any material amount included in all other operating expenses.

8. *Income or loss before income tax expense and appropriate items below.*

9. *Income tax expense.* Include under this caption only taxes based on income. (See § 210.4–08(g).)

10. *Minority interest in income of consolidated subsidiaries.*

11. *Equity in earnings of unconsolidated subsidiaries and 50% or less owned persons.* State, parenthetically or in a note, the amount of dividends received from such persons. If justified by the circumstances, this item may be presented in a different position and a different manner. (See § 210.4–01(a).)

12. *Income or loss from continuing operations.*

13. *Discontinued operations.*

14. *Income or loss before extraordinary items and cumulative effects of changes in accounting principles.*

15. *Extraordinary items, less applicable tax.*

16. *Cumulative effects of changes in accounting principles.*

17. *Net income or loss.*

18. *Earnings per share data.*

[46 FR 54335, Nov. 2, 1981, as amended at 57 FR 45293, Oct. 1, 1992]

§ 210.7–05 What schedules are to be filed.

(a) Except as expressly provided otherwise in the applicable form:

(1) The schedule specified below in this section as Schedules I shall be as of the date of the most recent audited balance sheet for each person or group.

(2) The schedules specified below in this section as Schedule IV and V shall be filed for each period for which an audited income statement is required to be filed for each person or group.

(3) Schedules II, III and V shall be filed as of the date and for periods specified in the schedule.

(b) When information is required in schedules for both the registrant and the registrant and its subsidiaries consolidated it may be presented in the form of a single schedule: *Provided,* That items pertaining to the registrant are shown separately and that such single schedule affords a properly summarized presentation of the facts. If the information required by any schedule (including the notes thereto) may be shown in the related financial statement or in a note thereto without making such statement unclear or confusing, that procedure may be followed and the schedule omitted.

(c) The schedules shall be examined by the independent accountant.

Schedule I—Summary of investments—other than investments in related parties. The schedule prescribed by § 210.12–15 shall be filed in support of caption 1 of the most recent audited balance sheet.

Schedule II—Condensed financial information of registrant. The schedule prescribed by § 210.12–04 shall be filed when the restricted net assets (§ 210.4.08(e)(3)) of consolidated subsidiaries exceed 25 percent of consolidated net assets as of the end of the most recently completed fiscal year. For purposes of the above test, restricted net assets of consolidated subsidiaries shall mean that amount of the registrant's proportionate share of net assets of consolidated subsidiaries (after intercompany eliminations) which as of the end of the most recent fiscal year may not be transferred to the parent company by subsidiaries in the form of loans, advances or cash dividends without the consent of a third party (i.e., lender, regulatory agency, foreign government, etc.). Where restrictions on the amount of funds which may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary shall be used. Redeemable preferred stocks (§ 210.7–03.21) and minority interests shall be deducted in computing net assets for purposes of this test.

Schedule III—Supplementary insurance information. The schedule prescribed by § 210.12–16 shall be filed giving segment detail in support of various balance sheet and income statement captions. The required balance sheet information shall be presented as of the date of each audited balance sheet filed, and the income statement information shall be presented for each period for which an audited income statement is required to be filed, for each person or group.

Schedule IV—Reinsurance. The schedule prescribed by § 210.12–17 shall be filed for reinsurance ceded and assumed.

Schedule V—Valuation and qualifying accounts. The schedule prescribed by § 210.12–09 shall be filed in support of valuation and qualifying accounts included in the balance sheet (see § 210.4–02).

Schedule VI—Supplemental Information Concerning Property-Casualty Insurance Operations. The information required by § 210.12–18 shall be presented as of the same dates and for the same periods for which the information is reflected in the audited consolidated financial statements required by §§ 210.3–01 and 3–02. The schedule may be omitted if reserves for unpaid property-casualty claims and claim adjustment expenses of the registrant and its consolidated subsidiaries, its unconsolidated subsidiaries and

its 50%-or-less-owned equity basis investees did not in the aggregate, exceed one-half of common stockholders' equity of the registrant and its consolidated subsidiaries as of the beginning of the fiscal year. For purposes of this test, only the proportionate share of the registrant and its other subsidiaries in the reserves for unpaid claims and claim adjustment expenses of 50%-or-less-owned equity investees taken in the aggregate after intercompany eliminations shall be taken into account. Article 12—Form and Content of Schedules (17 CFR 210)

(Secs. 7 and 19a of the Securities Act, 15 U.S.C. 77g, 77s(a), 77aa(25)(26); secs. 12, 13, 14, 15(d), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a), secs. 5(b), 10(a), 14, 20(a) of the Public Utility Holding Company Act, 15 U.S.C. 79e(a), 79n, 79t(a); secs. 8, 20, 30, 31(c), 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–8, 80a–20, 80a–29, 80a–30(c), 80a–37(a); secs. 6, 7, 8, 10, 19(a))

[46 FR 54335, Nov. 2, 1981, as amended at 47 FR 29837, July 9, 1982; 49 FR 47598, Dec. 6, 1984; 59 FR 65637, Dec. 20, 1994]

BANK HOLDING COMPANIES

SOURCE: Sections 210.9–01 to 210.9–07 appear at 48 FR 11107, Mar. 16, 1983, unless otherwise noted.

§210.9–01 Application of §§210.9–01 to 210.9–07

This article is applicable to consolidated financial statements filed for bank holding companies and to any financial statements of banks that are included in filings with the Commission.

§210.9–02 General requirement.

The requirements of the general rules in §§210.1 to 210.4 (Articles 1, 2, 3, 3A and 4) should be complied with where applicable.

§210.9–03 Balance sheets.

The purpose of this rule is to indicate the various items which, if applicable, should appear on the face of the balance sheets or in the notes thereto.

ASSETS

1. *Cash and due from banks.* The amounts in this caption should include all noninterest bearing deposits with other banks.

(a) Any withdrawal and usage restrictions (including requirements of the Federal Reserve to maintain certain average reserve balances) or compensating balance requirements should be disclosed (see §210.5–02–1).

2. Interest-bearing deposits in other banks.

3. *Federal funds sold and securities purchased under resale agreements of similar arrangements.* These amounts should be presented gross and not netted against Federal funds purchased and securities sold under agreement to repurchase as reported in Caption 13.

4. *Trading account assets.* Include securities or any other investments held for trading purposes only.

5. Other short-term investments.

6. *Investment securities* Include securities held for investment only. Disclose the aggregate book value of investment securities; show on the balance sheet the aggregate market value at the balance sheet date. The aggregate amounts should include securities pledged, loaned or sold under repurchase agreements and similar arrangements; borrowed securities and securities purchased under resale agreements or similar arrangements should be excluded.

(a) Disclose in a note the carrying value and market value of securities of (1) the U.S. Treasury and other U.S. Government agencies and corporations; (2) states of the U.S. and political subdivisions; and (3) other securities.

7. *Loans.* Disclose separately (1) total loans, (2) the related allowance for losses and (3) unearned income.

(a) Disclose on the balance sheet or in a note the amount of total loans in each of the following categories:

(1) Commercial, financial and agricultural
(2) Real estate—construction
(3) Real estate—mortgage
(4) Installment loans to individuals
(5) Lease financing
(6) Foreign
(7) Other (State separately any other loan category regardless of relative size if necessary to reflect any unusual risk concentration).

(b) A series of categories other than those specified in (a) above may be used to present details of loans if considered a more appropriate presentation.

(c) The amount of foreign loans must be presented if the disclosures provided by §210.9–05 are required.

(d) For each period for which an income statement is required, furnish in a note a statement of changes in the allowance for loan losses showing the balances at beginning and end of the period provision charged to income, recoveries of amounts charged off and losses charged to the allowance.

(e)(1)(i) As of each balance sheet date, disclose in a note the aggregate dollar amount of loans (exclusive of loans to any such persons which in the aggregate do not exceed $60,000 during the latest year) made by the

registrant or any of its subsidiaries to directors, executive officers, or principal holders of equity securities (§ 210.1–02) of the registrant or any of its significant subsidiaries (§ 210.1–02), or to any associate of such persons. For the latest fiscal year, an analysis of activity with respect to such aggregate loans to related parties should be provided. The analysis should include the aggregate amount at the beginning of the period, new loans, repayments, and other changes. (Other changes, if significant, should be explained.)

(ii) This disclosure need not be furnished when the aggregate amount of such loans at the balance sheet date (or with respect to the latest fiscal year, the maximum amount outstanding during the period) does not exceed 5 percent of stockholders equity at the balance sheet date.

(2) If a significant portion of the aggregate amount of loans outstanding at the end of the fiscal year disclosed pursuant to (e)(1)(i) above relates to loans which are disclosed as nonaccrual, past due, restructured or potential problems (see Item III.C. 1. or 2. of Industry Guide 3, Statistical Disclosure by Bank Holding Companies), so state and disclose the aggregate amounts of such loans along with such other information necessary to an understanding of the effects of the transactions on the financial statements.

(3) Notwithstanding the aggregate disclosure called for by (e)(1) above, if any loans were not made in the ordinary course of business during any period for which an income statement is required to be filed, provide an appropriate description of each such loan (see § 210.4–08(L)(3)).

(4) Definition of terms. For purposes of this rule, the following definitions shall apply:

Associate means (i) a corporation, venture or organization of which such person is a general partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities; (ii) any trust or other estate in which such person has a substantial beneficial interest or for which such person serves as trustee or in a similar capacity and (iii) any member of the immediate family of any of the foregoing persons.

Executive officers means the president, any vice president in charge of a principal business unit, division or function (such as loans, investments, operations, administration or finance), and any other officer or person who performs similar policymaking functions.

Immediate Family means such person's spouse; parents; children; siblings; mothers and fathers-in-law; sons and daughters-in-law; and brothers and sisters-in-law.

Ordinary course of business means those loans which were made on substantially the same terms, including interest rate and collateral, as those prevailing at the same time for comparable transactions with unrelated persons and did not involve more than the normal risk of collectibility or present other unfavorable features.

8. *Premises and equipment.*

9. *Due from customers on acceptances.* Include amounts receivable from customers on unmatured drafts and bills of exchange that have been accepted by a bank subsidiary or by other banks for the account of a subsidiary and that are outstanding—that is, not held by a subsidiary bank, on the reporting date. (If held by a bank subsidiary, they should be reported as ''loans'' under § 210.9–03.7.)

10. *Other assets.* Disclose separately on the balance sheet or in a note thereto any of the following assets or any other asset the amount of which exceeds thirty percent of stockholders equity. The remaining assets may be shown as one amount.

(1) Excess of cost over tangible and identifiable intangible assets acquired (net of amortization).

(2) Other intangible assets (net of amortization).

(3) Investments in and indebtness of affiliates and other persons.

(4) Other real estates.

(a) Disclose in a note the basis at which other real estate is carried. An reduction to fair market value from the carrying value of the related loan at the time of acquisition shall be accounted for as a loan loss. Any allowance for losses on other real estate which has been established subsequent to acquisition should be deducted from other real estate. For each period for which an income statement is required, disclosures should be made in a note as to the changes in the allowances, including balance at beginning and end of period, provision charged to income, and losses charged to the allowance.

11. Total assets.

LIABILITIES AND STOCKHOLDERS' EQUITY

Liabilities

12. *Deposits.* Disclose separately the amounts of noninterest bearing deposits and interest bearing deposits.

(a) The amount of noninterest bearing deposits and interest bearing deposits in foreign banking offices must be presented if the disclosure provided by § 210.0–05 are required.

13. *Short-term borrowing.* Disclosure separately on the balance sheet or in a note, amounts payable for (1) Federal funds purchased and securities sold under agreements to repurchase; (2) commercial paper, and (3) other short-term borrowings.

(a) Disclose any unused lines of credit for short-term financing: (§ 210.5–02.19(b)).

14. *Bank acceptances outstanding.* Disclose the aggregate of unmatured drafts and bills of exchange accepted by a bank subsidiary, or by some other bank as its agent, less the amount of such acceptances acquired by the

bank subsidiary through discount or purchase.

15. *Other liabilities.* Disclose separately on the balance sheet or in a note any of the following liabilities or any other items which are individually in excess of thirty percent of stockholders' equity (except that amounts in excess of 5 percent of stockholders' equity should be disclosed with respect to item (4)). The remaining items may be shown as one amount.

(1) Income taxes payable.

(2) Deferred income taxes.

(3) Indebtedness to affiliates and other persons the investments in which are accounted for by the equity method.

(4) Indebtedness to directors, executive officers, and principal holders of equity securities of the registrant or any of its significant subsidiaries (the guidance in §210.9–03.7(e) shall be used to identify related parties for purposes of this disclosure).

(5) Accounts payable and accrued expenses.

16. *Long-term debt.* Disclose in a note the information required by §210.5–02.22.

17. *Commitments and contingent liabilities.*

18. *Minority interest in consolidated subsidiaries.* The information required by §210.5–02.27 should be disclosed if applicable.

Redeemable Preferred Stocks

19. *Preferred stocks subject to mandatory redemption requirements or whose redemption is outside the control of the issuer.* See §210.5–02.28.

Non-redeemable Preferred Stocks

20. *Preferred stocks which are not redeemable or are redeemable solely at the option of the issuer.* See §210.5–02.29.

Common Stocks

21. *Common stocks.* See §210.5–02.30.

Other Stockholders' Equity

22. *Other stockholders' equity.* See §210.5–02.31.

23. *Total liabilities and stockholders' equity.*

(Secs. 7, 19a, and Schedule A (25) and (26) of the Securities Act of 1933, 15 U.S.C. 77g, 77s(a), 77nn (25) and (26); and secs. 12, 13, 14, 15(d), and 23(n) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a).

[48 FR 11107, Mar. 16, 1983, as amended at 48 FR 37612, Aug. 19, 1983; 50 FR 25215, June 18, 1985]

§210.9–04 Income statements.

The purpose of this rule is to indicate the various items which, if applicable, should appear on the face of the income statement or in the notes thereto.

1. *Interest and fees on loans.* Include commitment and origination fees, late charges and current amortization of premium and accretion of discount on loans which are related to or are an adjustment of the loan interest rate.

2. *Interest and dividends on investment securities.* Disclosure separately (1) taxable interest income, (2) nontaxable interest income, and (3) dividends.

3. *Trading account interest.*

4. *Other interest income.*

5. *Total interest income (total of lines 1 through 4).*

6. *Interest on deposits.*

7. *Interest on short-term borrowings.*

8. *Interest on long-term debt.*

9. *Total interest expense (total of lines 6 through 8).*

10. *Net interest income (line 5 minus line 9).*

11. *Provision for loan losses.*

12. *Net interest income after provision for loan losses.*

13. *Other income.* Disclose separately any of the following amounts, or any other item of other income, which exceed one percent of the aggregate of total interest income and other income. The remaining amounts may be shown as one amount, except for investment securities gains or losses which shall be shown separately regardless of size.

(a) Commissions and fees and fiduciary activities.

(b) Commissions, broker's fees and markups on securities underwriting and other securities activities.

(c) Insurance commissions, fees and premiums.

(d) Fees for other customer services.

(e) Profit or loss on transactions in securities in dealer trading account.

(f) Equity in earnings of unconsolidated subsidiaries and 50 percent or less owned persons.

(g) Gains or losses on disposition of equity in securities of subsidiaries or 50 percent or less owned persons.

(h) Investment securities gains or losses. The method followed in determining the cost of investments sold (e.g., ''average cost,'' ''first-in, first-out,'' or ''identified certificate) and related income taxes shall be disclosed.

14. *Other expenses.* Disclose separately any of the following amounts, or any other item of other expense, which exceed one percent of the aggregate of total interest income and other income. The remaining amounts may be shown as one amount.

(a) Salaries and employee benefits.

(b) Net occupancy expense of premises.

(c) Goodwill amortization.

(d) Net cost of operation of other real estate (including provisions for real estate losses, rental income and gains and losses on sales of real estate).

(e) Minority interest in income of consolidated subsidiaries.

15. *Income or loss before income tax expense.*

16. *Income tax expense.* The information required by § 210.4–08(h) should be disclosed.

17. *Income or loss before extraordinary items and cumulative effects of changes in accounting principles.*

18. *Extraordinary items, less applicable tax.*

19. *Cumulative effects of changes in accounting principles.*

20. *Net income or loss.*

21. *Earnings per share data.*

[48 FR 11107, Mar. 16, 1983, as amended at 50 FR 25215, June 18, 1985]

§ 210.9–05 Foreign activities.

(a) *General requirement.* Separate disclosure concerning foreign activities shall be made for each period in which either (1) assets, or (2) revenue, or (3) income (loss) before income tax expense, or (4) net income (loss), each as associated with foreign activities, exceeded ten percent of the corresponding amount in the related financial statements.

(b) *Disclosures.* (1) Disclose total identifiable assets (net of valuation allowances) associated with foreign activities.

(2) For each period for which an income statement is filed, state the amount of revenue, income (loss) before taxes, and net income (loss) associated with foreign activities. Disclose significant estimates and assumptions (including those related to the cost of capital) used in allocating revenue and expenses to foreign activities; describe the nature and effects of any changes in such estimates and assumptions which have a significant impact on interperiod comparability.

(3) The information in paragraph (b)(1) and (2) of this section shall be presented separately for each significant geographic area and in the aggregate for all other geographic areas not deemed significant.

(c) *Definitions.* (1) *Foreign activities* include loans and other revenues producing assets and transactions in which the debtor or customer, whether an affiliated or unaffiliated person, is domiciled outside the United States.

(2) The term *revenue* includes the total of the amount reported at §§ 210.9–04.5 and 210.9–04.13.

(3) A *significant geographic area* is one in which assets or revenue or income before income tax or net income exceed 10 percent of the comparable amount as reported in the financial statements.

§ 210.9–06 Condensed financial information of registrant.

The information prescribed by § 210.12–04 shall be presented in a note to the financial statements when the restricted net assets (§ 210.4–08(e)(3)) of consolidated subsidiaries exceed 25 percent of consolidated net assets as of the end of the most recently completed fiscal year. The investment in and indebtedness of and to bank subsidiaries shall be stated separately in the condensed balance sheet from amounts for other subsidiaries; the amount of cash dividends paid to the registrant for each of the last three years by bank subsidiaries shall be stated separately in the condensed income statement from amounts for other subsidiaries. For purposes of the above test, restricted net assets of consolidated subsidiaries shall mean that amount of the registrant's proportionate share of net assets of consolidated subsidiaries (after intercompany eliminations) which as of the end of the most recent fiscal year may not be transferred to the parent company by subsidiaries in the form of loans, advances or cash dividends without the consent of a third party (i.e., lender, regulatory agency, foreign government, etc.). Where restrictions on the amount of funds which may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary shall be used. Redeemable preferred stocks (§ 210.5–02.28) and minority interests shall be deducted in computing net assets for purposes of this test.

§ 210.9–07 [Reserved]

INTERIM FINANCIAL STATEMENTS

§ 210.10–01 Interim financial statements.

(a) *Condensed statements.* Interim financial statements shall follow the general form and content of presentation prescribed by the other sections

of this Regulation with the following exceptions:

(1) Interim financial statements required by this rule need only be provided as to the registrant and its subsidiaries consolidated and may be unaudited. Separate statements of other entities which may otherwise be required by this regulation may be omitted.

(2) Interim balance sheets shall include only major captions (i.e., numbered captions) prescribed by the applicable sections of this Regulation with the exception of inventories. Data as to raw materials, work in process and finished goods inventories shall be included either on the face of the balance sheet or in the notes to the financial statements, if applicable. Where any major balance sheet caption is less than 10% of total assets, and the amount in the caption has not increased or decreased by more than 25% since the end of the preceding fiscal year, the caption may be combined with others.

(3) Interim statements of income shall also include major captions prescribed by the applicable sections of this Regulation. When any major income statement caption is less than 15% of average net income for the most recent three fiscal years and the amount in the caption has not increased or decreased by more than 20% as compared to the corresponding interim period of the preceding fiscal year, the caption may be combined with others. In calculating average net income, loss years should be excluded. If losses were incurred in each of the most recent three years, the average loss shall be used for purposes of this test. Notwithstanding these tests, §210.4–02 applies and de minimis amounts therefore need not be shown separately, except that registrants reporting under §210.9 shall show investment securities gains or losses separately regardless of size.

(4) The statement of cash flows may be abbreviated starting with a single figure of net cash flows from operating activities and showing cash changes from investing and financing activities individually only when they exceed 10% of the average of net cash flows from operating activities for the most recent three years. Notwithstanding this test, §210.4–02 applies and *de minimis* amounts therefore need not be shown separately.

(5) The interim financial information shall include disclosures either on the face of the financial statements or in accompanying footnotes sufficient so as to make the interim information presented not misleading. Registrants may presume that users of the interim financial information have read or have access to the audited financial statements for the preceding fiscal year and that the adequacy of additional disclosure needed for a fair presentation, except in regard to material contingencies, may be determined in that context. Accordingly, footnote disclosure which would substantially duplicate the disclosure contained in the most recent annual report to security holders or latest audited financial statements, such as a statement of significant accounting policies and practices, details of accounts which have not changed significantly in amount or composition since the end of the most recently completed fiscal year, and detailed disclosures prescribed by Rule 4–08 of this Regulation, may be omitted. However, disclosure shall be provided where events subsequent to the end of the most recent fiscal year have occurred which have a material impact on the registrant. Disclosures should encompass for example, significant changes since the end of the most recently completed fiscal year in such items as: accounting principles and practices; estimates inherent in the preparation of financial statements; status of long-term contracts; capitalization including significant new borrowings or modification of existing financing arrangements; and the reporting entity resulting from business combinations or dispositions. Notwithstanding the above, where material contingencies exist, disclosure of such matters shall be provided even though a significant change since year end may not have occurred.

(6) Detailed schedules otherwise required by this Regulation may be omitted for purposes of preparing interim financial statements.

(7) In addition to the financial statements required by paragraphs (a) (2),

(3) and (4) of this section, registrants in the development stage shall provide the cumulative financial statements (condensed to the same degree as allowed in this paragraph) and disclosures required by Statement of Financial Accounting Standards No. 7, ''Accounting and Reporting by Development Stage Enterprises'' to the date of the latest balance sheet presented.

(b) *Other instructions as to content.* The following additional instructions shall be applicable for purposes of preparing interim financial statements:

(1) Summarized income statement information shall be given separately as to each subsidiary not consolidated or 50 percent or less owned persons or as to each group of such subsidiaries or fifty percent or less owned persons for which separate individual or group statements would otherwise be required for annual periods. Such summarized information, however, need not be furnished for any such unconsolidated subsidiary or person which would not be required pursuant to Rule 13a–13 or 15d–13 to file quarterly financial information with the Commission if it were a registrant.

(2) If appropriate, the income statement shall show earnings per share and dividends declared per share applicable to common stock. The basis of the earnings per share computation shall be stated together with the number of shares used in the computation. In addition, see Item 601(b)(11) of Regulation S–K, (17 CFR 229.601(b)(11)).

(3) If, during the most recent interim period presented, the registrant or any of its consolidated subsidiaries entered into a business combination treated for accounting purposes as a pooling of interests, the interim financial statements for both the current year and the preceding year shall reflect the combined results of the pooled businesses. Supplemental disclosure of the separate results of the combined entities for periods prior to the combination shall be given, with appropriate explanations.

(4) Where a material business combination accounted for as a purchase has occurred during the current fiscal year, pro forma disclosure shall be made of the results of operations for the current year up to the date of the most recent interim balance sheet provided (and for the corresponding period in the preceding year) as though the companies had combined at the beginning of the period being reported on. This pro forma information should as a minimum show revenue, income before extraordinary items and the cumulative effect of accounting changes, including such income on a per share basis, and net income and net income per share.

(5) Where the registrant has disposed of any significant segment of its business (as defined in paragraph 13 of Accounting Principles Board Opinion No. 30) during any of the periods covered by the interim financial statements, the effect thereof on revenues and net income—total and per share—for all periods shall be disclosed.

(6) In addition to meeting the reporting requirements specified by existing standards for accounting changes, the registrant shall state the date of any material accounting change and the reasons for making it. In addition, for filings on Form 10–Q and Form 10–QSB, a letter from the registrant's independent accountant shall be filed as an exhibit (in accordance with the provisions of Item 601 of Regulation S–K, 17 CFR 229.601) in the first Form 10–Q and Form 10–QSB subsequent to the date of an accounting change indicating whether or not the change is to an alternative principle which in his judgment is preferable under the circumstances; except that no letter from the accountant need be filed when the change is made in response to a standard adopted by the Financial Accounting Standards Board which requires such change.

(7) Any material retroactive prior period adjustment made during any period convered by the interim financial statements shall be disclosed, together with the effect thereof upon net income—total and per share—of any prior period included and upon the balance of retained earnings. If results of operations for any period presented have been adjusted retroactively by such an item subsequent to the initial reporting of such period, similar disclosure of the effect of the change shall be made.

(8) Any unaudited interim financial statements furnished shall reflect all adjustments which are, in the opinion of management, necessary to a fair statement of the results for the interim periods presented. A statement to that effect shall be included. Such adjustments shall include, for example, appropriate estimated provisions for bonus and profit sharing arrangements normally determined or settled at year-end. If all such adjustments are of a normal recurring nature, a statement to that effect shall be made; otherwise, there shall be furnished information describing in appropriate detail the nature and amount of any adjustments other than normal recurring adjustments entering into the determination of the results shown.

(c) *Periods to be covered.* The periods for which interim financial statements are to be provided in registration statements are prescribed elsewhere in this Regulation (see §§210.3–01 and 3–02). For filings on Form 10–Q and Form 10–QSB, financial statements shall be provided as set forth below:

(1) An interim balance sheet as of the end of the most recent fiscal quarter and a balance sheet as of the end of the preceding fiscal year shall be provided. The balance sheet as of the end of the preceding fiscal year may be condensed to the same degree as the interim balance sheet provided. An interim balance sheet as of the end of the corresponding fiscal quarter of the preceding fiscal year need not be provided unless necessary for an understanding of the impact of seasonal fluctuations on the registrant's financial condition.

(2) Interim statements of income shall be provided for the most recent fiscal quarter, for the period between the end of the preceding fiscal year and the end of the most recent fiscal quarter, and for the corresponding periods of the preceding fiscal year. Such statements may also be presented for the cumulative twelve month period ended during the most recent fiscal quarter and for the corresponding preceding period.

(3) Interim statements of cash flows shall be provided for the period between the end of the preceding fiscal year and the end of the most recent fiscal quarter, and for the corresponding period of the preceding fiscal year. Such statements may also be presented for the cumulative twelve month period ended during the most recent fiscal quarter and for the corresponding preceding period.

(4) Registrants engaged in seasonal production and sale of a single-crop agricultural commodity may provide interim statements of income and cash flows for the twelve month period ended during the most recent fiscal quarter and for the corresponding preceding period in lieu of the year-to-date statements specified in (2) and (3) above.

(d) *Interim review by independent public accountant.* Prior to filing, interim financial statements included in quarterly reports on Form 10–Q (17 CFR 249.308(a)) must be reviewed by an independent public accountant using professional standards and procedures for conducting such reviews, as established by generally accepted auditing standards, as may be modified or supplemented by the Commission. If, in any filing, the company states that interim financial statements have been reviewed by an independent public accountant, a report of the accountant on the review must be filed with the interim financial statements.

(e) *Filing of other interim financial information in certain cases.* The Commission may, upon the informal written request of the registrant, and where consistent with the protection of investors, permit the omission of any of the interim financial information herein required or the filing in substitution thereof of appropriate information of comparable character. The Commission may also by informal written notice require the filing of other information in addition to, or in substitution for, the interim information herein required in any case where such information is necessary or appropriate for an adequate presentation of the financial condition of any person for which interim financial information is required, or whose financial information is otherwise necessary for the protection of investors.

[46 FR 12489, Feb. 17, 1981, as amended at 50 FR 25215, June 18, 1985; 50 FR 49533, Dec. 3, 1985; 57 FR 45293, Oct. 1, 1992; 64 FR 73401, Dec. 30, 1999]

PRO FORMA FINANCIAL INFORMATION

AUTHORITY: Secs. 210.11–01 to 210.11–03 issued under secs. 7 and 19a of the Securities Act, 15 U.S.C. 77g, 77s(a), 77aa(25)(26); secs. 12, 13, 14, 15(d), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a); secs. 5(b), 10(a), 14, 20(a) of the Public Utility Holding Company Act, 15 U.S.C. 79e(a), 79n, 79t(a); secs. 8, 20, 30, 31(c), 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–8, 80a–20, 80a–29, 80a–30(c), 80a–37(a).

SOURCE: Sections 210.11–01 to 210.11–03 appear at 47 FR 29837, July 9, 1982, unless otherwise noted.

§ 210.11–01 Presentation requirements.

(a) Pro forma financial information shall be furnished when any of the following conditions exist:

(1) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3–01, a significant business combination accounted for as a purchase has occurred (for purposes of these rules, the term ''purchase'' encompasses the purchase of an interest in a business accounted for by the equity method);

(2) After the date of the most recent balance sheet filed pursuant to § 210.3–01, consummation of a significant business combination to be accounted for by either the purchase method or pooling-of-interests method of accounting has occurred or is probable;

(3) Securities being registered by the registrant are to be offered to the security holders of a significant business to be acquired or the proceeds from the offered securities will be applied directly or indirectly to the purchase of a specific significant business;

(4) The disposition of a significant portion of a business either by sale, abandonment or distribution to shareholders by means of a spin-off, split-up or split-off has occurred or is probable and such disposition is not fully reflected in the financial statements of the registrant included in the filing;

(5) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3–01, the registrant has acquired one or more real estate operations or properties which in the aggregate are significant, or since the date of the most recent balance sheet filed pursuant to that section the registrant has acquired or proposes to acquire one or more operations or properties which in the aggregate are significant.

(6) Pro forma financial information required by § 229.914 is required to be provided in connection with a roll-up transaction as defined in § 229.901(c).

(7) The registrant previously was a part of another entity and such presentation is necessary to reflect operations and financial position of the registrant as an autonomous entity; or

(8) Consummation of other events or transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors.

(b) A business combination or disposition of a business shall be considered significant if:

(1) A comparison of the most recent annual financial statements of the business acquired or to be acquired and the registrant's most recent annual consolidated financial statements filed at or prior to the date of acquisition indicates that the business would be a significant subsidiary pursuant to the conditions specified in § 210.1–02(w), substituting 20 percent for 10 percent each place it appears therein; or

(2) The business to be disposed of meets the conditions of a significant subsidiary in § 210.1–02(w).

(c) The pro forma effects of a business combination need not be presented pursuant to this section if separate financial statements of the acquired business are not included in the filing.

(d) For purposes of this rule, the term business should be evaluated in light of the facts and circumstances involved and whether there is sufficient continuity of the acquired entity's operations prior to and after the transactions so that disclosure of prior financial information is material to an understanding of future operations. A presumption exists that a separate entity, a subsidiary, or a division is a business. However, a lesser component of an entity may also constitute a business. Among the facts and circumstances which should be considered in evaluating whether an acquisition of a lesser component of an entity constitutes a business are the following:

(1) Whether the nature of the revenue-producing activity of the component will remain generally the same as before the transaction; or

(2) Whether any of the following attributes remain with the component after the transaction:

(i) Physical facilities,

(ii) Employee base,

(iii) Market distribution system,

(iv) Sales force,

(v) Customer base,

(vi) Operating rights,

(vii) Production techniques, or

(viii) Trade names.

(e) This rule does not apply to transactions between a parent company and its totally held subsidiary.

[47 FR 29837, July 9, 1982, as amended at 50 FR 49533, Dec. 3, 1985; 56 FR 57247, Nov. 8, 1991; 61 FR 54514, Oct. 18, 1996]

§ 210.11–02 Preparation requirements.

(a) *Objective.* Pro forma financial information should provide investors with information about the continuing impact of a particular transaction by showing how it might have affected historical financial statements if the transaction had been consummated at an earlier time. Such statements should assist investors in analyzing the future prospects of the registrant because they illustrate the possible scope of the change in the registrant's historical financial position and results of operations caused by the transaction.

(b) *Form and content.* (1) Pro forma financial information shall consist of a pro forma condensed balance sheet, pro forma condensed statements of income, and accompanying explanatory notes. In certain circumstances (i.e., where a limited number of pro forma adjustments are required and those adjustments are easily understood), a narrative description of the pro forma effects of the transaction may be furnished in lieu of the statements described herein.

(2) The pro forma financial information shall be accompanied by an introductory paragraph which briefly sets forth a description of (i) the transaction, (ii) the entities involved, and (iii) the periods for which the pro forma information is presented. In addition, an explanation of what the pro forma presentation shows shall be set forth.

(3) The pro forma condensed financial information need only include major captions (i.e., the numbered captions) prescribed by the applicable sections of this Regulation. Where any major balance sheet caption is less than 10 percent of total assets, the caption may be combined with others. When any major income statement caption is less than 15 percent of average net income of the registrant for the most recent three fiscal years, the caption may be combined with others. In calculating average net income, loss years should be excluded unless losses were incurred in each of the most recent three years, in which case the average loss shall be used for purposes of this test. Notwithstanding these tests, *de minimis* amounts need not be shown separately.

(4) Pro forma statements shall ordinarily be in columnar form showing condensed historical statements, pro forma adjustments, and the pro forma results.

(5) The pro forma condensed income statement shall disclose income (loss) from continuing operations before nonrecurring charges or credits directly attributable to the transaction. Material nonrecurring charges or credits and related tax effects which result directly from the transaction and which will be included in the income of the registrant within the 12 months succeeding the transaction shall be disclosed separately. It should be clearly indicated that such charges or credits were not considered in the pro forma condensed income statement. If the transaction for which pro forma financial information is presented relates to the disposition of a business, the pro forma results should give effect to the disposition and be presented under an appropriate caption.

(6) Pro forma adjustments related to the pro forma condensed income statement shall be computed assuming the transaction was consummated at the beginning of the fiscal year presented and shall include adjustments which give effect to events that are (i) directly attributable to the transaction,

(ii) expected to have a continuing impact on the registrant, and (iii) factually supportable. Pro forma adjustments related to the pro forma condensed balance sheet shall be computed assuming the transaction was consummated at the end of the most recent period for which a balance sheet is required by § 210.3–01 and shall include adjustments which give effect to events that are directly attributable to the transaction and factually supportable regardless of whether they have a continuing impact or are nonrecurring. All adjustments should be referenced to notes which clearly explain the assumptions involved.

(7) Historical primary and fully diluted per share data based on continuing operations (or net income if the registrant does not report either discontinued operations, extraordinary items, or the cumulative effects of accounting changes) for the registrant, and primary and fully diluted pro forma per share data based on continuing operations before nonrecurring charges or credits directly attributable to the transaction shall be presented on the face of the pro forma condensed income statement together with the number of shares used to compute such per share data. For transactions involving the issuance of securities, the number of shares used in the calculation of the pro forma per share data should be based on the weighted average number of shares outstanding during the period adjusted to give effect to shares subsequently issued or assumed to be issued had the particular transaction or event taken place at the beginning of the period presented. If a convertible security is being issued in the transaction, consideration should be given to the possible dilution of the pro forma per share data.

(8) If the transaction is structured in such a manner that significantly different results may occur, additional pro forma presentations shall be made which give effect to the range of possible results.

Instructions: 1. The historical statement of income used in the pro forma financial information shall not report operations of a segment that has been discontinued, extraordinary items, or the cumulative effects of accounting changes. If the historical statement of income includes such items, only the portion of the income statement through ''income from continuing operations'' (or the appropriate modification thereof) should be used in preparing pro forma results.

2. For a purchase transaction, pro forma adjustments for the income statement shall include amortization of goodwill, depreciation and other adjustments based on the allocated purchase price of net assets acquired. In some transactions, such as in financial institution acquisitions, the purchase adjustments may include significant discounts of the historical cost of the acquired assets to their fair value at the acquisition date. When such adjustments will result in a significant effect on earnings (losses) in periods immediately subsequent to the acquisition which will be progressively eliminated over a relatively short period, the effect of the purchase adjustments on reported results of operations for each of the next five years should be disclosed in a note.

3. For a disposition transaction, the pro forma financial information shall begin with the historical financial statements of the existing entity and show the deletion of the business to be divested along with the pro forma adjustments necessary to arrive at the remainder of the existing entity. For example, pro forma adjustments would include adjustments of interest expense arising from revised debt structures and expenses which will be or have been incurred on behalf of the business to be divested such as advertising costs, executive salaries and other costs.

4. For entities which were previously a component of another entity, pro forma adjustments should include adjustments similar in nature to those referred to in Instruction 3 above. Adjustments may also be necessary when charges for corporate overhead, interest, or income taxes have been allocated to the entity on a basis other than one deemed reasonable by management.

5. Adjustments to reflect the acquisition of real estate operations or properties for the pro forma income statement shall include a depreciation charge based on the new accounting basis for the assets, interest financing on any additional or refinanced debt, and other appropriate adjustments that can be factually supported. See also Instruction 4 above.

6. When consummation of more than one transaction has occurred or is probable during a fiscal year, the pro forma financial information may be presented on a combined basis; however, in some circumstances (e.g., depending upon the combination of probable and consummated transactions, and the nature of the filing) it may be more useful to present the pro forma financial information on a disaggregated basis even though some or all of the transactions would not meet the tests of significance individually. For combined presentations, a note should explain

the various transactions and disclose the maximum variances in the pro forma financial information which would occur for any of the possible combinations. If the pro forma financial information is presented in a proxy or information statement for purposes of obtaining shareholder approval of one of the transactions, the effects of that transaction must be clearly set forth.

7. Tax effects, if any, of pro forma adjustments normally should be calculated at the statutory rate in effect during the periods for which pro forma condensed income statements are presented and should be reflected as a separate pro forma adjustment.

(c) *Periods to be presented.* (1) A pro forma condensed balance sheet as of the end of the most recent period for which a consolidated balance sheet of the registrant is required by §210.3–01 shall be filed unless the transaction is already reflected in such balance sheet.

(2)(i) Pro forma condensed statements of income shall be filed for only the most recent fiscal year and for the period from the most recent fiscal year end to the most recent interim date for which a balance sheet is required. A pro forma condensed statement of income may be filed for the corresponding interim period of the preceding fiscal year. A pro forma condensed statement of income shall not be filed when the historical income statement reflects the transaction for the entire period.

(ii) For a business combination accounted for as a pooling of interests, the pro forma income statements (which are in effect a restatement of the historical income statements as if the combination had been consummated) shall be filed for all periods for which historical income statements of the registrant are required.

(3) Pro forma condensed statements of income shall be presented using the registrant's fiscal year end. If the most recent fiscal year end of any other entity involved in the transaction differs from the registrant's most recent fiscal year end by more than 93 days, the other entity's income statement shall be brought up to within 93 days of the registrant's most recent fiscal year end, if practicable. This updating could be accomplished by adding subsequent interim period results to the most recent fiscal year-end information and deducting the comparable preceding year interim period results. Disclosure shall be made of the periods combined and of the sales or revenues and income for any periods which were excluded from or included more than once in the condensed pro forma income statements (e.g., an interim period that is included both as part of the fiscal year and the subsequent interim period). For investment companies subject to §§210.6–01 to 210.6–10, the periods covered by the pro forma statements must be the same.

(4) Whenever unusual events enter into the determination of the results shown for the most recently completed fiscal year, the effect of such unusual events should be disclosed and consideration should be given to presenting a pro forma condensed income statement for the most recent twelve-month period in addition to those required in paragraph (c)(2)(i) above if the most recent twelve-month period is more representative of normal operations.

[47 FR 29837, July 9, 1982, as amended at 50 FR 49533, Dec. 3, 1985]

§210.11–03 Presentation of financial forecast.

(a) A financial forecast may be filed in lieu of the pro forma condensed statements of income required by §210.11–02(b)(1).

(1) The financial forecast shall cover a period of at least 12 months from the latest of (i) the most recent balance sheet included in the filing or (ii) the consummation date or estimated consummation date of the transaction.

(2) The forecasted statement of income shall be presented in the same degree of detail as the pro forma condensed statement of income required by §210.11–02(b)(3).

(3) Assumptions particularly relevant to the transaction and effects thereof should be clearly set forth.

(4) Historical condensed financial information of the registrant and the business acquired or to be acquired, if any, shall be presented for at least a recent 12 month period in parallel columns with the financial forecast.

(b) Such financial forecast shall be presented in accordance with the guidelines established by the American Institute of Certified Public Accountants.

(c) Forecasted earnings per share data shall be substituted for pro forma per share data.

(d) This rule does not permit the filing of a financial forecast in lieu of pro forma information required by generally accepted accounting principles.

FORM AND CONTENT OF SCHEDULES

general

§ 210.12–01 Application of §§ 210.12–01 to 210.12–29.

These sections prescribe the form and content of the schedules required by §§ 210.5–04, 210.6–10, 210.6A–05, and 210.7–05.

[59 FR 65637, Dec. 20, 1994]

§ 210.12–02—210.12–03 [Reserved]

§ 210.12–04 Condensed financial information of registrant.

(a) Provide condensed financial information as to financial position, cash flows and results of operations of the registrant as of the same dates and for the same periods for which audited consolidated financial statements are required. The financial information required need not be presented in greater detail than is required for condensed statements by § 210.10–01(a) (2), (3) and (4). Detailed footnote disclosure which would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations and guarantees. Descriptions of significant provisions of the registrant's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the registrant shall be provided along with a five-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements and guarantees of the registrant have been separately disclosed in the consolidated statements, they need not be repeated in this schedule.

(b) Disclose separately the amounts of cash dividends paid to the registrant for each of the last three fiscal years by consolidated subsidiaries, unconsolidated subsidiaries and 50 percent or less owned persons accounted for by the equity method, respectively.

[46 FR 56180, Nov. 16, 1981, as amended at 57 FR 45293, Oct. 1, 1992]

§ 210.12–05—210.12–08 [Reserved]

§ 210.12–09 Valuation and qualifying accounts.

Column A—Description [1]	Column B—Balance at beginning of period	Column C—Additions		Column D—Deductions—describe	Column E—Balance at end of period
		(1)—Charged to costs and expenses	(2)—Charged to other accounts—describe		

[1] List, by major classes, all valuation and qualifying accounts and reserves not included in specific schedules. Identify each class of valuation and qualifying accounts and reserves by descriptive title. Group (a) those valuation and qualifying accounts which are deducted in the balance sheet from the assets to which they apply and (b) those reserves which support the balance sheet caption, Reserves. Valuation and qualifying accounts and reserves as to which the additions, deductions, and balances were not individually significant may be grouped in one total and in such case the information called for under columns C and D need not be given.

[37 FR 14602, July 21, 1972. Redesignated and amended at 45 FR 63679, Sept. 25, 1980]

§ 210.12–10—210.12–11 [Reserved]

for management investment companies

§210.12–12 Investments in securities of unaffiliated issuers.

Col. A	Col. B	Col. C
Name of issuer and title of issue [1, 2]	Balance held at close of period. Number of shares—principal amount of bonds and notes [5]	Value of each item at close of period.[3, 4, 6, 7, 8]

[1] Each issue shall be listed separately: *Provided,* however, that an amount not exceeding five percent of the total of Column C may be listed in one amount as ''Miscellaneous securities,'' provided the securities so listed are not restricted, have been held for not more than one year prior to the date of the related balance sheet, and have not previously been reported by name to the shareholders of the person for which the schedule is filed or to any exchange, or set forth in any registration statement, application, or annual report or otherwise made available to the public.

[2] List separately: (a) Common shares; (b) preferred shares; (c) bonds and notes; (d) time deposits; and (e) put and call options purchased. Within each of these subdivisions, classify in an appropriate manner according to type of business; e.g., aerospace, banking, chemicals, machinery and machine tools, petroleum, utilities, etc.; or according to type of instrument; e.g., commercial paper, bankers' acceptances, certificates of deposit. Short-term debt instruments of the same issuer may be aggregated, in which case the range of interest rates and maturity dates shall be indicated. For issuers of periodic payment plan certificates and unit investment trusts, list separately: (i) Trust shares in trusts created or serviced by the depositor or sponsor of this trust; (ii) trust shares in other trusts; and (iii) securities of other investment companies. Restricted securities shall not be combined with unrestricted securities of the same issuer. Repurchase agreements shall be stated separately showing for each the name of the party or parties to the agreement, the date of the agreement, the total amount to be received upon repurchase, the repurchase date and description of securities subject to the repurchase agreements.

[3] The subtotals for each category of investments, subdivided by business grouping or instrument type, shall be shown together with their percentage value compared to net assets (§§ 210.6–04.19 or 210.6–05.4).

[4] Column C shall be totaled. The total of column C shall agree with the correlative amounts shown on the related balance sheet.

[5] Indicate by an appropriate symbol each issue of securities which is non-income producing. Evidences of indebtedness and preferred shares may be deemed to be income producing if, on the respective last interest payment date or date for the declaration of dividends prior to the date of the related balance sheet, there was only a partial payment of interest or a declaration of only a partial amount of the dividends payable; in such case, however, each such issue shall be indicated by an appropriate symbol referring to a note to the effect that, on the last interest or dividend date, only partial interest was paid or partial dividends declared. If, on such respective last interest or dividend date, no interest was paid or no cash or in kind dividends declared, the issue shall not be deemed to be income producing. Common shares shall not be deemed to be income producing unless, during the last year preceding the date of the related balance sheet, there was at least one dividend paid upon such common shares.

[6] Indicate by an appropriate symbol each issue of restricted securities. State the following in a footnote: (a) As to each such issue: (1) Acquisition date, (2) carrying value per unit of investment at date of related balance sheet, e.g., a percentage of current market value of unrestricted securities of the same issuer, etc., and (3) the cost of such securities; (b) as to each issue acquired during the year preceding the date of the related balance sheet, the carrying value per unit of investment of unrestricted securities of the same issuer at: (1) The day the purchase price was agreed to; and (2) the day on which an enforceable right to acquire such securities was obtained; and (c) the aggregate value of all restricted securities and the percentage which the aggregate value bears to net assets.

[7] Indicate by an appropriate symbol each issue of securities held in connection with open put or call option contracts or loans for short sales.

[8] State in a footnote the following amounts based on cost for Federal income tax purposes: (a) Aggregate gross unrealized appreciation for all securities in which there is an excess of value over tax cost, (b) the aggregate gross unrealized depreciation for all securities in which there is an excess of tax cost over value, (c) the net unrealized appreciation or depreciation, and (d) the aggregate cost of securities for Federal income tax purposes.

[47 FR 56843, Dec. 21, 1982]

§210.12–12A Investments—securities sold short.

[For management investment companies only]

Col. A	Col. B	Col. C
Name of issuer and title of issue [1]	Balance of short position at close of period. (number of shares).	Value of each open short position [2]

[1] Each issue shall be listed separately.

[2] Column C shall be totaled. The total of column C shall agree with the correlative amounts shown on the related balance sheet.

[47 FR 56844, Dec. 21, 1982]

§210.12–12B Open option contracts written.

[For management investment companies only]

Col. A	Col. B	Col. C	Col. D	Col. E
Name of issuer [1, 2]	Number of contracts [3]	Exercise price	Expiration date	Value.[4]

[1] Information as to put options shall be shown separately from information as to call options.

[2] Options of an issuer where exercise prices or expiration dates differ shall be listed separately.

[3] If the number of shares subject to option is substituted for number of contracts, the column name shall reflect that change.

[4] Column E shall be totaled and shall agree with the correlative amount shown on the related balance sheet.

[47 FR 56844, Dec. 21, 1982]

§ 210.12–13 Investments other than securities.

[For management investment companies only]

Col. A	Col. B	Col. C
Description [1]	Balance held at close of period—quantity [2, 3, 5]	Value of each item at close of period [4, 6, 7]

[1] List each major category of investments by descriptive title.
[2] If practicable, indicate the quantity or measure in appropriate units.
[3] Indicate by an appropriate symbol each investment which is non-income producing.
[4] Indicate by an appropriate symbol each investment not readily marketable. The term ''investment not readily marketable'' shall include investments for which there is no independent publicly quoted market and investments which cannot be sold because of restrictions or conditions applicable to the investment or the company.
[5] Indicate by an appropriate symbol each investment subject to option. State in a footnote: (a) The quantity subject to option, (b) nature of option contract, (c) option price, and (d) dates within which options may be exercised.
[6] Column C shall be totaled and shall agree with the correlative amount shown on the related balance sheet.
[7] Sate in a footnote the following amounts based on cost for Federal income tax purposes: (a) Aggregate gross unrealized appreciation for all investments in which there is an excess of value over tax cost, (b) the aggregate gross unrealized depreciation for all investments in which there is an excess of tax cost over value, (c) the net unrealized appreciation or depreciation, and (d) the aggregate cost of investments for Federal income tax purposes.

§ 210.12–14 Investments in and advances to affiliates.

[For management investment companies only]

Col. A	Col. B	Col. C	Col. D	Col. E
Name of issuer and title of issue or nature of indebtedness [1]	Number of shares—principal amount of bonds, notes and other indebtedness held at close of period	Amount of equity in net profit and loss for the period [2, 6]	Amount of dividends or interest [2, 5]	Value of each item at close of period [2, 3, 4, 5]
			(1) Credited to income	
			(2) Other	

[1] (a) List each issue separately and group (1) Investments in majority-owned subsidiaries, segregating subsidiaries consolidated; (2) other controlled companies; and (3) other affiliates. (b) If during the period there has been any increase or decrease in the amount of investment in and advance to any affiliate, state in a footnote (or if there have been changes to numerous affiliates, in a supplementary schedule) (1) name of each issuer and title of issue or nature of indebtedness; (2) balance at beginning of period; (3) gross additions; (4) gross reductions; (5) balance at close of period as shown in Column E. Include in the footnote or schedule comparable information as to affiliates in which there was an investment at any time during the period even though there was no investment at the close of the period of report.
[2] Give totals for each group. If operations of any controlled companies are different in character from those of the company, group such affiliates (1) within divisions and (2) by type of activities.—f[3] columns C, D and E shall be totaled. The totals of Column E shall agree with the correlative amount shown on the related balance sheet.
[4] (a) indicate by an appropriate symbol each issue of restricted securities. The information required by instruction 5 of § 210.12–12 shall be given in a footnote. (b) Indicate by an appropriate symbol each issue of securities subject to option. The information required by instruction 5 of § 210.12–13 shall be given in a footnote.
[5] (a) include in Column D (1) as to each issue held at the close of the period, the dividends or interest included in caption 1 of the statement of operations. In addition, show as the final item in column D (1) the aggregate of dividends and interest included in the statement of operations in respect of investments in affiliates not held at the close of the period. The total of this column shall agree with the correlative amount shown on the related statement of operations.
(b) Include in Column D (2) all other dividends and interest. Explain in an appropriate footnote the treatment accorded each item.
(c) Indicate by an appropriate symbol all non-cash dividends and explain the circumstances in a footnote.
(d) Indicate by an appropriate symbol each issue of securities which is non-income producing.
[6] The information required by column C shall be furnished only as to controlled companies.

[47 FR 56844, Dec. 21, 1982]

§ 210.12–15 Summary of investments—other than investments in related parties.

[For Insurance Companies]

Column A	Column B	Column C	Column D
Type of investment	Cost [1]	Value	Amount at which shown in the balance sheet [2]
Fixed maturities:			
Bonds:			
United States Government and government agencies and authorities ...	.....	.....	.....
States, municipalities and political subdivisions	.....	.....	.....
Foreign governments	.....	.....	.....
Public utilities	.....	.....	.....
Convertibles and bonds with warrants attached [3]	.....	.....	.....
All other corporate bonds	.....	.....	.....
Certificates of deposit	.....	.....	.....

[For Insurance Companies]

Column A	Column B	Column C	Column D
Type of investment	Cost [1]	Value	Amount at which shown in the balance sheet [2]
Redeemable preferred stock			
Total fixed maturities			
Equity securities:			
Common stocks:			
Public utilities			
Banks, trust and insurance companies			
Industrial, miscellaneous and all other			
Nonredeemable preferred stocks			
Total equity securities			
Mortgage loans on real estate			
Real estate [4]			
Policy loans			
Other long-term investments			
Short-term investments			
Total investments			
.			

[1] Original cost of equity securities and, as to fixed maturities, original cost reduced by repayments and adjusted for amortization of premiums or accrual of discounts.
[2] If the amount at which shown in the balance sheet is different from the amount shown in either column B or C, state the reason for such difference. The total of this column should agree with the balance sheet.
[3] All convertibles and bonds with warrants shall be included in this caption, regardless of issuer.
[4] State separately any real estate acquired in satisfaction of debt.

[46 FR 54337, Nov. 2, 1981]

§210.12–16 Supplementary insurance information.

[For insurance companies]

Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H	Column I	Column J	Column K
Segment [1]	Deferred policy acquisition cost (caption 7)	Future policy benefits, losses, claims and loss expenses (caption 13–a–1)	Unearned premiums (caption 13–a–2)	Other policy claims and benefits payable (caption 13–a–3)	Premium revenue (caption 1)	Net investment income (caption 2) [3]	Benefits, claims, losses, and settlement expenses (caption 5)	Amortization of deferred policy acquisition costs [4]	Other operating expenses [3, 4]	Premiums written [2]
Total [5]										

[1] Segments shown should be the same as those presented in the footnote disclosures called for by generally accepted accounting principles.
[2] Does not apply to life insurance or title insurance. This amount should include premiums from reinsurance assumed, and be net of premiums on reinsurance ceded.
[3] State the basis for allocation of net investment income and, where applicable, other operating expenses.
[4] The total of columns I and J should agree with the amount shown for income statement caption 7.
[5] Totals should agree with the indicated balance sheet and income statement caption amounts, where a caption number is shown.

[46 FR 54338, Nov. 2, 1981, as amended at 57 FR 45293, Oct. 1, 1992; 64 FR 1734, Jan. 12, 1999]

§ 210.12–17 Reinsurance.

[For insurance companies]

Column A	Column B	Column C	Column D	Column E	Column F
	Gross amount	Ceded to other companies [1]	Assumed from other companies	Net amount [2]	Percentage of amount assumed to net [3]
Life insurance in force	.....	.....	.....	.....	
Premiums:					
Life insurance	.....	.....	.....	.....	
Accident and health insurance.	.....	.....	.....	.....	
Property and liability insurance.	.....	.....	.....	.....	
Title insurance	.....	.....	.....	.....	
Total premiums	.....	.....	.....	.....	

[1] Indicate in a note any amounts of reinsurance or coinsurance income netted against premiums ceded.
[2] This Column represents the total of column B less column C plus column D. The total premiums in this column should represent the amount of premium revenue on the income statement.
[3] Calculated as the amount in column D divided by amount in column E.

[46 FR 54338, Nov. 2, 1981]

§ 210.12–18 Supplemental information (for property-casualty insurance underwriters).

Affiliation with registrant	Deferred policy acquisition costs	Reserves for unpaid claims and claim adjustment expenses	Discount, if any, deducted in column C[4]	Unearned premiums	Earned premiums	Net investment income	Claims and claim adjustment expenses incurred related to		Amortization of deferred policy acquisition costs	Paid claims and claim adjustment expenses	Premiums written
							(1) Current year	(2) Prior years			
Column A	Column B	Column C	Column D	Column E	Column F	Column G		Column H	Column I	Column J	Column K
(a) Consolidated property-casualty entities[2]											
(b) Unconsolidated property-casualty subsidiaries[2, 3]											
(c) Proportionate share of registrant and its subsidiaries' 50%-or-less-owned property-casualty equity investees[2, 3]											

[1] Information included in audited financial statements, including other schedules, need not be repeated in this schedule. Columns B, C, D, and E are as of the balance sheet dates, columns F, G, H, I, J, and K are for the same periods for which income statements are presented in the registrant's audited consolidated financial statements.

[2] Present combined or consolidated amounts, as appropriate for each category, after intercompany eliminations.

[3] Information is not required here for 50%-or-less-owned equity investees that file similar information with th Commission as registrants in their own right, if that fact and the name of the affiliated registrant is stated. If ending reserves in any category (a), (b), or (c) above is less than 5% of the total reserves otherwise required to be reported in this schedule, that category may be omitted and that fact so noted. If the amount of the reserves attributable to 50%-or-less-owned equity investors that file this information as registrants in their own right exceeds 95% of the total category (c) reserves, information for the other 50%-or-less-owned equity investees need not be provided.

[4] Disclose in a footnote to this schedule the rate, or range of rates, estimated if necessary, at which the discount was computed for each category.

[49 FR 47599, Dec. 6, 1984]

FOR FACE-AMOUNT CERTIFICATE INVESTMENT COMPANIES

SOURCE: Sections 210.12–21 to 210.12–41 appear at 16 FR 348, Jan. 13, 1951, unless otherwise noted. Redesignated at 45 FR 63679, Sept. 25, 1980.

§ 210.12–21 Investments in securities of unaffiliated issuers.

Column A—Name of issuer and title of issue [1]	Column B—Balance held at close of period. Number of shares—principal amount of bonds and notes [2]	Column C—Cost of each item [3, 4]	Column D—Value of each item at close of period [3, 5]

[1] (a) The required information is to be given as to all securities held as of the close of the period of report. Each issue shall be listed separately.

(b) Indicate by an appropriate symbol those securities which are non-income-producing securities. Evidences of indebtedness and preferred shares may be deemed to be income-producing if, on the respective last interest payment date or dates for the declaration of dividends prior to the date of the related balance sheet, there was only a partial payment of interest or a declaration of only a partial amount of the dividends payable; in such case, however, each such issue shall be indicated by an appropriate symbol referring to a note to the effect that, on the last interest or dividend date, only partial interest was paid or partial dividends declared. If, on such respective last interest or dividend date, no interest was paid or no dividends declared, the issue shall not be deemed to be income-producing. Common shares shall not be deemed to be income-producing unless, during the last year preceding the date of the related balance sheet, there was at least one dividend paid upon such common shares. List separately (1) bonds; (2) preferred shares; (3) common shares. Within each of these subdivisions classify according to type of business, insofar as practicable: e.g., investment companies, railroads, utilities, banks, insurance companies, or industrials. Give totals for each group, subdivision, and class.

[2] Indicate any securities subject to option at the end of the most recent period and state in a note the amount subject to option, the option prices, and the dates within which such options may be exercised.

[3] Columns C and D shall be totaled. The totals of columns C and D should agree with the correlative amounts required to be shown by the related balance sheet captions. State in a footnote to column C the aggregate cost for Federal income tax purposes.

[4] If any investments have been written down or reserved against by such companies pursuant to § 210.6–21(f), indicate each such item by means of an appropriate symbol and explain in a footnote.

[5] Where value is determined on any other basis than closing prices reported on any national securities exchange, explain such other basis in a footnote.

[47 FR 56844, Dec. 21, 1982]

§ 210.12–22 Investments in and advances to affiliates and income thereon.

Column A—Name of issuer and title of issue or amount of indebtedness [1]	Column B—Balance held at close of period—Number of shares—principal amount of bonds, notes and other indebtedness [2]	Column C—Cost of each item [3, 4]	Column D—Amount at which carried at close of period [4, 5]	Column E—Amount of dividends or interest [4, 6]		Column F—Amount of equity in net profit and loss for the period [7]
				(1)—Credited to income	(2)—Other	

[1] (a) The required information is to be given as to all investments in affiliates as of the close of the period. See captions 10, 13 and 20 of § 210.6–22. List each issue and group separately (1) investments in majority-owned subsidiaries, segregating subsidiaries consolidated; (2) other controlled companies; and (3) other affiliates. Give totals for each group. If operations of any controlled companies are different in character from those of the registrant, group such affiliates within divisions (1) and (2) by type of activities.

(b) *Changes during the period.* If during the period there has been any increase or decrease in the amount of investment in any affiliate, state in a footnote (or if there have been changes as to numerous affiliates, in a supplementary schedule) (1) name of each issuer and title of issue; (2) balance at beginning of period; (3) gross purchases and additions; (4) gross sales and reductions; (5) balance at close of period as shown in column C. Include in such footnote or schedule comparable information as to affiliates in which there was an investment at any time during the period even though there was no investment in such affiliate as of the close of such period.

[2] Indicate any securities subject to option at the end of the most recent period and state in a footnote the amount subject to option, the option prices, and the dates within which such options may be exercised.

[3] If the cost in column C represents other than cash expenditure, explain.

[4] (a) Columns C, D and E shall be totaled. The totals of columns C and D should agree with correlative amounts required to be shown by the related balance sheet captions. State in a footnote the aggregate cost for Federal income tax purposes.

(b) If any investments have been written down or reserved against by such companies pursuant to § 210.6–21(f), indicate each such item by means of an appropriate symbol and explain in a footnote.

[5] State the basis of determining the amounts shown in column D.

[6] Show in column E(1) as to each issue held at close of period, the dividends or interest included in caption 1 of the profit and loss or income statement. In addition, show as the final item in column E(1) the aggregate dividends and interest included in the profit and loss or income statement in respect of investments in affiliates not held at the close of the period. The total of this column should agree with the amounts shown under such caption. Include in column E(2) all other dividends and interest. Explain briefly in an appropriate footnote the treatment accorded each item. Identify by an appropriate symbol all non-cash dividends and explain the circumstances in a footnote. See §§ 210.6–22(b) and 210.6–23(a).

[7] The information required by column F need be furnished only as to controlled companies. The equity in the net profit and loss of each person required to be listed separately shall be computed on an individual basis. In addition, there may be submitted the information required as computed on the basis of the statements of each such person and its subsidiaries consolidated.

§ 210.12–23 Mortgage loans on real estate and interest earned on mortgages.[1]

Part 1—Mortgage loans on real estate at close of period						Part 2—Interest earned on mortgages	
Column A—List by classification indicated below[2, 3, 7]	Column B—Prior liens[2]	Column C—Carrying amount of mortgage[8, 9, 10, 11]	Column D—Amount of principal unpaid at close of period		Column E—Amount of mortgage being foreclosed	Column F—Interest due and accrued at end of period[6]	Column G—Interest income earned applicable to period[5]
			(1)—Total	(2)—Subject to delinquent interest[4]			
Liens on:							
Farms (total).							
Residential (total).							
Apartments and business (total).							
Unimproved (total).							
Total[12].							

[1] All money columns shall be totaled.

[2] If mortgages represent other than first liens, list separately in a schedule in a like manner, indicating briefly the nature of the lien. Information need not be furnished as to such liens which are fully insured or wholly guaranteed by an agency of the United States Government.

[3] In a separate schedule classify by states in which the mortgaged property is located the total amounts in support of columns B, C, D and E.

[4] (a) Interest in arrears for less than 3 months may be disregarded in computing the total amount of principal subject to delinquent interest.

(b) Of the total principal amount, state the amount acquired from controlled and other affiliates.

[5] In order to reconcile the total of column G with the amount shown in the profit and loss or income statement, interest income earned applicable to period from mortgages sold or canceled during period should be added to the total of this column.

[6] If the information required by columns F and G is not reasonably available because the obtaining thereof would involve unreasonable effort or expense, such information may be omitted if the registrant shall include a statement showing that unreasonable effort or expense would be involved. In such an event, state in column G for each of the above classes of mortgage loans the average gross rate of interest on mortgage loans held at the end of the fiscal period.

[7] Each mortgage loan included in column C in an amount in excess of $500,000 shall be listed separately. Loans from $100,000 to $500,000 shall be grouped by $50,000 groups, indicating the number of loans in each group.

[8] In a footnote to this schedule, furnish a reconciliation, in the following form, of the carrying amount of mortgage loans at the beginning of the period with the total amount shown in column C:

Balance at beginning of period .... $ .....
Additions during period:
New mortgage loans .... $ .....
Other (describe) ....
Deductions during period:
Collections of principal .... $.
Foreclosures ....
Cost of mortgages sold ....
Amortization of premium ....
Other (describe) ....
Balance at close of period .... $ .....

If additions represent other than cash expenditures, explain. If any of the changes during the period result from transactions, directly or indirectly with affiliates, explain the bases of such transactions, and amounts involved. State the aggregate amount of mortgages (a) renewed and (b) extended. If the carrying amount of the new mortgages is in excess of the unpaid amount (not including interest) of prior mortgages, explain.

[9] If any item of mortgage loans on real estate investments has been written down or reserved against pursuant to § 210.6–21 describe the item and explain the basis for the write-down or reserve.

[10] State in a footnote to column C the aggregate cost for Federal income tax purposes.

[11] If the total amount shown in column C includes intercompany profits, state the bases of the transactions resulting in such profits and, if practicable, state the amounts thereof.

[12] Summarize the aggregate amounts for each column applicable to captions 6(b), 6(c) and 12 of § 210.6–22.

[16 FR 348, Jan. 13, 1951, as amended at 16 FR 2655, Mar. 24, 1951]

§ 210.12–24 Real estate owned and rental income.[1]

Part 1—Real estate owned at end of period						Part 2—Rental income			
Column A—List classification of property as indicated below[2, 3]	Column B—Amount of incombrances	Column C—Initial cost to company	Column D—Cost of improvements, etc.	Column E—Amount at which carried at close of period[4, 5, 6, 7]	Column F—Reserve for depreciation	Column G—Rents due and accrued at end of period	Column H—Total rental income applicable to period	Column I—Expended for interest, taxes, repairs and expenses	Column J—Net income applicable to period
Farms									
Residential									
Apartments and business									
Unimproved									
Total[8]									
Rent from properties sold during period									
Total									

[1] All money columns shall be totaled.
[2] Each item of property included in column E in an amount in excess of $100,000 shall be listed separately.
[3] In a separate schedule classify by states in which the real estate owned is located the total amounts in support of columns E and F.
[4] In a footnote to this schedule, furnish a reconciliation, in the following form, of the total amount at which real estate was carried at the beginning of the period with the total amount shown in column E:

Balance at beginning of period		$
Additions during period:		
Acquisitions through foreclosure	$	
Other acquisitions		
Improvements, etc		
Other (describe)		
Deductions during period:		
Cost of real estate sold	$	
Other (describe)		
Balance at close of period		$

If additions, except acquisitions through foreclosure, represent other than cash expenditures, explain. If any of the changes during the period result from transactions, directly or indirectly, with affiliates, explain and state the amount of any intercompany gain or loss.
[5] If any item of real estate investments has been written down or reserved against pursuant to § 210.6–21(f), describe the item and explain the basis for the write-down or reserve.
[6] State in a footnote to column E the aggregate cost for Federal income tax purposes.
[7] The amount of all intercompany profits included in the total of column E shall be stated if material.
[8] Summarize the aggregate amounts for each column applicable to captions 7 and 12 of § 210.6–22.

[16 FR 348, Jan. 13, 1951, as amended at 16 FR 2655, Mar. 24, 1951. Redesignated at 45 FR 63679, Sept. 25, 1980]

§ 210.12–25 Supplementary profit and loss information.

Column A—Item[1]	Column B—Charged to investment expense	Column C—Charged to other accounts		Column D—Total
		(1)—Account	(2)—Amount	
1. Legal expenses (including those in connection with any matter, measure or proceeding before legislative bodies, officers or government departments)				
2. Advertising and publicity				
3. Sales promotion[2]				
4. Payments directly and indirectly to trade associations and service organizations, and contributions to other organizations				

[1] Amounts resulting from transactions with affiliates shall be stated separately.
[2] State separately each category of expense representing more than 5 percent of the total expense shown under this item.

§ 210.12–26 Certificate reserves.

Column A—Description[1]	Column B—Balance at beginning of period			Column C—Additions			Column D—Deductions			Column E—Balance at close of period		
	(1)—Number of accounts with security bidders	(2)—Amount of maturity value	(3)—Amount of reserved[2]	(1)—Charged to profit and loss or income	(2)—Reserve payments by certificate holders	(3)—Charged to other accounts describe	(1)—Maturities	(2)—Cash surenders prior to maturity	(3)—Other—describe	(1)—Number of accounts with security holders	(2)—Amount of maturity value	(3)—Amount of reserves[2]

[1] (a) Each series of certificates shall be stated separately. The description shall include the yield to maturity on an annual payment basis.

(b) For certificates of the installment type, information required by columns B, D (2) and (3) and E shall be given by age groupings, according to the number of months paid by security holders, grouped to show those upon which 1–12 monthly payments have been made, 13–24 payments, etc.

[2] (a) If the total of the reserves shown in these columns differs from the total of the reserves per the accounts, there should be stated (i) the aggregate difference and (ii) the difference on a $1,000 face-amount certificate basis.

(b) There shall be shown by footnote or by supplemental schedule (i) the amounts periodically credited to each class of security holders' accounts from installment payments and (ii) such other amounts periodically credited to accumulate the maturity amount of the certificate. Such information shall be stated on a $1,000 face-amount certificate basis for the term of the certificate.

§ 210.12–27 Qualified assets on deposit.[1]

Column A—Name of depositary[2]	Column B—Cash	Column C—Investments in securities	Column D—First mortgages and other first liens on real estate	Column E—Other	Column F—Total[3]

[1] All money columns shall be totaled.

[2] Classify names of individual depositaries under group headings, such as banks and states.

[3] Total of column F shall agree with note required by caption 11 of § 210.6–22 as to total amount of qualified Assets on Deposit.

FOR CERTAIN REAL ESTATE COMPANIES

§ 210.12–28 Real estate and accumulated depreciation.[1]

[For Certain Real Estate Companies]

Column A—Description[2]	Column B—Encumbrances	Column C—Initial cost to company		Column D—Cost capitalized subsequent to acquisition		Column E—Gross amount of which carried at close of period[3, 4, 5, 6, 7]			Column F—Accumulated depreciation	Column G—Date of construction	Column H—Date acquired	Column I—Life on which depreciation in latest income statements is computed
		Land	Buildings and improvements	Improvements	Carrying costs	Land	Buildings and improvements	Total				

[1] All money columns shall be totaled.

[2] The description for each property should include type of property (e.g., unimproved land, shopping center, garden apartments, etc.) and the geographical location.

[3] The required information is to be given as to each individual investment included in column E except that an amount not exceeding 5 percent of the total of column E may be listed in one amount as "miscellaneous investments."

[4] In a note to this schedule, furnish a reconciliation, in the following form, of the total amount at which real estate was carried at the beginning of each period for which income statements are required, with the total amount shown in column E:

Balance at beginning of period .... $ .....

Additions during period:

Acquisitions through foreclosure ..... $ ....

Other acquisitions		
Improvements, etc		
Other (describe)		$
Deductions during period:		
Cost of real estate sold	$	
Other (describe)		
Balance at close of period		$

If additions, except acquisitions through foreclosure, represent other than cash expenditures, explain. If any of the changes during the period result from transactions, directly or indirectly with affiliates, explain the bases of such transactions and state the amounts involved.

A similar reconciliation shall be furnished for the accumulated depreciation.

[5] If any item of real estate investments has been written down or reserved against, describe the item and explain the basis for the write-down or reserve.

[6] State in a note to column E the aggregate cost for Federal income tax purposes.

[7] The amount of all intercompany profits included in the total of column E shall be stated if material.

[38 FR 6068, Mar. 6, 1983. Redesignated at 45 FR 63630, Sept. 25, 1980]

§ 210.12–29 Mortgage loans on real estate.[1]

[For Certain Real Estate Companies]

Column A—Description [2, 3, 4]	Column B—Interest rate	Column C—Final maturity date	Column D—Periodic payment terms [5]	Column E—Prior liens	Column F—Face amount of mortgages	Column G—Carrying amount of mortgages [3, 6, 7, 8, 9]	Column H—Principal amount of loans subject to delinquent principal or interest [10]

[1] All money columns shall be totaled.

[2] The required information is to be given for each individual mortgage loan which exceeds three percent of the total of column G.

[3] If the portfolio includes large numbers of mortgages most of which are less than three percent of column G, the mortgages not required to be reported separately should be grouped by classifications that will indicate the dispersion of the portfolio, i.e., for a portfolio of mortgages on single family residential housing. The description should also include number of loans by original loan amounts (e.g., over $100,000, $50,000–$99,999, $20,000–$49,000, under $20,000) and type loan (e.g., VA, FHA, Conventional). Interest rates and maturity dates may be stated in terms of ranges. Data required by columns D, E and F may be omitted for mortgages not required to be reported individually.

[4] Loans should be grouped by categories, e.g., first mortgage, second mortgage, construction loans, etc., and for each loan the type of property, e.g., shopping center, high rise apartments, etc., and its geographic location should be stated.

[5] State whether principal and interest is payable at level amount over life to maturity or at varying amounts over life to maturity. State amount of balloon payment at maturity, if any. Also state prepayment penalty terms, if any.

[6] In a note to this schedule, furnish a reconciliation, in the following form, of the carrying amount of mortgage loans at the beginning of each period for which income statements are required, with the total amount shown in column G:

Balance at beginning of period		$
Additions during period:		
New mortgage loans	$.	
Other (describe)		$.
Deductions during period:		
Collections of principal	$.	
Foreclosures	.	
Cost of mortgages sold	.	
Amortization of premium	.	
Other (describe)		.
Balance at close of period		$.

If additions represent other than cash expenditures, explain. If any of the changes during the period result from transactions, directly or indirectly with affiliates, explain the bases of such transactions, and state the amounts involved. State the aggregate mortgages (a) renewed and (b) extended. If the carrying amount of new mortgages is in excess of the unpaid amount of the extended mortgages, explain.

[7] If any item of mortgage loans on real estate investments has been written down or reserved against, describe the item and explain the basis for the write-down or reserve.

[8] State in a note to column G the aggregate cost for Federal income tax purposes.

[9] The amount of all intercompany profits in the total of column G shall be stated, if material.

[10] (a) Interest in arrears for less than 3 months may be disregarded in computing the total amount of principal subject to delinquent interest.

(b) Of the total principal amount, state the amount acquired from controlled and other affiliates.

[38 FR 6069, Mar. 6, 1973; 38 FR 7323, Mar. 20, 1973. Redesignated at 45 FR 63680, Sept. 25, 1980]

PART 211—INTERPRETATIONS RELATING TO FINANCIAL REPORTING MATTERS

Subpart A—Financial Reporting Releases

Subject	Release No.	Date	Fed. Reg. Vol. and page
Codification of financial reporting policies	1	Apr. 15, 1982	47 FR 21030
Disclosure considerations relating to foreign operations and foreign currency translation effects.	6	Nov. 18, 1982	47 FR 53330
Accounting for extinguishment of debt	15	Dec. 22, 1983	49 FR 54
Certification of financial statements	16	Feb. 15, 1984	49 FR 6707y
Independence of accountants	291	Apr. 10, 1981	46 FR 22569
Last–In, First–Out method of accounting for inventories	889	July 2, 1981	46 FR 36127
Significance of oral guarantees to the financial reporting process	22	Dec. 19, 1985	50 FR 51671
Disclosure of the effects of the Tax Reform Act of 1986	26	Oct. 30, 1986	51 FR 39652
Accounting for loan losses by registrants engaged in lending activities	28	Dec. 1, 1986	51 FR 44446
Statement of the Commission Regarding Disclosure Obligations of Companies Affected by the Government's Defense Contract Procurement Inquiry and Related Issues.	32	Aug. 1, 1988	53 FR 29226
Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures.	36	May 18, 1989	54 FR 22427
Acceptability in financial statements of an accounting standard permitting the return of a nonaccrual loan to accrual status after a partial charge–off.	37	July 29, 1991	56 FR 37000
Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others.	42	Mar. 9, 1994	59 FR 12758
Interpretation Regarding Substantive Repossession of Collateral	28A	May 12, 1994	59 FR 26109
Financial Statements and Periodic Reports For Related Issuers and Guarantors, Appendices A, B and C.	55	Aug. 4, 2000	65 FR 51710
Bookkeeping Services Provided by Auditors to Audit Clients in Emergency or Other Unusual Situations.	57	Sept. 14, 2001	66 FR 48336
Calculation of Average Weekly Trading Volume	58A	Sept. 27, 2001	66 FR 49274

Subpart B—Staff Accounting Bulletins

Subject	Release No.	Date	Fed. Reg. Vol. and page
Publication of Staff Accounting Bulletin No. 39	SAB–39	Oct. 15, 1980	45 FR 68388
Publication of Staff Accounting Bulletin No. 40	SAB–40	Feb. 9, 1981	46 FR 11513
Publication of Staff Accounting Bulletin No. 41	SAB–41	Feb. 18, 1981	46 FR 12698
Publication of Staff Accounting Bulletin No. 42	SAB–42	Dec. 23, 1981	46 FR 63252
Publication of Staff Accounting Bulletin No. 43	SAB–43	Jan. 5, 1982	47 FR 1266
Publication of Staff Accounting Bulletin No. 44	SAB–44	Mar. 3, 1982	47 FR 10789
Publication of Staff Accounting Bulletin No. 45	SAB–45	May 20, 1982	47 FR 23915
Publication of Staff Accounting Bulletin No. 46	SAB–46	May 20, 1982	47 FR 23916
Publication of Staff Accounting Bulletin No. 47	SAB–47	Sept. 16, 1982	47 FR 41727
Publication of Staff Accounting Bulletin No. 48	SAB–48	Sept. 27, 1982	47 FR 43673
Publication of Staff Accounting Bulletin No. 47A	SAB–47A	Sept. 29, 1982	47 FR 44722
Publication of Staff Accounting Bulletin No. 49	SAB–49	Oct. 26, 1982	47 FR 49628
Publication of Staff Accounting Bulletin No. 49A	SAB–49A	Jan. 18, 1983	48 FR 3585
Publication of Staff Accounting Bulletin No. 50	SAB–50	Mar. 3, 1983	48 FR 10043
Publication of Staff Accounting Bulletin No. 51	SAB–51	Mar. 29, 1983	48 FR 14595
Publication of Staff Accounting Bulletin No. 52	SAB–52	May 16, 1983	48 FR 23173
Publication of Staff Accounting Bulletin No. 53 [Reserved]			
Publication of Staff Accounting Bulletin No. 54	SAB–54	Nov. 3, 1983	48 FR 51769
Publication of Staff Accounting Bulletin No. 55	SAB–55	Nov. 30, 1983	48 FR 54811
Publication of Staff Accounting Bulletin No. 56	SAB–56	Jan. 1, 1984	49 FR 4936
Publication of Staff Accounting Bulletin No. 58	SAB–58	Mar. 19, 1985	50 FR 11657
Publication of Staff Accounting Bulletin No. 59	SAB–59	Sept. 13, 1985	50 FR 37346
Publication of Staff Accounting Bulletin No. 60	SAB–60	Dec. 27, 1985	50 FR 52916
Publication of Staff Accounting Bulletin No. 42A	SAB–42A	Jan. 8, 1986	51 FR 739
Publication of Staff Accounting Bulletin No. 61	SAB–61	May 6, 1986	51 FR 17331
Publication of Staff Accounting Bulletin No. 62	SAB–62	July 7, 1986	51 FR 25194
Publication of Staff Accounting Bulletin No. 63	SAB–63	Sept. 24, 1986	51 FR 33886
Publication of Staff Accounting Bulletin No. 64	SAB–64	Oct. 8, 1986	51 FR 36007
Publication of Staff Accounting Bulletin No. 65	SAB–65	Nov. 13, 1986	51 FR 41080
Publication of Staff Accounting Bulletin No. 66	SAB–66	Nov. 25, 1986	51 FR 43594
Publication of Staff Accounting Bulletin No. 67	SAB–67	Dec. 8, 1986	51 FR 45314
Publication of Staff Accounting Bulletin No. 68	SAB–68	May 4, 1987	52 FR 17396
Publication of Staff Accounting Bulletin No. 69	SAB–69	May 8, 1987	52 FR 18200
Publication of Staff Accounting Bulletin No. 70	SAB–70	June 5, 1987	52 FR 21933

Subject	Release No.	Date	Fed. Reg. Vol. and page
Publication of Staff Accounting Bulletin No. 71	SAB–71	Aug. 12, 1987	52 FR 31027
Publication of Staff Accounting Bulletin No. 72	SAB–72	Nov. 10, 1987	52 FR 46454
Publication of Staff Accounting Bulletin No. 71A	SAB–71A	Dec. 15, 1987	52 FR 48193
Publication of Staff Accounting Bulletin No. 73	SAB–73	Dec. 30, 1987	53 FR 109
Publication of Staff Accounting Bulletin No. 74	SAB–74	Dec. 30, 1987	53 FR 110
Publication of Staff Accounting Bulletin No. 75	SAB–75	Jan. 4, 1988	53 FR 865
Publication of Staff Accounting Bulletin No. 76	SAB–76	Jan. 12, 1988	53 FR 1341
Publication of Staff Accounting Bulletin No. 77	SAB–77	Mar. 4, 1988	53 FR 7892
Publication of Staff Accounting Bulletin No. 78	SAB–78	Aug. 25, 1988	53 FR 33454
Publication of Staff Accounting Bulletin No. 79	SAB–79	Sept. 2, 1988	53 FR 34715
Publication of Staff Accounting Bulletin No. 80	SAB–80	Nov. 21, 1988	53 FR 47801
Publication of Staff Accounting Bulletin No. 81	SAB–81	Apr. 4, 1989	54 FR 14073
Publication of Staff Accounting Bulletin No. 82	SAB–82	July 5, 1989	54 FR 29333
Publication of Staff Accounting Bulletin No. 83	SAB–83	July 31, 1989	54 FR 32333
Publication of Staff Accounting Bulletin No. 84	SAB–84	July 31, 1989	54 FR 32334
Publication of Staff Accounting Bulletin No. 85	SAB–85	Sept. 18, 1989	54 FR 39351
Publication of Staff Accounting Bulletin No. 86	SAB–86	Sept. 28, 1989	54 FR 41084
Publication of Staff Accounting Bulletin No. 87	SAB–87	Dec. 12, 1989	54 FR 51880
Publication of Staff Accounting Bulletin No. 88	SAB–88	Aug. 10, 1990	55 FR 33284
Publication of Staff Accounting Bulletin No. 89	SAB–89	Jan. 7, 1991	56 FR 951
Publication of Staff Accounting Bulletin No. 90	SAB–90	Jan. 31, 1991	56 FR 4939
Publication of Staff Accounting Bulletin No. 91	SAB–91	July 17, 1991	56 FR 33376
Publication of Staff Accounting Bulletin No. 92	SAB–92	June 14, 1993	58 FR 32843
Publication of Staff Accounting Bulletin No. 93	SAB–93	Nov. 9, 1993	58 FR 59361
Publication of Staff Accounting Bulletin No. 94	SAB–94	Apr. 24, 1995	60 FR 20022
Publication of Staff Accounting Bulletin No. 95	SAB–95	Dec. 21, 1995	60 FR 66072
Publication of Staff Accounting Bulletin No. 96	SAB–96	Mar. 25, 1996	61 FR 12020
Publication of Staff Accounting Bulletin No. 97	SAB–97	Aug. 6, 1996	61 FR 40721
Publication of Staff Accounting Bulletin No. 98	SAB–98	Feb. 9, 1998	63 FR 6474
Publication of Staff Accounting Bulletin No. 99	SAB–99	Aug. 19, 1999	64 FR 45150
Publication of Staff Accounting Bulletin No. 100	SAB–100	Dec. 1, 1999	64 FR 67154
Publication of Staff Accounting Bulletin No. 101	SAB–101	Dec. 9, 1999	64 FR 68936
Publication of Staff Accounting Bulletin No. 102	SAB–102	July 6, 2001	66 FR 36457

Subpart C—Accounting and Auditing Enforcement Releases

Subject	Release No.	Date	Fed. Reg. vol. and page
Index of Accounting and Auditing Enforcement Releases	1	Apr. 15, 1982	47 FR 21030

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

Subpart A—Regulation S–B

Sec.

228.10 (Item 10) General.
228.101 (Item 101) Description of Business.
228.102 (Item 102) Description of Property.
228.103 (Item 103) Legal Proceedings.
228.201 (Item 201) Market for Common Equity and Related Stockholder Matters.
228.202 (Item 202) Description of Securities.
228.303 (Item 303) Management's Discussion and Analysis or Plan of Operation.
228.304 (Item 304) Changes In and Disagreements With Accountants on Accounting and Financial Disclosure.
228.305 [Reserved]
228.306 (Item 306) Audit committee report.
228.307 (Item 307) Controls and procedures.
228.310 (Item 310) Financial Statements.
228.401 (Item 401) Directors, Executive Officers, Promoters and Control Persons.
228.402 (Item 402) Executive Compensation.
228.403 (Item 403) Security Ownership of Certain Beneficial Owners and Management.
228.404 (Item 404) Certain Relationships and Related Transactions.
228.405 (Item 405) Compliance With Section 16(a) of the Exchange Act.
228.406 (Item 406) Code of ethics.
228.501 (Item 501) Front of registration statement and front cover of prospectus.
228.502 (Item 502) Inside front and outside back cover pages of prospectus.
228.503 (Item 503) Summary information and risk factors.
228.504 (Item 504) Use of Proceeds.
228.505 (Item 505) Determination of Offering Price.
228.506 (Item 506) Dilution.
228.507 (Item 507) Selling Security Holders.
228.508 (Item 508) Plan of Distribution.
228.509 (Item 509) Interest of Named Experts and Counsel.

228.510 (Item 510) Disclosure of Commission Position on Indemnification for Securities Act Liabilities.
228.511 (Item 511) Other Expenses of Issuance and Distribution.
228.512 (Item 512) Undertakings.
228.601 (Item 601) Exhibits.
228.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.
228.702 (Item 702) Indemnification of Directors and Officers.

AUTHORITY: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-29, 80a–30, 80a–37 and 80b–11.

Section 228.307 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.

Section 228.401 is also issued under secs. 3(a) and 407, Pub. L. 107–204, 116 Stat. 745.

Section 228.406 is also issued under secs. 3(a) and 406, Pub. L. 107–204, 116 Stat. 745.

Section 228.601 is also issued under secs. 3(a) and 406, Pub. L. 107–204, 116 Stat. 745.

EFFECTIVE DATE NOTE: At 68 FR 5998, Feb. 5, 2003, the authority citation for part 228 was amended by adding an entry for § 228.303, effective April 7, 2003. For the convenience of the user, the added text is set forth as follows:

Section 228.303 is also issued under secs. 3(a) and 401(a), Pub. L. No. 107–204, 116 Stat. 745.

SOURCE: 57 FR 36449, Aug. 13, 1992, unless otherwise noted.

ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S–T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S–T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

Subpart A—Regulation S–B

§ 228.10 (Item 10) General.

(a) *Application of Regulation S–B.* Regulation S–B is the source of disclosure requirements for ''small business issuer'' filings under the Securities Act of 1933 (the ''Securities Act'') and the Securities Exchange Act of 1934 (the ''Exchange Act'').

(1) *Definition of small business issuer.* A small business issuer is defined as a company that meets all of the following criteria:

(i) has revenues of less than $25,000,000;

(ii) is a U.S. or Canadian issuer;

(iii) is not an investment company; and

(iv) if a majority owned subsidiary, the parent corporation is also a small business issuer.

Provided however, that an entity is not a small business issuer if it has a public float (the aggregate market value of the issuer's outstanding voting and non-voting common equity held by non-affiliates) of $25,000,000 or more.

NOTE: The public float of a reporting company shall be computed by use of the price at which the stock was last sold, or the average of the bid and asked prices of such stock, on a date within 60 days prior to the end of its most recent fiscal year. The public float of a company filing an initial registration statement under the Exchange Act shall be determined as of a date within 60 days of the date the registration statement is filed. In the case of an initial public offering of securities, public float shall be computed on the basis of the number of shares outstanding prior to the offering and the estimated public offering price of the securities.

(2) *Entering and Exiting the Small Business Disclosure System.* (i) A company that meets the definition of small business issuer may use Form SB–2 for registration of its securities under the Securities Act; Form 10–SB for registration of its securities under the Exchange Act; and Forms 10–KSB and 10–QSB for its annual and quarterly reports.

(ii) For a non-reporting company entering the disclosure system for the first time either by filing a registration statement under the Securities Act on Form SB–2 or a registration statement under the Exchange Act on Form 10–SB, the determination as to whether a company is a small business issuer is made with reference to its revenues during its last fiscal year and public float as of a date within 60 days of the date the registration statement is filed. *See* Note to paragraph (a) of this Item.

(iii) Once a small business issuer becomes a reporting company it will remain a small business issuer until it

exceeds the revenue limit or the public float limit at the end of two consecutive years. For example, if a company exceeds the revenue limit for two consecutive years, it will no longer be considered a small business. However, if it exceeds the revenue limit in one year and the next year exceeds the public float limit, but not the revenue limit, it will still be considered a small business. *See* Note to paragraph (a) of this Item.

(iv) A reporting company that is not a small business company must meet the definition of a small business issuer at the end of two consecutive fiscal years before it will be considered a small business issuer for purposes of using Form SB–2, Form 10–SB, Form 10–KSB and Form 10–QSB. *See* Note to paragraph (a) of this Item.

(v) The determination as to the reporting category (small business issuer or other issuer) made for a non-reporting company at the time it enters the disclosure system governs all reports relating to the remainder of the fiscal year. The determination made for a reporting company at the end of its fiscal year governs all reports relating to the next fiscal year. An issuer may not change from one category to another with respect to its reports under the Exchange Act for a single fiscal year. A company may, however, choose not to use a Form SB–2 for a registration under the Securities Act.

(b) *Definitions of terms.*

(1) *Common Equity*—means the small business issuer's common stock. If the small business issuer is a limited partnership, the term refers to the equity interests in the partnership.

(2) *Public market*—no public market shall be deemed to exist unless, within the past 60 business days, both bid and asked quotations at fixed prices (excluding ''bid wanted'' or ''offer wanted'' quotations) have appeared regularly in any established quotation system on at least half of such business days. Transactions arranged without the participation of a broker or dealer functioning as such are not indicative of a ''public market.''

(3) *Reporting company*—means a company that is obligated to file periodic reports with the Securities and Exchange Commission under section 15(d) or 13(a) of the Exchange Act.

(4) *Small business issuer*—refers to the issuer and all of its consolidated subsidiaries.

(c) *Preparing the disclosure document.* (1) The purpose of a disclosure document is to inform investors. Hence, information should be presented in a clear, concise and understandable fashion. Avoid unnecessary details, repetition or the use of technical language. The responses to the items of this Regulation should be brief and to the point.

(2) Small business issuers should consult the General Rules and Regulations under the Securities Act and Exchange Act for requirements concerning the preparation and filing of documents. Small business issuers should be aware that there are special rules concerning such matters as the kind and size of paper that is allowed and how filings should be bound. These special rules are located in Regulation C of the Securities Act (17 CFR 230.400 *et seq.*) and in Regulation 12B of the Exchange Act (17 CFR 240.12b–1 *et seq.*).

(d) *Commission policy on projections.* The Commission encourages the use of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. The guidelines below set forth the Commission's views on important factors to be considered in preparing and disclosing such projections. (*See also* 17 CFR 230.175 and 240.3b–6).

(1) *Basis for projections.* Management has the option to present in Commission filings its good faith assessment of a small business issuer's future performance. Management, however, must have a reasonable basis for such an assessment. An outside review of management's projections may furnish additional support in this regard. If management decides to include a report of such a review in a Commission filing, it should also disclose the qualifications of the reviewer, the extent of the review, the relationship between the reviewer and the registrant, and other material factors concerning the process by which any outside review was sought or obtained. Moreover, in the case of a registration statement under

the Securities Act, the reviewer would be deemed an expert and an appropriate consent must be filed with the registration statement.

(2) *Format for projections.* Traditionally, projections have been given for three financial items generally considered to be of primary importance to investors (revenues, net income (loss) and earnings (loss) per share), projection information need not necessarily be limited to these three items. However, management should take care to assure that the choice of items projected is not susceptible to misleading inferences through selective projection of only favorable items. It generally would be misleading to present sales or revenue projections without one of the foregoing measures of income. The period that appropriately may be covered by a projection depends to a large extent on the particular circumstances of the company involved. For certain companies in certain industries, a projection covering a two or three year period may be entirely reasonable. Other companies may not have a reasonable basis for projections beyond the current year.

(3) *Investor understanding.* Disclosures accompanying the projections should facilitate investor understanding of the basis for and limitations of projections. The Commission believes that investor understanding would be enhanced by disclosure of the assumptions which in management's opinion are most significant to the projections or are the key factors upon which the financial results of the enterprise depend and encourages disclosure of assumptions in a manner that will provide a frame-work for analysis of the projection. Management also should consider whether disclosure of the accuracy or inaccuracy of previous projections would provide investors with important insights into the limitations of projections.

(e) *Commission policy on security ratings.* In view of the importance of security ratings (''ratings'') to investors and the marketplace, the Commission permits small business issuers to disclose ratings assigned by rating organizations to classes of debt securities, convertible debt securities and preferred stock in registration statements and periodic reports. In addition, the Commission permits, disclosure of ratings assigned by any nationally recognized statistical rating organizations (''NRSROs'') in certain communications deemed not to be a prospectus (''tombstone advertisements''). Below are the Commission's views on important matters to be considered in disclosing security ratings.

(1)(i) If a small business issuer includes in a filing any rating(s) assigned to a class of securities, it should consider including any other rating assigned by a different NRSRO that is materially different. A statement that a security rating is not a recommendation to buy, sell or hold securities and that it may be subject to revision or withdrawal at any time by the assigning rating organization should also be included.

(ii)(A) If the rating is included in a filing under the Securities Act, the written consent of any rating organization that is not a NRSRO whose rating is included should be filed. The consent of any NRSRO is not required. (See Rule 436(g) under the Securities Act (§ 230.436(g) of this chapter.)

(B) If a change in a rating already included is available before effectiveness of the registration statement, the small business issuer should consider including such rating change in the prospectus. If the rating change is material, consideration should be given to recirculating the preliminary prospectus.

(C) If a materially different additional NRSRO rating or a material change in a rating already included becomes available during any period in which offers or sales are being made, the small business issuer should consider disclosing this information in a sticker to the prospectus.

(iii) If there is a material change in the rating(s) assigned by any NRSRO(s) to any outstanding class(es) of securities of a reporting company, the registrant should consider filing a report on Form 8–K (§ 249.308 of this chapter) or other appropriate report under the Exchange Act disclosing such rating change.

(2) [Reserved]

(f) *Incorporation by Reference.* Where rules, regulations, or instructions to

forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted. Except where a registrant or issuer is expressly required to incorporate a document or documents by reference, reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. No document on file with the Commission for more than five years may be incorporated by reference except:

(1) Documents contained in registration statements, which may be incorporated by reference as long as the registrant has a reporting requirement with the Commission; or

(2) Documents that the registrant specifically identifies by physical location by SEC file number reference, provided such materials have not been disposed of by the Commission pursuant to its Records Control Schedule (17 CFR 200.80f).

(g) *Quantitative and qualitative disclosures about market risk.* The safe harbor provision included in paragraph (d) of Item 305 of Regulation S–K (§ 229.305(d) of this chapter) shall apply to information required by Item 305 of Regulation S–K (§ 229.305 of this chapter) that is voluntarily provided by or on behalf of a small business issuer as defined in Rule 12b–2 of the Exchange Act.

NOTE TO PARAGRAPH (g): Such small business issuers are not required to provide the information required by Item 305 of Regulation S–K.

(h) *Use of non-GAAP financial measures in Commission filings.* (1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:

(i) The registrant must include the following in the filing:

(A) A presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);

(B) A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measure or measures calculated and presented in accordance with GAAP identified in paragraph (h)(1)(i)(A) of this section;

(C) A statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations; and

(D) To the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not disclosed pursuant to paragraph (h)(1)(i)(C) of this section; and

(ii) A registrant must not:

(A) Exclude charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures, other than the measures earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA);

(B) Adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years;

(C) Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

(D) Present non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X (17 CFR 210.11–01 through 210.11–03); or

(E) Use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP measures; and

(iii) If the filing is not an annual report on Form 10–KSB (17 CFR 249.310b), a registrant need not include the information required by paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section if that information was included in its most recent annual report on Form 10-KSB or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements of paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section at the time of the registrant's current filing.

(2) For purposes of this paragraph (h), a non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flow that:

(i) Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or

(ii) Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

(3) For purposes of this paragraph (h), GAAP refers to generally accepted accounting principles in the United States.

(4) For purposes of this paragraph (h), non-GAAP financial measures exclude:

(i) Operating and other statistical measures; and

(ii) Ratios or statistical measures calculated using exclusively one or both of:

(A) Financial measures calculated in accordance with GAAP; and

(B) Operating measures or other measures that are not non-GAAP financial measures.

(5) For purposes of this paragraph (h), non-GAAP financial measures exclude financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. However, the financial measure should be presented outside of the financial statements unless the financial measure is required or expressly permitted by the standard setter that is responsible for establishing the GAAP used in such financial statements.

(6) The requirements of paragraph (h) of this section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to §230.425 of this chapter, §240.14a–12 or §240.14d–2(b)(2) of this chapter or §229.1015 of this chapter.

[57 FR 36449, Aug. 13, 1992, as amended at 60 FR 32824, June 23, 1995; 62 FR 6064, Feb. 10, 1997; 62 FR 26388, May 14, 1997; 68 FR 4830, Jan. 30, 2003]

§228.101 (Item 101) Description of Business.

(a) *Business Development.* Describe the development of the small business issuer during the last three years. If the small business issuer has not been in business for three years, give the same information for predecessor(s) of the small business issuer if there are any. This business development description should include:

(1) Form and year of organization;

(2) Any bankruptcy, receivership or similar proceeding; and

(3) Any material reclassification, merger, consolidation, or purchase or sale of a significant amount of assets not in the ordinary course of business.

(b) *Business of Issuer.* Briefly describe the business and include, to the extent material to an understanding of the issuer:

(1) Principal products or services and their markets;

(2) Distribution methods of the products or services;

(3) Status of any publicly announced new product or service;

(4) Competitive business conditions and the small business issuer's competitive position in the industry and methods of competition;

(5) Sources and availability of raw materials and the names of principal suppliers;

(6) Dependence on one or a few major customers;

(7) Patents, trademarks, licenses, franchises, concessions, royalty agreements or labor contracts, including duration;

(8) Need for any government approval of principal products or services. If government approval is necessary and the small business issuer has not yet received that approval, discuss the status of the approval within the government approval process;

(9) Effect of existing or probable governmental regulations on the business;

(10) Estimate of the amount spent during each of the last two fiscal years on research and development activities, and if applicable the extent to which the cost of such activities are borne directly by customers;

(11) Costs and effects of compliance with environmental laws (federal, state and local); and

(12) Number of total employees and number of full time employees.

(c) *Reports to security holders.* Disclose the following in any registration statement you file under the Securities Act of 1933:

(1) If you are not required to deliver an annual report to security holders, whether you will voluntarily send an annual report and whether the report will include audited financial statements;

(2) Whether you file reports with the Securities and Exchange Commission. If you are a reporting company, identify the reports and other information you file with the SEC; and

(3) That the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 450 Fifth Street, N.W., Washington, D.C. 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1–800–SEC–0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet address, if available.

(d) *Canadian Issuers.* Provide the information required by Items 101(f)(2) and 101(g) of Regulation S–K (§ 229.101(f)(2) and (g)).

[57 FR 36449, Aug. 13, 1992, as amended at 63 FR 6379, Feb. 6, 1998]

§ 228.102 (Item 102) Description of Property.

(a) Give the location of the principal plants and other property of the small business issuer and describe the condition of the property. If the small business issuer does not have complete ownership of the property, for example, others also own the property or there is a mortgage or lien on the property, describe the limitations on the ownership.

Instructions to Item 102(a): 1. Small business issuers engaged in significant mining operations also should provide the information in Guide 7 (§ 229.801(g) and § 229.802(g) of this chapter).

2. Small business issuers engaged in oil and gas producing activities also should provide the information in Guide 2 (§ 229.801(b) and § 229.802(b) of this chapter).

3. Small business issuers engaged in real estate activities should, in addition to Guide 5 (§ 229.801(e) of this chapter) provide responses to the following Items:

(b) *Investment policies.* Describe the policy of the small business issuer with respect to each of the following types of investments. State whether there are any limitations on the percentage of assets which may be invested in any one investment, or type of investment, and indicate whether such policy may be changed without a vote of security holders. State whether it is the small business issuer's policy to acquire assets primarily for possible capital gain or primarily for income.

(1) *Investments in real estate or interests in real estate.* Indicate the types of real estate in which the small business issuer may invest, for example, office or apartment buildings, shopping centers, industrial or commercial properties, special purpose buildings and undeveloped acreage, and the geographic area(s) of these properties.

Briefly describe the method, or proposed method, of operating and financing these properties. Indicate any limitations on the number or amount of mortgages which may be placed on any one piece of property.

(2) *Investments in real estate mortgages.* Indicate the types of mortgages, for example, first or second mortgages, and the types of properties subject to mortgages in which the small business issuer intends to invest, for example, single family dwellings, apartment buildings, office buildings, unimproved land, and the nature of any guarantees or insurance. Describe each type of mortgage activity in which the small business issuer intends to engage such as originating, servicing and warehousing, and the portfolio turnover policy.

(3) *Securities of or interests in persons primarily engaged in real estate activities.* Indicate the types of securities in which the small business issuer may invest, for example, common stock, interest in real estate investment trusts, partnership interests. Indicate the primary activities of persons in which the small business issuer will invest, such as mortgage sales, investments in developed or undeveloped properties and state the investment policies of such persons.

(c) *Description of real estate and operating data.* This information shall be furnished separately for each property the book value of which amounts to ten percent or more of the total assets of the small business issuer and its consolidated subsidiaries for the last fiscal year. With respect to other properties, the information shall be given by such classes or groups and in such detail as will reasonably convey the information required.

(1) Describe the general character and location of all materially important properties held or intended to be acquired by or leased to the small business issuer and describe the present or proposed use of such properties and their suitability and adequacy for such use. Properties not yet acquired shall be identified as such.

(2) State the nature of the small business issuer's title to, or other interest in such properties and the nature and amount of all material mortgages, liens or encumbrances against such properties. Disclose the current principal amount of each material encumbrance, interest and amortization provisions, prepayment provisions, maturity date and the balance due at maturity assuming no prepayments.

(3) Outline briefly the principal terms of any lease of any of such properties or any option or contract to purchase or sell any of such properties.

(4) Outline briefly any proposed program for the renovation, improvement or development of such properties, including the estimated cost thereof and the method of financing to be used. If there are no present plans for the improvement or development of any unimproved or undeveloped property, so state and indicate the purpose for which the property is to be held or acquired.

(5) Describe the general competitive conditions to which the properties are or may be subject.

(6) Include a statement as to whether, in the opinion of the management of the small business issuer, the properties are adequately covered by insurance.

(7) With respect to each improved property which is separately described, provide the following in addition to the above:

(i) Occupancy rate;

(ii) Number of tenants occupying ten percent or more of the rentable square footage and principal nature of business of each such tenant and the principal provisions of each of their leases;

(iii) Principal business, occupations and professions carried on in, or from the building;

(iv) The average effective annual rental per square foot or unit;

(v) Schedule of the lease expirations for each of the ten years starting with the year in which the registration statement is filed, stating:

(A) the number of tenants whose leases will expire,

(B) the total area in square feet covered by such leases,

(C) the annual rental represented by such leases, and

(D) the percentage of gross annual rental represented by such leases;

(vi) Each of the properties and components thereof upon which depreciation is taken, setting forth the:

(A) federal tax basis,

(B) rate,

(C) method, and

(D) life claimed with respect to such property or component thereof for purposes of depreciation;

(vii) The realty tax rate, annual realty taxes and estimated taxes on any proposed improvements.

Instruction: If the small business issuer has a number of properties, the information may be given in tabular form.

§ 228.103 (Item 103) Legal Proceedings.

(a) If a small business issuer is a party to any pending legal proceeding (or its property is the subject of a pending legal proceeding), give the following information (no information is necessary as to routine litigation that is incidental to the business):

(1) Name of court or agency where proceeding is pending;

(2) Date proceeding began;

(3) Principal parties;

(4) Description of facts underlying the proceedings; and

(5) Relief sought.

(b) Include the information called for by paragraphs (a) (1) through (5) of this Item for any proceeding that a governmental authority is contemplating (if the small business issuer is aware of the proceeding).

Instructions to Item 103: 1. A proceeding that primarily involves a claim for damages does not need to be described if the amount involved, exclusive of interest and costs, does not exceed 10% of the current assets of the small business issuer. If any proceeding presents the same legal and factual issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.

2. The following types of proceedings with respect to the registrant are not ''routine litigation incidental to the business'' and, notwithstanding instruction 1 of this Item, must be described: bankruptcy, receivership, or similar proceeding.

3. Any proceeding that involves federal, state or local environmental laws must be described if it is material; involves a damages claim for more than 10% of the current assets of the issuer; or potentially involves more than $100,000 in sanctions and a governmental authority is a party.

4. Disclose any material proceeding to which any director, officer or affiliate of the issuer, any owner of record or beneficially of more than 5% of any class of voting securities of the small business issuer, or security holder is a party adverse to the small business issuer or has a material interest adverse to the small business issuer.

§ 228.201 (Item 201) Market for Common Equity and Related Stockholder Matters.

(a) *Market information.* (1) Identify the principal market or markets where the small business issuer's common equity is traded. If there is no public trading market, so state.

(i) If the principal market for the small business issuer's common equity is an exchange, give the high and low sales prices for each quarter within the last two fiscal years and any subsequent interim period for which financial statements are required by Item 310(b).

(ii) If the principal market is not an exchange, give the range of high and low bid information for the small business issuer's common equity for each quarter within the last two fiscal years and any subsequent interim period for which financial statements are required by Item 310(b). Show the source of the high and low bid information. If over-the-counter market quotations are provided, also state that the quotations reflect inter-dealer prices, without retail mark-up, mark-down or commission and may not represent actual transactions.

(2) If the information called for by paragraph (a) of this Item is being presented in a registration statement relating to a class of common equity for which at the time of filing there is no established public trading market, indicate the amount(s) of common equity:

(i) that is subject to outstanding options or warrants to purchase, or securities convertible into, common equity of the registrant;

(ii) that could be sold pursuant to Rule 144 under the Securities Act or that the registrant has agreed to register under the Securities Act for sale by security holders; or

(iii) that is being or has been proposed to be, publicly offered by the registrant unless such common equity is

being offered pursuant to an employee benefit plan (or dividend reinvestment plan), the offering of which could have a material effect on the market price of the registrant's common equity.

(b) *Holders.* Give the approximate number of holders of record of each class of common equity.

(c) *Dividends.* (1) Discuss any cash dividends declared on each class of common equity for the last two fiscal years and in any subsequent period for which financial information is required.

(2) Describe any restrictions that limit the ability to pay dividends on common equity or that are likely to do so in the future.

(d) *Securities authorized for issuance under equity compensation plans.* (1) In the following tabular format, provide the information specified in paragraph (d)(2) of this Item as of the end of the most recently completed fiscal year with respect to compensation plans (including individual compensation arrangements) under which equity securities of the small business issuer are authorized for issuance, aggregated as follows:

(i) All compensation plans previously approved by security holders; and

(ii) All compensation plans not previously approved by security holders.

EQUITY COMPENSATION PLAN INFORMATION

Plan category	Number of securities to be issued upon exercise of outstanding options, warrants and rights	Weighted-average exercise price of outstanding options, warrants and rights	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a))
	(a)	(b)	(c)
Equity compensation plans approved by security holders			
Equity compensation plans not approved by security holders			
Total			

(2) The table shall include the following information as of the end of the most recently completed fiscal year for each category of equity compensation plan described in paragraph (d)(1) of this Item:

(i) The number of securities to be issued upon the exercise of outstanding options, warrants and rights (column (a));

(ii) The weighted-average exercise price of the outstanding options, warrants and rights disclosed pursuant to paragraph (d)(2)(i) of this Item (column (b)); and

(iii) Other than securities to be issued upon the exercise of the outstanding options, warrants and rights disclosed in paragraph (d)(2)(i) of this Item, the number of securities remaining available for future issuance under the plan (column (c)).

(3) For each compensation plan under which equity securities of the small business issuer are authorized for issuance that was adopted without the approval of security holders, describe briefly, in narrative form, the material features of the plan.

Instructions to Paragraph (d).

1. Disclosure shall be provided with respect to any compensation plan and individual compensation arrangement of the small business issuer (or parent, subsidiary or affiliate of the small business issuer) under which equity securities of the small business issuer are authorized for issuance to employees or non-employees (such as directors, consultants, advisors, vendors, customers, suppliers or lenders) in exchange for consideration in the form of goods or services as described in Statement of Financial Accounting Standards No. 123, *Accounting for Stock-Based Compensation,* or any successor standard. No disclosure is required with respect to:

a. Any plan, contract or arrangement for the issuance of warrants or rights to all security holders of the small business issuer as such on a pro rata basis (such as a stock rights offering) or

b. Any employee benefit plan that is intended to meet the qualification requirements of Section 401(a) of the Internal Revenue Code (26 U.S.C. 401(a)).

2. For purposes of this paragraph, an ''individual compensation arrangement'' includes, but is not limited to, the following: a written compensation contract within the meaning of ''employee benefit plan'' under § 230.405 of this chapter and a plan (whether or not set forth in any formal document) applicable to one person as provided under Item 402(a)(7)(ii) of Regulation S–B (§ 228.402(a)(7)(ii)).

3. If more than one class of equity security is issued under its equity compensation plans, a small business issuer should aggregate plan information for each class of security.

4. A small business issuer may aggregate information regarding individual compensation arrangements with the plan information required under paragraph (d)(1)(i) and (ii) of this item, as applicable.

5. A small business issuer may aggregate information regarding a compensation plan assumed in connection with a merger, consolidation or other acquisition transaction pursuant to which the small business issuer may make subsequent grants or awards of its equity securities with the plan information required under paragraph (d)(1)(i) and (ii) of this Item, as applicable. A small business issuer shall disclose on an aggregated basis in a footnote to the table the information required under paragraph (d)(2)(i) and (ii) of this Item with respect to any individual options, warrants or rights assumed in connection with a merger, consolidation or other acquisition transaction.

6. To the extent that the number of securities remaining available for future issuance disclosed in column (c) includes securities available for future issuance under any compensation plan or individual compensation arrangement other than upon the exercise of an option, warrant or right, disclose the number of securities and type of plan separately for each such plan in a footnote to the table.

7. If the description of an equity compensation plan set forth in a small business issuer's financial statements contains the disclosure required by paragraph (d)(3) of this Item, a cross-reference to such description will satisfy the requirements of paragraph (d)(3) of this Item.

8. If an equity compensation plan contains a formula for calculating the number of securities available for issuance under the plan, including, without limitation, a formula that automatically increases the number of securities available for issuance by a percentage of the number of outstanding securities of the small business issuer, a description of this formula shall be disclosed in a footnote to the table.

9. Except where it is part of a document that is incorporated by reference into a prospectus, the information required by this paragraph need not be provided in any registration statement filed under the Securities Act.

Instruction: Canadian issuers should, in addition to the information called for by this Item, provide the information in Item 201(a)(1)(iv) of Regulation S–K and Instruction 4 thereto.

[57 FR 36449, Aug. 13, 1992, as amended at 67 FR 245]

§ 228.202 (Item 202) Description of Securities.

(a) *Common or Preferred Stock.* (1) If the small business issuer is offering common equity, describe any dividend, voting and preemption rights.

(2) If the small business issuer is offering preferred stock, describe the dividend, voting, conversion and liquidation rights as well as redemption or sinking fund provisions.

(3) Describe any other material rights of common or preferred stockholders.

(4) Describe any provision in the charter or by-laws that would delay, defer or prevent a change in control of the small business issuer.

(b) *Debt Securities.* (1) If the small business issuer is offering debt securities, describe the maturity date, interest rate, conversion or redemption features and sinking fund requirements.

(2) Describe all other material provisions giving or limiting the rights of debtholders. For example, describe subordination provisions, limitations on the declaration of dividends, restrictions on the issuance of additional debt, maintenance of asset ratios, etc.

(3) Give the name of any trustee(s) designated by the indenture and describe the circumstances under which the trustee must act on behalf of the debtholders.

(4) Discuss the tax effects of any securities offered at an ''original issue discount.''

(c) *Other Securities To Be Registered.* If the small business issuer is registering other securities, provide similar information concerning the material provisions of those securities.

§ 228.303, Note (Item 303) Management's Discussion and Analysis or Plan of Operation.

Small business issuers that have not had revenues from operations in each of the last two fiscal years, or the last fiscal year and any interim period in the current fiscal year for which financial statements are furnished in the disclosure document, shall provide the information in paragraph (a) of this Item. All other issuers shall provide the information in paragraph (b) of this Item.

(a) *Plan of Operation.* (1) Describe the small business issuer's plan of operation for the next twelve months. This description should include such matters as:

(i) a discussion of how long the small business issuer can satisfy its cash requirements and whether it will have to raise additional funds in the next twelve months;

(ii) a summary of any product research and development that the small business issuer will perform for the term of the plan;

(iii) any expected purchase or sale of plant and significant equipment; and

(iv) any expected significant changes in the number of employees.

(2) [Reserved]

(b) *Management's Discussion and Analysis of Financial Condition and Results of Operations*—(1) *Full fiscal years.* Discuss the small business issuer's financial condition, changes in financial condition and results of operations for each of the last two fiscal years. This discussion should address the past and future financial condition and results of operation of the small business issuer, with particular emphasis on the prospects for the future. The discussion should also address those key variable and other qualitative and quantitative factors which are necessary to an understanding and evaluation of the small business issuer. If material, the small business issuer should disclose the following:

(i) Any known trends, events or uncertainties that have or are reasonably likely to have a material impact on the small business issuer's short-term or long-term liquidity;

(ii) Internal and external sources of liquidity;

(iii) Any material commitments for capital expenditures and the expected sources of funds for such expenditures;

(iv) Any known trends, events or uncertainties that have had or that are reasonably expected to have a material impact on the net sales or revenues or income from continuing operations;

(v) Any significant elements of income or loss that do not arise from the small business issuer's continuing operations;

(vi) The causes for any material changes from period to period in one or more line items of the small business issuer's financial statements; and

(vii) Any seasonal aspects that had a material effect on the financial condition or results of operation.

(2) *Interim Periods.* If the small business issuer must include interim financial statements in the registration statement or report, provide a comparable discussion that will enable the reader to assess material changes in financial condition and results of operations since the end of the last fiscal year and for the comparable interim period in the preceding year.

Instructions to Item 303: 1. The discussion and analysis shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition.

2. Small business issuers are encouraged, but not required, to supply forward looking information. This is distinguished from presently known data which will impact upon future operating results, such as known future increases in costs of labor or materials. This latter data may be required to be disclosed.

EFFECTIVE DATE NOTE: At 68 FR 5998, Feb. 5, 2003, § 228.303 was amended by removing the phrase ''paragraph (a)'' and adding, in its place, the phrase ''paragraphs (a) and (c)'' in the first sentence of the introductory text, removing the phrase ''paragraph (b)'' and adding, in its place, the phrase ''paragraphs (b) and (c)'' in the second sentence of the introductory text and adding paragraphs (c) and (d), effective April 7, 2003. For the convenience of the user, the added text is set forth as follows:

§ 228.303 (Item 303) Management's discussion and analysis or plan of operation.

* * * * *

(c) *Off-balance sheet arrangements.* (1) In a separately-captioned section, discuss the small business issuer's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the small business issuer's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors. The disclosure shall include the items specified in paragraphs (c)(1)(i), (ii), (iii) and (iv) of this Item to the extent necessary to an understanding of such arrangements and effect and shall also include such other information that the small business issuer believes is necessary for such an understanding.

(i) The nature and business purpose to the small business issuer of such off-balance sheet arrangements;

(ii) The importance to the small business issuer of such off-balance sheet arrangements in respect of its liquidity, capital resources, market risk support, credit risk support or other benefits; (iii) The amounts of revenues, expenses and cash flows of the small business issuer arising from such arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred by the small business issuer in connection with such arrangements; and the nature and amounts of any other obligations or liabilities (including contingent obligations or liabilities) of the small business issuer arising from such arrangements that are or are reasonably likely to become material and the triggering events or circumstances that could cause them to arise; and

(iv) Any known event, demand, commitment, trend or uncertainty that will result in or is reasonably likely to result in the termination, or material reduction in availability to the small business issuer, of its off-balance sheet arrangements that provide material benefits to it, and the course of action that the small business issuer has taken or proposes to take in response to any such circumstances.

(2) As used in paragraph (c) of this Item, the term *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the small business issuer is a party, under which the small business issuer has:

(i) Any obligation under a guarantee contract that has any of the characteristics identified in paragraph 3 of FASB Interpretation No. 45, *Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others* (November 2002) (''FIN 45''), as may be modified or supplemented, and that is not excluded from the initial recognition and measurement provisions of FIN 45 pursuant to paragraphs 6 or 7 of that Interpretation;

(ii) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets;

(iii) Any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument, except that it is both indexed to the small business issuer's own stock and classified in stockholders' equity in the small business issuer's statement of financial position, and therefore excluded from the scope of FASB Statement of Financial Accounting Standards No. 133, *Accounting for Derivative Instruments and Hedging Activities* (June 1998), pursuant to paragraph 11(a) of that Statement, as may be modified or supplemented; or

(iv) Any obligation, including a contingent obligation, arising out of a variable interest (as referenced in FASB Interpretation No. 46, *Consolidation of Variable Interest Entities* (January 2003), as may be modified or supplemented) in an unconsolidated entity that is held by, and material to, the small business issuer, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the small business issuer.

Instructions to paragraph (c) of Item 303. 1. No obligation to make disclosure under paragraph (c) of this Item shall arise in respect of an off-balance sheet arrangement until a definitive agreement that is unconditionally binding or subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.

2. Small business issuers should aggregate off-balance sheet arrangements in groups or categories that provide material information in an efficient and understandable manner and should avoid repetition and disclosure of immaterial information. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent the aggregation increases understanding. Distinctions in arrangements and their effects must be discussed to the extent the information is material, but the discussion should avoid repetition and disclosure of immaterial information.

3. For purposes of paragraph (c) of this Item only, contingent liabilities arising out of litigation, arbitration or regulatory actions are not considered to be off-balance sheet arrangements.

4. Generally, the disclosure required by paragraph (c) of this Item shall cover the most recent fiscal year. However, the discussion should address changes from the previous year where such discussion is necessary to an understanding of the disclosure.

5. In satisfying the requirements of paragraph (c) of this Item, the discussion of off-

balance sheet arrangements need not repeat information provided in the footnotes to the financial statements, provided that such discussion clearly cross-references to specific information in the relevant footnotes and integrates the substance of the footnotes into such discussion in a manner designed to inform readers of the significance of the information that is not included within the body of such discussion.

(d) *Safe harbor.* (1) The safe harbor provided in section 27A of the Securities Act of 1933 (15 U.S.C. 77z–2) and section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u–5) (''statutory safe harbors'') shall apply to forward-looking information provided pursuant to paragraph (c) of this Item, provided that the disclosure is made by: an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

(2) For purposes of paragraph (d) of this Item only:

(i) All information required by paragraph (c) of this Item is deemed to be a ''forward looking statement'' as that term is defined in the statutory safe harbors, except for historical facts.

(ii) With respect to paragraph (c) of this Item, the meaningful cautionary statements element of the statutory safe harbors will be satisfied if a small business issuer satisfies all requirements of that same paragraph (c) of this Item.

§ 228.304 (Item 304) Changes In and Disagreements With Accountants on Accounting and Financial Disclosure.

(a)(1) If, during the small business issuer's two most recent fiscal years or any later interim period, the principal independent accountant or a significant subsidiary's independent accountant on whom the principal accountant expressed reliance in its report, resigned (or declined to stand for re-election) or was dismissed, then the small business issuer shall state:

(i) Whether the former accountant resigned, declined to stand for re-election or was dismissed and the date;

(ii) Whether the principal accountant's report on the financial statements for either of the past two years contained an adverse opinion or disclaimer of opinion, or was modified as to uncertainty, audit scope, or accounting principles, and also describe the nature of each such adverse opinion, disclaimer of opinion or modification;

(iii) Whether the decision to change accountants was recommended or approved by the board of directors or an audit or similar committee of the board of directors; and

(iv)(A) Whether there were any disagreements with the former accountant, whether or not resolved, on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which, if not resolved to the former accountant's satisfaction, would have caused it to make reference to the subject matter of the disagreement(s) in connection with its report; or

(B) The following information only if applicable. Indicate whether the former accountant advised the small business issuer that:

(*1*) internal controls necessary to develop reliable financial statements did not exist; or

(*2*) information has come to the attention of the former accountant which made the accountant unwilling to rely on management's representations, or unwilling to be associated with the financial statements prepared by management; or

(*3*) the scope of the audit should be expanded significantly, or information has come to the accountant's attention that the accountant has concluded will, or if further investigated might, materially impact the fairness or reliability of a previously issued audit report or the underlying financial statements, or the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent audited financial statements (including information that might preclude the issuance of an unqualified audit report), and the issue was not resolved to the accountant's satisfaction prior to its resignation or dismissal; and

(C) The subject matter of each such disagreement or event identified in response to paragraph (a)(1)(iv) of this Item;

(D) Whether any committee of the board of directors, or the board of directors, discussed the subject matter of the disagreement with the former accountant; and

(E) Whether the small business issuer has authorized the former accountant to respond fully to the inquiries of the successor accountant concerning the subject matter of each of such disagreements or events and, if not, describe the nature of and reason for any limitation.

(2) If during the period specified in paragraph (a)(1) of this Item, a new accountant has been engaged as either the principal accountant to audit the issuer's financial statements or as the auditor of a significant subsidiary and on whom the principal accountant is expected to express reliance in its report, identify the new accountant and the engagement date. Additionally, if the issuer (or someone on its behalf) consulted the new accountant regarding:

(i) The application of accounting principles to a specific completed or contemplated transaction, or the type of audit opinion that might be rendered on the small business issuer's financial statements and either written or oral advice was provided that was an important factor considered by the small business issuer in reaching a decision as to the accounting, auditing or financial reporting issue; or

(ii) Any matter that was the subject of a disagreement or event identified in response to paragraph (a)(1)(iv) of this Item, then the small business issuer shall:

(A) Identify the issues that were the subjects of those consultations;

(B) Briefly describe the views of the new accountant given to the small business issuer and, if written views were received by the small business issuer, file them as an exhibit to the report or registration statement;

(C) State whether the former accountant was consulted by the small business issuer regarding any such issues, and if so, describe the former accountant's views; and

(D) Request the new accountant to review the disclosure required by this Item before it is filed with the Commission and provide the new accountant the opportunity to furnish the small business issuer with a letter addressed to the Commission containing any new information, clarification of the small business issuer's expression of its views, or the respects in which it does not agree with the statements made in response to this Item. Any such letter shall be filed as an exhibit to the report or registration statement containing the disclosure required by this Item.

(3) The small business issuer shall provide the former accountant with a copy of the disclosures it is making in response to this Item no later than the day that the disclosures are filed with the Commission. The small business issuer shall request the former accountant to furnish a letter addressed to the Commission stating whether it agrees with the statements made by the issuer and, if not, stating the respects in which it does not agree. The small business issuer shall file the letter as an exhibit to the report or registration statement containing this disclosure. If the letter is unavailable at the time of filing, the small business issuer shall request the former accountant to provide the letter so that it can be filed with the Commission within ten business days after the filing of the report or registration statement. Notwithstanding the ten business day period, the letter shall be filed within two business days of receipt. The former accountant may provide an interim letter highlighting specific areas of concern and indicating that a more detailed letter will be forthcoming within the ten business day period noted above. The interim letter, if any, shall be filed with the report or registration statement or by amendment within two business days of receipt.

(b) If the conditions in paragraphs (b)(1) through (b)(3) of this Item exist, the small business issuer shall describe the nature of the disagreement or event and the effect on the financial statements if the method had been followed which the former accountants apparently would have concluded was required (unless that method ceases to be generally accepted because of authoritative standards or interpretations issued after the disagreement or event):

(1) In connection with a change in accountants subject to paragraph (a) of this Item, there was any disagreement

or event as described in paragraph (a)(1)(iv) of this Item;

(2) During the fiscal year in which the change in accountants took place or during the later fiscal year, there have been any transactions or events similar to those involved in such disagreement or event; and

(3) Such transactions or events were material and were accounted for or disclosed in a manner different from that which the former accountants apparently would have concluded was required.

Instructions to Item 304: 1. The disclosure called for by paragraph (a) of this Item need not be provided if it has been previously reported as that term is defined in Rule 12b–2 under the Exchange Act (§ 240.12b–2); the disclosure called for by paragraph (a) of this Item must be provided, however, notwithstanding prior disclosure, if required pursuant to Item 9 of Schedule 14A (§ 249.14a–101 *et seq.*). The disclosure called for by paragraph (b) of this Item must be furnished, where required, notwithstanding any prior disclosure about accountant changes or disagreements.

2. When disclosure is required by paragraph (a) of this Item in an annual report to security holders pursuant to Rule 14a–3 or Rule 14c–3 (§ 240.14a–3 or 240.14c–3 of this chapter), or in a proxy or information statement filed pursuant to the requirements of Schedule 14A (§ 240.14a–101 *et seq.*) or 14C (§ 240.14c–101 *et seq.*), in lieu of a letter pursuant to paragraph (a)(2)(ii)(D) or (a)(3) of this Item, before filing such materials with or furnishing such materials to the Commission, the small business issuer shall furnish the disclosure required by paragraph (a) of this Item to each accountant who was engaged during the period set forth in paragraph (a) of this Item. If any such accountant believes that the statements made in response to paragraph (a) of this Item are incorrect or incomplete, it may present its views in a brief statement, ordinarily expected not to exceed 200 words, to be included in the annual report or proxy or information statement. This statement shall be submitted to the small business issuer within ten business days of the date the accountant receives the small business issuer's disclosure. Further, unless the written views of the newly engaged accountant required to be filed as an exhibit by paragraph (a)(2)(ii)(D) of this Item have been previously filed with the Commission, the small business issuer shall file a Form 8–K (17 CFR 249.308 of this chapter) along with the annual report or proxy or information statement for the purpose of filing the written views as exhibits.

3. The information required by this Item need not be provided for a company being acquired by the small business issuer if such acquiree has not been subject to the filing requirements of either section 13(a) or 15(d) of the Exchange Act, or, because of section 12(i) of the Exchange Act, has not furnished an annual report to security holders pursuant to Rule 14a–3 or Rule 14c–3 (§ 240.14a–3 or 240.14c–3 of this chapter) for its latest fiscal year.

4. In determining whether any disagreement or reportable event has occurred, an oral communication from the engagement partner or another person responsible for rendering the accounting firm's opinion (or their designee) will generally suffice as the accountant advising the small business issuer of a reportable event or as a statement of a disagreement at the ''decision-making level'' within the accounting firm and require disclosure under this Item.

§ 228.305 [Reserved]

§ 228.306 (Item 306) Audit committee report.

(a) The audit committee must state whether:

(1) The audit committee has reviewed and discussed the audited financial statements with management;

(2) The audit committee has discussed with the independent auditors the matters required to be discussed by SAS 61, as may be modified or supplemented;

(3) The audit committee has received the written disclosures and the letter from the independent accountants required by Independence Standards Board Standard No. 1 (Independence Standards Board Standard No. 1, *Independence Discussions with Audit Committees*), as may be modified or supplemented, and has discussed with the independent accountant the independent accountant's independence; and

(4) Based on the review and discussions referred to in paragraphs (a)(1) through (a)(3) of this Item, the audit committee recommended to the Board of Directors that the audited financial statements be included in the company's Annual Report on Form 10–KSB (17 CFR 249.310b) for the last fiscal year for filing with the Commission.

(b) The name of each member of the company's audit committee (or, in the absence of an audit committee, the

board committee performing equivalent functions or the entire board of directors) must appear below the disclosure required by this Item.

(c) The information required by paragraphs (a) and (b) of this Item shall not be deemed to be ''soliciting material,'' or to be ''filed'' with the Commission or subject to Regulation 14A or 14C (17 CFR 240.14a–1 *et seq.* or 240.14c–1 *et seq.*), other than as provided in this Item, or to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the company specifically requests that the information be treated as soliciting material or specifically incorporates it by reference into a document filed under the Securities Act or the Exchange Act.

(d) The information required by paragraphs (a) and (b) of this Item need not be provided in any filings other than a registrant proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

[64 FR 73401, Dec. 30, 1999]

§ 228.307 (Item 307) Controls and procedures.

(a) *Evaluation of disclosure controls and procedures.* Disclose the conclusions of the small business issuer's principal executive officer or officers and principal financial officer or officers, or persons performing similar functions, about the effectiveness of the small business issuer's disclosure controls and procedures (as defined in §§ 240.13a–14(c) and 240.15d–14(c) of this chapter) based on their evaluation of these controls and procedures as of a date within 90 days of the filing date of the quarterly or annual report that includes the disclosure required by this paragraph.

(b) *Changes in internal controls.* Disclose whether or not there were significant changes in the small business issuer's internal controls or in other factors that could significantly affect these controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

(c) *Asset-Backed Issuers.* A small business issuer that is an Asset-Backed Issuer (as defined in Rule 13a–14(g) and Rule 15d–14(g) under the Securities Exchange Act of 1934 (17 CFR 240.13a–14(g) and 17 CFR 240.15d–14(g) of this chapter) is not required to disclose the information required by this Item.

[67 FR 57287, Sept. 9, 2002]

§ 228.310 (Item 310) Financial Statements.

NOTES: 1. Financial statements of a small business issuer, its predecessors or any businesses to which the small business issuer is a successor shall be prepared in accordance with generally accepted accounting principles in the United States.

2. Regulation S–X (17 CFR 210.1 through 210.12) Form and Content of and Requirements for Financial Statements shall not apply to the preparation of such financial statements, except that the report and qualifications of the independent accountant shall comply with the requirements of Article 2 of Regulation S–X (17 CFR 210.2), Item 8.A of Form 20–F (17 CFR 249.220f) and Article 3–20 of Regulation S–X (17 CFR 210.3–20) shall apply to financial statements of foreign private issuers, the description of accounting policies shall comply with Article 4–08(n) of Regulation S–X (17 CFR 210.4–08(n)), and small business issuers engaged in oil and gas producing activities shall follow the financial accounting and reporting standards specified in Article 4–10 of Regulation S–X (17 CFR 210.4–10) with respect to such activities. To the extent that Article 11–01 [17 CFR 210.11–01] (Pro Forma Presentation Requirements) offers enhanced guidelines for the preparation, presentation and disclosure of pro forma financial information, small business issuers may wish to consider these items. Financial statements of foreign private issuers shall be prepared and presented in accordance with the requirements of Item 18 of Form 20–F except that Item 17 may be followed for financial statements included in filings other than registration statements for offerings of securities unless the only securities being offered are: (a) upon the exercise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted by the issuer of the securities to be offered, if such rights are granted on a pro rata basis to all existing securities holders of the class of securities to which the rights attach and there is no standby underwriting in the United States or similar arrangement; or (b) pursuant to a dividend or

interest reinvestment plan; or (c) upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferrable warrants issued by the issuer of the securities being offered, or by an affiliate of such issuer.

3. Financial statements for a subsidiary of a small business issuer that issues securities guaranteed by the small business issuer or guarantees securities issued by the small business issuer must be presented as required by Rule 3–10 of Regulation S–X (17 CFR 210.3–10), except that the periods presented are those required by paragraph (a) of this item.

4. Financial statements for a small business issuer's affiliates whose securities constitute a substantial portion of the collateral for any class of securities registered or being registered must be presented as required by Rule 3–16 of Regulation S–X (17 CFR 210.3–16), except that the periods presented are those required by paragraph (a) of this item.

5. The Commission, where consistent with the protection of investors, may permit the omission of one or more of the financial statements or the substitution of appropriate statements of comparable character. The Commission by informal written notice may require the filing of other financial statements where necessary or appropriate.

(a) *Annual Financial Statements.* Small business issuers shall file an audited balance sheet as of the end of the most recent fiscal year, or as of a date within 135 days if the issuers existed for a period less than one fiscal year, and audited statements of income, cash flows and changes in stockholders' equity for each of the two fiscal years preceding the date of such audited balance sheet (or such shorter period as the registrant has been in business).

(b) *Interim Financial Statements.* Interim financial statements may be unaudited; however, prior to filing, interim financial statements included in quarterly reports on Form 10–QSB (17 CFR 249.308b) must be reviewed by an independent public accountant using professional standards and procedures for conducting such reviews, as established by generally accepted auditing standards, as may be modified or supplemented by the Commission. If, in any filing, the issuer states that interim financial statements have been reviewed by an independent public accountant, a report of the accountant on the review must be filed with the interim financial statements. Interim financial statements shall include a balance sheet as of the end of the issuer's most recent fiscal quarter and income statements and statements of cash flows for the interim period up to the date of such balance sheet and the comparable period of the preceding fiscal year.

Instructions to Item 310(b): 1. Where Item 310 is applicable to a Form 10–QSB (§249.308b) and the interim period is more than one quarter, income statements must also be provided for the most recent interim quarter and the comparable quarter of the preceding fiscal year.

2. Interim financial statements must include all adjustments which in the opinion of management are necessary in order to make the financial statements not misleading. An affirmative statement that the financial statements have been so adjusted must be included with the interim financial statements.

(1) *Condensed Format.* Interim financial statements may be condensed as follows:

(i) Balance sheets should include separate captions for each balance sheet component presented in the annual financial statements which represents 10% or more of total assets. Cash and retained earnings should be presented regardless of relative significance to total assets. Registrants which present a classified balance sheet in their annual financial statements should present totals for current assets and current liabilities.

(ii) Income statements should include net sales or gross revenue, each cost and expense category presented in the annual financial statements which exceeds 20% of sales or gross revenues, provision for income taxes, discontinued operations, extraordinary items and cumulative effects of changes in accounting principles or practices. (Financial institutions should substitute net interest income for sales for purposes of determining items to be disclosed.) Dividends per share should be presented.

(iii) Cash flow statements should include cash flows from operating, investing and financing activities as well as cash at the beginning and end of each period and the increase or decrease in such balance.

(iv) Additional line items may be presented to facilitate the usefulness of

the interim financial statements including their comparability with annual financial statements.

(2) *Disclosure required and additional instructions as to Content.*—(i) *Footnotes.* Footnote and other disclosures should be provided as needed for fair presentation and to ensure that the financial statements are not misleading.

(ii) *Material Subsequent Events and Contingencies.* Disclosure must be provided of material subsequent events and material contingencies notwithstanding disclosure in the annual financial statements.

(iii) *Significant Equity Investees.* Sales, gross profit, net income (loss) from continuing operations and net income must be disclosed for equity investees which constitute 20% or more of a registrant's consolidated assets, equity or income from continuing operations.

(iv) *Significant Dispositions and Purchase Business Combinations.* If a significant disposition or purchase business combination has occurred during the most recent interim period and the transaction required the filing of a Form 8–K (§ 249.308 of this chapter), pro forma data must be presented which reflects revenue, income from continuing operations, net income and income per share for the current interim period and the corresponding interim period of the preceding fiscal year as though the transaction occurred at the beginning of the periods.

(v) *Material Accounting Changes.* Disclosure must be provided of the date and reasons for any material accounting change. The registrant's independent accountant must provide a letter in the first Form 10–QSB (§ 249.308b of this chapter) filed subsequent to the change indicating whether or not the change is to a preferable method. Disclosure must be provided of any retroactive change to prior period financial statements, including the effect of any such change on income and income per share.

(vi) *Development Stage Companies.* A registrant in the development stage must provide cumulative from inception financial information.

(c) *Financial Statements of Businesses Acquired or to be Acquired.* (1) If a business combination accounted for as a ''purchase'' has occurred or is probable, or if a business combination accounted for as a ''pooling of interest'' is probable, financial statements of the business acquired or to be acquired shall be furnished for the periods specified in paragraph (c)(3) of this Item.

(i) The term ''purchase'' encompasses the purchase of an interest in a business accounted for by the equity method.

(ii) Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the issuer have been filed shall be treated as if they are a single business combination for purposes of this section. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. A group of businesses are deemed to be related if:

(A) They are under common control or management;

(B) The acquisition of one business is conditional on the acquisition of each other business; or

(C) Each acquisition is conditioned on a single common event.

(iii) Annual financial statements required by this paragraph (c) shall be audited. The form and content of the financial statements shall be in accordance with paragraphs (a) and (b) of this Item.

(2) The periods for which financial statements are to be presented are determined by comparison of the most recent annual financial statements of the business acquired or to be acquired and the small business issuer's most recent annual financial statements filed at or prior to the date of acquisition to evaluate each of the following conditions:

(i) Compare the small business issuer's investments in and advances to the acquiree to the total consolidated assets of the small business issuer as of the end of the most recently completed fiscal year. For a proposed business combination to be accounted for as a pooling of interests, also compare the number of common shares exchanged or to be exchanged by the small business issuer to its total common shares

outstanding at the date the combination is initiated.

(ii) Compare the small business issuer's proportionate share of the total assets (after intercompany eliminations) of the acquiree to the total consolidated assets of the small business issuer as of the end of the most recently completed fiscal year.

(iii) Compare the small business issuer's equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principles of the acquiree to such consolidated income of the small business issuer for the most recently completed fiscal year.

Computational note to paragraph (c)(2): For purposes of making the prescribed income test the following guidance should be applied: If income of the small business issuer and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

(3)(i) If none of the conditions specified in paragraph (c)(2) of this Item exceeds 20%, financial statements are not required. If any of the conditions exceed 20%, but none exceeds 40%, financial statements shall be furnished for the most recent fiscal year and any interim periods specified in paragraph (b) of this item. If any of the conditions exceed 40%, financial statements shall be furnished for the two most recent fiscal years and any interim periods specified in paragraph (b) of this item.

(ii) The separate audited balance sheet of the acquired business is not required when the small business issuer's most recent audited balance sheet filed is for a date after the acquisition was consummated.

(iii) If the aggregate impact of individually insignificant businesses acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%, financial statements covering at least the substantial majority of the businesses acquired shall be furnished. Such financial statements shall be for the most recent fiscal year and any interim periods specified in paragraph (b) of this Item.

(iv) Registration statements not subject to the provisions of §230.419 of this chapter (Regulation C) and proxy statements need not include separate financial statements of the acquired or to be acquired business if it does not meet or exceed any of the conditions specified in paragraph (c)(2) of this Item at the 50 percent level, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The effective date of the registration statement, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business combination, and the financial statements have not been filed previously by the registrant.

(v) An issuer that omits from its initial registration statement financial statements of a recently consummated business combination pursuant to paragraph (c)(3)(iv) of this section shall furnish those financial statements and any pro forma information specified by paragraph (d) of this Item under cover of Form 8–K (§249.308 of this chapter) no later than 75 days after consummation of the acquisition.

(4) If the small business issuer made a significant business acquisition subsequent to the latest fiscal year end and filed a report on Form 8–K which included audited financial statements of such acquired business for the periods required by paragraph (c)(3) of this Item and the pro forma financial information required by paragraph (d) of this Item, the determination of significance may be made by using pro forma amounts for the latest fiscal year in the report on Form 8–K rather than by using the historical amounts of the registrant. The tests may not be made by ''annualizing'' data.

(d) *Pro Forma Financial Information.* (1) Pro forma information showing the effects of the acquisition shall be furnished if financial statements of a business acquired or to be acquired are presented.

(2) Pro forma statements should be condensed, in columnar form showing pro forma adjustments and results and should include the following:

(i) If the transaction was consummated during the most recent fiscal year or subsequent interim period,

pro forma statements of income reflecting the combined operations of the entities for the latest fiscal year and interim period, if any, or;

(ii) If consummation of the transaction has occurred or is probable after the date of the most recent balance sheet required by paragraph (a) or (b) of this Item, a pro forma balance sheet giving effect to the combination as of the date of the most recent balance sheet. For a purchase, pro forma statements of income reflecting the combined operations of the entities for the latest fiscal year and interim period, if any, and for a pooling of interests, pro forma statements of income for all periods for which income statements of the small business issuer are required.

(e) *Real Estate Operations Acquired or to be Acquired.* If, during the period for which income statements are required, the small business issuer has acquired one or more properties which in the aggregate are significant, or since the date of the latest balance sheet required by paragraph (a) or (b) of this Item, has acquired or proposes to acquire one or more properties which in the aggregate are significant, the following shall be furnished with respect to such properties:

(1) Audited income statements (not including earnings per unit) for the two most recent years, which shall exclude items not comparable to the proposed future operations of the property such as mortgage interest, leasehold rental, depreciation, corporate expenses and federal and state income taxes; *Provided, however,* That such audited statements need be presented for only the most recent fiscal year if:

(i) the property is not acquired from a related party;

(ii) material factors considered by the small business issuer in assessing the property are described with specificity in the registration statement with regard to the property, including source of revenue (including, but not limited to, competition in the rental market, comparative rents, occupancy rates) and expenses (including but not limited to, utilities, *ad valorem* tax rates, maintenance expenses, capital improvements anticipated); and

(iii) the small business issuer indicates that, after reasonable inquiry, it is not aware of any material factors relating to the specific property other than those discussed in response to paragraph (e)(1)(ii) of this Item that would cause the reported financial information not to be necessarily indicative of future operating results.

(2) If the property will be operated by the small business issuer, a statement shall be furnished showing the estimated taxable operating results of the small business issuer based on the most recent twelve-month period including such adjustments as can be factually supported. If the property will be acquired subject to a net lease, the estimated taxable operating results shall be based on the rent to be paid for the first year of the lease. In either case, the estimated amount of cash to be made available by operations shall be shown. Disclosure must be provided of the principal assumptions which have been made in preparing the statements of estimated taxable operating results and cash to be made available by operations.

(3) If appropriate under the circumstances, a table should be provided which shows, for a limited number of years, the estimated cash distribution per unit indicating the portion reportable as taxable income and the portion representing a return of capital with an explanation of annual variations, if any. If taxable net income per unit will be greater than the cash available for distribution per unit, that fact and approximate year of occurrence shall be stated, if significant.

(f) *Limited Partnerships.* (1) Small business issuers which are limited partnerships must provide the balance sheets of the general partners as described in paragraphs (f)(2) through (f)(4) of this Item.

(2) Where a general partner is a corporation, the audited balance sheet of the corporation as of the end of its most recently completed fiscal year must be filed. Receivables, other than trade receivables, from affiliates of the general partner should be deducted from shareholders' equity of the general partner. Where an affiliate has committed itself to increase or maintain the general partner's capital, the audited balance sheet of such affiliate must also be presented.

(3) Where a general partner is a partnership, there shall be filed an audited balance sheet of such partnership as of the end of its most recently completed fiscal year.

(4) Where the general partner is a natural person, there shall be filed, as supplemental information, a balance sheet of such natural person as of a recent date. Such balance sheet need not be audited. The assets and liabilities should be carried at estimated fair market value, with provisions for estimated income taxes on unrealized gains. The net worth of such general partner(s), based on such balance sheet(s), singly or in the aggregate, shall be disclosed in the registration statement.

(g) *Age of Financial Statements.* At the date of filing, financial statements included in filings other than filings on Form 10–KSB must be not less current than financial statements which would be required in Forms 10–KSB and 10–QSB if such reports were required to be filed. If required financial statements are as of a date 135 days or more prior to the date a registration statement becomes effective or proxy material is expected to be mailed, the financial statements shall be updated to include financial statements for an interim period ending within 135 days of the effective or expected mailing date. Interim financial statements should be prepared and presented in accordance with paragraph (b) of this Item:

(1) When the anticipated effective or mailing date falls within 45 days after the end of the fiscal year, the filing may include financial statements only as current as the end of the third fiscal quarter; *Provided, however,* That if the audited financial statements for the recently completed fiscal year are available or become available prior to effectiveness or mailing, they must be included in the filing;

(2) If the effective date or anticipated mailing date falls after 45 days but within 90 days of the end of the small business issuer's fiscal year, the small business issuer is not required to provide the audited financial statements for such year end provided that the following conditions are met:

(i) If the small business issuer is a reporting company, all reports due must have been filed;

(ii) For the most recent fiscal year for which audited financial statements are not yet available, the small business issuer reasonably and in good faith expects to report income from continuing operations before taxes; and

(iii) For at least one of the two fiscal years immediately preceding the most recent fiscal year the small business issuer reported income from continuing operations before taxes.

[57 FR 36449, Aug. 13, 1992, as amended at 58 FR 26514, May 4, 1993; 61 FR 54515, Oct. 18, 1996; 62 FR 6064, Feb. 10, 1997; 64 FR 53909, Oct. 5, 1999; 64 FR 73401, Dec. 30, 1999; 65 FR 51710, Aug. 24, 2000]

§ 228.401 (Item 401) Directors, Executive Officers, Promoters and Control Persons.

(a) *Identify directors and executive officers.* (1) List the names and ages of all directors and executive officers and all persons nominated or chosen to become such;

(2) List the positions and offices that each such person held with the small business issuer;

(3) Give the person's term of office as a director and the period during which the person has served;

(4) Briefly describe the person's business experience during the past five years; and

(5) If a director, identify other directorships held in reporting companies naming each company.

(b) *Identify Significant Employees.* Give the information specified in paragraph (a) of this Item for each person who is not an executive officer but who is expected by the small business issuer to make a significant contribution to the business.

(c) *Family relationships.* Describe any family relationships among directors, executive officers, or persons nominated or chosen by the small business issuer to become directors or executive officers.

(d) *Involvement in certain legal proceedings.* Describe any of the following events that occurred during the past five years that are material to an evaluation of the ability or integrity of any director, person nominated to become a

director, executive officer, promoter or control person of the small business issuer:

(1) Any bankruptcy petition filed by or against any business of which such person was a general partner or executive officer either at the time of the bankruptcy or within two years prior to that time;

(2) Any conviction in a criminal proceeding or being subject to a pending criminal proceeding (excluding traffic violations and other minor offenses);

(3) Being subject to any order, judgment, or decree, not subsequently reversed, suspended or vacated, of any court of competent jurisdiction, permanently or temporarily enjoining, barring, suspending or otherwise limiting his involvement in any type of business, securities or banking activities; and

(4) Being found by a court of competent jurisdiction (in a civil action), the Commission or the Commodity Futures Trading Commission to have violated a federal or state securities or commodities law, and the judgment has not been reversed, suspended, or vacated.

(e) *Audit committee financial expert.* (1)(i) Disclose that the small business issuer's board of directors has determined that the small business issuer either:

(A) Has at least one audit committee financial expert serving on its audit committee; or

(B) Does not have an audit committee financial expert serving on its audit committee.

(ii) If the small business issuer provides the disclosure required by paragraph (e)(1)(i)(A) of this Item, it must disclose the name of the audit committee financial expert and whether that person is *independent*, as that term is used in Item 7(d)(3)(iv) of Schedule 14A (240.14a–101 of this chapter) under the Exchange Act.

(iii) If the small business issuer provides the disclosure required by paragraph (e)(1)(i)(B) of this Item, it must explain why it does not have an audit committee financial expert.

Instruction to paragraph (e)(1) of Item 401. If the small business issuer's board of directors has determined that the small business issuer has more than one audit committee financial expert serving on its audit committee, the small business issuer may, but is not required to, disclose the names of those additional persons. A small business issuer choosing to identify such persons must indicate whether they are independent pursuant to Item 401(e)(1)(ii).

(2) For purposes of this Item, an *audit committee financial expert* means a person who has the following attributes:

(i) An understanding of generally accepted accounting principles and financial statements;

(ii) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(iii) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the small business issuer's financial statements, or experience actively supervising one or more persons engaged in such activities;

(iv) An understanding of internal controls and procedures for financial reporting; and

(v) An understanding of audit committee functions.

(3) A person shall have acquired such attributes through:

(i) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(ii) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(iii) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(iv) Other relevant experience.

(4) *Safe Harbor.* (i) A person who is determined to be an audit committee financial expert will not be deemed an *expert* for any purpose, including without limitation for purposes of section 11 of the Securities Act of 1933 (15

U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 401.

(ii) The designation or identification of a person as an audit committee financial expert pursuant to this Item 401 does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(iii) The designation or identification of a person as an audit committee financial expert pursuant to this Item 401 does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.

Instructions to Item 401(e). 1. The disclosure under Item 401(e) is required only in a small business issuer's annual report. The small business issuer need not provide the disclosure required by this Item 401(e) in a proxy or information statement unless that small business issuer is electing to incorporate this information by reference from the proxy or information statement into its annual report pursuant to general instruction E(3) to Form 10–KSB.

2. If a person qualifies as an audit committee financial expert by means of having held a position described in paragraph (e)(3)(iv) of this Item, the small business issuer shall provide a brief listing of that person's relevant experience. Such disclosure may be made by reference to disclosures required under paragraph (a)(4) of this Item 401 (§ 229.401(a)(4) or this chapter).

3. In the case of a foreign private issuer with a two-tier board of directors, for purposes of this Item 401(e), the term *board of directors* means the supervisory or non-management board. Also, in the case of a foreign private issuer, the term *generally accepted accounting principles* in paragraph (e)(2)(i) of this Item means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the Commission.

4. A small business issuer that is an Asset-Backed Issuer (as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter) is not required to disclose the information required by this Item 401(e).

5. Following the effective date of the first registration statement filed under the Securities Act (15 U.S.C. 77a *et seq.*) or Securities Exchange Act (15 U.S.C. 78a *et seq.*) by a small business issuer, the small business issuer or successor issuer need not make the disclosures required by this Item in its first annual report filed pursuant to Section 13(a) or 15(d) (15 U.S.C. 78m(a) or 78o(d)) of the Exchange Act after effectiveness.

[57 FR 36449, Aug. 13, 1992, as amended at 68 FR 5125, Jan. 31, 2003; 68 FR 15353, Mar. 31, 2003]

§ 228.402 (Item 402) Executive compensation.

(a) *General*—(1) *All compensation covered.* This item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(2) of this item, and directors covered by paragraph (f) of this item by any person for all services rendered in all capacities to the registrant and its subsidiaries, unless otherwise specified in this item. Except as provided by paragraph (a)(4) of this item, all such compensation shall be reported pursuant to this item even if also called for by another requirement, including transactions between the registrant and a third party where the primary purpose of the transaction is to furnish compensation to any such named executive officer or director. No item reported as compensation for one fiscal year need be reported as compensation for a subsequent fiscal year.

(2) *Persons covered.* Disclosure shall be provided pursuant to this item for each of the following (the ''named executive officers''):

(i) All individuals serving as the registrant's chief executive officer or acting in a similar capacity during the last completed fiscal year (''CEO''), regardless of compensation level;

(ii) The registrant's four most highly compensated executive officers other than the CEO who were serving as executive officers at the end of the last completed fiscal year; and

(iii) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (a)(2)(ii) of this item but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year.

Instructions to Item 402(a)(2): 1. *Determination of Most Highly Compensated Executive Officers.* The determination as to which executive officers are most highly compensated shall be

made by reference to total annual salary and bonus for the last completed fiscal year (as required to be disclosed pursuant to paragraph (b)(2)(iii)(A) and (B) of this item), but including the dollar value of salary or bonus amounts forgone pursuant to Instruction 3 to paragraph (b)(2)(iii)(A) and (B) of this item, *provided, however,* that no disclosure need be provided for any executive officer, other than the CEO, whose total annual salary and bonus, as so determined, does not exceed $100,000.

2. *Inclusion of Executive Officer of Subsidiary.* It may be appropriate in certain circumstances for a registrant to include an executive officer of a subsidiary in the disclosure required by this item. See Rule 3b–7 under the Exchange Act [17 CFR 240.3b–7].

3. *Exclusion of Executive Officer due to Unusual or Overseas Compensation.* It may be appropriate in limited circumstances for a registrant not to include in the disclosure required by this item an individual, other than its CEO, who is one of the registrant's most highly compensated executive officers. Among the factors that should be considered in determining not to name an individual are: (a) the distribution or accrual of an unusually large amount of cash compensation (such as a bonus or commission) that is not part of a recurring arrangement and is unlikely to continue; and (b) the payment of amounts of cash compensation relating to overseas assignments that may be attributed predominantly to such assignments.

(3) *Information for full fiscal year.* If the CEO served in that capacity during any part of a fiscal year with respect to which information is required, information should be provided as to all of his or her compensation for the full fiscal year. If a named executive officer (other than the CEO) served as an executive officer of the registrant (whether or not in the same position) during any part of a fiscal year with respect to which information is required, information shall be provided as to all compensation of that individual for the full fiscal year.

(4) *Transactions with third parties reported under item 404.* This item includes transactions between the registrant and a third party where the primary purpose of the transaction is to furnish compensation to a named executive officer. No information need be given in response to any paragraph of this item as to any such third-party transaction if the transaction has been reported in response to Item 404 of Regulation S–B (§ 228.404).

(5) *Omission of table or column.* A table or column may be omitted, if there has been no compensation awarded to, earned by or paid to any of the named executives required to be reported in that table or column in any fiscal year covered by that table.

(6) *Definitions.* For purposes of this item:

(i) The term *stock appreciation rights (SARs)* refers to SARs payable in cash or stock, including SARs payable in cash or stock at the election of the registrant or a named executive officer.

(ii) The term *plan* includes, but is not limited to, the following: any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, pursuant to which the following may be received: cash, stock, restricted stock or restricted stock units, phantom stock, stock options, SARs, stock options in tandem with SARs, warrants, convertible securities, performance units and performance shares, and similar instruments. A plan may be applicable to one person. Registrants may omit information regarding group life, health, hospitalization, medical reimbursement or relocation plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

(iii) The term *long-term incentive plan* means any plan providing compensation intended to serve as incentive for performance to occur over a period longer than one fiscal year, whether such performance is measured by reference to financial performance of the registrant or an affiliate, the registrant's stock price, or any other measure, but excluding restricted stock, stock option and SAR plans.

(7) *Location of specified information.* The information required by paragraph (h) of this item need not be provided in any filings other than a registrant proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that

the registrant specifically incorporates it by reference.

(b) *Summary compensation table*—(1) *General.* The information specified in paragraph (b)(2) of this item, concerning the compensation of the named executive officers for each of the registrant's last three completed fiscal years, shall be provided in a Summary Compensation Table, in the tabular format specified below.

SUMMARY COMPENSATION TABLE

Name and principal position	Year	Annual compensation			Long term compensation			
					Awards		Payouts	
		Salary ($)	Bonus ($)	Other annual compensation ($)	Restricted stock award(s) ($)	Securities underlying options/ SARs (#)	LTIP payouts ($)	All other compensation ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
CEO	—							
	—							
	—							
A	—							
	—							
	—							
B	—							
	—							
	—							
C	—							
	—							
	—							
D	—							
	—							
	—							

(2) The Table shall include: (i) The name and principal position of the executive officer (column (a));

(ii) Fiscal year covered (column (b));

(iii) Annual compensation (columns (c), (d) and (e)), including:

(A) The dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (c));

(B) The dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (d)); and

Instructions to Item 402(b)(2)(iii) (A) and (B): 1. Amounts deferred at the election of a named executive officer, whether pursuant to a plan established under section 401(k) of the Internal Revenue Code [26 U.S.C. 401(k)], or otherwise, shall be included in the salary column (column (c)) or bonus column (column (d)), as appropriate, for the fiscal year in which earned. If the amount of salary or bonus earned in a given fiscal year is not calculable through the latest practicable date, that fact must be disclosed in a footnote and such amount must be disclosed in the subsequent fiscal year in the appropriate column for the fiscal year in which earned.

2. For stock or any other form of non-cash compensation, disclose the fair market value at the time the compensation is awarded, earned or paid.

3. Registrants need not include in the salary column (column (c)) or bonus column (column (d)) any amount of salary or bonus forgone at the election of a named executive officer pursuant to a registrant program under which stock, stock-based or other forms of non-cash compensation may be received by a named executive in lieu of a portion of annual compensation earned in a covered fiscal year. However, the receipt of any such form of non-cash compensation in lieu of salary or bonus earned for a covered fiscal year must be disclosed in the appropriate column of the Table corresponding to that fiscal year (i.e., restricted stock awards (column (f)); options or SARs (column (g)); all other compensation (column (i)), or, if made pursuant to a long-term incentive plan and therefore not reportable at grant in the Summary Compensation Table, a footnote must be added to the salary or bonus column so disclosing and referring to the Long-Term Incentive Plan Table (required by paragraph (e) of this item) where the award is reported.

(C) The dollar value of other annual compensation not properly categorized as salary or bonus, as follows (column (e)):

(*1*) Perquisites and other personal benefits, securities or property, unless the aggregate amount of such compensation is the lesser of either $50,000 or 10% of the total of annual salary and bonus reported for the named executive officer in columns (c) and (d);

(*2*) Above-market or preferential earnings on restricted stock, options, SARs or deferred compensation paid during the fiscal year or payable during that period but deferred at the election of the named executive officer;

(*3*) Earnings on long-term incentive plan compensation paid during the fiscal year or payable during that period but deferred at the election of the named executive officer;

(*4*) Amounts reimbursed during the fiscal year for the payment of taxes; and

(*5*) The dollar value of the difference between the price paid by a named executive officer for any security of the registrant or its subsidiaries purchased from the registrant or its subsidiaries (through deferral of salary or bonus, or otherwise), and the fair market value of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the registrant.

Instructions to Item 402(b)(2)(iii)(C): 1. Each perquisite or other personal benefit exceeding 25% of the total perquisites and other personal benefits reported for a named executive officer must be identified by type and amount in a footnote or accompanying narrative discussion to column (e).

2. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the registrant and its subsidiaries.

3. Interest on deferred or long-term compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding (as prescribed under section 1274(d) of the Internal Revenue Code, [26 U.S.C. 1274(d)]) at the rate that corresponds most closely to the rate under the registrant's plan at the time the interest rate or formula is set. In the event of a discretionary reset of the interest rate, the requisite calculation must be made on the basis of the interest rate at the time of such reset, rather than when originally established. Only the above-market portion of the interest must be included. If the applicable interest rates vary depending upon conditions such as a minimum period of continued

service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest at the highest rate.

4. Dividends (and dividend equivalents) on restricted stock, options, SARs or deferred compensation denominated in stock (''deferred stock'') are preferential only if earned at a rate higher than dividends on the registrant's common stock. Only the preferential portion of the dividends or equivalents must be included.

(iv) Long-term compensation (columns (f), (g) and (h)), including:

(A) The dollar value (net of any consideration paid by the named executive officer) of any award of restricted stock, including share units (calculated by multiplying the closing market price of the registrant's unrestricted stock on the date of grant by the number of shares awarded) (column (f));

(B) The sum of the number of securities underlying stock options granted (including options that subsequently have been transferred), with or without tandem SARs, and the number of freestanding SARs (column (g)); and

(C) The dollar value of all payouts pursuant to long-term incentive plans (''LTIPs'') as defined in paragraph (a)(6)(iii) of this item (column (h)).

Instructions to Item 402(b)(2)(iv): 1. Awards of restricted stock that are subject to performance-based conditions to vesting, in addition to lapse of time and/or continued service with the registrant or a subsidiary, may be reported as LTIP awards pursuant to paragraph (e) of this item instead of in column (f). If this approach is selected, once the restricted stock vests, it must be reported as an LTIP payout in column (h).

2. The registrant shall, in a footnote to the Summary Compensation Table (appended to column (f), if included), disclose:

a. The number and value of the aggregate restricted stock holdings at the end of the last completed fiscal year. The value shall be calculated in the manner specified in paragraph (b)(2)(iv)(A) of this item using the value of the registrant's shares at the end of the last completed fiscal year;

b. For any restricted stock award reported in the Summary Compensation Table that will vest, in whole or in part, in under three years from the date of grant, the total number of shares awarded and the vesting schedule; and

c. Whether dividends will be paid on the restricted stock reported in column (f).

3. If at any time during the last completed fiscal year, the registrant has adjusted or amended the exercise price of stock options or freestanding SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means (''repriced''), the registrant shall include the number of options or freestanding SARs so repriced as Stock Options/SARs granted and required to be reported in column (g).

4. If any specified performance target, goal or condition to payout was waived with respect to any amount included in LTIP payouts reported in column (h), the registrant shall so state in a footnote to column (h).

(v) All other compensation for the covered fiscal year that the registrant could not properly report in any other column of the Summary Compensation Table (column (i)). Any compensation reported in this column for the last completed fiscal year shall be identified and quantified in a footnote. Such compensation shall include, but not be limited to:

(A) The amount paid, payable or accrued to any named executive officer pursuant to a plan or arrangement in connection with:

(*1*) The resignation, retirement or any other termination of such executive officer's employment with the registrant and its subsidiaries; or

(*2*) A change in control of the registrant or a change in the executive officer's responsibilities following such a change in control.

(B) The dollar value of above-market or preferential amounts earned on restricted stock, options, SARs or deferred compensation during the fiscal year, or calculated with respect to that period, except that if such amounts are paid during the period, or payable during the period but deferred at the election of a named executive officer, this information shall be reported as Other Annual Compensation in column (e). See Instructions 3 and 4 to paragraph 402(b) (2) (iii) (C) of this item;

(C) The dollar value of amounts earned on long-term incentive plan compensation during the fiscal year, or calculated with respect to that period, except that if such amounts are paid during that period, or payable during that period at the election of the named executive officer, this information shall be reported as Other Annual Compensation in column (e);

(D) Annual registrant contributions or other allocations to vested and unvested defined contribution plans; and

(E) The dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to term life insurance for the benefit of a named executive officer, and, if there is any arrangement or understanding, whether formal or informal, that such executive officer has or will receive or be allocated an interest in any cash surrender value under the insurance policy, either:

(*1*) The full dollar value of the remainder of the premiums paid by, or on behalf of, the registrant; or

(*2*) If the premiums will be refunded to the registrant on termination of the policy, the dollar value of the benefit to the executive officer of the remainder of the premium paid by, or on behalf of, the registrant during the fiscal year. The benefit shall be determined for the period, projected on an actuarial basis, between payment of the premium and the refund.

Instructions to Item 402(b)(2)(v): 1. LTIP awards and amounts received on exercise of options and SARs need not be reported as All Other Compensation in column (i).

2. Information relating to defined benefit and actuarial plans need not be reported.

3. Where alternative methods of reporting are available under paragraph (b) (2) (v) (E) of this item, the same method should be used for each of the named executive officers. If the registrant chooses to change methods from one year to the next, that fact, and the reason therefor, should be disclosed in a footnote to column (i).

Instruction to Item 402(b): Information with respect to fiscal years prior to the last completed fiscal year will not be required if the registrant was not a reporting company pursuant to Section 13(a) or 15(d) of the Exchange Act at any time during that year, except that the registrant will be required to provide information for any such year if that information previously was required to be provided in response to a Commission filing requirement.

(c) *Option/SAR grants table.* (1) The information specified in paragraph (c)(2) of this item, concerning individual grants of stock options (whether or not in tandem with SARs) and freestanding SARs (including options and SARs that subsequently have been transferred) made during the last completed fiscal year to each of the named executive officers shall be provided in the tabular format specified as follows:

OPTION/SAR GRANTS IN LAST FISCAL YEAR

[Individual Grants]

Name (a)	Number of securities underlying options/SARs granted (#) (b)	Percent of total options/SARs granted to employees in fiscal year (c)	Exercise or base price ($/Sh) (d)	Expiration date (e)
CEO				
A				
B				
C				
D				

(2) The Table shall include, with respect to each grant:

(i) The name of the executive officer (column (a));

(ii) number of securities underlying option/SARs granted (column (b)).

(iii) The percent the grant represents of total options and SARs granted to employees during the fiscal year (column (c));

(iv) The per-share exercise or base price of the options or SARs granted (column (d)). If such exercise or base price is less than the market price of the underlying security on the date of grant, a separate, adjoining column shall be added showing market price on the date of grant; and

(v) The expiration date of the options or SARs (column (e)).

Instructions to Item 402(c): 1. If more than one grant of options and/or freestanding SARs was made to a named executive officer during the last completed fiscal year, a separate

line should be used to provide disclosure of each such grant. However, multiple grants during a single fiscal year may be aggregated where each grant was made at the same exercise and/or base price and has the same expiration date, and the same performance vesting thresholds, if any. A single grant consisting of options and/or freestanding SARs shall be reported as separate grants with respect to each tranche with a different exercise and/or base price, performance vesting threshold, or expiration date.

2. Options or freestanding SARs granted in connection with an option repricing transaction shall be reported in this table. See Instruction 3 to paragraph (b)(2)(iv) of this item.

3. Any material term of the grant, including but not limited to the date of exercisability, the number of SARs, performance units or other instruments granted in tandem with options, a performance-based condition to exercisability, a reload feature, or a tax-reimbursement feature, shall be footnoted.

4. If the exercise or base price is adjustable over the term of any option or freestanding SAR in accordance with any prescribed standard or formula, including but not limited to an index or premium price provision, describe the following, either by footnote to column (c) or in narrative accompanying the Table:

(a) The standard or formula; and

(b) Any constant assumption made by the registrant regarding any adjustment to the exercise price in calculating the potential option or SAR value.

5. If any provision of a grant (other than an antidilution provision) could cause the exercise price to be lowered, registrants must clearly and fully disclose these provisions and their potential consequences either by a footnote or accompanying textual narrative.

6. In determining the grant-date market or base price of the security underlying options or freestanding SARs, the registrant may use either the closing market price per share of the security, or any other formula prescribed for the security.

(d) *Aggregated option/SAR exercises and fiscal year-end option/SAR Value Table.* (1) The information specified in paragraph (d)(2) of this item, concerning each exercise of stock options (or tandem SARs) and freestanding SARs during the last completed fiscal year by each of the named executive officers and the fiscal year-end value of unexercised options and SARs, shall be provided on an aggregated basis in the tabular format specified below:

AGGREGATED OPTION/SAR EXERCISES IN LAST FISCAL YEAR AND FY-END OPTION/SAR VALUES

Name (a)	Shares acquired on exercise (#) (b)	Value realized ($) (c)	Number of securities underlying unexercised options/SARs at FY-end (#) Exercisable/Unexercisable (d)	Value of unexercised in-the-money options/SARs at FY-end ($) Exercisable/Unexercisable (e)
CEO				
A				
B				
C				
D				

(2) The table shall include:

(i) The name of the executive officer (column (a));

(ii) The number of shares received upon exercise, or, if no shares were received, the number of securities with respect to which the options or SARs were exercised (column (b));

(iii) The aggregate dollar value realized upon exercise (column (c));

(iv) The total number of securities underlying unexercised options and SARs held at the end of the last completed fiscal year, separately identifying the exercisable and unexercisable options and SARs (column (d)); and

(v) The aggregate dollar value of in-the-money, unexercised options and SARs held at the end of the fiscal year, separately identifying the exercisable and unexercisable options and SARs (column (e)).

Instructions to Item 402(d)(2): 1. Options or freestanding SARs are in-the-money if the fair market value of the underlying securities exceeds the exercise or base price of the option or SAR. The dollar values in columns (c) and (e) are calculated by determining the difference between the fair market value of the securities underlying the options or SARs and the exercise or base price of the options or SARs at exercise or fiscal year-end, respectively.

2. In calculating the dollar value realized upon exercise (column (c)), the value of any related payment or other consideration provided (or to be provided) by the registrant to or on behalf of a named executive officer, whether in payment of the exercise price or related taxes, shall not be included. Payments by the registrant in reimbursement of tax obligations incurred by a named executive officer are required to be disclosed in accordance with paragraph (b)(2)(iii)(C)(*4*) of this item.

(e) *Long-Term Incentive Plan (''LTIP'') awards table.* (1) The information specified in paragraph (e)(2) of this item, regarding each award made to a named executive officer in the last completed fiscal year under any LTIP, shall be provided in the tabular format specified below:

LONG-TERM INCENTIVE PLANS—AWARDS IN LAST FISCAL YEAR

(a) Name	(b) Number of shares, units or other rights (#)	(c) Performance or other period until maturation or payout	Estimated Future Payouts under Non-Stock Price-Based Plans		
			(d) Threshold ($ or #)	(e) Target ($ or #)	(f) Maximum ($ or #)
CEO					
A					
B					
C					
D					

(2) The Table shall include: (i) The name of the executive officer (column (a));

(ii) The number of shares, units or other rights awarded under any LTIP, and, if applicable, the number of shares underlying any such unit or right (column (b));

(iii) The performance or other time period until payout or maturation of the award (column (c)); and

(iv) For plans not based on stock price, the dollar value of the estimated payout, the number of shares to be awarded as the payout or a range of estimated payouts denominated in dollars or number of shares under the award (threshold, target and maximum amount) (columns (d) through (f)).

Instructions to Item 402(e): 1. For purposes of this paragraph, the term ''long-term incentive plan'' or ''LTIP'' shall be defined in accordance with paragraph (a)(6)(iii) of this item.

2. Describe in a footnote or in narrative text accompanying this table the material terms of any award, including a general description of the formula or criteria to be applied in determining the amounts payable. Registrants are not required to disclose any factor, criterion or performance-related or other condition to payout or maturation of a particular award that involves confidential commercial or business information, disclosure of which would adversely affect the registrant's competitive position.

3. Separate disclosure shall be provided in the Table for each award made to a named executive officer, accompanied by the information specified in Instruction 2 to this paragraph. If awards are made to a named executive officer during the fiscal year under more than one plan, identify the particular plan under which each such award was made.

4. For column (d), ''threshold'' refers to the minimum amount payable for a certain level of performance under the plan. For column (e), ''target'' refers to the amount payable if the specified performance target(s) are reached. For column (f), ''maximum'' refers to the maximum payout possible under the plan.

5. In column (e), registrants must provide a representative amount based on the previous fiscal year's performance if the target award is not determinable.

6. A tandem grant of two instruments, only one of which is pursuant to a LTIP, need be reported only in the table applicable to the other instrument. For example, an option granted in tandem with a performance share would be reported only as an option grant, with the tandem feature noted.

(f) *Compensation of directors*—(1) *Standard arrangements.* Describe any standard arrangements, stating amounts, pursuant to which directors of the registrant are compensated for any services provided as a director, including any additional amounts payable for committee participation or special assignments.

(2) *Other arrangements.* Describe any other arrangements pursuant to which any director of the registrant was compensated during the registrant's last completed fiscal year for any service

provided as a director, stating the amount paid and the name of the director.

Instruction to Item 402(f)(2): The information required by paragraph (f)(2) of this item shall include any arrangement, including consulting contracts, entered into in consideration of the director's service on the board. The material terms of any such arrangement shall be included.

(g) *Employment contracts and termination of employment and change-in-control arrangements.* Describe the terms and conditions of each of the following contracts or arrangements:

(1) Any employment contract between the registrant and a named executive officer; and

(2) Any compensatory plan or arrangement, including payments to be received from the registrant, with respect to a named executive officer, if such plan or arrangement results or will result from the resignation, retirement or any other termination of such executive officer's employment with the registrant and its subsidiaries or from a change-in-control of the registrant or a change in the named executive officer's responsibilities following a change-in-control and the amount involved, including all periodic payments or installments, exceeds $100,000.

(h) *Report on repricing of options/SARs.* (1) If at any time during the last completed fiscal year, the registrant, while a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act [15 U.S.C. 78m(a), 78*o*(d)], has adjusted or amended the exercise price of stock options or SARs previously awarded to any of the named executive officers, whether through amendment, cancellation or replacement grants, or any other means (''repriced''), the registrant shall provide the information specified in paragraph (h)(2) of this item.

(2) The compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) shall explain in reasonable detail any such repricing of options and or SARs held by a named executive officer in the last completed fiscal year, as well as the basis for each such repricing.

Instructions to Item 402(h): 1. A replacement grant is any grant of options or SARs reasonably related to any prior or potential option or SAR cancellation, whether by an exchange of existing options or SARs for options or SARs with new terms; the grant of new options or SARs in tandem with previously granted options or SARs that will operate to cancel the previously granted options or SARs upon exercise; repricing of previously granted options or SARs; or otherwise. If a corresponding original grant was canceled in a prior year, information about such grant nevertheless must be disclosed pursuant to this paragraph.

2. If the replacement grant is not made at the current market price, describe the terms of the grant in a footnote or accompanying textual narrative.

3. This paragraph shall not apply to any repricing occurring through the operation of:

a. A plan formula or mechanism that results in the periodic adjustment of the option or SAR exercise or base price;

b. A plan antidilution provision; or

c. A recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

[57 FR 48145, Oct. 21, 1992, as amended at 58 FR 63012, Nov. 29, 1993; 64 FR 11115, Mar. 8, 1999]

§ 228.403 (Item 403) Security Ownership of Certain Beneficial Owners and Management.

(a) *Security ownership of certain beneficial owners.* Complete the table below for any person (including any ''group'') who is known to the small business issuer to be the beneficial owner of more than five percent of any class of the small business issuer's voting securities.

Title of class	Name and address of beneficial owner	Amount and nature of beneficial owner	Percent of class
(1)	(2)	(3)	(4)

(b) *Security ownership of management.* Furnish the following information, as of the most recent practicable date, in substantially the tabular form indicated, as to each class of equity securities of the registrant or any of its parents or subsidiaries other than directors' qualifying shares, beneficially owned by all directors and nominees, naming them, each of the named executive officers as defined in Item 402(a)(2) (§ 228.402(a)(2)), and directors and executive officers of the registrant

as a group, without naming them. Show in column (3) the total number of shares beneficially owned and in column (4) the percent of class so owned. Of the number of shares shown in column (3), indicate, by footnote or otherwise, the amount of shares with respect to which such persons have the right to acquire beneficial ownership as specified in §240.13d—3(d)(1) of this chapter.

Title of class	Name and address of beneficial owner	Amount and nature of beneficial owner	Percent of class
(1)	(2)	(3)	(4)

(c) *Changes in control.* Describe any arrangements which may result in a change in control of the small business issuer.

Instructions to Item 403 1. Of the number of shares shown in column (3) of paragraphs (a) and (b) of this Item, state in a footnote the amount which the listed beneficial owner has the right to acquire within sixty days, from options, warrants, rights, conversion privilege or similar obligations.

2. Where persons hold more than 5% of a class under a voting trust or similar agreement, provide the following:

(a) the title of such securities;

(b) the amount that they hold under the trust or agreement (if not clear from the table);

(c) the duration of the agreement;

(d) the names and addresses of the voting trustees; and

(e) a brief outline of the voting rights and other powers of the voting trustees under the trust or agreement.

3. Calculate the percentages on the basis of the amount of outstanding securities plus, for each person or group, any securities that person or group has the right to acquire within 60 days pursuant to options, warrants, conversion privileges or other rights.

4. In this Item, a *beneficial owner* of a security means:

(a) Any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares:

(1) Voting power, which includes the power to vote, or to direct the voting of, such security; or

(2) Investment power, which includes the power to dispose, or to direct the disposition of, such security.

(b) Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership.

5. All securities of the same class beneficially owned by a person, regardless of the form that such beneficial ownership takes, shall be totaled in calculating the number of shares beneficially owned by such person.

6. The small business issuer is responsible for knowing the contents of any statements filed with the Commission under section 13(d) or 13(g) of the Exchange Act concerning the beneficial ownership of securities and may rely upon the information in such statements unless it knows or has reason to believe that the information is not complete or accurate.

7. The term ''group'' means two or more persons acting as a partnership, syndicate, or other group for the purpose of acquiring, holding or disposing of securities of an issuer.

8. Where the small business issuer lists more than one beneficial owner for the same securities, adequate disclosure should be included to avoid confusion.

[57 FR 36449, Aug. 13, 1992, as amended at 57 FR 48150, Oct. 21, 1992]

§228.404 (Item 404) Certain Relationships and Related Transactions.

(a) Describe any transaction during the last two years, or proposed transactions, to which the small business issuer was or is to be a party, in which any of the following persons had or is to have a direct or indirect material interest. Give the name of the person, the relationship to the issuer, nature of the person's interest in the transaction and, the amount of such interest:

(1) Any director or executive officer of the small business issuer;

(2) Any nominee for election as a director;

(3) Any security holder named in response to Item 403 (§228.403); and

(4) Any member of the immediate family (including spouse, parents, children, siblings, and in-laws) of any of the persons in paragraphs (a) (1), (2) or (3) of this Item.

(b) No information need be included for any transaction where:

(1) Competitive bids determine the rates or charges involved in the transaction;

(2) The transaction involves services at rates or charges fixed by law or governmental authority;

(3) The transaction involves services as a bank depositary of funds, transfer

agent, registrar, trustee under a trust indenture, or similar services;

(4) The amount involved in the transaction or a series of similar transactions does not exceed $60,000; or

(5) The interest of the person arises solely from the ownership of securities of the small business issuer and the person receives no extra or special benefit that was not shared equally (pro rata) by all holders of securities of the class.

(c) List all parents of the small business issuer showing the basis of control and as to each parent, the percentage of voting securities owned or other basis of control by its immediate parent if any.

(d) *Transactions with promoters.* Issuers organized within the past five years shall:

(1) State the names of the promoters, the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter, directly or indirectly, from the issuer and the nature and amount of any assets, services or other consideration therefore received or to be received by the registrant; and

(2) As to any assets acquired or to be acquired from a promoter, state the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount and identify the persons making the determination and their relationship, if any, with the registrant or any promoter. If the assets were acquired by the promoter within two years prior to their transfer to the issuer, also state the cost thereof to the promoter.

Instructions to Item 404: 1. A person does not have a material indirect interest in a transaction within the meaning of this Item where:

(a) The interest arises only:

(1) from such person's position as a director of another corporation or organization (other than a partnership) which is a party to the transaction and/or

(2) from the total ownership (direct or indirect) by all specified persons of less than a 10% equity interest in another person (other than a partnership) which is a party to the transaction;

(b) The interest arises only from such person's position as a limited partner in a partnership in which he and all other specified persons had an interest of less than 10 percent; or

(c) The interest of such person arises solely from holding an equity interest (but not a general partnership interest) or a creditor interest in another person that is a party to the transaction and the transaction is not material to such other person.

2. Include information for any material underwriting discounts and commissions upon the sale of securities by the small business issuer where any of the specified persons was or is to be a principal underwriter or is a controlling person or member of a firm that was or is to be a principle underwriter.

3. As to any transaction involving the purchase or sale of assets by or to the small business issuer otherwise than in the ordinary course of business, state the cost of the assets to the purchase and if acquired by the seller within two years before the transaction, the cost thereof to the seller.

§ 228.405 (Item 405) Compliance With Section 16(a) of the Exchange Act.

Every small business issuer that has a class of equity securities registered pursuant to Section 12 of the Exchange Act (15 U.S.C. 78*l*) shall:

(a) Based solely upon a review of Forms 3 and 4 (17 CFR 249.103 and 249.104 of this chapter) and amendments thereto furnished to the registrant under Rule 16a–3(e) (17 CFR 240.16a–3(e) of this chapter) during its most recent fiscal year and Forms 5 and amendments thereto (§ 249.105 of this chapter) furnished to the registrant with respect to its most recent fiscal year, and any written representation referred to in paragraph (b)(2)(i) of this Item:

(1) Under the caption ''Section 16(a) Beneficial Ownership Reporting Compliance,'' identify each person who, at any time during the fiscal year, was a director, officer, beneficial owner of more than ten percent of any class of equity securities of the registrant registered pursuant to section 12 (''reporting person'') that failed to file on a timely basis, as disclosed in the above Forms, reports required by section 16(a) of the Exchange Act during the most recent fiscal year or prior fiscal years.

(2) For each such person, set forth the number of late reports, the number of transactions that were not reported on a timely basis, and any known failure to file a required Form. A known failure to file would include, but not be

limited to, a failure to file a Form 3, which is required of all reporting persons, and a failure to file a Form 5 in the absence of the written representation referred to in paragraph (b)(2)(i) of this section, unless the registrant otherwise knows that no Form 5 is required.

NOTE: The disclosure requirement is based on a review of the forms submitted to the registrant during and with respect to its most recent fiscal year, as specified above. Accordingly, a failure to file timely need only be disclosed once. For example, if in the most recently concluded fiscal year a reporting person filed a Form 4 disclosing a transaction that took place in the prior fiscal year, and should have been reported in that year, the registrant should disclose that late filing and transaction pursuant to this Item for the most recent fiscal year, but not in material filed with respect to subsequent years.

(b) With respect to the disclosure required by paragraph (a) of this Item:

(1) A form received by the registrant within three calendar days of the required filing date may be presumed to have been filed with the Commission by the required filing date.

(2) If the registrant:

(i) receives a written representation from the reporting person that no Form 5 is required; and

(ii) maintains the representation for two years, making a copy available to the Commission or its staff upon request, the registrant need not identify such reporting person pursuant to paragraph (a) of this Item as having failed to file a Form 5 with respect to that fiscal year.

[57 FR 36449, Aug. 13, 1992, as amended at 61 FR 30391, June 14, 1996]

§ 228.406 (Item 406) Code of ethics.

(a) Disclose whether the small business issuer has adopted a code of ethics that applies to the small business issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If the small business issuer has not adopted such a code of ethics, explain why it has not done so.

(b) For purposes of this Item 406, the term *code of ethics* means written standards that are reasonably designed to deter wrongdoing and to promote:

(1) Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(2) Full, fair, accurate, timely, and understandable disclosure in reports and documents that a small business issuer files with, or submits to, the Commission and in other public communications made by the small business issuer;

(3) Compliance with applicable governmental laws, rules and regulations;

(4) The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and

(5) Accountability for adherence to the code.

(c) The small business issuer must:

(1) File with the Commission a copy of its code of ethics that applies to the small business issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions, as an exhibit to its annual report;

(2) Post the text of such code of ethics on its Internet website and disclose, in its annual report, its Internet address and the fact that it has posted such code of ethics on its Internet website; or

(3) Undertake in its annual report filed with the Commission to provide to any person without charge, upon request, a copy of such code of ethics and explain the manner in which such request may be made.

(d) If the small business issuer intends to satisfy the disclosure requirement under Item 10 of Form 8–K regarding an amendment to, or a waiver from, a provision of its code of ethics that applies to the small business issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions and that relates to any element of the code of ethics definition enumerated in paragraph (b) of this Item by posting such information on its Internet website, disclose the small business

issuer's Internet address and such intention.

Instructions to Item 406. 1. A small business issuer may have separate codes of ethics for different types of officers. Furthermore, a *code of ethics* within the meaning of paragraph (b) of this Item may be a portion of a broader document that addresses additional topics or that applies to more persons than those specified in paragraph (a). In satisfying the requirements of paragraph (c), a small business issuer need only file, post or provide the portions of a broader document that constitutes a *code of ethics* as defined in paragraph (b) and that apply to the persons specified in paragraph (a).

2. If a small business issuer elects to satisfy paragraph (c) of this Item by posting its code of ethics on its website pursuant to paragraph (c)(2), the code of ethics must remain accessible on its website for as long as the small business issuer remains subject to the requirements of this Item and chooses to comply with this Item by posting its code on its Web site pursuant to paragraph (c)(2).

3. A small business issuer that is an Asset-Backed Issuer (as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter) is not required to disclose the information required by this Item.

[68 FR 5127, Jan. 31, 2003]

§ 228.501 (Item 501) Front of registration statement and front cover of prospectus.

The small business issuer must furnish the following information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) Limit the outside front cover page of the prospectus to one page and include the following information:

(1) The registrant's name. A foreign registrant also must give the English translation of its name;

(2) The title, amount, and description of securities offered. If the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may purchase additional shares in connection with the offering, indicate that this arrangement exists and state the amount of additional shares that the underwriter may purchase under the arrangement;

(3) If there are selling security holders, a statement to that effect;

(4) Whether any national securities exchange or the Nasdaq Stock Market lists the securities offered, naming the particular market(s), and identifying the trading symbol(s) for those securities;

(5) A cross-reference to the risk factors section, including the page number where it appears in the prospectus. Highlight this cross-reference by prominent type or in another manner;

(6) Any legend or statement required by the law of any state in which the securities are offered;

(7) A legend that indicates that neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the securities or passed on the adequacy or accuracy of the disclosures in the prospectus. Also make clear that any representation to the contrary is a criminal offense. You may use one of the following or other clear, plain language:

Example A: Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the adequacy or accuracy of the prospectus. Any representation to the contrary is a criminal offense.

Example B: Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

(8) If you are not a reporting company and the preliminary prospectus will be circulated, as applicable:

(i) A bona fide estimate of the range of the maximum offering price and maximum number of shares or units offered; or

(ii) A bona fide estimate of the principal amount of debt securities offered;

(9)(i) Name(s) of the lead or managing underwriter(s) and an identification of the nature of the underwriting arrangements;

(ii) If the offering is not made on a firm commitment basis, a brief description of the underwriting arrangements;

(iii) If you offer the securities on a best efforts or best efforts minimum/maximum basis, the date the offering will end, any minimum purchase requirements, and whether or not there are any arrangements to place the funds in an escrow, trust, or similar account; and

(iv) If you offer the securities for cash, the price to the public for the securities, the underwriting discounts and commissions, and proceeds to the registrant or other persons. Show the information on both a per share or unit basis and for the total amount of the offering. If you make the offering on a minimum/maximum basis, show this information based on the total minimum and total maximum amount of the offering. You may present the information in a table, term sheet format, or other clear presentation. You may present the information in any format that fits the design of the cover page so long as the information can be easily read and is not misleading;

(10) If the prospectus will be used before the effective date of the registration statement, a prominent statement that:

(i) The information in the prospectus will be amended or completed;

(ii) A registration statement relating to these securities has been filed with the Securities and Exchange Commission;

(iii) The securities may not be sold until the registration statement becomes effective; and

(iv) The prospectus is not an offer to sell the securities and it is not soliciting an offer to buy the securities in any state where offers or sales are not permitted. You may use the following or other clear, plain language:

The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.

(11) If you use § 230.430A of this chapter to omit pricing information and the prospectus is used before you determine the public offering price, the information in paragraph (a)(10) of this section; and

(12) The date of the prospectus.

(b) [Reserved]

[63 FR 6379, Feb. 6, 1998]

§ 228.502 (Item 502) Inside front and outside back cover pages of prospectus.

The small business issuer must furnish the following information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) *Table of contents.* On either the inside front or outside back cover page of the prospectus, provide a reasonably detailed table of contents. It must show the page number of the various sections or subdivisions of the prospectus. Include a specific listing of the risk factors section required by Item 503 of this Regulation S–B (17 CFR 228.503). You must include the table of contents immediately following the cover page in any prospectus you deliver electronically;

(b) *Dealer prospectus delivery obligation.* If applicable to your offering, on the outside back cover page of the prospectus, advise dealers of their prospectus delivery obligation, including the expiration date specified by Section 4(3) of the Securities Act (15 U.S.C. 77d(3)) and § 230.174 of this chapter. You may use the following or other clear, plain language:

DEALER PROSPECTUS DELIVERY OBLIGATION

Until (insert date), all dealers that effect transactions in these securities, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealers' obligation to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

[63 FR 6380, Feb. 6, 1998]

§ 228.503 (Item 503) Summary information and risk factors.

The small business issuer must furnish the following information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) *Summary.* Provide a summary of the information in the prospectus where the length or complexity of the prospectus makes a summary useful. The summary should be brief. The summary should not contain, and is not required to contain, all of the detailed information in the prospectus. If you provide summary business or financial information, even if you do not caption it as a summary, you still must provide that information in plain English.

Instruction to paragraph 503(a): The summary should not merely repeat the text of the prospectus but should provide a brief overview of the key aspects of the offering. Carefully consider and identify those aspects of the offering that are the most significant and determine how best to highlight those points in clear, plain language.

(b) *Address and phone number.* Include, either on the cover page or in the summary section of the prospectus, the complete mailing address and telephone number of your principal executive offices.

(c) *Risk factors.* (1) Discuss in a section captioned ''Risk Factors'' any factors that make the offering speculative or risky. The factors may include, among other things, the following:

(i) Your lack of an operating history;

(ii) Your lack of recent profits from operations;

(iii) Your poor financial position;

(iv) Your business or proposed business; or

(v) The lack of a market for your common equity securities.

(2) The risk factor discussion must immediately follow the summary section. If you do not include a summary section, the risk factor discussion must immediately follow the cover page or the pricing information that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on § 230.430A(a) of this chapter.

[63 FR 6380, Feb. 6, 1998]

§ 228.504 (Item 504) Use of Proceeds.

State how the net proceeds of the offering will be used, indicating the amount to be used for each purpose and the priority of each purpose, if all of the securities are not sold. If all or a substantial part of the proceeds are not allocated for a specific purpose, so state and discuss the principal reasons for the offering.

Instructions to Item 504: 1. If a material amount of proceeds will discharge debt, state the interest rate and maturity. If that debt was incurred within one year, describe the use of the proceeds of that debt other than short-term borrowings used for working capital.

2. If any material amount of the proceeds is to be used to acquire assets or finance the acquisitions of other businesses, describe the assets or businesses and identify the persons from whom they will be bought. State the cost of the assets and, where such assets are to be acquired from affiliates of the small business issuer or their associates, give the names of the persons from whom they are to be acquired and set forth the principle followed in determining the cost to the small business issuer.

§ 228.505 (Item 505) Determination of Offering Price.

(a) If there is no established public market for the common equity being registered or if there is a significant difference between the offering price and the market price of the stock, give the factors that were considered in determining the offering price.

(b) If warrants, rights and convertible securities are being registered and there is no public market for the underlying securities, describe the factors considered in determining the exercise or conversion price.

§ 228.506 (Item 506) Dilution.

(a) If the small business issuer is not a reporting company and is selling common equity at a price significantly more than the price paid by officers, directors, promoters and affiliated persons for common equity purchased by them during the past five years (or which they have rights to purchase), compare these prices.

(b) If paragraph (a) of this Item applies and the issuer had losses in each of its last three fiscal years, or since its inception, whichever period is shorter, and there is a material dilution of the purchasers' equity interest, disclose the following:

(1) The net tangible book value per share before and after the distribution;

(2) The amount of the increase in such net tangible book value per share attributable to the cash payments made by purchasers of the shares being offered; and

(3) The amount of the immediate dilution from the public offering price which will be absorbed by such purchasers.

§ 228.507 (Item 507) Selling Security Holders.

If security holders of a small business issuer is offering securities, name each

selling security holder, state any position, office, or other material relationship which the selling security holder has had within the past three years with the small business issuer or any of its predecessors or affiliates, and state the amount of securities of the class owned by such security holder before the offering, the amount to be offered for the security holder's account, the amount and (if one percent or more) the percentage of the class to be owned by such security holder after the offering is complete.

Instruction: Responses to this item may be combined with disclosure in response to Item 403.

§ 228.508 (Item 508) Plan of Distribution.

(a) *Underwriters and underwriting obligations.* If the securities are to be offered through underwriters, name the principal underwriters, and state the respective amounts underwritten. Identify each such underwriter having a material relationship with the small business issuer and state the nature of the relationship. State the nature of the obligation of the underwriter(s) to take the securities, *i.e.,* firm commitment, best efforts. The small business issuer must disclose the offering expenses specified in Item 511 of this Regulation S–B (17 CFR 228.511). If there is an arrangement under which the underwriter may purchase additional shares in connection with the offering, such as an over-allotment option, describe that arrangement and disclose information on the total offering price, underwriting discounts and commissions, and total proceeds assuming the underwriter purchases all of the shares subject to that arrangement.

(b) *New underwriters.* Describe the business experience of managing or principal underwriters that have been in business less than three years, state their principal business function and identify any material relationships between the promoters of the issuer and the underwriter(s). This information need not be given if:

(1) The issuer is a reporting company; and

(2) An offering has no material risks.

(c) *Other distributions.* Outline briefly the plan of distribution of any securities to be registered that are to be offered otherwise than through underwriters.

(d) *Underwriter's representative on the board of directors.* Describe any arrangement whereby the underwriter has the right to designate or nominate a member or members of the board of directors of the small business issuer. Identify any director so designated or nominated and indicate any relationship with the small business issuer.

(e) *Indemnification of underwriters.* If the underwriting agreement provides for indemnification by the small business issuer of the underwriters or their controlling persons against any liability arising under the Securities Act, furnish a brief description of such indemnification provisions.

(f) *Dealers' compensation.* State briefly the discounts and commissions to be allowed or paid to dealers, including all cash, securities, contracts or other considerations to be received by any dealer in connection with the sale of the securities.

(g) *Finders.* Identify any finder and describe the nature of any material relationship between such finder and the small business issuer or associates or affiliates of the small business issuer.

(h) *Discretionary accounts.* If the small business issuer is not a reporting company, identify any principal underwriter that intends to sell to any discretionary accounts and include an estimate of the amount of securities so intended to be sold. The response to this paragraph shall be contained in a pre-effective amendment which shall be circulated if the information is not available when the registration statement is filed.

(i) *Passive market making.* If the underwriters or any selling group members intend to engage in passive market making transactions as permitted by Rule 103 of Regulation M (§ 242.103 of this chapter), indicate such intention and briefly describe passive market making.

(j) *Stabilization and other transactions.* (1) Briefly describe any transaction that the underwriter intends to conduct during the offering that stabilizes, maintains, or otherwise affects the market price of the offered securities. Include information on stabilizing

transactions, syndicate short covering transactions, penalty bids, or any other transaction that affects the offered security's price. Describe the nature of the transactions clearly and explain how the transactions affect the offered security's price. Identify the exchange or other market on which these transactions may occur. If true, disclose that the underwriter may discontinue these transactions at any time;

(2) If the stabilizing began before the effective date of the registration statement, disclose the amount of securities bought, the prices at which they were bought, and the period within which they were bought. If you use § 230.430A of this chapter, the final prospectus must contain information on the stabilizing transactions that took place before the public offering price was set; and

(3) If you are making a warrant or rights offering of securities to existing security holders and the securities not purchased by existing security holders are to be reoffered to the public, disclose the following information in the reoffer prospectus:

(i) The amount of securities bought in stabilization activities during the offering period and the price or range of prices at which the securities were bought;

(ii) The amount of the offered securities subscribed for during the offering period;

(iii) The amount of the offered securities purchased by the underwriter during the offering period;

(iv) The amount of the offered securities sold by the underwriter during the offering period and the price or range of prices at which the securities were sold; and

(v) The amount of the offered securities that will be reoffered to the public and the offering price.

[57 FR 36449, Aug. 13, 1992, as amended at 58 FR 19605, Apr. 15, 1993; 62 FR 543, Jan. 3, 1997; 62 FR 11323, Mar. 12, 1997; 63 FR 6380, Feb. 6, 1998]

§ 228.509 (Item 509) Interest of Named Experts and Counsel.

If an ''expert'' or ''counsel'' was hired on a contingent basis, will receive a direct or indirect interest in the small business issuer or was a promoter, underwriter, voting trustee, director, officer, or employee, of the small business issuer, describe the contingent basis, interest, or connection.

(a) *Expert*—is a person who is named as preparing or certifying all or part of the small business issuer's registration statement or a report or valuation for use in connection with the registration statement.

(b) *Counsel*—is counsel named in the prospectus as having given an opinion on the validity of the securities being registered or upon other legal matters concerning the registration or offering of the securities.

Instruction to Item 509: 1. The small business issuer does not need to disclose the interest of an expert (other than an accountant) or counsel if their interest (including the fair market value of all securities of the small business issuer received and to be received, or subject to options, warrants or rights received or to be received) does not exceed $50,000.

§ 228.510 (Item 510) Disclosure of Commission Position on Indemnification for Securities Act Liabilities.

Describe the indemnification provisions for directors, officers and controlling persons of the small business issuer against liability under the Securities Act. This includes any provision in the underwriting agreement which indemnifies the underwriter or its controlling persons against such liabilities where a director, officer or controlling person of the small business issuer is such an underwriter or controlling person or a member of any firm which is such an underwriter. In addition, provide the undertaking in the first sentence of Item 512(e).

§ 228.511 (Item 511) Other Expenses of Issuance and Distribution.

(a) Give an itemized statement of all expenses of the offering, other than underwriting discounts and commissions. If any of the securities are registered for sale by security holders, state how much of the expenses the security holders will pay.

(1) The itemized list should generally include registration fees, federal taxes, state taxes and fees, trustees' and transfer agents' fees, costs of printing

and engraving, legal, accounting, and engineering fees and any listing fees.

(2) Include as a separate item any premium paid by the small business issuer or any selling security holder on any policy to insure or indemnify directors or officers against any liabilities they may incur in the registration, offering, or sale of these securities.

(b) [Reserved]

Instruction to Item 511: 1. If the amounts of any items are not known, give estimates but identify them as such.

§228.512 (Item 512) Undertakings.

Include each of the following undertakings that apply to the offering.

(a) *Rule 415 Offering.* If the small business issuer is registering securities under Rule 415 of the Securities Act (§230.415 of this chapter), that the small business issuer will:

(1) File, during any period in which it offers or sells securities, a post-effective amendment to this registration statement to:

(i) Include any prospectus required by section 10(a)(3) of the Securities Act;

(ii) Reflect in the prospectus any facts or events which, individually or together, represent a fundamental change in the information in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) (§230.424(b) of this chapter) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the ''Calculation of Registration Fee'' table in the effective registration statement; and

(iii) Include any additional or changed material information on the plan of distribution.

NOTE: Small business issuers do not need to give the statements in paragraphs (a)(1)(i) and (a)(1)(ii) of this Item if the registration statement is on Form S–3 or S–8 (§§239.13 or 239.16b of this chapter), and the information required in a post-effective amendment is incorporated by reference from periodic reports filed by the small business issuer under the Exchange Act.

(2) For determining liability under the Securities Act, treat each post-effective amendment as a new registration statement of the securities offered, and the offering of the securities at that time to be the initial bona fide offering.

(3) File a post-effective amendment to remove from registration any of the securities that remain unsold at the end of the offering.

(b) *Warrants and rights offerings.* If the small business issuer will offer the securities to existing security holders under warrants or rights and the small business issuer will reoffer to the public any securities not taken by security holders, with any modifications that suit the particular case—The small business issuer will supplement the prospectus, after the end of the subscription period, to include the results of the subscription offer, the transactions by the underwriters during the subscription period, the amount of unsubscribed securities that the underwriters will purchase and the terms of any later reoffering. If the underwriters make any public offering of the securities on terms different from those on the cover page of the prospectus, the small business issuer will file a post-effective amendment to state the terms of such offering.

(c) *Competitive bids.* If the small business issuer is offering securities at competitive bidding, with modifications to suit the particular case, the small business issuer will:

(1) Use its best efforts to distribute before the opening of bids, to prospective bidders, underwriters, and dealers, a reasonable number of copies of a prospectus that meet the requirements of section 10(a) of the Securities Act, and relating to the securities offered at competitive bidding, as contained in the registration statement, together with any supplements; and

(2) File an amendment to the registration statement reflecting the results of bidding, the terms of the reoffering and related matters where required by the applicable form, not later than the first use, authorized by the

issuer after the opening of bids, of a prospectus relating to the securities offered at competitive bidding, unless the issuer proposes no further public offering of such securities by the issuer or by the purchasers.

(d) *Equity offerings of nonreporting small business issuers.* If a small business issuer that before the offering had no duty to file reports with the Commission under section 13(a) or 15(d) of the Exchange Act is registering equity securities for sale in an underwritten offering—The small business issuer will provide to the underwriter at the closing specified in the underwriting agreement certificates in such denominations and registered in such names as required by the underwriter to permit prompt delivery to each purchaser.

(e) *Request for acceleration of effective date.* If the small business issuer will request acceleration of the effective date of the registration statement under Rule 461 under the Securities Act, include the following:

> Insofar as indemnification for liabilities arising under the Securities Act of 1933 (the ''Act'') may be permitted to directors, officers and controlling persons of the small business issuer pursuant to the foregoing provisions, or otherwise, the small business issuer has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable.

In the event that a claim for indemnification against such liabilities (other than the payment by the small business issuer of expenses incurred or paid by a director, officer or controlling person of the small business issuer in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the small business issuer will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

(f) If the issuer relies on Rule 430A under the Securities Act [§ 230.430A of this chapter], that the small business issuer will:

(1) For determining any liability under the Securities Act, treat the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the small business issuer under Rule 424(b)(1), or (4) or 497(h) under the Securities Act (§§ 230.424(b)(1), (4) or 230.497(h)) as part of this registration statement as of the time the Commission declared it effective.

(2) For determining any liability under the Securities Act, treat each post-effective amendment that contains a form of prospectus as a new registration statement for the securities offered in the registration statement, and that offering of the securities at that time as the initial bona fide offering of those securities.

[57 FR 36449, Aug. 13, 1992, as amended at 60 FR 26614, May 17, 1995]

§ 228.601 (Item 601) Exhibits.

(a) *Exhibits and index of exhibits.* (1) The exhibits required by the exhibit table generally must be filed or incorporated by reference. The Financial Data Schedule required by paragraph (b)(27) of this Item must be submitted to the Commission as provided in paragraph (c) of this Item.

(2) Each filing must have an index of exhibits. The exhibit index must list exhibits in the same order as the exhibit table. If the exhibits are incorporated by reference, this fact should be noted in the exhibit index. In the manually signed registration statement or report, the exhibit index should give the page number of each exhibit.

(3) If a material contract or plan of acquisition, reorganization, arrangement, liquidation or succession is executed or becomes effective during the reporting period covered by a Form 10–QSB or Form 10–KSB, it must be filed as an exhibit to the Form 10–QSB or Form 10–KSB filed for the same period. Any amendment or modification to a previously filed exhibit to a Form 10–SB, 10–KSB or 10–QSB document must be filed as an exhibit to a Form 10–QSB

or 10–KSB. The amendment or modification does not need to be filed if the previously filed exhibit would not be currently required.

Instructions to Item 601(a): 1. If an exhibit (other than an opinion or consent) is filed in preliminary form and is later changed to include only interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters' or dealers' commissions, names, addresses or participation of underwriters or similar matters and the information appears elsewhere in the registration statement or a prospectus, no amendment need be filed.

2. Small business issuers may file copies of each exhibit, rather than originals, except as otherwise specifically noted.

3. *Electronic filings.* Whenever an exhibit is filed in paper pursuant to a hardship exemption (§§ 232.201 and 232.202 of this chapter), the letter ''P'' (paper) should be placed next to the exhibit in the list of exhibits required by Item 601(a)(2) of this Rule (§ 228.601(a)(2)). Whenever an electronic confirming copy of an exhibit is filed pursuant to a hardship exemption (§ 232.201 or § 232.202(d) of this chapter), the exhibit index should specify where the confirming electronic copy can be located; in addition, the designation ''CE'' (confirming electronic) should be placed next to the listed exhibit in the exhibit index.

EXHIBIT TABLE

	Securities Act Forms					Exchange Act Forms			
	SB-2	S-2	S-3	S-4***	S-8	10-SB	8-K	10-QSB	10-KSB
(1) Underwriting agreement	x	x	x	x	--------	--------	x	--------	--------
(2) Plan of acquisition, reorganization, arrangement, liquidation, or succession	x	x	x	x	--------	x	x	x	x
(3) (i) Articles of incorporation	x	--------	--------	x	--------	x	--------	x	x
(ii) By-laws	x	--------	--------	x	--------	x	--------	x	x
(4) Instruments defining the rights of holders, incl. indentures	x	x	x	x	x	x	x	x	x
(5) Opinion re: legality	x	x	x	x	x	--------	--------	--------	--------
(6) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(8) Opinion re: tax matters	x	x	x	x	--------	--------	--------	--------	--------
(9) Voting trust agreement	x	--------	--------	x	--------	x	--------	--------	x
(10) Material contracts	x	x	--------	x	--------	x	--------	x	x
(11) Statement re: computation of per share earnings	x	x	--------	x	--------	x	--------	x	x
(12) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(13) Annual or quarterly reports, Form 10-Q *	--------	x	--------	x	--------	--------	--------	--------	x
(14) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(15) Letter on unaudited interim financial information	x	x	x	x	x	--------	--------	x	--------
(16) Letter on change in certifying accountant****	x	x	--------	x	--------	x	x	--------	x
(17) Letter on director resignation	--------	--------	--------	--------	--------	--------	x	--------	--------
(18) Letter on change in accounting principles	--------	--------	--------	--------	--------	--------	--------	x	x
(19) Reports furnished to securityholders	--------	--------	--------	--------	--------	--------	--------	x	--------
(20) Other documents or statements to securityholders	--------	--------	--------	--------	--------	--------	x	--------	--------
(21) Subsidiaries of the registrant	x	--------	--------	x	--------	x	--------	--------	x
(22) Published report regarding matters submitted to vote	--------	--------	--------	--------	--------	--------	--------	x	x
(23) Consent of experts and counsel	x	x	x	x	x	--------	x**	x**	x**
(24) Power of attorney	x	x	x	x	x	x	x	x	x
(25) Statement of eligibility of trustee	x	x	x	x	--------	--------	--------	--------	--------
(26) Invitations for competitive bids	x	x	x	x	--------	--------	--------	--------	--------
(27) Financial Data Schedule*****	x	x	x	x	--------	x	x	x	x
(28) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(29) through (98) [Reserved]									
(99) Additional Exhibits	x	x	x	x	x	x	x	x	x

* Only if incorporated by reference into a prospectus and delivered to holders along with the prospectus as permitted by the registration statement; or in the case of a Form 10-KSB, where the annual report is incorporated by reference into the text of the Form 10-KSB.

** Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

*** An issuer need not provide an exhibit if: (1) an election was made under Form S-4 to provide S-2 or S-3 disclosure; and (2) the form selected (S-2 or S-3) would not require the company to provide the exhibit.

**** If required under Item 304 of Regulation S-B.

***** Financial Data Schedules shall be filed by electronic filers only. Such schedule shall be filed only when a filing includes annual and/or interim financial statements that have not been previously included in a filing with the Commission. See Item 601(c) of Regulation S-B.

(b) *Description of exhibits.* Below is a description of each document listed in the exhibit table.

(1) *Underwriting agreement.* Each agreement with a principal underwriter for the distribution of the securities. If the terms have been determined and the securities are to be registered on Form S–3 (§ 239.13), the agreement may be filed on Form 8–K (§ 249.308) after the effectiveness of the registration statement.

(2) *Plan of purchase, sale, reorganization, arrangement, liquidation or succession.* Any such plan described in the filing. Schedules or attachments may be omitted if they are listed in the index and provided to the Commission upon request.

(3) *Articles of incorporation and by-laws.* (i) A complete copy of the articles of incorporation. Whenever amendments to articles of incorporation are filed, a complete copy of the articles as amended shall be filed.

(ii) A complete copy of the by-laws. Whenever amendments to the by-laws are filed, a complete copy of the by-laws as amended shall be filed.

(4) *Instruments defining the rights of security holders, including indentures.* (i) All instruments that define the rights of holders of the equity or debt securities that the issuer is registering, including the pages from the articles of incorporation or by-laws that define those rights.

(ii) All instruments defining the rights of holders of long term debt unless the total amount of debt covered by the instrument does not exceed 10% of the total assets of the small business issuer.

(iii) Copies of indentures to be qualified under the Trust Indenture Act of 1939 shall include an itemized table of contents and a cross reference sheet showing the location of the provisions inserted in accordance with Sections 310 through 318(a) of that Act.

Instruction to Item 601(b)(4)(iii) for electronic filings. If the instrument defining the rights of security holders is in the form of a certificate, the text appearing on the certificate shall be reproduced in an electronic filing together with a description of any other graphic and image material appearing on the certificate, as provided in Rule 304 of Regulation S–T (§232.304 of this chapter).

(5) *Opinion on legality.* (i) An opinion of counsel on the legality of the securities being registered stating whether they will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the small business issuer.

(ii) If the securities being registered are issued under a plan that is subject to the requirements of ERISA furnish either:

(A) An opinion of counsel which confirms compliance with ERISA; or

(B) A copy of the Internal Revenue Service determination letter that the plan is qualified under section 401 of the Internal Revenue Code. If the plan is later amended, the small business issuer must have the opinion of counsel and the IRS determination letter updated to confirm compliance and qualification.

(6) No Exhibit Required.

(7) [Reserved]

(8) *Opinion on tax matters.* If tax consequences of the transaction are material to an investor, an opinion of counsel, an independent public or certified public accountant or, a revenue ruling from the Internal Revenue Service, supporting the tax matters and consequences to the shareholders. The exhibit is required for filings to which Securities Act Industry Guide 5 applies.

(9) *Voting trust agreement and amendments.*

(10) *Material contracts.* (i) Every material contract, not made in the ordinary course of business, that will be performed after the filing of the registration statement or report or was entered into not more than two years before such filing. Also include the following contracts:

(A) Any contract to which directors, officers, promoters, voting trustees, security holders named in the registration statement or report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price;

(B) Any contract upon which the small business issuer's business is substantially dependent, such as contracts with principal customers, principal suppliers, franchise agreements, etc.;

(C) Any contract for the purchase or sale of any property, plant or equipment for a consideration exceeding 15 percent of such assets of the small business issuer; or

(D) Any material lease under which a part of the property described in the registration statement or report is held by the small business issuer.

(ii)(A) Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any

director or any of the named executive officers of the registrant as defined by Item 402(a)(2) (§ 228.402(a)(2)) participates shall be deemed material and shall be filed; and any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates shall be filed unless immaterial in amount or significance.

(B) Any compensatory plan, contract or arrangement adopted without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights (or if not set forth in any formal document, a written description thereof), in which any employee (whether or not an executive officer of the small business issuer) participates shall be filed unless immaterial in amount or significance. A compensation plan assumed by a small business issuer in connection with a merger, consolidation or other acquisition transaction pursuant to which the small business issuer may make further grants or awards of its equity securities shall be considered a compensation plan of the small business issuer for purposes of the preceding sentence.

(C) The following management contracts or compensatory plans need not be filed:

(*1*) Ordinary purchase and sales agency agreements;

(*2*) Agreements with managers of stores in a chain organization or similar organization;

(*3*) Contracts providing for labor or salesmen's bonuses or payments to a class of security holders, as such;

(*4*) Any compensatory plan which is available to employees, officers or directors generally and provides for the same method of allocation of benefits between management and nonmanagement participants; and

(*5*) Any compensatory plan if the issuer is a wholly owned subsidiary of a reporting company and is filing a report on Form 10–KSB (§ 249.310b), or registering debt or non-voting preferred stock on Form S–2 (§ 239.12).

Instruction 1 to Item 601(b)(10): Only copies of the various remunerative plans need be filed. Each individual director's or executive officer's personal agreement under the plans need not be filed, unless they contain material provisions.

Instruction 2 to Item 601(b)(10): If a material contract is executed or becomes effective during the reporting period reflected by a Form 10–QSB or Form 10–KSB, it shall be filed as an exhibit to the Form 10–QSB or Form 10–KSB filed for the corresponding period. *See* paragraph (a)(3) of this Item. With respect to quarterly reports on Form 10–QSB, only those contracts executed or becoming effective during the most recent period reflected in the report shall be filed.

(11) *Statement re computation of per share earnings.* An explanation of the computation of per share earnings on both a primary and fully diluted basis unless the computation can be clearly determined from the registration statement or report.

(12) No exhibit required.

(13)(i) Annual report to security holders for the last fiscal year, Form 10–Q or 10–QSB or quarterly report to security holders, if incorporated by reference in the filing. Such reports, except for the parts which are expressly incorporated by reference in the filing are not deemed ''filed'' as part of the filing. If the financial statements in the report have been incorporated by reference in the filing, the accountant's certificate shall be manually signed in one copy. See Rule 411(b) (§ 230.411(b) of this chapter).

(ii) If the annual or quarterly report to security holders is incorporated by reference in whole or in part into an electronic filing, whatever is so incorporated must be filed in electronic format as an exhibit to the filing.

(14) *Code of ethics.* Any code of ethics, or amendment thereto, that is the subject of the disclosure required by Item 406 of Regulation S–B (§ 228.406) or Item 10 of Form 8–K (§ 249.308 of this chapter), to the extent that the small business issuer intends to satisfy the Item 406 or Item 10 requirements through filing of an exhibit.

(15) *Letter on unaudited interim financial information.* A letter, where applicable, from the independent accountant which acknowledges awareness of the use in a registration statement of a report on unaudited interim financial information. The letter is not considered a part of a registration statement prepared or certified by an accountant

or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of the Securities Act. Such letter may be filed with the registration statement, an amendment thereto, or a report on Form 10–QSB (§249.308b) which is incorporated by reference into the registration statement.

(16) *Letter on change in certifying accountant.* File the letter required by Item 304(a)(3).

(17) *Letter on director resignation.* Any letter from a former director which describes a disagreement with the small business issuer that led to the director's resignation or refusal to stand for re-election and which requests that the matter be disclosed.

(18) *Letter on change in accounting principles.* Unless previously filed, a letter from the issuer's accountant stating whether any change in accounting principles or practices followed by the issuer, or any change in the method of applying any such accounting principles or practices, which affected the financial statements being filed with the Commission in the report or which is expected to affect the financial statements of future fiscal years is to an alternative principle which in his judgment is preferable under the circumstances. No such letter need be filed when such change is made in response to a standard adopted by the Financial Accounting Standards Board that creates a new accounting principle, that expresses a preference for an accounting principle, or that rejects a specific accounting principle.

(19) *Report furnished to security holders.* If the issuer makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of Part I of Form 10–Q or 10–QSB, the information called for may be incorporated by reference to such published document or statement provided copies thereof are included as an exhibit to the registration statement or to Part I of the Form 10–Q or 10–QSB report.

(20) Other documents or statements to security holders or any document incorporated by reference.

(21) *Subsidiaries of the small business issuer.* A list of all subsidiaries, the state or other jurisdiction of incorporation or organization of each, and the names under which such subsidiaries do business.

(22) *Published report regarding matters submitted to vote of security holders.* Published reports containing all of the information called for by Item 4 of Part II of Form 10–Q (or 10–QSB) or Item 4 of Part I of Form 10–K or 10–KSB which is referred to therein in lieu of providing disclosure in Form 10–Q (10–QSB) or 10–K (10–KSB), which are required to be filed as exhibits by Rule 12b–23(a)(3) under the Exchange Act.

(23) *Consents of experts and counsel.* (i) Securities Act filings—Dated and manually signed written consents or a reference in the index to the location of the consent.

(ii) Exchange Act reports. If required to file a consent for material incorporated by reference in a previously filed registration statement under the Securities Act, the dated and manually signed consent to the material incorporated by reference. The consents shall be dated and manually signed.

(24) *Power of attorney.* If a person signs a registration statement or report under a power of attorney, a manually signed copy of such power of attorney or if located elsewhere in the registration statement, a reference in the index to where it is located. In addition, if an officer signs a registration statement for the small business issuer by a power of attorney, a certified copy of a resolution of the board of directors authorizing such signature. A power of attorney that is filed with the Commission must relate to a specific filing or an amendment, provided, however, that a power of attorney relating to a registration statement under the Securities Act or an amendment thereto also may relate to any registration statement for the same offering that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act (§230.462(b) of this chapter. A power of attorney that confers general authority must not be filed with the Commission.

(25) *Statement of eligibility of trustee.* (i) Form T–1 (§269.1 of this chapter) if an indenture is being qualified under the Trust Indenture Act, bound separately from the other exhibits.

(ii) The requirement to bind separately the statement of eligibility and qualification does not apply to statements submitted in electronic format.Rather, such statements must be submitted as exhibits in the same electronic submission as the registration statement to which they relate, or in an amendment thereto, except that electronic filers that rely on Trust Indenture Act Section 305(b)(2) for determining the eligibility of the trustee under indentures for securities to be issued, offered or sold on a delayed basis by or on behalf of the registrant shall file such statements separately in the manner prescribed by § 260.5b–1 through § 260.5b–3 of this chapter and by the EDGAR Filer Manual.

(26) *Invitations for competitive bids.* If the registration statement covers securities that the small business issuer is offering at competitive bidding, any invitation for competitive bid that the small business issuer will send or give to any person shall be filed.

(27) through (98) [Reserved]

(99) *Additional exhibits.* (i) Any additional exhibits if listed and described in the exhibit index.

(ii) If pursuant to Section 11(a) of the Securities Act (15 U.S.C. 77k(a)) an issuer makes generally available to its security holders an earnings statement covering a period of at least 12 months beginning after the effective date of the registration statement, and if such earnings statement is made available by ''other methods'' than those specified in paragraphs (a) or (b) of § 230.158 of this chapter, it must be filed as an exhibit to the Form 10–QSB or the Form 10–KSB, as appropriate, covering the period in which the earnings statement was released.

[57 FR 36449, Aug. 13, 1992, as amended at 57 FR 48150, Oct. 21, 1992; 58 FR 14660, Mar. 18, 1993; 58 FR 21349, Apr. 21, 1993; 58 FR 26383, May 3, 1993; 58 FR 27469, May 10, 1993; 59 FR 36260, July 15, 1994; 59 FR 67759, Dec. 30, 1994; 60 FR 26614, May 17, 1995; 61 FR 24654, May 15, 1996; 61 FR 30401, June 14, 1996; 62 FR 36455, July 8, 1997; 65 FR 24799, Apr. 27, 2000; 67 FR 246, Jan. 2, 2002]

EDITORIAL NOTES: 1. At 65 FR 24799, Apr. 27, 2000, in §thnsp;228.601, paragraph (a), the table was amended by removing the entries for exhibits (27) and (28) and footnote *****. However, this is a photographed table; thus the entries could not be removed.

2. At 68 FR 5126, Jan. 31, 2003, § 268.601 was amended by emoving the ''reserved'' designation for exhibit (14) and adding ''Code of ethics'' in its place in the Exhibit Table, by removing ''N/A'' corresponding to exhibit (14) under all captions in the Exhibit Table, and bu adding an ''X'' corresponding to exhibit (14) under the caption ''Exchange Act Forms'', ''8–K'' and ''10–KSB'' in the Exhibit Table. However, this is a photographed table; thus these amendments could not be incorporated

§ 228.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.

Give the following information for all securities that the small business issuer sold within the past three years without registering the securities under the Securities Act.

(a) The date, title and amount of securities sold.

(b) Give the names of the principal underwriters, if any. If the small business issuer did not publicly offer any securities, identify the persons or class of persons to whom the small business issuer sold the securities.

(c) For securities sold for cash, the total offering price and the total underwriting discounts or commissions. For securities sold other than for cash, describe the transaction and the type and amount of consideration received by the small business issuer.

(d) The section of the Securities Act or the rule of the Commission under which the small business issuer claimed exemption from registration and the facts relied upon to make the exemption available.

(e) If the information called for by this paragraph (e) is being presented on Form 8–K, Form 10–QSB, Form 10–Q, Form 10–KSB or Form 10–K (§§ 249.308, 249.308b, 249.308a, 249.310b or 249.310) under the Exchange Act, and where the securities sold by the registrant are convertible or exchangeable into equity securities, or are warrants or options representing equity securities, disclose the terms of conversion or exercise of the securities.

(f) As required by § 230.463 of this chapter, following the effective date of the first registration statement filed under the Securities Act by an issuer, the issuer or successor issuer shall report the use of proceeds on its first

periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act (15 U.S.C. 78m(a) and 78o(d)) after effectiveness of its Securities Act registration statement, and thereafter on each of its subsequent periodic reports filed pursuant to sections 13(a) and 15(d) of the Exchange Act through the later of disclosure of the application of all the offering proceeds, or disclosure of the termination of the offering. If a report of the use of proceeds is required with respect to the first effective registration statement of the predecessor issuer, the successor issuer shall provide such a report. The information provided pursuant to paragraphs (f)(2) through (f)(4) of this Item need only be provided with respect to the first periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act after effectiveness of the registration statement filed under the Securities Act. Subsequent periodic reports filed pursuant to sections 13(a) and 15(d) of the Exchange Act need only provide the information required in paragraphs (f)(2) through (f)(4) of this Item if any of such required information has changed since the last periodic report filed. In disclosing the use of proceeds in the first periodic report filed pursuant to the Exchange Act, the issuer or successor issuer should include the following information:

(1) The effective date of the Securities Act registration statement for which the use of proceeds information is being disclosed and the Commission file number assigned to the registration statement;

(2) If the offering has commenced, the offering date, and if the offering has not commenced, an explanation why it has not;

(3) If the offering terminated before any securities were sold, an explanation for such termination; and

(4) If the offering did not terminate before any securities were sold, disclose:

(i) Whether the offering has terminated and, if so, whether it terminated before the sale of all securities registered;

(ii) The name(s) of the managing underwriter(s), if any;

(iii) The title of each class of securities registered and, where a class of convertible securities is being registered, the title of any class of securities into which such securities may be converted;

(iv) For each class of securities (other than a class of securities into which a class of convertible securities registered may be converted without additional payment to the issuer) the following information, provided for both the account of the issuer and the account(s) of any selling security holder(s): the amount registered, the aggregate price of the offering amount registered, the amount sold and the aggregate offering price of the amount sold to date;

(v) From the effective date of the Securities Act registration statement to the ending date of the reporting period, the amount of expenses incurred for the issuer's account in connection with the issuance and distribution of the securities registered for underwriting discounts and commissions, finders' fees, expenses paid to or for underwriters, other expenses and total expenses. Indicate if a reasonable estimate for the amount of expenses incurred is provided instead of the actual amount of expenses. Indicate whether such payments were:

(A) Direct or indirect payments to directors, officers, general partners of the issuer or their associates; to persons owning ten (10) percent or more of any class of equity securities of the issuer; and to affiliates of the issuer; or

(B) Direct or indirect payments to others;

(vi) The net offering proceeds to the issuer after deducting the total expenses described in paragraph (f)(4)(v) of this Item;

(vii) From the effective date of the Securities Act registration statement to the ending date of the reporting period, the amount of net offering proceeds to the issuer used for construction of plant, building and facilities; purchase and installation of machinery and equipment; purchases of real estate; acquisition of other business(es); repayment of indebtedness; working capital; temporary investments (which should be specified); and any other purposes for which at least five (5) percent of the issuer's total offering proceeds or $100,000 (whichever is less) has been

used (which should be specified). Indicate if a reasonable estimate for the amount of net offering proceeds applied is provided instead of the actual amount of net offering proceeds used. Indicate whether such payments were:

(A) Direct or indirect payments to directors, officers, general partners of the issuer or their associates; to persons owning ten (10) percent or more of any class of equity securities of the issuer; and to affiliates of the issuer; or

(B) Direct or indirect payments to others; and

(viii) If the use of proceeds in paragraph (f)(4)(vii) of this Item represents a material change in the use of proceeds described in the prospectus, the issuer should describe briefly the material change.

[57 FR 36449, Aug. 13, 1992, as amended at 61 FR 54508, Oct. 18, 1996; 62 FR 39761, July 24, 1997]

§ 228.702 (Item 702) Indemnification of Directors and Officers.

State whether any statute, charter provisions, by-laws, contract or other arrangements that insures or indemnifies a controlling person, director or officer of the small business issuer affects his or her liability in that capacity.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

Subpart 229.1—General

Sec.

229.10 (Item 10) General.

Subpart 229.100—Business

229.101 (Item 101) Description of business.
229.102 (Item 102) Description of property.
229.103 (Item 103) Legal proceedings.

Subpart 229.200—Securities of the Registrant

229.201 (Item 201) Market price of and dividends on the registrant's common equity and related stockholder matters.
229.202 (Item 202) Description of registrant's securities.

Subpart 229.300—Financial Information

229.301 (Item 301) Selected financial data.
229.302 (Item 302) Supplementary financial information.
229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.
229.304 (Item 304) Changes in and disagreements with accountants on accounting and financial disclosure.
229.305 (Item 305) Quantitative and qualitative disclosures about market risk.
229.306 (Item 306) Audit committee report.
229.307 (Item 307) Controls and procedures.

Subpart 229.400—Management and Certain Security Holders

229.401 (Item 401) Directors, executive officers, promoters and control persons.
229.402 (Item 402) Executive compensation.
229.403 (Item 403) Security ownership of certain beneficial owners and management.
229.404 (Item 404) Certain relationships and related transactions.
229.405 (Item 405) Compliance with section 16(a) of the Exchange Act.
229.406 (Item 406) Code of ethics.

Subpart 229.500—Registration Statement and Prospectus Provisions

229.501 (Item 501) Forepart of registration statement and outside front cover page of prospectus.
229.502 (Item 502) Inside front and outside back cover pages of prospectus.
229.503 (Item 503) Prospectus summary, risk factors, and ratio of earnings to fixed charges.
229.504 (Item 504) Use of proceeds.
229.505 (Item 505) Determination of offering price.
229.506 (Item 506) Dilution.
229.507 (Item 507) Selling security holders.
229.508 (Item 508) Plan of distribution.
229.509 (Item 509) Interests of named experts and counsel.
229.510 (Item 510) Disclosure of Commission position on indemnification for Securities Act liabilities.
229.511 (Item 511) Other expenses of issuance and distribution.
229.512 (Item 512) Undertakings.

Subpart 229.600—Exhibits

229.601 (Item 601) Exhibits.

Subpart 229.700—Miscellaneous

229.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.
229.702 (Item 702) Indemnification of directors and officers.

Subpart 229.800—List of Industry Guides

229.801 Securities Act industry guides.
229.802 Exchange Act industry guides.

Subpart 229.900—Roll-Up Transactions

229.901 (Item 901) Definitions.
229.902 (Item 902) Individual partnership supplements.
229.903 (Item 903) Summary.
229.904 (Item 904) Risk factors and other considerations.
229.905 (Item 905) Comparative information.
229.906 (Item 906) Allocation of roll-up consideration.
229.907 (Item 907) Background of the roll-up transaction.
229.908 (Item 908) Reasons for and alternatives to the roll-up transaction.
229.909 (Item 909) Conflicts of interest.
229.910 (Item 910) Fairness of the transaction.
229.911 (Item 911) Reports, opinions and appraisals.
229.912 (Item 912) Source and amount of funds and transactional expenses.
229.913 (Item 913) Other provisions of the transaction.
229.914 (Item 914) Pro forma financial statements; selected financial data.
229.915 (Item 915) Federal income tax consequences.

Subpart 229.1000—Mergers and Acquisitions (Regulation M–A)

229.1000 (Item 1000) Definitions.
229.1001 (Item 1001) Summary term sheet.
229.1002 (Item 1002) Subject company information.
229.1003 (Item 1003) Identity and background of filing person.
229.1004 (Item 1004) Terms of the transaction.
229.1005 (Item 1005) Past contacts, transactions, negotiations and agreements.
229.1006 (Item 1006) Purposes of the transaction and plans or proposals.
229.1007 (Item 1007) Source and amount of funds or other consideration.
229.1008 (Item 1008) Interest in securities of the subject company.
229.1009 (Item 1009) Persons/assets, retained, employed, compensated or used.
229.1010 (Item 1010) Financial statements.
229.1011 (Item 1011) Additional information.
229.1012 (Item 1012) The solicitation or recommendation.
229.1013 (Item 1013) Purposes, alternatives, reasons and effects in a going-private transaction.
229.1014 (Item 1014) Fairness of the going-private transaction.
229.1015 (Item 1015) Reports, opinions, appraisals and negotiations.
229.1016 (Item 1016) Exhibits.

AUTHORITY: 15 U.S.C. 7261, 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*(d), 78mm, 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a) and 80b–11, unless otherwise noted.

Section 229.307 is also issued under secs. 3(a) and 302, Pub.L.No. 107–204, 116 Stat. 745.

Section 229.401 is also issued under secs. 3(a) and 407, Pub. L. 107–204, 116 Stat. 745.

Section 229.406 is also issued under secs. 3(a) and 406, Pub. L. 107–204, 116 Stat. 745.

Section 229.601 is also issued under secs. 3(a) and 406, Pub. L. 107–204, 116 Stat. 745.

EFFECTIVE DATE NOTE: At 68 FR 5999, Feb. 5, 2003, the authority citaion for part 229 was amended by adding an entry for § 229.303, effective April 7, 2003. For the convenience of the user, the added text is set forth as follows:

Section 229.303 is also issued under secs. 3(a) and 401(a), Pub. L. No. 107–204, 116 Stat. 745.

SOURCE: 47 FR 11401, Mar. 16, 1982, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 229 appear at 57 FR 36501, Aug. 13, 1992, and 57 FR 47409, Oct. 16, 1992.

ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S–T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S–T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

Subpart 229.1—General

§ 229.10 (Item 10) General.

(a) *Application of Regulation S–K.* This part (together with the General Rules and Regulations under the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, as amended (*Securities Act*), and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, as amended (*Exchange Act*) (parts 230 and 240 of this chapter), the Interpretative Releases under these Acts (parts 231 and 241 of this chapter) and the forms under these Acts (parts 239 and 249 of this chapter)) states the requirements applicable to the content

of the non-financial statement portions of:

(1) Registration statements under the Securities Act (part 239 of this chapter) to the extent provided in the forms to be used for registration under such Act; and

(2) Registration statements under section 12 (subpart C of part 249 of this chapter), annual or other reports under sections 13 and 15(d) (subparts D and E of part 249 of this chapter), going-private transaction statements under section 13 (part 240 of this chapter), tender offer statements under sections 13 and 14 (part 240 of this chapter), annual reports to security holders and proxy and information statements under section 14 (part 240 of this chapter), and any other documents required to be filed under the Exchange Act, to the extent provided in the forms and rules under that Act.

(b) *Commission policy on projections.* The Commission encourages the use in documents specified in Rule 175 under the Securities Act (§ 230.175 of this chapter) and Rule 3b–6 under the Exchange Act (§ 240.3b–6 of this chapter) of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. The guidelines set forth herein represent the Commission's views on important factors to be considered in formulating and disclosing such projections.

(1) *Basis for projections.* The Commission believes that management must have the option to present in Commission filings its good faith assessment of a registrant's future performance. Management, however, must have a reasonable basis for such an assessment. Although a history of operations or experience in projecting may be among the factors providing a basis for management's assessment, the Commission does not believe that a registrant always must have had such a history or experience in order to formulate projections with a reasonable basis. An outside review of management's projections may furnish additional support for having a reasonable basis for a projection. If management decides to include a report of such a review in a Commission filing, there also should be disclosure of the qualifications of the reviewer, the extent of the review, the relationship between the reviewer and the registrant, and other material factors concerning the process by which any outside review was sought or obtained. Moreover, in the case of a registration statement under the Securities Act, the reviewer would be deemed an expert and an appropriate consent must be filed with the registration statement.

(2) *Format for projections.* In determining the appropriate format for projections included in Commission filings, consideration must be given to, among other things, the financial items to be projected, the period to be covered, and the manner of presentation to be used. Although traditionally projections have been given for three financial items generally considered to be of primary importance to investors (revenues, net income (loss) and earnings (loss) per share), projection information need not necessarily be limited to these three items. However, management should take care to assure that the choice of items projected is not susceptible of misleading inferences through selective projection of only favorable items. Revenues, net income (loss) and earnings (loss) per share usually are presented together in order to avoid any misleading inferences that may arise when the individual items reflect contradictory trends. There may be instances, however, when it is appropriate to present earnings (loss) from continuing operations, or income (loss) before extraordinary items in addition to or in lieu of net income (loss). It generally would be misleading to present sales or revenue projections without one of the foregoing measures of income. The period that appropriately may be covered by a projection depends to a large extent on the particular circumstances of the company involved. For certain companies in certain industries, a projection covering a two or three year period may be entirely reasonable. Other companies may not have a reasonable basis for projections beyond the current year. Accordingly, management should select the period most appropriate in the circumstances. In addition, management, in making a projection, should disclose what, in its opinion, is

the most probable specific amount or the most reasonable range for each financial item projected based on the selected assumptions. Ranges, however, should not be so wide as to make the disclosures meaningless. Moreover, several projections based on varying assumptions may be judged by management to be more meaningful than a single number or range and would be permitted.

(3) *Investor understanding.* (i) When management chooses to include its projections in a Commission filing, the disclosures accompanying the projections should facilitate investor understanding of the basis for and limitations of projections. In this regard investors should be cautioned against attributing undue certainty to management's assessment, and the Commission believes that investors would be aided by a statement indicating management's intention regarding the furnishing of updated projections. The Commission also believes that investor understanding would be enhanced by disclosure of the assumptions which in management's opinion are most significant to the projections or are the key factors upon which the financial results of the enterprise depend and encourages disclosure of assumptions in a manner that will provide a framework for analysis of the projection.

(ii) Management also should consider whether disclosure of the accuracy or inaccuracy of previous projections would provide investors with important insights into the limitations of projections. In this regard, consideration should be given to presenting the projections in a format that will facilitate subsequent analysis of the reasons for differences between actual and forecast results. An important benefit may arise from the systematic analysis of variances between projected and actual results on a continuing basis, since such disclosure may highlight for investors the most significant risk and profit-sensitive areas in a business operation.

(iii) With respect to previously issued projections, registrants are reminded of their responsibility to make full and prompt disclosure of material facts, both favorable and unfavorable, regarding their financial condition. This responsibility may extend to situations where management knows or has reason to know that its previously disclosed projections no longer have a reasonable basis.

(iv) Since a registrant's ability to make projections with relative confidence may vary with all the facts and circumstances, the responsibility for determining whether to discontinue or to resume making projections is best left to management. However, the Commission encourages registrants not to discontinue or to resume projections in Commission filings without a reasonable basis.

(c) *Commission policy on security ratings.* In view of the importance of security ratings (*ratings*) to investors and the marketplace, the Commission permits registrants to disclose, on a voluntary basis, ratings assigned by rating organizations to classes of debt securities, convertible debt securities and preferred stock in registration statements and periodic reports. In addition, the Commission permits, pursuant to Rule 134(a)(14) under the Securities Act (§ 230.134(a)(14) of this chapter), voluntary disclosure of ratings assigned by any nationally recognized statistical rating organizations (*NRSROs*) in certain communications deemed not to be a prospectus (*tombstone advertisements*). Set forth herein are the Commission's views on important matters to be considered in disclosing security ratings.

(1) *Securities Act filings.* (i) If a registrant includes in a registration statement filed under the Securities Act any rating(s) assigned to a class of securities, it should consider including: (A) Any other rating intended for public dissemination assigned to such class by a NRSRO (*additional NRSRO rating*) that is available on the date of the initial filing of the document and that is materially different from any rating disclosed; and (B) the name of each rating organization whose rating is disclosed; each such rating organization's definition or description of the category in which it rated the class of securities; the relative rank of each rating within the assigning rating organization's overall classification system; and a statement informing investors

that a security rating is not a recommendation to buy, sell or hold securities, that it may be subject to revision or withdrawal at any time by the assigning rating organization, and that each rating should be evaluated independently of any other rating. The registrant also should include the written consent of any rating organization that is not a NRSRO whose rating is included. With respect to the written consent of any NRSRO whose rating is included, see Rule 436(g) under the Securities Act (§ 230.436(g) of this chapter). When the registrant has filed a registration statement on Form F–9 (§ 239.39 of this chapter), see Rule 436(g) (§ 230.436(g) of this chapter) under the Securities Act with respect to the written consent of any rating organization specified in the Instruction to paragraph (a)(2) of General Instruction I of Form F–9.

(ii) If a change in a rating already included is available subsequent to the filing of the registration statement, but prior to its effectiveness, the registrant should consider including such rating change in the final prospectus. If the rating change is material or if a materially different rating from any disclosed becomes available during this period, the registrant should consider amending the registration statement to include the rating change or additional rating and recirculating the preliminary prospectus.

(iii) If a materially different additional NRSRO rating or a material change in a rating already included becomes available during any period in which offers or sales are being made, the registrant should consider disclosing such additional rating or rating change by means of post-effective amendment or sticker to the prospectus pursuant to Rule 424(b) under the Securities Act (§ 230.424(b) of this chapter), unless, in the case of a registration statement on Form S–3 (§ 239.13 of this chapter), it has been disclosed in a document incorporated by reference into the registration statement subsequent to its effectiveness and prior to the termination of the offering.

(2) *Exchange Act filings.* (i) If a registrant includes in a registration statement or periodic report filed under the Exchange Act any rating(s) assigned to a class of securities, it should consider including the information specified in paragraphs (c)(1)(i)(A) and (B) of this section.

(ii) If there is a material change in the rating(s) assigned by any NRSRO(s) to any outstanding class(es) of securities of a registrant subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act, the registrant should consider filing a report on Form 8–K (§ 249.308 of this chapter) or other appropriate report under the Exchange Act disclosing such rating change.

(d) *Incorporation by Reference.* Where rules, regulations, or instructions to forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted. Except where a registrant or issuer is expressly required to incorporate a document or documents by reference, reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. No document on file with the Commission for more than five years may be incorporated by reference except:

(1) Documents contained in registration statements, which may be incorporated by reference as long as the registrant has a reporting requirement with the Commission; or

(2) Documents that the registrant specifically identifies by physical location by SEC file number reference, provided such materials have not been disposed of by the Commission pursuant to its Records Control Schedule (17 CFR 200.80f).

(e) *Use of non-GAAP financial measures in Commission filings.* (1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:

(i) The registrant must include the following in the filing:

(A) A presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);

(B) A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measure or measures calculated and presented in accordance with GAAP identified in paragraph (e)(1)(i)(A) of this section;

(C) A statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations; and

(D) To the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not disclosed pursuant to paragraph (e)(1)(i)(C) of this section; and

(ii) A registrant must not:

(A) Exclude charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures, other than the measures earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA);

(B) Adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years;

(C) Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

(D) Present non-GAAP financial measures on the face of any *pro forma* financial information required to be disclosed by Article 11 of Regulation S–X (17 CFR 210.11–01 through 210.11–03); or

(E) Use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures; and

(iii) If the filing is not an annual report on Form 10–K or Form 20–F (17 CFR 249.220f), a registrant need not include the information required by paragraphs (e)(1)(i)(C) and (e)(1)(i)(D) of this section if that information was included in its most recent annual report on Form 10–K or Form 20–F or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements of paragraphs (e)(1)(i)(C) and (e)(1)(i)(D) of this section at the time of the registrant's current filing.

(2) For purposes of this paragraph (e), a non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that:

(i) Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or

(ii) Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

(3) For purposes of this paragraph (e), GAAP refers to generally accepted accounting principles in the United States, except that:

(i) In the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, GAAP refers to the principles under which those primary financial statements are prepared; and

(ii) In the case of foreign private issuers that include a non-GAAP financial measure derived from or based on a measure calculated in accordance

with U.S. generally accepted accounting principles, GAAP refers to U.S. generally accepted accounting principles for purposes of the application of the requirements of this paragraph (e) to the disclosure of that measure.

(4) For purposes of this paragraph (e), non-GAAP financial measures exclude:

(i) Operating and other statistical measures; and

(ii) Ratios or statistical measures calculated using exclusively one or both of:

(A) Financial measures calculated in accordance with GAAP; and

(B) Operating measures or other measures that are not non-GAAP financial measures.

(5) For purposes of this paragraph (e), non-GAAP financial measures exclude financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. However, the financial measure should be presented outside of the financial statements unless the financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements.

(6) The requirements of paragraph (e) of this section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to § 230.425 of this chapter, § 240.14a–12 or § 240.14d–2(b)(2) of this chapter or § 229.1015 of this chapter.

(7) The requirements of paragraph (e) of this section shall not apply to investment companies registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8).

NOTE TO PARAGRAPH (e). A non-GAAP financial measure that would otherwise be prohibited by paragraph (e)(1)(ii) of this section is permitted in a filing of a foreign private issuer if:

1. The non-GAAP financial measure relates to the GAAP used in the registrant's primary financial statements included in its filing with the Commission;

2. The non-GAAP financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and

3. The non-GAAP financial measure is included in the annual report prepared by the registrant for use in the jurisdiction in which it is domiciled, incorporated or organized or for distribution to its security holders.

[47 FR 11401, Mar. 16, 1982, as amended at 52 FR 21260, June 5, 1987; 58 FR 14665, Mar. 18, 1993; 58 FR 62029, Nov. 23, 1993; 60 FR 32824, June 23, 1995; 64 FR 61443, Nov. 10, 1999; 68 FR 4831, Jan. 30, 2003]

Subpart 229.100—Business

§ 229.101 (Item 101) Description of business.

(a) *General development of business.* Describe the general development of the business of the registrant, its subsidiaries and any predecessor(s) during the past five years, or such shorter period as the registrant may have been engaged in business. Information shall be disclosed for earlier periods if material to an understanding of the general development of the business.

(1) In describing developments, information shall be given as to matters such as the following: the year in which the registrant was organized and its form of organization; the nature and results of any bankruptcy, receivership or similar proceedings with respect to the registrant or any of its significant subsidiaries; the nature and results of any other material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries; the acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business; and any material changes in the mode of conducting the business.

(2) Registrants, (i) filing a registration statement on Form S–1 (§ 239.11 of this chapter) under the Securities Act or on Form 10 and Form 10–SB (§ 249.210 of this chapter) under the Exchange Act, (ii) not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act immediately prior to the filing of such registration statement, and (iii) that (including predecessors) have not received revenue from operations during each of the 3 fiscal years immediately prior to the filing of registration statement, shall provide the following information:

(A) If the registration statement is filed prior to the end of the registrant's second fiscal quarter, a description of the registrant's plan of operation for the remainder of the fiscal year; or

(B) If the registration statement is filed subsequent to the end of the registrant's second fiscal quarter, a descripition of the registrant's plan of operation for the remainder of the fiscal year and for the first six months of the next fiscal year. If such information is not available, the reasons for its not being available shall be stated. Disclosure relating to any plan shall include such matters as:

(*1*) In the case of a registration statement on Form S–1, a statement in narrative form indicating the registrant's opinion as to the period of time that the proceeds from the offering will satisfy cash requirements and whether in the next six months it will be necessary to raise additional funds to meet the expenditures required for operating the business of the registrant; the specific reasons for such opinion shall be set forth and categories of expenditures and sources of cash resources shall be identified; however, amounts of expenditures and cash resources need not be provided; in addition, if the narrative statement is based on a cash budget, such budget shall be furnished to the Commission as supplemental information, but not as part of the registration statement;

(*2*) An explanation of material product research and development to be performed during the period covered in the plan;

(*3*) Any anticipated material acquisition of plant and equipment and the capacity thereof;

(*4*) Any anticipated material changes in number of employees in the various departments such as research and development, production, sales or administration; and

(*5*) Other material areas which may be peculiar to the registrant's business.

(b) *Financial information about segments.* Report for each segment, as defined by generally accepted accounting principles, revenues from external customers, a measure of profit or loss and total assets. A registrant must report this information for each of the last three fiscal years or for as long as it has been in business, whichever period is shorter. If the information provided in response to this paragraph (b) conforms with generally accepted accounting principles, a registrant may include in its financial statements a cross reference to this data in lieu of presenting duplicative information in the financial statements; conversely, a registrant may cross reference to the financial statements.

(1) If a registrant changes the structure of its internal organization in a manner that causes the composition of its reportable segments to change, the registrant must restate the corresponding information for earlier periods, including interim periods, unless it is impracticable to do so. Following a change in the composition of its reportable segments, a registrant shall disclose whether it has restated the corresponding items of segment information for earlier periods. If it has not restated the items from earlier periods, the registrant shall disclose in the year in which the change occurs segment information for the current period under both the old basis and the new basis of segmentation, unless it is impracticable to do so.

(2) If the registrant includes, or is required by Article 3 of Regulation S–X (17 CFR 210) to include, interim financial statements, discuss any facts relating to the performance of any of the segments during the period which, in the opinion of management, indicate that the three year segment financial data may not be indicative of current or future operations of the segment. Comparative financial information shall be included to the extent necessary to the discussion.

(c) *Narrative description of business.* (1) Describe the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in the financial statements. To the extent material to an understanding of the registrant's business taken as a whole, the description of each such segment shall include the information specified in paragraphs (c)(1) (i) through (x) of this section. The matters specified in paragraphs (c)(1) (xi) through (xiii) of this section shall

be discussed with respect to the registrant's business in general; where material, the segments to which these matters are significant shall be identified.

(i) The principal products produced and services rendered by the registrant in the segment and the principal markets for, and methods of distribution of, the segment's principal products and services. In addition, state for each of the last three fiscal years the amount or percentage of total revenue contributed by any class of similar products or services which accounted for 10 percent or more of consolidated revenue in any of the last three fiscal years or 15 percent or more of consolidated revenue, if total revenue did not exceed $50,000,000 during any of such fiscal years.

(ii) A description of the status of a product or segment (*e.g.* whether in the planning stage, whether prototypes exist, the degree to which product design has progressed or whether further engineering is necessary), if there has been a public announcement of, or if the registrant otherwise has made public information about, a new product or segment that would require the investment of a material amount of the assets of the registrant or that otherwise is material. This paragraph is not intended to require disclosure of otherwise nonpublic corporate information the disclosure of which would affect adversely the registrant's competitive position.

(iii) The sources and availability of raw materials.

(iv) The importance to the segment and the duration and effect of all patents, trademarks, licenses, franchises and concessions held.

(v) The extent to which the business of the segment is or may be seasonal.

(vi) The practices of the registrant and the industry (respective industries) relating to working capital items (*e.g.*, where the registrant is required to carry significant amounts of inventory to meet rapid delivery requirements of customers or to assure itself of a continuous allotment of goods from suppliers; where the registrant provides rights to return merchandise; or where the registrant has provided extended payment terms to customers).

(vii) The dependence of the segment upon a single customer, or a few customers, the loss of any one or more of which would have a material adverse effect on the segment. The name of any customer and its relationship, if any, with the registrant or its subsidiaries shall be disclosed if sales to the customer by one or more segments are made in an aggregate amount equal to 10 percent or more of the registrant's consolidated revenues and the loss of such customer would have a material adverse effect on the registrant and its subsidiaries taken as a whole. The names of other customers may be included, unless in the particular case the effect of including the names would be misleading. For purposes of this paragraph, a group of customers under common control or customers that are affiliates of each other shall be regarded as a single customer.

(viii) The dollar amount of backlog orders believed to be firm, as of a recent date and as of a comparable date in the preceding fiscal year, together with an indication of the portion thereof not reasonably expected to be filled within the current fiscal year, and seasonal or other material aspects of the backlog. (There may be included as firm orders government orders that are firm but not yet funded and contracts awarded but not yet signed, provided an appropriate statement is added to explain the nature of such orders and the amount thereof. The portion of orders already included in sales or operating revenues on the basis of percentage of completion or program accounting shall be excluded.)

(ix) A description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government.

(x) Competitive conditions in the business involved including, where material, the identity of the particular markets in which the registrant competes, an estimate of the number of competitors and the registrant's competitive position, if known or reasonably available to the registrant. Separate consideration shall be given to the

principal products or services or classes of products or services of the segment, if any. Generally, the names of competitors need not be disclosed. The registrant may include such names, unless in the particular case the effect of including the names would be misleading. Where, however, the registrant knows or has reason to know that one or a small number of competitors is dominant in the industry it shall be identified. The principal methods of competition (*e.g.,* price, service, warranty or product performance) shall be identified, and positive and negative factors pertaining to the competitive position of the registrant, to the extent that they exist, shall be explained if known or reasonably available to the registrant.

(xi) If material, the estimated amount spent during each of the last three fiscal years on company-sponsored research and development activities determined in accordance with generally accepted accounting principles. In addition, state, if material, the estimated dollar amount spent during each of such years on customer-sponsored research activities relating to the development of new products, services or techniques or the improvement of existing products, services or techniques.

(xii) Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem materials.

(xiii) The number of persons employed by the registrant.

(d) *Financial information about geographic areas.* (1) State for each of the registrant's last three fiscal years, or for each fiscal year the registrant has been engaged in business, whichever period is shorter:

(i) Revenues from external customers attributed to:

(A) The registrant's country of domicile;

(B) All foreign countries, in total, from which the registrant derives revenues; and

(C) Any individual foreign country, if material. Disclose the basis for attributing revenues from external customers to individual countries.

(ii) Long-lived assets, other than financial instruments, long-term customer relationships of a financial institution, mortgage and other servicing rights, deferred policy acquisition costs, and deferred tax assets, located in:

(A) The registrant's country of domicile;

(B) All foreign countries, in total, in which the registrant holds assets; and

(C) Any individual foreign country, if material.

(2) A registrant shall report the amounts based on the financial information that it uses to produce the general-purpose financial statements. If providing the geographic information is impracticable, the registrant shall disclose that fact. A registrant may wish to provide, in addition to the information required by paragraph (d)(1) of this section, subtotals of geographic information about groups of countries. To the extent that the disclosed information conforms with generally accepted accounting principles, the registrant may include in its financial statements a cross reference to this data in lieu of presenting duplicative data in its financial statements; conversely, a registrant may cross-reference to the financial statements.

(3) A registrant shall describe any risks attendant to the foreign operations and any dependence on one or more of the registrant's segments upon such foreign operations, unless it would be more appropriate to discuss this information in connection with the description of one or more of the registrant's segments under paragraph (c) of this item.

(4) If the registrant includes, or is required by Article 3 of Regulation S–X

(17 CFR 210), to include, interim financial statements, discuss any facts relating to the information furnished under this paragraph (d) that, in the opinion of management, indicate that the three year financial data for geographic areas may not be indicative of current or future operations. To the extent necessary to the discussion, include comparative information.

(e) *Available information.* Disclose the information in paragraphs (e)(1), (e)(2) and (e)(3) of this section in any registration statement you file under the Securities Act (15 U.S.C. 77a *et seq.*), and disclose the information in paragraphs (e)(3) and (e)(4) of this section if you are an accelerated filer (as defined in § 240.12b–2 of this chapter) filing an annual report on Form 10–K (§ 249.310 of this chapter):

(1) Whether you file reports with the Securities and Exchange Commission. If you are a reporting company, identify the reports and other information you file with the SEC.

(2) That the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 450 Fifth Street, NW., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1–800–SEC–0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (*http://www.sec.gov*).

(3) You are encouraged to give your Internet address, if available, except that if you are an accelerated filer filing your annual report on Form 10–K, you must disclose your Internet address, if you have one.

(4)(i) Whether you make available free of charge on or through your Internet website, if you have one, your annual report on Form 10–K, quarterly reports on Form 10–Q (§ 249.308a of this chapter), current reports on Form 8–K (§ 249.308 of this chapter), and amendments to those reports filed or furnished pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) as soon as reasonably practicable after you electronically file such material with, or furnish it to, the SEC;

(ii) If you do not make your filings available in this manner, the reasons you do not do so (including, where applicable, that you do not have an Internet website); and

(iii) If you do not make your filings available in this manner, whether you voluntarily will provide electronic or paper copies of your filings free of charge upon request.

(f) *Reports to security holders.* Disclose the following information in any registration statement you file under the Securities Act:

(1) If the SEC's proxy rules or regulations, or stock exchange requirements, do not require you to send an annual report to security holders or to holders of American depository receipts, describe briefly the nature and frequency of reports that you will give to security holders. Specify whether the reports that you give will contain financial information that has been examined and reported on, with an opinion expressed ''by'' an independent public or certified public accountant.

(2) For a foreign private issuer, if the report will not contain financial information prepared in accordance with U.S. generally accepted accounting principles, you must state whether the report will include a reconciliation of this information with U.S. generally accepted accounting principles.

(g) *Enforceability of civil liabilities against foreign persons.* Disclose the following if you are a foreign private issuer filing a registration statement under the Securities Act:

(1) Whether or not investors may bring actions under the civil liability provisions of the U.S. Federal securities laws against the foreign private issuer, any of its officers and directors who are residents of a foreign country, any underwriters or experts named in the registration statement that are residents of a foreign country, and whether investors may enforce these civil liability provisions when the assets of the issuer or these other persons are located outside of the United States. The disclosure must address the following matters:

(i) The investor's ability to effect service of process within the United

States on the foreign private issuer or any person;

(ii) The investor's ability to enforce judgments obtained in U.S. courts against foreign persons based upon the civil liability provisions of the U.S. Federal securities laws;

(iii) The investor's ability to enforce, in an appropriate foreign court, judgments of U.S. courts based upon the civil liability provisions of the U.S. Federal securities laws; and

(iv) The investor's ability to bring an original action in an appropriate foreign court to enforce liabilities against the foreign private issuer or any person based upon the U.S. Federal securities laws.

(2) If you provide this disclosure based on an opinion of counsel, name counsel in the prospectus and file as an exhibit to the registration statement a signed consent of counsel to the use of its name and opinion.

Instructions to Item 101: 1. In determining what information about the segments is material to an understanding of the registrant's business taken as a whole and therefore required to be disclosed, pursuant to paragraph (c) of this Item, the registrant should take into account both quantitative and qualitative factors such as the significance of the matter to the registrant (*e.g.,* whether a matter with a relatively minor impact on the registrant's business is represented by management to be important to its future profitability), the pervasiveness of the matter (*e.g.,* whether it affects or may affect numerous items in the segment information), and the impact of the matter (*e.g.,* whether it distorts the trends reflected in the segment information). Situations may arise when information should be disclosed about a segment, althought the information in quantitative terms may not appear significant to the registrant's business taken as a whole.

2. Base the determination of whether information about segments is required for a particular year upon an evaluation of interperiod comparability. For instance, interperiod comparability would require a registrant to report segment information in the current period even if not material under the criteria for reportability of SFAS No. 131 if a segment has been significant in the immediately preceding period and the registrant expects it to be significant in the future.

3. The Commission, upon written request of the registrant and where consistent with the protection of investors, may permit the omission of any of the information required by this Item or the furnishing in substitution thereof of appropriate information of comparable character.

[47 FR 11401, Mar. 16, 1982, as amended at 63 FR 6381, Feb. 6, 1998; 64 FR 1734, Jan. 12, 1999; 67 FR 58504, Sept. 16, 2002]

§229.102 (Item 102) Description of property.

State briefly the location and general character of the principal plants, mines and other materially important physical properties of the registrant and its subsidiaries. In addition, identify the segment(s), as reported in the financial statements, that use the properties described. If any such property is not held in fee or is held subject to any major encumbrance, so state and describe briefly how held.

Instructions to Item 102: 1. What is required is such information as reasonably will inform investors as to the suitability, adequacy, productive capacity and extent of utilization of the facilities by the registrant. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and shall not be given.

2. In determining whether properties should be described, the registrant should take into account both quantitative and qualitative factors. See Instruction 1 to Item 101 of Regulation S–K (§229.101).

3. In the case of an extractive enterprise, material information shall be given as to production, reserves, locations, development and the nature of the registrant's interest. If individual properties are of major significance to an industry segment:

A. More detailed information concerning these matters shall be furnished; and

B. Appropriate maps shall be used to disclose location data of significant properties except in cases for which numerous maps would be required.

4. A. If reserve estimates are referred to in the document, the staff of the Office of Engineering, Division of Corporation Finance of the Commission, shall be consulted. That Office may request that a copy of the full report of the engineer or other expert who estimated the reserves be furnished as supplemental information and not as part of the filing. See Rule 418 of Regulation C (§230.418 of this chapter) and Rule 12b–4 of Regulation 12B (§240.12b–4 of this chapter) with respect to the submission to, and return by, the Commission of supplemental information.

B. If the estimates of reserves, or any estimated valuation thereof, are represented as being based on estimates prepared or reviewed by independent consultants, those independent consultants shall be named in the document.

5. Estimates of oil or gas reserves other than proved or, in the case of other extractive reserves, estimates other than proved or probable reserves, and any estimated values of such reserves shall not be disclosed in any document publicly filed with the Commission, unless such information is required to be disclosed in the document by foreign or state law; provided, however, that where such estimates previously have been provided to a person (or any of its affiliates) that is offering to acquire, merge or consolidate with the registrant or otherwise to acquire the registrant's securities, such estimates may be included in documents relating to such acquisition.

6. The definitions in § 210.4–10(a) of Regulation S–X [17 CFR 210] shall apply to this Item with respect to oil and gas operations.

[47 FR 11401, Mar. 16, 1982, as amended at 64 FR 1735, Jan. 12, 1999]

§ 229.103 (Item 103) Legal proceedings.

Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

Instructions to Item 103: 1. If the business ordinarily results in actions for negligence or other claims, no such action or claim need be described unless it departs from the normal kind of such actions.

2. No information need be given with respect to any proceeding that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis. However, if any proceeding presents in large degree the same legal and factual issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.

3. Notwithstanding Instructions 1 and 2, any material bankruptcy, receivership, or similar proceeding with respect to the registrant or any of its significant subsidiaries shall be described.

4. Any material proceedings to which any director, officer or affiliate of the registrant, any owner of record or beneficially of more than five percent of any class of voting securities of the registrant, or any associate of any such director, officer, affiliate of the registrant, or security holder is a party adverse to the registrant or any of its subsidiaries or has a material interest adverse to the registrant or any of its subsidiaries also shall be described.

5. Notwithstanding the foregoing, an administrative or judicial proceeding (including, for purposes of A and B of this Instruction, proceedings which present in large degree the same issues) arising under any Federal, State or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary for the purpose of protecting the environment shall not be deemed ''ordinary routine litigation incidental to the business'' and shall be described if:

A. Such proceeding is material to the business or financial condition of the registrant;

B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or

C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.

Subpart 229.200—Securities of the Registrant

§ 229.201 (Item 201) Market price of and dividends on the registrant's common equity and related stockholder matters.

(a) *Market information.* (1)(i) Identify the principal United States market or markets in which each class of the registrant's common equity is being traded. Where there is no established public trading market for a class of common equity, furnish a statement to that effect. For purposes of this Item the existence of limited or sporadic quotations should not of itself be deemed to constitute an ''established public trading market.'' In the case of foreign registrants, also identify the principal established foreign public

trading market, if any, for each class of the registrant's common equity.

(ii) If the principal United States market for such common equity is an exchange, state the high and low sales prices for the equity for each full quarterly period within the two most recent fiscal years and any subsequent interim period for which financial statements are included, or are required to be included by Article 3 of Regulation S–X [17 CFR 210], as reported in the consolidated transaction reporting system or, if not so reported, as reported on the principal exchange market for such equity.

(iii) If the principal United States market for such common equity is not an exchange, state the range of high and low bid information for the equity for each full quarterly period within the two most recent fiscal years and any subsequent interim period for which financial statements are included, or are required to be included by Article 3 of Regulation S–X, as regularly quoted in the automated quotation system of a registered securities association, or where the equity is not quoted in such a system, the range of reported high and low bid quotations, indicating the source of such quotations. Indicate, as applicable, that such over-the-counter market quotations reflect inter-dealer prices, without retail mark-up, mark-down or commission and may not necessarily represent actual transactions. Where there is an absence of an established public trading market, reference to quotations shall be qualified by appropriate explanation.

(iv) Where a foreign registrant has identified a principal established foreign trading market for its common equity pursuant to paragraph (a)(1) of this Item, also provide market price information comparable, to the extent practicable, to that required for the principal United States market, including the source of such information. Such prices shall be stated in the currency in which they are quoted. The registrant may translate such prices into United States currency at the currency exchange rate in effect on the date the price disclosed was reported on the foreign exchange. If the primary United States market for the registrant's common equity trades using American Depositary Receipts, the United States prices disclosed shall be on that basis.

(v) If the information called for by this Item is being presented in a registration statement filed pursuant to the Securities Act or a proxy or information statement filed pursuant to the Exchange Act, the document also shall include price information as of the latest practicable date, and, in the case of securities to be issued in connection with an acquisition, business combination or other reorganization, as of the date immediately prior to the public announcement of such transaction.

(2) If the information called for by this paragraph (a) is being presented in a registration statement on Form S–1 (§239.11 of this chapter) or Form SB–2 (§239.28 of this chapter) under the Securities Act or on Form 10 and Form 10–SB (§249.210 of this chapter) under the Exchange Act relating to a class of common equity for which at the time of filing there is no established United States public trading market, indicate the amount(s) of common equity (i) that is subject to outstanding options or warrants to purchase, or securities convertible into, common equity of the registrant; (ii) that could be sold pursuant to Rule 144 under the Securities Act [§230.144 of this chapter] or that the registrant has agreed to register under the Securities Act for sale by security holders; or (iii) that is being, or has been publicly proposed to be, publicly offered by the registrant (unless such common equity is being offered pursuant to an employee benefit plan or dividend reinvestment plan), the offering of which could have a material effect on the market price of the registrant's common equity.

(b) *Holders.* (1) Set forth the approximate number of holders of each class of common equity of the registrant as of the latest practicable date.

(2) If the information called for by this paragraph (b) is being presented in a registration statement filed pursuant to the Securities Act or a proxy statement or information statement filed pursuant to the Exchange Act that relates to an acquisition, business combination or other reorganization, indicate the effect of such transaction on

the amount and percentage of present holdings of the registrant's common equity owned beneficially by (i) any person (including any group as that term is used in section 13(d)(3) of the Exchange Act) who is known to the registrant to be the beneficial owner of more than five percent of any class of the registrant's common equity and (ii) each director and nominee and (iii) all directors and officers as a group, and the registrant's present commitments to such persons with respect to the issuance of shares of any class of its common equity.

(c) *Dividends.* (1) State the frequency and amount of any cash dividends declared on each class of its common equity by the registrant for the two most recent fiscal years and any subsequent interim period for which financial statements are required to be presented by § 210.3 of Regulation S–X. Where there are restrictions (including, where appropriate, restrictions on the ability of registrant's subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances) that currently materially limit the registrant's ability to pay such dividends or that the registrant reasonably believes are likely to limit materially the future payment of dividends on the common equity so state and either (i) describe briefly (where appropriate quantify) such restrictions, or (ii) cross reference to the specific discussion of such restrictions in the Management's Discussion and Analysis of financial condition and operating results prescribed by Item 303 of Regulation S–K (§ 229.303) and the description of such restrictions required by Regulation S–X in the registrant's financial statements.

(2) Where registrants have a record of paying no cash dividends although earnings indicate an ability to do so, they are encouraged to consider the question of their intention to pay cash dividends in the foreseeable future and, if no such intention exists, to make a statement of that fact in the filing. Registrants which have a history of paying cash dividends also are encouraged to indicate whether they currently expect that comparable cash dividends will continue to be paid in the future and, if not, the nature of the change in the amount or rate of cash dividend payments.

(d) *Securities authorized for issuance under equity compensation plans.* (1) In the following tabular format, provide the information specified in paragraph (d)(2) of this Item as of the end of the most recently completed fiscal year with respect to compensation plans (including individual compensation arrangements) under which equity securities of the registrant are authorized for issuance, aggregated as follows:

(i) All compensation plans previously approved by security holders; and

(ii) All compensation plans not previously approved by security holders.

EQUITY COMPENSATION PLAN INFORMATION

Plan category	Number of securities to be issued upon exercise of outstanding options, warrants and rights	Weighted-average exercise price of outstanding options, warrants and rights	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a))
	(a)	(b)	(c)
Equity compensation plans approved by security holders			
Equity compensation plans not approved by security holders			
Total.			

(2) The table shall include the following information as of the end of the most recently completed fiscal year for each category of equity compensation plan described in paragraph (d)(1) of this Item:

(i) The number of securities to be issued upon the exercise of outstanding options, warrants and rights (column (a));

(ii) The weighted-average exercise price of the outstanding options, warrants and rights disclosed pursuant to paragraph (d)(2)(i) of this Item (column (b)); and

(iii) Other than securities to be issued upon the exercise of the outstanding options, warrants and rights disclosed in paragraph (d)(2)(i) of this Item, the number of securities remaining available for future issuance under the plan (column (c)).

(3) For each compensation plan under which equity securities of the registrant are authorized for issuance that was adopted without the approval of security holders, describe briefly, in narrative form, the material features of the plan.

Instructions to Paragraph (d).

1. Disclosure shall be provided with respect to any compensation plan and individual compensation arrangement of the registrant (or parent, subsidiary or affiliate of the registrant) under which equity securities of the registrant are authorized for issuance to employees or non-employees (such as directors, consultants, advisors, vendors, customers, suppliers or lenders) in exchange for consideration in the form of goods or services as described in Statement of Financial Accounting Standards No. 123, *Accounting for Stock-Based Compensation*, or any successor standard. No disclosure is required with respect to:

a. Any plan, contract or arrangement for the issuance of warrants or rights to all security holders of the registrant as such on a pro rata basis (such as a stock rights offering) or

b. Any employee benefit plan that is intended to meet the qualification requirements of Section 401(a) of the Internal Revenue Code (26 U.S.C. 401(a)).

2. For purposes of this paragraph, an ''individual compensation arrangement'' includes, but is not limited to, the following: a written compensation contract within the meaning of ''employee benefit plan'' under § 230.405 of this chapter and a plan (whether or not set forth in any formal document) applicable to one person as provided under Item 402(a)(7)(ii) of Regulation S–K (§ 229.402(a)(7)(ii)).

3. If more than one class of equity security is issued under its equity compensation plans, a registrant should aggregate plan information for each class of security.

4. A registrant may aggregate information regarding individual compensation arrangements with the plan information required under paragraph (d)(1)(i) and (ii) of this Item, as applicable.

5. A registrant may aggregate information regarding a compensation plan assumed in connection with a merger, consolidation or other acquisition transaction pursuant to which the registrant may make subsequent grants or awards of its equity securities with the plan information required under paragraph (d)(1)(i) and (ii) of this Item, as applicable. A registrant shall disclose on an aggregated basis in a footnote to the table the information required under paragraph (d)(2)(i) and (ii) of this Item with respect to any individual options, warrants or rights assumed in connection with a merger, consolidation or other acquisition transaction.

6. To the extent that the number of securities remaining available for future issuance disclosed in column (c) includes securities available for future issuance under any compensation plan or individual compensation arrangement other than upon the exercise of an option, warrant or right, disclose the number of securities and type of plan separately for each such plan in a footnote to the table.

7. If the description of an equity compensation plan set forth in a registrant's financial statements contains the disclosure required by paragraph (d)(3) of this Item, a cross-reference to such description will satisfy the requirements of paragraph (d)(3) of this Item.

8. If an equity compensation plan contains a formula for calculating the number of securities available for issuance under the plan, including, without limitation, a formula that automatically increases the number of securities available for issuance by a percentage of the number of outstanding securities of the registrant, a description of this formula shall be disclosed in a footnote to the table.

9. Except where it is part of a document that is incorporated by reference into a prospectus, the information required by this paragraph need not be provided in any registration statement filed under the Securities Act.

* * * * *

Instructions to Item 201: 1. Registrants, the common equity of which is listed for trading on more than one securities exchange registered under the Exchange Act, are required to indicate each such exchange pursuant to paragraph (a)(1)(i) of this Item; such registrants, however, need only report one set of price quotations pursuant to paragraph (a)(1)(ii) of this Item; where available, these shall be the prices as reported in the consolidated transaction reporting system and, where the prices are not so reported, the prices on the most significant (in terms of volume) securities exchange for such shares.

2. Market prices and dividends reported pursuant to this Item shall be adjusted to

give retroactive effect to material changes resulting from stock dividends, stock splits and reverse stock splits.

3. The computation of the approximate number of holders of registrant's common equity may be based upon the number of record holders or also may include individual participants in security position listings. See Rule 17Ad–8 under the Exchange Act. The method of computation that is chosen shall be indicated.

4. If the registrant is a foreign issuer, describe briefly:

A. Any governmental laws, decrees or regulations in the country in which the registrant is organized that restrict the export or import of capital, including, but not limited to, foreign exchange controls, or that affect the remittance of dividends or other payments to nonresident holders of the registrant's common equity; and

B. All taxes, including withholding provisions, to which United States common equity holders are subject under existing laws and regulations of the foreign country in which the registrant is organized. Include a brief description of pertinent provisions of any reciprocal tax treaty between such foreign country and the United States regarding withholding. If there is no such treaty, so state.

5. If the registrant is a foreign private issuer whose common equity of the class being registered is wholly or partially in bearer form, the response to this Item shall so indicate together with as much information as the registrant is able to provide with respect to security holdings in the United States. If the securities being registered trade in the United States in the form of American Depositary Receipts or similar certificates, the response to this Item shall so indicate together with the name of the depositary issuing such receipts and the number of shares or other units of the underlying security representing the trading units in such receipts.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 25127, June 10, 1982; 47 FR 54768, Dec. 6, 1982; 67 FR 246, Jan. 2, 2002]

§ 229.202 (Item 202) Description of registrant's securities.

NOTE: If the securities being described have been accepted for listing on an exchange, the exchange may be identified. The document should not however, convey the impression that the registrant may apply successfully for listing of the securities on an exchange or that, in the case of an underwritten offering, the underwriters may request the registrant to apply for such listing, unless there is reasonable assurance that the securities to be offered will be acceptable to a securities exchange for listing.

(a) *Capital stock*. If capital stock is to be registered, state the title of the class and describe such of the matters listed in paragraphs (a) (1) through (5) as are relevant. A complete legal description of the securities need not be given.

(1) Outline briefly: (i) dividend rights; (ii) terms of conversion; (iii) sinking fund provisions; (iv) redemption provisions; (v) voting rights, including any provisions specifying the vote required by security holders to take action; (vi) any classification of the Board of Directors, and the impact of such classification where cumulative voting is permitted or required; (vii) liquidation rights; (viii) preemption rights; and (ix) liability to further calls or to assessment by the registrant and for liabilities of the registrant imposed on its stockholders under state statutes (*e.g.*, to laborers, servants or employees of the registrant), unless such disclosure would be immaterial because the financial resources of the registrant or other factors make it improbable that liability under such state statues would be imposed; (x) any restriction on alienability of the securities to be registered; and (xi) any provision discriminating against any existing or prospective holder of such securities as a result of such security holder owning a substantial amount of securities.

(2) If the rights of holders of such stock may be modified otherwise than by a vote of a majority or more of the shares outstanding, voting as a class, so state and explain briefly.

(3) If preferred stock is to be registered, describe briefly any restriction on the repurchase or redemption of shares by the registrant while there is any arrearage in the payment of dividends or sinking fund installments. If there is no such restriction, so state.

(4) If the rights evidenced by, or amounts payable with respect to, the shares to be registered are, or may be, materially limited or qualified by the rights of any other authorized class of securities, include the information regarding such other securities as will enable investors to understand such limitations or qualifications. No information need be given, however, as to any class of securities all of which will be retired, provided appropriate steps

to ensure such retirement will be completed prior to or upon delivery by the registrant of the shares.

(5) Describe briefly or cross-reference to a description in another part of the document, any provision of the registrant's charter or by-laws that would have an effect of delaying, deferring or preventing a change in control of the registrant and that would operate only with respect to an extraordinary corporate transaction involving the registrant (or any of its subsidiaries), such as a merger, reorganization, tender offer, sale or transfer of substantially all of its assets, or liquidation. Provisions and arrangements required by law or imposed by governmental or judicial authority need not be described or discussed pursuant to this paragraph (a)(5). Provisions or arrangements adopted by the registrant to effect, or further, compliance with laws or governmental or judicial mandate are not subject to the immediately preceding sentence where such compliance did not require the specific provisions or arrangements adopted.

(b) *Debt securities.* If debt securities are to be registered, state the title of such securities, the principal amount being offered, and, if a series, the total amount authorized and the total amount outstanding as of the most recent practicable date; and describe such of the matter listed in paragraphs (b) (1) through (10) as are relevant. A complete legal description of the securities need not be given. For purposes solely of this Item, debt securities that differ from one another only as to the interest rate or maturity shall be regarded as securities of the same class. Outline briefly:

(1) Provisions with respect to maturity, interest, conversion, redemption, amortization, sinking fund, or retirement;

(2) Provisions with respect to the kind and priority of any lien securing the securities, together with a brief identification of the principal properties subject to such lien;

(3) Provisions with respect to the subordination of the rights of holders of the securities to other security holders or creditors of the registrant; where debt securities are designated as subordinated in accordance with Instruction 1 to this Item, set forth the aggregate amount of outstanding indebtedness as of the most recent practicable date that by the terms of such debt securities would be senior to such subordinated debt and describe briefly any limitation on the issuance of such additional senior indebtedness or state that there is no such limitation;

(4) Provisions restricting the declaration of dividends or requiring the maintenance of any asset ratio or the creation or maintenance of reserves;

(5) Provisions restricting the incurrence of additional debt or the issuance of additional securities; in the case of secured debt, whether the securities being registered are to be issued on the basis of unbonded bondable property, the deposit of cash or otherwise; as of the most recent practicable date, the approximate amount of unbonded bondable property available as a basis for the issuance of bonds; provisions permitting the withdrawal of cash deposited as a basis for the issuance of bonds; and provisions permitting the release or substitution of assets securing the issue; *Provided, however,* That provisions permitting the release of assets upon the deposit of equivalent funds or the pledge of equivalent property, the release of property no longer required in the business, obsolete property, or property taken by eminent domain or the application of insurance moneys, and other similar provisions need not be described;

(6) The general type of event that constitutes a default and whether or not any periodic evidence is required to be furnished as to the absence of default or as to compliance with the terms of the indenture;

(7) Provisions relating to modification of the terms of the security or the rights of security holders;

(8) If the rights evidenced by the securities to be registered are, or may be, materially limited or qualified by the rights of any other authorized class of securities, the information regarding such other securities as will enable investors to understand the rights evidenced by the securities; to the extent not otherwise disclosed pursuant to this Item; no information need be

given, however, as to any class of securities all of which will be retired, provided appropriate steps to ensure such retirement will be completed prior to or upon delivery by the registrant of the securities;

(9) If debt securities are to be offered at a price such that they will be deemed to be offered at an ''original issue discount'' as defined in paragraph (a) of section 1273 of the Internal Revenue Code (26 U.S.C. 1273), or if a debt security is sold in a package with another security and the allocation of the offering price between the two securities may have the effect of offering the debt security at such an original issue discount, the tax effects thereof pursuant to sections 1271–1278;

(10) The name of the trustee(s) and the nature of any material relationship with the registrant or with any of its affiliates; the percentage of securities of the class necessary to require the trustee to take action; and what indemnification the trustee may require before proceeding to enforce the lien.

(c) *Warrants and rights.* If the securities described are to be offered pursuant to warrants or rights state:

(1) The amount of securities called for by such warrants or rights;

(2) The period during which and the price at which the warrants or rights are exercisable;

(3) The amount of warrants or rights outstanding;

(4) Provisions for changes to or adjustments in the exercise price; and

(5) Any other material terms of such rights on warrants.

(d) *Other securities.* If securities other than capital stock, debt, warrants or rights are to be registered, include a brief description (comparable to that required in paragraphs (a), (b) and (c) of Item 202) of the rights evidenced thereby.

(e) *Market information for securities other than common equity.* If securities other than common equity are to be registered and there is an established public trading market for such securities (as that term is used in Item 201 of Regulation S–K (§ 229.201 of this chapter)) provide market information with respect to such securities comparable to that required by paragraph (a) of Item 201 of Regulation S–K (§ 229.201).

(f) *American Depositary Receipts.* If Depositary Shares represented by American Depositary Receipts are being registered, furnish the following information:

(1) The name of the depositary and the address of its principal executive office.

(2) State the title of the American Depositary Receipts and identify the deposited security. Describe briefly the terms of deposit, including the provisions, if any, with respect to:

(i) The amount of deposited securities represented by one unit of American Depositary Receipts;

(ii) The procedure for voting, if any, the deposited securities;

(iii) The collection and distribution of dividends;

(iv) The transmission of notices, reports and proxy soliciting material;

(v) The sale or exercise of rights;

(vi) The deposit or sale of securities resulting from dividends, splits or plans of reorganization;

(vii) Amendment, extension or termination of the deposit;

(viii) Rights of holders of receipts to inspect the transfer books of the depositary and the list of holders of receipts;

(ix) Restrictions upon the right to deposit or withdraw the underlying securities;

(x) Limitation upon the liability of the depositary.

(3) Describe all fees and charges which may be imposed directly or indirectly against the holder of the American Depositary Receipts, indicating the type of service, the amount of fee or charges and to whom paid.

Instructions to Item 202: 1. Wherever the title of securities is required to be stated, there shall be given such information as will indicate the type and general character of the securities, including the following:

A. In the case of shares, the par or stated value, if any; the rate of dividends, if fixed, and whether cumulative or non-cumulative; a brief indication of the preference, if any; and if convertible or redeemable, a statement to that effect;

B. In the case of debt, the rate of interest; the date of maturity or, if the issue matures serially, a brief indication of the serial maturities, such as ''maturing serially from 1955 to 1960''; if the payment of principal or interest is contingent, an appropriate indication of such contingency; a brief indication

of the priority of the issue; and, if convertible or callable, a statement to that effect; or

C. In the case of any other kind of security, appropriate information of comparable character.

2. If the registrant is a foreign registrant, include (to the extent not disclosed in the document pursuant to Item 201 of Regulation S–K (§ 229.201) or otherwise) in the description of the securities:

A. A brief description of any limitations on the right of nonresident or foreign owners to hold or vote such securities imposed by foreign law or by the charter or other constituent document of the registrant, or if no such limitations are applicable, so state;

B. A brief description of any governmental laws, decrees or regulations in the country in which the registrant is organized affecting the remittance of dividends, interest and other payments to nonresident holders of the securities being registered;

C. A brief outline of all taxes, including withholding provisions, to which United States security holders are subject under existing laws and regulations of the foreign country in which the registrant is organized; and

D. A brief description of pertinent provisions of any reciprocal tax treaty between such foreign country and the United States regarding withholding or, if there is no such treaty, so state.

3. Section 305(a)(2) of the Trust Indenture Act of 1939, 15 U.S.C. 77aaa et seq., as amended (''Trust Indenture Act''), shall not be deemed to require the inclusion in a registration statement or in a prospectus of any information not required by this Item.

4. Where convertible securities or stock purchase warrants are being registered that are subject to redemption or call, the description of the conversion terms of the securities or material terms of the warrants shall disclose:

A. Whether the right to convert or purchase the securities will be forfeited unless it is exercised before the date specified in a notice of the redemption or call;

B. The expiration or termination date of the warrants;

C. The kinds, frequency and timing of notice of the redemption or call, including the cities or newspapers in which notice will be published (where the securities provide for a class of newspapers or group of cities in which the publication may be made at the discretion of the registrant, the registrant should describe such provision); and

D. In the case of bearer securities, that investors are responsible for making arrangements to prevent loss of the right to convert or purchase in the event of redemption of call, for example, by reading the newspapers in which the notice of redemption or call may be published.

5. The response to paragraph (f) shall include information with respect to fees and charges in connection with (A) the deposit or substitution of the underlying securities; (B) receipt and distribution of dividends; (C) the sale or exercise of rights; (D) the withdrawal of the underlying security; and (E) the transferring, splitting or grouping of receipts. Information with respect to the right to collect the fees and charges against dividends received and deposited securities shall be included in response to this item.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78*l*, 78m, 78*o*(d), 78w(a), 80a–8, 80a–29, 80a–30(c), 80a–37(a))

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 54768, Dec. 6, 1982; 51 FR 42056, Nov. 20, 1986]

Subpart 229.300—Financial Information

§ 229.301 (Item 301) Selected financial data.

Furnish in comparative columnar form the selected financial data for the registrant referred to below, for

(a) Each of the last five fiscal years of the registrant (or for the life of the registrant and its predecessors, if less), and

(b) Any additional fiscal years necessary to keep the information from being misleading.

Instructions to Item 301: 1. The purpose of the selected financial data shall be to supply in a convenient and readable format selected financial data which highlight certain significant trends in the registrant's financial condition and results of operations.

2. Subject to appropriate variation to conform to the nature of the registrant's business, the following items shall be included in the table of financial data: net sales or operating revenues; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock (including long-term debt, capital leases, and redeemable preferred

stock as defined in § 210.5–02.28(a) of Regulation S–X [17 CFR 210]; and cash dividends declared per common share. Registrants may include additional items which they believe would enhance an understanding of and would highlight other trends in their financial condition and results of operations.

Briefly describe, or cross-reference to a discussion thereof, factors such as accounting changes, business combinations or dispositions of business operations, that materially affect the comparability of the information reflected in selected financial data. Discussion of, or reference to, any material uncertainties should also be included where such matters might cause the data reflected herein not to be indicative of the registrant's future financial condition or results of operations.

3. All references to the registrant in the table of selected financial data and in this Item shall mean the registrant and its subsidiaries consolidated.

4. If interim period financial statements are included, or are required to be included, by Article 3 of Regulation S–X, registrants should consider whether any or all of the selected financial data need to be updated for such interim periods to reflect a material change in the trends indicated; where such updating information is necessary, registrants shall provide the information on a comparative basis unless not necessary to an understanding of such updating information.

5. A foreign private issuer shall disclose also the following information in all filings containing financial statements:

A. In the forepart of the document and as of the latest practicable date, the exchange rate into U.S. currency of the foreign currency in which the financial statements are denominated;

B. A history of exchange rates for the five most recent years and any subsequent interim period for which financial statements are presented setting forth the rates for period end, the average rates, and the range of high and low rates for each year; and

C. If equity securities are being registered, a five year summary of dividends per share stated in both the currency in which the financial statements are denominated and United States currency based on the exchange rates at each respective payment date.

6. A foreign private issuer shall present the selected financial data in the same currency as its financial statements. The issuer may present the selected financial data on the basis of the accounting principles used in its primary financial statements but in such case shall present this data also on the basis of any reconciliations of such data to United States generally accepted accounting principles and Regulation S–X made pursuant to Rule 4–01 of Regulation S–X (§ 210.4–01 of this chapter).

7. For purposes of this rule, the rate of exchange means the noon buying rate in New York City for cable transfers in foreign currencies as certified for customs purposes by the Federal Reserve Bank of New York. The average rate means the average of the exchange rates on the last day of each month during a year.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8, 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78*l*, 78m, 78*o*(d), 78w(a), 80a–8, 80a–29, 80a–30(c), 80a–37(a))

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 54768, Dec. 6, 1982; 52 FR 30919, Aug. 18, 1987]

§ 229.302 (Item 302) Supplementary financial information.

(a) *Selected quarterly financial data.* Registrants specified in paragraph (a)(5) of this Item shall provide the information specified below.

(1) Disclosure shall be made of net sales, gross profit (net sales less costs and expenses associated directly with or allocated to products sold or services rendered), income (loss) before extraordinary items and cumulative effect of a change in accounting, per share data based upon such income (loss), and net income (loss), for each full quarter within the two most recent fiscal years and any subsequent interim period for which financial statements are included or are required to be included by Article 3 of Regulation S–X [17 CFR 210].

(2) When the data supplied pursuant to this paragraph (a) vary from the amounts previously reported on the Form 10–Q and Form 10–QSB (§ 249.308a of this chapter) filed for any quarter, such as would be the case when a pooling of interests occurs or where an error is corrected, reconcile the amounts given with those previously reported and describe the reason for the difference.

(3) Describe the effect of any disposals of segments of a business, and extraordinary, unusual or infrequently occurring items recognized in each full quarter within the two most recent fiscal years and any subsequent interim period for which financial statements are included or are required to be included by Article 3 of Regulation S–X, as well as the aggregate effect and the nature of year-end or other adjustments which are material to the results of that quarter.

(4) If the financial statements to which this information relates have been reported on by an accountant, appropriate professional standards and procedures, as enumerated in the Statements of Auditing Standards issued by the Auditing Standards Board of the American Institute of Certified Public Accountants, shall be followed by the reporting accountant with regard to the data required by this paragraph (a).

(5) This paragraph (a) applies to any registrant, except a foreign private issuer, that has securities registered pursuant to sections 12(b) (15 U.S.C. § 78*l*(b)) (other than mutual life insurance companies) or 12(g) of the Exchange Act (15 U.S.C. § 78*l*(g)).

(b) *Information about oil and gas producing activities.* Registrants engaged in oil and gas producing activities shall present the information about oil and gas producing activities (as those activities are defined in Regulation S–X, § 210.4–10(a)) specified in paragraphs 9–34 of Statement of Financial Accounting Standards (''SFAS'') No. 69, ''Disclosures about Oil and Gas Producing Activities.'' If such oil and gas producing activities are regarded as significant under one or more of the tests set forth in paragraph 8 of SFAS No. 69.

Instructions to Paragraph (b): 1. (a) SFAS No. 69 disclosures that relate to annual periods shall be presented for each annual period for which an income statement is required. (b) SFAS No. 69 disclosures required as of the end of an annual period shall be presented as of the date of each audited balance sheet required, and (c) SFAS No. 69 disclosures required as of the beginning of an annual period shall be presented as of the beginning of each annual period for which an income statement is required.

2. This paragraph, together with § 210.4–10 of Regulation S–X, prescribes financial reporting standards for the preparation of accounts by persons engaged, in whole or in part, in the production of crude oil or natural gas in the United States, pursuant to Section 503 of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 8383) (''EPCA'') and Section 11(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 796) (''ESECA'') as amended by Section 506 of EPCA. The application of the paragraph to those oil and gas producing operations of companies regulated for ratemaking purposes on an individual-company-cost-of-service basis may, however, give appropriate recognition to differences arising because of the effect of the ratemaking process.

3. Any person exempted by the Department of Energy from any record-keeping or reporting requirements pursuant to Section 11(c) of ESECA, as amended, is similarly exempted from the related provisions of this paragraph in the preparation of accounts pursuant to EPCA. This exemption does not affect the applicability of this paragraph to filings pursuant to the federal securities laws.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 57914, Dec. 29, 1982; 52 FR 30919, Aug. 18, 1987; 56 FR 30053, July 1, 1991; 64 FR 73402, Dec. 30, 1999]

§ 229.303, Note (Item 303) Management's discussion and analysis of financial condition and results of operations.

(a) *Full fiscal years.* Discuss registrant's financial condition, changes in financial condition and results of operations. The discussion shall provide information as specified in paragraphs (a) (1), (2) and (3) with respect to liquidity, capital resources and results of operations and also shall provide such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated. Where in the registrant's judgment a discussion of segment information or of other subdivisions of the registrant's business would be appropriate to an understanding of such business, the discussion shall focus on each relevant, reportable segment or other subdivision of the business and on the registrant as a whole.

(1) *Liquidity.* Identify any known trends or any known demands, commitments, events or uncertainties that

will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(2) *Capital resources.* (i) Describe the registrant's material commitments for capital expenditures as of the end of the latest fiscal period, and indicate the general purpose of such commitments and the anticipated source of funds needed to fulfill such commitments.

(ii) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources. Indicate any expected material changes in the mix and relative cost of such resources. The discussion shall consider changes between equity, debt and any off-balance sheet financing arrangements.

(3) *Results of operations.* (i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, should be described in order to understand the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed.

(iii) To the extent that the financial statements disclose material increases in net sales or revenues, provide a narrative discussion of the extent to which such increases are attributable to increases in prices or to increases in the volume or amount of goods or services being sold or to the introduction of new products or services.

(iv) For the three most recent fiscal years of the registrant, or for those fiscal years beginning after December 25, 1979, or for those fiscal years in which the registrant has been engaged in business, whichever period is shortest, discuss the impact of inflation and changing prices on the registrant's net sales and revenues and on income from continuing operations.

Instructions to Paragraph 303(a): 1. The registrant's discussion and analysis shall be of the financial statements and of other statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition and results of operations. Generally, the discussion shall cover the three year period covered by the financial statements and shall use year-to-year comparisons or any other formats that in the registrant's judgment enhance a reader's understanding. However, where trend information is relevant, reference to the five year selected financial data appearing pursuant to Item 301 of Regulation S–K (§ 229.301) may be necessary.

2. The purpose of the discussion and analysis shall be to provide to investors and other users information relevant to an assessment of the financial condition and results of operations of the registrant as determined by evaluating the amounts and certainty of cash flows from operations and from outside sources. The information provided pursuant to this Item need only include that which is available to the registrant without undue effort or expense and which does not clearly appear in the registrant's financial statements.

3. The discussion and analysis shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This would include descriptions and amounts of (A) matters that would have an impact on future operations and have not had an impact in the past, and (B) matters that have had an impact on reported operations and are not expected to have an impact upon future operations.

4. Where the consolidated financial statements reveal material changes from year to year in one or more line items, the causes for the changes shall be described to the extent necesary to an understanding of the registrant's businesses as a whole; *Provided, however,* That if the causes for a change in one line item also relate to other line items,

no repetition is required and a line-by-line analysis of the financial statements as a whole is not required or generally appropriate. Registrants need not recite the amounts of changes from year to year which are readily computable from the financial statements. The discussion shall not merely repeat numerical data contained in the consolidated financial statements.

5. The term ''liquidity'' as used in this Item refers to the ability of an enterprise to generate adequate amounts of cash to meet the enterprise's needs for cash. Except where it is otherwise clear from the discussion, the registrant shall indicate those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition. Liquidity generally shall be discussed on both a long-term and short-term basis. The issue of liquidity shall be discussed in the context of the registrant's own business or businesses. For example a discussion of working capital may be appropriate for certain manufacturing, industrial or related operations but might be inappropriate for a bank or public utility.

6. Where financial statements presented or incorporated by reference in the registration statement are required by § 210.4–08(e)(3) of Regulation S–X [17 CFR part 210] to include disclosure of restrictions on the ability of both consolidated and unconsolidated subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances, the discussion of liquidity shall include a discussion of the nature and extent of such restrictions and the impact such restrictions have had and are expected to have on the ability of the parent company to meet its cash obligations.

7. Registrants are encouraged, but not required, to supply forward-looking information. This is to be distinguished from presently known data which will impact upon future operating results, such as known future increases in costs of labor or materials. This latter data may be required to be disclosed. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See Rule 175 under the Securities Act [17 CFR 230.175], Rule 3b–6 under the Exchange Act [17 CFR 240.3b–6] and Securities Act Release No. 6084 (June 25, 1979) (44 FR 38810).

8. Registrants are only required to discuss the effects of inflation and other changes in prices when considered material. This discussion may be made in whatever manner appears appropriate under the circumstances. All that is required is a brief textual presentation of management's views. No specific numerical financial data need be presented except as Rule 3–20(c) of Regulation S–X (§ 210.3–20(c) of this chapter) otherwise requires. However, registrants may elect to voluntarily disclose supplemental information on the effects of changing prices as provided for in Statement of Financial Accounting Standards No. 89, ''Financial Reporting and Changing Prices'' or through other supplemental disclosures. The Commission encourages experimentation with these disclosures in order to provide the most meaningful presentation of the impact of price changes on the registrant's financial statements.

9. Registrants that elect to disclose supplementary information on the effects of changing prices as specified by SFAS No. 89, ''Financial Reporting and Changing Prices,'' may combine such explanations with the discussion and analysis required pursuant to this Item or may supply such information separately with appropriate cross reference.

10. All references to the registrant in the discussion and in this Item shall mean the registrant and its subsidiaries consolidated.

11. Foreign private registrants also shall discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, their operations or investments by United States nationals.

12. If the registrant is a foreign private issuer, the discussion shall focus on the primary financial statements presented in the registration statement or report. There shall be a reference to the reconciliation to United States generally accepted accounting principles, and a discussion of any aspects of the difference between foreign and United States generally accepted accounting principles, not discussed in the reconciliation, that the registrant believes is necessary for an understanding of the financial statements as a whole.

(b) *Interim periods.* If interim period financial statements are included or are required to be included by Article 3 of Regulation S–X (17 CFR 210), a management's discussion and analysis of the financial condition and results of operations shall be provided so as to enable the reader to assess material changes in financial condition and results of operations between the periods specified in paragraphs (b) (1) and (2) of this Item. The discussion and analysis shall include a discussion of material changes in those items specifically listed in paragraph (a) of this Item, except that the impact of inflation and changing prices on operations for interim periods need not be addressed.

(1) *Material changes in financial condition.* Discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the

most recent interim balance sheet provided. If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding fiscal year, any material changes in financial condition from that date to the date of the most recent interim balance sheet provided also shall be discussed. If discussions of changes from both the end and the corresponding interim date of the preceding fiscal year are required, the discussions may be combined at the discretion of the registrant.

(2) *Material changes in results of operations.* Discuss any material changes in the registrant's results of operations with respect to the most recent fiscal year-to-date period for which an income statement is provided and the corresponding year-to-date period of the preceding fiscal year. If the registrant is required to or has elected to provide an income statement for the most recent fiscal quarter, such discussion also shall cover material changes with respect to that fiscal quarter and the corresponding fiscal quarter in the preceding fiscal year. In addition, if the registrant has elected to provide an income statement for the twelve-month period ended as of the date of the most recent interim balance sheet provided, the discussion also shall cover material changes with respect to that twelve-month period and the twelve-month period ended as of the corresponding interim balance sheet date of the preceding fiscal year. Notwithstanding the above, if for purposes of a registration statement a registrant subject to paragraph (b) of § 210.3–03 of Regulation S–X provides a statement of income for the twelve-month period ended as of the date of the most recent interim balance sheet provided in lieu of the interim income statements otherwise required, the discussion of material changes in that twelve-month period will be in respect to the preceding fiscal year rather than the corresponding preceding period.

Instructions to Paragraph (b) of Item 303: 1. If interim financial statements are presented together with financial statements for full fiscal years, the discussion of the interim financial information shall be prepared pursuant to this paragraph (b) and the discussion of the full fiscal year's information shall be prepared pursuant to paragraph (a) of this Item. Such discussions may be combined.

2. In preparing the discussion and analysis required by this paragraph (b), the registrant may presume that users of the interim financial information have read or have access to the discussion and analysis required by paragraph (a) for the preceding fiscal year.

3. The discussion and analysis required by this paragraph (b) is required to focus only on material changes. Where the interim financial statements reveal material changes from period to period in one or more significant line items, the causes for the changes shall be described if they have not already been disclosed: *Provided, however,* That if the causes for a change in one line item also relate to other line items, no repetition is required. Registrants need not recite the amounts of changes from period to period which are readily computable from the financial statements. The discussion shall not merely repeat numerical data contained in the financial statements. The information provided shall include that which is available to the registrant without undue effort or expense and which does not clearly appear in the registrant's condensed interim financial statements.

4. The registrant's discussion of material changes in results of operations shall identify any significant elements of the registrant's income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant's ongoing business.

5. The registrant shall discuss any seasonal aspects of its business which have had a material effect upon its financial condition or results of operation.

6. Registrants are encouraged but are not required to discuss forward-looking information. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See Rule 175 under the Securities Act [17 CFR 230. 175], Rule 3b–6 under the Exchange Act [17 CFR 249.3b–6] and

Securities Act Release No. 6084 (June 25, 1979) (44 FR 38810).

(Secs. 7 and 19a of the Securities Act, 15 U.S.C. 77g, 77s(a), 77aa(25)(26); secs. 12, 13, 14, 15(d), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78w(a), secs. 5(b), 10(a), 14, 20(a) of the Public Utility Holding Company Act, 15 U.S.C. 79e(a), 79n, 79t(a); secs. 8, 20, 30, 31(c), 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a–8, 80a–20, 80a–29, 80a–30(c), 80a–37(a); secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78*l*, 78m, 78*o*(d), 78w(a), 80a–8, 80a–29, 80a–30(c), 80a–37(a))

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 29839, July 9, 1982; 47 FR 54768, Dec. 6, 1982; 52 FR 30919, Aug. 18, 1987]

EFFECTIVE DATE NOTE: At 68 FR 5999, Feb. 5, 2003, § 229.303 was amended by removing the authority citation, the second sentence of Instruction 2 and the first three sentences of Instruction 7 of ''Instructions to Paragraph 303(a)''; removing the phrase ''paragraphs (a)(1), (2) and (3) with respect to liquidity, capital resources and results of operations'' and adding, in its place, the phrase ''paragraphs (a)(1) through (5) of this Item'' in the second sentence of the introductory text of paragraph (a); removing the phrase ''or for those fiscal years beginning after December 25, 1979,'' in paragraph (a)(3)(iv); removing the first sentence of Instruction 6 of ''Instructions to Paragraph (b) of Item 303''; and by adding paragraphs (a)(4), (5), and (c), Instructions 1 through 5 to paragraph 303(a)(4) at the end of ''Instructions to Paragraph 303(a)'', and Instruction 7 to ''Instructions to Paragraph (b) of Item 303'', effective April 7, 2003. For the convenience of the user, the added text is set forth as follows:

§ 229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.

(a) * * *

(4) *Off-balance sheet arrangements.* (i) In a separately-captioned section, discuss the registrant's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors. The disclosure shall include the items specified in paragraphs (a)(4)(i)(A), (B), (C) and (D) of this Item to the extent necessary to an understanding of such arrangements and effect and shall also include such other information that the registrant believes is necessary for such an understanding.

(A) The nature and business purpose to the registrant of such off-balance sheet arrangements;

(B) The importance to the registrant of such off-balance sheet arrangements in respect of its liquidity, capital resources, market risk support, credit risk support or other benefits;

(C) The amounts of revenues, expenses and cash flows of the registrant arising from such arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred by the registrant in connection with such arrangements; and the nature and amounts of any other obligations or liabilities (including contingent obligations or liabilities) of the registrant arising from such arrangements that are or are reasonably likely to become material and the triggering events or circumstances that could cause them to arise; and

(D) Any known event, demand, commitment, trend or uncertainty that will result in or is reasonably likely to result in the termination, or material reduction in availability to the registrant, of its off-balance sheet arrangements that provide material benefits to it, and the course of action that the registrant has taken or proposes to take in response to any such circumstances.

(ii) As used in this paragraph (a)(4), the term *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the registrant is a party, under which the registrant has:

(A) Any obligation under a guarantee contract that has any of the characteristics identified in paragraph 3 of FASB Interpretation No. 45, *Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others* (November 2002) (''FIN 45''), as may be modified or supplemented, and that is not excluded from the initial recognition and measurement provisions of FIN 45 pursuant to paragraphs 6 or 7 of that Interpretation;

(B) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets;

(C) Any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument, except that it is both indexed to the registrant's own stock and classified in stockholders' equity in the registrant's statement

of financial position, and therefore excluded from the scope of FASB Statement of Financial Accounting Standards No. 133, *Accounting for Derivative Instruments and Hedging Activities* (June 1998), pursuant to paragraph 11(a) of that Statement, as may be modified or supplemented; or

(D) Any obligation, including a contingent obligation, arising out of a variable interest (as referenced in FASB Interpretation No. 46, *Consolidation of Variable Interest Entities* (January 2003), as may be modified or supplemented) in an unconsolidated entity that is held by, and material to, the registrant, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the registrant.

(5) *Tabular disclosure of contractual obligations.* (i) In a tabular format, provide the information specified in this paragraph (a)(5) as of the latest fiscal year end balance sheet date with respect to the registrant's known contractual obligations specified in the table that follows this paragraph (a)(5)(i). The registrant shall provide amounts, aggregated by type of contractual obligation. The registrant may disaggregate the specified categories of contractual obligations using other categories suitable to its business, but the presentation must include all of the obligations of the registrant that fall within the specified categories. A presentation covering at least the periods specified shall be included. The tabular presentation may be accompanied by footnotes to describe provisions that create, increase or accelerate obligations, or other pertinent data to the extent necessary for an understanding of the timing and amount of the registrant's specified contractual obligations.

Contractual obligations	Payments due by period			3–5 years	More than 5 years
	Total	Less than 1 year	1–3 years		
[Long-Term Debt Obligations]					
[Capital Lease Obligations]					
[Operating Lease Obligations]					
[Purchase Obligations]					
[Other Long-Term Liabilities Reflected on the Registrant's Balance Sheet under GAAP]					
Total					

(ii) *Definitions:* The following definitions apply to this paragraph (a)(5):

(A) *Long-Term Debt Obligation* means a payment obligation under long-term borrowings referenced in FASB Statement of Financial Accounting Standards No. 47 *Disclosure of Long-Term Obligations* (March 1981), as may be modified or supplemented.

(B) *Capital Lease Obligation* means a payment obligation under a lease classified as a capital lease pursuant to FASB Statement of Financial Accounting Standards No. 13 *Accounting for Leases* (November 1976), as may be modified or supplemented.

(C) *Operating Lease Obligation* means a payment obligation under a lease classified as an operating lease and disclosed pursuant to FASB Statement of Financial Accounting Standards No. 13 *Accounting for Leases* (November 1976), as may be modified or supplemented.

(D) *Purchase Obligation* means an agreement to purchase goods or services that is enforceable and legally binding on the registrant that specifies all significant terms, including: fixed or minimum quantities to be purchased; fixed, minimum or variable price provisions; and the approximate timing of the transaction.

Instructions to Paragraph 303(a):

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Instructions to Paragraph 303(a)(4):

1. No obligation to make disclosure under paragraph (a)(4) of this Item shall arise in respect of an off-balance sheet arrangement until a definitive agreement that is unconditionally binding or subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.

2. Registrants should aggregate off-balance sheet arrangements in groups or categories that provide material information in an efficient and understandable manner and should avoid repetition and disclosure of immaterial information. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent the aggregation increases understanding. Distinctions in arrangements and their effects must be discussed to the extent the information is material, but the discussion should avoid repetition and disclosure of immaterial information.

3. For purposes of paragraph (a)(4) of this Item only, contingent liabilities arising out

of litigation, arbitration or regulatory actions are not considered to be off-balance sheet arrangements.

4. Generally, the disclosure required by paragraph (a)(4) shall cover the most recent fiscal year. However, the discussion should address changes from the previous year where such discussion is necessary to an understanding of the disclosure.

5. In satisfying the requirements of paragraph (a)(4) of this Item, the discussion of off-balance sheet arrangements need not repeat information provided in the footnotes to the financial statements, provided that such discussion clearly cross-references to specific information in the relevant footnotes and integrates the substance of the footnotes into such discussion in a manner designed to inform readers of the significance of the information that is not included within the body of such discussion.

(b) * * *

Instructions to Paragraph (b) of Item 303:

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7. The registrant is not required to include the table required by paragraph (a)(5) of this Item for interim periods. Instead, the registrant should disclose material changes outside the ordinary course of the registrant's business in the specified contractual obligations during the interim period.

(c) *Safe harbor.* (1) The safe harbor provided in section 27A of the Securities Act of 1933 (15 U.S.C. 77z–2) and section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u–5) (''statutory safe harbors'') shall apply to forward-looking information provided pursuant to paragraphs (a)(4) and (5) of this Item, provided that the disclosure is made by: an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

(2) For purposes of paragraph (c) of this Item only:

(i) All information required by paragraphs (a)(4) and (5) of this Item is deemed to be a *forward looking statement* as that term is defined in the statutory safe harbors, except for historical facts.

(ii) With respect to paragraph (a)(4) of this Item, the meaningful cautionary statements element of the statutory safe harbors will be satisfied if a registrant satisfies all requirements of that same paragraph (a)(4) of this Item.

§ 229.304 (Item 304) Changes in and disagreements with accountants on accounting and financial disclosure.

(a)(1) If during the registrant's two most recent fiscal years or any subsequent interim period, an independent accountant who was previously engaged as the principal accountant to audit the registrant's financial statements, or an independent accountant who was previously engaged to audit a significant subsidiary and on whom the principal accountant expressed reliance in its report, has resigned (or indicated it has declined to stand for reelection after the completion of the current audit) or was dismissed, then the registrant shall:

(i) State whether the former accountant resigned, declined to stand for reelection or was dismissed and the date thereof.

(ii) State whether the principal accountant's report on the financial statements for either of the past two years contained an adverse opinion or a disclaimer of opinion, or was qualified or modified as to uncertainty, audit scope, or accounting principles; and also describe the nature of each such adverse opinion, disclaimer of opinion, modification, or qualification.

(iii) State whether the decision to change accountants was recommended or approved by:

(A) Any audit or similar committee of the board of directors, if the issuer has such a committee; or

(B) The board of directors, if the issuer has no such committee.

(iv) State whether during the registrant's two most recent fiscal years and any subsequent interim period preceding such resignation, declination or dismissal there were any disagreements with the former accountant on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreement(s), if not resolved to the satisfaction of the former accountant, would have caused it to make reference to the subject matter of the disagreement(s) in connection with its report. Also, (A) describe each such disagreement; (B) state whether any audit or similar committee of the

board of directors, or the board of directors, discussed the subject matter of each of such disagreements with the former accountant; and (C) state whether the registrant has authorized the former accountant to respond fully to the inquiries of the successor accountant concerning the subject matter of each of such disagreements and, if not, describe the nature of any limitation thereon and the reason therefore. The disagreements required to be reported in response to this Item include both those resolved to the former accountant's satisfaction and those not resolved to the former accountant's satisfaction. Disagreements contemplated by this Item are those that occur at the decision-making level, i.e., between personnel of the registrant responsible for presentation of its financial statements and personnel of the accounting firm responsible for rendering its report.

(v) Provide the information required by paragraph (a)(1)(iv) of this Item for each of the kinds of events (even though the registrant and the former accountant did not express a difference of opinion regarding the event) listed in paragraphs (a)(1)(v) (A) through (D) of this section, that occurred within the registrant's two most recent fiscal years and any subsequent interim period preceding the former accountant's resignation, declination to stand for re-election, or dismissal (''reportable events''). If the event led to a disagreement or difference of opinion, then the event should be reported as a disagreement under paragraph (a)(1)(iv) and need not be repeated under this paragraph.

(A) The accountant's having advised the registrant that the internal controls necessary for the registrant to develop reliable financial statements do not exist;

(B) The accountant's having advised the registrant that information has come to the accountant's attention that has led it to no longer be able to rely on management's representations, or that has made it unwilling to be associated with the financial statements prepared by management;

(C) (*1*) The accountant's having advised the registrant of the need to expand significantly the scope of its audit, or that information has come to the accountant's attention during the time period covered by Item 304(a)(1)(iv), that if further investigated may:

(*i*) Materially impact the fairness or reliability of either: a previously issued audit report or the underlying financial statements; or the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit report (including information that may prevent it from rendering an unqualified audit report on those financial statements), or

(*ii*) Cause it to be unwilling to rely on management's representations or be associated with the registrant's financial statements, and

(*2*) Due to the accountant's resignation (due to audit scope limitations or otherwise) or dismissal, or for any other reason, the accountant did not so expand the scope of its audit or conduct such further investigation; or

(D)(*1*) The accountant's having advised the registrant that information has come to the accountant's attention that it has concluded materially impacts the fairness or reliability of either (*i*) a previously issued audit report or the underlying financial statements, or (*ii*) the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit report (including information that, unless resolved to the accountant's satisfaction, would prevent it from rendering an unqualified audit report on those financial statements), and

(*2*) Due to the accountant's resignation, dismissal or declination to stand for re-election, or for any other reason, the issue has not been resolved to the accountant's satisfaction prior to its resignation, dismissal or declination to stand for re-election.

(2) If during the registrant's two most recent fiscal years or any subsequent interim period, a new independent accountant has been engaged as either the principal accountant to audit the registrant's financial statements, or as an independent accountant to audit a significant subsidiary

and on whom the principal accountant is expected to express reliance in its report, then the registrant shall identify the newly engaged accountant and indicate the date of such accountant's engagement. In addition, if during the registrant's two most recent fiscal years, and any subsequent interim period prior to engaging that accountant, the registrant (or someone on its behalf) consulted the newly engaged accountant regarding:

(i) Either: The application of accounting principles to a specified transaction, either completed or proposed; or the type of audit opinion that might be rendered on the registrant's financial statements, and either a written report was provided to the registrant or oral advice was provided that the new accountant concluded was an important factor considered by the registrant in reaching a decision as to the accounting, auditing or financial reporting issue; or

(ii) Any matter that was either the subject of a disagreement (as defined in paragraph 304(a)(1)(iv) and the related instructions to this item) or a reportable event (as described in paragraph 304(a)(1)(v)), then the registrant shall:

(A) So state and identify the issues that were the subjects of those consultations;

(B) Briefly describe the views of the newly engaged accountant as expressed orally or in writing to the registrant on each such issue and, if written views were received by the registrant, file them as an exhibit to the report or registration statement requiring compliance with this Item 304(a);

(C) State whether the former accountant was consulted by the registrant regarding any such issues, and if so, provide a summary of the former accountant's views; and

(D) Request the newly engaged accountant to review the disclosure required by this Item 304(a) before it is filed with the Commission and provide the new accountant the opportunity to furnish the registrant with a letter addressed to the Commission containing any new information, clarification of the registrant's expression of its views, or the respects in which it does not agree with the statements made by the registrant in response to Item 304(a). The registrant shall file any such letter as an exhibit to the report or registration statement containing the disclosure required by this Item.

(3) The registrant shall provide the former accountant with a copy of the disclosures it is making in response to this Item 304(a) that the former accountant shall receive no later than the day that the disclosures are filed with the Commission. The registrant shall request the former accountant to furnish the registrant with a letter addressed to the Commission stating whether it agrees with the statements made by the registrant in response to this Item 304(a) and, if not, stating the respects in which it does not agree. The registrant shall file the former accountant's letter as an exhibit to the report on registration statement containing this disclosure. If the former accountant's letter is unavailable at the time of filing such report or registration statement, then the registrant shall request the former accountant to provide the letter as promptly as possible so that the registrant can file the letter with the Commission within ten business days after the filing of the report or registration statement. Notwithstanding the ten business day period, the registrant shall file the letter by amendment within two business days of receipt; if the letter is received on a Saturday, Sunday or holiday on which the Commission is not open for business, then the two business day period shall begin to run on and shall include the first business day thereafter. The former accountant may provide the registrant with an interim letter highlighting specific areas of concern and indicating that a more detailed letter will be forthcoming within the ten business day period noted above. If not filed with the report or registration statement containing the registrant's disclosure under this Item 304(a), then the interim letter, if any, shall be filed by the registrant by amendment within two business days of receipt.

(b) If: (1) In connection with a change in accountants subject to paragraph (a) of this Item 304, there was any disagreement of the type described in paragraph (a)(1)(iv) or any reportable

event as described in paragraph (a)(1)(v) of this Item;

(2) During the fiscal year in which the change in accountants took place or during the subsequent fiscal year, there have been any transactions or events similar to those which involved such disagreement or reportable event; and

(3) Such transactions or events were material and were accounted for or disclosed in a manner different from that which the former accountants apparently would have concluded was required, the registrant shall state the existence and nature of the disagreement or reportable event and also state the effect on the financial statements if the method had been followed which the former accountants apparently would have concluded was required.

These disclosures need not be made if the method asserted by the former accountants ceases to be generally accepted because of authoritative standards or interpretations subsequently issued.

Instructions to Item 304: 1. The disclosure called for by paragraph (a) of this Item need not be provided if it has been previously reported as that term is defined in Rule 12b–2 under the Exchange Act (§240.12b–2 of this chapter); the disclosure called for by paragraph (a) must be provided, however, notwithstanding prior disclosure, if required pursuant to Item 9 of Schedule 14A (§240.14a–101 of this chapter). The disclosure called for by paragraph (b) of this section must be furnished, where required, notwithstanding any prior disclosure about accountant changes or disagreements.

2. When disclosure is required by paragraph (a) of this section in an annual report to security holders pursuant to Rule 14a–3 (§240.14a–3 of this chapter) or Rule 14c–3 (§240.14c–3 of this chapter), or in a proxy or information statement filed pursuant to the requirements of Schedule 14A or 14C (§240.14a–101 or §240.14c–101 of this chapter), in lieu of a letter pursuant to paragraph (a)(2)(D) or (a)(3), prior to filing such materials with or furnishing such materials to the Commission, the registrant shall furnish the disclosure required by paragraph (a) of this section to any former accountant engaged by the registrant during the period set forth in paragraph (a) of this section and to the newly engaged accountant. If any such accountant believes that the statements made in response to paragraph (a) of this section are incorrect or incomplete, it may present its views in a brief statement, ordinarily expected not to exceed 200 words, to be included in the annual report or proxy or information statement. This statement shall be submitted to the registrant within ten business days of the date the accountant receives the registrant's disclosure. Further, unless the written views of the newly engaged accountant required to be filed as an exhibit by paragraph (a)(2)(B) of this Item 304 have been previously filed with the Commission the registrant shall file a Form 8–K concurrently with the annual report or proxy or information statement for the purpose of filing the written views as exhibits thereto.

3. The information required by Item 304(a) need not be provided for a company being acquired by the registrant that is not subject to the filing requirements of either section 13(a) or 15(d) of the Exchange Act, or, because of section 12(i) of the Exchange Act, has not furnished an annual report to security holders pursuant to Rule 14a–3 or Rule 14c–3 for its latest fiscal year.

4. The term ''disagreements'' as used in this Item shall be interpreted broadly, to include any difference of opinion concerning any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure which (if not resolved to the satisfaction of the former accountant) would have caused it to make reference to the subject matter of the disagreement in connection with its report. It is not necessary for there to have been an argument to have had a disagreement, merely a difference of opinion. For purposes of this Item, however, the term disagreements does not include initial differences of opinion based on incomplete facts or preliminary information that were later resolved to the former accountant's satisfaction by, and providing the registrant and the accountant do not continue to have a difference of opinion upon, obtaining additional relevant facts or information.

5. In determining whether any disagreement or reportable event has occurred, an oral communication from the engagement partner or another person responsible for rendering the accounting firm's opinion (or their designee) will generally suffice as the accountant advising the registrant of a reportable event or as a statement of a disagreement at the ''decision-making level'' within the accounting firm and require disclosure under this Item.

[53 FR 12929, Apr. 20, 1988, as amended at 54 FR 9774, Mar. 8, 1989]

§ 229.305 (Item 305) Quantitative and qualitative disclosures about market risk.

(a) *Quantitative information about market risk.* (1) Registrants shall provide,

in their reporting currency, quantitative information about market risk as of the end of the latest fiscal year, in accordance with one of the following three disclosure alternatives. In preparing this quantitative information, registrants shall categorize market risk sensitive instruments into instruments entered into for trading purposes and instruments entered into for purposes other than trading purposes. Within both the trading and other than trading portfolios, separate quantitative information shall be presented, to the extent material, for each market risk exposure category (*i.e.*, interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market risks, such as equity price risk). A registrant may use one of the three alternatives set forth in this section for all of the required quantitative disclosures about market risk. A registrant also may choose, from among the three alternatives, one disclosure alternative for market risk sensitive instruments entered into for trading purposes and another disclosure alternative for market risk sensitive instruments entered into for other than trading purposes. Alternatively, a registrant may choose any disclosure alternative, from among the three alternatives, for each risk exposure category within the trading and other than trading portfolios. The three disclosure alternatives are:

(i)(A)(*1*) Tabular presentation of information related to market risk sensitive instruments; such information shall include fair values of the market risk sensitive instruments and contract terms sufficient to determine future cash flows from those instruments, categorized by expected maturity dates.

(*2*) Tabular information relating to contract terms shall allow readers of the table to determine expected cash flows from the market risk sensitive instruments for each of the next five years. Comparable tabular information for any remaining years shall be displayed as an aggregate amount.

(*3*) Within each risk exposure category, the market risk sensitive instruments shall be grouped based on common characteristics. Within the foreign currency exchange rate risk category, the market risk sensitive instruments shall be grouped by functional currency and within the commodity price risk category, the market risk sensitive instruments shall be grouped by type of commodity.

(*4*) See the Appendix to this Item for a suggested format for presentation of this information; and

(B) Registrants shall provide a description of the contents of the table and any related assumptions necessary to understand the disclosures required under paragraph (a)(1)(i)(A) of this Item 305; or

(ii)(A) Sensitivity analysis disclosures that express the potential loss in future earnings, fair values, or cash flows of market risk sensitive instruments resulting from one or more selected hypothetical changes in interest rates, foreign currency exchange rates, commodity prices, and other relevant market rates or prices over a selected period of time. The magnitude of selected hypothetical changes in rates or prices may differ among and within market risk exposure categories; and

(B) Registrants shall provide a description of the model, assumptions, and parameters, which are necessary to understand the disclosures required under paragraph (a)(1)(ii)(A) of this Item 305; or

(iii)(A) Value at risk disclosures that express the potential loss in future earnings, fair values, or cash flows of market risk sensitive instruments over a selected period of time, with a selected likelihood of occurrence, from changes in interest rates, foreign currency exchange rates, commodity prices, and other relevant market rates or prices;

(B)(*1*) For each category for which value at risk disclosures are required under paragraph (a)(1)(iii)(A) of this Item 305, provide either:

(*i*) The average, high and low amounts, or the distribution of the value at risk amounts for the reporting period; or

(*ii*) The average, high and low amounts, or the distribution of actual changes in fair values, earnings, or cash flows from the market risk sensitive instruments occurring during the reporting period; or

(*iii*) The percentage or number of times the actual changes in fair values, earnings, or cash flows from the market risk sensitive instruments exceeded the value at risk amounts during the reporting period;

(*2*) Information required under paragraph (a)(1)(iii)(B)(*1*) of this Item 305 is not required for the first fiscal year end in which a registrant must present Item 305 information; and

(C) Registrants shall provide a description of the model, assumptions, and parameters, which are necessary to understand the disclosures required under paragraphs (a)(1)(iii)(A) and (B) of this Item 305.

(2) Registrants shall discuss material limitations that cause the information required under paragraph (a)(1) of this Item 305 not to reflect fully the net market risk exposures of the entity. This discussion shall include summarized descriptions of instruments, positions, and transactions omitted from the quantitative market risk disclosure information or the features of instruments, positions, and transactions that are included, but not reflected fully in the quantitative market risk disclosure information.

(3) Registrants shall present summarized market risk information for the preceding fiscal year. In addition, registrants shall discuss the reasons for material quantitative changes in market risk exposures between the current and preceding fiscal years. Information required by this paragraph (a)(3), however, is not required if disclosure is not required under paragraph (a)(1) of this Item 305 for the current fiscal year. Information required by this paragraph (a)(3) is not required for the first fiscal year end in which a registrant must present Item 305 information.

(4) If registrants change disclosure alternatives or key model characteristics, assumptions, and parameters used in providing quantitative information about market risk (*e.g.*, changing from tabular presentation to value at risk, changing the scope of instruments included in the model, or changing the definition of loss from fair values to earnings), and if the effects of any such change is material, the registrant shall:

(i) Explain the reasons for the change; and

(ii) Either provide summarized comparable information, under the new disclosure method, for the year preceding the current year or, in addition to providing disclosure for the current year under the new method, provide disclosures for the current year and preceding fiscal year under the method used in the preceding year.

Instructions to Paragraph 305(a): 1. Under paragraph 305(a)(1):

A. For each market risk exposure category within the trading and other than trading portfolios, registrants may report the average, high, and low sensitivity analysis or value at risk amounts for the reporting period, as an alternative to reporting year-end amounts.

B. In determining the average, high, and low amounts for the fiscal year under instruction 1.A. of the Instructions to Paragraph 305(a), registrants should use sensitivity analysis or value at risk amounts relating to at least four equal time periods throughout the reporting period (*e.g.*, four quarter-end amounts, 12 month-end amounts, or 52 week-end amounts).

C. Functional currency means functional currency as defined by generally accepted accounting principles (see, *e.g.*, FASB, *Statement of Financial Accounting Standards No. 52, ''Foreign Currency Translation''*, (''FAS 52'') paragraph 20 (December 1981)).

D. Registrants using the sensitivity analysis and value at risk disclosure alternatives are encouraged, but not required, to provide quantitative amounts that reflect the aggregate market risk inherent in the trading and other than trading portfolios.

2. Under paragraph 305(a)(1)(i):

A. Examples of contract terms sufficient to determine future cash flows from market risk sensitive instruments include, but are not limited to:

i. Debt instruments—principal amounts and weighted average effective interest rates;

ii. Forwards and futures—contract amounts and weighted average settlement prices;

iii. Options—contract amounts and weighted average strike prices;

iv. Swaps—notional amounts, weighted average pay rates or prices, and weighted average receive rates or prices; and

v. Complex instruments—likely to be a combination of the contract terms presented in 2.A.i. through iv. of this Instruction;

B. When grouping based on common characteristics, instruments should be categorized, at a minimum, by the following characteristics, when material:

i. Fixed rate or variable rate assets or liabilities;

ii. Long or short forwards and futures;

iii. Written or purchased put or call options with similar strike prices;

iv. Receive fixed and pay variable swaps, receive variable and pay fixed swaps, and receive variable and pay variable swaps;

v. The currency in which the instruments' cash flows are denominated;

vi. Financial instruments for which foreign currency transaction gains and losses are reported in the same manner as translation adjustments under generally accepted accounting principles (see, *e.g.,* FAS 52 paragraph 20 (December 1981)); and

vii. Derivatives used to manage risks inherent in anticipated transactions;

C. Registrants may aggregate information regarding functional currencies that are economically related, managed together for internal risk management purposes, and have statistical correlations of greater than 75% over each of the past three years;

D. Market risk sensitive instruments that are exposed to rate or price changes in more than one market risk exposure category should be presented within the tabular information for each of the risk exposure categories to which those instruments are exposed;

E. If a currency swap (see, *e.g.,* FAS 52 Appendix E for a definition of currency swap) eliminates all foreign currency exposures in the cash flows of a foreign currency denominated debt instrument, neither the currency swap nor the foreign currency denominated debt instrument are required to be disclosed in the foreign currency risk exposure category. However, both the currency swap and the foreign currency denominated debt instrument should be disclosed in the interest rate risk exposure category; and

F. The contents of the table and related assumptions that should be described include, but are not limited to:

i. The different amounts reported in the table for various categories of the market risk sensitive instruments (*e.g.,* principal amounts for debt, notional amounts for swaps, and contract amounts for options and futures);

ii. The different types of reported market rates or prices (*e.g.,* contractual rates or prices, spot rates or prices, forward rates or prices); and

iii. Key prepayment or reinvestment assumptions relating to the timing of reported amounts.

3. Under paragraph 305(a)(1)(ii):

A. Registrants should select hypothetical changes in market rates or prices that are expected to reflect reasonably possible near-term changes in those rates and prices. In this regard, absent economic justification for the selection of a different amount, registrants should use changes that are not less than 10 percent of end of period market rates or prices;

B. For purposes of instruction 3.A. of the Instructions to Paragraph 305(a), the term *reasonably possible* has the same meaning as defined by generally accepted accounting principles (see, *e.g.,* FASB, *Statement of Financial Accounting Standards No. 5,* ''*Accounting for Contingencies,*'' (''FAS 5'') paragraph 3 (March 1975));

C. For purposes of instruction 3.A. of the Instructions to Paragraph 305(a), the term *near term* means a period of time going forward up to one year from the date of the financial statements (see generally AICPA, Statement of Position 94–6, ''*Disclosure of Certain Significant Risks and Uncertainties,*'' (''SOP 94–6'') at paragraph 7 (December 30, 1994));

D. Market risk sensitive instruments that are exposed to rate or price changes in more than one market risk exposure category should be included in the sensitivity analysis disclosures for each market risk category to which those instruments are exposed;

E. Registrants with multiple foreign currency exchange rate exposures should prepare foreign currency sensitivity analysis disclosures that measure the aggregate sensitivity to changes in all foreign currency exchange rate exposures, including the effects of changes in both transactional currency/functional currency exchange rate exposures and functional currency/reporting currency exchange rate exposures. For example, assume a French division of a registrant presenting its financial statements in U.S. dollars ($US) invests in a deutschmark(DM)-denominated debt security. In these circumstances, the $US is the reporting currency and the DM is the transactional currency. In addition, assume this division determines that the French franc (FF) is its functional currency according to FAS 52. In preparing the foreign currency sensitivity analysis disclosures, this registrant should report the aggregate potential loss from hypothetical changes in both the DM/FF exchange rate exposure and the FF/$US exchange rate exposure; and

F. Model, assumptions, and parameters that should be described include, but are not limited to, how *loss* is defined by the model (*e.g.,* loss in earnings, fair values, or cash flows), a general description of the modeling technique (*e.g.,* duration modeling, modeling that measures the change in net present values arising from selected hypothetical changes in market rates or prices, and a description as to how optionality is addressed by the model), the types of instruments covered by the model (*e.g.,* derivative financial instruments, other financial instruments, derivative commodity instruments, and

whether other instruments are included voluntarily, such as certain commodity instruments and positions, cash flows from anticipated transactions, and certain financial instruments excluded under instruction 3.C.ii. of the General Instructions to Paragraphs 305(a) and 305(b)), and other relevant information about the model's assumptions and parameters, (*e.g.*, the magnitude and timing of selected hypothetical changes in market rates or prices used, the method by which discount rates are determined, and key prepayment or reinvestment assumptions).

4. Under paragraph 305(a)(1)(iii):

A. The confidence intervals selected should reflect reasonably possible near-term changes in market rates and prices. In this regard, absent economic justification for the selection of different confidence intervals, registrants should use intervals that are 95 percent or higher;

B. For purposes of instruction 4.A. of the Instructions to Paragraph 305(a), the term *reasonably possible* has the same meaning as defined by generally accepted accounting principles (see, *e.g.*, FAS 5, paragraph 3 (March 1975));

C. For purposes of instruction 4.A. of the Instructions to Paragraphs 305(a), the term *near term* means a period of time going forward up to one year from the date of the financial statements (see generally SOP 94–6, at paragraph 7 (December 30, 1994));

D. Registrants with multiple foreign currency exchange rate exposures should prepare foreign currency value at risk analysis disclosures that measure the aggregate sensitivity to changes in all foreign currency exchange rate exposures, including the aggregate effects of changes in both transactional currency/functional currency exchange rate exposures and functional currency/reporting currency exchange rate exposures. For example, assume a French division of a registrant presenting its financial statements in U.S. dollars ($US) invests in a deutschmark(DM)-denominated debt security. In these circumstances, the $US is the reporting currency and the DM is the transactional currency. In addition, assume this division determines that the French franc (FF) is its functional currency according to FAS 52. In preparing the foreign currency value at risk disclosures, this registrant should report the aggregate potential loss from hypothetical changes in both the DM/FF exchange rate exposure and the FF/$US exchange rate exposure; and

E. Model, assumptions, and parameters that should be described include, but are not limited to, how *loss* is defined by the model (*e.g.*, loss in earnings, fair values, or cash flows), the type of model used (*e.g.*, variance/covariance, historical simulation, or Monte Carlo simulation and a description as to how optionality is addressed by the model), the types of instruments covered by the model (*e.g.*, derivative financial instruments, other financial instruments, derivative commodity instruments, and whether other instruments are included voluntarily, such as certain commodity instruments and positions, cash flows from anticipated transactions, and certain financial instruments excluded under instruction 3.C.ii. of the General Instructions to Paragraphs 305(a) and 305(b)), and other relevant information about the model's assumptions and parameters, (*e.g.*, holding periods, confidence intervals, and, when appropriate, the methods used for aggregating value at risk amounts across market risk exposure categories, such as by assuming perfect positive correlation, independence, or actual observed correlation).

5. Under paragraph 305(a)(2), limitations that should be considered include, but are not limited to:

A. The exclusion of certain market risk sensitive instruments, positions, and transactions from the disclosures required under paragraph 305(a)(1) (*e.g.*, derivative commodity instruments not permitted by contract or business custom to be settled in cash or with another financial instrument, commodity positions, cash flows from anticipated transactions, and certain financial instruments excluded under instruction 3.C.ii. of the General Instructions to Paragraphs 305(a) and 305(b)). Failure to include such instruments, positions, and transactions in preparing the disclosures under paragraph 305(a)(1) may be a limitation because the resulting disclosures may not fully reflect the net market risk of a registrant; and

B. The ability of disclosures required under paragraph 305(a)(1) to reflect fully the market risk that may be inherent in instruments with leverage, option, or prepayment features (*e.g.*, options, including written options, structured notes, collateralized mortgage obligations, leveraged swaps, and options embedded in swaps).

(b) *Qualitative information about market risk.* (1) To the extent material, describe:

(i) The registrant's primary market risk exposures;

(ii) How those exposures are managed. Such descriptions shall include, but not be limited to, a discussion of the objectives, general strategies, and instruments, if any, used to manage those exposures; and

(iii) Changes in either the registrant's primary market risk exposures or how those exposures are managed, when compared to what was in effect during the most recently completed fiscal year and what is known or expected to be in effect in future reporting periods.

(2) Qualitative information about market risk shall be presented separately for market risk sensitive instruments entered into for trading purposes and those entered into for purposes other than trading.

Instructions to Paragraph 305(b): 1. For purposes of disclosure under paragraph 305(b), *primary market risk exposures* means:

A. The following categories of market risk: interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market rate or price risks (e.g., equity price risk); and

B. Within each of these categories, the particular markets that present the primary risk of loss to the registrant. For example, if a registrant has a material exposure to foreign currency exchange rate risk and, within this category of market risk, is most vulnerable to changes in dollar/yen, dollar/pound, and dollar/peso exchange rates, the registrant should disclose those exposures. Similarly, if a registrant has a material exposure to interest rate risk and, within this category of market risk, is most vulnerable to changes in short-term U.S. prime interest rates, it should disclose the existence of that exposure.

2. For purposes of disclosure under paragraph 305(b), registrants should describe primary market risk exposures that exist as of the end of the latest fiscal year, and how those exposures are managed.

General Instructions to Paragraphs 305(a) and 305(b): 1. The disclosures called for by paragraphs 305(a) and 305(b) are intended to clarify the registrant's exposures to market risk associated with activities in derivative financial instruments, other financial instruments, and derivative commodity instruments.

2. In preparing the disclosures under paragraphs 305(a) and 305(b), registrants are required to include derivative financial instruments, other financial instruments, and derivative commodity instruments.

3. For purposes of paragraphs 305(a) and 305(b), derivative financial instruments, other financial instruments, and derivative commodity instruments (collectively referred to as ''market risk sensitive instruments'') are defined as follows:

A. *Derivative financial instruments* has the same meaning as defined by generally accepted accounting principles (see, *e.g.*, FASB, *Statement of Financial Accounting Standards No. 119, ''Disclosure about Derivative Financial Instruments and Fair Value of Financial Instruments,''* (''FAS 119'') paragraphs 5–7 (October 1994)), and includes futures, forwards, swaps, options, and other financial instruments with similar characteristics;

B. *Other financial instruments* means all financial instruments as defined by generally accepted accounting principles for which fair value disclosures are required (see, *e.g.*, FASB, *Statement of Financial Accounting Standards No. 107, ''Disclosures about Fair Value of Financial Instruments,''* (''FAS 107'') paragraphs 3 and 8 (December 1991)), except for derivative financial instruments, as defined above;

C.i. Other financial instruments include, but are not limited to, trade accounts receivable, investments, loans, structured notes, mortgage-backed securities, trade accounts payable, indexed debt instruments, interest-only and principal-only obligations, deposits, and other debt obligations;

ii. Other financial instruments exclude employers' and plans' obligations for pension and other post-retirement benefits, substantively extinguished debt, insurance contracts, lease contracts, warranty obligations and rights, unconditional purchase obligations, investments accounted for under the equity method, minority interests in consolidated enterprises, and equity instruments issued by the registrant and classified in stockholders' equity in the statement of financial position (see, e.g., FAS 107, paragraph 8 (December 1991)). For purposes of this item, trade accounts receivable and trade accounts payable need not be considered other financial instruments when their carrying amounts approximate fair value; and

D. *Derivative commodity instruments* include, to the extent such instruments are not derivative financial instruments, commodity futures, commodity forwards, commodity swaps, commodity options, and other commodity instruments with similar characteristics that are permitted by contract or business custom to be settled in cash or with another financial instrument. For purposes of this paragraph, settlement in cash includes settlement in cash of the net change in value of the derivative commodity instrument (*e.g.*, net cash settlement based on changes in the price of the underlying commodity).

4.A. In addition to providing required disclosures for the market risk sensitive instruments defined in instruction 2. of the General Instructions to Paragraphs 305(a) and 305(b), registrants are encouraged to include other market risk sensitive instruments, positions, and transactions within the disclosures required under paragraphs 305(a) and 305(b). Such instruments, positions, and transactions might include commodity positions, derivative commodity instruments that are not permitted by contract or business custom to be settled in cash or with another financial instrument, cash flows from anticipated transactions, and certain financial instruments excluded under instruction 3.C.ii. of the General Instructions to Paragraphs 305(a) and 305(b).

B. Registrants that voluntarily include other market risk sensitive instruments, positions and transactions within their quantitative disclosures about market risk under the sensitivity analysis or value at risk disclosure alternatives are not required to provide separate market risk disclosures for any voluntarily selected instruments, positions, or transactions. Instead, registrants selecting the sensitivity analysis and value at risk disclosure alternatives are permitted to present comprehensive market risk disclosures, which reflect the combined market risk exposures inherent in both the required and any voluntarily selected instruments, position, or transactions. Registrants that choose the tabular presentation disclosure alternative should present voluntarily selected instruments, positions, or transactions in a manner consistent with the requirements in Item 305(a) for market risk sensitive instruments.

C. If a registrant elects to include voluntarily a particular type of instrument, position, or transaction in their quantitative disclosures about market risk, that registrant should include all, rather than some, of those instruments, positions, or transactions within those disclosures. For example, if a registrant holds in inventory a particular type of commodity position and elects to include that commodity position within their market risk disclosures, the registrant should include the entire commodity position, rather than only a portion thereof, in their quantitative disclosures about market risk.

5.A. Under paragraphs 305(a) and 305(b), a materiality assessment should be made for each market risk exposure category within the trading and other than trading portfolios.

B. For purposes of making the materiality assessment under instruction 5.A. of the General Instructions to Paragraphs 305(a) and 305(b), registrants should evaluate both:

i. The materiality of the fair values of derivative financial instruments, other financial instruments, and derivative commodity instruments outstanding as of the end of the latest fiscal year; and

ii. The materiality of potential, near-term losses in future earnings, fair values, and/or cash flows from reasonably possible near-term changes in market rates or prices.

iii. If either paragraphs B.i. or B.ii. in this instruction of the General Instructions to Paragraphs 305(a) and 305(b) are material, the registrant should disclose quantitative and qualitative information about market risk, if such market risk for the particular market risk exposure category is material.

C. For purposes of instruction 5.B.i. of the General Instructions to Paragraphs 305(a) and 305(b), registrants generally should not net fair values, except to the extent allowed under generally accepted accounting principles (see, *e.g.*, *FASB Interpretation No. 39, ''Offsetting of Amounts Related to Certain Contracts''* (March 1992)). For example, under this instruction, the fair value of assets generally should not be netted with the fair value of liabilities.

D. For purposes of instruction 5.B.ii. of the General Instructions to Paragraphs 305(a) and 305(b), registrants should consider, among other things, the magnitude of:

i. Past market movements;

ii. Reasonably possible, near-term market movements; and

iii. Potential losses that may arise from leverage, option, and multiplier features.

E. For purposes of instructions 5.B.ii and 5.D.ii of the General Instructions to Paragraphs 305(a) and 305(b), the term *near term* means a period of time going forward up to one year from the date of the financial statements (see generally SOP 94–6, at paragraph 7 (December 30, 1994)).

F. For the purpose of instructions 5.B.ii. and 5.D.ii. of the General Instructions to Paragraphs 305(a) and 305(b), the term *reasonably possible* has the same meaning as defined by generally accepted accounting principles (see, *e.g.*, FAS 5, paragraph 3 (March 1975)).

6. For purposes of paragraphs 305(a) and 305(b), registrants should present the information outside of, and not incorporate the information into, the financial statements (including the footnotes to the financial statements). In addition, registrants are encouraged to provide the required information in one location. However, alternative presentation, such as inclusion of all or part of the information in Management's Discussion and Analysis, may be used at the discretion of the registrant. If information is disclosed in more than one location, registrants should provide cross-references to the locations of the related disclosures.

7. For purposes of the instructions to paragraphs 305(a) and 305(b), *trading purposes* has the same meaning as defined by generally accepted accounting principles (see, *e.g.*, FAS 119, paragraph 9a (October 1994)). In addition, *anticipated transactions* means transactions (other than transactions involving existing assets or liabilities or transactions necessitated by existing firm commitments) an enterprise expects, but is not obligated, to carry out in the normal course of business (see, *e.g.*, FASB, *Statement of Financial Accounting Standards No. 80, ''Accounting for Futures Contracts,''* paragraph 9, (August 1984)).

(c) *Interim periods.* If interim period financial statements are included or are required to be included by Article 3 of Regulation S–X (17 CFR 210), discussion and analysis shall be provided so as to enable the reader to assess the sources and effects of material changes in information that would be provided

under Item 305 of Regulation S–K from the end of the preceding fiscal year to the date of the most recent interim balance sheet.

Instructions to Paragraph 305(c): 1. Information required under paragraph (c) of this Item 305 is not required until after the first fiscal year end in which this Item 305 is applicable.

(d) *Safe Harbor.* (1) The safe harbor provided in Section 27A of the Securities Act of 1933 (15 U.S.C. 77z–2) and Section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u–5) (''statutory safe harbors'') shall apply, with respect to all types of issuers and transactions, to information provided pursuant to paragraphs (a), (b), and (c) of this Item 305, provided that the disclosure is made by: an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

(2) For purposes of paragraph (d) of this Item 305 only:

(i) All information required by paragraphs (a), (b)(1)(i), (b)(1)(iii), and (c) of this Item 305 is considered *forward looking statements* for purposes of the statutory safe harbors, except for historical facts such as the terms of particular contracts and the number of market risk sensitive instruments held during or at the end of the reporting period; and

(ii) With respect to paragraph (a) of this Item 305, the *meaningful cautionary statements* prong of the statutory safe harbors will be satisfied if a registrant satisfies all requirements of that same paragraph (a) of this Item 305.

(e) *Small business issuers.* Small business issuers, as defined in § 230.405 of this chapter and § 230.12b–2 of this chapter, need not provide the information required by this Item 305, whether or not they file on forms specially designated as small business issuer forms.

General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e): 1. Bank registrants, thrift registrants, and non-bank and non-thrift registrants with market capitalizations on January 28, 1997 in excess of $2.5 billion should provide Item 305 disclosures in filings with the Commission that include annual financial statements for fiscal years ending after June 15, 1997. Non-bank and non-thrift registrants with market capitalizations on January 28, 1997 of $2.5 billion or less should provide Item 305 disclosures in filings with the Commission that include financial statements for fiscal years ending after June 15, 1998.

2.A. For purposes of instruction 1. of the General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e), *bank registrants and thrift registrants* include any registrant which has control over a depository institution.

B. For purposes of instruction 2.A. of the General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e), a registrant has control over a depository institution if:

i. The registrant directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25% or more of any class of voting securities of the depository institution;

ii. The registrant controls in any manner the election of a majority of the directors or trustees of the depository institution; or

iii. The Federal Reserve Board or Office of Thrift Supervision determines, after notice and opportunity for hearing, that the registrant directly or indirectly exercises a controlling influence over the management or policies of the depository institution.

C. For purposes of instruction 2.B. of the General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e), a depository institution means any of the following:

i. An insured depository institution as defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C.A. Sec. 1813 (c));

ii. An institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Somoa, or the Virgin Islands, which both accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others and is engaged in the business of making commercial loans.

D. For purposes of instruction 1. of the General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d) and 305(e), *market capitalization* is the aggregate market value of common equity as set forth in General Instruction I.B.1. of Form S–3; provided however, that common equity held by affiliates is included in the calculation of market capitalization; and provided further that instead of using the 60 day period prior to filing referenced in General Instruction I.B.1. of Form S–3, the measurement date is January 28, 1997.

APPENDIX TO ITEM 305—TABULAR DISCLOSURES

The tables set forth below are illustrative of the format that might be used when a registrant elects to present the information required by paragraph (a)(1)(i)(A) of Item 305 regarding terms and information about derivative financial instruments, other financial instruments, and derivative commodity instruments. These examples are for illustrative purposes only. Registrants are not required to display the information in the specific format illustrated below. Alternative methods of display are permissible as long as the disclosure requirements of the section are satisfied. Furthermore, these examples were designed primarily to illustrate possible formats for presentation of the information required by the disclosure item and do not purport to illustrate the broad range of derivative financial instruments, other financial instruments, and derivative commodity instruments utilized by registrants.

INTEREST RATE SENSITIVITY

The table below provides information about the Company's derivative financial instruments and other financial instruments that are sensitive to changes in interest rates, including interest rate swaps and debt obligations. For debt obligations, the table presents principal cash flows and related weighted average interest rates by expected maturity dates. For interest rate swaps, the table presents notional amounts and weighted average interest rates by expected (contractual) maturity dates. Notional amounts are used to calculate the contractual payments to be exchanged under the contract. Weighted average variable rates are based on implied forward rates in the yield curve at the reporting date. The information is presented in U.S. dollar equivalents, which is the Company's reporting currency. The instrument's actual cash flows are denominated in both U.S. dollars ($US) and German deutschmarks (DM), as indicated in parentheses.

December 31, 19X1

	Expected maturity date							
	19X2	19X3	19X4	19X5	19X6	Thereafter	Total	Fair value
Liabilities	(US$ Equivalent in millions)							
Long-term Debt:								
Fixed Rate ($US)	$XXX	$XXX	$XXX	$XXX	$XXX	$XXX	$XXX	$XXX
Average interest rate	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	
Fixed Rate (DM)	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX
Average interest rate	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	
Variable Rate ($US)	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX
Average interest rate	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	
Interest Rate Derivatives	(In millions)							
Interest Rate Swaps:								
Variable to Fixed ($US)	$XXX	$XXX	$XXX	$XXX	$XXX	$XXX	$XXX	$XXX
Average pay rate	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	
Average receive rate	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	
Fixed to Variable ($US)	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX
Average pay rate	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	
Average receive rate	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	

EXCHANGE RATE SENSITIVITY

The table below provides information about the Company's derivative financial instruments, other financial instruments, and firmly committed sales transactions by functional currency and presents such information in U.S. dollar equivalents.[1] The table summarizes information on instruments and transactions that are sensitive to foreign currency exchange rates, including foreign currency forward exchange agreements, deutschmark (DM)-denominated debt obligations, and firmly committed DM sales transactions. For debt obligations, the table presents principal cash flows and related weighted average interest rates by expected maturity dates. For firmly committed DM-sales transactions, sales amounts are presented by the expected transaction date,

[1] The information is presented in U.S. dollars because that is the registrant's reporting currency.

which are not expected to exceed two years. For foreign currency forward exchange agreements, the table presents the notional amounts and weighted average exchange rates by expected (contractual) maturity dates. These notional amounts generally are used to calculate the contractual payments to be exchanged under the contract.

December 31, 19X1

	Expected maturity date							
	19X2	19X3	19X4	19X5	19X6	There-after	Total	Fair value
On-Balance Sheet Financial Instruments	(US$ Equivalent in millions)							
Anticipated Transactions and Related Derivatives [3]								
$US Functional Currency [2]:								
Liabilities								
Long-Term Debt:								
Fixed Rate (DM)	$XXX	$XXX	$XXX	$XXX	$XXX	$XXX	$XXX	$XXX
Average interest rate	X.X	X.X	X.X	X.X	X.X	X.X	X.X	.....
Anticipated Transcations and Related Derivatives[3]	Expected maturity or transaction date (US$ Equivalent in millions)							
$US Functional Currency:								
Firmly committed Sales Contracts (DM)	$XXX	$XXX	.....	.....	.....	.....	$XXX	$XXX
Forward Exchange Agreements (Receive $US/Pay DM):.								
Contract Amount	XXX	XXX	.....	.....	.....	.....	XXX	XXX
Average Contractual Exchange Rate	X.X	X.X	.....	.....	.....	.....	X.X	.....

[2] Similar tabular information would be provided for other functional currencies.
[3] Pursuant to General Instruction 4. to Items 305(a) and 305(b) of Regulation S–K, registrants may include cash flows from anticipated transactions and operating cash flows resulting from non-financial and non-commodity instruments.

COMMODITY PRICE SENSITIVITY

The table below provides information about the Company's corn inventory and futures contracts that are sensitive to changes in commodity prices, specifically corn prices. For inventory, the table presents the carrying amount and fair value at December 31, 19x1. For the futures contracts the table presents the notional amounts in bushels, the weighted average contract prices, and the total dollar contract amount by expected maturity dates, the latest of which occurs one year from the reporting date. Contract amounts are used to calculate the contractual payments and quantity of corn to be exchanged under the futures contracts.

December 31, 19X1

	Carrying amount	Fair value
	(In millions)	
On Balance Sheet Commodity Position and Related Derivatives		
Corn Inventory [4]	$XXX	$XXX
	Expected maturity 1992	Fair value
Related Derivatives		
Futures Contracts (Short):		
Contract Volumes (100,000 bushels)	XXX	.....
Weighted Average Price (Per 100,000 bushels)	$X.XX	.....

December 31, 19X1

	Carrying amount	Fair value
Contract Amount ($US in millions)	$XXX	$XXX

[4] Pursuant to General Instruction 4. to Items 305(a) and 305(b) of Regulation S–K, registrants may include information on commodity positions, such as corn inventory.

[62 FR 6064, Feb. 10, 1997]

§ 229.306 (Item 306) Audit committee report.

(a) The audit committee must state whether:

(1) The audit committee has reviewed and discussed the audited financial statements with management;

(2) The audit committee has discussed with the independent auditors the matters required to be discussed by SAS 61 (Codification of Statements on Auditing Standards, AU § 380), as may be modified or supplemented;

(3) The audit committee has received the written disclosures and the letter from the independent accountants required by Independence Standards Board Standard No. 1 (Independence Standards Board Standard No. 1, *Independence Discussions with Audit Committees*), as may be modified or supplemented, and has discussed with the independent accountant the independent accountant's independence; and

(4) Based on the review and discussions referred to in paragraphs (a)(1) through (a)(3) of this Item, the audit committee recommended to the Board of Directors that the audited financial statements be included in the company's Annual Report on Form 10–K (17 CFR 249.310) (or, for closed-end investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), the annual report to shareholders required by Section 30(e) of the Investment Company Act of 1940 (15 U.S.C. 80a–29(e)) and Rule 30d–1 (17 CFR 270.30d–1) thereunder) for the last fiscal year for filing with the Commission.

(b) The name of each member of the company's audit committee (or, in the absence of an audit committee, the board committee performing equivalent functions or the entire board of directors) must appear below the disclosure required by this Item.

(c) The information required by paragraphs (a) and (b) of this Item shall not be deemed to be ''soliciting material,'' or to be ''filed'' with the Commission or subject to Regulation 14A or 14C (17 CFR 240.14a–1 *et seq.* or 240.14c–1 *et seq.*), other than as provided in this Item, or to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the company specifically requests that the information be treated as soliciting material or specifically incorporates it by reference into a document filed under the Securities Act or the Exchange Act.

(d) The information required by paragraphs (a) and (b) of this Item need not be provided in any filings other than a company proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the company specifically incorporates it by reference.

[64 FR 73402, Dec. 30, 1999]

§ 229.307 (Item 307) Controls and procedures.

(a) *Evaluation of disclosure controls and procedures.* Disclose the conclusions of the registrant's principal executive officer or officers and principal financial officer or officers, or persons performing similar functions, about the effectiveness of the registrant's disclosure controls and procedures (as defined in §§ 240.13a–14(c) and 240.15d–14(c) of this chapter) based on their evaluation of these controls and procedures as of a date within 90 days of the filing date of the quarterly or annual report that includes the disclosure required by this paragraph.

(b) *Changes in internal controls.* Disclose whether or not there were significant changes in the registrant's internal controls or in other factors that could significantly affect these controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

(c) *Asset-Backed Issuers.* A registrant that is an Asset-Backed Issuer (as defined in § 240.13a– 14(g) and § 240.15d–14(g) of this chapter) is not required to disclose the information required by this Item.

[67 FR 57287, Sept. 9, 2002]

Subpart 229.400—Management and Certain Security Holders

§ 229.401 (Item 401) Directors, executive officers, promoters and control persons.

(a) *Identification of directors.* List the names and ages of all directors of the registrant and all persons nominated or chosen to become directors; indicate all positions and offices with the registrant held by each such person; state his term of office as director and any period(s) during which he has served as such; describe briefly any arrangement or understanding between him and any other person(s) (naming such person(s)) pursuant to which he was or is to be selected as a director or nominee.

Instructions to Paragraph (a) of Item 401: 1. Do not include arrangements or understandings with directors or officers of the registrant acting solely in their capacities as such.

2. No nominee or person chosen to become a director who has not consented to act as such shall be named in response to this Item. In this regard, with respect to proxy statements, see Rule 14a–4(d) under the Exchange Act (§ 240.14a–4(d) of this chapter).

3. If the information called for by this paragraph (a) is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

4. With regard to proxy statements in connection with action to be taken concerning the election of directors, if fewer nominees are named than the number fixed by or pursuant to the governing instruments, state the reasons for this procedure and that the proxies cannot be voted for a greater number of persons than the number of nominees named.

5. With regard to proxy statements in connection with action to be taken concerning the election of directors, if the solicitation is made by persons other than management, information shall be given as to nominees of the persons making the solicitation. In all other instances, information shall be given as to directors and persons nominated for election or chosen by management to become directors.

(b) *Identification of executive officers.* List the names and ages of all executive officers of the registrant and all persons chosen to become executive officers; indicate all positions and offices with the registrant held by each such person; state his term of office as officer and the period during which he has served as such and describe briefly any arrangement or understanding between him and any other person(s) (naming such person) pursuant to which he was or is to be selected as an officer.

Instructions to Paragraph (b) of Item 401: 1. Do not include arrangements or understandings with directors or officers of the registrant acting solely in their capacities as such.

2. No person chosen to become an executive officer who has not consented to act as such shall be named in response to this Item.

3. The information regarding executive officers called for by this Item need not be furnished in proxy or information statements prepared in accordance with Schedule 14A under the Exchange Act (§ 240.14a–101 of this chapter) by those registrants relying on General Instruction G of Form 10–K and Form 10–KSB under the Exchange Act (§ 249.310 of this chapter), *Provided,* That such information is furnished in a separate item captioned ''Executive officers of the registrant'' and included in Part I of the registrant's annual report on Form 10–K and Form 10–KSB.

(c) *Identification of certain significant employees.* Where the registrant employs persons such as production managers, sales managers, or research scientists who are not executive officers but who make or are expected to make significant contributions to the business of the registrant, such persons shall be identified and their background disclosed to the same extent as in the case of executive officers. Such disclosure need not be made if the registrant was subject to section 13(a) or 15(d) of the Exchange Act or was exempt from section 13(a) by section 12(g)(2)(G) of such Act immediately

prior to the filing of the registration statement, report, or statement to which this Item is applicable.

(d) *Family relationships.* State the nature of any family relationship between any director, executive officer, or person nominated or chosen by the registrant to become a director or executive officer.

Instruction to Paragraph 401(d): The term ''family relationship'' means any relationship by blood, marriage, or adoption, not more remote than first cousin.

(e) *Business experience*—(1) *Background.* Briefly describe the business experience during the past five years of each director, executive officer, person nominated or chosen to become a director or executive officer, and each person named in answer to paragraph (c) of Item 401, including: Each person's principal occupations and employment during the past five years; the name and principal business of any corporation or other organization in which such occupations and employment were carried on; and whether such corporation or organization is a parent, subsidiary or other affiliate of the registrant. When an executive officer or person named in response to paragraph (c) of Item 401 has been employed by the registrant or a subsidiary of the registrant for less than five years, a brief explanation shall be included as to the nature of the responsibility undertaken by the individual in prior positions to provide adequate disclosure of his prior business experience. What is required is information relating to the level of his professional competence, which may include, depending upon the circumstances, such specific information as the size of the operation supervised.

(2) *Directorships.* Indicate any other directorships held by each director or person nominated or chosen to become a director in any company with a class of securities registered pursuant to section 12 of the Exchange Act or subject to the requirements of section 15(d) of such Act or any company registered as an investment company under the Investment Company Act of 1940, 15 U.S.C. 80a–1, *et seq.*, as amended, naming such company.

Instruction to Paragraph (e) of Item 401: For the purposes of paragraph (e)(2), where the other directorships of each director or person nominated or chosen to become a director include directorships of two or more registered investment companies that are part of a ''fund complex'' as that term is defined in Item 22(a) of Schedule 14A under the Exchange Act (§ 240.14a–101 of this chapter), the registrant may, rather than listing each such investment company, identify the fund complex and provide the number of investment company directorships held by the director or nominee in such fund complex.

(f) *Involvement in certain legal proceedings.* Describe any of the following events that occurred during the past five years and that are material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the registrant:

(1) A petition under the Federal bankruptcy laws or any state insolvency law was filed by or against, or a receiver, fiscal agent or similar officer was appointed by a court for the business or property of such person, or any partnership in which he was a general partner at or within two years before the time of such filing, or any corporation or business association of which he was an executive officer at or within two years before the time of such filing;

(2) Such person was convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses);

(3) Such person was the subject of any order, judgment, or decree, not subsequently reversed, suspended or vacated, of any court of competent jurisdiction, permanently or temporarily enjoining him from, or otherwise limiting, the following activities:

(i) Acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the Commodity Futures Trading Commission, or an associated person of any of the foregoing, or as an investment adviser, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of any investment company, bank, savings and loan association or

insurance company, or engaging in or continuing any conduct or practice in connection with such activity;

(ii) Engaging in any type of business practice; or

(iii) Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of Federal or State securities laws or Federal commodities laws;

(4) Such person was the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, of any Federal or State authority barring, suspending or otherwise limiting for more than 60 days the right of such person to engage in any activity described in paragraph (f)(3)(i) of this section, or to be associated with persons engaged in any such activity; or

(5) Such person was found by a court of competent jurisdiction in a civil action or by the Commission to have violated any Federal or State securities law, and the judgment in such civil action or finding by the Commission has not been subsequently reversed, suspended, or vacated.

(6) Such person was found by a court of competent jurisdiction in a civil action or by the Commodity Futures Trading Commission to have violated any Federal commodities law, and the judgment in such civil action or finding by the Commodity Futures Trading Commission has not been subsequently reversed, suspended or vacated.

Instructions to Paragraph (f) of Item 401: 1. For purposes of computing the five year period referred to in this paragraph, the date of a reportable event shall be deemed the date on which the final order, judgment or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees have lapsed. With respect to bankruptcy petitions, the computation date shall be the date of filing for uncontested petitions or the date upon which approval of a contested petition became final.

2. If any event specified in this paragraph (f) has occurred and information in regard thereto is omitted on the grounds that it is not material, the registrant may furnish to the Commission, at time of filing (or at the time preliminary materials are filed, or ten days before definitive materials are filed in preliminary filing is not required, pursuant to Rule 14a–6 or 14c–5 under the Exchange Act (§§240.14a–6 and 240–14c–5 of this chapter)), as supplemental information and not as part of the registration statement, report, or proxy or information statement, materials to which the omission relates, a description of the event and a statement of the reasons for the omission of information in regard thereto.

3. The registrant is permitted to explain any mitigating circumstances associated with events reported pursuant to this paragraph.

4. If the information called for by this paragraph (f) is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

(g) *Promoters and control persons.* (1) Registrants, which have not been subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, and which were organized within the last five years, shall describe with respect to any promoter, any of the events enumerated in paragraphs (f)(1) through (f)(6) of this section that occurred during the past five years and that are material to a voting or investment decision.

(2) Registrants, which have not been subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, shall describe with respect to any control person, any of the events enumerated in paragraphs (f)(1) through (f)(6) of this section that occurred during the past five years and that are material to a voting or investment decision.

Instructions to Paragraph (g) of Item 401: 1. Instructions 1. through 3. to paragraph (f) shall apply to this paragraph (g).

2. Paragraph (g) shall not apply to any subsidiary of a registrant which has been reporting pursuant to Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report or statement.

(h) *Audit committee financial expert.* (1)(i) Disclose that the registrant's board of directors has determined that the registrant either:

(A) Has at least one audit committee financial expert serving on its audit committee; or

(B) Does not have an audit committee financial expert serving on its audit committee.

(ii) If the registrant provides the disclosure required by paragraph (h)(1)(i)(A) of this Item, it must disclose the name of the audit committee financial expert and whether that person is *independent,* as that term is used in Item 7(d)(3)(iv) of Schedule 14A (240.14a–101 of this chapter) under the Exchange Act.

(iii) If the registrant provides the disclosure required by paragraph (h)(1)(i)(B) of this Item, it must explain why it does not have an audit committee financial expert.

Instruction to paragraph (h)(1) of Item 401. If the registrant's board of directors has determined that the registrant has more than one audit committee financial expert serving on its audit committee, the registrant may, but is not required to, disclose the names of those additional persons. A registrant choosing to identify such persons must indicate whether they are independent pursuant to Item 401(h)(1)(ii).

(2) For purposes of this Item, an *audit committee financial expert* means a person who has the following attributes:

(i) An understanding of generally accepted accounting principles and financial statements;

(ii) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(iii) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant's financial statements, or experience actively supervising one or more persons engaged in such activities;

(iv) An understanding of internal controls and procedures for financial reporting; and

(v) An understanding of audit committee functions.

(3) A person shall have acquired such attributes through:

(i) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(ii) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(iii) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(iv) Other relevant experience.

(4) *Safe Harbor.* (i) A person who is determined to be an audit committee financial expert will not be deemed an *expert* for any purpose, including without limitation for purposes of section 11 of the Securities Act of 1933 (15 U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 401.

(ii) The designation or identification of a person as an audit committee financial expert pursuant to this Item 401 does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(iii) The designation or identification of a person as an audit committee financial expert pursuant to this Item 401 does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.

Instructions to Item 401(h). 1. The disclosure under Item 401(h) is required only in a registrant's annual report. The registrant need not provide the disclosure required by this Item 401(h) in a proxy or information statement unless that registrant is electing to incorporate this information by reference from the proxy or information statement into its annual report pursuant to general instruction G(3) to Form 10–K.

2. If a person qualifies as an audit committee financial expert by means of having held a position described in paragraph (h)(3)(iv) of this Item, the registrant shall provide a brief listing of that person's relevant experience. Such disclosure may be made by reference to disclosures required

under paragraph (e) of this Item 401 (§ 229.401(e) or this chapter).

3. In the case of a foreign private issuer with a two-tier board of directors, for purposes of this Item 401(h), the term *board of directors* means the supervisory or non-management board. Also, in the case of a foreign private issuer, the term *generally accepted accounting principles* in paragraph (h)(2)(i) of this Item means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the Commission.

4. A registrant that is an Asset-Backed Issuer (as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter) is not required to disclose the information required by this Item 401(h).

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 55665, Dec. 13, 1982; 48 FR 19874, May 3, 1983; 49 FR 32763, Aug. 16, 1984; 52 FR 48982, Dec. 29, 1987; 59 FR 52695, Oct. 19, 1994; 68 FR 5127, Jan. 31, 2003; 68 FR 15354, Mar. 31, 2003]

§ 229.402 (Item 402) Executive compensation.

(a) *General*—(1) *Treatment of specific types of issuers*—(i) *Small business issuers.* A registrant that qualifies as ''small business issuer,'' as defined by Item 10(a)(1) of Regulation S–B [17 CFR 228.10(a)(1)], will be deemed to comply with this item if it provides the information required by paragraph (b) (Summary Compensation Table), paragraphs (c)(1) and (c)(2)(i)–(v) (Option/SAR Grants Table), paragraph (d) (Aggregated Option/SAR Exercise and Fiscal Year-End Option/SAR Value Table), paragraph (e) (Long-Term Incentive Plan Awards Table), paragraph (g) (Compensation of Directors), paragraph (h) (Employment Contracts, Termination of Employment and Change in Control Arrangements) and paragraph (i) (1) and (2) (Report on Repricing of Options/SARs) of this item.

(ii) *Foreign private issuers.* A foreign private issuer will be deemed to comply with this item if it provides the information required by Items 6.B. and 6.E.2. of Form 20–F (17 CFR 249.220f), with more detailed information provided if otherwise made publicly available.

(2) *All compensation covered.* This item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(3) of this item, and directors covered by paragraph (g) of this item by any person for all services rendered in all capacities to the registrant and its subsidiaries, unless otherwise specified in this item. Except as provided by paragraph (a)(5) of this item, all such compensation shall be reported pursuant to this item, even if also called for by another requirement, including transactions between the registrant and a third party where the primary purpose of the transaction is to furnish compensation to any such named executive officer or director. No item reported as compensation for one fiscal year need be reported as compensation for a subsequent fiscal year.

(3) *Persons covered.* Disclosure shall be provided pursuant to this item for each of the following (the ''named executive officers''):

(i) All individuals serving as the registrant's chief executive officer or acting in a similar capacity during the last completed fiscal year (''CEO''), regardless of compensation level;

(ii) The registrant's four most highly compensated executive officers other than the CEO who were serving as executive officers at the end of the last completed fiscal year; and

(iii) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (a)(3)(ii) of this item but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year.

Instructions to Item 402(a)(3): 1. *Determination of Most Highly Compensated Executive Officers.* The determination as to which executive officers are most highly compensated shall be made by reference to total annual salary and bonus for the last completed fiscal year (as required to be disclosed pursuant to paragraph (b)(2)(iii) (A) and (B) of this item), but including the dollar value of salary or bonus amounts forgone pursuant to Instruction 3 to paragraph (b)(2)(iii) (A) and (B) of this item: *Provided, however,* That no disclosure need be provided for any executive officer, other than the CEO, whose total annual salary and bonus, as so determined, does not exceed $100,000.

2. *Inclusion of Executive Officer of Subsidiary*. It may be appropriate in certain circumstances for a registrant to include an executive officer of a subsidiary in the disclosure required by this item. *See* Rule 3b–7 under the Exchange Act [17 CFR 240.3b–7].

3. *Exclusion of Executive Officer due to Unusual or Overseas Compensation*. It may be appropriate in limited circumstances for a registrant not to include in the disclosure required by this item an individual, other than its CEO, who is one of the registrant's most highly compensated executive officers. Among the factors that should be considered in determining not to name an individual are: (a) the distribution or accrual of an unusually large amount of cash compensation (such as a bonus or commission) that is not part of a recurring arrangement and is unlikely to continue; and (b) the payment of amounts of cash compensation relating to overseas assignments that may be attributed predominantly to such assignments.

(4) *Information for full fiscal year*. If the CEO served in that capacity during any part of a fiscal year with respect to which information is required, information should be provided as to all of his or her compensation for the full fiscal year. If a named executive officer (other than the CEO) served as an executive officer of the registrant (whether or not in the same position) during any part of a fiscal year with respect to which information is required, information shall be provided as to all compensation of that individual for the full fiscal year.

(5) *Transactions with third parties reported under item 404*. This item includes transactions between the registrant and a third party where the primary purpose of the transaction is to furnish compensation to a named executive officer. No information need be given in response to any paragraph of this item, other than paragraph (j), as to any such third-party transaction if the transaction has been reported in response to Item 404 of Regulation S–K (§ 229.404).

(6) *Omission of table or column*. A table or column may be omitted, if there has been no compensation awarded to, earned by or paid to any of the named executives required to be reported in that table or column in any fiscal year covered by that table.

(7) *Definitions*. For purposes of this item:

(i) The term *stock appreciation rights* (*SARs*) refers to SARs payable in cash or stock, including SARs payable in cash or stock at the election of the registrant or a named executive officer.

(ii) The term *plan* includes, but is not limited to, the following: Any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, pursuant to which the following may be received: cash, stock, restricted stock or restricted stock units, phantom stock, stock options, SARs, stock options in tandem with SARs, warrants, convertible securities, performance units and performance shares, and similar instruments. A plan may be applicable to one person. Registrants may omit information regarding group life, health, hospitalization, medical reimbursement or relocation plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

(iii) The term *long-term incentive plan* means any plan providing compensation intended to serve as incentive for performance to occur over a period longer than one fiscal year, whether such performance is measured by reference to financial performance of the registrant or an affiliate, the registrant's stock price, or any other measure, but excluding restricted stock, stock option and SAR plans.

(8) *Location of specified information*. The information required by paragraphs (i), (k) and (l) of this item need not be provided in any filings other than a registrant proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

(9) *Liability for specified information*. The information required by paragraphs (k) and (l) of this item shall not be deemed to be ''soliciting material'' or to be ''filed'' with the Commission or subject to Regulations 14A or 14C [17 CFR 240.14a–1 *et seq*. or 240.14c–1 *et seq*.],

other than as provided in this item, or to the liabilities of section 18 of the Exchange Act [15 U.S.C. 78r], except to the extent that the registrant specifically requests that such information be treated as soliciting material or specifically incorporates it by reference into a filing under the Securities Act or the Exchange Act.

(b) *Summary Compensation Table.* (1) *General.* The information specified in paragraph (b)(2) of this item, concerning the compensation of the named executive officers for each of the registrant's last three completed fiscal years, shall be provided in a Summary Compensation Table, in the tabular format specified below.

SUMMARY COMPENSATION TABLE

Name and principal position	Year	Annual compensation			Long term compensation			
					Awards		Payouts	All other compensation ($)
		Salary ($)	Bonus ($)	Other annual compensation ($)	Restricted stock award(s)	Securities under-lying options/SARs (#)	LTIP payouts ($)	
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
CEO	—							
	—							
	—							
A	—							
	—							
	—							
B	—							
	—							
	—							
C	—							
	—							
	—							
D	—							
	—							
	—							

(2) The Table shall include:

(i) The name and principal position of the executive officer (column (a));

(ii) Fiscal year covered (column (b));

(iii) Annual compensation (columns (c), (d) and (e)), including:

(A) The dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (c));

(B) The dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (d)); and

Instructions to Item 402(b)(2)(iii) (A) and (B): 1. Amounts deferred at the election of a named executive officer, whether pursuant to a plan established under Section 401(k) of the Internal Revenue Code [26 U.S.C. 401(k)], or otherwise, shall be included in the salary column (column (c)) or bonus column (column (d)), as appropriate, for the fiscal year in which earned. If the amount of salary or bonus earned in a given fiscal year is not calculable through the latest practicable date, that fact must be disclosed in a footnote and such amount must be disclosed in the subsequent fiscal year in the appropriate column for the fiscal year in which earned.

2. For stock or any other form of non-cash compensation, disclose the fair market value at the time the compensation is awarded, earned or paid.

3. Registrants need not include in the salary column (column (c)) or bonus column (column (d)) any amount of salary or bonus forgone at the election of a named executive officer pursuant to a registrant program under which stock, stock-based or other forms of non-cash compensation may be received by a named executive in lieu of a portion of annual compensation earned in a covered fiscal year. However, the receipt of any such form of non-cash compensation in lieu of salary or bonus earned for a covered fiscal year must be disclosed in the appropriate column of the Table corresponding to that fiscal year (i.e., restricted stock awards (column (f)); options or SARs (column (g)); all other compensation (column (i)), or, if made pursuant to a long-term incentive plan and therefore not reportable at grant in the Summary Compensation Table, a footnote must be added to the salary or bonus column so disclosing and referring to the Long-Term

Incentive Plan Table (required by paragraph (e) of this item) where the award is reported.

(C) The dollar value of other annual compensation not properly categorized as salary or bonus, as follows (column (e)):

(*1*) Perquisites and other personal benefits, securities or property, unless the aggregate amount of such compensation is the lesser of either $50,000 or 10% of the total of annual salary and bonus reported for the named executive officer in columns (c) and (d);

(*2*) Above-market or preferential earnings on restricted stock, options, SARs or deferred compensation paid during the fiscal year or payable during that period but deferred at the election of the named executive officer;

(*3*) Earnings on long-term incentive plan compensation paid during the fiscal year or payable during that period but deferred at the election of the named executive officer;

(*4*) Amounts reimbursed during the fiscal year for the payment of taxes; and

(*5*) The dollar value of the difference between the price paid by a named executive officer for any security of the registrant or its subsidiaries purchased from the registrant or its subsidiaries (through deferral of salary or bonus, or otherwise), and the fair market value of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the registrant.

Instructions to Item 402(b)(2)(iii)(C): 1. Each perquisite or other personal benefit exceeding 25% of the total perquisites and other personal benefits reported for a named executive officer must be identified by type and amount in a footnote or accompanying narrative discussion to column (e).

2. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the registrant and its subsidiaries.

3. Interest on deferred or long-term compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding (as prescribed under section 1274(d) of the Internal Revenue Code, [26 U.S.C. 1274(d)]) at the rate that corresponds most closely to the rate under the registrant's plan at the time the interest rate or formula is set. In the event of a discretionary reset of the interest rate, the requisite calculation must be made on the basis of the interest rate at the time of such reset, rather than when originally established. Only the above-market portion of the interest must be included. If the applicable interest rates vary depending upon conditions such as a minimum period of continued service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest at the highest rate.

4. Dividends (and dividend equivalents) on restricted stock, options, SARs or deferred compensation denominated in stock (''deferred stock'') are preferential only if earned at a rate higher than dividends on the registrant's common stock. Only the preferential portion of the dividends or equivalents must be included.

(iv) Long-term compensation (columns (f), (g) and (h)), including:

(A) The dollar value (net of any consideration paid by the named executive officer) of any award of restricted stock, including share units (calculated by multiplying the closing market price of the registrant's unrestricted stock on the date of grant by the number of shares awarded) (column (f));

(B) The sum of the number of securities underlying stock options granted (including options that subsequently have been transferred), with or without tandem SARs, and the number of freestanding SARs (column (g)); and

(C) The dollar value of all payouts pursuant to long-term incentive plans (''LTIPs'') as defined in paragraph (a)(7)(iii) of this item (column (h)).

Instructions to Item 402(b)(2)(iv): 1. Awards of restricted stock that are subject to performance-based conditions on vesting, in addition to lapse of time and/or continued service with the registrant or a subsidiary, may be reported as LTIP awards pursuant to paragraph (e) of this item instead of in column (f). If this approach is selected, once the restricted stock vests, it must be reported as an LTIP payout in column (h).

2. The registrant shall, in a footnote to the Summary Compensation Table (appended to column (f), if included), disclose:

a. The number and value of the aggregate restricted stock holdings at the end of the last completed fiscal year. The value shall be calculated in the manner specified in paragraph (b)(2)(iv)(A) of this item using the value of the registrant's shares at the end of the last completed fiscal year;

b. For any restricted stock award reported in the Summary Compensation Table that will vest, in whole or in part, in under three

years from the date of grant, the total number of shares awarded and the vesting schedule; and

c. Whether dividends will be paid on the restricted stock reported in column (f).

3. If at any time during the last completed fiscal year, the registrant has adjusted or amended the exercise price of stock options or freestanding SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means (''repriced''), the registrant shall include the number of options or freestanding SARs so repriced as Stock Options/SARs granted and required to be reported in column (g).

4. If any specified performance target, goal or condition to payout was waived with respect to any amount included in LTIP payouts reported in column (h), the registrant shall so state in a footnote to column (h).

(v) All other compensation for the covered fiscal year that the registrant could not properly report in any other column of the Summary Compensation Table (column (i)). Any compensation reported in this column for the last completed fiscal year shall be identified and quantified in a footnote. Such compensation shall include, but not be limited to:

(A) The amount paid, payable or accrued to any named executive officer pursuant to a plan or arrangement in connection with:

(*1*) The resignation, retirement or any other termination of such executive officer's employment with the registrant and its subsidiaries; or

(*2*) A change in control of the registrant or a change in the executive officer's responsibilities following such a change in control;

(B) The dollar value of above-market or preferential amounts earned on restricted stock, options, SARs or deferred compensation during the fiscal year, or calculated with respect to that period, except that if such amounts are paid during the period, or payable during the period but deferred at the election of a named executive officer, this information shall be reported as Other Annual Compensation in column (e). See Instructions 3 and 4 to paragraph 402(b)(2)(iii)(C) of this item;

(C) The dollar value of amounts earned on long-term incentive plan compensation during the fiscal year, or calculated with respect to that period, except that if such amounts are paid during that period, or payable during that period at the election of the named executive officer, this information shall be reported as Other Annual Compensation in column (e);

(D) Annual registrant contributions or other allocations to vested and unvested defined contribution plans; and

(E) The dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to term life insurance for the benefit of a named executive officer, and, if there is any arrangement or understanding, whether formal or informal, that such executive officer has or will receive or be allocated an interest in any cash surrender value under the insurance policy, either:

(*1*) The full dollar value of the remainder of the premiums paid by, or on behalf of, the registrant; or

(*2*) If the premiums will be refunded to the registrant on termination of the policy, the dollar value of the benefit to the executive officer of the remainder of the premium paid by, or on behalf of, the registrant during the fiscal year. The benefit shall be determined for the period, projected on an actuarial basis, between payment of the premium and the refund.

Instructions to Item 402(b)(2)(v): 1. LTIP awards and amounts received on exercise of options and SARs need not be reported as All Other Compensation in column (i).

2. Information relating to defined benefit and actuarial plans should not be reported pursuant to paragraph (b) of this item, but instead should be reported pursuant to paragraph (f) of this item.

3. Where alternative methods of reporting are available under paragraph (b)(2)(v)(E) of this item, the same method should be used for each of the named executive officers. If the registrant chooses to change methods from one year to the next, that fact, and the reason therefor, should be disclosed in a footnote to column (i).

Instruction to Item 402(b): Information with respect to fiscal years prior to the last completed fiscal year will not be required if the registrant was not a reporting company pursuant to Section 13(a) or 15(d) of the Exchange Act at any time during that year, except that the registrant will be required to provide information for any such year if that information previously was required to be

provided in response to a Commission filing requirement.

(c) *Option/SAR Grants Table.* (1) The information specified in paragraph (c)(2) of this item, concerning individual grants of stock options (whether or not in tandem with SARs) and freestanding SARs (including options and SARs that subsequently have been transferred) made during the last completed fiscal year to each of the named executive officers shall be provided in the tabular format specified as follows:

OPTION/SAR GRANTS IN LAST FISCAL YEAR

Individual grants					Potential realizable value at assumed annual rates of stock price appreciation for option term		Alternative to (f) and (g): grant date value
Name	Number of securities underlying options/SARs granted (#)	Percent of total options/SARs granted to employees in fiscal year	Exercise of base price ($/Sh)	Expiration date	5% ($)	10% ($)	Grant date present value $
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(f)
CEO							
A							
B							
C							
D							

(2) The Table shall include, with respect to each grant:

(i) The name of the executive officer (column (a));

(ii) Number of securities underlying option/SARs granted (column (b)).

(iii) The percent the grant represents of total options and SARs granted to employees during the fiscal year (column (c));

(iv) The per-share exercise or base price of the options or SARs granted (column (d)). If such exercise or base price is less than the market price of the underlying security on the date of grant, a separate, adjoining column shall be added showing market price on the date of grant;

(v) The expiration date of the options or SARs (column (e)); and

(vi) Either (A) the potential realizable value of each grant of options or freestanding SARs or (B) the present value of each grant, as follows:

(A) The potential realizable value of each grant of options or freestanding SARs, assuming that the market price of the underlying security appreciates in value from the date of grant to the end of the option or SAR term, at the following annualized rates:

(*1*) 5% (column (f));

(*2*) 10% (column (g)); and

(*3*) If the exercise or base price was below the market price of the underlying security at the date of grant, provide an additional column labeled 0%, to show the value at grant-date market price; or

(B) The present value of the grant at the date of grant, under any option pricing model (alternative column (f)).

Instructions to Item 402(c): 1. If more than one grant of options and/or freestanding SARs was made to a named executive officer during the last completed fiscal year, a separate line should be used to provide disclosure of each such grant. However, multiple grants during a single fiscal year may be aggregated where each grant was made at the same exercise and/or base price and has the same expiration date, and the same performance vesting thresholds, if any. A single grant consisting of options and/or freestanding SARs shall be reported as separate grants with respect to each tranche with a different exercise and/or base price, performance vesting threshold, or expiration date.

2. Options or freestanding SARs granted in connection with an option repricing transaction shall be reported in this table. See Instruction 3 to paragraph (b)(2)(iv) of this item.

3. Any material term of the grant, including but not limited to the date of exercisability, the number of SARs, performance units or other instruments granted in tandem with options, a performance-based condition to exercisability, a reload feature, or a tax-reimbursement feature, shall be footnoted.

4. If the exercise or base price is adjustable over the term of any option or freestanding SAR in accordance with any prescribed

standard or formula, including but not limited to an index or premium price provision, describe the following, either by footnote to column (c) or in narrative accompanying the Table: (a) the standard or formula; and (b) any constant assumption made by the registrant regarding any adjustment to the exercise price in calculating the potential option or SAR value.

5. If any provision of a grant (other than an antidilution provision) could cause the exercise price to be lowered, registrants must clearly and fully disclose these provisions and their potential consequences either by a footnote or accompanying textual narrative.

6. In determining the grant-date market or base price of the security underlying options or freestanding SARs, the registrant may use either the closing market price per share of the security, or any other formula prescribed for the security.

7. The potential realizable dollar value of a grant (columns (f) and (g)) shall be the product of:

(a) The difference between:

(i) The product of the per-share market price at the time of the grant and the sum of 1 plus the adjusted stock price appreciation rate (the assumed rate of appreciation compounded annually over the term of the option or SAR); and

(ii) The per-share exercise price of the option or SAR; and

(b) The number of securities underlying the grant at fiscal year-end.

8. Registrants may add one or more separate columns using the formula prescribed in Instruction 7 to paragraph (c) of this item, to reflect the following:

a. The registrant's historic rate of appreciation over a period equivalent to the term of such options and/or SARs;

b. 0% appreciation, where the exercise or base price was equal to or greater than the market price of the underlying securities on the date of grant; and

c. N% appreciation, the percentage appreciation by which the exercise or base price exceeded the market price at grant. Where the grant included multiple tranches with exercise or base prices exceeding the market price of the underlying security by varying degrees, include an additional column for each additional tranche.

9. Where the registrant chooses to use the grant-date valuation alternative specified in paragraph (c)(2)(vi)(B) of this item, the valuation shall be footnoted to describe the valuation method used. Where the registrant has used a variation of the Black-Scholes or binomial option pricing model, the description shall identify the use of such pricing model and describe the assumptions used relating to the expected volatility, risk-free rate of return, dividend yield and time of exercise. Any adjustments for non-transferability or risk of forfeiture also shall be disclosed. In the event another valuation method is used, the registrant is required to describe the methodology as well as any material assumptions.

(d) *Aggregated option/SAR exercises and fiscal year-end option/SAR value table.* (1) The information specified in paragraph (d)(2) of this item, concerning each exercise of stock options (or tandem SARs) and freestanding SARs during the last completed fiscal year by each of the named executive officers and the fiscal year-end value of unexercised options and SARs, shall be provided on an aggregated basis in the tabular format specified below:

AGGREGATED OPTION/SAR EXERCISES IN LAST FISCAL YEAR AND FY-END OPTION/SAR VALUES

Name (a)	Shares acquired on exercise (#) (b)	Value realized ($) (c)	Number of securities underlying unexercised options/SARs at FY-end (#) Exercisable/Unexercisable (d)	Value of unexercised in-the-money options/SARs at FY-end ($) Exercisable/Unexercisable (e)
CEO				
A				
B				
C				
D				

(2) The table shall include:

(i) The name of the executive officer (column (a));

(ii) The number of shares received upon exercise, or, if no shares were received, the number of securities with respect to which the options or SARs were exercised (column (b));

(iii) The aggregate dollar value realized upon exercise (column (c));

(iv) The total number of securities underlying unexercised options and

SARs held at the end of the last completed fiscal year, separately identifying the exercisable and unexercisable options and SARs (column (d)); and

(v) The aggregate dollar value of in-the-money, unexercised options and SARs held at the end of the fiscal year, separately identifying the exercisable and unexercisable options and SARs (column (e)).

Instructions to Item 402(d)(2): 1. Options or freestanding SARs are in-the-money if the fair market value of the underlying securities exceeds the exercise or base price of the option or SAR. The dollar values in columns (c) and (e) are calculated by determining the difference between the fair market value of the securities underlying the options or SARs and the exercise or base price of the options or SARs at exercise or fiscal year-end, respectively.

2. In calculating the dollar value realized upon exercise (column (c)), the value of any related payment or other consideration provided (or to be provided) by the registrant to or on behalf of a named executive officer, whether in payment of the exercise price or related taxes, shall not be included. Payments by the registrant in reimbursement of tax obligations incurred by a named executive officer are required to be disclosed in accordance with paragraph (b)(2)(iii)(C)(*4*) of this item.

(e) *Long-Term Incentive Plan (''LTIP'') awards table.* (1) The information specified in paragraph (e)(2) of this item, regarding each award made to a named executive officer in the last completed fiscal year under any LTIP, shall be provided in the tabular format specified below:

LONG-TERM INCENTIVE PLANS—AWARDS IN LAST FISCAL YEAR

Name	Number of shares, units or other rights (#)	Performance or other period until maturation or payout	Estimated future payouts under non-stock price-based plans		
			Threshold ($ or #)	Target ($ or #)	Maximum ($ or #)
(a)	(b)	(c)	(d)	(e)	(f)
CEO					
A					
B					
C					
D					

(2) The Table shall include:

(i) The name of the executive officer (column (a));

(ii) The number of shares, units or other rights awarded under any LTIP, and, if applicable, the number of shares underlying any such unit or right (column (b));

(iii) The performance or other time period until payout or maturation of the award (column (c)); and

(iv) For plans not based on stock price, the dollar value of the estimated payout, the number of shares to be awarded as the payout or a range of estimated payouts denominated in dollars or number of shares under the award (threshold, target and maximum amount) (columns (d) through (f)).

Instructions to Item 402(e): 1. For purposes of this paragraph, the term ''long-term incentive plan'' or ''LTIP'' shall be defined in accordance with paragraph (a)(7)(iii) of this item.

2. Describe in a footnote or in narrative text accompanying this table the material terms of any award, including a general description of the formula or criteria to be applied in determining the amounts payable. Registrants are not required to disclose any factor, criterion or performance-related or other condition to payout or maturation of a particular award that involves confidential commercial or business information, disclosure of which would adversely affect the registrant's competitive position.

3. Separate disclosure shall be provided in the Table for each award made to a named executive officer, accompanied by the information specified in Instruction 2 to this paragraph. If awards are made to a named executive officer during the fiscal year under more than one plan, identify the particular plan under which each such award was made.

4. For column (d), ''threshold'' refers to the minimum amount payable for a certain level of performance under the plan. For column (e), ''target'' refers to the amount payable if the specified performance target(s) are reached. For column (f), ''maximum'' refers to the maximum payout possible under the plan.

5. In column (e), registrants must provide a representative amount based on the previous

fiscal year's performance if the target award is not determinable.

6. A tandem grant of two instruments, only one of which is pursuant to a LTIP, need be reported only in the table applicable to the other instrument. For example, an option granted in tandem with a performance share would be reported only as an option grant, with the tandem feature noted.

(f) *Defined benefit or actuarial plan disclosure*—(1) *Pension plan table.* (i) For any defined benefit or actuarial plan under which benefits are determined primarily by final compensation (or average final compensation) and years of service, provide a separate Pension Plan Table showing estimated annual benefits payable upon retirement (including amounts attributable to any defined benefit supplementary or excess pension award plans) in specified compensation and years of service classifications in the format specified below.

PENSION PLAN TABLE

Remuneration	Years of service				
	15	20	25	30	35
125,000					
150,000					
175,000					
200,000					
225,000					
250,000					
300,000					
400,000					
450,000					
500,000					

(ii) Immediately following the Table, the registrant shall disclose:

(A) The compensation covered by the plan(s), including the relationship of such covered compensation to the annual compensation reported in the Summary Compensation Table required by paragraph (b)(2)(iii) of this item, and state the current compensation covered by the plan for any named executive officer whose covered compensation differs substantially (by more than 10%) from that set forth in the annual compensation columns of the Summary Compensation Table;

(B) The estimated credited years of service for each of the named executive officers; and

(C) A statement as to the basis upon which benefits are computed (e.g., straight-life annuity amounts), and whether or not the benefits listed in the Pension Plan Table are subject to any deduction for Social Security or other offset amounts.

(2) *Alternative pension plan disclosure.* For any defined benefit or actuarial plan under which benefits are not determined primarily by final compensation (or average final compensation) and years of service, the registrant shall state in narrative form:

(i) The formula by which benefits are determined; and

(ii) The estimated annual benefits payable upon retirement at normal retirement age for each of the named executive officers.

Instructions to Item 402(f): 1. *Pension Levels.* Compensation set forth in the Pension Plan Table pursuant to paragraph (f)(1)(i) of this item shall allow for reasonable increases in existing compensation levels; alternatively, registrants may present as the highest compensation level in the Pension Plan Table an amount equal to 120% of the amount of covered compensation of the most highly compensated individual named in the Summary Compensation Table required by paragraph (b)(2) of this item.

2. *Normal Retirement Age.* The term ''normal retirement age'' means normal retirement age as defined in a pension or similar plan or, if not defined therein, the earliest time at which a participant may retire without any benefit reduction due to age.

(g) *Compensation of Directors*—(1) *Standard arrangements.* Describe any standard arrangements, stating amounts, pursuant to which directors of the registrant are compensated for any services provided as a director, including any additional amounts payable for committee participation or special assignments.

(2) *Other arrangements.* Describe any other arrangements pursuant to which any director of the registrant was compensated during the registrant's last completed fiscal year for any service provided as a director, stating the amount paid and the name of the director.

Instruction to Item 402(g)(2): The information required by paragraph (g)(2) of this item shall include any arrangement, including consulting contracts, entered into in consideration of the director's service on the board. The material terms of any such arrangement shall be included.

(h) *Employment contracts and termination of employment and change-in-control arrangements.* Describe the terms and conditions of each of the following contracts or arrangements:

(1) Any employment contract between the registrant and a named executive officer; and

(2) Any compensatory plan or arrangement, including payments to be received from the registrant, with respect to a named executive officer, if such plan or arrangement results or will result from the resignation, retirement or any other termination of such executive officer's employment with the registrant and its subsidiaries or from a change-in-control of the registrant or a change in the named executive officer's responsibilities following a change-in-control and the amount involved, including all periodic payments or installments, exceeds $100,000.

(i) *Report on repricing of options/SARs.* (1) If at any time during the last completed fiscal year, the registrant, while a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act [15 U.S.C. 78m(a), 78*o*(d)], has adjusted or amended the exercise price of stock options or SARs previously awarded to any of the named executive officers, whether through amendment, cancellation or replacement grants, or any other means (''repriced''), the registrant shall provide the information specified in paragraphs (i)(2) and (i)(3) of this item.

(2) The compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) shall explain in reasonable detail any such repricing of options and/or SARs held by a named executive officer in the last completed fiscal year, as well as the basis for each such repricing.

(3)(i) The information specified in paragraph (i)(3)(*ii*) of this item, concerning all such repricings of options and SARs held by any executive officer during the last ten completed fiscal years, shall be provided in the tabular format specified below:

TEN-YEAR OPTION/SAR REPRICINGS

Name (a)	Date (b)	Number of securities underlying options/SARs repriced or amended (#) (c)	Market price of stock at time of repricing or amendment ($) (d)	Exercise price at time of repricing or amendment ($) (e)	New exercise price ($) (f)	Length of original option term remaining at date of repricing or amendment (g)

(ii) The Table shall include, with respect to each repricing:

(A) The name and position of the executive officer (column (a));

(B) The date of each repricing (column (b));

(C) The number of securities underlying replacement or amended options or SARs (column (c));

(D) The per-share market price of the underlying security at the time of repricing (column (d));

(E) The original exercise price or base price of the cancelled or amended option or SAR (column (e));

(F) The per-share exercise price or base price of the replacement option or SAR (column (f)); and

(G) The amount of time remaining before the replaced or amended option or SAR would have expired (column (g)).

Instructions to Item 402(i): 1. The required report shall be made over the name of each member of the registrant's compensation committee, or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors.

2. A replacement grant is any grant of options or SARs reasonably related to any prior or potential option or SAR cancellation, whether by an exchange of existing options or SARs for options or SARs with new terms; the grant of new options or SARs in tandem with previously granted options or SARs that will operate to cancel the previously granted options or SARs upon exercise; repricing of previously granted options

or SARs; or otherwise. If a corresponding original grant was canceled in a prior year, information about such grant nevertheless must be disclosed pursuant to this paragraph.

3. If the replacement grant is not made at the current market price, describe the terms of the grant in a footnote or accompanying textual narrative.

4. This paragraph shall not apply to any repricing occurring through the operation of:

a. A plan formula or mechanism that results in the periodic adjustment of the option or SAR exercise or base price;

b. A plan antidilution provision; or

c. A recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

5. Information required by paragraph (i)(3) of this item shall not be provided for any repricings effected before the registrant became a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act.

(j) *Additional information with respect to Compensation Committee Interlocks and Insider Participation in compensation decisions.* Under the caption ''Compensation Committee Interlocks and Insider Participation,''

(1) The registrant shall identify each person who served as a member of the compensation committee of the registrant's board of directors (or board committee performing equivalent functions) during the last completed fiscal year, indicating each committee member who:

(i) Was, during the fiscal year, an officer or employee of the registrant or any of its subsidiaries;

(ii) Was formerly an officer of the registrant or any of its subsidiaries; or

(iii) Had any relationship requiring disclosure by the registrant under any paragraph of Item 404 of Regulation S–K (§ 229.404). In this event, the disclosure required by Item 404 shall accompany such identification.

(2) If the registrant has no compensation committee (or other board committee performing equivalent functions), the registrant shall identify each officer and employee of the registrant or any of its subsidiaries, and any former officer of the registrant or any of its subsidiaries, who, during the last completed fiscal year, participated in deliberations of the registrant's board of directors concerning executive officer compensation.

(3) The registrant shall describe any of the following relationships that existed during the last completed fiscal year:

(i) An executive officer of the registrant served as a member of the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of another entity, one of whose executive officers served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of the registrant;

(ii) An executive officer of the registrant served as a director of another entity, one of whose executive officers served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of the registrant; and

(iii) An executive officer of the registrant served as a member of the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of another entity, one of whose executive officers served as a director of the registrant.

(4) Disclosure required under paragraph (j)(3) of this item regarding any compensation committee member or other director of the registrant who also served as an executive officer of another entity shall be accompanied by the disclosure called for by Item 404 (§ 229.404) with respect to that person.

Instruction to Item 402(j): For purposes of this paragraph, the term ''entity'' shall not include an entity exempt from tax under section 501(c)(3) of the Internal Revenue Code [26 U.S.C. 501(c)(3)].

(k) *Board compensation committee report on executive compensation.* (1) Disclosure of the compensation committee's compensation policies applicable to the registrant's executive officers (including the named executive officers), including the specific relationship of corporate performance to executive compensation, is required with respect to compensation reported for the last completed fiscal year.

(2) Discussion is required of the compensation committee's bases for the CEO's compensation reported for the last completed fiscal year, including the factors and criteria upon which the CEO's compensation was based. The committee shall include a specific discussion of the relationship of the registrant's performance to the CEO's compensation for the last completed fiscal year, describing each measure of the registrant's performance, whether qualitative or quantitative, on which the CEO's compensation was based.

(3) The required disclosure shall be made over the name of each member of the registrant's compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, entire board of directors). If the board of directors modified or rejected in any material way any action or recommendation by such committee with respect to such decisions in the last completed fiscal year, the disclosure must so indicate and explain the reasons for the board's actions, and be made over the names of all members of the board.

Instructions to Item 402(k): 1. Boilerplate language should be avoided in describing factors and criteria underlying awards or payments of executive compensation in the statement required.

2. Registrants are not required to disclose target levels with respect to specific quantitative or qualitative performance-related factors considered by the committee (or board), or any factors or criteria involving confidential commercial or business information, the disclosure of which would have an adverse effect on the registrant.

(l) Performance graph. (1) Provide a line graph comparing the yearly percentage change in the registrant's cumulative total shareholder return on a class of common stock registered under section 12 of the Exchange Act (as measured by dividing (i) the sum of (A) the cumulative amount of dividends for the measurement period, assuming dividend reinvestment, and (B) the difference between the registrant's share price at the end and the beginning of the measurement period; by (ii) the share price at the beginning of the measurement period) with

(i) the cumulative total return of a broad equity market index assuming reinvestment of dividends, that includes companies whose equity securities are traded on the same exchange or NASDAQ market or are of comparable market capitalization; *Provided, however,* That if the registrant is a company within the Standard & Poor's 500 Stock Index, the registrant must use that index; and

(ii) The cumulative total return, assuming reinvestment of dividends, of:

(A) A published industry or line-of-business index;

(B) Peer issuer(s) selected in good faith. If the registrant does not select its peer issuer(s) on an industry or line-of-business basis, the registrant shall disclose the basis for its selection; or

(C) Issuer(s) with similar market capitalization(s), but only if the registrant does not use a published industry or line-of-business index and does not believe it can reasonably identify a peer group. If the registrant uses this alternative, the graph shall be accompanied by a statement of the reasons for this selection.

(2) For purposes of paragraph (l)(1) of this item, the term ''measurement period'' shall be the period beginning at the ''measurement point'' established by the market close on the last trading day before the beginning of the registrant's fifth preceding fiscal year, through and including the end of the registrant's last completed fiscal year. If the class of securities has been registered under section 12 of the Exchange Act for a shorter period of time, the period covered by the comparison may correspond to that time period.

(3) For purposes of paragraph (l)(1)(ii)(A) of this item, the term ''published industry or line-of-business index'' means any index that is prepared by a party other than the registrant or an affiliate and is accessible to the registrant's security holders; provided, however, that registrants may use an index prepared by the registrant or affiliate if such index is widely recognized and used.

(4) If the registrant selects a different index from an index used for the immediately preceding fiscal year, explain the reason(s) for this change and also compare the registrant's total return with that of both the newly selected index and the index used in the immediately preceding fiscal year.

Instructions to Item 402(l): 1. In preparing the required graphic comparisons, the registrant should:

a. Use, to the extent feasible, comparable methods of presentation and assumptions for the total return calculations required by paragraph (l)(1) of this item; *Provided, however,* That if the registrant constructs its own peer group index under paragraph (l)(1)(ii)(B), the same methodology must be used in calculating both the registrant's total return and that on the peer group index; and

b. Assume the reinvestment of dividends into additional shares of the same class of equity securities at the frequency with which dividends are paid on such securities during the applicable fiscal year.

2. In constructing the graph:

(a) The closing price at the measurement point must be converted into a fixed investment, stated in dollars, in the registrant's stock (or in the stocks represented by a given index), with cumulative returns for each subsequent fiscal year measured as a change from that investment; and

(b) Each fiscal year should be plotted with points showing the cumulative total return as of that point. The value of the investment as of each point plotted on a given return line is the number of shares held at that point multiplied by the then-prevailing share price.

3. The registrant is required to present information for the registrant's last five fiscal years, and may choose to graph a longer period; but the measurement point, however, shall remain the same.

4. Registrants may include comparisons using performance measures in addition to total return, such as return on average common shareholders' equity, so long as the registrant's compensation committee (or other board committee performing equivalent functions or in the absence of any such committee, the entire board of directors) describes the link between that measure and the level of executive compensation in the statement required by paragraph (k) of this Item.

5. If the registrant uses a peer issuer(s) comparison or comparison with issuer(s) with similar market capitalizations, the identity of those issuers must be disclosed and the returns of each component issuer of the group must be weighted according to the respective issuer's stock market capitalization at the beginning of each period for which a return is indicated.

[57 FR 48150, Oct. 21, 1992, as amended at 57 FR 53985, Nov. 16, 1992; 58 FR 63013, Nov. 29, 1993; 64 FR 11115, Mar. 8, 1999; 64 FR 53909, Oct. 5, 1999]

§ 229.403 (Item 403) Security ownership of certain beneficial owners and management.

(a) *Security ownership of certain beneficial owners.* Furnish the following information, as of the most recent practicable date, substantially in the tabular form indicated, with respect to any person (including any ''group'' as that term is used in section 13(d)(3) of the Exchange Act) who is known to the registrant to be the beneficial owner of more than five percent of any class of the registrant's voting securities. The address given in column (2) may be a business, mailing or residence address. Show in column (3) the total number of shares beneficially owned and in column (4) the percentage of class so owned. Of the number of shares shown in column (3), indicate by footnote or otherwise the amount known to be shares with respect to which such listed beneficial owner has the right to acquire beneficial ownership, as specified in Rule 13d–3(d)(1) under the Exchange Act (§ 240.13d–3(d)(1) of this chapter).

(1) Title of class	(2) Name and address of beneficial owner	(3) Amount and nature of beneficial ownership	(4) Percent of class

(b) *Security ownership of management.* Furnish the following information, as of the most recent practicable date, in substantially the tabular form indicated, as to each class of equity securities of the registrant or any of its parents or subsidiaries other than directors' qualifying shares, beneficially owned by all directors and nominees, naming them, each of the named executive officers as defined in Item 402(a)(3) (§ 229.402(a)(3)), and directors and executive officers of the registrant as a group, without naming them. Show in column (3) the total number of shares beneficially owned and in column (4) the percent of class so owned. Of the number of shares shown in column (3), indicate, by footnote or otherwise, the amount of shares with respect to which such persons have the right to acquire beneficial ownership as specified in § 240.13d–3(d)(1) of this chapter.

(1) Title of class	(2) Name of beneficial owner	(3) Amount of nature of beneficial ownership	(4) Percent of class

(c) *Changes in control.* Describe any arrangements, known to the registrant, including any pledge by any person of securities of the registrant or any of its parents, the operation of which may at a subsequent date result in a change in control of the registrant.

Instructions to Item 403: 1. The percentages are to be calculated on the basis of the amount of outstanding securities, excluding securities held by or for the account of the registrant or its subsidiaries, plus securities deemed outstanding pursuant to Rule 13d–3(d)(1) under the Exchange Act 17 (CFR 240.13d–3(d)(1)). For purposes of paragraph (b), if the percentage of shares beneficially owned by any director or nominee, or by all directors and officers of the registrant as a group, does not exceed one percent of the class so owned, the registrant may, in lieu of furnishing a precise percentage, indicate this fact by means of an asterisk and explanatory footnote or other similar means.

2. For the purposes of this Item, beneficial ownership shall be determined in accordance with Rule 13d–3 under the Exchange Act (§ 240.13d–3 of this chapter). Include such additional subcolumns or other appropriate explanation of column (3) necessary to reflect amounts as to which the beneficial owner has (A) sole voting power, (B) shared voting power, (C) sole investment power, or (D) shared investment power.

3. The registrant shall be deemed to know the contents of any statements filed with the Commission pursuant to section 13(d) or 13(g) of the Exchange Act. When applicable, a registrant may rely upon information set forth in such statements unless the registrant knows or has reason to believe that such information is not complete or accurate or that a statement or amendment should have been filed and was not.

4. For purposes of furnishing information pursuant to paragraph (a) of this Item, the registrant may indicate the source and date of such information.

5. Where more than one beneficial owner is known to be listed for the same securities, appropriate disclosure should be made to avoid confusion. For purposes of paragraph (b), in computing the aggregate number of shares owned by directors and officers of the registrant as a group, the same shares shall not be counted more than once.

6. Paragraph (c) of this Item does not require a description of ordinary default provisions contained in the charter, trust indentures or other governing instruments relating to securities of the registrant.

7. Where the holder(s) of voting securities reported pursuant to paragraph (a) hold more than five percent of any class of voting securities of the registrant pursuant to any voting trust or similar agreement, state the title of such securities, the amount held or to be held pursuant to the trust or agreement (if not clear from the table) and the duration of the agreement. Give the names and addresses of the voting trustees and outline briefly their voting rights and other powers under the trust or agreement.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 55665, Dec. 13, 1982; 51 FR 42056, Nov. 20, 1986; 57 FR 48158, Oct. 21, 1992]

§ 229.404 (Item 404) Certain relationships and related transactions.

(a) *Transactions with management and others.* Describe briefly any transaction, or series of similar transactions, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, or series of similar transactions, to which the registrant or any of its subsidiaries was or is to be a party, in which the amount involved exceeds $60,000 and in which any of the following persons had, or will have, a direct or indirect material interest, naming such person and indicating the person's relationship to the registrant, the nature of such person's interest in the transaction(s), the amount of such transaction(s) and, where practicable, the amount of such person's interest in the transaction(s):

(1) Any director or executive officer of the registrant;

(2) Any nominee for election as a director;

(3) Any security holder who is known to the registrant to own of record or beneficially more than five percent of any class of the registrant's voting securities; and

(4) Any member of the immediate family of any of the foregoing persons.

Instructions to Paragraph (a) of Item 404: 1. The materiality of any interest is to be determined on the basis of the significance of the information to investors in light of all the circumstances of the particular case. The importance of the interest to the person having the interest, the relationship of the parties to the transaction with each other and the amount involved in the transactions are

among the factors to be considered in determining the significance of the information to investors.

2. For purposes of paragraph (a), a person's immediate family shall include such person's spouse; parents; children; siblings; mothers and fathers-in-law; sons and daughters-in-law; and brothers and sisters-in-law.

3. In computing the amount involved in the transaction or series of similar transactions, include all periodic installments in the case of any lease or other agreement providing for periodic payments or installments.

4. The amount of the interest of any person specified in paragraphs (a) (1) through (4) shall be computed without regard to the amount of the profit or loss involved in the transaction(s).

5. In describing any transaction involving the purchase or sale of assets by or to the registrant or any of its subsidiaries, otherwise than in the ordinary course of business, state the cost of the assets to the purchaser and, if acquired by the seller within two years prior to the transaction, the cost thereof to the seller. Indicate the principle followed in determining the registrant's purchase or sale price and the name of the person making such determination.

6. Information shall be furnished in answer to paragraph (a) with respect to transactions that involve remuneration from the registrant or its subsidiaries, directly or indirectly, to any of the persons specified in paragraphs (a) (1) through (4) for services in any capacity unless the interest of such person arises solely from the ownership individually and in the aggregate of less than ten percent of any class of equity securities of another corporation furnishing the services to the registrant or its subsidiaries.

7. No information need be given in answer to paragraph (a) as to any transactions where:

A. The rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common or contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;

B. The transaction involves services as a bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services; or

C. The interest of the person specified in paragraphs (a) (1) through (4) arises solely from the ownership of securities of the registrant and such person receives no extra or special benefit not shared on a pro rata basis.

8. Paragraph (a) requires disclosure of indirect, as well as direct, material interests in transactions. A person who has a position or relationship with a firm, corporation, or other entity that engages in a transaction with the registrant or its subsidiaries may have an indirect interest in such transaction by reason of such position or relationship. Such an interest, however, shall not be deemed ''material'' within the meaning of paragraph (a) where:

A. The interest arises only: (i) From such person's position as a director of another corporation or organization which is a party to the transaction; or (ii) from the direct or indirect ownership by such person and all other persons specified in paragraphs (a) (1) through (4), in the aggregate, of less than a ten percent equity interest in another person (other than a partnership) which is a party to the transaction; or (iii) from both such position and ownership;

B. The interest arises only from such person's position as a limited partner in a partnership in which the person and all other persons specified in paragraphs (a) (1) through (4) have an interest of less than ten percent; or

C. The interest of such person arises solely from the holding of an equity interest (including a limited partnership interest, but excluding a general partnership interest) or a creditor interest in another person that is a party to the transaction with the registrant or any of its subsidiaries, and the transaction is not material to such other person.

9. There may be situations where, although these instrucions do not expressly authorize nondisclosure, the interest of a person specified in paragraphs (a) (1) through (4) in a particular transaction or series of transactions is not a direct or indirect material interest. In that case, information regarding such interest and transaction is not required to be disclosed in response to this paragraph.

(b) *Certain business relationships.* Describe any of the following relationships regarding directors or nominees for director that exist, or have existed during the registrant's last fiscal year, indicating the identity of the entity with which the registrant has such a relationship, the name of the nominee or director affiliated with such entity and the nature of such nominee's or director's affiliation, the relationship between such entity and the registrant and the amount of the business done between the registrant and the entity during the registrant's last full fiscal year or proposed to be done during the registrant's current fiscal year:

(1) If the nominee or director is, or during the last fiscal year has been, an executive officer of, or owns, or during the last fiscal year has owned, of record or beneficially in excess of ten percent equity interest in, any business

or professional entity that has made during the registrant's last full fiscal year, or proposes to make during the registrant's current fiscal year, payments to the registrant or its subsidiaries for property or services in excess of five percent of (i) the registrant's consolidated gross revenues for its last full fiscal year, or (ii) the other entity's consolidated gross revenues for its last full fiscal year;

(2) If the nominee or director is, or during the last fiscal year has been, an executive officer of, or owns, or during the last fiscal year has owned, of record or beneficially in excess of ten percent equity interest in, any business or professional entity to which the registrant or its subsidiaries has made during the registrant's last full fiscal year, or proposes to make during the registrant's current fiscal year, payments for property or services in excess of five percent of (i) the registrant's consolidated gross revenues for its last full fiscal year, or (ii) the other entity's consolidated gross revenues for its last full fiscal year;

(3) If the nominee or director is, or during the last fiscal year has been, an executive officer of, or owns, or during the last fiscal year has owned, of record or beneficially in excess of ten percent equity interest in, any business or professional entity to which the registrant or its subsidiaries was indebted at the end of the registrant's last full fiscal year in an aggregate amount in excess of five percent of the registrant's total consolidated assets at the end of such fiscal year;

(4) If the nominee or director is, or during the last fiscal year has been, a member of, or of counsel to, a law firm that the issuer has retained during the last fiscal year or proposes to retain during the current fiscal year; *Provided, however,* that the dollar amount of fees paid to a law firm by the registrant need not be disclosed if such amount does not exceed five percent of the law firm's gross revenues for that firm's last full fiscal year;

(5) If the nominee or director is, or during the last fiscal year has been, a partner or executive officer of any investment banking firm that has performed services for the registrant, other than as a participating underwriter in a syndicate, during the last fiscal year or that the registrant proposes to have perform services during the current year; *Provided, however,* That the dollar amount of compensation received by an investment banking firm need not be disclosed if such amount does not exceed five percent of the investment banking firm's consolidated gross revenues for that firm's last full fiscal year; or

(6) Any other relationships that the registrant is aware of between the nominee or director and the registrant that are substantially similar in nature and scope to those relationships listed in paragraphs (b) (1) through (5).

Instructions to Paragraph (b) of Item 404: 1. In order to determine whether payments or indebtedness exceed five percent of the consolidated gross revenues of any entity, other than the registrant, it is appropriate to rely on information provided by the nominee or director.

2. In calculating payments for property and services the following may be excluded:

A. Payments where the rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;

B. Payments that arise solely from the ownership of securities of the registrant and no extra or special benefit not shared on a pro rata basis by all holders of the class of securities is received; or

C. Payments made or received by subsidiaries other than significant subsidiaries as defined in Rule 1–02(w) of Regulation S–X [§ 210.1–02(w) of this chapter], provided that all such subsidiaries making or receiving payments, when considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as defined in Rule 1–02(w).

3. In calculating indebtedness the following may be excluded:

A. Debt securities that have been publicly offered, admitted to trading on a national securities exchange, or quoted on the automated quotation system of a registered securities association;

B. Amounts due for purchases subject to the usual trade terms; or

C. Indebtedness incurred by subsidiaries other than significant subsidiaries as defined in Rule 1–02(w) of Regulation S–X [§ 210.1–02(w) of this chapter], provided that all such subsidiaries incurring indebtedness, when considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as defined in Rule 1–02(w).

4. No information called for by paragraph (b) need be given respecting any director who is no longer a director at the time of filing the registration statement or report containing such disclosure. If such information is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

(c) *Indebtedness of management.* If any of the following persons has been indebted to the registrant or its subsidiaries at any time since the beginning of the registrant's last fiscal year in an amount in excess of $60,000, indicate the name of such person, the nature of the person's relationship by reason of which such person's indebtedness is required to be described, the largest aggregate amount of indebtedness outstanding at any time during such period, the nature of the indebtedness and of the transaction in which it was incurred, the amount thereof outstanding as of the latest practicable date and the rate of interest paid or charged thereon:

(1) Any director or executive officer of the registrant;

(2) Any nominee for election as a director;

(3) Any member of the immediate family of any of the persons specified in paragraph (c) (1) or (2);

(4) Any corporation or organization (other than the registrant or a majority-owned subsidiary of the registrant) of which any of the persons specified in paragraph (c) (1) or (2) is an executive officer or partner or is, directly or indirectly, the beneficial owner of ten percent or more of any class of equity securities; and

(5) Any trust or other estate in which any of the persons specified in paragraph (c) (1) or (2) has a substantial beneficial interest or as to which such person serves as a trustee or in a similar capacity.

Instructions to Paragraph (c), of Item 404: 1. For purposes of paragraph (c), the members of a person's immediate family are those persons specified in Instruction 2 to Item 404(a).

2. Exclude from the determination of the amount of indebtedness all amounts due from the particular person for purchases subject to usual trade terms, for ordinary travel and expense payments and for other transactions in the ordinary course of business.

3. If the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T [12 CFR part 220] and the loans are not disclosed as nonaccrual, past due, restructured or potential problems (see Item III.C. 1. and 2. of Industry Guide 3, Statistical Disclosure by Bank Holding Companies), disclosure may consist of a statement, if such is the case, that the loans to such persons (A) were made in the ordinary course of business, (B) were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons, and (C) did not involve more than the normal risk of collectibility or present other unfavorable features.

4. If any indebtedness required to be described arose under section 16(b) of the Exchange Act and has not been discharged by payment, state the amount of any profit realized, that such profit will inure to the benefit of the registrant or its subsidiaries and whether suit will be brought or other steps taken to recover such profit. If, in the opinion of counsel, a question reasonably exists as to the recoverability of such profit, it will suffice to state all facts necessary to describe the transactions, including the prices and number of shares involved.

(d) *Transactions with promoters.* Registrants that have been organized within the past five years and that are filing a registration statement on Form S–1 under the Securities Act (§ 239.11 of this chapter) or on Form 10 and Form 10–SB under the Exchange Act (§ 239.210 of this chapter) shall:

(1) State the names of the promoters, the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter, directly or indirectly, from the registrant and the nature and amount of any assets, services or other consideration therefore received or to be received by the registrant; and

(2) As to any assets acquired or to be acquired by the registrant from a promoter, state the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount and identify the persons making the determination and their relationship, if any, with the registrant or any promoter. If the assets were acquired by the promoter within two

years prior to their transfer to the registrant, also state the cost thereof to the promoter.

Instructions to Item 404: 1. No information need be given in response to any paragraph of Item 404 as to any compensation or other transaction reported in response to any other paragraph of Item 404 or to Item 402 of Regulation S–K (§ 229.402 of this chapter) or as to any compensation with respect to which information may be omitted pursuant to Item 402.

2. If the information called for by Item 404 is being presented in a registration statement filed pursuant to the Securities Act or the Exchange Act, information shall be given for the periods specified in the Item and, in addition, for the two fiscal years preceding the registrant's last fiscal year.

3. A foreign private issuer will be deemed to comply with Item 404 if it provides the information required by Item 7.B of Form 20–F (17 CFR 249.220f).

[47 FR 55665, Dec. 13, 1982, as amended at 48 FR 37612, Aug. 19, 1983; 48 FR 44475, Sept. 29, 1983; 56 FR 30053, 30054, July 1, 1991; 59 FR 65637, Dec. 20, 1994; 64 FR 53909, Oct. 5, 1999]

§ 229.405 (Item 405) Compliance with section 16(a) of the Exchange Act.

Every registrant having a class of equity securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*), every closed-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), and every holding company registered pursuant to the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) shall:

(a) Based solely upon a review of Forms 3 (§ 249.103) and 4 (§ 249.104) and amendments thereto furnished to the registrant pursuant to § 240.16a–3(e) during its most recent fiscal year and Forms 5 and amendments thereto (§ 249.105) furnished to the registrant with respect to its most recent fiscal year, and any written representation referred to in paragraph (b)(2)(i) of this Item.

(1) Under the caption ''Section 16(a) Beneficial Ownership Reporting Compliance,'' identify each person who, at any time during the fiscal year, was a director, officer, beneficial owner of more than ten percent of any class of equity securities of the registrant registered pursuant to section 12 of the Exchange Act, or any other person subject to section 16 of the Exchange Act with respect to the registrant because of the requirements of section 30 of the Investment Company Act or section 17 of the Public Utility Holding Company Act (''reporting person'') that failed to file on a timely basis, as disclosed in the above Forms, reports required by section 16(a) of the Exchange Act during the most recent fiscal year or prior fiscal years.

(2) For each such person, set forth the number of late reports, the number of transactions that were not reported on a timely basis, and any known failure to file a required Form. A known failure to file would include, but not be limited to, a failure to file a Form 3, which is required of all reporting persons, and a failure to file a Form 5 in the absence of the written representation referred to in paragraph (b)(2)(i) of this section, unless the registrant otherwise knows that no Form 5 is required.

NOTE: The disclosure requirement is based on a review of the forms submitted to the registrant during and with respect to its most recent fiscal year, as specified above. Accordingly, a failure to file timely need only be disclosed once. For example, if in the most recently concluded fiscal year a reporting person filed a Form 4 disclosing a transaction that took place in the prior fiscal year, and should have been reported in that year, the registrant should disclose that late filing and transaction pursuant to this Item 405 with respect to the most recently concluded fiscal year, but not in material filed with respect to subsequent years.

(b) With respect to the disclosure required by paragraph (a) of this Item:

(1) A form received by the registrant within three calendar days of the required filing date may be presumed to have been filed with the Commission by the required filing date.

(2) If the registrant (i) receives a written representation from the reporting person that no Form 5 is required; and (ii) maintains the representation for two years, making a copy available to the Commission or its staff upon request, the registrant need not identify such reporting person pursuant to paragraph (a) of this Item as having failed to file a Form 5 with respect to that fiscal year.

[56 FR 7265, Feb. 21, 1991, as amended at 61 FR 30391, June 14, 1996]

§229.406 (Item 406) Code of ethics.

(a) Disclose whether the registrant has adopted a code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If the registrant has not adopted such a code of ethics, explain why it has not done so.

(b) For purposes of this Item 406, the term *code of ethics* means written standards that are reasonably designed to deter wrongdoing and to promote:

(1) Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(2) Full, fair, accurate, timely, and understandable disclosure in reports and documents that a registrant files with, or submits to, the Commission and in other public communications made by the registrant;

(3) Compliance with applicable governmental laws, rules and regulations;

(4) The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and

(5) Accountability for adherence to the code.

(c) The registrant must:

(1) File with the Commission a copy of its code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions, as an exhibit to its annual report;

(2) Post the text of such code of ethics on its Internet website and disclose, in its annual report, its Internet address and the fact that it has posted such code of ethics on its Internet Web site; or

(3) Undertake in its annual report filed with the Commission to provide to any person without charge, upon request, a copy of such code of ethics and explain the manner in which such request may be made.

(d) If the registrant intends to satisfy the disclosure requirement under Item 10 of Form 8–K regarding an amendment to, or a waiver from, a provision of its code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions and that relates to any element of the code of ethics definition enumerated in paragraph (b) of this Item by posting such information on its Internet website, disclose the registrant's Internet address and such intention.

Instructions to Item 406. 1. A registrant may have separate codes of ethics for different types of officers. Furthermore, a *code of ethics* within the meaning of paragraph (b) of this Item may be a portion of a broader document that addresses additional topics or that applies to more persons than those specified in paragraph (a). In satisfying the requirements of paragraph (c), a registrant need only file, post or provide the portions of a broader document that constitutes a *code of ethics* as defined in paragraph (b) and that apply to the persons specified in paragraph (a).

2. If a registrant elects to satisfy paragraph (c) of this Item by posting its code of ethics on its website pursuant to paragraph (c)(2), the code of ethics must remain accessible on its Web site for as long as the registrant remains subject to the requirements of this Item and chooses to comply with this Item by posting its code on its Web site pursuant to paragraph (c)(2).

3. A registrant that is an Asset-Backed Issuer (as defined in §240.13a–14(g) and §240.15d–14(g) of this chapter) is not required to disclose the information required by this Item.

[68 FR 5127, Jan. 31, 2003]

Subpart 229.500—Registration Statement and Prospectus Provisions

§229.501 (Item 501) Forepart of Registration Statement and Outside Front Cover Page of Prospectus.

The registrant must furnish the following information in plain English. See §230.421(d) of Regulation C of this chapter.

(a) *Front cover page of the registration statement.* Where appropriate, include the delaying amendment legend from §230.473 of Regulation C of this chapter.

(b) *Outside front cover page of the prospectus.* Limit the outside cover page to one page. If the following information applies to your offering, disclose it on the outside cover page of the prospectus.

(1) *Name.* The registrant's name. A foreign registrant must give the English translation of its name.

Instruction to paragraph 501(b)(1): If your name is the same as that of a company that is well known, include information to eliminate any possible confusion with the other company. If your name indicates a line of business in which you are not engaged or you are engaged only to a limited extent, include information to eliminate any misleading inference as to your business. In some circumstances, disclosure may not be sufficient and you may be required to change your name. You will not be required to change your name if you are an established company, the character of your business has changed, and the investing public is generally aware of the change and the character of your current business.

(2) *Title and amount of securities.* The title and amount of securities offered. Separately state the amount of securities offered by selling security holders, if any. If the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may purchase additional shares in connection with the offering, indicate that this arrangement exists and state the amount of additional shares that the underwriter may purchase under the arrangement. Give a brief description of the securities except where the information is clear from the title of the security. For example, you are not required to describe common stock that has full voting, dividend and liquidation rights usually associated with common stock.

(3) *Offering price of the securities.* Where you offer securities for cash, the price to the public of the securities, the underwriter's discounts and commissions, the net proceeds you receive, and any selling shareholder's net proceeds. Show this information on both a per share or unit basis and for the total amount of the offering. If you make the offering on a minimum/maximum basis, show this information based on the total minimum and total maximum amount of the offering. You may present the information in a table, term sheet format, or other clear presentation. You may present the information in any format that fits the design of the cover page so long as the information can be easily read and is not misleading:

Instructions to paragraph 501(b)(3): 1. If a preliminary prospectus is circulated and you are not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, provide, as applicable:

(A) A bona fide estimate of the range of the maximum offering price and the maximum number of securities offered; or

(B) A bona fide estimate of the principal amount of the debt securities offered.

2. If it is impracticable to state the price to the public, explain the method by which the price is to be determined. If the securities are to be offered at the market price, or if the offering price is to be determined by a formula related to the market price, indicate the market and market price of the securities as of the latest practicable date.

3. If you file a registration statement on Form S–8, you are not required to comply with this paragraph (b)(3).

(4) *Market for the securities.* Whether any national securities exchange or the Nasdaq Stock Market lists the securities offered, naming the particular market(s), and identifying the trading symbol(s) for those securities;

(5) *Risk factors.* A cross-reference to the risk factors section, including the page number where it appears in the prospectus. Highlight this cross-reference by prominent type or in another manner;

(6) *State legend.* Any legend or statement required by the law of any state in which the securities are to be offered. You may combine this with any legend required by the SEC, if appropriate;

(7) *Commission legend.* A legend that indicates that neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the securities or passed upon the accuracy or adequacy of the disclosures in the prospectus and that any contrary representation is a criminal offense. You may use one of the following or other clear, plain language:

Example A: Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the adequacy or accuracy of this prospectus. Any representation to the contrary is a criminal offense.

Example B: Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of

these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

(8) *Underwriting.* (i) Name(s) of the lead or managing underwriter(s) and an identification of the nature of the underwriting arrangements;

(ii) If the offering is not made on a firm commitment basis, a brief description of the underwriting arrangements. You may use any clear, concise, and accurate description of the underwriting arrangements. You may use the following descriptions of underwriting arrangements where appropriate:

Example A: Best efforts offering. The underwriters are not required to sell any specific number or dollar amount of securities but will use their best efforts to sell the securities offered.

Example B: Best efforts, minimum-maximum offering. The underwriters must sell the minimum number of securities offered (*insert number*) if any are sold. The underwriters are required to use only their best efforts to sell the maximum number of securities offered (*insert number*).

(iii) If you offer the securities on a best efforts or best efforts minimum/maximum basis, the date the offering will end, any minimum purchase requirements, and any arrangements to place the funds in an escrow, trust, or similar account. If you have not made any of these arrangements, state this fact and describe the effect on investors;

(9) *Date of prospectus.* The date of the prospectus;

(10) *Prospectus ''Subject to Completion'' legend.* If you use the prospectus before the effective date of the registration statement, a prominent statement that:

(i) The information in the prospectus will be amended or completed;

(ii) A registration statement relating to these securities has been filed with the Securities and Exchange Commission;

(iii) The securities may not be sold until the registration statement becomes effective; and

(iv) The prospectus is not an offer to sell the securities and it is not soliciting an offer to buy the securities in any state where offers or sales are not permitted. The legend may be in the following or other clear, plain language:

The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.

(11) If you use § 230.430A of this chapter to omit pricing information and the prospectus is used before you determine the public offering price, the information and legend in paragraph (b)(10) of this section.

[63 FR 6381, Feb. 6, 1998]

§ 229.502 (Item 502) Inside front and outside back cover pages of prospectus.

The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) *Table of contents.* On either the inside front or outside back cover page of the prospectus, provide a reasonably detailed table of contents. It must show the page number of the various sections or subdivisions of the prospectus. Include a specific listing of the risk factors section required by Item 503 of this Regulation S–K (17 CFR 229.503). You must include the table of contents immediately following the cover page in any prospectus you deliver electronically.

(b) *Dealer prospectus delivery obligation.* On the outside back cover page of the prospectus, advise dealers of their prospectus delivery obligation, including the expiration date specified by Section 4(3) of the Securities Act (15 U.S.C. 77d(3)) and § 230.174 of this chapter. If you do not know the expiration date on the effective date of the registration statement, include the expiration date in the copy of the prospectus you file under § 230.424(b) of this chapter. You do not have to include this information if dealers are not required to deliver a prospectus under § 230.174 of this chapter or Section 24(d) of the Investment Company Act (15 U.S.C. 80a–24). You may use the following or other clear, plain language:

DEALER PROSPECTUS DELIVERY OBLIGATION

Until (*insert date*), all dealers that effect transactions in these securities, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealers' obligation to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

[63 FR 6383, Feb. 6, 1998]

§ 229.503 (Item 503) Prospectus summary, risk factors, and ratio of earnings to fixed charges.

The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) *Prospectus summary.* Provide a summary of the information in the prospectus where the length or complexity of the prospectus makes a summary useful. The summary should be brief. The summary should not contain, and is not required to contain, all of the detailed information in the prospectus. If you provide summary business or financial information, even if you do not caption it as a summary, you still must provide that information in plain English.

Instruction to paragraph 503(a): The summary should not merely repeat the text of the prospectus but should provide a brief overview of the key aspects of the offering. Carefully consider and identify those aspects of the offering that are the most significant and determine how best to highlight those points in clear, plain language.

(b) *Address and telephone number.* Include, either on the cover page or in the summary section of the prospectus, the complete mailing address and telephone number of your principal executive offices.

(c) *Risk factors.* Where appropriate, provide under the caption ''Risk Factors'' a discussion of the most significant factors that make the offering speculative or risky. This discussion must be concise and organized logically. Do not present risks that could apply to any issuer or any offering. Explain how the risk affects the issuer or the securities being offered. Set forth each risk factor under a subcaption that adequately describes the risk. The risk factor discussion must immediately follow the summary section. If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on § 230.430A(a) of this chapter. The risk factors may include, among other things, the following:

(1) Your lack of an operating history;

(2) Your lack of profitable operations in recent periods;

(3) Your financial position;

(4) Your business or proposed business; or

(5) The lack of a market for your common equity securities or securities convertible into or exercisable for common equity securities.

(d) *Ratio of earnings to fixed charges.* If you register debt securities, show a ratio of earnings to fixed charges. If you register preference equity securities, show the ratio of combined fixed charges and preference dividends to earnings. Present the ratio for each of the last five fiscal years and the latest interim period for which financial statements are presented in the document. If you will use the proceeds from the sale of debt or preference securities to repay any of your outstanding debt or to retire other securities and the change in the ratio would be ten percent or greater, you must include a ratio showing the application of the proceeds, commonly referred to as the pro forma ratio.

Instructions to paragraph 503(d): 1. *Definitions.* In calculating the ratio of earnings to fixed charges, you must use the following definitions:

(A) *Fixed charges.* The term ''fixed charges'' means the sum of the following: (a) interest expensed and capitalized, (b) amortized premiums, discounts and capitalized expenses related to indebtedness, (c) an estimate of the interest within rental expense, and (d) preference security dividend requirements of consolidated subsidiaries.

(B) *Preference security dividend.* The term ''preference security dividend'' is the amount of pre-tax earnings that is required to pay the dividends on outstanding preference securities. The dividend requirement must be computed as the amount of the dividend divided by (1 minus the effective income tax rate applicable to continuing operations).

(C) *Earnings.* The term ''earnings'' is the amount resulting from adding and subtracting the following items. Add the following: (a) Pre-tax income from continuing operations before adjustment for minority interests in consolidated subsidiaries or income or loss from equity investees, (b) fixed charges, (c) amortization of capitalized interest, (d) distributed income of equity investees, and (e) your share of pre-tax losses of equity investees for which charges arising from guarantees are included in fixed charges. From the total of the added items, subtract the following: (a) interest capitalized, (b) preference security dividend requirements of consolidated subsidiaries, and (c) the minority interest in pre-tax income of subsidiaries that have not incurred fixed charges. Equity investees are investments that you account for using the equity method of accounting. Public utilities following SFAS 71 should not add amortization of capitalized interest in determining earnings, nor reduce fixed charges by any allowance for funds used during construction.

2. *Disclosure.* Disclose the following information when showing the ratio of earnings to fixed charges:

(A) *Deficiency.* If a ratio indicates less than one-to-one coverage, disclose the dollar amount of the deficiency.

(B) *Pro forma ratio.* You may show the pro forma ratio only for the most recent fiscal year and the latest interim period. Use the net change in interest or dividends from the refinancing to calculate the pro forma ratio.

(C) *Foreign private issuers.* A foreign private issuer must show the ratio based on the figures in the primary financial statement. A foreign private issuer must show the ratio based on the figures resulting from the reconciliation to U.S. generally accepted accounting principles if this ratio is materially different.

(D) *Summary Section.* If you provide a summary or similar section in the prospectus, show the ratios in that section.

3. *Exhibit.* File an exhibit to the registration statement to show the figures used to calculate the ratios. See paragraph (b)(12) of Item 601 of Regulation S–K (17 CFR 229.601(b)(12)).

[63 FR 6383, Feb. 6, 1998]

§ 229.504 (Item 504) Use of proceeds.

State the principal purposes for which the net proceeds to the registrant from the securities to be offered are intended to be used and the approximate amount intended to be used for each such purpose. Where registrant has no current specific plan for the proceeds, or a significant portion thereof, the registrant shall so state and discuss the principal reasons for the offering.

Instructions to Item 504: 1. Where less than all the securities to be offered may be sold and more than one use is listed for the proceeds, indicate the order of priority of such purposes and discuss the registrant's plans if substantially less than the maximum proceeds are obtained. Such discussion need not be included if underwriting arrangements with respect to such securities are such that, if any securities are sold to the public, it reasonably can be expected that the actual proceeds will not be substantially less than the aggregate proceeds to the registrant shown pursuant to Item 501 of Regulation S–K (§ 229.501).

2. Details of proposed expenditures need not be given; for example, there need be furnished only a brief outline of any program of construction or addition of equipment. Consideration should be given as to the need to include a discussion of certain matters addressed in the discussion and analysis of registrant's financial condition and results of operations, such as liquidity and capital expenditures.

3. If any material amounts of other funds are necessary to accomplish the specified purposes for which the proceeds are to be obtained, state the amounts and sources of such other funds needed for each such specified purpose and the sources thereof.

4. If any material part of the proceeds is to be used to discharge indebtedness, set forth the interest rate and maturity of such indebtedness. If the indebtedness to be discharged was incurred within one year, describe the use of the proceeds of such indebtedness other than short-term borrowings used for working capital.

5. If any material amount of the proceeds is to be used to acquire assets, otherwise than in the ordinary course of business, describe briefly and state the cost of the assets and, where such assets are to be acquired from affiliates of the registrant or their associates, give the names of the persons from whom they are to be acquired and set forth the principle followed in determining the cost to the registrant.

6. Where the registrant indicates that the proceeds may, or will, be used to finance acquisitions of other businesses, the identity of such businesses, if known, or, if not known, the nature of the businesses to be sought, the status of any negotiations with respect to the acquisition, and a brief description of such business shall be included. Where, however, pro forma financial statements reflecting such acquisition are not required by Regulation S–X to be included, in the registration statement, the possible terms of any transaction, the identification of the parties thereto or the nature of the business sought need not be disclosed, to the extent that the

registrant reasonably determines that public disclosure of such information would jeopardize the acquisition. Where Regulation S–X (17 CFR 210) would require financial statements of the business to be acquired to be included, the description of the business to be acquired shall be more detailed.

7. The registrant may reserve the right to change the use of proceeds, provided that such reservation is due to certain contingencies that are discussed specifically and the alternatives to such use in that event are indicated.

§ 229.505 (Item 505) Determination of offering price.

(a) *Common equity.* Where common equity is being registered for which there is no established public trading market for purposes of paragraph (a) of Item 201 of Regulation S–K (§ 229.201(a)) or where there is a material disparity between the offering price of the common equity being registered and the market price of outstanding shares of the same class, describe the various factors considered in determining such offering price.

(b) *Warrants, rights and convertible securities.* Where warrants, rights or convertible securities exercisable for common equity for which there is no established public trading market for purposes of paragraph (a) of Item 201 of Regulation S–K (§ 229.201(a)) are being registered, describe the various factors considered in determining their exercise or conversion price.

§ 229.506 (Item 506) Dilution.

Where common equity securities are being registered and there is substantial disparity between the public offering price and the effective cash cost to officers, directors, promoters and affiliated persons of common equity acquired by them in transactions during the past five years, or which they have the right to acquire, and the registrant is not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act immediately prior to filing of the registration statement, there shall be included a comparison of the public contribution under the proposed public offering and the effective cash contribution of such persons. In such cases, and in other instances where common equity securities are being registered by a registrant that has had losses in each of its last three fiscal years and there is a material dilution of the purchasers' equity interest, the following shall be disclosed:

(a) The net tangible book value per share before and after the distribution;

(b) The amount of the increase in such net tangible book value per share attributable to the cash payments made by purchasers of the shares being offered; and

(c) The amount of the immediate dilution from the public offering price which will be absorbed by such purchasers.

§ 229.507 (Item 507) Selling security holders.

If any of the securities to be registered are to be offered for the account of security holders, name each such security holder, indicate the nature of any position, office, or other material relationship which the selling security holder has had within the past three years with the registrant or any of its predecessors or affiliates, and state the amount of securities of the class owned by such security holder prior to the offering, the amount to be offered for the security holder's account, the amount and (if one percent or more) the percentage of the class to be owned by such security holder after completion of the offering.

§ 229.508 (Item 508) Plan of distribution.

(a) *Underwriters and underwriting obligation.* If the securities are to be offered through underwriters, name the principal underwriters, and state the respective amounts underwritten. Identify each such underwriter having a material relationship with the registrant and state the nature of the relationship. State briefly the nature of the obligation of the underwriter(s) to take the securities.

Instruction to Paragraph 508(a): All that is required as to the nature of the underwriters' obligation is whether the underwriters are or will be committed to take and to pay for all of the securities if any are taken, or whether it is merely an agency or the type of *best efforts* arrangement under which the underwriters are required to take and to pay for only such securities as they may sell to the

public. Conditions precedent to the underwriters' taking the securities, including *market-outs*, need not be described except in the case of an agency or *best efforts* arrangement.

(b) *New underwriters.* Where securities being registered are those of a registrant that has not previously been required to file reports pursuant to section 13(a) or 15(d) of the Exchange Act, or where a prospectus is required to include reference on its cover page to material risks pursuant to Item 501 of Regulation S–K (§ 229.501), and any one or more of the managing underwriter(s) (or where there are no managing underwriters, a majority of the principal underwriters) has been organized, reactivated, or first registered as a broker-dealer within the past three years, these facts concerning such underwriter(s) shall be disclosed in the prospectus together with, where applicable, the disclosures that the principal business function of such underwriter(s) will be to sell the securities to be registered, or that the promoters of the registrant have a material relationship with such underwriter(s). Sufficient details shall be given to allow full appreciation of such underwriter(s) experience and its relationship with the registrant, promoters and their controlling persons.

(c) *Other distributions.* Outline briefly the plan of distribution of any securities to be registered that are to be offered otherwise than through underwriters.

(1) If any securities are to be offered pursuant to a dividend or interest reinvestment plan the terms of which provide for the purchase of some securities on the market, state whether the registrant or the participant pays fees, commissions, and expenses incurred in connection with the plan. If the participant will pay such fees, commissions and expenses, state the anticipated cost to participants by transaction or other convenient reference.

(2) If the securities are to be offered through the selling efforts of brokers or dealers, describe the plan of distribution and the terms of any agreement, arrangement, or understanding entered into with broker(s) or dealer(s) prior to the effective date of the registration statement, including volume limitations on sales, parties to the agreement and the conditions under which the agreement may be terminated. If known, identify the broker(s) or dealer(s) which will participate in the offering and state the amount to be offered through each.

(3) If any of the securities being registered are to be offered otherwise than for cash, state briefly the general purposes of the distribution, the basis upon which the securities are to be offered, the amount of compensation and other expenses of distribution, and by whom they are to be borne. If the distribution is to be made pursuant to a plan of acquisition, reorganization, readjustment or succession, describe briefly the general effect of the plan and state when it became or is to become operative. As to any material amount of assets to be acquired under the plan, furnish information corresponding to that required by Instruction 5 of Item 504 of Regulation S–K (§ 229.504).

(d) *Offerings on exchange.* If the securities are to be offered on an exchange, indicate the exchange. If the registered securities are to be offered in connection with the writing of exchange-traded call options, describe briefly such transactions.

(e) *Underwriter's compensation.* Provide a table that sets out the nature of the compensation and the amount of discounts and commissions to be paid to the underwriter for each security and in total. The table must show the separate amounts to be paid by the company and the selling shareholders. In addition, include in the table all other items considered by the National Association of Securities Dealers to be underwriting compensation for purposes of that Association's Rules of Fair Practice.

Instructions to paragraph 508(e): 1. The term ''commissions'' is defined in paragraph (17) of Schedule A of the Securities Act. Show separately in the table the cash commissions paid by the registrant and selling security holders. Also show in the table commissions paid by other persons. Disclose any finder's fee or similar payments in the table.

2. Disclose the offering expenses specified in Item 511 of Regulation S–K (17 CFR 229.511).

3. If the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may

purchase additional shares in connection with the offering, indicate that this arrangement exists and state the amount of additional shares that the underwriter may purchase under the arrangement. Where the underwriter has such an arrangement, present maximum-minimum information in a separate column to the table, based on the purchase of all or none of the shares subject to the arrangement. Describe the key terms of the arrangement in the narrative.

(f) *Underwriter's representative on board of directors.* Describe any arrangement whereby the underwriter has the right to designate or nominate a member or members of the board of directors of the registrant. The registrant shall disclose the identity of any director so designated or nominated, and indicate whether or not a person so designated or nominated, or allowed to be designated or nominated by the underwriter is or may be a director, officer, partner, employee or affiliate of the underwriter.

(g) *Indemnification of underwriters.* If the underwriting agreement provides for indemnification by the registrant of the underwriters or their controlling persons against any liability arising under the Securities Act, furnish a brief description of such indemnification provisions.

(h) *Dealers' compensation.* State briefly the discounts and commissions to be allowed or paid to dealers, including all cash, securities, contracts or other considerations to be received by any dealer in connection with the sale of the securities. If any dealers are to act in the capacity of sub-underwriters and are to be allowed or paid any additional discounts or commissions for acting in such capacity, a general statement to that effect will suffice without giving the additional amounts to be sold.

(i) *Finders.* Identify any finder and, if applicable, describe the nature of any material relationship between such finder and the registrant, its officers, directors, principal stockholders, finders or promoters or the principal underwriter(s), or if there is a managing underwriter(s), the managing underwriter(s), (including, in each case, affiliates or associates thereof).

(j) *Discretionary accounts.* If the registrant was not, immediately prior to the filing of the registration statement, subject to the requirements of section 13(a) or 15(d) of the Exchange Act, identify any principal underwriter that intends to sell to any accounts over which it exercises discretionary authority and include an estimate of the amount of securities so intended to be sold. The response to this paragraph shall be contained in a pre-effective amendment which shall be circulated if the information is not available when the registration statement is filed.

(k) *Passive market making.* If the underwriters or any selling group members intend to engage in passive market making transactions as permitted by Rule 103 of Regulation M (§ 242.103 of this chapter), indicate such intention and briefly describe passive market making.

(l) *Stabilization and other transactions.* (1) Briefly describe any transaction that the underwriter intends to conduct during the offering that stabilizes, maintains, or otherwise affects the market price of the offered securities. Include information on stabilizing transactions, syndicate short covering transactions, penalty bids, or any other transaction that affects the offered security's price. Describe the nature of the transactions clearly and explain how the transactions affect the offered security's price. Identify the exchange or other market on which these transactions may occur. If true, disclose that the underwriter may discontinue these transactions at any time;

(2) If the stabilizing began before the effective date of the registration statement, disclose the amount of securities bought, the prices at which they were bought and the period within which they were bought. If you use § 230.430A of this chapter, the prospectus you file under § 230.424(b) of this chapter or include in a post-effective amendment must contain information on the stabilizing transactions that took place before the determination of the public offering price; and

(3) If you are making a warrants or rights offering of securities to existing security holders and any securities not purchased by existing security holders are to be reoffered to the public, disclose in a supplement to the prospectus

or in the prospectus used in connection with the reoffering:

(i) The amount of securities bought in stabilization activities during the offering period and the price or range of prices at which the securities were bought;

(ii) The amount of the offered securities subscribed for during the offering period;

(iii) The amount of the offered securities subscribed for by the underwriter during the offering period;

(iv) The amount of the offered securities sold during the offering period by the underwriter and the price or price ranges at which the securities were sold; and

(v) The amount of the offered securities that will be reoffered to the public and the public offering price.

[47 FR 11401, Mar. 16, 1982, as amended at 58 FR 19606, Apr. 15, 1993; 62 FR 543, Jan. 3, 1997; 62 FR 11323, Mar. 12, 1997; 63 FR 6384, Feb. 6, 1998]

§ 229.509 (Item 509) Interests of named experts and counsel.

If (a) any expert named in the registration statement as having prepared or certified any part thereof (or is named as having prepared or certified a report or valuation for use in connection with the registration statement), or (b) counsel for the registrant, underwriters or selling security holders named in the prospectus as having given an opinion upon the validity of the securities being registered or upon other legal matters in connection with the registration or offering of such securities, was employed for such purpose on a contingent basis, or at the time of such preparation, certification or opinion or at any time thereafter, through the date of effectiveness of the registration statement or that part of the registration statement to which such preparation, certification or opinion relates, had, or is to receive in connection with the offering, a substantial interest, direct or indirect, in the registrant or any of its parents or subsidiaries or was connected with the registrant or any of its parents or subsidiaries as a promoter, managing underwriter (or any principal underwriter, if there are no managing underwriters) voting trustee, director, officer, or employee, furnish a brief statement of the nature of such contingent basis, interest, or connection.

Instructions to Item 509: 1. The interest of an expert (other than an accountant) or counsel will not be deemed substantial and need not be disclosed if the interest, including the fair market value of all securities of the registrant owned, received and to be received, or subject to options, warrants or rights received or to be received by the expert or counsel does not exceed $50,000. For the purpose of this Instruction, the term *expert* or counsel includes the firm, corporation, partnership or other entity, if any, by which such expert or counsel is employed or of which he is a member or of counsel to and all attorneys in the case of counsel, and all nonclerical personnel in the case of named experts, participating in such matter on behalf of such firm, corporation, partnership or entity.

2. Accountants, providing a report on the financial statements, presented or incorporated by reference in the registration statement, should note § 210.2–01 of Regulation S–X (17 CFR 210) for the Commission's requirements regarding ''Qualification of Accountants'' which discusses disqualifying interests.

§ 229.510 (Item 510) Disclosure of Commission position on indemnification for Securities Act liabilities.

In addition to the disclosure prescribed by Item 702 of Regulation S–K (§ 229.702), if the undertaking required by paragraph (h) of Item 512 of Regulation S–K (§ 229.512) is not required to be included in the registration statement because acceleration of the effective date of the registration statement is not being requested, and if waivers have not been obtained comparable to those specified in paragraph (h), a brief description of the indemnification provisions relating to directors, officers and controlling persons of the registrant against liability arising under the Securities Act (including any provision of the underwriting agreement which relates to indemnification of the underwriter or its controlling persons by the registrant against such liabilities where a director, officer or controlling person of the registrant is such an underwriter or controlling person thereof or a member of any firm which is such an underwriter) shall be included in the prospectus, together with a statement in substantially the following form:

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers or persons controlling the registrant pursuant to the foregoing provisions, the registrant has been informed that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is therefore unenforceable.

[47 FR 11401, Mar. 16, 1982, as amended at 56 FR 48103, Sept. 24, 1991]

§ 229.511 (Item 511) Other expenses of issuance and distribution.

Furnish a reasonably itemized statement of all expenses in connection with the issuance and distribution of the securities to be registered, other than underwriting discounts and commissions. If any of the securities to be registered are to be offered for the account of security holders, indicate the portion of such expenses to be borne by such security holder.

Instruction to Item 511: Insofar as practicable, registration fees, Federal taxes, States taxes and fees, trustees' and transfer agents' fees, costs of printing and engraving, and legal, accounting, and engineering fees shall be itemized separately. Include as a separate item any premium paid by the registrant or any selling security holder on any policy obtained in connection with the offering and sale of the securities being registered which insures or indemnifies directors or officers against any liabilities they may incur in connection with the registration, offering, or sale of such securities. The information may be given as subject to future contingencies. If the amounts of any items are not known, estimates, identified as such, shall be given.

§ 229.512 (Item 512) Undertakings.

Include each of the following undertakings that is applicable to the offering being registered.

(a) *Rule 415 Offering.*[1] Include the following if the securities are registered pursuant to Rule 415 under the Securities Act (§ 230.415 of this chapter):

The undersigned registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any propectus required by section 10(a)(3) of the Securities Act of 1933;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) (§ 230.424(b) of this chapter) if, in the aggregate, the changes in volume and price represent no more than 20% change in the maximum aggregate offering price set forth in the ''Calculation of Registration Fee'' table in the effective registration statement.

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

Provided, however, That paragraphs (a)(1)(i) and (a)(1)(ii) of this section do not apply if the registration statement is on Form S–3 (§ 239.13 of this chapter), Form S–8 (§ 239.16b of this chapter) or Form F–3 (§ 239.33 of this chapter), and the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement.

(2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

[1] Paragraph (a) reflects proposals made in Securities Act Release No. 6334 (Aug. 6, 1981).

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(4) If the registrant is a foreign private issuer, to file a post-effective amendment to the registration statement to include any financial statements required by ''Item 8.A. of Form 20–F (17 CFR 249.220f)'' at the start of any delayed offering or throughout a continuous offering. Financial statements and information otherwise required by Section 10(a)(3) of the Act need not be furnished, *provided* that the registrant includes in the prospectus, by means of a post-effective amendment, financial statements required pursuant to this paragraph (a)(4) and other information necessary to ensure that all other information in the prospectus is at least as current as the date of those financial statements. Notwithstanding the foregoing, with respect to registration statements on Form F–3 (§239.33 of this chapter), a post-effective amendment need not be filed to include financial statements and information required by Section 10(a)(3) of the Act or §210.3–19 of this chapter if such financial statements and information are contained in periodic reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the Form F–3.

(b) *Filings incorporating subsequent Exchange Act documents by reference.* Include the following if the registration statement incorporates by reference any Exchange Act document filed subsequent to the effective date of the registration statement:

The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant's annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(c) *Warrants and rights offerings.* Include the following, with appropriate modifications to suit the particular case, if the securities to be registered are to be offered to existing security holders pursuant to warrants or rights and any securities not taken by security holders are to be reoffered to the public:

The undersigned registrant hereby undertakes to supplement the prospectus, after the expiration of the subscription period, to set forth the results of the subscription offer, the transactions by the underwriters during the subscription period, the amount of unsubscribed securities to be purchased by the underwriters, and the terms of any subsequent reoffering thereof. If any public offering by the underwriters is to be made on terms differing from those set forth on the cover page of the prospectus, a post-effective amendment will be filed to set forth the terms of such offering.

(d) *Competitive bids.* Include the following, with appropriate modifications to suit the particular case, if the securities to be registered are to be offered at competitive bidding:

The undersigned registrant hereby undertakes (1) to use its best efforts to distribute prior to the opening of bids, to prospective bidders, underwriters, and dealers, a reasonable number of copies of a prospectus which at that time meets the requirements of section 10(a) of the Act, and relating to the securities offered at competitive bidding, as contained in the registration statement, together with any supplements thereto, and (2) to file an amendment to the registration statement reflecting the results of bidding, the terms of the reoffering and related matters to the extent required by the applicable form, not later than the first use, authorized by the issuer after the opening of bids, of a prospectus relating to the securities offered at competitive bidding, unless no further public offering of such securities by the issuer and no reoffering of such securities by the purchasers is proposed to be made.

(e) *Incorporated annual and quarterly reports.* Include the following if the registration statement specifically incorporates by reference (other than by indirect incorporation by reference through a Form 10–K and Form 10–KSB (§249.310 of this chapter) report) in the prospectus all or any part of the annual report to security holders meeting the requirements of Rule 14a–3 or Rule

14c–3 under the Exchange Act) §§ 240.14a–3 and 240.14c–3 of this chapter):

The undersigned registrant hereby undertakes to deliver or cause to be delivered with the prospectus, to each person to whom the prospectus is sent or given, the latest annual report to security holders that is incorporated by reference in the prospectus and furnished pursuant to and meeting the requirements of Rule 14a–3 or Rule 14c–3 under the Securities Exchange Act of 1934; and, where interim financial information required to be presented by Article 3 of Regulation S–X are not set forth in the prospectus, to deliver, or cause to be delivered to each person to whom the prospectus is sent or given, the latest quarterly report that is specifically incorporated by reference in the prospectus to provide such interim financial information.

(f) *Equity offerings of nonreporting registrants.* Include the following if equity securities of a registrant that prior to the offering had no obligation to file reports with the Commission pursuant to section 13(a) or 15(d) of the Exchange Act are being registered for sale in an underwritten offering:

The undersigned registrant hereby undertakes to provide to the underwriter at the closing specified in the underwriting agreements certificates in such denominations and registered in such names as required by the underwriter to permit prompt delivery to each purchaser.

(g) *Registration on Form S–4 or F–4 of securities offered for resale.* Include the following if the securities are being registered on Form S–4 or F–4 (§ 239.25, or 34 of this chapter) in connection with a transaction specified in paragraph (a) of Rule 145 (§ 230.145 of this chapter).

(1) The undersigned registrant hereby undertakes as follows: That prior to any public reoffering of the securities registered hereunder through use of a prospectus which is a part of this registration statement, by any person or party who is deemed to be an underwriter within the meaning of Rule 145(c), the issuer undertakes that such reoffering prospectus will contain the information called for by the applicable registration form with respect to reofferings by persons who may be deemed underwriters, in addition to the information called for by the other Items of the applicable form.

(2) The registrant undertakes that every prospectus (i) that is filed pursuant to paragraph (h)(1) immediately preceding, or (ii) that purports to meet the requirements of section 10(a)(3) of the Act and is used in connection with an offering of securities subject to Rule 415 (§ 230.415 of this chapter), will be filed as a part of an amendment to the registration statement and will not be used until such amendment is effective, and that, for purposes of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(h) *Request for acceleration of effective date or filing of registration statement on Form S–8.* Include the following if acceleration is requested of the effective date of the registration statement pursuant to Rule 461 under the Securities Act (§ 230.461 of this chapter), or if the registration statement is filed on Form S–8, and:

(1) Any provision or arrangement exists whereby the registrant may indemnify a director, officer or controlling person of the registrant against liabilities arising under the Securities Act, or

(2) The underwriting agreement contains a provision whereby the registrant indemnifies the underwriter or controlling persons of the underwriter against such liabilities and a director, officer or controlling person of the registrant is such an underwriter or controlling person thereof or a member of any firm which is such an underwriter, and

(3) The benefits of such indemnification are not waived by such persons:

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a

claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

(i) Include the following in a registration statement permitted by Rule 430A under the Securities Act of 1933 (§ 230.430A of this chapter):

The undersigned registrant hereby undertakes that:

(1) For purposes of determining any liability under the Securities Act of 1933, the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the registrant pursuant to Rule 424(b) (1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this registration statement as of the time it was declared effective.

(2) For the purpose of determining any liability under the Securities Act of 1933, each post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(j) *Qualification of trust indentures under the Trust Indenture Act of 1939 for delayed offerings.* Include the following if the registrant intends to rely on section 305(b)(2) of the Trust Indenture Act of 1939 for determining the eligibility of the trustee under indentures for securities to be issued, offered, or sold on a delayed basis by or on behalf of the registrant:

The undersigned registrant hereby undertakes to file an application for the purpose of determining the eligibility of the trustee to act under subsection (a) of section 310 of the Trust Indenture Act (''Act'') in accordance with the rules and regulations prescribed by the Commission under section 305(b)(2) of the Act.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 39803, Sept. 10, 1982; 47 FR 54769, Dec. 6, 1982; 50 FR 18999, May 6, 1985; 52 FR 21260, June 5, 1987; 52 FR 21939, June 10, 1987; 52 FR 30145, Aug. 13, 1987; 55 FR 23922, June 13, 1990; 56 FR 22319, May 15, 1991; 58 FR 60306, Nov. 15, 1993; 59 FR 21649, Apr. 26, 1994; 60 FR 26615, May 17, 1995; 64 FR 53909, Oct. 5, 1999]

Subpart 229.600—Exhibits

§ 229.601 (Item 601) Exhibits.

(a) *Exhibits and index required.* (1) Subject to Rule 411(c) (§ 230.411(c) of this chapter) under the Securities Act and Rule 12b–32 (§ 240.12b–32 of this chapter) under the Exchange Act regarding incorporation of exhibits by reference, the exhibits required in the exhibit table shall be filed as indicated, as part of the registration statement or report. Financial Data Schedules required by paragraph (b)(27) of this Item shall be submitted pursuant to the provisions of paragraph (c) of this Item. Notwithstanding the provisions of paragraphs (b)(27) and (c) of this Item, registered investment companies and business development companies filing on forms available solely to investment companies shall be subject to the provisions of rule 483 under the Securities Act of 1933 (§ 230.483 of this chapter), and any provision or instruction therein shall be controlling with respect to registered investment companies and business development companies unless otherwise specifically provided in rules or instructions pertaining to the submission of a specific form.

(2) Each registration statement or report shall contain an exhibit index, which shall precede immediately the exhibits filed with such registration statement. For convenient reference, each exhibit shall be listed in the exhibit index according to the number assigned to it in the exhibit table. The exhibit index shall indicate, by handwritten, typed, printed, or other legible form of notation in the manually signed original registration statement or report, the page number in the sequential numbering system where such

exhibit can be found. Where exhibits are incorporated by reference, this fact shall be noted in the exhibit index referred to in the preceding sentence. Further, the first page of the manually signed registration statement shall list the page in the filing where the exhibit index is located. For a description of each of the exhibits included in the exhibit table, see paragraph (b) of this section.

(3) This Item applies only to the forms specified in the exhibit table. With regard to forms not listed in that table, reference shall be made to the appropriate form for the specific exhibit filing requirements applicable thereto.

(4) If a material contract or plan of acquisition, reorganization, arrangement, liquidation or succession is executed or becomes effective during the reporting period reflected by a Form 10–Q and Form 10–QSB or Form 10–K and Form 10–KSB, it shall be filed as an exhibit to the Form 10–Q and Form 10–QSB or Form 10–K and Form 10–KSB filed for the corresponding period. Any amendment or modification to a previously filed exhibit to a Form 10 and Form 10–SB, 10–K or 10–Q document shall be filed as an exhibit to a Form 10–Q and Form 10–QSB or Form 10–K and Form 10–KSB. Such amendment or modification need not be filed where such previously filed exhibit would not be currently required.

Instructions to Item 601: 1. If an exhibit to a registration statement (other than an opinion or consent), filed in preliminary form, has been changed only (A) to insert information as to interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters' or dealers' commissions, names, addresses or participation of underwriters or similar matters, which information appears elsewhere in an amendment to the registration statement or a prospectus filed pursuant to Rule 424(b) under the Securities Act (§ 230.424(b) of this chapter), or (B) to correct typographical errors, insert signatures or make other similar immaterial changes, then, notwithstanding any contrary requirement of any rule or form, the registrant need not refile such exhibit as so amended. Any such incomplete exhibit may not, however, be incorporated by reference in any subsequent filing under any Act administered by the Commission.

2. In any case where two or more indentures, contracts, franchises, or other documents required to be filed as exhibits are substantially identical in all material respects except as to the parties thereto, the dates of execution, or other details, the registrant need file a copy of only one of such documents, with a schedule identifying the other documents omitted and setting forth the material details in which such documents differ from the document a copy of which is filed. The Commission may at any time in its discretion require filing of copies of any documents so omitted.

3. Only copies, rather than originals, need be filed of each exhibit required except as otherwise specifically noted.

4. *Electronic filings.* Whenever an exhibit is filed in paper pursuant to a hardship exemption (§§ 232.201 and 232.202 of this chapter), the letter ''P'' (paper) shall be placed next to the exhibit in the list of exhibits required by Item 601(a)(2) of this Rule. Whenever an electronic confirming copy of an exhibit is filed pursuant to a hardship exemption (§ 232.201 or § 232.202(d) of this chapter), the exhibit index should specify where the confirming electronic copy can be located; in addition, the designation ''CE'' (confirming electronic) should be placed next to the listed exhibit in the exhibit index.

EXHIBIT TABLE

Instructions to the Exhibit Table

1. The exhibit table indicates those documents that must be filed as exhibits to the respective forms listed.

2. The ''X'' designation indicates the documents which are required to be filed with each form even if filed previously with another document, *Provided, However,* that such previously filed documents may be incorporated by reference to satisfy the filing requirements.

3. The number used in the far left column of the table refers to the appropriate subsection in paragraph (b) where a description of the exhibit can be found. Whenever necessary, alphabetical or numerical subparts may be used.

EXHIBIT TABLE

	Securities Act Forms										Exchange Act Forms			
	S-1	S-2	S-3	S-4[3]	S-8	S-11	F-1	F-2	F-3	F-4[3]	10	8-K	10-Q	10-K
(1) Underwriting agreement	X	X	X	X	-----	X	X	X	X	X	-----	X	------	------
(2) Plan of acquisition, reorganization, arrangement, liquidation, or succession	X	X	X	X	-----	X	X	X	X	X	X	X	X	X
(3) (i) Articles of incorporation	X	-----	-----	X	-----	X	X	-----	-----	X	X	-----	X	X
(ii) By-laws	X	-----	-----	X	-----	X	X	-----	-----	X	X	-----	X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(5) Opinion re legality	X	X	X	X	X	X	X	X	X	X	-----	-----	------	------
(6) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(8) Opinion re tax matters	X	X	X	X	-----	X	X	X	X	X	-----	-----	------	------
(9) Voting trust agreement	X	-----	-----	X	-----	X	X	-----	-----	X	X	-----	------	X
(10) Material contracts	X	X	-----	X	-----	X	X	X	-----	X	X	-----	X	X
(11) Statement re computation of per share earnings	X	X	-----	X	-----	X	X	X	-----	X	X	-----	X	X
(12) Statements re computation of ratios	X	X	X	X	-----	X	X	X	-----	X	X	-----	------	X
(13) Annual report to security holders, form 10-Q or quarterly report to security holders[1]	-----	X	-----	X	-----	------	------	------	------	------	------	------	------	X
(14) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(15) Letter re unaudited interim financial information	X	X	X	X	X	X	X	X	X	X	-----	-----	X	------
(16) Letter re change in certifying accountant[4]	X	X	-----	X	-----	X	-----	-----	-----	-----	X	X	------	X
(17) Letter re director resignation	-----	-----	-----	-----	-----	------	------	------	------	------	------	X	------	------
(18) Letter re change in accounting principles	-----	-----	-----	-----	-----	------	------	------	------	------	------	------	X	X
(19) Report furnished to security holders	-----	-----	-----	-----	-----	------	------	------	------	------	------	------	X	------
(20) Other documents or statements to security holders	-----	-----	-----	-----	-----	------	------	------	------	------	------	X	------	------
(21) Subsidiaries of the registrant	X	-----	-----	X	-----	X	X	-----	-----	X	X	-----	------	X
(22) Published report regarding matters submitted to vote of security holders	-----	-----	-----	-----	-----	------	------	------	------	------	------	------	X	X
(23) Consent of experts and counsel	X	X	X	X	X	X	X	X	X	X	-----	X[2]	X[2]	X[2]
(24) Power of attorney	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(25) Statement of eligibility of trustee	X	X	X	X	-----	X	X	X	X	X	-----	-----	------	------
(26) Invitations for competitive bids	X	X	X	X	-----	------	X	X	X	X	-----	-----	------	------
(27) Financial Data Schedule[5]	X	X	X	X	-----	X	-----	-----	-----	-----	X	X	X	X
(28) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(29) through (98) [Reserved]														
(99) Additional Exhibits	X	X	X	X	X	X	X	X	X	X	X	X	X	X

[1] Where incorporated by reference into the text of the prospectus and delivered to security holders along with the prospectus as permitted by the registration statement; or, in the case of the Form 10-K, where the annual report to security holders is incorporated by reference into the text of the Form 10-K.

[2] Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

[3] An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Forms S-4 or F-4 to provide information about such company at a level prescribed by Forms S-2, S-3, F-2 or F-3 and (2) the form, the level of which has been elected under Forms S-4 or F-4, would not require such company to provide such exhibit if it were registering a primary offering.

[4] If required pursuant to Item 304 of Regulation S-K.

[5] Financial Data Schedules shall be filed by electronic filers only. Such schedule shall be filed only when a filing includes annual and/or interim financial statements that have not been previously included in a filing with the Commission. See Item 601(c) of Regulation S-K.

(b) *Description of exhibits.* Set forth below is a description of each document listed in the exhibit tables.

(1) *Underwriting agreement.* Each underwriting contract or agreement with a principal underwriter pursuant to which the securities being registered are to be distributed; if the terms of such documents have not been determined, the proposed forms thereof. Such agreement may be filed as an exhibit to a report on Form 8–K (§249.308 of this chapter) which is incorporated by reference into a registration statement subsequent to its effectiveness.

(2) *Plan of acquisition, reorganization, arrangement, liquidation or succession.* Any material plan of acquisition, disposition, reorganization, readjustment, succession, liquidation or arrangement and any amendments thereto described in the statement or report. Schedules (or similar attachments) to these exhibits shall not be filed unless such schedules contain information which is material to an investment decision and which is not otherwise disclosed in the agreement or the disclosure document. The plan filed shall contain a list briefly identifying the contents of all omitted schedules, together with an agreement to furnish supplementally a copy of any omitted schedule to the Commission upon request.

(3)(i) *Articles of incorporation.* The articles of incorporation of the registrant or instruments corresponding thereto as currently in effect and any amendments thereto. Whenever amendments to articles of incorporation are filed, a complete copy of the articles as amended shall be filed. Where it is impracticable for the registrant to file a charter amendment authorizing new securities with the appropriate state authority prior to the effective date of the registration statement registering such securities, the registrant may file as an exhibit to the registration statement the form of amendment to be filed with the state authority; and in such a case, if material changes are made after the copy is filed, the registrant must also file the changed copy.

(ii) *By-laws.* The by-laws of the registrant or instruments corresponding thereto as currently in effect and any amendments thereto. Whenever amendments to the by-laws are filed, a complete copy of the by-laws as amended shall be filed.

(4) *Instruments defining the rights of security holders, including identures.* (i) All instruments defining the rights of holders of the equity or debt securities being registered including, where applicable, the relevant portion of the articles of incorporation or by-laws of the registrant.

(ii) Except as set forth in paragraph (b)(4)(iii) of this section for filings on Forms S–1, S–4, S–11, S–14 and F–4 under the Securities Act (§§ 239.1, and 25, 18, 23 and 34 of this chapter) and Forms 10 and Form 10–SB and 10–K and Form 10–KSB (§§ 249.210 and 310 of this chapter) under the Exchange Act all instruments defining the rights of holders of long-term debt of the registrant and its consolidated subsidiaries and for any of its unconsolidated subsidiaries for which financial statements are required to be filed.

(iii) Where the instrument defines the rights of holders of long-term debt of the registrant and its consolidated subsidiaries and for any of its unconsolidated subsidiaries for which financial statements are required to be filed, there need not be filed:

(A) Any instrument with respect to long-term debt not being registered if the total amount of securities authorized thereunder does not exceed 10 percent of the total assets of the registrant and its subsidiaries on a consolidated basis and if there is filed an agreement to furnish a copy of such agreement to the Commission upon request;

(B) Any instrument with respect to any class of securities if appropriate steps to assure the redemption or retirement of such class will be taken prior to or upon delivery by the registrant of the securities being registered; or

(C) Copies of instruments evidencing scrip certificates for fractions of shares.

(iv) If any of the securities being registered are, or will be, issued under an indenture to be qualified under the Trust Indenture Act, the copy of such indenture which is filed as an exhibit shall include or be accompanied by:

(A) A reasonably itemized and informative table of contents; and

(B) A cross-reference sheet showing the location in the indenture of the provisions inserted pursuant to sections 310 through 318(a) inclusive of the Trust Indenture Act of 1939.

(v) With respect to Forms 8–K and 10–Q and 10–QSB under the Exchange Act which are filed and which disclose, in the text of the Form 10–Q and Form 10–QSB, the interim financial statements, or the footnotes thereto the creation of a new class of securities or indebtedness or the modification of existing rights of security holders, file all instruments defining the rights of holders of these securities or indebtedness. However, there need not be filed any instrument with respect to long-term debt not being registered which meets the exclusion set forth above in paragraph (b)(4)(iii)(A).

Instruction 1 to paragraph (b)(4): There need not be filed any instrument which defines the rights of participants (not as security holders) pursuant to an employee benefit plan.

Instruction 2 to paragraph (b)(4) (for electronic filings): If the instrument defining the rights of security holders is in the form of a certificate, the text appearing on the certificate shall be reproduced in an electronic filing together with a description of any other graphic and image material appearing on the certificate, as provided in Rule 304 of Regulation S–T (§ 232.304 of this chapter).

(5) *Opinion re legality.* (i) An opinion of counsel as to the legality of the securities being registered, indicating whether they will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the registrant.

(ii) If the securities being registered are issued under a plan and the plan is subject to the requirements of ERISA furnish either:

(A) An opinion of counsel which confirms compliance of the provisions of the written documents constituting the plan with the requirements of ERISA pertaining to such provisions; or

(B) A copy of the Internal Revenue Service determination letter that the plan is qualified under section 401 of the Internal Revenue Code; or

(iii) If the securities being registered are issued under a plan which is subject to the requirements of ERISA and the plan has been amended subsequent to the filing of paragraph (b)(5)(ii) (A) or (B) above, furnish either:

(A) An opinion of counsel which confirms compliance of the amended provisions of the plan with the requirements of ERISA pertaining to such provisions; or

(B) A copy of the Internal Revenue Service determination letter that the amended plan is qualified under section 401 of the Internal Revenue Code.

NOTE: Attention is directed to Item 8 of Form S–8 for exemptions to this exhibit requirement applicable to that Form.

(6)–(7) [Reserved]

(8) *Opinion re tax matters.* For filings on Form S–11 under the Securities Act (§239.18) or those to which Securities Act Industry Guide 5 applies, an opinion of counsel or of an independent public or certified public accountant or, in lieu thereof, a revenue ruling from the Internal Revenue Service, supporting the tax matters and consequences to the shareholders as described in the filing when such tax matters are material to the transaction for which the registration statement is being filed. This exhibit otherwise need only be filed with the other applicable registration forms where the tax consequences are material to an investor and a representation as to tax consequences is set forth in the filing. If a tax opinion is set forth in full in the filing, an indication that such is the case may be made in lieu of filing the otherwise required exhibit. Such tax opinions may be conditioned or may be qualified, so long as such conditions and qualifications are adequately described in the filing.

(9) *Voting trust agreement.* Any voting trust agreements and amendments thereto.

(10) *Material contracts.* (i) Every contract not made in the ordinary course of business which is material to the registrant and is to be performed in whole or in part at or after the filing of the registration statement or report or was entered into not more than two years before such filing. Only contracts need be filed as to which the registrant or subsidiary of the registrant is a party or has succeeded to a party by assumption or assignment or in which the registrant or such subsidiary has a beneficial interest.

(ii) If the contract is such as ordinarily accompanies the kind of business conducted by the registrant and its subsidiaries, it will be deemed to have been made in the ordinary course of business and need not be filed unless it falls within one or more of the following categories, in which case it shall be filed except where immaterial in amount or significance:

(A) Any contract to which directors, officers, promoters, voting trustees, security holders named in the registration statement or report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price;

(B) Any contract upon which the registrant's business is substantially dependent, as in the case of continuing contracts to sell the major part of registrant's products or services or to purchase the major part of registrant's requirements of goods, services or raw materials or any franchise or license or other agreement to use a patent, formula, trade secret, process or trade name upon which registrant's business depends to a material extent;

(C) Any contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15 percent of such fixed assets of the registrant on a consolidated basis; or

(D) Any material lease under which a part of the property described in the registration statement or report is held by the registrant.

(iii)(A) Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any of the named executive officers of the registrant, as defined by Item 402(a)(3) (§229.402(a)(3)), participates shall be deemed material and shall be filed; and any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates shall be filed unless immaterial in amount or significance.

(B) Any compensatory plan, contract or arrangement adopted without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights (or if not set forth in any formal document, a written description thereof), in which any employee (whether or not an executive officer of the registrant) participates shall be filed unless immaterial in amount or significance. A compensation plan assumed by a registrant in connection with a merger, consolidation or other acquisition transaction pursuant to which the registrant may make further grants or awards of its equity securities

shall be considered a compensation plan of the registrant for purposes of the preceding sentence.

(C) Notwithstanding paragraph (b)(10)(iii)(A) above, the following management contracts or compensatory plans, contracts or arrangements need not be filed:

(*1*) Ordinary purchase and sales agency agreements.

(*2*) Agreements with managers of stores in a chain organization or similar organization.

(*3*) Contracts providing for labor or salesmen's bonuses or payments to a class of security holders, as such.

(*4*) Any compensatory plan, contract or arrangement which pursuant to its terms is available to employees, officers or directors generally and which in operation provides for the same method of allocation of benefits between management and nonmanagement participants.

(*5*) Any compensatory plan, contract or arrangement if the registrant is a foreign private issuer that furnishes compensatory information on an aggregate basis as permitted by General Instruction 1 to Item 402 (§ 229.402) or by Item 6.B of Form 20–F (§ 249.220f of this chapter).

(*6*) Any compensatory plan, contract, or arrangement if the registrant is a wholly owned subsidiary of a company that has a class of securities registered pursuant to section 12 or files reports pursuant to section 15(d) of the Exchange Act and is filing a report on Form 10–K and Form 10–KSB or registering debt instruments or preferred stock which are not voting securities on Form S–2.

Instruction 1 to paragraph (b)(10): With the exception of management contracts, in order to comply with paragraph (iii) above, registrants need only file copies of the various compensatory plans and need not file each individual director's or executive officer's personal agreement under the plans unless there are particular provisions in such personal agreements whose disclosure in an exhibit is necessary to an investor's understanding of that individual's compensation under the plan.

Instruction 2 to paragraph (b)(10): If a material contract is executed or becomes effective during the reporting period reflected by a Form 10–Q or Form 10–K, it shall be filed as an exhibit to the Form 10–Q or Form 10–K filed for the corresponding period. *See* paragraph (a)(4) of this Item. With respect to quarterly reports on Form 10–Q, only those contracts executed or becoming effective during the most recent period reflected in the report shall be filed.

(11) *Statement re computation of per share earnings.* A statement setting forth in reasonable detail the computation of per share earnings, unless the computation can be clearly determined from the material contained in the registration statement or report. The information with respect to the computation of per share earnings on both primary and fully diluted basis, presented by exhibit or otherwise, must be furnished even though the amounts of per share earnings on the fully diluted bases are not required to be presented in the income statement under the provisions of Accounting Principles Board Opinion No. 15. That Opinion provides that any reduction of less than 3% need not be considered as dilution (see footnote to paragraph 14 of the Opinion) and that a computation on the fully diluted basis which results in improvement of earnings per share not be taken into account (see paragraph 40 of the Opinion).

(12) *Statements re computation of ratios.* A statement setting forth in reasonable detail the computation of any ratio of earnings to fixed charges, any ratio of earnings to combined fixed charges and preferred stock dividends or any other ratios which appear in the registration statement or report. See Item 503(d) of Regulation S–K (§ 229.503(d)).

(13) *Annual report to security holders, Form 10–Q and Form 10–QSB or quarterly report to security holders.* (i) The registrant's annual report to security holders for its last fiscal year, its Form 10–Q and Form 10–QSB (if specifically incorporated by reference in the prospectus) or its quarterly report to security holders, if all or a portion thereof is incorporated by reference in the filing. Such report, except for those portions thereof which are expressly incorporated by reference in the filing, is to be furnished for the information of the Commission and is not to be deemed ''filed'' as part of the filing. If the financial statements in the report have been incorporated by reference in the filing, the accountant's certificate shall be manually signed in one copy. See Rule 411(b) (§ 230.411(b) of this chapter).

(ii) Electronic filings. If all, or any portion, of the annual or quarterly report to security holders is incorporated by reference into any electronic filing, all, or such portion of the annual or quarterly report to security holders so incorporated, shall be filed in electronic format as an exhibit to the filing.

(14) *Code of ethics.* Any code of ethics, or amendment thereto, that is the subject of the disclosure required by Item 406 of Regulation S–K (§ 229.406) or Item 10 of Form 8–K (§ 249.308 of this chapter), to the extent that the registrant intends to satisfy the Item 406 or Item 10 requirements through filing of an exhibit.

(15) *Letter re unaudited interim financial information.* A letter, where applicable, from the independent accountant which acknowledges awareness of the use in a registration statement of a report on unaudited interim financial information which pursuant to Rule 436(c) under the Securities Act

(§ 230.436(c) of this chapter) is not considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of that Act. Such letter may be filed with the registration statement, an amendment thereto, or a report on Form 10–Q and Form 10–QSB which is incorporated by reference into the registration statement.

(16) *Letter re change in certifying accountant*. A letter from the registrant's former independent accountant regarding its concurrence or disagreement with the statements made by the registrant in the current report concerning the resignation or dismissal as the registrant's principal accountant.

(17) *Letter re director resignation*. Any letter from a former director which sets forth a description of a disagreement with the registrant that led to the director's resignation or refusal to stand for re-election and which requests that the matter be disclosed.

(18) *Letter re change in accounting principles*. Unless previously filed, a letter from the registrant's independent accountant indicating whether any change in accounting principles or practices followed by the registrant, or any change in the method of applying any such accounting principles or practices, which affected the financial statements being filed with the Commission in the report or which is reasonably certain to affect the financial statements of future fiscal years is to an alternative principle which in his judgment is preferable under the circumstances. No such letter need be filed when such change is made in response to a standard adopted by the Financial Accounting Standards Board that creates a new accounting principle, that expresses a preference for an accounting principle, or that rejects a specific accounting principle.

(19) *Report furnished to security holders*. If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of Part I of Form 10–Q and Form 10–QSB, the information called for may be incorporated by reference to such published document or statement provided copies thereof are included as an exhibit to the registration statement or to Part I of the Form 10–Q and Form 10–QSB report.

(20) *Other documents or statements to security holders*. If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of this form the information called for may be incorporated by reference to such published document or statement provided copies thereof are filed as an exhibit to the report on this form.

(21) *Subsidiaries of the registrant*. (i) List all subsidiaries of the registrant, the state or other jurisdiction of incorporation or organization of each, and the names under which such subsidiaries do business. This list may be incorporated by reference from a document which includes a complete and accurate list.

(ii) The names of particular subsidiaries may be omitted if the unnamed subsidiaries, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as of the end of the year covered by this report. (See the definition of ''significant subsidiary'' in Rule 1–02(w) (17 CFR 210.1–02(w)) of Regulation S–X.) The names of consolidated wholly-owned multiple subsidiaries carrying on the same line of business, such as chain stores or small loan companies, may be omitted, provided the name of the immediate parent, the line of business, the number of omitted subsidiaries operating in the United States and the number operating in foreign countries are given. This instruction shall not apply, however, to banks, insurance companies, savings and loan associations or to any subsidiary subject to regulation by another Federal agency.

(22) *Published report regarding matters submitted to vote of security holders*. Published reports containing all of the information called for by Item 4 of Part II of Form 10–Q and Form 10–QSB or Item 4 of Part I of Form 10–K and Form 10–KSB which is referred to therein in lieu of providing disclosure in Form 10–Q and Form 10–QSB or 10–K and Form 10–KSB, which are required to be filed as exhibits by Rule 12b–23(a)(3) under the Exchange Act (§ 240.12b–23(a)(3) of this chapter).

(23) *Consents of experts and counsel*—(i) *Securities Act filings*. All written consents required to be filed shall be dated and manually signed. Where the consent of an expert or counsel is contained in his report or opinion or elsewhere in the registration statement or document filed therewith, a reference shall be made in the index to the report, the part of the registration statement or document or opinion, containing the consent.

(ii) *Exchange Act reports*. Where the filing of a written consent is required with respect to material incorporated by reference in a previously filed registration statement under the Securities Act, such consent may be filed as exhibit to the material incorporated by reference. Such consents shall be dated and manually signed.

(24) *Power of attorney*. If any name is signed to the registration statement or report pursuant to a power of attorney, manually signed copies of such power of attorney shall be filed. Where the power of attorney is contained elsewhere in the registration statement or documents filed therewith a reference shall be made in the index to the part of the registration statement or document

containing such power of attorney. In addition, if the name of any officer signing on behalf of the registrant is signed pursuant to a power of attorney, certified copies of a resolution of the registrant's board of directors authorizing such signature shall also be filed. A power of attorney that is filed with the Commission shall relate to a specific filing or an amendment thereto, provided, however, that a power of attorney relating to a registration statement under the Securities Act or an amendment thereto also may relate to any registration statement for the same offering that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act (§ 230.462(b) of this chapter). A power of attorney that confers general authority shall not be filed with the Commission.

(25) *Statement of eligibility of trustee.* (i) A statement of eligibility and qualification of each person designated to act as trustee under an indenture to be qualified under the Trust Indenture Act of 1939. Such statement of eligibility shall be bound separately from the other exhibits.

(ii) *Electronic filings.* The requirement to bind separately the statement of eligibility and qualification of each person designated to act as a trustee under the Trust Indenture Act of 1939 from other exhibits shall not apply to statements submitted in electronic format. Rather, such statements must be submitted as exhibits in the same electronic submission as the registration statement to which they relate, or in an amendment thereto, except that electronic filers that rely on Trust Indenture Act Section 305(b)(2) for determining the eligibility of the trustee under indentures for securities to be issued, offered or sold on a delayed basis by or on behalf of the registrant shall file such statements separately in the manner prescribed by § 260.5b–1 through § 260.5b–3 of this chapter and by the EDGAR Filer Manual.

(26) *Invitations for competitive bids.* If the registration statement covers securities to be offered at competitive bidding, any form of communication which is an invitation for competitive bid which will be sent or given to any person shall be filed.

(27) through (98) [Reserved]

(99) *Additional exhibits.* (i) Any additional exhibits which the registrant may wish to file shall be so marked as to indicate clearly the subject matters to which they refer.

(ii) Any document (except for an exhibit) or part thereof which is incorporated by reference in the filing and is not otherwise required to be filed by this Item or is not a Commission filed document incorporated by reference in a Securities Act registration statement.

(iii) If pursuant to Section 11(a) of the Securities Act (15 U.S.C. 77k(a)) an issuer makes generally available to its security holders an earnings statement covering a period of at least 12 months beginning after the effective date of the registration statement, and if such earnings statement is made available by ''other methods'' than those specified in paragraphs (a) or (b) of § 230.158 of this chapter, it must be filed as an exhibit to the Form 10–Q or the Form 10–K, as appropriate, covering the period in which the earnings statement was released.

[47 FR 11401, Mar. 16, 1982]

EDITORIAL NOTES: 1. For FEDERAL REGISTER citations affecting §229.601, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

2. At 65 FR 24799, Apr. 27, 2000, in §thnsp;229.601, paragraph (a), the table was amended by removing the entries for exhibits (27) and (28) and footnote 5, however, this is a photographed table, thus the entries could not be removed.

3. At 68 FR 5128, Jan. 31, 2003, § 229.601 was amended by removing the ''reserved'' designation for exhibit (14) and adding ''Code of ethics'' in its place in the Exhibit Table, removing ''N/A'' corresponding to exhibit (14) under all captions in the Exhibit Table and adding an ''X'' corresponding to exhibit (14) under the caption ''Exchange Act Forms'', ''8–K'' and ''10–K'' in the Exhibit Table, however, this is a photographed table, thus the amendments could not be incorporated.

Subpart 229.700—Miscellaneous

§ 229.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.

Furnish the following information as to all securities of the registrant sold by the registrant within the past three years which were not registered under the Securities Act. Include sales of reacquired securities, as well as new issues, securities issued in exchange for property, services, or other securities, and new securities resulting from the modification of outstanding securities.

(a) *Securities sold.* Give the date of sale and the title and amount of securities sold.

(b) *Underwriters and other purchasers.* Give the names of the principal underwriters, if any. As to any such securities not publicly offered, name the persons or identify the class of persons to whom the securities were sold.

(c) *Consideration.* As to securities sold for cash, state the aggregate offering price and the aggregate underwriting discounts or commissions. As to any securities sold otherwise than for cash,

state the nature of the transaction and the nature and aggregate amount of consideration received by the registrant.

(d) *Exemption from registration claimed.* Indicate the section of the Securities Act or the rule of the Commission under which exemption from registration was claimed and state briefly the facts relied upon to make the exemption available.

(e) *Terms of conversion or exercise.* If the information called for by this paragraph (e) is being presented on Form 8–K, Form 10–QSB, Form 10–Q, Form 10–KSB or Form 10–K (§§249.308, 249.308b, 249.308a, 249.310b or 249.310) under the Exchange Act, and where the securities sold by the registrant are convertible or exchangeable into equity securities, or are warrants or options representing equity securities, disclose the terms of conversion or exercise of the securities.

(f) *Use of proceeds.* As required by §230.463 of this chapter, following the effective date of the first registration statement filed under the Securities Act by an issuer, the issuer or successor issuer shall report the use of proceeds on its first periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act (15 U.S.C. 78m(a) and 78o(d)) after effectiveness of its Securities Act registration statement, and thereafter on each of its subsequent periodic reports filed pursuant to sections 13(a) and 15(d) of the Exchange Act through the later of disclosure of the application of all the offering proceeds, or disclosure of the termination of the offering. If a report of the use of proceeds is required with respect to the first effective registration statement of the predecessor issuer, the successor issuer shall provide such a report. The information provided pursuant to paragraphs (f)(2) through (f)(4) of this Item need only be provided with respect to the first periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act after effectiveness of the registration statement filed under the Securities Act. Subsequent periodic reports filed pursuant to sections 13(a) and 15(d) of the Exchange Act need only provide the information required in paragraphs (f)(2) through (f)(4) of this Item if any of such required information has changed since the last periodic report filed. In disclosing the use of proceeds in the first periodic report filed pursuant to the Exchange Act, the issuer or successor issuer should include the following information:

(1) The effective date of the Securities Act registration statement for which the use of proceeds information is being disclosed and the Commission file number assigned to the registration statement;

(2) If the offering has commenced, the offering date, and if the offering has not commenced, an explanation why it has not;

(3) If the offering terminated before any securities were sold, an explanation for such termination; and

(4) If the offering did not terminate before any securities were sold, disclose:

(i) Whether the offering has terminated and, if so, whether it terminated before the sale of all securities registered;

(ii) The name(s) of the managing underwriter(s), if any;

(iii) The title of each class of securities registered and, where a class of convertible securities is being registered, the title of any class of securities into which such securities may be converted;

(iv) For each class of securities (other than a class of securities into which a class of convertible securities registered may be converted without additional payment to the issuer) the following information, provided for both the account of the issuer and the account(s) of any selling security holder(s): the amount registered, the aggregate price of the offering amount registered, the amount sold and the aggregate offering price of the amount sold to date;

(v) From the effective date of the Securities Act registration statement to the ending date of the reporting period, the amount of expenses incurred for the issuer's account in connection with the issuance and distribution of the securities registered for underwriting discounts and commissions, finders' fees, expenses paid to or for underwriters, other expenses and total expenses. Indicate if a reasonable estimate for the amount of expenses incurred is provided instead of the actual

amount of expense. Indicate whether such payments were:

(A) Direct or indirect payments to directors, officers, general partners of the issuer or their associates; to persons owning ten (10) percent or more of any class of equity securities of the issuer; and to affiliates of the issuer; or

(B) Direct or indirect payments to others;

(vi) The net offering proceeds to the issuer after deducting the total expenses described in paragraph (f)(4)(v) of this Item;

(vii) From the effective date of the Securities Act registration statement to the ending date of the reporting period, the amount of net offering proceeds to the issuer used for construction of plant, building and facilities; purchase and installation of machinery and equipment; purchases of real estate; acquisition of other business(es); repayment of indebtedness; working capital; temporary investments (which should be specified); and any other purposes for which at least five (5) percent of the issuer's total offering proceeds or $100,000 (whichever is less) has been used (which should be specified). Indicate if a reasonable estimate for the amount of net offering proceeds applied is provided instead of the actual amount of net offering proceeds used. Indicate whether such payments were:

(A) Direct or indirect payments to directors, officers, general partners of the issuer or their associates; to persons owning ten (10) percent or more of any class of equity securities of the issuer; and to affiliates of the issuer; or

(B) Direct or indirect payments to others; and

(viii) If the use of proceeds in paragraph (f)(4)(vii) of this Item represents a material change in the use of proceeds described in the prospectus, the issuer should describe briefly the material change.

Instructions. 1. Information required by this Item 701 need not be set forth as to notes, drafts, bills of exchange, or bankers' acceptances which mature not later than one year from the date of issuance.

2. If the sales were made in a series of transactions, the information may be given by such totals and periods as will reasonably convey the information required.

[47 FR 11401, Mar. 16, 1982, as amended at 61 FR 54508, Oct. 18, 1996; 62 FR 39762, July 24, 1997]

§ 229.702 (Item 702) Indemnification of directors and officers.

State the general effect of any statute, charter provisions, by-laws, contract or other arrangements under which any controlling persons, director or officer of the registrant is insured or indemnified in any manner against liability which he may incur in his capacity as such.

Subpart 229.800—List of Industry Guides

§ 229.801 Securities Act industry guides.

(a) [Reserved]

(b) *Guide 2.* Disclosure of oil and gas operations.

(c) *Guide 3.* Statistical disclosure by bank holding companies.

(d) *Guide 4.* Prospectuses relating to interests in oil and gas programs.

(e) *Guide 5.* Preparation of registration statements relating to interests in real estate limited partnerships.

(f) *Guide 6.* Disclosures concerning unpaid claims and claim adjustment expenses of property-casualty insurance underwriters.

(g) *Guide 7.* Description of Property by Issuers Engaged or To Be Engaged in Significant Mining Operations.

(Secs. 6, 7, 8, 10, 19(a) and Schedule A (25) and (26) (15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77aa (25) and (26), Securities Act of 1933; secs. 12, 13, 14, 15(d) and 23(a) (15 U.S.C. 78(l), 78m, 78n, 78o(d), 78w, Securities Exchange Act of 1934)

[47 FR 11401, Mar. 16, 1982, and 49 FR 47600, Dec. 6, 1984, as amended at 57 FR 36466, Aug. 13, 1992; 61 FR 30401, June 14, 1996]

§ 229.802 Exchange Act industry guides.

(a) [Reserved]

(b) *Guide 2.* Disclosure of oil and gas operations.

(c) *Guide 3.* Statistical disclosure by bank holding companies.

(d) *Guide 4.* Disclosures concerning unpaid claims and claim adjustment expenses of property-casualty underwriters.

(e)–(f) [Reserved]

(g) *Guide 7.* Description of Property by Issuers Engaged or To Be Engaged in Significant Mining Operations.

(Secs. 6, 7, 8, 10, 19(a) and Schedule A (25) and (26) (15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77aa (25) and (26), Securities Act of 1933; secs. 12, 13, 14, 15(d) and 23(a) (15 U.S.C. 78(l), 78m, 78n, 78o(d), 78w, Securities Exchange Act of 1934)

[47 FR 11401, Mar. 16, 1982, as amended at 49 FR 47600, Dec. 6, 1984; 57 FR 36468, Aug. 13, 1992; 61 FR 30401, June 14, 1996]

Subpart 229.900—Roll-Up Transactions

SOURCE: 56 FR 57247, Nov. 8, 1991, unless otherwise noted.

§ 229.901 (Item 901) Definitions.

For the purposes of this subpart 229.900:

(a) *General partner* means the person or persons responsible under state law for managing or directing the management of the business and affairs of a partnership that is the subject of a roll-up transaction including, but not limited to, the general partner(s), board of directors, board of trustees, or other person(s) having a fiduciary duty to such partnership.

(b)(1) *Partnership* means any:

(i) Finite-life limited partnership; or

(ii) Other finite-life entity.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this Item (§ 229.901(b)(2)(ii)), a limited partnership or other entity is ''finite-life'' if:

(A) It operates as a conduit vehicle for investors to participate in the ownership of assets for a limited period of time; and

(B) It has as a policy or purpose distributing to investors proceeds from the sale, financing or refinancing of assets or cash from operations, rather than reinvesting such proceeds or cash in the business (whether for the term of the entity or after an initial period of time following commencement of operations).

(ii) A real estate investment trust as defined in I.R.C. section 856 is not *finite-life* solely because of the distribution to investors of net income as provided by the I.R.C. if its policies or purposes do not include the distribution to investors of proceeds from the sale, financing or refinancing of assets, rather than the reinvestment of such proceeds in the business.

(3) *Partnership* does not include any entity registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) or any Business Development Company as defined in section 2(a)(48) of that Act (15 U.S.C. 80a–2(a)(48)).

(c)(1) Except as provided in paragraph (c)(2) or (c)(3) of this Item, (§ 229.901(c)(2) or (c)(3)) *roll-up transaction* means a transaction involving the combination or reorganization of one or more partnerships, directly or indirectly, in which some or all of the investors in any of such partnerships will receive new securities, or securities in another entity.

(2) Notwithstanding paragraph (c)(1) of this Item, (§ 229.901(c)(1)) *roll-up transaction* shall not include:

(i) A transaction wherein the interests of all of the investors in each of the partnerships are repurchased, recalled, or exchanged in accordance with the terms of the preexisting partnership agreement for securities in an operating company specifically identified at the time of the formation of the original partnership;

(ii) A transaction in which the securities to be issued or exchanged are not required to be and are not registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*);

(iii) A transaction that involves only issuers that are not required to register or report under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), both before and after the transaction;

(iv) A transaction that involves the combination or reorganization of one or more partnerships in which a non-affiliated party succeeds to the interests of a general partner or sponsor, if:

(A) Such action is approved by not less than 66⅔% of the outstanding units of each of the participating partnerships; and

(B) As a result of the transaction, the existing general partners will receive only compensation to which they are entitled as expressly provided for in the preexisting partnership agreements;

(v) A transaction in which the securities offered to investors are securities

of another entity that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1), if:

(A) Such other entity was formed, and such class of securities was reported and regularly traded, not less than 12 months before the date on which soliciting material is mailed to investors; and

(B) The securities of that entity issued to investors in the transaction do not exceed 20% of the total outstanding securities of the entity, exclusive of any securities of such class held by or for the account of the entity or a subsidiary of the entity; and

(C) For purposes of paragraph (c)(2)(v) of this Item (§ 229.901(c)(2)(v)), a *regularly traded* security means any security with a minimum closing price of $2.00 or more for a majority of the business days during the preceding three-month period and a six-month minimum average daily trading volume of 1,000 shares;

(vi) A transaction in which all of the investors' partnership securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1) and such investors receive new securities or securities in another entity that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1), except that, for purposes of this paragraph, securities that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 shall not include securities listed on the American Stock Exchange's Emerging Company Marketplace;

(vii) A transaction in which the investors in any of the partnerships involved in the transaction are not subject to a significant adverse change with respect to voting rights, the terms of existence of the entity, management compensation or investment objectives; or

(viii) A transaction in which all investors are provided an option to receive or retain a security under substantially the same terms and conditions as the original issue.

(3) The Commission, upon written request or upon its own motion, may exempt by rule or order any security or class of securities, any transaction or class of transactions, or any person or class of persons, in whole or in part, conditionally or unconditionally, from the definition of roll-up transaction or the requirements imposed on roll-up transactions by Items 902–915 of Regulation S–K (§§ 229.902–229.915), if it finds such action to be consistent with the public interest and the protection of investors.

(d) *Sponsor* means the person proposing the roll-up transaction.

(e) *Successor* means the surviving entity after completion of the roll-up transaction or the entity whose securities are being offered or sold to, or acquired by, limited partners of the partnerships or the limited partnerships to be combined or reorganized.

Instruction to Item 901. If a transaction is a roll-up transaction as defined in Item 901(c) of this subpart (§ 229.901(c)), the requirements of this subpart apply to each entity proposed to be included in the roll-up transaction, whether or not the entity is a ''partnership'' as defined in Item 901(b) of this subpart (§ 229.901(b)).

[56 FR 57247, Nov. 8, 1991, as amended at 59 FR 63682, Dec. 8, 1994]

§ 229.902 (Item 902) Individual partnership supplements.

(a) If two or more entities are proposed to be included in the roll-up transaction, provide the information specified in this Item (§ 229.902) in a separate supplement to the disclosure document for each entity.

(b) The separate supplement required by paragraph (a) of this Item (§ 229.902) shall be filed as part of the registration statement, shall be delivered with the prospectus to investors in the partnership covered thereby, and shall include:

(1) A statement in the forepart of the supplement to the effect that:

(i) Supplements have been prepared for each partnership;

(ii) The effects of the roll-up transaction may be different for investors in the various partnerships; and

(iii) Upon receipt of a written request by an investor or his representative who has been so designated in writing, a copy of any supplement will be transmitted promptly, without charge, by the general partner or sponsor.

This statement must include the name and address of the person to whom investors should make their request.

(2) A brief description of each material risk and effect of the roll-up transaction, including, but not limited to, federal income tax consequences, for investors in the partnership, with appropriate cross references to the discussions of the risks, effects and tax consequences of the roll-up transaction required in the principal disclosure document pursuant to Items 904 and 915 of this subpart (§229.904 and §229.915). Such discussion shall address the effect of the roll-up transaction on the partnership's financial condition and results of operations.

(3) A statement concerning whether the general partner reasonably believes that the roll-up transaction is fair or unfair to investors in the partnership, together with a brief discussion of the bases for such belief, with appropriate cross references to the discussion of the fairness of the roll-up transaction required in the principal disclosure document pursuant to Item 910 of this subpart (§229.910). If there are material differences between the fairness analysis for the partnership and for the other partnerships, such differences shall be described briefly in the supplement.

(4) A brief, narrative description of the method of calculating the value of the partnership and allocating interests in the successor to the partnership, and a table showing such calculation and allocation. Such table shall include the following information (or other information of a comparable character necessary to a thorough understanding of the calculation and allocation):

(i) The appraised value of each separately appraised significant asset (as defined in Item 911(c)(5) of this subpart (§229.911(c)(5)) held by the partnership, or, if appraisals have not been obtained for each significant asset, the value assigned for purposes of the valuation of the partnership to each significant asset for which an appraisal has not been obtained;

(ii) The dollar amount of any mortgages or other similar liabilities to which each of such assets is subject;

(iii) Cash and cash equivalent assets held by the partnership;

(iv) Other assets held by the partnership;

(v) Other liabilities of the partnership;

(vi) The value assigned to the partnership;

(vii) The value assigned to the partnership per interest held by investors in the partnership (on an equivalent interest basis, such as per $1,000 original investment);

(viii) The aggregate number of interests in the successor to be allocated to the partnership and the percentage of the total interests of the successor;

(ix) The number of interests in the successor to be allocated to investors in the partnership for each interest held by such investors (on an equivalent interest basis, such as per $1,000 original investment); and

(x) The value assigned to the general partner's interest in the partnership, and the number of interests in the successor or other consideration to be allocated in the roll-up transaction to the general partner for such general partnership interest or otherwise as compensation or reimbursement for claims against or interests in the partnership, such as foregone fees, unearned fees and for fees to be earned on the sale or refinancing of an asset.

(5) The amounts of compensation paid, and cash distributions made, to the general partner and its affiliates by the partnership for the last three fiscal years and the most recently completed interim period and the amounts that would have been paid if the compensation and distributions structure to be in effect after the roll-up transaction had been in effect during such period. If any proposed change(s) in the business or operations of the successor after the roll-up transaction would change materially the compensation and distributions that would have been paid by the successor (e.g., if properties will be sold

or purchased after the roll-up transaction and no properties were sold or purchased during the period covered by the table), describe such changes and the effects thereof on the compensation and distributions to be paid by the successor.

(6) Cash distributions made to investors during each of the last five fiscal years and most recently completed interim period, identifying any such distributions which represent a return of capital.

(7) An appropriate cross reference to selected financial information concerning the partnership and the pro forma financial statements included in the principal disclosure document in response to Item 914(b)(2) of this subpart (§ 229.914(b)(2)).

§ 229.903 (Item 903) Summary.

(a) Provide in the forepart of the disclosure document a clear, concise and comprehensible summary of the roll-up transaction.

(b) The summary required by paragraph (a) of this Item (§ 229.903) shall include a summary description of each of the following items, as well as any other material terms or consequences of the roll-up transaction necessary to an understanding of such transaction:

(1) Each material risk and effect on investors, including, but not limited to:

(i) Changes in the business plan, voting rights, cash distribution policies, form of ownership interest or management compensation;

(ii) The general partner's conflicts of interest in connection with the roll-up transaction and in connection with the successor's future operations; and

(iii) The likelihood that securities received by investors in the roll-up transaction will trade at prices substantially below the value assigned to such securities in the roll-up transaction and/or the value of the successor's assets;

(2) The material terms of the roll-up transaction, including the valuation method used to allocate securities in the successor to investors in the partnerships;

(3) Whether the general partner reasonably believes that the roll-up transaction is fair or unfair to investors in each partnership, including a brief discussion of the bases for such belief;

(4) Any opinion from an outside party concerning the fairness of the roll-up transaction, including whether the opinion addresses the fairness of all possible combinations of partnerships or portions of partnerships, and contacts with any outside party concerning fairness opinions, valuations or reports in connection with the roll-up transaction required to be disclosed pursuant to Item 911(a)(5) of this subpart (§ 229.911(a)(5));

(5) The background of and reasons for the roll-up transaction, as well as alternatives to the roll-up transaction described in response to Item 908(b) of this subpart (§ 229.908(b));

(6) Rights of investors to exercise dissenters' or appraisal rights or similar rights and to obtain a list of investors in the partnership in which the investor holds an interest; and

(7) If any affiliates of the general partner or the sponsor may participate in the business of the successor or receive compensation from the successor, an organizational chart showing the relationships between the general partner, the sponsor and their affiliates.

Instruction to Item 903. The description of the material risks and effects of the roll-up transaction required by paragraph (b)(1) of this Item (§ 229.903) must be presented prominently in the forepart of the summary.

§ 229.904 (Item 904) Risk factors and other considerations.

(a) Immediately following the summary required by Item 903 of this subpart (§ 229.903), describe in reasonable detail each material risk and effect of the roll-up transaction on investors in each partnership, including, but not limited to:

(1) The potential risks, adverse effects and benefits of the roll-up transaction for investors and for the general partner, including those which result from each matter described in response to Item 905 of this subpart (§ 229.905), with appropriate cross references to the comparative information required by Item 905;

(2) The material risks arising from an investment in the successor; and

(3) The likelihood that securities of the successor received by investors in

the roll-up transaction will trade in the securities markets at a price substantially below the value assigned to such securities in the roll-up transaction and/or the value of the assets of the successor, and the effects on investors of such a trading market discount.

(b) Quantify each risk or effect to the extent practicable.

(c) State whether any of such risks or effects may be different for investors in any partnership and, if so, identify such partnership(s) and describe such difference(s).

Instruction to Item 904. The requirement to quantify the effects of the roll-up transaction shall include, but not be limited to:

(i) If cost savings resulting from combined administration of the partnerships is identified as a potential benefit of the roll-up transaction, the amount of cost savings and a comparison of such amount to the costs of the roll-up transaction; and

(ii) If there may be a material conflict of interest of the sponsor or general partner arising from its receipt of payments or other consideration as a result of the roll-up transaction, the amount of such payments and other consideration to be obtained in the roll-up transaction and a comparison of such amounts to the amounts to which the sponsor or general partner would be entitled without the roll-up transaction.

§ 229.905 (Item 905) comparative information.

(a)(1) Describe the voting and other rights of investors in the successor under the successor's governing instruments and under applicable law. Compare such rights to the voting and other rights of investors in each partnership subject to the transaction under the partnerships' governing instruments and under applicable law. Describe the effects of the change(s) in such rights.

(2) Describe the duties owed by the general partner of the successor to investors in the successor under the successor's governing instruments and under applicable law. Compare such duties to the duties owed by the general partner of each partnership to investors in the partnership under the partnership's governing instruments and under applicable law. Describe the effects of the change(s) in such duties.

(b)(1) Describe each item of compensation (including reimbursement of expenses) payable by the successor after the roll-up transaction to the general partner and its affiliates or to any affiliate of the successor. Compare such compensation to the compensation currently payable to the general partner and its affiliates by each partnership. Describe the effects of the change(s) in compensation arrangements.

(2) Describe each instance in which cash or other distributions may be made by the successor to the general partner and its affiliates or to any affiliate of the successor. Compare such distributions to the distributions currently paid or payable to the general partner and its affiliates by each partnership. Describe the effects of the change(s) in distribution arrangements. If distributions similar to those currently paid or payable by any partnership to the general partner or its affiliates will not be made by the successor, state whether or not other compensation arrangements with the successor described in response to paragraph (b)(1) of this Item (§ 229.905) (e.g., incentive fees payable upon sale of a property) will, in effect, replace such distributions.

(3) Provide a table demonstrating the changes in such compensation and distributions setting forth among other things:

(i) The actual amounts of compensation and distributions, separately identified, paid by the partnerships on a combined basis to the general partner and its affiliates for the partnerships' last three fiscal years and most recently ended interim periods; and

(ii) The amounts of compensation and distributions that would have been paid if the compensation and distributions structure to be in effect after the roll-up transaction had been in effect during such period.

(4) If any proposed change(s) in the business or operations of the successor after the roll-up transaction would change materially the compensation and distributions that would have been paid by the successor from that shown in the table provided in response to paragraph (b)(3)(ii) of this Item (§ 229.905) (e.g., if properties will be sold or purchased after the roll-up transaction and no properties were sold or purchased during the period covered by

the table), describe such changes and the effects thereof on the compensation and distributions to be paid by the successor.

(5) Describe the material conflicts that may arise between the interests of the sponsor or general partner and the interests of investors in the successor as a result of the compensation and distribution arrangements described in response to paragraphs (b)(1) and (2) of this Item (§ 229.905) and describe any steps that will be taken to resolve any such conflicts.

(c) Describe any provisions in the governing instruments of the successor and any policies of the general partner of the successor relating to distributions to investors of cash from operations, proceeds from the sale, financing or refinancing of assets, and any other distributions. Compare such provisions and policies to those of each of the partnerships. Describe the effects of any change(s) in such provisions or policies.

(d)(1) Describe each material investment policy of the successor, including, without limitation, policies with respect to borrowings by the successor. Compare such investment policies to the investment policies of each of the partnerships. Describe the effects of any change(s) in such policies.

(2) Describe any plans of the general partner, sponsor or of any person who will be an affiliate of the successor with respect to:

(i) A sale of any material assets of the partnerships;

(ii) A purchase of any material assets; and

(iii) Borrowings.

(3)(i) State whether or not specific assets have been identified for sale, financing, refinancing or purchase following the roll-up transaction.

(ii) If specific assets have been so identified, describe the assets and the proposed transaction.

(e) Describe any other similar terms or policies of the successor that are material to an investment in the successor. Compare any such terms or policies to those of each of the partnerships. Describe the effects of any change(s) in any such terms or policies.

Instructions to Item 905: (1) The information provided in response to this Item (§ 229.905) should be illustrated in tables or other readily understandable formats, which should be included together with the disclosures required by this Item.

(2) The information required by this Item (§ 229.905) shall be set forth in appropriate separate sections of the principal disclosure document.

§ 229.906 (Item 906) Allocation of roll-up consideration.

(a) Describe in reasonable detail the method used to allocate interests in the successor to investors in the partnerships and the reasons why such method was used.

(b) Provide a table showing the calculation of the valuation of each partnership and the allocation of interests in the successor to investors. Such table shall include for each partnership the following information (or other information of a comparable character necessary to an understanding of the calculation and allocation):

(1) The value assigned to each significant category of assets of the partnership and the total value assigned to the partnership;

(2) The total value assigned to all partnerships;

(3) The aggregate amount of interests in the successor to be allocated to each partnership and the percentage of the total amount of all such interests represented thereby; and

(4) The amount of interests of the successor to be issued to investors per interest held in each partnership (on an equivalent interest basis, such as per $1,000 invested).

(c) If interests in the successor will be allocated to the general partner in exchange for its general partner interest or otherwise or if the general partner will receive other consideration in connection with the roll-up transaction:

(1) Describe in reasonable detail the method used to allocate interests in the successor to the general partner or to determine the amount of consideration payable to the general partner and the reasons such method(s) was used; and

(2) Identify the consideration paid by the general partner for interests in the partnerships that will be exchanged in the roll-up transaction.

§ 229.907 (Item 907) Background of the roll-up transaction.

(a)(1) Furnish a summary of the background of the transaction. Such summary shall include, but not be limited to, a description of any contacts, negotiations or transactions concerning any of the following matters:

(i) A merger, consolidation, or combination of any of the partnerships;

(ii) An acquisition of any of the partnerships or a material amount of any of their assets;

(iii) A tender offer for or other acquisition of securities of any class issued by any of the partnerships; or

(iv) A change in control of any of the partnerships.

(2) The summary required by paragraph (a)(1) of this Item shall:

(i) Cover the period beginning with each partnership's second full fiscal year preceding the date of the filing of the roll-up transaction;

(ii) Include contacts, negotiations or transactions between the general partner or its affiliates and any person who would have a direct interest in the matters listed in paragraphs (a)(1)(i)–(iv) of this Item; and

(iii) Identify the person who initiated such contacts, negotiations or transactions.

(b) Briefly describe the background of each partnership, including, but not limited to:

(1) The amount of capital raised from investors, the extent to which net proceeds from the original offering of interests have been invested, the extent to which funds have been invested as planned and the amount not yet invested; and

(2) The partnership's investment objectives and the extent to which the partnership has achieved its investment objectives.

(c) Discuss whether the general partner (including any affiliated person materially dependent on the general partner's compensation arrangement with the partnership) or any partnership has experienced since the commencement of the most recently completed fiscal year or is likely to experience any material adverse financial developments. If so, describe such developments and the effect of the transaction on such matters.

§ 229.908 (Item 908) Reasons for and alternatives to the roll-up transaction.

(a) Describe the reason(s) for the roll-up transaction.

(b)(1) If the general partner or sponsor considered alternatives to the roll-up transaction being proposed, describe such alternative(s) and state the reason(s) for their rejection.

(2) Whether or not described in response to paragraph (b)(1) of this Item (§ 229.908), describe in reasonable detail the potential alternative of continuation of the partnerships in accordance with their existing business plans, including the effects of such continuation and the material risks and benefits that likely would arise in connection therewith, and, if applicable, the general partner's reasons for not considering such alternative.

(3) Whether or not described in response to paragraph (b)(1) of this Item (§ 229.908), describe in reasonable detail the potential alternative of liquidation of the partnerships, the procedures required to accomplish liquidation, the effects of liquidation, the material risks and benefits that likely would arise in connection with liquidation, and, if applicable, the general partner's reasons for not considering such alternative.

(c) State the reasons for the structure of the roll-up transaction and for undertaking such transaction at this time.

(d) State whether the general partner initiated the roll-up transaction and, if not, whether the general partner participated in the structuring of the transaction.

(e) State whether the general partner recommends the roll-up transaction and briefly describe the reasons for such recommendation.

§ 229.909 (Item 909) Conflicts of interest.

(a) Briefly describe the general partner's fiduciary duties to each partnership subject to the roll-up transaction and each actual or potential material conflict of interest between the general partner and the investors relating to the roll-up transaction.

(b)(1) State whether or not the general partner has retained an unaffiliated representative to act on behalf of investors for purposes of negotiating the terms of the roll-up transaction. If no such representative has been retained, describe the reasons therefor and the risks arising from the absence of separate representation.

(2) If an unaffiliated representative has been retained to represent investors:

(i) Identify such unaffiliated representative;

(ii) Briefly describe the representative's qualifications, including a brief description of any other transaction similar to the roll-up transaction in which the representative has served in a similar capacity within the past five years;

(iii) Describe the method of selection of such representative, including a statement as to whether or not any investors were consulted in the selection of the representative and, if so, the names of such investors;

(iv) Describe the scope and terms of the engagement of the representative, including, but not limited to, what party will be responsible for paying the representative's fees and whether such fees are contingent upon the outcome of the roll-up transaction;

(v) Describe any material relationship between the representative or its affiliates and:

(A) The general partner, sponsor, any affiliate of the general partner or sponsor; or

(B) Any other person having a material interest in the roll-up transaction, which existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of such relationship;

(vi) Describe in reasonable detail the actions taken by the representative on behalf of investors; and

(vii) Describe the fiduciary duties or other legal obligations of the representative to investors in each of the partnerships.

§ 229.910 (Item 910) Fairness of the transaction.

(a) State whether the general partner reasonably believes that the roll-up transaction is fair or unfair to investors and the reasons for such belief. Such discussion must address the fairness of the roll-up transaction to investors in each of the partnerships and as a whole. If the roll-up transaction may be completed with a combination of partnerships consisting of less than all partnerships, or with portions of partnerships, the belief stated must address each possible combination.

(b) Discuss in reasonable detail the material factors upon which the belief stated in paragraph (a) of this Item (§ 229.910) is based and, to the extent practicable, the weight assigned to each such factor. Such discussion should include an analysis of the extent, if any, to which such belief is based on the factors set forth in Instructions (2) and (3) to this Item (§ 229.910), paragraph (b)(1) of Item 909 of this subpart (§ 229.909(b)(1)) and Item 911 of this subpart (§ 229.911). This discussion also must:

(1) Compare the value of the consideration to be received in the roll-up transaction to the value of the consideration that would be received pursuant to each of the alternatives discussed in response to Item 908(b) of this subpart (§ 229.908(b)); and

(2) Describe any material differences among the partnerships (e.g., different types of assets or different investment objectives) relating to the fairness of the transaction.

(c) If any offer of the type described in Instruction (2)(viii) to this Item (§ 229.910) has been received, describe such offer and state the reason(s) for its rejection.

(d) Describe any factors known to the general partner that may affect materially the value of the consideration to be received by investors in the roll-up transaction, the values assigned to the partnerships for purposes of the comparisons to alternatives required by paragraph (b) of this Item (§ 229.910) and the fairness of the transaction to investors.

(e) State whether the general partner's statements in response to paragraphs (a) and (b) of this Item (§ 229.910) are based, in whole or in part, on any report, opinion or appraisal described in response to Item 911 of this subpart (§ 229.911). If so, describe any material

uncertainties known to the general partner that relate to the conclusions in any such report, opinion or appraisal including, but not limited to, developments or trends that have affected or are reasonably likely to affect materially such conclusions.

Instructions to Item 910: (1) A statement that the general partner has no reasonable belief as to the fairness of the roll-up transaction to investors will not be considered sufficient disclosure in response to paragraph (a) of this Item (§229.910(a)).

(2) The factors which are important in determining the fairness of a roll-up transaction to investors and the weight, if any, which should be given to them in a particular context will vary. Normally such factors will include, among others, those referred to in paragraph (b)(1) of Item 909 (§229.909(b)(1)) and whether the consideration offered to investors constitutes fair value in relation to:

(i) Current market prices, if any;

(ii) Historic market prices, if any;

(iii) Net book value;

(iv) Going concern value;

(v) Liquidation value;

(vi) Purchases of limited partnership interests by the general partner or sponsor or their affiliates since the commencement of the partnership's second full fiscal year preceding the date of filing of the disclosure document for the roll-up transaction;

(vii) Any report, opinion, or appraisal described in Item 911 of this subpart (§229.911); and

(viii) Offers of which the general partner or sponsor is aware made during the preceding eighteen months for a merger, consolidation, or combination of any of the partnerships; an acquisition of any of the partnerships or a material amount of their assets; a tender offer for or other acquisition of securities of any class issued by any of the partnerships; or a change in control of any of the partnerships.

(3) The discussion concerning fairness should specifically address material terms of the transaction including whether the consideration offered to investors constitutes fair value in relation to:

(i) The form and amount of consideration to be received by investors and the sponsor in the roll-up transaction;

(ii) The methods used to determine such consideration; and

(iii) The compensation to be paid to the sponsor in the future.

(4) Conclusory statements, such as ''The roll-up transaction is fair to investors in relation to net book value, going concern value, liquidation value and future prospects of the partnership,'' will not be considered sufficient disclosure in response to paragraph (b) of this Item (§229.910(b)).

(5) Consideration should be given to presenting the comparative numerical data as to the value of the consideration being received by investors, liquidation value and other values in a tabular format. Financial and other information concerning the partnerships should be prepared based upon the most recent available information, such as, in the case of financial information, the periods covered by interim selected financial information included in the prospectus in accordance with Item 914 of this subpart (§229.914).

§229.911 (Item 911) Reports, opinions and appraisals.

(a)(1) *All material reports, opinions or appraisals.* State whether or not the general partner or sponsor has received any report, opinion (other than an opinion of counsel) or appraisal from an outside party which is materially related to the roll-up transaction including, but not limited to, any such report, opinion or appraisal relating to the consideration or the fairness of the consideration to be offered to investors in connection with the roll-up transaction or the fairness of such transaction to the general partner or investors.

(2) With respect to any report, opinion or appraisal described in paragraph (a)(1) of this Item (§229.911);

(i) Identify such outside party;

(ii) Briefly describe the qualifications of such outside party;

(iii) Describe the method of selection of such outside party;

(iv) Describe any material relationship between:

(A) The outside party or its affiliates; and

(B) The general partner, sponsor, the successor or any of their affiliates,

which existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of such relationship;

(v) If such report, opinion or appraisal relates to the fairness of the consideration, state whether the general partner, sponsor or affiliate determined the amount of consideration to be paid or whether the outside party recommended the amount of consideration to be paid.

(vi) Furnish a summary concerning such report, opinion or appraisal which shall include, but not be limited to, the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the general partner, sponsor or its affiliates; and any limitation imposed by the general partner, sponsor or affiliate on the scope of the investigation. If any limitation was imposed by the general partner, sponsor or affiliate on the scope of the investigation, including, but not limited to, access to its personnel, premises, and relevant books and records, state the reasons therefor.

(vii) State whether any compensation paid to such outside party is contingent on the approval or completion of the roll-up transaction and, if so, the reasons for compensating such parties on a contingent basis.

(3) Furnish a statement to the effect that upon written request by an investor or his representative who has been so designated in writing, a copy of any such report, opinion or appraisal shall be transmitted promptly, without charge, by the general partner or sponsor. The statement also must include the name and address of the person to whom investors or their representatives should make their request.

(4) All reports, opinions or appraisals referred to in paragraph (a)(1) of this Item (§ 229.911) shall be filed as exhibits to the registration statement.

(5)(i) Describe any contacts in connection with the roll-up transaction between the sponsor or the general partner and any outside party with respect to the preparation by such party of an opinion concerning the fairness of the roll-up transaction, a valuation of a partnership or its assets, or any other report with respect to the roll-up transaction. No description is required, however, of contacts with respect to reports, opinions or appraisals filed as exhibits pursuant to paragraph (a)(4) of this Item (§ 229.911).

(ii) The description of contacts with any outside party required by paragraph (a)(5)(i) of this Item (§ 229.911) shall include the following:

(A) The identity of each such party;

(B) The nature of the contact;

(C) The actions taken by such party;

(D) Any views, preliminary or final, expressed on the proposed subject matter of the report, opinion or appraisal; and

(E) Any reasons such party did not provide a report, opinion or appraisal.

(b) *Fairness opinions:* (1) If any report, opinion or appraisal relates to the fairness of the roll-up transaction to investors in the partnerships, state whether or not the report, opinion or appraisal addresses the fairness of:

(i) The roll-up transaction as a whole and to investors in each partnership; and

(ii) All possible combinations of partnerships in the roll-up transaction (including portions of partnerships if the transaction is structured to permit portions of partnerships to participate). If all possible combinations are not addressed:

(A) Identify the combinations that are addressed;

(B) Identify the person(s) that determined which combinations would be addressed and state the reasons for the selection of the combinations; and

(C) State that if the roll-up transaction is completed with a combination of partnerships not addressed, no report, opinion or appraisal concerning the fairness of the roll-up transaction will have been obtained.

(2) If the sponsor or the general partner has not obtained any opinion on the fairness of the proposed roll-up transaction to investors in each of the affected partnerships, state the sponsor's or general partner's reasons for concluding that such an opinion is not necessary in order to permit the limited partners or shareholders to make an informed decision on the proposed transaction.

(c) *Appraisals.* If the report, opinion or appraisal consists of an appraisal of the assets of the partnerships:

(1) Describe the purpose(s) for which the appraisals were obtained and their use in connection with the roll-up transaction;

(2) Describe which assets are covered by the appraisals and state the aggregate appraised value of the assets covered by the appraisals (including such value net of associated indebtedness). Provide a description of, and valuation

of, any assets subject to any material qualifications by the appraiser and a summary of such qualifications;

(3) Identify the date as of which the appraisals were prepared. State whether and in what circumstances the appraisals will be updated. State whether any events have occurred or conditions have changed since the date of the appraisals that may have caused a material change in the value of the assets;

(4) Include as an appendix to the prospectus one or more tables setting forth the following information:

(i) The appraised value of any separately appraised asset that is significant to the partnership holding such asset;

(ii) If the appraiser considered different valuation approaches in preparing the appraisals of the assets identified in response to paragraph (c)(4)(i) of this Item (§229.911(c)(4)(i)), the value of each such asset under each valuation approach considered by the appraiser, identifying the valuation approach used by the appraiser in determining the appraised value and the reason such approach was chosen; and

(iii) All material assumptions used by the appraiser in appraising the assets identified in response to paragraph (c)(4)(i) of this Item (§229.911(c)(4)(i)), and, if the appraiser used different assumptions for any of such assets, the reasons the different assumptions were chosen.

(5) For purposes of this Item and Item 902 of this subpart (§229.902), an asset is ''significant'' to a partnership if it represents more than 10% of the value of the partnership's assets as of the end of the most recently-completed fiscal year or recently-completed interim period or if 10% or more of the partnership's cash flow or net income for the most recently-completed fiscal year or most recently-completed subsequent interim period was derived from such asset.

Instructions to Item 911: (1) The reports, opinions and appraisals required to be identified in response to paragraph (a) of this Item (§229.911) include any reports, opinions and appraisals which materially relate to the roll-up transaction whether or not relied upon, such as reports or opinions regarding alternatives to the roll-up transaction whether or not the alternatives were rejected.

(2) The information called for by paragraph (a)(2) of this Item (§229.911) should be given with respect to the firm which provides the report, opinion or appraisal rather than the employees of such firm who prepared it.

(3) With respect to appraisals, a summary prepared by the appraisers should not be included in lieu of the description of the appraisals required by paragraph (c) of this Item (§229.911). A clear and concise summary description of the appraisals is required.

[56 FR 57247, Nov. 8, 1991, as amended at 59 FR 63683, Dec. 8, 1994]

§229.912 (Item 912) Source and amount of funds and transactional expenses.

(a) State the source and total amount of funds or other consideration to be used in the roll-up transaction.

(b)(1) Furnish a reasonably itemized statement of all expenses incurred or estimated to be incurred in connection with the roll-up transaction including, but not limited to, filing fees, legal, financial advisory, accounting and appraisal fees, solicitation expenses and printing costs. Identify the persons responsible for paying any or all of such expenses.

(2) State whether or not any partnership subject to the roll-up transaction will be, directly or indirectly, responsible for any or all of the expenses of the transaction. If any partnership will be so responsible, state the amount to be provided by each partnership and the sources of capital to finance such amount.

(c) If all or any part of the consideration to be used by the sponsor or successor in the roll-up transaction is expected to be, directly or indirectly, provided by any partnership, state the amount to be provided by each partnership and the sources of capital to finance such amount.

(d) If all or any part of the funds or other consideration is, or is expected to be, directly or indirectly borrowed by the sponsor or successor for the purpose of the roll-up transaction:

(1) Provide a summary of each such loan agreement containing the identity of the parties, the term, the collateral, the stated and effective interest rates, and other material terms or conditions; and

(2) Briefly describe any plans or arrangements to finance or repay such

borrowing, or, if no plans or arrangements have been made, make a statement to that effect.

(e) If the source of all or any part of the funds to be used in the roll-up transaction is a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Exchange Act and section 13(d) or 14(d) is applicable to such transaction, the name of such bank shall not be made available to the public if the person filing the statement so requests in writing and files such request, naming such bank, with the Secretary of the Commission.

§ 229.913 (Item 913) Other provisions of the transaction.

(a) State whether or not appraisal rights are provided under applicable state law, under the partnership's governing instruments or will be voluntarily accorded by the successor, the general partner or the sponsor (or any of their affiliates) in connection with the roll-up transaction. If so, summarize such appraisal rights. If appraisal rights will not be available to investors who object to the transaction, briefly outline the rights which may be available to such investors under such law.

(b) If any provision has been made to allow investors to obtain access to the books and records of the partnership or to obtain counsel or appraisal services at the expense of the successor, the general partner, the partnership, the sponsor (or any of their affiliates), describe such provision.

(c) Discuss the investors' rights under federal and state law to obtain a partnership's list of investors.

§ 229.914 (Item 914) Pro forma financial statements: selected financial data.

(a) In addition to the information required by Item 301 of Regulation S–K, Selected Financial Data (§ 229.301), and Item 302 of Regulation S–K, Supplementary Financial Information (§ 229.302), for each partnership proposed to be included in a roll-up transaction provide: Ratio of earnings to fixed charges, cash and cash equivalents, total assets at book value, total assets at the value assigned for purposes of the roll-up transaction (if applicable), total liabilities, general and limited partners' equity, net increase (decrease) in cash and cash equivalents, net cash provided by operating activities, distributions; and per unit data for net income (loss), book value, value assigned for purposes of the roll-up transaction (if applicable), and distributions (separately identifying distributions that represent a return of capital). This information should be provided for the same period(s) for which Selected Financial Data and Supplementary Financial Information are required to be provided. Additional or other information should be provided if material to an understanding of each partnership proposed to be included in a roll-up transaction.

(b) Provide pro forma financial information (including oil and gas reserves and cash flow disclosure, if appropriate), assuming:

(1) All partnerships participate in the roll-up transaction; and

(2) Participation in a roll-up transaction of those partnerships that on a combined basis have the lowest combined net cash provided by operating activities for the last fiscal year of such partnerships, *provided* participation by such partnerships satisfies all conditions to consummation of the roll-up transaction. If the combination of all partnerships proposed to be included in a roll-up transaction results in such lowest combined net cash provided by operating activities, this shall be noted and no separate pro forma financial statements are required.

(c) The pro forma financial statements required by paragraph (b) of this Item (§ 229.914) shall disclose the effect of the roll-up transaction on the successor's:

(1) Balance sheet as of the later of the end of the most recent fiscal year or the latest interim period;

(2) Statement of income (with separate line items to reflect income (loss) excluding and including the roll-up expenses and payments), earnings per share amounts, and ratio of earnings to fixed charges for the most recent fiscal year and the latest interim period;

(3) Statement of cash flows for the most recent fiscal year and the latest interim period; and

(4) Book value per share as of the later of the end of the most recent fiscal year or the latest interim period.

Instructions to Item 914. (1) Notwithstanding the provisions of this Item (§229.914), any or all of the information required by paragraphs (b) and (c) of this Item (§229.914) that is not material for the exercise of prudent judgment in regard to the matter to be acted upon, may be omitted.

(2) If the roll-up transaction is structured to permit participation by portions of partnerships, consideration should be given to the effect of such participation in preparing the pro forma financial statements reflecting a partial roll-up.

§229.915 (Item 915) Federal income tax consequences.

(a) Provide a brief, clear and understandable summary of the material Federal income tax consequences of the roll-up transaction and an investment in the successor. Where a tax opinion has been provided, briefly summarize the substance of such opinion, including identification of the material consequences upon which counsel has not been asked, or is unable, to opine. If any of the material Federal income tax consequences are not expected to be the same for investors in all partnerships, the differences shall be described.

(b) State whether or not the opinion of counsel is included as an appendix to the prospectus. If filed as an exhibit to the registration statement and not included as an appendix to the prospectus, include a statement to the effect that, upon receipt of a written request by an investor or his representative who has been so designated in writing, a copy of the opinion of counsel will be transmitted promptly, without charge, by the general partner or sponsor. The statement should include the name and address of the person to whom investors should make their request.

Subpart 229.1000—Mergers and Acquisitions (Regulation M–A)

SOURCE: 64 FR 61443, Nov. 10, 1999, unless otherwise noted.

§229.1000 (Item 1000) Definitions.

The following definitions apply to the terms used in Regulation M–A (§§229.1000 through 229.1016), unless specified otherwise:

(a) *Associate* has the same meaning as in §240.12b–2 of this chapter;

(b) *Instruction C* means General Instruction C to Schedule 13E–3 (§240.13e–100 of this chapter) and General Instruction C to Schedule TO (§240.14d–100 of this chapter);

(c) *Issuer tender offer* has the same meaning as in §240.13e–4(a)(2) of this chapter;

(d) *Offeror* means any person who makes a tender offer or on whose behalf a tender offer is made;

(e) *Rule 13e–3 transaction* has the same meaning as in §240.13e–3(a)(3) of this chapter;

(f) *Subject company* means the company or entity whose securities are sought to be acquired in the transaction (*e.g.*, the target), or that is otherwise the subject of the transaction;

(g) *Subject securities* means the securities or class of securities that are sought to be acquired in the transaction or that are otherwise the subject of the transaction; and

(h) *Third-party tender offer* means a tender offer that is not an issuer tender offer.

§229.1001 (Item 1001) Summary term sheet.

Summary term sheet. Provide security holders with a summary term sheet that is written in plain English. The summary term sheet must briefly describe in bullet point format the most material terms of the proposed transaction. The summary term sheet must provide security holders with sufficient information to understand the essential features and significance of the proposed transaction. The bullet points must cross-reference a more detailed discussion contained in the disclosure document that is disseminated to security holders.

Instructions to Item 1001:

1. The summary term sheet must not recite all information contained in the disclosure document that will be provided to security holders. The summary term sheet is intended to serve as an overview of all material matters that are presented in the accompanying documents provided to security holders.

2. The summary term sheet must begin on the first or second page of the disclosure document provided to security holders.

3. Refer to Rule 421(b) and (d) of Regulation C of the Securities Act (§ 230.421 of this chapter) for a description of plain English disclosure.

§ 229.1002 (Item 1002) Subject company information.

(a) *Name and address.* State the name of the subject company (or the issuer in the case of an issuer tender offer), and the address and telephone number of its principal executive offices.

(b) *Securities.* State the exact title and number of shares outstanding of the subject class of equity securities as of the most recent practicable date. This may be based upon information in the most recently available filing with the Commission by the subject company unless the filing person has more current information.

(c) *Trading market and price.* Identify the principal market in which the subject securities are traded and state the high and low sales prices for the subject securities in the principal market (or, if there is no principal market, the range of high and low bid quotations and the source of the quotations) for each quarter during the past two years. If there is no established trading market for the securities (except for limited or sporadic quotations), so state.

(d) *Dividends.* State the frequency and amount of any dividends paid during the past two years with respect to the subject securities. Briefly describe any restriction on the subject company's current or future ability to pay dividends. If the filing person is not the subject company, furnish this information to the extent known after making reasonable inquiry.

(e) *Prior public offerings.* If the filing person has made an underwritten public offering of the subject securities for cash during the past three years that was registered under the Securities Act of 1933 or exempt from registration under Regulation A (§ 230.251 through § 230.263 of this chapter), state the date of the offering, the amount of securities offered, the offering price per share (adjusted for stock splits, stock dividends, etc. as appropriate) and the aggregate proceeds received by the filing person.

(f) *Prior stock purchases.* If the filing person purchased any subject securities during the past two years, state the amount of the securities purchased, the range of prices paid and the average purchase price for each quarter during that period. Affiliates need not give information for purchases made before becoming an affiliate.

§ 229.1003 (Item 1003) Identity and background of filing person.

(a) *Name and address.* State the name, business address and business telephone number of each filing person. Also state the name and address of each person specified in Instruction C to the schedule (except for Schedule 14D–9 (§ 240.14d–101 of this chapter)). If the filing person is an affiliate of the subject company, state the nature of the affiliation. If the filing person is the subject company, so state.

(b) *Business and background of entities.* If any filing person (other than the subject company) or any person specified in Instruction C to the schedule is not a natural person, state the person's principal business, state or other place of organization, and the information required by paragraphs (c)(3) and (c)(4) of this section for each person.

(c) *Business and background of natural persons.* If any filing person or any person specified in Instruction C to the schedule is a natural person, provide the following information for each person:

(1) Current principal occupation or employment and the name, principal business and address of any corporation or other organization in which the employment or occupation is conducted;

(2) Material occupations, positions, offices or employment during the past five years, giving the starting and ending dates of each and the name, principal business and address of any corporation or other organization in which the occupation, position, office or employment was carried on;

(3) A statement whether or not the person was convicted in a criminal proceeding during the past five years (excluding traffic violations or similar misdemeanors). If the person was convicted, describe the criminal proceeding, including the dates, nature of

conviction, name and location of court, and penalty imposed or other disposition of the case;

(4) A statement whether or not the person was a party to any judicial or administrative proceeding during the past five years (except for matters that were dismissed without sanction or settlement) that resulted in a judgment, decree or final order enjoining the person from future violations of, or prohibiting activities subject to, federal or state securities laws, or a finding of any violation of federal or state securities laws. Describe the proceeding, including a summary of the terms of the judgment, decree or final order; and

(5) Country of citizenship.

(d) *Tender offer.* Identify the tender offer and the class of securities to which the offer relates, the name of the offeror and its address (which may be based on the offeror's Schedule TO (§240.14d–100 of this chapter) filed with the Commission).

Instruction to Item 1003

If the filing person is making information relating to the transaction available on the Internet, state the address where the information can be found.

§229.1004 (Item 1004) Terms of the transaction.

(a) *Material terms.* State the material terms of the transaction.

(1) *Tender offers.* In the case of a tender offer, the information must include:

(i) The total number and class of securities sought in the offer;

(ii) The type and amount of consideration offered to security holders;

(iii) The scheduled expiration date;

(iv) Whether a subsequent offering period will be available, if the transaction is a third-party tender offer;

(v) Whether the offer may be extended, and if so, how it could be extended;

(vi) The dates before and after which security holders may withdraw securities tendered in the offer;

(vii) The procedures for tendering and withdrawing securities;

(viii) The manner in which securities will be accepted for payment;

(ix) If the offer is for less than all securities of a class, the periods for accepting securities on a pro rata basis and the offeror's present intentions in the event that the offer is oversubscribed;

(x) An explanation of any material differences in the rights of security holders as a result of the transaction, if material;

(xi) A brief statement as to the accounting treatment of the transaction, if material; and

(xii) The federal income tax consequences of the transaction, if material.

(2) *Mergers or similar transactions.* In the case of a merger or similar transaction, the information must include:

(i) A brief description of the transaction;

(ii) The consideration offered to security holders;

(iii) The reasons for engaging in the transaction;

(iv) The vote required for approval of the transaction;

(v) An explanation of any material differences in the rights of security holders as a result of the transaction, if material;

(vi) A brief statement as to the accounting treatment of the transaction, if material; and

(vii) The federal income tax consequences of the transaction, if material.

Instruction to Item 1004(a):

If the consideration offered includes securities exempt from registration under the Securities Act of 1933, provide a description of the securities that complies with Item 202 of Regulation S–K (§229.202). This description is not required if the issuer of the securities meets the requirements of General Instructions I.A, I.B.1 or I.B.2, as applicable, or I.C. of Form S–3 (§239.13 of this chapter) and elects to furnish information by incorporation by reference; only capital stock is to be issued; and securities of the same class are registered under section 12 of the Exchange Act and either are listed for trading or admitted to unlisted trading privileges on a national securities exchange; or are securities for which bid and offer quotations are reported in an automated quotations system operated by a national securities association.

(b) *Purchases.* State whether any securities are to be purchased from any officer, director or affiliate of the subject company and provide the details of each transaction.

(c) *Different terms.* Describe any term or arrangement in the Rule 13e-3 transaction that treats any subject security holders differently from other subject security holders.

(d) *Appraisal rights.* State whether or not dissenting security holders are entitled to any appraisal rights. If so, summarize the appraisal rights. If there are no appraisal rights available under state law for security holders who object to the transaction, briefly outline any other rights that may be available to security holders under the law.

(e) *Provisions for unaffiliated security holders.* Describe any provision made by the filing person in connection with the transaction to grant unaffiliated security holders access to the corporate files of the filing person or to obtain counsel or appraisal services at the expense of the filing person. If none, so state.

(f) *Eligibility for listing or trading.* If the transaction involves the offer of securities of the filing person in exchange for equity securities held by unaffiliated security holders of the subject company, describe whether or not the filing person will take steps to assure that the securities offered are or will be eligible for trading on an automated quotations system operated by a national securities association.

§ 229.1005 (Item 1005) Past contacts, transactions, negotiations and agreements.

(a) *Transactions.* Briefly state the nature and approximate dollar amount of any transaction, other than those described in paragraphs (b) or (c) of this section, that occurred during the past two years, between the filing person (including any person specified in Instruction C of the schedule) and;

(1) The subject company or any of its affiliates that are not natural persons if the aggregate value of the transactions is more than one percent of the subject company's consolidated revenues for:

(i) The fiscal year when the transaction occurred; or

(ii) The past portion of the current fiscal year, if the transaction occurred in the current year; and

Instruction to Item 1005(a)(1):

The information required by this Item may be based on information in the subject company's most recent filing with the Commission, unless the filing person has reason to believe the information is not accurate.

(2) Any executive officer, director or affiliate of the subject company that is a natural person if the aggregate value of the transaction or series of similar transactions with that person exceeds $60,000.

(b) *Significant corporate events.* Describe any negotiations, transactions or material contacts during the past two years between the filing person (including subsidiaries of the filing person and any person specified in Instruction C of the schedule) and the subject company or its affiliates concerning any:

(1) Merger;

(2) Consolidation;

(3) Acquisition;

(4) Tender offer for or other acquisition of any class of the subject company's securities;

(5) Election of the subject company's directors; or

(6) Sale or other transfer of a material amount of assets of the subject company.

(c) *Negotiations or contacts.* Describe any negotiations or material contacts concerning the matters referred to in paragraph (b) of this section during the past two years between:

(1) Any affiliates of the subject company; or

(2) The subject company or any of its affiliates and any person not affiliated with the subject company who would have a direct interest in such matters.

Instruction to paragraphs (b) and (c) of Item 1005

Identify the person who initiated the contacts or negotiations.

(d) *Conflicts of interest.* If material, describe any agreement, arrangement or understanding and any actual or potential conflict of interest between the filing person or its affiliates and:

(1) The subject company, its executive officers, directors or affiliates; or

(2) The offeror, its executive officers, directors or affiliates.

Instruction to Item 1005(d)

If the filing person is the subject company, no disclosure called for by this paragraph is required in the document disseminated to security holders, so long as substantially the

same information was filed with the Commission previously and disclosed in a proxy statement, report or other communication sent to security holders by the subject company in the past year. The document disseminated to security holders, however, must refer specifically to the discussion in the proxy statement, report or other communication that was sent to security holders previously. The information also must be filed as an exhibit to the schedule.

(e) *Agreements involving the subject company's securities.* Describe any agreement, arrangement, or understanding, whether or not legally enforceable, between the filing person (including any person specified in Instruction C of the schedule) and any other person with respect to any securities of the subject company. Name all persons that are a party to the agreements, arrangements, or understandings and describe all material provisions.

Instructions to Item 1005(e)

1. The information required by this Item includes: the transfer or voting of securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss, or the giving or withholding of proxies, consents or authorizations.

2. Include information for any securities that are pledged or otherwise subject to a contingency, the occurrence of which would give another person the power to direct the voting or disposition of the subject securities. No disclosure, however, is required about standard default and similar provisions contained in loan agreements.

§ 229.1006 (Item 1006) Purposes of the transaction and plans or proposals.

(a) *Purposes.* State the purposes of the transaction.

(b) *Use of securities acquired.* Indicate whether the securities acquired in the transaction will be retained, retired, held in treasury, or otherwise disposed of.

(c) *Plans.* Describe any plans, proposals or negotiations that relate to or would result in:

(1) Any extraordinary transaction, such as a merger, reorganization or liquidation, involving the subject company or any of its subsidiaries;

(2) Any purchase, sale or transfer of a material amount of assets of the subject company or any of its subsidiaries;

(3) Any material change in the present dividend rate or policy, or indebtedness or capitalization of the subject company;

(4) Any change in the present board of directors or management of the subject company, including, but not limited to, any plans or proposals to change the number or the term of directors or to fill any existing vacancies on the board or to change any material term of the employment contract of any executive officer;

(5) Any other material change in the subject company's corporate structure or business, including, if the subject company is a registered closed-end investment company, any plans or proposals to make any changes in its investment policy for which a vote would be required by Section 13 of the Investment Company Act of 1940 (15 U.S.C. 80a–13);

(6) Any class of equity securities of the subject company to be delisted from a national securities exchange or cease to be authorized to be quoted in an automated quotations system operated by a national securities association;

(7) Any class of equity securities of the subject company becoming eligible for termination of registration under section 12(g)(4) of the Act (15 U.S.C. 78*l*);

(8) The suspension of the subject company's obligation to file reports under Section 15(d) of the Act (15 U.S.C. 78o);

(9) The acquisition by any person of additional securities of the subject company, or the disposition of securities of the subject company; or (10) Any changes in the subject company's charter, bylaws or other governing instruments or other actions that could impede the acquisition of control of the subject company.

(d) *Subject company negotiations.* If the filing person is the subject company:

(1) State whether or not that person is undertaking or engaged in any negotiations in response to the tender offer that relate to:

(i) A tender offer or other acquisition of the subject company's securities by the filing person, any of its subsidiaries, or any other person; or

(ii) Any of the matters referred to in paragraphs (c)(1) through (c)(3) of this section; and

(2) Describe any transaction, board resolution, agreement in principle, or signed contract that is entered into in response to the tender offer that relates to one or more of the matters referred to in paragraph (d)(1) of this section.

Instruction to Item 1006(d)(1)

If an agreement in principle has not been reached at the time of filing, no disclosure under paragraph (d)(1) of this section is required of the possible terms of or the parties to the transaction if in the opinion of the board of directors of the subject company disclosure would jeopardize continuation of the negotiations. In that case, disclosure indicating that negotiations are being undertaken or are underway and are in the preliminary stages is sufficient.

§ 229.1007 (Item 1007) Source and amount of funds or other consideration.

(a) *Source of funds.* State the specific sources and total amount of funds or other consideration to be used in the transaction. If the transaction involves a tender offer, disclose the amount of funds or other consideration required to purchase the maximum amount of securities sought in the offer.

(b) *Conditions.* State any material conditions to the financing discussed in response to paragraph (a) of this section. Disclose any alternative financing arrangements or alternative financing plans in the event the primary financing plans fall through. If none, so state.

(c) *Expenses.* Furnish a reasonably itemized statement of all expenses incurred or estimated to be incurred in connection with the transaction including, but not limited to, filing, legal, accounting and appraisal fees, solicitation expenses and printing costs and state whether or not the subject company has paid or will be responsible for paying any or all expenses.

(d) *Borrowed funds.* If all or any part of the funds or other consideration required is, or is expected, to be borrowed, directly or indirectly, for the purpose of the transaction:

(1) Provide a summary of each loan agreement or arrangement containing the identity of the parties, the term, the collateral, the stated and effective interest rates, and any other material terms or conditions of the loan; and

(2) Briefly describe any plans or arrangements to finance or repay the loan, or, if no plans or arrangements have been made, so state.

Instruction to Item 1007(d):

If the transaction is a third-party tender offer and the source of all or any part of the funds used in the transaction is to come from a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Act (15 U.S.C. 78c), the name of the bank will not be made available to the public if the filing person so requests in writing and files the request, naming the bank, with the Secretary of the Commission.

§ 229.1008 (Item 1008) Interest in securities of the subject company.

(a) *Securities ownership.* State the aggregate number and percentage of subject securities that are beneficially owned by each person named in response to Item 1003 of Regulation M–A (§ 229.1003) and by each associate and majority-owned subsidiary of those persons. Give the name and address of any associate or subsidiary.

Instructions to Item 1008(a)

1. For purposes of this section, beneficial ownership is determined in accordance with Rule 13d–3 (§ 240.13d–3 of this chapter) under the Exchange Act. Identify the shares that the person has a right to acquire.

2. The information required by this section may be based on the number of outstanding securities disclosed in the subject company's most recently available filing with the Commission, unless the filing person has more current information.

3. The information required by this section with respect to officers, directors and associates of the subject company must be given to the extent known after making reasonable inquiry.

(b) *Securities transactions.* Describe any transaction in the subject securities during the past 60 days. The description of transactions required must include, but not necessarily be limited to:

(1) The identity of the persons specified in the Instruction to this section who effected the transaction;

(2) The date of the transaction;

(3) The amount of securities involved;

(4) The price per share; and

(5) Where and how the transaction was effected.

Instructions to Item 1008(b)

1. Provide the required transaction information for the following persons:

(a) The filing person (for all schedules);

(b) Any person named in Instruction C of the schedule and any associate or majority-owned subsidiary of the issuer or filing person (for all schedules except Schedule 14D–9 (§240.14d–101 of this chapter));

(c) Any executive officer, director, affiliate or subsidiary of the filing person (for Schedule 14D–9 (§240.14d–101 of this chapter);

(d) The issuer and any executive officer or director of any subsidiary of the issuer or filing person (for an issuer tender offer on Schedule TO (§240.14d–100 of this chapter)); and

(e) The issuer and any pension, profit-sharing or similar plan of the issuer or affiliate filing the schedule (for a going-private transaction on Schedule 13E–3 (§240.13e–100 of this chapter)).

2. Provide the information required by this Item if it is available to the filing person at the time the statement is initially filed with the Commission. If the information is not initially available, it must be obtained and filed with the Commission promptly, but in no event later than three business days after the date of the initial filing, and if material, disclosed in a manner reasonably designed to inform security holders. The procedure specified by this instruction is provided to maintain the confidentiality of information in order to avoid possible misuse of inside information.

§229.1009 (Item 1009) Persons/assets, retained, employed, compensated or used.

(a) *Solicitations or recommendations.* Identify all persons and classes of persons that are directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations in connection with the transaction. Provide a summary of all material terms of employment, retainer or other arrangement for compensation.

(b) *Employees and corporate assets.* Identify any officer, class of employees or corporate assets of the subject company that has been or will be employed or used by the filing person in connection with the transaction. Describe the purpose for their employment or use.

Instruction to Item 1009(b):

Provide all information required by this Item except for the information required by paragraph (a) of this section and Item 1007 of Regulation M–A (§229.1007).

§229.1010 (Item 1010) Financial statements.

(a) *Financial information.* Furnish the following financial information:

(1) Audited financial statements for the two fiscal years required to be filed with the company's most recent annual report under sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m; 15 U.S.C. 78o);

(2) Unaudited balance sheets, comparative year-to-date income statements and related earnings per share data, statements of cash flows, and comprehensive income required to be included in the company's most recent quarterly report filed under the Exchange Act;

(3) Ratio of earnings to fixed charges, computed in a manner consistent with Item 503(d) of Regulation S–K (§229.503(d)), for the two most recent fiscal years and the interim periods provided under paragraph (a)(2) of this section; and

(4) Book value per share as of the date of the most recent balance sheet presented.

(b) *Pro forma information.* If material, furnish pro forma information disclosing the effect of the transaction on:

(1) The company's balance sheet as of the date of the most recent balance sheet presented under paragraph (a) of this section;

(2) The company's statement of income, earnings per share, and ratio of earnings to fixed charges for the most recent fiscal year and the latest interim period provided under paragraph (a)(2) of this section; and

(3) The company's book value per share as of the date of the most recent balance sheet presented under paragraph (a) of this section.

(c) *Summary information.* Furnish a fair and adequate summary of the information specified in paragraphs (a) and (b) of this section for the same periods specified. A fair and adequate summary includes:

(1) The summarized financial information specified in §210.1–02(bb)(1) of this chapter;

(2) Income per common share from continuing operations (basic and diluted, if applicable);

(3) Net income per common share (basic and diluted, if applicable);

(4) Ratio of earnings to fixed charges, computed in a manner consistent with Item 503(d) of Regulation S–K (§229.503(d));

(5) Book value per share as of the date of the most recent balance sheet; and

(6) If material, pro forma data for the summarized financial information specified in paragraphs (c)(1) through (c)(5) of this section disclosing the effect of the transaction.

§ 229.1011 (Item 1011) Additional information.

(a) *Agreements, regulatory requirements and legal proceedings.* If material to a security holder's decision whether to sell, tender or hold the securities sought in the tender offer, furnish the following information:

(1) Any present or proposed material agreement, arrangement, understanding or relationship between the offeror or any of its executive officers, directors, controlling persons or subsidiaries and the subject company or any of its executive officers, directors, controlling persons or subsidiaries (other than any agreement, arrangement or understanding disclosed under any other sections of Regulation M–A (§§ 229.1000 through 229.1016));

Instruction to paragraph (a)(1):

In an issuer tender offer disclose any material agreement, arrangement, understanding or relationship between the offeror and any of its executive officers, directors, controlling persons or subsidiaries.

(2) To the extent known by the offeror after reasonable investigation, the applicable regulatory requirements which must be complied with or approvals which must be obtained in connection with the tender offer;

(3) The applicability of any anti-trust laws;

(4) The applicability of margin requirements under section 7 of the Act (15 U.S.C. 78g) and the applicable regulations; and

(5) Any material pending legal proceedings relating to the tender offer, including the name and location of the court or agency in which the proceedings are pending, the date instituted, the principal parties, and a brief summary of the proceedings and the relief sought.

Instruction to Item 1011(a)(5):

A copy of any document relating to a major development (such as pleadings, an answer, complaint, temporary restraining order, injunction, opinion, judgment or order) in a material pending legal proceeding must be furnished promptly to the Commission staff on a supplemental basis.

(b) *Other material information.* Furnish such additional material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

§ 229.1012 (Item 1012) The solicitation or recommendation.

(a) *Solicitation or recommendation.* State the nature of the solicitation or the recommendation. If this statement relates to a recommendation, state whether the filing person is advising holders of the subject securities to accept or reject the tender offer or to take other action with respect to the tender offer and, if so, describe the other action recommended. If the filing person is the subject company and is not making a recommendation, state whether the subject company is expressing no opinion and is remaining neutral toward the tender offer or is unable to take a position with respect to the tender offer.

(b) *Reasons.* State the reasons for the position (including the inability to take a position) stated in paragraph (a) of this section. Conclusory statements such as ''The tender offer is in the best interests of shareholders'' are not considered sufficient disclosure.

(c) *Intent to tender.* To the extent known by the filing person after making reasonable inquiry, state whether the filing person or any executive officer, director, affiliate or subsidiary of the filing person currently intends to tender, sell or hold the subject securities that are held of record or beneficially owned by that person.

(d) *Intent to tender or vote in a going-private transaction.* To the extent known by the filing person after making reasonable inquiry, state whether or not any executive officer, director or affiliate of the issuer (or any person specified in Instruction C to the schedule) currently intends to tender or sell subject securities owned or held by that person and/or how each person

currently intends to vote subject securities, including any securities the person has proxy authority for. State the reasons for the intended action.

Instruction to Item 1012(d):

Provide the information required by this section if it is available to the filing person at the time the statement is initially filed with the Commission. If the information is not available, it must be filed with the Commission promptly, but in no event later than three business days after the date of the initial filing, and if material, disclosed in a manner reasonably designed to inform security holders.

(e) *Recommendations of others.* To the extent known by the filing person after making reasonable inquiry, state whether or not any person specified in paragraph (d) of this section has made a recommendation either in support of or opposed to the transaction and the reasons for the recommendation.

§229.1013 (Item 1013) Purposes, alternatives, reasons and effects in a going-private transaction.

(a) *Purposes.* State the purposes for the Rule 13e–3 transaction.

(b) *Alternatives.* If the subject company or affiliate considered alternative means to accomplish the stated purposes, briefly describe the alternatives and state the reasons for their rejection.

(c) *Reasons.* State the reasons for the structure of the Rule 13e–3 transaction and for undertaking the transaction at this time.

(d) *Effects.* Describe the effects of the Rule 13e–3 transaction on the subject company, its affiliates and unaffiliated security holders, including the federal tax consequences of the transaction.

Instructions to Item 1013:

1. Conclusory statements will not be considered sufficient disclosure in response to this section.

2. The description required by paragraph (d) of this section must include a reasonably detailed discussion of both the benefits and detriments of the Rule 13e–3 transaction to the subject company, its affiliates and unaffiliated security holders. The benefits and detriments of the Rule 13e–3 transaction must be quantified to the extent practicable.

3. If this statement is filed by an affiliate of the subject company, the description required by paragraph (d) of this section must include, but not be limited to, the effect of the Rule 13e–3 transaction on the affiliate's interest in the net book value and net earnings of the subject company in terms of both dollar amounts and percentages.

§229.1014 (Item 1014) Fairness of the going-private transaction.

(a) *Fairness.* State whether the subject company or affiliate filing the statement reasonably believes that the Rule 13e–3 transaction is fair or unfair to unaffiliated security holders. If any director dissented to or abstained from voting on the Rule 13e–3 transaction, identify the director, and indicate, if known, after making reasonable inquiry, the reasons for the dissent or abstention.

(b) *Factors considered in determining fairness.* Discuss in reasonable detail the material factors upon which the belief stated in paragraph (a) of this section is based and, to the extent practicable, the weight assigned to each factor. The discussion must include an analysis of the extent, if any, to which the filing person's beliefs are based on the factors described in Instruction 2 of this section, paragraphs (c), (d) and (e) of this section and Item 1015 of Regulation M–A (§229.1015).

(c) *Approval of security holders.* State whether or not the transaction is structured so that approval of at least a majority of unaffiliated security holders is required.

(d) *Unaffiliated representative.* State whether or not a majority of directors who are not employees of the subject company has retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for purposes of negotiating the terms of the Rule 13e–3 transaction and/or preparing a report concerning the fairness of the transaction.

(e) *Approval of directors.* State whether or not the Rule 13e–3 transaction was approved by a majority of the directors of the subject company who are not employees of the subject company.

(f) *Other offers.* If any offer of the type described in paragraph (viii) of Instruction 2 to this section has been received, describe the offer and state the reasons for its rejection.

Instructions to Item 1014:

1. A statement that the issuer or affiliate has no reasonable belief as to the fairness of

the Rule 13e–3 transaction to unaffiliated security holders will not be considered sufficient disclosure in response to paragraph (a) of this section.

2. The factors that are important in determining the fairness of a transaction to unaffiliated security holders and the weight, if any, that should be given to them in a particular context will vary. Normally such factors will include, among others, those referred to in paragraphs (c), (d) and (e) of this section and whether the consideration offered to unaffiliated security holders constitutes fair value in relation to:

(i) Current market prices;

(ii) Historical market prices;

(iii) Net book value;

(iv) Going concern value;

(v) Liquidation value;

(vi) Purchase prices paid in previous purchases disclosed in response to Item 1002(f) of Regulation M–A (§ 229.1002(f));

(vii) Any report, opinion, or appraisal described in Item 1015 of Regulation M–A (§ 229.1015); and

(viii) Firm offers of which the subject company or affiliate is aware made by any unaffiliated person, other than the filing persons, during the past two years for:

(A) The merger or consolidation of the subject company with or into another company, or *vice versa;*

(B) The sale or other transfer of all or any substantial part of the assets of the subject company; or

(C) A purchase of the subject company's securities that would enable the holder to exercise control of the subject company.

3. Conclusory statements, such as ''The Rule 13e–3 transaction is fair to unaffiliated security holders in relation to net book value, going concern value and future prospects of the issuer'' will not be considered sufficient disclosure in response to paragraph (b) of this section.

§ 229.1015 (Item 1015) Reports, opinions, appraisals and negotiations.

(a) *Report, opinion or appraisal.* State whether or not the subject company or affiliate has received any report, opinion (other than an opinion of counsel) or appraisal from an outside party that is materially related to the Rule 13e–3 transaction, including, but not limited to: Any report, opinion or appraisal relating to the consideration or the fairness of the consideration to be offered to security holders or the fairness of the transaction to the issuer or affiliate or to security holders who are not affiliates.

(b) *Preparer and summary of the report, opinion or appraisal.* For each report, opinion or appraisal described in response to paragraph (a) of this section or any negotiation or report described in response to Item 1014(d) of Regulation M–A (§ 229.1014) or Item 14(b)(6) of Schedule 14A (§ 240.14a–101 of this chapter) concerning the terms of the transaction:

(1) Identify the outside party and/or unaffiliated representative;

(2) Briefly describe the qualifications of the outside party and/or unaffiliated representative;

(3) Describe the method of selection of the outside party and/or unaffiliated representative;

(4) Describe any material relationship that existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship between:

(i) The outside party, its affiliates, and/or unaffiliated representative; and

(ii) The subject company or its affiliates;

(5) If the report, opinion or appraisal relates to the fairness of the consideration, state whether the subject company or affiliate determined the amount of consideration to be paid or whether the outside party recommended the amount of consideration to be paid; and

(6) Furnish a summary concerning the negotiation, report, opinion or appraisal. The summary must include, but need not be limited to, the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the subject company or affiliate; and any limitation imposed by the subject company or affiliate on the scope of the investigation.

Instruction to Item 1015(b):

The information called for by paragraphs (b)(1), (2) and (3) of this section must be given with respect to the firm that provides the report, opinion or appraisal rather than the employees of the firm that prepared the report.

(c) *Availability of documents.* Furnish a statement to the effect that the report, opinion or appraisal will be made available for inspection and copying at the principal executive offices of the subject company or affiliate during its

regular business hours by any interested equity security holder of the subject company or representative who has been so designated in writing. This statement also may provide that a copy of the report, opinion or appraisal will be transmitted by the subject company or affiliate to any interested equity security holder of the subject company or representative who has been so designated in writing upon written request and at the expense of the requesting security holder.

§ 229.1016 (Item 1016) Exhibits.

File as an exhibit to the schedule:

(a) Any disclosure materials furnished to security holders by or on behalf of the filing person, including:

(1) Tender offer materials (including transmittal letter);

(2) Solicitation or recommendation (including those referred to in Item 1012 of Regulation M–A (§ 229.1012));

(3) Going-private disclosure document;

(4) Prospectus used in connection with an exchange offer where securities are registered under the Securities Act of 1933; and

(5) Any other disclosure materials;

(b) Any loan agreement referred to in response to Item 1007(d) of Regulation M–A (§ 229.1007(d));

Instruction to Item 1016(b):

If the filing relates to a third-party tender offer and a request is made under Item 1007(d) of Regulation M–A (§ 229.1007(d)), the identity of the bank providing financing may be omitted from the loan agreement filed as an exhibit.

(c) Any report, opinion or appraisal referred to in response to Item 1014(d) or Item 1015 of Regulation M–A (§ 229.1014(d) or § 229.1015);

(d) Any document setting forth the terms of any agreement, arrangement, understanding or relationship referred to in response to Item 1005(e) or Item 1011(a)(1) of Regulation M–A (§ 229.1005(e) or § 229.1011(a)(1));

(e) Any agreement, arrangement or understanding referred to in response to § 229.1005(d), or the pertinent portions of any proxy statement, report or other communication containing the disclosure required by Item 1005(d) of Regulation M–A (§ 229.1005(d));

(f) A detailed statement describing security holders' appraisal rights and the procedures for exercising those appraisal rights referred to in response to Item 1004(d) of Regulation M–A (§ 229.1004(d));

(g) Any written instruction, form or other material that is furnished to persons making an oral solicitation or recommendation by or on behalf of the filing person for their use directly or indirectly in connection with the transaction; and

(h) Any written opinion prepared by legal counsel at the filing person's request and communicated to the filing person pertaining to the tax consequences of the transaction.

EXHIBIT TABLE TO ITEM 1016 OF REGULATION M–A

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PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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AUTHORITY: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77sss, 77z–3, 78c, 78d, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

Section 230.151 is also issued under 15 U.S.C. 77s(a).

Section 230.160 is also issued under Section 104(d) of the Electronic Signatures Act.

Sections 230.400 to 230.499 issued under 15 U.S.C. 77f, 77h, 77j, 77s, unless otherwise noted.

Section 230.473 is also issued under 15 U.S.C. 79(t).

Section 230.502 is also issued under 15 U.S.C. 80a–8, 80a–29, 80a–30.

EDITORIAL NOTE: Nomenclature changes to part 230 appear at 57 FR 36501, Aug. 13, 1992, and 57 FR 47409, Oct. 16, 1992.

ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S–T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S–T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT

GENERAL

NOTE: In §§230.100 to 230.174, the numbers to the right of the decimal point correspond with the respective rule numbers in general rules and regulations adopted by the Securities and Exchange Commission under the Securities Act of 1933.

CROSS REFERENCE: For regulations governing registration, see §§230.400—230.494.

§230.100 Definitions of terms used in the rules and regulations.

(a) As used in the rules and regulations prescribed in this part by the Securities and Exchange Commission pursuant to the Securities Act of 1933, unless the context otherwise requires:

(1) The term *Commission* means the Securities and Exchange Commission.

(2) The term *Act* means the Securities Act of 1933.

(3) The term *rules and regulations* refers to all rules and regulations adopted by the Commission pursuant to the Act, including the forms and accompanying instructions thereto.

(4) The term *registrant* means the issuer of securities for which a registration statement is filed.

(5) The term *agent for service* means the person authorized in the registration statement to receive notices and communications from the Commission.

(6) The term *electronic filer* means a person or an entity that submits filings electronically pursuant to Rules 101, 901, 902 or 903 of Regulation S–T (§§232.101, 232.901, 232.902 or 232.903 of this chapter, respectively).

(7) The term *electronic filing* means a document under the federal securities laws that is transmitted or delivered to the Commission in electronic format.

(b) Unless otherwise specifically provided, the terms used in this part shall have the meanings defined in the act.

(c) A rule in the general rules and regulations which defines a term without express reference to the Act or to the rules and regulations or to a portion thereof defines such term for all purposes as used both in the Act and in the rules and regulations, unless the context otherwise requires.

[2 FR 1076, May 26, 1937, as amended at 21 FR 7566, Oct. 3, 1956; 58 FR 14669, Mar. 18, 1993]

§230.110 Business hours of the Commission.

(a) *General.* The principal office of the Commission, at 450 Fifth Street, NW., Washington, DC 20549, is open each day,

except Saturdays, Sundays, and federal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, *provided that* hours for the filing of documents pursuant to the Act or the rules and regulations thereunder are as set forth in paragraphs (b), (c) and (d) of this section.

(b) *Submissions made in paper or on magnetic cartridge.* Paper documents filed with or otherwise furnished to the Commission, as well as electronic filings and submissions on magnetic cartridge under cover of Form ET (§§ 239.62, 249.445, 259.601, 269.6 and 274.401 of this chapter), may be submitted to the Commission each day, except Saturdays, Sundays and federal holidays, from 8 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect.

(c) *Filings by direct transmission.* Filings made by direct transmission may be submitted to the Commission each day, except Saturdays, Sundays and federal holidays, from 8 a.m. to 10 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect.

(d) *Filings by facsimile.* Registration statements and post-effective amendments thereto filed by facsimile transmission pursuant to Rule 462(b) (§ 230.462(b)) and Rule 455 (§ 230.455) may be filed with the Commission each day, except Saturdays, Sundays and federal holidays, from 5:30 p.m. to 10 p.m., Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect.

[58 FR 14669, Mar. 18, 1993, as amended at 60 FR 26615, May 17, 1995; 65 FR 24799, Apr. 27, 2000]

§ 230.111 Payment of fees.

(a) All payments of fees for registration statements under the Act shall be made in cash or by U.S. postal money order, certified check, bank cashier's check, or bank money order payable to the Securities and Exchange Commission, omitting the name or title of any official of the Commission. In addition, all other filing fees may be paid by personal check. There will be no refunds.

(b) Notwithstanding paragraph (a) of this section, for registration statements filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)), payment of filing fees for the purposes of this section may be made by:

(1) The registrant or its agent instructing its bank or a wire transfer service to transmit to the Commission the applicable filing fee by a wire transfer of such amount from the issuer's account or its agent's account to the Commission's account at Mellon Bank as soon as practicable but no later than the close of the next business day following the filing of the registration statement; and

(2) The registrant submitting with the registration statement at the time of filing a certification that:

(i) The registrant or its agent has so instructed its bank or a wire transfer service;

(ii) The registrant or its agent will not revoke such instructions; and

(iii) The registrant or its agent has sufficient funds in such account to cover the amount of such filing fee.

NOTE TO PARAGRAPH(B): Such instructions may be sent on the date of filing the registration statement after the close of business of such bank or wire transfer service, provided that the registrant undertakes in the certification sent to the Commission with the registration statement that it will confirm receipt of such instructions by the bank or wire transfer service during regular business hours on the following business day.

[37 FR 1471, Jan. 29, 1972, as amended at 49 FR 27307, July 3, 1984; 60 FR 26615, May 17, 1995; 61 FR 49959, Sept. 24, 1996]

§ 230.120 Inspection of registration statements.

Except for material contracts or portions thereof accorded confidential treatment pursuant to § 230.406, all registration statements are available for public inspection, during business hours, at the principal office of the Commission in Washington, D.C. Electronic registration statements made through the Electronic Data Gathering, Analysis, and Retrieval system are publicly available through the Commission's Web site (http://www.sec.gov).

[61 FR 24654, May 15, 1996]

§ 230.122 Non-disclosure of information obtained in the course of examinations and investigations.

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 8(e) or 20(a) (48 Stat. 80, 86; 15 U.S.C. 77h(e), 77t(a)) shall, unless made a matter of public record, be deemed confidential. Except as provided by 17 CFR 203.2, officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer or employee of the Commission, unless the Commission or the General Counsel, pursuant to delegated authority, authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his or her refusal upon this section. Any officer or employee who is served with such a subpoena shall promptly advise the General Counsel of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear on the desirability of making available such information or documents.

(Sec. 19, 48 Stat. 85; sec. 20, 48 Stat. 86; sec. 21, 48 Stat. 899; sec. 23, 48 Stat. 901; sec. 18, 49 Stat. 831; sec. 20, 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 321, 53 Stat. 1174; sec. 38, 54 Stat. 841; sec. 42, 54 Stat. 842; sec. 209, 54 Stat. 853; sec. 211, 54 Stat. 855; sec. 1, 76 Stat. 394.

(15 U.S.C. 77s, 77t, 78u, 78w, 79r, 79t, 77sss, 77uuu, 80a–37, 80a–41, 80b–9, 89b–11, 78d–1))

[44 FR 50836, Aug. 30, 1979, as amended at 53 FR 17459, May 17, 1988; 54 FR 33501, Aug. 15, 1989]

§ 230.130 Definition of "rules and regulations" as used in certain sections of the Act.

The term *rules and regulations* as used in sections 7, 10 (a), (c) and (d) and 19(a) of the Act, shall include the forms for registration of securities under the Act and the related instructions thereto.

[21 FR 1046, Feb. 15, 1956]

§ 230.131 Definition of security issued under governmental obligations.

(a) Any part of an obligation evidenced by any bond, note, debenture, or other evidence of indebtedness issued by any governmental unit specified in section 3(a)(2) of the Act which is payable from payments to be made in respect of property or money which is or will be used, under a lease, sale, or loan arrangement, by or for industrial or commercial enterprise, shall be deemed to be a separate *security* within the meaning of section 2(l) of the Act, issued by the lessee or obligor under the lease, sale or loan arrangement.

(b) An obligation shall not be deemed a separate *security* as defined in paragraph (a) of this section if, (1) the obligation is payable from the general revenues of a governmental unit, specified in section 3(a)(2) of the Act, having other resources which may be used for payment of the obligation, or (2) the obligation relates to a public project or facility owned and operated by or on behalf of and under the control of a governmental unit specified in such section, or (3) the obligation relates to a facility which is leased to and under the control of an industrial or commercial enterprise but is a part of a public project which, as a whole, is owned by and under the general control of a governmental unit specified in such section, or an instrumentality thereof.

(c) This rule shall apply to transactions of the character described in paragraph (a) of this section only with respect to bonds, notes, debentures or other evidences of indebtedness sold after December 31, 1968.

(15 U.S.C. 77w)

[33 FR 12648, Sept. 6, 1968, as amended at 35 FR 6000, Apr. 11, 1970]

§ 230.132 Definition of "common trust fund" as used in section 3(a)(2) of the Act.

The term *common trust fund* as used in section 3(a)(2) of the Act (15 U.S.C. 77c(a)(2)) shall include a common trust fund which is maintained by a bank

which is a member of an affiliated group, as defined in section 1504(a) of the Internal Revenue Code of 1954 (26 U.S.C. 1504(a)), and which is maintained exclusively for the collective investment and reinvestment of monies contributed thereto by one or more bank members of such affiliated group in the capacity of trustee, executor, administrator, or guardian, *Provided That:*

(a) The common trust fund is operated in compliance with the same state and federal regulatory requirements as would apply if the bank maintaining such fund and any other contributing banks were the same entry; and

(b) The rights of persons for whose benefit a contributing bank acts as trustee, executor, administrator, or guardian would not be diminished by reason of the maintenance of such common trust fund by another bank member of the affiliated group.

(15 U.S.C. 77s(a))

[43 FR 2392, Jan. 17, 1978]

§ 230.133 Definition for purposes of section 5 of the Act, of "sale", "offer", "offer to sell", and "offer for sale".

(a) For purposes only of section 5 of the Act, no *sale, offer to sell,* or *offer for sale* shall be deemed to be involved so far as the stockholders of a corporation are concerned where, pursuant to statutory provisions in the state of incorporation or provisions contained in the certificate of incorporation, there is submitted to the vote of such stockholders a plan or agreement for a statutory merger or consolidation or reclassification of securities, or a proposal for the transfer of assets of such corporation to another person in consideration of the issuance of securities of such other person or securities of a corporation which owns stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of such person, under such circumstances that the vote of a required favorable majority (1) will operate to authorize the proposed transaction as far as concerns the corporation whose stockholders are voting (except for the taking of action by the directors of the corporation involved and for compliance with such statutory provisions as the filing of the plan or agreement with the appropriate State authority), and (2) will bind all stockholders of such corporation except to the extent that dissenting shareholders may be entitled, under statutory provisions or provisions contained in the certificate of incorporation, to receive the appraised or fair value of their holdings.

(b) Any person who purchases securities of the issuer from security holders of a constituent corporation with a view to, or offers or sells such securities for such security holders in connection with, a distribution thereof pursuant to any contract or arrangement, made in connection with any transaction specified in paragraph (a) of this section, with the issuer or with any affiliate of the issuer, or with any person who in connection with such transaction is acting as an underwriter of such securities, shall be deemed to an underwriter of such securities within the meaning of section 2(11) of the Act. This paragraph does not refer to arrangements limited to provision for the matching and combination of fractional interests in securities into whole interests, or the purchase and sale of such fractional interests, among security holders of the constituent corporation and to the sale on behalf of, and as agent for, such security holders of such number of fractional or whole interests as may be necessary to adjust for any remaining fractional interests after such matching.

(c) Any constituent corporation, or any person who is an affiliate of a constituent corporation at the time any transaction specified in paragraph (a) of this section, is submitted to a vote of the stockholders of such corporation, who acquires securities of the issuer in connection with such transaction with a view to the distribution thereof shall be deemed to be an underwriter of such securities within the meaning of section 2(11) of the Act. A transfer by a constituent corporation to its security holders of securities of the issuer upon a complete or partial liquidation shall not be deemed a distribution for the purpose of this paragraph.

(d) Notwithstanding the provisions of paragraph (c) of this section, a person specified therein shall not be deemed to be an underwriter nor to be engaged in a distribution with respect to securities acquired in any transaction specified in paragraph (a) of this section, which are sold by him in brokers' transactions within the meaning of section 4(4) of the Act, in accordance with the conditions and subject to the limitations specified in paragraph (e) of this section, if such person:

(1) Does not directly or indirectly solicit or arrange for the solicitation of orders to buy in anticipation of or in connection with such brokers' transactions;

(2) Makes no payment in connection with the execution of such brokers' transactions to any person other than the broker; and

(3) Limits such brokers' transactions to a sale or series of sales which, together with all other sales of securities of the same class by such person or on his behalf within the preceding six months, will not exceed the following:

(i) If the security is traded only otherwise than on a securities exchange, approximately one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions, or

(ii) If the security is admitted to trading on a securities exchange, the lesser of approximately (*a*) one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (*b*) the largest aggregate reported volume of trading on securities exchanges during any one week within the four calendar weeks preceding the receipt of such order.

(e) For the purposes of paragraph (d) of this section:

(1) The term *brokers' transactions* in section 4(4) of the Act shall be deemed to include transactions by a broker acting as agent for the account of the seller where:

(i) The broker performs no more than the usual and customary broker's functions,

(ii) The broker does no more than execute an order or orders to sell as a broker and receives no more than the usual or customary broker's commissions,

(iii) The broker does not solicit or arrange for the solicitation of orders to buy in anticipation of or in connection with such transactions and

(iv) The broker is not aware of any circumstances indicating that his principal is failing to comply with the provisions of paragraph (d) of this section;

(2) The term *solicitation of such orders* in section 4(4) of the Act shall be deemed to include the solicitation of an order to buy a security, but shall not be deemed to include the solicitation of an order to sell a security;

(3) Where within the previous 60 days a dealer has made a written bid for a security or a written solicitation of an offer to sell such security, the term *solicitation* in section 4(4) shall not be deemed to include an inquiry regarding the dealer's bid or solicitation.

(f) For the purposes of this rule, the term *constituent corporation* means any corporation, other than the issuer, which is a party to any transaction specified in paragraph (a) of this section. The term *affiliate* means a person controlling, controlled by or under common control with a specified person.

NOTE: This section is rescinded effective on and after January 1, 1973, except that it shall remain in effect: (1) For transactions submitted before that date for vote or consent of security holders; (2) for transactions formally submitted before such date for approval to any governmental regulatory agency, if such approval is required by law; and (3) for resales of securities received by persons in such transactions.

(Sec. 5, 48 Stat. 77; 15 U.S.C. 77e)

[19 FR 7129, Nov. 3, 1954, as amended at 24 FR 5900, July 23, 1959; 30 FR 2022, Feb. 13, 1965; 33 FR 566, Jan. 17, 1968. Rescinded at 37 FR 23636, Nov. 7, 1972]

§230.134 Communications not deemed a prospectus.

The term *prospectus* as defined in section 2(10) of the Act shall not include a notice, circular, advertisement, letter, or other communication published or transmitted to any person after a registration statement has been filed if it contains only the statements required or permitted to be included therein by the following provisions of this section:

(a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph:

(1) The name of the issuer of the security;

(2) The full title of the security and the amount being offered;

(3) A brief indication of the general type of business of the issuer, limited to the following:

(i) In the case of a manufacturing company, the general type of manufacturing and the principal products or classes of products manufactured;

(ii) In the case of a public utility company, the general type of services rendered and a brief indication of the area served;

(iii) In the case of an investment company registered under the Investment Company Act of 1940, the company's classification and subclassification under the Act, whether it is a balanced, specialized, bond, preferred stock or common stock fund and whether in the selection of investments emphasis is placed upon income or growth characteristics, and a general description of an investment company including its general attributes, methods of operation and services offered provided that such description is not inconsistent with the operation of the particular investment company for which more specific information is being given, identification of the company's investment adviser, any logo, corporate symbol or trademark of the company or its investment adviser and any graphic design or device or an attention-getting headline, not involving performance figures, designed to direct the reader's attention to textual material included in the communication pursuant to other provisions of this rule; and, with respect to an investment company issuing redeemable securities:

(A) A description of such company's investment objectives and policies, services, and method of operation;

(B) Identification of the company's principal officers;

(C) The year of incorporation or organization or period of existence of the company, its investment adviser, or both;

(D) The company's aggregate net asset value as of the most recent practicable date;

(E) The aggregate net asset value as of the most recent practicable date of all registered investment companies under the management of the company's investment adviser;

(F) Any pictorial illustration which is appropriate for inclusion in the company's prospectus and not involving performance figures;

(G) Descriptive material relating to economic conditions, or to retirement plans or other goals to which an investment in the company could be directed, but not directly or indirectly relating to past performance or implying achievement of investment objectives; *Provided*, That, (*1*) if any printed material permitted by paragraphs (a)(3)(iii) (A) through (G) of this section is included, such communication shall also contain the following legend set in a size type at least as large as and of a style different from, but at least as prominent as, that used in the major portion of the advertisement; and

(H) Written notice of the terms of an offer made solely to all registered holders of the securities, or of a particular class or series of securities, issued by the company proportate to their holdings, offering to sell additional shares to such holders of securities at prices reflecting a reduction in, or elimination of, the regular sales load charged: *Provided*, That, (*1*) if any printed material permitted by pargraphs (a)(3)(iii) (A) through (H) of this section is included, such communication shall also contain the following legend set in a size type at least as large as and of a style different from, but at least as prominent as, that used in the major portion of the advertisements:

For more complete information about (Name of Company) including charges and expenses (get) (obtain) (send for) a prospectus (from (Name and Address)) (by sending this coupon). Read it carefully before you invest or (pay) (forward funds) (send money).

Or, (*2*) if any material permitted by paragraphs (a)(3)(iii) (A) through (G) of this section is used in a radio or television advertisement, such communication shall also contain the following legend given emphasis equal to

that used in the major portion of the advertisement:

For more complete information about (Name of Company) including charges and expenses (get) (obtain) (send for) a prospectus (from (Name and Address)). Read it carefully before you invest or (pay) (forward funds) (send money).

For purposes of paragraph (a)(3)(iii)(B) of this section, *principal officers* means the president in charge of a principal business function and any other person who performs similar policy making functions for the company on a regular basis. In the case of two or more registered investment companies having the same investment adviser or principal underwriter, the same information described in this paragraph (a)(3)(iii) may be included as to each such company in a joint communication on the same basis as it is permitted in communications dealing with individual companies under this paragraph (a)(3)(iii).

(iv) In the case of any other type of company, a corresponding statement;

(4) The price of the security, or if the price is not known, the method of its determination or the probable price range as specified by the issuer or the managing underwriter;

(5) In the case of a debt security with a fixed (non-contingent) interest provision, the yield or, if the yield is not known, the probable yield range, as specified by the issuer or the managing underwriter;

(6) The name and address of the sender of the communication and the fact that he is participating, or expects to participate, in the distribution of the security;

(7) The names of the managing underwriters;

(8) The approximate date upon which it is anticipated the proposed sale to the public will commence;

(9) Whether, in the opinion of counsel, the security is a legal investment for savings banks, fiduciaries, insurance companies, or similar investors under the laws of any State or Territory or the District of Columbia;

(10) Whether, in the opinion of counsel, the security is exempt from specified taxes, or the extent to which the issuer has agreed to pay any tax with respect to the security or measured by the income therefrom;

(11) Whether the security is being offered through rights issued to security holders, and, if so, the class of securities the holders of which will be entitled to subscribe, the subscription ratio, the actual or proposed record date, the date upon which the rights were issued or are expected to be issued, the actual or anticipated date upon which they will expire, and the approximate subscription price, or any of the foregoing;

(12) Any statement or legend required by any state law or administrative authority; and

(13) A communication concerning the securities of a registered investment company may also include any one or more of the following items of information: Offers, descriptions, and explanations of any products and services not constituting securities subject to registration under the Securities Act of 1933, and descriptions of corporations provided that such offers, descriptions and explanations do not relate directly to the desirability of owning or purchasing a security issued by a registered investment company and that all direct references in such communications to a security issued by a registered investment company contain only the statements required or permitted to be included therein by the other provisions of this rule, and that all such direct references be placed in a separate and enclosed area in the communication.

(14)(i) With respect to any class of debt securities, any class of convertible debt securities or any class of preferred stock, the security rating or ratings assigned to the class of securities by any nationally recognized statistical rating organization and the name or names of the nationally recognized statistical rating organization(s) which assigned such rating(s), and with respect to any class of debt securities, any class of convertible debt securities or any class of preferred stock registered on Form F–9 (§ 239.39 of this chapter), the security rating or ratings assigned to the class of securities by any other rating organization specified in the Instruction to paragraph (a)(2) of General Instruction I of Form F–9 and

the name or names of the rating organization or organizations which assigned such rating(s).

(ii) For the purpose of paragraph (a)(14)(i) of this section, the term *nationally recognized statistical rating organization* shall have the same meaning as used in Rule 15c–3–1(c)(2)(vi)(F) under the Securities Exchange Act of 1934 (17 CFR 240.15c3–1(c)(2)(vi)(F)).

(b) Except as provided in paragraph (c) of this section, every communication used pursuant to this section shall contain the following:

(1) If the registration statement has not yet become effective, the following statement:

A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective. This (communication) shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in any State in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such State.

(2) A statement whether the security is being offered in connection with a distribution by the issuer or by a security holder, or both, and whether the issue represents new financing or refunding or both; and

(3) The name and address of a person or persons from whom a written prospectus meeting the requirements of section 10 of the Act may be obtained.

(c) Any of the statements or information specified in paragraph (b) of this section may, but need not, be contained in a communication: (i) Which does no more than state from whom a written prospectus meeting the requirements of section 10 of the Act may be obtained, identify the security, state the price thereof and state by whom orders will be executed; or (ii) which is accompanied or preceded by a prospectus or a summary prospectus which meets the requirements of section 10 of the act at the date of such preliminary communication.

(d) A communication sent or delivered to any person pursuant to this rule which is accompanied or preceded by a prospectus which meets the requirements of section 10 of the Act at the date of such communication, may solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate, upon an enclosed or attached coupon or card, or in some other manner, whether he might be interested in the security, if the communication contains substantially the following statement:

No offer to buy the securities can be accepted and no part of the purchase price can be received until the registration statement has become effective, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time prior to notice of its acceptance given after the effective date. An indication of interest in response to this advertisement will involve no obligation or commitment of any kind.

Provided, That such statement need not be included in such a communication to a dealer if the communication refers to a prior communication to the dealer, with respect to the same security, in which the statement was included.

(e) In the case of an investment company registered under the Investment Company Act of 1940 that holds itself out as a ''money market fund,'' a communication used under this section

shall contain the disclosure required by §230.482(a)(7).

(Sec. 2, 48 Stat. 74, as amended; 15 U.S.C. 77b; secs. 2(10), 10(b), 10(c), 10(d), 10(f), and 19(a) of the 1933 Act (15 U.S.C. 77b(10), 77j(b), 77j(c), 77j(d), 77j(f) and 77s(a); secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a–37; secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85, secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 14, 15(d), 23(a), 48 Stat. 892, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 5, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3–5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 81 Stat. 1494, 1498, 1499, 1500; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78n, 78o(d), 78w(a))

[20 FR 6524, Sept. 3, 1955, as amended at 23 FR 184, Jan. 10, 1958; 37 FR 10073, May 19, 1972; 39 FR 39869, Nov. 12, 1974; 40 FR 27443, June 30, 1975; 43 FR 47495, Oct. 16, 1978; 44 FR 52818, Sept. 10, 1979; 47 FR 11433, Mar. 16, 1982; 48 FR 19875, May 3, 1983; 58 FR 62029, Nov. 23, 1993; 61 FR 13975, Mar. 28, 1996]

§230.134a Options material not deemed a prospectus.

Written materials, including advertisements, relating to standardized options, as that term is defined in Rule 9b–1 under the Securities Exchange Act of 1934, shall not be deemed to be a prospectus for the purposes of section 2(10) of the Securities Act of 1933; *Provided*, That such materials are limited to explanatory information describing the general nature of the standardized options markets or one or more strategies; *And, Provided further*, That:

(a) The potential risks related to options trading generally and to each strategy addressed are explained;

(b) No past or projected performance figures, including annualized rates of return are used;

(c) No recommendation to purchase or sell any option contract is made;

(d) No specific security is identified, other than

(1) An option or other security exempt from registration under the Act, or

(2) An index option, including the component securities of the index; and

(e) If there is a definitive options disclosure document, as defined in Rule 9b–1 under the Securities Exchange Act of 1934, the materials shall contain the name and address of a person or persons from whom a copy of such document may be obtained.

(15 U.S.C. 77a *et seq.;* secs. 2, 7, 10, 19(a), 48 Stat. 74, 78, 81, 85; secs. 201, 205, 209, 210, 48 Stat. 905, 906, 908; secs. 1–4. 8, 68 Stat. 683, 685; sec. 12(a), 73 Stat. 143; sec. 7(a), 74 Stat. 412; sec. 27(a), 84 Stat. 1433; sec. 308(a)(2), 90 Stat. 57)

[47 FR 41955, Sept. 23, 1982, as amended at 49 FR 12688, Mar. 30, 1984]

§230.134b Statements of additional information.

For the purpose only of Section 5(b) of the Act (15 U.S.C. 77e(b)), the term ''prospectus'' as defined in Section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) does not include a Statement of Additional Information filed as part of a registration statement on Form N–1A (§239.15A and §274.11A of this chapter), Form N–2 (§239.14 and §274.11a–1 of this chapter), Form N–3 (§239.17a and §274.11b of this chapter), Form N–4 (§239.17b and §274.11c of this chapter), or Form N–6 (§239.17c and §274.11d of this chapter) transmitted prior to the effective date of the registration statement if it is accompanied or preceded by a preliminary prospectus meeting the requirements of §230.430.

[67 FR 19868, Apr. 23, 2002]

§230.135 Notice of proposed registered offerings.

(a) *When notice is not an offer.* For purposes of section 5 of the Act (15 U.S.C. 77e) only, an issuer or a selling security holder (and any person acting on behalf of either of them) that publishes through any medium a notice of a proposed offering to be registered under the Act will not be deemed to offer its securities for sale through that notice if:

(1) *Legend.* The notice includes a statement to the effect that it does not constitute an offer of any securities for sale; and

(2) *Limited notice content.* The notice otherwise includes no more than the following information:

(i) The name of the issuer;

(ii) The title, amount and basic terms of the securities offered;

(iii) The amount of the offering, if any, to be made by selling security holders;

(iv) The anticipated timing of the offering;

(v) A brief statement of the manner and the purpose of the offering, without naming the underwriters;

(vi) Whether the issuer is directing its offering to only a particular class of purchasers;

(vii) Any statements or legends required by the laws of any state or foreign country or administrative authority; and

(viii) In the following offerings, the notice may contain additional information, as follows:

(A) *Rights offering.* In a rights offering to existing security holders:

(*1*) The class of security holders eligible to subscribe;

(*2*) The subscription ratio and expected subscription price;

(*3*) The proposed record date;

(*4*) The anticipated issuance date of the rights; and

(*5*) The subscription period or expiration date of the rights offering.

(B) *Offering to employees.* In an offering to employees of the issuer or an affiliated company:

(*1*) The name of the employer;

(*2*) The class of employees being offered the securities;

(*3*) The offering price; and

(*4*) The duration of the offering period.

(C) *Exchange offer.* In an exchange offer:

(*1*) The basic terms of the exchange offer;

(*2*) The name of the subject company;

(*3*) The subject class of securities sought in the exchange offer.

(D) *Rule 145(a) offering.* In a § 230.145(a) offering:

(*1*) The name of the person whose assets are to be sold in exchange for the securities to be offered;

(*2*) The names of any other parties to the transaction;

(*3*) A brief description of the business of the parties to the transaction;

(*4*) The date, time and place of the meeting of security holders to vote on or consent to the transaction; and

(*5*) A brief description of the transaction and the basic terms of the transaction.

(b) *Corrections of misstatements about the offering.* A person that publishes a notice in reliance on this section may issue a notice that contains no more information than is necessary to correct inaccuracies published about the proposed offering.

NOTE TO § 230.135: Communications under this section relating to business combination transactions must be filed as required by § 230.425(b).

[64 FR 61449, Nov. 10, 1999]

§ 230.135a Generic advertising.

(a) For the purposes only of section 5 of the Act, a notice, circular, advertisement, letter, sign, or other communication, published or transmitted to any person which does not specifically refer by name to the securities of a particular investment company, to the investment company itself, or to any other securities not exempt under section 3(a) of the Act, will not be deemed to offer any security for sale, provided:

(1) Such communication is limited to any one or more of the following:

(i) Explanatory information relating to securities of investment companies generally or to the nature of investment companies, or to services offered in connection with the ownership of such securities,

(ii) The mention or explanation of investment companies of different generic types or having various investment objectives, such as *balanced funds, growth funds, income funds, leveraged funds, specialty funds, variable annuities, bond funds,* and *no-load funds,*

(iii) Offers, descriptions, and explanation of various products and services not constituting a security subject to registration under the Act: *Provided,* That such offers, descriptions, and explanations do not relate directly to the

desirability of owning or purchasing a security issued by a registered investment company,

(iv) Invitation to inquire for further information, and

(2) Such communication contains the name and address of a registered broker or dealer or other person sponsoring the communication.

(b) If such communication contains a solicitation of inquiries and prospectuses for investment company securities are to be sent or delivered in response to such inquiries, the number of such investment companies and, if applicable, the fact that the sponsor of the communication is the principal underwriter or investment adviser in respect to such investment companies shall be stated.

(c) With respect to any communication describing any type of security, service, or product, the broker, dealer, or other person sponsoring such communication must offer for sale a security, service, or product of the type described in such communication.

[37 FR 10073, May 19, 1972, as amended at 37 FR 10931, June 1, 1972]

§230.135b Materials not deemed an offer to sell or offer to buy nor a prospectus.

Materials meeting the requirements of §240.9b–1 of this chapter shall not be deemed an offer to sell or offer to buy a security for purposes solely of Section 5 (15 U.S.C. 77e) of the Act, nor shall such materials be deemed a prospectus for purposes of Sections 2(a)(10) and 12(a)(2) (15 U.S.C. 77b(a)(10) and 77*l*(a)(2)) of the Act, even if such materials are referred to in, deemed to be incorporated by reference into, or otherwise in any manner deemed to be a part of a Form S–20 prospectus.

[67 FR 228, Jan. 2, 2002]

§230.135c Notice of certain proposed unregistered offerings.

(a) For the purposes only of section 5 of the Act, a notice given by an issuer required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 or a foreign issuer that is exempt from registration under the Securities Exchange Act of 1934 pursuant to §240.12g3–2(b) of this chapter that it proposes to make, is making or has made an offering of securities not registered or required to be registered under the Act shall not be deemed to offer any securities for sale if:

(1) Such notice is not used for the purpose of conditioning the market in the United States for any of the securities offered;

(2) Such notice states that the securities offered will not be or have not been registered under the Act and may not be offered or sold in the United States absent registration or an applicable exemption from registration requirements; and

(3) Such notice contains no more than the following additional information:

(i) The name of the issuer;

(ii) The title, amount and basic terms of the securities offered, the amount of the offering, if any, made by selling security holders, the time of the offering and a brief statement of the manner and purpose of the offering without naming the underwriters;

(iii) In the case of a rights offering to security holders of the issuer, the class of securities the holders of which will be or were entitled to subscribe to the securities offered, the subscription ratio, the record date, the date upon which the rights are proposed to be or were issued, the term or expiration date of the rights and the subscription price, or any of the foregoing;

(iv) In the case of an offering of securities in exchange for other securities of the issuer or of another issuer, the name of the issuer and the title of the securities to be surrendered in exchange for the securities offered, the basis upon which the exchange may be made, or any of the foregoing;

(v) In the case of an offering to employees of the issuer or to employees of any affiliate of the issuer, the name of the employer and class or classes of employees to whom the securities are offered, the offering price or basis of the offering and the period during which the offering is to be or was made or any of the foregoing; and

(vi) Any statement or legend required by State or foreign law or administrative authority.

(b) Any notice contemplated by this section may take the form of a news

release or a written communication directed to security holders or employees, as the case may be, or other published statements.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, in the case of a rights offering of a security listed or subject to unlisted trading privileges on a national securities exchange or quoted on the NASDAQ inter-dealer quotation system information with respect to the interest rate, conversion ratio and subscription price may be disseminated through the facilities of the exchange, the consolidated transaction reporting system, the NASDAQ system or the Dow Jones broad tape, provided such information is already disclosed in a Form 8–K (§ 249.308 of this chapter) on file with the Commission, in a Form 6–K (§ 249.306 of this chapter) furnished to the Commission or, in the case of an issuer relying on § 240.12g3–2(b) of this chapter, in a submission made pursuant to that Section to the Commission.

(d) The issuer shall file any notice contemplated by this section with the Commission under cover of Form 8–K (§ 249.308 of this chapter) or furnish such notice under Form 6–K (§ 249.306 of this chapter), as applicable, and, if relying on § 240.12g3–2(b) of this chapter, shall furnish such notice to the Commission in accordance with the provisions of that exemptive Section.

[59 FR 21649, Apr. 26, 1994]

§ 230.135d [Reserved]

§ 230.135e Offshore press conferences, meetings with issuer representatives conducted offshore, and press-related materials released offshore.

(a) For the purposes only of Section 5 of the Act (15 U.S.C. 77e), an issuer that is a foreign private issuer (as defined in § 230.405) or a foreign government issuer, a selling security holder of the securities of such issuers, or their representatives will not be deemed to offer any security for sale by virtue of providing any journalist with access to its press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if:

(1) The present or proposed offering is not being, or to be, conducted solely in the United States;

NOTE TO PARAGRAPH (A)(1): An offering will be considered not to be made solely in the United States under this paragraph (a)(1) only if there is an intent to make a bona fide offering offshore.

(2) Access is provided to both U.S. and foreign journalists; and

(3) Any written press-related materials pertaining to transactions in which any of the securities will be or are being offered in the United States satisfy the requirements of paragraph (b) of this section.

(b) Any written press-related materials specified in paragraph (a)(3) of this section must:

(1) State that the written press-related materials are not an offer of securities for sale in the United States, that securities may not be offered or sold in the United States absent registration or an exemption from registration, that any public offering of securities to be made in the United States will be made by means of a prospectus that may be obtained from the issuer or the selling security holder and that will contain detailed information about the company and management, as well as financial statements;

(2) If the issuer or selling security holder intends to register any part of the present or proposed offering in the United States, include a statement regarding this intention; and

(3) Not include any purchase order, or coupon that could be returned indicating interest in the offering, as part of, or attached to, the written press-related materials.

(c) For the purposes of this section, *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

[62 FR 53954, Oct. 17, 1997]

§ 230.136 Definition of certain terms in relation to assessable stock.

(a) An *offer, offer to sell,* or *offer for sale* of securities shall be deemed to be made to the holders of assessable stock

of a corporation when such corporation shall give notice of an assessment to the holders of such assessable stock. A *sale* shall be deemed to occur when a stockholder shall pay or agree to pay all or any part of such an assessment.

(b) The term *transactions by any person other than an issuer, underwriter or dealer* in section 4(1) of the Act shall not be deemed to include the offering or sale of assessable stock, at public auction or otherwise, upon the failure of the holder of such stock to pay an assessment levied thereon by the issuer, where the offer or sale is made for the purpose of realizing the amount of the assessment and any of the proceeds of such sale are to be received by the issuer. However, any person whose functions are limited to acting as auctioneer at such an auction sale shall not be deemed to be an underwriter of the securities offered or sold at the auction sale. Any person who acquires assessable stock at any such public auction or other sale with a view to the distribution thereof shall be deemed to be an underwriter of such assessable stock.

(c) The term *assessable stock* means stock which is subject to resale by the issuer pursuant to statute or otherwise in the event of a failure of the holder of such stock to pay any assessment levied thereon.

[24 FR 6386, Aug. 8, 1959]

§ 230.137 Definition of "offers", "participates", or "participation" in section 2(11) in relation to certain publications by persons independent of participants in a distribution.

The terms *offers, participates,* or *participation* in section 2(11) of the Act shall not be deemed to apply to the publication or distribution of information, opinions or recommendations with respect to the securities of a registrant which is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 and proposes to file, has filed or has an effective registration statement under the Securities Act of 1933 if—

(a) Such information, opinions, and recommendations are published and distributed in the regular course of its business by a broker or dealer which is not and does not propose to be a participant in the distribution of the security to which the registration statement relates; and

(b) Such broker or dealer receives no consideration, directly or indirectly, in connection with the publication and distribution of such information, opinions or recommendations from the registrant, a selling security holder or any participant in the distribution or any other person interested in the securities to which the registration statement relates, and such information, opinions or recommendations are not published or distributed pursuant to any arrangement or understanding, direct or indirect, with such registrant, underwriter, dealer, or selling security holder; *Provided, however,* That nothing herein shall forbid payment of the regular subscription or purchase price of the document or other written communication in which such information, opinions or recommendations appear.

(Secs. 6, 7, 10, 19(a), 48 Stat. 78, 81, 85; secs. 205, 109, 48 Stat. 906, 908; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; 15 U.S.C. 77f, 77g, 77j, 77s(a))

[49 FR 37573, Sept. 25, 1984]

§ 230.138 Definition of "offer for sale" and "offer to sell" in sections 2(10) and 5(c) in relation to certain publications.

(a) Where a registrant which meets the requirements of paragraph (c)(1), (c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to a nonconvertible debt security or to a nonconvertible, nonparticipating preferred stock, publication or distribution in the regular course of its business by a broker or dealer of information, opinions or recommendations relating solely to common stock or to debt or preferred stock convertible into common stock of such registrant shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*) even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(b) Where a registrant which meets the requirements of paragraph (c)(1),

(c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to common stock or to debt or preferred stock convertible into common stock, the publication or distribution in the regular course of its business by a broker or dealer of information, opinions or recommendations relating solely to a nonconvertible debt security, or to a nonconvertible nonparticipating preferred stock shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(c)(1) The registrant meets all of the conditions for the use of Form S–2 [§ 239.12 of this chapter] or Form F–2 [§ 239.32 of this chapter];

(2) The registrant meets the registrant requirements of Form S–3 [§ 239.13 of this chapter] or Form F–3 [§ 239.33 of this chapter]; or

(3) The registrant is a foreign private issuer which meets all the registrant requirements of Form F–3 [§ 239.33 of this chapter], other than the reporting history provisions of paragraph A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I. of such form and the registrant's securities have been traded for a period of at least 12 months on a designated offshore securities market, as defined in § 230.902(a).

Instruction to Rule 138: When a registration statement relates to securities which are being registered for an offering to be made on a continuous or delayed basis pursuant to Rule 415(a)(1)(x) under the Act (§ 230.415(a)(1)(x)) and the securities which are being registered include classes of securities which are specified in both paragraphs (a) and (b) of this section on either an allocated or unallocated basis, a broker or dealer may nonetheless rely on:

1. Paragraph (a) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (a) of this section, and

2. Paragraph (b) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (b) of this section.

[60 FR 6965, Feb. 6, 1995]

§ 230.139 Definition of "offer for sale" and "offer to sell" in sections 2(10) and 5(c) in relation to certain publications.

Where a registrant which is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or which is a foreign private issuer meeting the conditions of paragraph (a)(2) of this section proposes to file, has filed or has an effective registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) relating to its securities, the publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to the registrant or any class of its securities shall not be deemed to constitute an offer for sale or offer to sell the securities registered or proposed to be registered for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of such securities, if the conditions of paragraph (a) or (b) of this section have been met:

(a)(1) The registrant meets the registrant requirements of Form S–3 (§ 239.13 of this chapter) or Form F–3 (§ 239.33 of this chapter) and the minimum float or investment grade securities provisions of either paragraph (B)(1) or (2) of General Instruction I of the respective form and such information, opinion or recommendation is contained in a publication which is distributed with reasonable regularity in the normal course of business; or

(2) The registrant is a foreign private issuer that meets all the registrant requirements of Form F–3 (§ 239.33 of this chapter), other than the reporting history provisions of paragraphs A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I of such form, and the registrant's securities have been traded for a period of at least 12 months on a designated offshore securities market,

as defined in § 230.902(a), and such information, opinion or recommendation is contained in a publication which is distributed with reasonable regularity in the normal course of business.

(b)(1) Such information, opinion or recommendation is contained in a publication which:

(i) Is distributed with reasonable regularity in the normal course of business and

(ii) Includes similar information, opinions or recommendations with respect to a substantial number of companies in the registrant's industry, or sub-industry, or contains a comprehensive list of securities currently recommend by such broker or dealer.

(2) Such information, opinion or recommendation is given no materially greater space or prominence in such publication than that given to other securities or registrants; and

(3) An opinion or recommendation as favorable or more favorable as to the registrant or any class of its securities was published by the broker or dealer in the last publication of such broker or dealer addressing the registrant or its securities prior to the commencement of participation in the distribution.

Instructions to Rule 139: 1. For purposes of paragraph (a), a research report has not been distributed with *reasonable regularity* if it contains information, an opinion, or a recommendation concerning a company with respect to which a broker or dealer currently is not publishing research.

2. Where projections of a registrant's sales or earnings are included, the publication must comply with the following in order to meet paragraphs (b)(1) and (b)(3).

A. The projections must have been published previously on a regular basis in order for the publication to meet paragraph (b)(1)(i);

B. The projections must be included with respect to either a substantial number of companies in the registrant's industry or sub-industry or all companies in a comprehensive list which is contained in the publication, and must cover the same periods with respect to such companies as with respect to the registrant, in order to meet the requirements of paragraph (b)(1)(ii); and

C. Because projections constitute opinions within the meaning of the Rule, they must come within paragraph (b)(3).

[49 FR 37573, Sept. 25, 1984, as amended at 59 FR 21650, Apr. 26, 1994; 60 FR 6966, Feb. 6, 1995]

§ 230.140 Definition of "distribution" in section 2(11) for certain transactions.

A person, the chief part of whose business consists of the purchase of the securities of one issuer, or of two or more affiliated issuers, and the sale of its own securities, including the levying of assessments on its assessable stock and the resale of such stock upon the failure of the holder thereof to pay any assessment levied thereon, to furnish the proceeds with which to acquire the securities of such issuer or affiliated issuers, is to be regarded as engaged in the distribution of the securities of such issuer or affiliated issuers within the meaning of section 2(11) of the Act.

[24 FR 6386, Aug. 8, 1959]

§ 230.141 Definition of "commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commissions" in section 2(11), for certain transactions.

(a) The term *commission* in section 2(11) of the Act shall include such remuneration, commonly known as a spread, as may be received by a distributor or dealer as a consequence of reselling securities bought from an underwriter or dealer at a price below the offering price of such securities, where such resales afford the distributor or dealer a margin of profit not in excess of what is usual and customary in such transactions.

(b) The term *commission from an underwriter or dealer* in section 2(11) of the Act shall include commissions paid by an underwriter or dealer directly or indirectly controlling or controlled by, or under direct or indirect common control with the issuer.

(c) The term *usual and customary distributors' or sellers' commission* in section 2(11) of the Act shall mean a commission or remuneration, commonly known as a spread, paid to or received by any person selling securities either for his own account or for the account of others, which is not in excess of the amount usual and customary in the distribution and sale of issues of similar type and size; and not in excess of the amount allowed to other persons, if

any, for comparable service in the distribution of the particular issue; but such term shall not include amounts paid to any person whose function is the management of the distribution of all or a substantial part of the particular issue, or who performs the functions normally performed by an underwriter or underwriting syndicate.

[2 FR 1075, May 26, 1937]

§ 230.142 Definition of "participates" and "participation," as used in section 2(11), in relation to certain transactions.

(a) The terms *participates* and *participation* in section 2(11) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b) shall not include the interest of a person (1) who is not in privity of contract with the issuer nor directly or indirectly controlling, controlled by, or under common control with, the issuer, and (2) who has no association with any principal underwriter of the securities being distributed, and (3) whose function in the distribution is confined to an undertaking to purchase all or some specified proportion of the securities remaining unsold after the lapse of some specified period of time, and (4) who purchases such securities for investment and not with a view to distribution.

(b) As used in this section:

(1) The term *issuer* shall have the meaning defined in section 2(4) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b) and in the last sentence of section 2(11).

(2) The term *association* shall include a relationship between two persons under which one:

(i) Is directly or indirectly controlling, controlled by, or under common control with, the other, or

(ii) Has, in common with the other, one or more partners, officers, directors, trustees, branch managers, or other persons occupying a similar status or performing similar functions, or

(iii) Has a participation, direct or indirect, in the profits of the other, or has a financial stake, by debtor-creditor relationship, stock ownership, contract or otherwise, in the income or business of the other.

(3) The term *principal underwriter* shall have the meaning defined in § 230.405.

[3 FR 3015, Dec. 16, 1938]

CROSS REFERENCE: For interpretative release applicable to § 230.142, see No. 1862 in tabulation, part 231, of this chapter.

§ 230.143 Definition of "has purchased", "sells for", "participates", and "participation", as used in section 2(11), in relation to certain transactions of foreign governments for war purposes.

The terms *has purchased, sells for, participates*, and *participation*, in section 2(11) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b), shall not be deemed to apply to any action of a foreign government in acquiring, for war purposes and by or in anticipation of the exercise of war powers, from any person subject to its jurisdiction securities of a person organized under the laws of the United States or any State or Territory, or in disposing of such securities with a view to their distribution by underwriters in the United States, notwithstanding the fact that the price to be paid to such foreign government upon the disposition of such securities by it may be measured by or may be in direct or indirect relation to such price as may be realized by the underwriters.

[6 FR 2052, Apr. 23, 1941]

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

PRELIMINARY NOTE: Rule 144 is designed to implement the fundamental purposes of the Act, as expressed in its preamble, *To provide full and fair disclosure of the character of the securities sold in interstate commerce and through the mails, and to prevent fraud in the sale thereof* * * * The rule is designed to prohibit the creation of public markets in securities of issuers concerning which adequate current information is not available to the public. At the same time, where adequate current information concerning the issuer is available to the public, the rule permits the public sale in ordinary trading transactions of limited amounts of securities owned by persons controlling, controlled by or under common control with the issuer and by persons who have acquired restricted securities of the issuer.

Certain basic principles are essential to an understanding of the requirement of registration in the Act:

1. If any person utilizes the jurisdictional means to sell any nonexempt security to any other person, the security must be registered unless a statutory exemption can be found for the transaction.

2. In addition to the exemptions found in section 3, four exemptions applicable to transactions in securities are contained in section 4. Three of these section 4 exemptions are clearly not available to anyone acting as an *underwriter* of securities. (The fourth, found in section 4(4), is available only to those who act as brokers under certain limited circumstances.) An understanding of the term *underwriter* is therefore important to anyone who wishes to determine whether or not an exemption from registration is available for his sale of securities.

The term underwriter is broadly defined in section 2(11) of the Act to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates, or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The interpretation of this definition has traditionally focused on the words *with a view to* in the phrase *purchased from an issuer with a view to * * * distribution*. Thus, an investment banking firm which arranges with an issuer for the public sale of its securities is clearly an *underwriter* under that section. Individual investors who are not professionals in the securities business may also be *underwriters* within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public. Since it is difficult to ascertain the mental state of the purchaser at the time of his acquisition, subsequent acts and circumstances have been considered to determine whether such person took with a view to distribution at the time of his acquisition. Emphasis has been placed on factors such as the length of time the person has held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors as the above has not assured adequate protection of investors through the maintenance of informed trading markets and has led to uncertainty in the application of the registration provisions of the Act.

It should be noted that the statutory language of section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in connection with the distribution of the securities, does not participate or have a direct or indirect participation in any such undertaking, and does not participate or have a participation in the direct or indirect underwriting of such an undertaking.

In determining when a person is deemed not to be engaged in a distribution several factors must be considered.

First, the purpose and underlying policy of the Act to protect investors requires that there be adequate current information concerning the issuer, whether the resales of securities by persons result in a distribution or are effected in trading transactions. Accordingly, the availability of the rule is conditioned on the existence of adequate current public information.

Secondly, a holding period prior to resale is essential, among other reasons, to assure that those persons who buy under a claim of a section 4(2) exemption have assumed the economic risks of investment, and therefore are not acting as conduits for sale to the public of unregistered securities, directly or indirectly, on behalf of an issuer. It should be noted that there is nothing in section 2(11) which places a time limit on a person's status as an underwriter. The public has the same need for protection afforded by registration whether the securities are distributed shortly after their purchase or after a considerable length of time.

A third factor, which must be considered in determining what is deemed not to constitute a *distribution*, is the impact of the particular transaction or transactions on the trading markets. Section 4(1) was intended to exempt only routine trading transactions between individual investors with respect to securities already issued and not to exempt distributions by issuers or acts of other individuals who engage in steps necessary to such distributions. Therefore, a person reselling securities under section 4(1) of the Act must sell the securities in such limited quantities and in such a manner as not to disrupt the trading markets. The larger the amount of securities involved, the more likely it is that such resales may involve methods of offering and amounts of compensation usually associated with a distribution rather than routine trading transactions. Thus, solicitation of buy orders or the payment of extra compensation are not permitted by the rule.

In summary, if the sale in question is made in accordance with all of the provisions of the section as set forth below, any person who sells restricted securities shall be deemed not to be engaged in a distribution of such securities and therefore not an underwriter thereof. The rule also provides that any person who sells restricted or other securities on behalf of a person in a control relationship with the issuer shall be deemed not to be engaged in a distribution of such

securities and therefore not to be an underwriter thereof, if the sale is made in accordance with all the conditions of the section.

(a) *Definitions.* The following definitions shall apply for the purposes of this section.

(1) An *affiliate* of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.

(2) The term *person* when used with reference to a person for whose account securities are to be sold in reliance upon this section includes, in addition to such person, all of the following persons:

(i) Any relative or spouse of such person, or any relative of such spouse, any one of whom has the same home as such person;

(ii) Any trust or estate in which such person or any of the persons specified in paragraph (a)(2)(i) of this section collectively own 10 percent or more of the total beneficial interest or of which any of such persons serve as trustee, executor or in any similar capacity; and

(iii) Any corporation or other organization (other than the issuer) in which such person or any of the persons specified in paragraph (a)(2)(i) of this section are the beneficial owners collectively of 10 percent or more of any class of equity securities or 10 percent or more of the equity interest.

(3) The term *restricted securities* means:

(i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering;

(ii) Securities acquired from the issuer that are subject to the resale limitations of § 230.502(d) under Regulation D or § 230.701(c);

(iii) Securities acquired in a transaction or chain of transactions meeting the requirements of § 230.144A;

(iv) Securities acquired from the issuer in a transaction subject to the conditions of Regulation CE (§ 230.1001);

(v) Equity securities of domestic issuers acquired in a transaction or chain of transactions subject to the conditions of § 230.901 or § 230.903 under Regulation S (§ 230.901 through § 230.905, and Preliminary Notes);

(vi) Securities acquired in a transaction made under § 230.801 to the same extent and proportion that the securities held by the security holder of the class with respect to which the rights offering was made were as of the record date for the rights offering ''restricted securities'' within the meaning of this paragraph (a)(3); and

(vii) Securities acquired in a transaction made under § 230.802 to the same extent and proportion that the securities that were tendered or exchanged in the exchange offer or business combination were ''restricted securities'' within the meaning of this paragraph (a)(3).

(b) *Conditions to be met.* Any affiliate or other person who sells restricted securities of an issuer for his own account, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof within the meaning of section 2(11) of the Act if all of the conditions of this section are met.

(c) *Current public information.* There shall be available adequate current public information with respect to the issuer of the securities. Such information shall be deemed to be available only if either of the following conditions is met:

(1) *Filing of reports.* The issuer has securities registered pursuant to section 12 of the Securities Exchange Act of 1934, has been subject to the reporting requirements of section 13 of that Act for a period of at least 90 days immediately preceding the sale of the securities and has filed all the reports required to be filed thereunder during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports); or has securities registered pursuant to the Securities Act of 1933, has been subject to the reporting requirements of section 15(d) of the Securities Exchange Act of 1934 for a period of at least 90 days immediately preceding the sale of the securities and has filed all the reports required to be filed thereunder during the 12 months preceding such sale (or for

such shorter period that the issuer was required to file such reports). The person for whose account the securities are to be sold shall be entitled to rely upon a statement in whichever is the most recent report, quarterly or annual, required to be filed and filed by the issuer that such issuer has filed all reports required to be filed by section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the issuer was required to file such reports) and has been subject to such filing requirements for the past 90 days, unless he knows or has reason to believe that the issuer has not complied with such requirements. Such person shall also be entitled to rely upon a written statement from the issuer that it has complied with such reporting requirements unless he knows or has reasons to believe that the issuer has not complied with such requirements.

(2) *Other public information.* If the issuer is not subject to section 13 or 15(d) of the Securities Exchange Act of 1934, there is publicly available the information concerning the issuer specified in paragraphs (a)(5)(i) to (xiv), inclusive, and paragraph (a)(5)(xvi) of Rule 15c2–11 (§ 240.15c2–11 of this chapter) under that Act or, if the issuer is an insurance company, the information specified in section 12(g)(2)(G)(i) of that Act.

(d) *Holding period for restricted securities.* If the securities sold are restricted securities, the following provisions apply:

(1) *General rule.* A minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities. If the acquiror takes the securities by purchase, the one-year period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer.

(2) *Promissory notes, other obligations or installment contracts.* Giving the issuer or affiliate of the issuer from whom the securities were purchased a promissory note or other obligation to pay the purchase price, or entering into an installment purchase contract with such seller, shall not be deemed full payment of the purchase price unless the promissory note, obligation or contract:

(i) Provides for full recourse against the purchaser of the securities;

(ii) Is secured by collateral, other than the securities purchased, having a fair market value at least equal to the purchase price of the securities purchased; and

(iii) Shall have been discharged by payment in full prior to the sale of the securities.

(3) *Determination of holding period.* The following provisions shall apply for the purpose of determining the period securities have been held:

(i) *Stock dividends, splits and recapitalizations.* Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization;

(ii) *Conversions.* If the securities sold were acquired from the issuer for a consideration consisting solely of other securities of the same issuer surrendered for conversion, the securities so acquired shall be deemed to have been acquired at the same time as the securities surrendered for conversion;

(iii) *Contingent issuance of securities.* Securities acquired as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer shall be deemed to have been acquired at the time of such sale if the issuer or affiliate was then committed to issue the securities subject only to conditions other than the payment of further consideration for such securities. An agreement entered into in connection with any such purchase to remain in the employment of, or not to compete with, the issuer or affiliate or the rendering of services pursuant to such agreement shall not be deemed to be

the payment of further consideration for such securities.

(iv) *Pledged securities.* Securities which are bona-fide pledged by an affiliate of the issuer when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of purchase.

(v) *Gifts of securities.* Securities acquired from an affiliate of the issuer by gift shall be deemed to have been acquired by the donee when they were acquired by the donor.

(vi) *Trusts.* Where a trust settlor is an affiliate of the issuer, securities acquired from the settlor by the trust, or acquired from the trust by the beneficiaries thereof, shall be deemed to have been acquired when such securities were acquired by the settlor.

(vii) *Estates.* Where a deceased person was an affiliate of the issuer, securities held by the estate of such person or acquired from such estate by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

NOTE: While there is no holding period or amount limitation for estates and beneficiaries thereof which are not affiliates of the issuer, paragraphs (c), (h) and (i) of the rule apply to securities sold by such persons in reliance upon the rule.

(viii) *Rule 145(a) transactions.* The holding period for securities acquired in a transaction specified in Rule 145(a) shall be deemed to commence on the date the securities were acquired by the purchaser in such transaction. This provision shall not apply, however, to a transaction effected solely for the purpose of forming a holding company.

(e) *Limitation on amount of securities sold.* Except as hereinafter provided, the amount of securities which may be sold in reliance upon this rule shall be determined as follows:

(1) *Sales by affiliates.* If restricted or other securities are sold for the account of an affiliate of the issuer, the amount of securities sold, together with all sales of restricted and other securities of the same class for the account of such person within the preceding three months, shall not exceed the greater of

(i) One percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or

(ii) The average weekly reported volume of trading in such securities on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the four calendar weeks preceding the filing of notice required by paragraph (h), or if no such notice is required the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker, or

(iii) The average weekly volume of trading in such securities reported through the consolidated transaction reporting system contemplated by Rule 11Aa3–1 under the Securities Exchange Act of 1934 (§ 240.11A3–1) during the four-week period specified in paragraph (e)(1)(ii) of this section.

(2) *Sales by persons other than affiliates.* The amount of restricted securities sold for the account of any person other than an affiliate of the issuer, together with all other sales of restricted securities of the same class for the account of such person within the preceding three months, shall not exceed the amount specified in paragraphs (e)(1) (i), (ii) or (iii) of this section, whichever is applicable, unless the conditions of paragraph (k) of this rule are satisfied.

(3) *Determination of amount.* For the purpose of determining the amount of securities specified in paragraphs (e) (1) and (2) of this section, the following provisions shall apply:

(i) Where both convertible securities and securities of the class into which they are convertible are sold, the amount of convertible securities sold shall be deemed to be the amount of securities of the class into which they

are convertible for the purpose of determining the aggregate amount of securities of both classes sold;

(ii) The amount of securities sold for the account of a pledgee thereof, or for the account of a purchaser of the pledged securities, during any period of three months within one year after a default in the obligation secured by the pledge, and the amount of securities sold during the same three-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable;

(iii) The amount of securities sold for the account of a donee thereof during any period of three months within one year after the donation, and the amount of securities sold during the same three-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable;

(iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any period of three months within one year after the acquisition of the securities by the trust, and the amount of securities sold during the same three-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable;

(v) The amount of securities sold for the account of the estate of a deceased person, or for the account of a beneficiary of such estate, during any period of 3 months and the amount of securities sold during the same period for the account of the deceased person prior to his death shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable: *Provided,* That no limitation on amount shall apply if the estate or beneficiary thereof is not an affiliate of the issuer;

(vi) When two or more affiliates or other persons agree to act in concert for the purpose of selling securities of an issuer, all securities of the same class sold for the account of all such persons during any period of 3 months shall be aggregated for the purpose of determining the limitation on the amount of securities sold;

(vii) The following sales of securities need not be included in determining the amount of securities sold in reliance upon this section: securities sold pursuant to an effective registration statement under the Act; securities sold pursuant to an exemption provided by Regulation A (§230.251 through §230.263) under the Act; securities sold in a transaction exempt pursuant to Section 4 of the Act (15 U.S.C. 77d) and not involving any public offering; and securities sold offshore pursuant to Regulation S (§230.901 through §230.905, and Preliminary Notes) under the Act.

(f) *Manner of sale.* The securities shall be sold in *brokers' transactions* within the meaning of section 4(4) of the Act or in transactions directly with a *market maker,* as that term is defined in section 3(a)(38) of the Securities Exchange Act of 1934, and the person selling the securities shall not (1) solicit or arrange for the solicitation of orders to buy the securities in anticipation of or in connection with such transaction, or (2) make any payment in connection with the offer or sale of the securities to any person other than the broker who executes an order to sell the securities. The requirements of this paragraph, however, shall not apply to securities sold for the account of the estate of a deceased person or for the account of a beneficiary of such estate provided the estate or beneficiary thereof is not an affiliate of the issuer; nor shall they apply to securities sold for the account of any person other than an affiliate of the issuer provided the conditions of paragraph (k) of this rule are satisfied.

(g) *Brokers' transactions.* The term *brokers' transactions* in section 4(4) of the Act shall for the purposes of this rule be deemed to include transactions by a broker in which such broker:

(1) Does not more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold; and receives no more than the usual and customary broker's commission;

(2) Neither solicits nor arranges for the solicitation of customers' orders to buy the securities in anticipation of or

in connection with the transaction; provided, that the foregoing shall not preclude (i) inquiries by the broker of other brokers or dealers who have indicated an interest in the securities within the preceding 60 days, (ii) inquiries by the broker of his customers who have indicated an unsolicited bona fide interest in the securities within the preceding 10 business days; or (iii) the publication by the broker of bid and ask quotations for the security in an inter-dealer quotation system provided that such quotations are incident to the maintenance of a bona fide inter-dealer market for the security for the broker's own account and that the broker has published bona fide bid and ask quotations for the security in an inter-dealer quotation system on each of at least twelve days within the preceding thirty calendar days with no more than four business days in succession without such two-way quotations;

NOTE TO PARAGRAPH (G)(2)(II): The broker should obtain and retain in his files written evidence of indications of bona fide unsolicited interest by his customers in the securities at the time such indications are received.

(3) After reasonable inquiry is not aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is a part of a distribution of securities of the issuer. Without limiting the foregoing, the broker shall be deemed to be aware of any facts or statements contained in the notice required by paragraph (h) of this section.

NOTES: (i) The broker, for his own protection, should obtain and retain in his files a copy of the notice required by paragraph (h) of this section.

(ii) The reasonable inquiry required by paragraph (g)(3) of this section should include, but not necessarily be limited to, inquiry as to the following matters:

(*a*) The length of time the securities have been held by the person for whose account they are to be sold. If practicable, the inquiry should include physical inspection of the securities;

(*b*) The nature of the transaction in which the securities were acquired by such person;

(*c*) The amount of securities of the same class sold during the past 3 months by all persons whose sales are required to be taken into consideration pursuant to paragraph (e) of this section;

(*d*) Whether such person intends to sell additional securities of the same class through any other means;

(*e*) Whether such person has solicited or made any arrangement for the solicitation of buy orders in connection with the proposed sale of securities;

(*f*) Whether such person has made any payment to any other person in connection with the proposed sale of the securities; and

(*g*) The number of shares or other units of the class outstanding, or the relevant trading volume.

(h) *Notice of proposed sale.* If the amount of securities to be sold in reliance upon the rule during any period of three months exceeds 500 shares or other units or has an aggregate sale price in excess of $10,000, three copies of a notice on Form 144 shall be filed with the Commission at its principal office in Washington, DC; and if such securities are admitted to trading on any national securities exchange, one copy of such notice shall also be transmitted to the principal exchange on which such securities are so admitted. The Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon this rule or the execution directly with a market maker of such a sale. Neither the filing of such notice nor the failure of the Commission to comment thereon shall be deemed to preclude the Commission from taking any action it deems necessary or appropriate with respect to the sale of the securities referred to in such notice. The requirements of this paragraph, however, shall not apply to securities sold for the account of any person other than an affiliate of the issuer, provided the conditions of paragraph (k) of this rule are satisfied.

(i) *Bona fide intention to sell.* The person filing the notice required by paragraph (h) of this section shall have a bona fide intention to sell the securities referred to therein within a reasonable time after the filing of such notice.

(j) *Non-exclusive rule.* Although this rule provides a means for reselling restricted securities and securities held by affiliates without registration, it is not the exclusive means for reselling

such securities in that manner. Therefore, it does not eliminate or otherwise affect the availability of any exemption for resales under the Securities Act that a person or entity may be able to rely upon.

(k) *Termination of certain restrictions on sales of restricted securities by persons other than affiliates.* The requirements of paragraphs (c), (e), (f) and (h) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of at least two years has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer. The two-year period shall be calculated as described in paragraph (d) of this section.

(Secs. 2(11), 4(1), 4(4), 19(a), 19(c), 48 Stat. 74, 75, 77, 85; secs. 201, 203, 209, 210, 48 Stat. 904, 906, 908; secs. 1–4, 6, 68 Stat. 683, 684; sec. 12, 78 Stat. 580, 84 Stat. 1480; sec. 308(a)(2), 90 Stat. 58 (15 U.S.C. 77b(11), 77d(1), 77d(4), 77s(a); sec. 209, 59 Stat. 167; sec. 3(b), 48 Stat. 75; sec. 308(a) (1), (2), (3), 90 Stat. 56, 57; secs. 2, 18, 92 Stat. 275, 962; secs. 505, 622, 701, 94 Stat. 2291, 2292, 2294 (15 U.S.C. 77c(b), 77d(1), 77s(a), 77s(c)); secs. 2(11), 4(1), 4(4), 19(a), 48 Stat. 74, 77, 85; secs. 201, 203, 209, 210, 48 Stat. 904, 906, 908; secs. 14, 5, 68 Stat. 683, 684; sec. 12, 78 Stat. 580 (15 U.S.C. 77b(11), 77d(1), 77d(4), 77s(a)))

[37 FR 596, Jan. 14, 1972, as amended at 39 FR 6071, Feb. 19, 1974; 39 FR 8914, Mar. 7, 1974; 43 FR 43711, Sept. 27, 1978; 43 FR 54230, Nov. 21, 1978; 44 FR 15612, Mar. 14, 1979; 45 FR 12391, Feb. 28, 1980; 46 FR 12197, Feb. 12, 1981; 47 FR 11261, Mar. 16, 1982; 53 FR 12921, Apr. 20, 1988; 55 FR 17944, Apr. 30, 1990; 58 FR 67312, Dec. 21, 1993; 61 FR 21359, May 9, 1996; 62 FR 9244, Feb. 28, 1997; 63 FR 9642, Feb. 25, 1998; 64 FR 61400, Nov. 10, 1999]

§230.144A Private resales of securities to institutions.

PRELIMINARY NOTES: 1. This section relates solely to the application of section 5 of the Act and not to antifraud or other provisions of the federal securities laws.

2. Attempted compliance with this section does not act as an exclusive election; any seller hereunder may also claim the availability of any other applicable exemption from the registration requirements of the Act.

3. In view of the objective of this section and the policies underlying the Act, this section is not available with respect to any transaction or series of transactions that, although in technical compliance with this section, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

4. Nothing in this section obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (the *Exchange Act*), whenever such requirements are applicable.

5. Nothing in this section obviates the need for any person to comply with any applicable state law relating to the offer or sale of securities.

6. Securities acquired in a transaction made pursuant to the provisions of this section are deemed to be *restricted securities* within the meaning of §230.144(a)(3) of this chapter.

7. The fact that purchasers of securities from the issuer thereof may purchase such securities with a view to reselling such securities pursuant to this section will not affect the availability to such issuer of an exemption under section 4(2) of the Act, or Regulation D under the Act, from the registration requirements of the Act.

(a) *Definitions.* (1) For purposes of this section, *qualified institutional buyer* shall mean:

(i) Any of the following entities, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the entity:

(A) Any *insurance company* as defined in section 2(13) of the Act;

NOTE: A purchase by an insurance company for one or more of its separate accounts, as defined by section 2(a)(37) of the Investment Company Act of 1940 (the ''Investment Company Act''), which are neither registered under section 8 of the Investment Company Act nor required to be so registered, shall be deemed to be a purchase for the account of such insurance company.

(B) Any *investment company* registered under the Investment Company Act or any *business development company* as defined in section 2(a)(48) of that Act;

(C) Any *Small Business Investment Company* licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958;

(D) Any *plan* established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees;

(E) Any *employee benefit plan* within the meaning of title I of the Employee Retirement Income Security Act of 1974;

(F) Any trust fund whose trustee is a bank or trust company and whose participants are exclusively plans of the types identified in paragraph (a)(1)(i)(D) or (E) of this section, except trust funds that include as participants individual retirement accounts or H.R. 10 plans.

(G) Any *business development company* as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(H) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation (other than a bank as defined in section 3(a)(2) of the Act or a savings and loan association or other institution referenced in section 3(a)(5)(A) of the Act or a foreign bank or savings and loan association or equivalent institution), partnership, or Massachusetts or similar business trust; and

(I) Any *investment adviser* registered under the Investment Advisers Act.

(ii) Any *dealer* registered pursuant to section 15 of the Exchange Act, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $10 million of securities of issuers that are not affiliated with the dealer, *Provided,* That securities constituting the whole or a part of an unsold allotment to or subscription by a dealer as a participant in a public offering shall not be deemed to be owned by such dealer;

(iii) Any *dealer* registered pursuant to section 15 of the Exchange Act acting in a riskless principal transaction on behalf of a qualified institutional buyer;

NOTE: A registered dealer may act as agent, on a non-discretionary basis, in a transaction with a qualified institutional buyer without itself having to be a qualified institutional buyer.

(iv) Any investment company registered under the Investment Company Act, acting for its own account or for the accounts of other qualified institutional buyers, that is part of a family of investment companies which own in the aggregate at least $100 million in securities of issuers, other than issuers that are affiliated with the investment company or are part of such family of investment companies. *Family of investment companies* means any two or more investment companies registered under the Investment Company Act, except for a unit investment trust whose assets consist solely of shares of one or more registered investment companies, that have the same investment adviser (or, in the case of unit investment trusts, the same depositor), Provided That, for purposes of this section:

(A) Each series of a series company (as defined in Rule 18f–2 under the Investment Company Act [17 CFR 270.18f–2]) shall be deemed to be a separate investment company; and

(B) Investment companies shall be deemed to have the same adviser (or depositor) if their advisers (or depositors) are majority-owned subsidiaries of the same parent, or if one investment company's adviser (or depositor) is a majority-owned subsidiary of the other investment company's adviser (or depositor);

(v) Any entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of other qualified institutional buyers; and

(vi) Any *bank* as defined in section 3(a)(2) of the Act, any savings and loan association or other institution as referenced in section 3(a)(5)(A) of the Act, or any foreign bank or savings and loan association or equivalent institution, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with it and that has an audited net worth of at least $25 million as demonstrated in its latest annual financial statements, as of a date not more than 16 months preceding the date of sale under the Rule in the case of a U.S. bank or savings and loan association, and not more than 18 months preceding such date of sale for a foreign bank or savings and

loan association or equivalent institution.

(2) In determining the aggregate amount of securities owned and invested on a discretionary basis by an entity, the following instruments and interests shall be excluded: bank deposit notes and certificates of deposit; loan participations; repurchase agreements; securities owned but subject to a repurchase agreement; and currency, interest rate and commodity swaps.

(3) The aggregate value of securities owned and invested on a discretionary basis by an entity shall be the cost of such securities, except where the entity reports its securities holdings in its financial statements on the basis of their market value, and no current information with respect to the cost of those securities has been published. In the latter event, the securities may be valued at market for purposes of this section.

(4) In determining the aggregate amount of securities owned by an entity and invested on a discretionary basis, securities owned by subsidiaries of the entity that are consolidated with the entity in its financial statements prepared in accordance with generally accepted accounting principles may be included if the investments of such subsidiaries are managed under the direction of the entity, except that, unless the entity is a reporting company under section 13 or 15(d) of the Exchange Act, securities owned by such subsidiaries may not be included if the entity itself is a majority-owned subsidiary that would be included in the consolidated financial statements of another enterprise.

(5) For purposes of this section, *riskless principal transaction* means a transaction in which a dealer buys a security from any person and makes a simultaneous offsetting sale of such security to a qualified institutional buyer, including another dealer acting as riskless principal for a qualified institutional buyer.

(6) For purposes of this section, *effective conversion premium* means the amount, expressed as a percentage of the security's conversion value, by which the price at issuance of a convertible security exceeds its conversion value.

(7) For purposes of this section, *effective exercise premium* means the amount, expressed as a percentage of the warrant's exercise value, by which the sum of the price at issuance and the exercise price of a warrant exceeds its exercise value.

(b) *Sales by persons other than issuers or dealers.* Any person, other than the issuer or a dealer, who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter of such securities within the meaning of sections 2(11) and 4(1) of the Act.

(c) *Sales by Dealers.* Any dealer who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be a participant in a distribution of such securities within the meaning of section 4(3)(C) of the Act and not to be an underwriter of such securities within the meaning of section 2(11) of the Act, and such securities shall be deemed not to have been offered to the public within the meaning of section 4(3)(A) of the Act.

(d) *Conditions to be met.* To qualify for exemption under this section, an offer or sale must meet the following conditions:

(1) The securities are offered or sold only to a qualified institutional buyer or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer. In determining whether a prospective purchaser is a qualified institutional buyer, the seller and any person acting on its behalf shall be entitled to rely upon the following non-exclusive methods of establishing the prospective purchaser's ownership and discretionary investments of securities:

(i) The prospective purchaser's most recent publicly available financial statements, *Provided* That such statements present the information as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;

(ii) The most recent publicly available information appearing in documents filed by the prospective purchaser with the Commission or another United States federal, state, or local governmental agency or self-regulatory organization, or with a foreign governmental agency or self-regulatory organization, *Provided* That any such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;

(iii) The most recent publicly available information appearing in a recognized securities manual, *Provided* That such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser; or

(iv) A certification by the chief financial officer, a person fulfilling an equivalent function, or other executive officer of the purchaser, specifying the amount of securities owned and invested on a discretionary basis by the purchaser as of a specific date on or since the close of the purchaser's most recent fiscal year, or, in the case of a purchaser that is a member of a family of investment companies, a certification by an executive officer of the investment adviser specifying the amount of securities owned by the family of investment companies as of a specific date on or since the close of the purchaser's most recent fiscal year;

(2) The seller and any person acting on its behalf takes reasonable steps to ensure that the purchaser is aware that the seller may rely on the exemption from the provisions of section 5 of the Act provided by this section;

(3) The securities offered or sold:

(i) Were not, when issued, of the same class as securities listed on a national securities exchange registered under section 6 of the Exchange Act or quoted in a U.S. automated inter-dealer quotation system; *Provided*, That securities that are convertible or exchangeable into securities so listed or quoted at the time of issuance and that had an effective conversion premium of less than 10 percent, shall be treated as securities of the class into which they are convertible or exchangeable; and that warrants that may be exercised for securities so listed or quoted at the time of issuance, for a period of less than 3 years from the date of issuance, or that had an effective exercise premium of less than 10 percent, shall be treated as securities of the class to be issued upon exercise; and *Provided further*, That the Commission may from time to time, taking into account then-existing market practices, designate additional securities and classes of securities that will not be deemed of the same class as securities listed on a national securities exchange or quoted in a U.S. automated inter-dealer quotation system; and

(ii) Are not securities of an open-end investment company, unit investment trust or face-amount certificate company that is or is required to be registered under section 8 of the Investment Company Act; and

(4)(i) In the case of securities of an issuer that is neither subject to section 13 or 15(d) of the Exchange Act, nor exempt from reporting pursuant to Rule 12g3–2(b) (§ 240.12g3–2(b) of this chapter) under the Exchange Act, nor a foreign government as defined in Rule 405 (§ 230.405 of this chapter) eligible to register securities under Schedule B of the Act, the holder and a prospective purchaser designated by the holder have the right to obtain from the issuer, upon request of the holder, and the prospective purchaser has received from the issuer, the seller, or a person acting on either of their behalf, at or prior to the time of sale, upon such prospective purchaser's request to the holder or the issuer, the following information (which shall be reasonably current in relation to the date of resale under this section): a very brief statement of the nature of the business of the issuer and the products and services it offers; and the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available).

(ii) The requirement that the information be *reasonably current* will be presumed to be satisfied if:

(A) The balance sheet is as of a date less than 16 months before the date of resale, the statements of profit and loss and retained earnings are for the 12 months preceding the date of such balance sheet, and if such balance sheet is not as of a date less than 6 months before the date of resale, it shall be accompanied by additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than 6 months before the date of resale; and

(B) The statement of the nature of the issuer's business and its products and services offered is as of a date within 12 months prior to the date of resale; or

(C) With regard to foreign private issuers, the required information meets the timing requirements of the issuer's home country or principal trading markets.

(e) Offers and sales of securities pursuant to this section shall be deemed not to affect the availability of any exemption or safe harbor relating to any previous or subsequent offer or sale of such securities by the issuer or any prior or subsequent holder thereof.

[55 FR 17945, Apr. 30, 1990, as amended at 57 FR 48722, Oct. 28, 1992]

§ 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.

PRELIMINARY NOTE: Rule 145 (§ 230.145 of this chapter) is designed to make available the protection provided by registration under the Securities Act of 1933, as amended (Act), to persons who are offered securities in a business combination of the type described in paragraphs (a) (1), (2) and (3) of the rule. The thrust of the rule is that an *offer, offer to sell, offer for sale,* or *sale* occurs when there is submitted to security holders a plan or agreement pursuant to which such holders are required to elect, on the basis of what is in substance a new investment decision, whether to accept a new or different security in exchange for their existing security. Rule 145 embodies the Commission's determination that such transactions are subject to the registration requirements of the Act, and that the previously existing *no-sale* theory of Rule 133 is no longer consistent with the statutory purposes of the Act. *See* Release No. 33–5316 (October 6, 1972) [37 FR 23631]. Securities issued in transactions described in paragraph (a) of Rule 145 may be registered on Form S–4 or F–4 (§ 239.25 or § 239.34 of this chapter) or Form N–14 (§ 239.23 of this chapter) under the Act.

Transactions for which statutory exemptions under the Act, including those contained in sections 3(a)(9), (10), (11) and 4(2), are otherwise available are not affected by Rule 145.

NOTE 1: Reference is made to Rule 153a (§ 230.153a of this chapter) describing the prospectus delivery required in a transaction of the type referred to in Rule 145.

NOTE 2: A reclassification of securities covered by Rule 145 would be exempt from registration pursuant to section 3(a)(9) or (11) of the Act if the conditions of either of these sections are satisfied.

(a) *Transactions within this section.* An *offer, offer to sell, offer for sale,* or *sale* shall be deemed to be involved, within the meaning of section 2(3) of the Act, so far as the security holders of a corporation or other person are concerned where, pursuant to statutory provisions of the jurisdiction under which such corporation or other person is organized, or pursuant to provisions contained in its certificate of incorporation or similar controlling instruments, or otherwise, there is submitted for the vote or consent of such security holders a plan or agreement for:

(1) *Reclassifications.* A reclassification of securities of such corporation or other person, other than a stock split, reverse stock split, or change in par value, which involves the substitution of a security for another security;

(2) *Mergers of Consolidations.* A statutory merger or consolidation or similar plan or acquisition in which securities of such corporation or other person held by such security holders will become or be exchanged for securities of any person, unless the sole purpose of the transaction is to change an issuer's domicile solely within the United States; or

(3) *Transfers of assets.* A transfer of assets of such corporation or other person, to another person in consideration of the issuance of securities of such other person or any of its affiliates, if:

(i) Such plan or agreement provides for dissolution of the corporation or

other person whose security holders are voting or consenting; or

(ii) Such plan or agreement provides for a pro rata or similar distribution of such securities to the security holders voting or consenting; or

(iii) The board of directors or similar representatives of such corporation or other person, adopts resolutions relative to paragraph (a)(3) (i) or (ii) of this section within 1 year after the taking of such vote or consent; or

(iv) The transfer of assets is a part of a preexisting plan for distribution of such securities, notwithstanding paragraph (a)(3) (i), (ii), or (iii) of this section.

(b) *Communications before a Registration Statement is filed.* Communications made in connection with or relating to a transaction described in paragraph (a) of this section that will be registered under the Act may be made under § 230.135, § 230.165 or § 230.166.

(c) *Persons and parties deemed to be underwriters.* For purposes of this section, any party to any transaction specified in paragraph (a) of this section, other than the issuer, or any person who is an affiliate of such party at the time any such transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with any such transaction, shall be deemed to be engaged in a distribution and therefore to be an underwriter thereof within the meaning of section 2(11) of the Act. The term *party* as used in this paragraph (c) shall mean the corporations, business entities, or other persons, other than the issuer, whose assets or capital structure are affected by the transactions specified in paragraph (a) of this section.

(d) *Resale provisions for persons and parties deemed underwriters.* Notwithstanding the provisions of paragraph (c), a person or party specified therein shall not be deemed to be engaged in a distribution and therefore not to be an underwriter of registered securities acquired in a transaction specified in paragraph (a) of this section if:

(1) Such securities are sold by such person or party in accordance with the provisions of paragraphs (c), (e), (f) and (g) of § 230.144;

(2) Such person or party is not an affiliate of the issuer, and a period of at least one year, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction, and the issuer meets the requirements of paragraph (c) of § 230.144; or

(3) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and a period of at least two years, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction.

(e) *Definition of person.* The term *person* as used in paragraphs (c) and (d) of this section, when used with reference to a person for whose account securities are to be sold, shall have the same meaning as the definition of that term in paragraph (a)(2) of § 230.144.

(Secs. 2(11), 4(1), 4(4), 19(a), 48 Stat. 74, 77, 85; sec. 209, 48 Stat. 908; secs. 1–4, 68 Stat. 683; sec. 12, 78 Stat. 580; sec. 308(a)(2), 90 Stat. 57; 15 U.S.C. 77b(11), 77d(1), 77d(4), 77s(a))

[37 FR 23636, Nov. 7, 1972, as amended at 49 FR 5921, Feb. 16, 1984; 50 FR 19016, May 6, 1985; 50 FR 48382, Nov. 25, 1985; 55 FR 17944, Apr. 30, 1990; 62 FR 9245, Feb. 28, 1997; 64 FR 61449, Nov. 10, 1999]

§ 230.146 Rules under section 18 of the Act.

(a) *Prepared by or on behalf of the issuer.* An offering document (as defined in Section 18(d)(1) of the Act [15 U.S.C. 77r(d)(1)]) is ''prepared by or on behalf of the issuer'' for purposes of Section 18 of the Act, if the issuer or an agent or representative:

(1) Authorizes the document's production, and

(2) Approves the document before its use.

(b) *Covered securities for purposes of Section 18.* (1) For purposes of Section 18(b) of the Act (15 U.S.C. 77r), the Commission finds that the following national securities exchanges, or segments or tiers thereof, have listing standards that are substantially similar to those of the New York Stock Exchange (''NYSE''), the American Stock Exchange (''Amex''), or the National Market System of the Nasdaq Stock

Market (''Nasdaq/NMS''), and that securities listed on such exchanges shall be deemed covered securities:

(i) Tier I of the Pacific Exchange, Incorporated;

(ii) Tier I of the Philadelphia Stock Exchange, Incorporated; and

(iii) The Chicago Board Options Exchange, Incorporated.

(2) The designation of securities in paragraphs (b)(1) (i) through (iii) of this section as covered securities is conditioned on such exchanges' listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, Amex, or Nasdaq/NMS.

[62 FR 24573, May 6, 1997, as amended at 63 FR 3035, Jan. 21, 1998]

§ 230.147 "Part of an issue", "person resident", and "doing business within" for purposes of section 3(a)(11).

PRELIMINARY NOTES: 1. This rule shall not raise any presumption that the exemption provided by section 3(a)(11) of the Act is not available for transactions by an issuer which do not satisfy all of the provisions of the rule.

2. Nothing in this rule obviates the need for compliance with any state law relating to the offer and sale of the securities.

3. Section 5 of the Act requires that all securities offered by the use of the mails or by any means or instruments of transportation or communication in interstate commerce be registered with the Commission. Congress, however, provided certain exemptions in the Act from such registration provisions where there was no practical need for registration or where the benefits of registration were too remote. Among those exemptions is that provided by section 3(a)(11) of the Act for transactions in *any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within * * * such State or Territory*. The legislative history of that Section suggests that the exemption was intended to apply only to issues genuinely local in character, which in reality represent local financing by local industries, carried out through local investment. Rule 147 is intended to provide more objective standards upon which responsible local businessmen intending to raise capital from local sources may rely in claiming the section 3(a)(11) exemption.

All of the terms and conditions of the rule must be satisfied in order for the rule to be available. These are: (i) That the issuer be a resident of and doing business within the state or territory in which all offers and sales are made; and (ii) that no part of the issue be offered or sold to non-residents within the period of time specified in the rule. For purposes of the rule the definition of *issuer* in section 2(4) of the Act shall apply.

All offers, offers to sell, offers for sale, and sales which are part of the same issue must meet all of the conditions of Rule 147 for the rule to be available. The determination whether offers, offers to sell, offers for sale and sales of securities are part of the same issue (i.e., are deemed to be *integrated*) will continue to be a question of fact and will depend on the particular circumstances. See Securities Act of 1933 Release No. 4434 (December 6, 1961) (26 FR 9158). Securities Act Release No. 4434 indicated that in determining whether offers and sales should be regarded as part of the same issue and thus should be integrated any one or more of the following factors may be determinative:

(i) Are the offerings part of a single plan of financing;

(ii) Do the offerings involve issuance of the same class of securities;

(iii) Are the offerings made at or about the same time;

(iv) Is the same type of consideration to be received; and

(v) Are the offerings made for the same general purpose.

Subparagraph (b)(2) of the rule, however, is designed to provide certainty to the extent feasible by identifying certain types of offers and sales of securities which will be deemed not part of an issue, for purposes of the rule only.

Persons claiming the availability of the rule have the burden of proving that they have satisfied all of its provisions. However, the rule does not establish exclusive standards for complying with the section 3(a)(11) exemption. The exemption would also be available if the issuer satisfied the standards set forth in relevant administrative and judicial interpretations at the time of the offering but the issuer would have the burden of proving the availability of the exemption. Rule 147 relates to transactions exempted from the registration requirements of section 5 of the Act by section 3(a)(11). Neither the rule nor section 3(a)(11) provides an exemption from the registration requirements of section 12(g) of the Securities Exchange Act of 1934, the anti-fraud provisions of the federal securities laws, the civil liability provisions of section 12(2) of the Act or other provisions of the federal securities laws.

Finally, in view of the objectives of the rule and the purposes and policies underlying the Act, the rule shall not be available to any person with respect to any offering which, although in technical compliance with the rule, is part of a plan or scheme by such person to make interstate offers or sales of securities. In such cases registration pursuant to the Act is required.

4. The rule provides an exemption for offers and sales by the issuer only. It is not available for offers or sales of securities by other persons. Section 3(a)(11) of the Act has been interpreted to permit offers and sales by persons controlling the issuer, if the exemption provided by that section would have been available to the issuer at the time of the offering. See Securities Act Release No. 4434. Controlling persons who want to offer or sell securities pursuant to section 3(a)(11) may continue to do so in accordance with applicable judicial and administrative interpretations.

(a) *Transactions covered.* Offers, offers to sell, offers for sale and sales by an issuer of its securities made in accordance with all of the terms and conditions of this rule shall be deemed to be part of an issue offered and sold only to persons resident within a single state or territory where the issuer is a person resident and doing business within such state or territory, within the meaning of section 3(a)(11) of the Act.

(b) *Part of an issue.* (1) For purposes of this rule, all securities of the issuer which are part of an issue shall be offered, offered for sale or sold in accordance with all of the terms and conditions of this rule.

(2) For purposes of this rule only, an issue shall be deemed not to include offers, offers to sell, offers for sale or sales of securities of the issuer pursuant to the exemption provided by section 3 or section 4(2) of the Act or pursuant to a registration statement filed under the Act, that take place prior to the six month period immediately preceding or after the six month period immediately following any offers, offers for sale or sales pursuant to this rule, *Provided*, That, there are during either of said six month periods no offers, offers for sale or sales of securities by or for the issuer of the same or similar class as those offered, offered for sale or sold pursuant to the rule.

NOTE: In the event that securities of the same or similar class as those offered pursuant to the rule are offered, offered for sale or sold less than six months prior to or subsequent to any offer, offer for sale or sale pursuant to this rule, see Preliminary Note 3 hereof as to which offers, offers to sell, offers for sale, or sales are part of an issue.

(c) *Nature of the issuer.* The issuer of the securities shall at the time of any offers and the sales be a person resident and doing business within the state or territory in which all of the offers, offers to sell, offers for sale and sales are made.

(1) The issuer shall be deemed to be a resident of the state or territory in which:

(i) It is incorporated or organized, if a corporation, limited partnership, trust or other form of business organization that is organized under state or territorial law;

(ii) Its principal office is located, if a general partnership or other form of business organization that is not organized under any state or territorial law;

(iii) His principal residence is located if an individual.

(2) The issuer shall be deemed to be doing business within a state or territory if:

(i) The issuer derived at least 80 percent of its gross revenues and those of its subsidiaries on a consolidated basis.

(A) For its most recent fiscal year, if the first offer of any part of the issue is made during the first six months of the issuer's current fiscal year; or

(B) For the first six months of its current fiscal year or during the twelve-month fiscal period ending with such six-month period, if the first offer of any part of the issue is made during the last six months of the issuer's current fiscal year from the operation of a business or of real property located in or from the rendering of services within such state or territory; provided, however, that this provision does not apply to any issuer which has not had gross revenues in excess of $5,000 from the sale of products or services or other conduct of its business for its most recent twelve-month fiscal period;

(ii) The issuer had at the end of its most recent semi-annual fiscal period prior to the first offer of any part of the issue, at least 80 percent of its assets and those of its subsidiaries on a consolidated basis located within such state or territory;

(iii) The issuer intends to use and uses at least 80 percent of the net proceeds to the issuer from sales made pursuant to this rule in connection with the operation of a business or of real property, the purchase of real property located in, or the rendering of

services within such state or territory; and

(iv) The principal office of the issuer is located within such state or territory.

(d) *Offerees and purchasers: Person Resident.* Offers, offers to sell, offers for sale and sales of securities that are part of an issue shall be made only to persons resident within the state or territory of which the issuer is a resident. For purposes of determining the residence of offerees and purchasers:

(1) A corporation, partnership, trust or other form of business organization shall be deemed to be a resident of a state or territory if, at the time of the offer and sale to it, it has its principal office within such state or territory.

(2) An individual shall be deemed to be a resident of a state or territory if such individual has, at the time of the offer and sale to him, his principal residence in the state or territory.

(3) A corporation, partnership, trust or other form of business organization which is organized for the specific purpose of acquiring part of an issue offered pursuant to this rule shall be deemed not to be a resident of a state or territory unless all of the beneficial owners of such organization are residents of such state or territory.

(e) *Limitation of resales.* During the period in which securities that are part of an issue are being offered and sold by the issuer, and for a period of nine months from the date of the last sale by the issuer of such securities, all resales of any part of the issue, by any person, shall be made only to persons resident within such state or territory.

NOTES: 1. In the case of convertible securities resales of either the convertible security, or if it is converted, the underlying security, could be made during the period described in paragraph (e) only to persons resident within such state or territory. For purposes of this rule a conversion in reliance on section 3(a)(9) of the Act does not begin a new period.

2. Dealers must satisfy the requirements of Rule 15c2–11 under the Securities Exchange Act of 1934 prior to publishing any quotation for a security, or submitting any quotation for publication, in any quotation medium.

(f) *Precautions against interstate offers and sales.* (1) The issuer shall, in connection with any securities sold by it pursuant to this rule:

(i) Place a legend on the certificate or other document evidencing the security stating that the securities have not been registered under the Act and setting forth the limitations on resale contained in paragraph (e) of this section;

(ii) Issue stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities make a notation in the appropriate records of the issuer; and

(iii) Obtain a written representation from each purchaser as to his residence.

(2) The issuer shall, in connection with the issuance of new certificates for any of the securities that are part of the same issue that are presented for transfer during the time period specified in paragraph (e), take the steps required by paragraphs (f)(1) (i) and (ii) of this section.

(3) The issuer shall, in connection with any offers, offers to sell, offers for sale or sales by it pursuant to this rule, disclose, in writing, the limitations on resale contained in paragraph (e) and the provisions of paragraphs (f)(1) (i) and (ii) and paragraph (f)(2) of this section.

[39 FR 2356, Jan. 21, 1974]

§ 230.148 [Reserved]

§ 230.149 Definition of "exchanged" in section 3(a)(9), for certain transactions.

The term *exchanged* in section 3(a)(9) (sec. 202(c), 48 Stat. 906; 15 U.S.C. 77c(9)) shall be deemed to include the issuance of a security in consideration of the surrender, by the existing security holders of the issuer, of outstanding securities of the issuer, notwithstanding the fact that the surrender of the outstanding securities may be required by the terms of the plans of exchange to be accompanied by such payment in cash by the security holder as may be necessary to effect an equitable adjustment, in respect of dividends or interest paid or payable on the securities involved in the exchange, as between such security holder and other security holders of the same class accepting the offer of exchange.

[2 FR 1382, July 7, 1937]

§ 230.150 Definition of "commission or other remuneration" in section 3(a)(9), for certain transactions.

The term *commission or other remuneration* in section 3(a)(9) of the Act shall not include payments made by the issuer, directly or indirectly, to its security holders in connection with an exchange of securities for outstanding securities, when such payments are part of the terms of the offer of exchange.

[2 FR 1076, May 26, 1937]

§ 230.151 Safe harbor definition of certain "annuity contracts or optional annuity contracts" within the meaning of section 3(a)(8).

(a) Any annuity contract or optional annuity contract (a *contract*) shall be deemed to be within the provisions of section 3(a)(8) of the Securities Act of 1933 (15 U.S.C. 77c(a)(8)), *Provided*, That

(1) The annuity or optional annuity contract is issued by a corporation (the *insurer*) subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

(2) The insurer assumes the investment risk under the contract as prescribed in paragraph (b) of this section; and

(3) The contract is not marketed primarily as an investment.

(b) The insurer shall be deemed to assume the investment risk under the contract if:

(1) The value of the contract does not vary according to the investment experience of a separate account;

(2) The insurer for the life of the contract

(i) Guarantees the principal amount of purchase payments and interest credited thereto, less any deduction (without regard to its timing) for sales, administrative or other expenses or charges; and

(ii) Credits a specified rate of interest (as defined in paragraph (c) of this section to net purchase payments and interest credited thereto; and

(3) The insurer guarantees that the rate of any interest to be credited in excess of that described in paragraph (b)(2)(ii) of this section will not be modifed more frequently than once per year.

(c) The term *specified rate of interest*, as used in paragraph (b)(2)(ii) of this section, means a rate of interest under the contract that is at least equal to the minimum rate required to be credited by the relevant nonforfeiture law in the jurisdiction in which the contract is issued. If that jurisdiction does not have any applicable nonforfeiture law at the time the contract is issued (or if the minimum rate applicable to an existing contract is no longer mandated in that jurisdiction), the specified rate under the contract must at least be equal to the minimum rate then required for individual annuity contracts by the NAIC Standard Nonforfeiture Law.

[51 FR 20262, June 4, 1986]

§ 230.152 Definition of "transactions by an issuer not involving any public offering" in section 4(2), for certain transactions.

The phrase *transactions by an issuer not involving any public offering* in section 4(2) (48 Stat. 77, sec. 203(a), 48 Stat. 906; 15 U.S.C. 77d) shall be deemed to apply to transactions not involving any public offering at the time of said transactions although subsequently thereto the issuer decides to make a public offering and/or files a registration statement.

[2 FR 1076, May 26, 1937, as amended at 30 FR 2022, Feb. 13, 1965]

CROSS REFERENCE: For regulations relating to registration statement, see §§ 230.400—230.494.

§ 230.152a Offer or sale of certain fractional interests.

Any offer or sale of a security, evidenced by a scrip certificate, order form or similar document which represents a fractional interest in a share of stock or similar security shall be deemed a transaction by a person other than an issuer, underwriter or dealer, within the meaning of section 4(1) of the act, if the fractional interest (a) resulted from a stock dividend, stock split, reverse stock split, conversion, merger or similar transaction, and (b)

is offered or sold pursuant to arrangements for the purchase and sale of fractional interests among the person entitled to such fractional interests for the purpose of combining such interests into whole shares, and for the sale of such number of whole shares as may be necessary to compensate security holders for any remaining fractional interests not so combined, notwithstanding that the issuer or an affiliate of the issuer may act on behalf of or as agent for the security holders in effecting such transactions.

(Sec. 4, 48 Stat. 77; 15 U.S.C. 77d)

[30 FR 2657, Mar. 2, 1965]

§230.153 Definition of "preceded by a prospectus", as used in section 5(b)(2), in relation to certain transactions.

(a) The term *preceded by a prospectus,* as used in section 5(b)(2) of the Securities Act of 1933 (48 Stat. 77; 15 U.S.C. 77e(b)(2), as amended, in respect of any requirement of delivery of a prospectus to a member of a national securities exchange, on account of a transaction in a security effected on such exchange, shall mean delivery, prior to such transaction, of copies of a prospectus descriptive of such security and meeting the requirements of section 10(a) (48 Stat. 81, sec. 205, 48 Stat. 906; 15 U.S.C. 77j) to such exchange by the issuer or any underwriter, for the purpose of redelivery to members of such exchange upon their request: *Provided,* That as to any transaction occurring prior to the expiration of forty days after the effective date of the registration statement or the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (exclusive of the time during which a stop order issued under section 8 is in effect as to such security):

(1) Such exchange shall theretofore have requested of the issuer or, if such requests shall not have been compiled with, of a *principal underwriter* (as that term is defined in §230.405), from time to time, such number of copies of such prospectus as may have appeared reasonably necessary to comply with the requests of its members, and shall have delivered from its supply on hand a copy to any member theretofore making a written request therefor, and

(2) The issuer or any underwriter shall theretofore have furnished such exchange with such reasonable number of copies of such prospectus as may have been requested by the exchange for the purpose stated above.

(b) The term *national securities exchange,* as used herein shall mean a securities exchange registered as a national securities exchange under the Securities Exchange Act of 1934 (48 Stat. 881; 15 U.S.C. Chapter 2B), as amended.

[2 FR 1076, May 26, 1937, as amended at 19 FR 6737, Oct. 20, 1954]

CROSS REFERENCES: For the rules and regulations under the Securities Exchange Act of 1934, see part 240 of this chapter. For general requirements as to prospectuses, see §§230.400–230.434a.

§230.153a Definition of "preceded by a prospectus" as used in section 5(b)(2) of the Act, in relation to certain transactions requiring approval of security holders.

The term *preceded by a prospectus,* as used in section 5(b)(2) of the Act with respect to any requirement for the delivery of a prospectus to security holders of a corporation or other person, in connection with transactions of the character specified in paragraph (a) of §230.145, shall mean the delivery of a prospectus:

(a) Prior to the vote of security holders on such transactions; or,

(b) With respect to actions taken by consent, prior to the earliest date on which the corporate action may be taken; to all security holders of record of such corporation or other person, entitled to vote on or consent to the proposed transaction, at their address of record on the transfer records of the corporation or other person.

[37 FR 23636, Nov. 7, 1972]

§230.153b Definition of "preceded by a prospectus", as used in section 5(b)(2), in connection with certain transactions in standardized options.

The term *preceded by a prospectus,* as used in section 5(b)(2) of the Act with

respect to any requirement for the delivery of a prospectus relating to standardized options registered on Form S–20, shall mean the delivery, prior to any transactions, of copies of such prospectus to each options market upon which the options are traded, for the purpose of redelivery to options customers upon their request, *Provided* That:

(a) Such options market shall thereto have requested of the issuer, from time to time, such number of copies of such prospectus as may have appeared reasonably necessary to comply with the requests of options customers, and shall have delivered promptly from its supply on hand a copy to any options customer making a request thereof; and

(b) The issuer shall have furnished such options market with such reasonable number of copies of such prospectus as may have been requested by the options market for the purpose stated above.

(15 U.S.C. 77a *et seq.*)

[47 FR 41955, Sept. 23, 1982]

§ 230.154 Delivery of prospectuses to investors at the same address.

(a) *Delivery of a single prospectus.* If you must deliver a prospectus under the federal securities laws, for purposes of sections 5(b) and 2(a)(10) of the Act (15 U.S.C. 77e(b) and 77b(a)(10)) or § 240.15c2–8(b) of this chapter, you will be considered to have delivered a prospectus to investors who share an address if:

(1) You deliver a prospectus to the shared address;

(2) You address the prospectus to the investors as a group (for example, ''ABC Fund [or Corporation] Shareholders,'' ''Jane Doe and Household,'' ''The Smith Family'') or to each of the investors individually (for example, ''John Doe and Richard Jones''); and

(3) The investors consent in writing to delivery of one prospectus.

(b) *Implied consent.* You do not need to obtain written consent from an investor under paragraph (a)(3) of this section if all of the following conditions are met:

(1) The investor has the same last name as the other investors, or you reasonably believe that the investors are members of the same family;

(2) You have sent the investor a notice at least 60 days before you begin to rely on this section concerning delivery of prospectuses to that investor. The notice must be a separate written statement and:

(i) State that only one prospectus will be delivered to the shared address unless you receive contrary instructions;

(ii) Include a toll-free telephone number or be accompanied by a reply form that is pre-addressed with postage provided, that the investor can use to notify you that he or she wishes to receive a separate prospectus;

(iii) State the duration of the consent;

(iv) Explain how an investor can revoke consent;

(v) State that you will begin sending individual copies to an investor within 30 days after you receive revocation of the investor's consent; and

(vi) Contain the following prominent statement, or similar clear and understandable statement, in bold-face type: ''Important Notice Regarding Delivery of Shareholder Documents.'' This statement also must appear on the envelope in which the notice is delivered. Alternatively, if the notice is delivered separately from other communications to investors, this statement may appear either on the notice or on the envelope in which the notice is delivered;

NOTE TO PARAGRAPH (B)(2): The notice should be written in plain English. See § 230.421(d)(2) of this chapter for a discussion of plain English principles.

(3) You have not received the reply form or other notification indicating that the investor wishes to continue to receive an individual copy of the prospectus, within 60 days after you sent the notice; and

(4) You deliver the prospectus to a post office box or to a residential street address. You can assume a street address is a residence unless you have information that indicates it is a business.

(c) *Revocation of consent.* If an investor, orally or in writing, revokes consent to delivery of one prospectus to a shared address (provided under paragraphs (a)(3) or (b) of this section), you

must begin sending individual copies to that investor within 30 days after you receive the revocation. If the individual's consent concerns delivery of the prospectus of a registered open-end management investment company, at least once a year you must explain to investors who have consented how they can revoke their consent. The explanation must be reasonably designed to reach these investors.

(d) *Definition of address.* For purposes of this section, *address* means a street address, a post office box number, an electronic mail address, a facsimile telephone number, or other similar destination to which paper or electronic documents are delivered, unless otherwise provided in this section. If you have reason to believe that an address is the street address of a multi-unit building, the address must include the unit number.

[64 FR 62545, Nov. 16, 1999, as amended at 65 FR 65749, Nov. 2, 2000]

§ 230.155 Integration of abandoned offerings.

PRELIMINARY NOTE: Compliance with paragraph (b) or (c) of this section provides a non-exclusive safe harbor from integration of private and registered offerings. Because of the objectives of Rule 155 and the policies underlying the Act, Rule 155 is not available to any issuer for any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Act.

(a) *Definition of terms.* For the purposes of this section only, a *private offering* means an unregistered offering of securities that is exempt from registration under Section 4(2) or 4(6) of the Act (15 U.S.C. 77d(2) and 77d(6)) or Rule 506 of Regulation D (§ 230.506).

(b) *Abandoned private offering followed by a registered offering.* A private offering of securities will not be considered part of an offering for which the issuer later files a registration statement if:

(1) No securities were sold in the private offering;

(2) The issuer and any person(s) acting on its behalf terminate all offering activity in the private offering before the issuer files the registration statement;

(3) The Section 10(a) final prospectus and any Section 10 preliminary prospectus used in the registered offering disclose information about the abandoned private offering, including:

(i) The size and nature of the private offering;

(ii) The date on which the issuer abandoned the private offering;

(iii) That any offers to buy or indications of interest given in the private offering were rejected or otherwise not accepted; and

(iv) That the prospectus delivered in the registered offering supersedes any offering materials used in the private offering; and

(4) The issuer does not file the registration statement until at least 30 calendar days after termination of all offering activity in the private offering, unless the issuer and any person acting on its behalf offered securities in the private offering only to persons who were (or who the issuer reasonably believes were):

(i) Accredited investors (as that term is defined in § 230.501(a)); or

(ii) Persons who satisfy the knowledge and experience standard of § 230.506(b)(2)(ii).

(c) *Abandoned registered offering followed by a private offering.* An offering for which the issuer filed a registration statement will not be considered part of a later commenced private offering if:

(1) No securities were sold in the registered offering;

(2) The issuer withdraws the registration statement under § 230.477;

(3) Neither the issuer nor any person acting on the issuer's behalf commences the private offering earlier than 30 calendar days after the effective date of withdrawal of the registration statement under § 230.477;

(4) The issuer notifies each offeree in the private offering that:

(i) The offering is not registered under the Act;

(ii) The securities will be ''restricted securities'' (as that term is defined in § 230.144(a)(3)) and may not be resold unless they are registered under the Act or an exemption from registration is available;

(iii) Purchasers in the private offering do not have the protection of Section 11 of the Act (15 U.S.C. 77k); and

(iv) A registration statement for the abandoned offering was filed and withdrawn, specifying the effective date of the withdrawal; and

(5) Any disclosure document used in the private offering discloses any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering.

[66 FR 8896, Feb. 5, 2001]

§ 230.156 Investment company sales literature.

(a) Under the federal securities laws, including section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q(a)) and section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b–5 thereunder (17 CFR part 240), it is unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, to use sales literature which is materially misleading in connection with the offer or sale of securities issued by an investment company. Under these provisions, sales literature is materially misleading if it: (1) Contains an untrue statement of a material fact or (2) omits to state a material fact necessary in order to make a statement made, in the light of the circumstances of its use, not misleading.

(b) Whether or not a particular description, representation, illustration, or other statement involving a material fact is misleading depends on evaluation of the context in which it is made. In considering whether a particular statement involving a material fact is or might be misleading, weight should be given to all pertinent factors, including, but not limited to, those listed below.

(1) A Statement could be misleading because of:

(i) Other statements being made in connection with the offer of sale or sale of the securities in question;

(ii) The absence of explanations, qualifications, limitations or other statements necessary or appropriate to make such statement not misleading; or

(iii) General economic or financial conditions or circumstances.

(2) Representations about past or future investment performance could be misleading because of statements or omissions made involving a material fact, including situations where:

(i) Portrayals of past income, gain, or growth of assets convey an impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances; and

(ii) Representations, whether express or implied, about future investment performance, including:

(A) Representations, as to security of capital, possible future gains or income, or expenses associated with an investment;

(B) Representations implying that future gain or income may be inferred from or predicted based on past investment performance; or

(C) Portrayals of past performance, made in a manner which would imply that gains or income realized in the past would be repeated in the future.

(3) A statement involving a material fact about the characteristics or attributes of an investment company could be misleading because of:

(i) Statements about possible benefits connected with or resulting from services to be provided or methods of operation which do not give equal prominence to discussion of any risks or limitations associated therewith;

(ii) Exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by such company, services, security of investment or funds, effects of government supervision, or other attributes; and

(iii) Unwarranted or incompletely explained comparisons to other investment vehicles or to indexes.

(c) For purposes of this section, the term *sales literature* shall be deemed to include any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company. Communications between issuers, underwriters and dealers are included in this definition of sales literature if such communications, or the information contained therein, can be reasonably expected to

be communicated to prospective investors in the offer or sale of securities or are designed to be employed in either written or oral form in the offer or sale of securities.

(Sec. 38(a) (15 U.S.C. 80a–37(a)); sec. 19(a) (15 U.S.C. 77s(a)); secs. 10(b) and 23(a) (15 U.S.C. 78j(b) and 78w(a)))

[44 FR 64072, Nov. 6, 1979]

§230.157 Small entities under the Securities Act for purposes of the Regulatory Flexibility Act.

For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 *et seq.*), and unless otherwise defined for purposes of a particular rulemaking proceeding, the term *small business* or *small organization* shall:

(a) When used with reference to an issuer, other than an investment company, for purposes of the Securities Act of 1933, mean an issuer whose total assets on the last day of its most recent fiscal year were $5 million or less and that is engaged or proposing to engage in small business financing. An issuer is considered to be engaged or proposing to engage in small business financing under this section if it is conducting or proposes to conduct an offering of securities which does not exceed the dollar limitation prescribed by section 3(b) of the Securities Act.

(b) When used with reference to an investment company that is an issuer for purposes of the Act, have the meaning ascribed to those terms by §270.0–10 of this chapter.

[47 FR 5221, Feb. 4, 1982, as amended at 51 FR 25362, July 14, 1986; 63 FR 35514, June 30, 1998]

§230.158 Definitions of certain terms in the last paragraph of section 11(a).

(a) An ''earning statement'' made generally available to securityholders of the registrant pursuant to the last paragraph of section 11(a) of the Act shall be sufficient for the purposes of such paragraph if:

(1) There is included the information required for statements of income contained either:

(i) In Item 8 of Form 10–K and Form 10–KSB (§249.310 of this chapter), part I, Item 1 of Form 10–Q and Form 10–QSB (§249.308a of this chapter), or rule 14a–3(b) (§240.14a–3(b) of this chapter) under the Securities Exchange Act of 1934;

(ii) In Item 17 of Form 20–F (§249.220f of this chapter), if appropriate; or

(iii) In Form 40–F (§249.240f of this chapter); and

(2) The information specified in the last paragraph of section 11(a) is contained in one report or any combination of reports either:

(i) On Form 10–K and Form 10–KSB, Form 10–Q and Form 10–QSB, Form 8–K (§249.308 of this chapter), or in the annual report to securityholders pursuant to rule 14a–3 under the Securities Exchange Act of 1934; or

(ii) On Form 20–F, Form 40–F or Form 6–K (§249.306 of this chapter).

A subsidiary issuing debt securities guaranteed by its parent will be deemed to have met the requirements of this paragraph if the parent's income statements satisfy the criteria of this paragraph and information respecting the subsidiary is included to the same extent as was presented in the registration statement. An ''earning statement'' not meeting the requirements of this paragraph may otherwise be sufficient for purposes of the last paragraph of section 11(a).

(b) For purposes of the last paragraph of section 11(a) only, the ''earning statement'' contemplated by paragraph (a) of this section shall be deemed to be ''made generally available to its securityholders'' if the registrant:

(1) Is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 and

(2) Has filed its report or reports on Form 10–K and Form 10–KSB, Form 10–Q and Form 10–QSB, Form 8–K, Form 20–F, Form 40–F, or Form 6–K, or has supplied to the Commission copies of the annual report sent to securityholders pursuant to rule 14a–3(c), containing such information.

A registrant may use other methods to make an earning statement ''generally available to its securityholders'' for purposes of the last paragraph of section 11(a).

(c) For purposes of the last paragraph of section 11(a) only, the *effective date of the registration statement* is deemed to be the date of the latest to occur of (1) the effective date of the registration

statement: (2) the effective date of the last post-effective amendment to the registration statement, next preceding a particular sale by the registrant of registered securities to the public filed for purposes of (i) including any prospectus required by section 10(a)(3) of the Act, (ii) reflecting in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement, or (iii) including any material information with respect to the plan or distribution not previously disclosed in this registration statement or any material change to such information in the registration statement, or (3) the date of filing of the last report of the registrant incorporated by reference into the prospectus, and relied upon in lieu of filing a post-effective amendment for purposes of paragraphs (c)(2) (i) and (ii) of this rule, next preceding a particular sale by the registrant of registered securities to the public.

(d) If an earnings statement was made available by ''other methods'' than those specified in paragraphs (a) and (b) of this section, the earnings statement must be filed as exhibit 99 to the next periodic report required by section 13 or 15(d) of the Exchange Act covering the period in which the earnings statement was released.

[48 FR 44770, Sept. 30, 1983, as amended at 56 FR 30054, July 1, 1991; 58 FR 14669, Mar. 18, 1993]

§ 230.160. Registered investment company exemption from Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

A prospectus for an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) that is sent or given for the sole purpose of permitting a communication not to be deemed a prospectus under section 2(a)(10)(a) of the Act (15 U.S.C. 77b(a)(10)(a)) shall be exempt from the requirements of section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

[65 FR 47284, Aug. 2, 2000]

§ 230.161 Amendments to rules and regulations governing exemptions.

The rules and regulations governing the exemption of securities under section 3(b) of the Act, as in effect at the time the securities are first bona fide offered to the public in conformity therewith, shall continue to govern the exemption of such securities notwithstanding the subsequent amendment of such rules and regulations. This section shall not apply, however, to any new offering of such securities by an issuer or underwriter after the effective date of any such amendment, nor shall it apply to any offering after January 1, 1959, of securities by an issuer or underwriter pursuant to Regulation D or pursuant to Regulation A as in effect at any time prior to July 23, 1956.

[23 FR 4454, June 20, 1958]

§ 230.162 Submission of tenders in registered exchange offers.

(a) Notwithstanding section 5(a) of the Act (15 U.S.C. 77e(a)), offerors may solicit tenders of securities in an exchange offer subject to § 240.13e–4(e) or § 240.14d–4(b) of this chapter before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules.

(b) Notwithstanding section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)), a prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) need not be delivered to security holders in an exchange offer subject to § 240.13e–4(e) or § 240.14d–4(b) of this chapter, so long as a preliminary prospectus, prospectus supplements and revised prospectuses are delivered to security holders in accordance with § 240.13e–4(e)(2) or § 240.14d–4(b) of this chapter, as applicable.

[64 FR 61450, Nov. 10, 1999]

§ 230.165 Offers made in connection with a business combination transaction.

PRELIMINARY NOTE: This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

(a) *Communications before a registration statement is filed.* Notwithstanding section 5(c) of the Act (15 U.S.C. 77e(c)), the offeror of securities in a business combination transaction to be registered under the Act may make an offer to sell or solicit an offer to buy those securities from and including the first public announcement until the filing of a registration statement related to the transaction, so long as any written communication (other than non-public communications among participants) made in connection with or relating to the transaction (*i.e.,* prospectus) is filed in accordance with § 230.425 and the conditions in paragraph (c) of this section are satisfied.

(b) *Communications after a registration statement is filed.* Notwithstanding section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), any written communication (other than non-public communications among participants) made in connection with or relating to a business combination transaction (*i.e.,* prospectus) after the filing of a registration statement related to the transaction need not satisfy the requirements of section 10 (15 U.S.C. 77j) of the Act, so long as the prospectus is filed in accordance with § 230.424 or § 230.425 and the conditions in paragraph (c) of this section are satisfied.

(c) *Conditions.* To rely on paragraphs (a) and (b) of this section:

(1) Each prospectus must contain a prominent legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also must explain to investors that they can get the documents for free at the Commission's web site and describe which documents are available free from the offeror; and

(2) In an exchange offer, the offer must be made in accordance with the applicable tender offer rules (§§ 240.14d–1 through 240.14e–8 of this chapter); and, in a transaction involving the vote of security holders, the offer must be made in accordance with the applicable proxy or information statement rules (§§ 240.14a–1 through 240.14a–101 and §§ 240.14c–1 through 240.14c–101 of this chapter).

(d) *Applicability.* This section is applicable not only to the offeror of securities in a business combination transaction, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction.

(e) *Failure to file or delay in filing.* An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) or (c) of the Act (15 U.S.C. 77e(b)(1) and (c)), so long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The prospectus is filed as soon as practicable after discovery of the failure to file.

(f) *Definitions.*

(1) A *business combination transaction* means any transaction specified in § 230.145(a) or exchange offer;

(2) A *participant* is any person or entity that is a party to the business combination transaction and any persons authorized to act on their behalf; and

(3) *Public announcement* is any oral or written communication by a participant that is reasonably designed to, or has the effect of, informing the public or security holders in general about the business combination transaction.

[64 FR 61450, Nov. 10, 1999]

§ 230.166 Exemption from section 5(c) for certain communications in connection with business combination transactions.

PRELIMINARY NOTE: This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

(a) *Communications.* In a registered offering involving a business combination transaction, any communication made in connection with or relating to the transaction before the first public announcement of the offering will not constitute an offer to sell or a solicitation of an offer to buy the securities offered for purposes of section 5(c) of the Act (15 U.S.C. 77e(c)), so long as the participants take all reasonable steps within their control to prevent further distribution or publication of the communication until either the first public announcement is made or the registration statement related to the transaction is filed.

(b) *Definitions.* The terms business combination transaction, participant and public announcement have the same meaning as set forth in § 230.165(f).

[64 FR 61450, Nov. 10, 1999]

§ 230.170 Prohibition of use of certain financial statements.

Financial statements which purport to give effect to the receipt and application of any part of the proceeds from the sale of securities for cash shall not be used unless such securities are to be offered through underwriters and the underwriting arrangements are such that the underwriters are or will be committed to take and pay for all of the securities, if any are taken, prior to or within a reasonable time after the commencement of the public offering, or if the securities are not so taken to refund to all subscribers the full amount of all subscription payments made for the securities. The caption of any such financial statement shall clearly set forth the assumptions upon which such statement is based. The caption shall be in type at least as large as that used generally in the body of the statement.

[21 FR 7566, Oct. 3, 1956]

§ 230.171 Disclosure detrimental to the national defense or foreign policy.

(a) Any requirement to the contrary notwithstanding, no registration statement, prospectus, or other document filed with the Commission or used in connection with the offering or sale of any securities shall contain any document or information which, pursuant to Executive order, has been classified by an appropriate department or agency of the United States for protection in the interests of national defense or foreign policy.

(b) Where a document or information is omitted pursuant to paragraph (a) of this section, there shall be filed, in lieu of such document or information, a statement from an appropriate department or agency of the United States to the effect that such document or information has been classified or that the status thereof is awaiting determination. Where a document is omitted pursuant to paragraph (a) of this section, but information relating to the subject matter of such document is nevertheless included in material filed with the Commission pursuant to a determination of an appropriate department or agency of the United States that disclosure of such information would not be contrary to the interests of national defense or foreign policy, a statement from such department or agency to that effect shall be submitted for the information of the Commission. A registrant may rely upon any such statement in filing or omitting any document or information to which the statement relates.

(c) The Commission may protect any information in its possession which may require classification in the interests of national defense or foreign policy pending determination by an appropriate department or agency as to whether such information should be classified.

(d) It shall be the duty of the registrant to submit the documents or information referred to in paragraph (a) of this section to the appropriate department or agency of the United States prior to filing them with the Commission and to obtain and submit to the Commission, at the time of filing such documents or information, or in lieu thereof, as the case may be, the statements from such department or agency required by paragraph (b) of this section. All such statements shall be in writing.

[33 FR 7682, May 24, 1968]

§ 230.174 Delivery of prospectus by dealers; exemptions under section 4(3) of the Act.

The obligations of a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transactions) to deliver a prospectus in transactions in a security as to which a registration statement has been filed taking place prior to the expiration of the 40- or 90-day period specified in section 4(3) of the Act after the effective date of such registration statement or prior to the expiration of such period after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later, shall be subject to the following provisions:

(a) No prospectus need be delivered if the registration statement is on Form F–6 (§ 239.36 of this chapter).

(b) No prospectus need be delivered if the issuer is subject, immediately prior to the time of filing the registration statement, to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934.

(c) Where a registration statement relates to offerings to be made from time to time no prospectus need be delivered after the expiration of the initial prospectus delivery period specified in section 4(3) of the Act following the first bona fide offering of securities under such registration statement.

(d) If (1) the registration statement relates to the security of an issuer that is not subject, immediately prior to the time of filing the registration statement, to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934, and (2) as of the offering date, the security is listed on a registered national securities exchange or authorized for inclusion in an electronic inter-dealer quotation system sponsored and governed by the rules of a registered securities association, no prospectus need be delivered after the expiration of twenty-five calendar days after the offering date. For purposes of this provision, the term *offering date* refers to the later of the effective date of the registration statement or the first date on which the security was bona fide offered to the public.

(e) Notwithstanding the foregoing, the period during which a prospectus must be delivered by a dealer shall be:

(1) As specified in section 4(3) of the Act if the registration statement was the subject of a stop order issued under section 8 of the Act; or

(2) As the Commission may provide upon application or on its own motion in a particular case.

(f) Nothing in this section shall affect the obligation to deliver a prospectus pursuant to the provisions of section 5 of the Act by a dealer who is acting as an underwriter with respect to the securities involved or who is engaged in a transaction as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(g) If the registration statement relates to an offering of securities of a ''blank check company,'' as defined in Rule 419 under the Act (17 CFR 230.419), the statutory period for prospectus delivery specified in section 4(3) of the Act shall not terminate until 90 days after the date funds and securities are released from the escrow or trust account pursuant to Rule 419 under the Act.

(15 U.S.C. 77d; Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78*l*, 78m, 78*o*(d), 78w(a))

[35 FR 18457, Dec. 4, 1970, as amended at 48 FR 12347, Mar. 24, 1983; 53 FR 11845, Apr. 11, 1988; 57 FR 18043, Apr. 28, 1992]

§ 230.175 Liability for certain statements by issuers.

(a) A statement within the coverage of paragraph (b) of this section which is made by or on behalf of an issuer or by an outside reviewer retained by the issuer shall be deemed not to be a fraudulent statement (as defined in paragraph (d) of this section), unless it

is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.

(b) This rule applies to the following statements:

(1) A forward-looking statement (as defined in paragraph (c) of this section) made in a document filed with the Commission, in Part I of a quarterly report on Form 10–Q and Form 10–QSB, § 249.308a of this chapter, or in an annual report to shareholders meeting the requirements of Rules 14a–3 (b) and (c) or 14c–3 (a) and (b) under the Securities Exchange Act of 1934, a statement reaffirming such forward-looking statement subsequent to the date the document was filed or the annual report was made publicly available, or a forward-looking statement made prior to the date the document was filed or the date the annual report was publicly available if such statement is reaffirmed in a filed document, in Part I of a quarterly report on Form 10–Q and Form 10–QSB, or in an annual report made publicly available within a reasonable time after the making of such forward-looking statement; *Provided*, That

(i) At the time such statements are made or reaffirmed, either the issuer is subject to the reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 and has complied with the requirements of rule 13a–1 or 15d–1 thereunder, if applicable, to file its most recent annual report on Form 10–K and Form 10–KSB, Form 20–F or Form 40–F; or if the issuer is not subject to the reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934, the statements are made in a registration statement filed under the Act, offering statement or solicitation of interest written document or broadcast script under Regulation A or pursuant to section 12 (b) or (g) of the Securities Exchange Act of 1934, and

(ii) The statements are not made by or on behalf of an issuer that is an investment company registered under the Investment Company Act of 1940; and

(2) Information which is disclosed in a document filed with the Commission, in Part I of a quarterly report on Form 10–Q and Form 10–QSB (§ 249.308a of this chapter) or in an annual report to shareholders meeting the requirements of Rules 14a–3 (b) and (c) or 14c–3 (a) and (b) under the Securities Exchange Act of 1934 (§§ 240.14a–3 (b) and (c) or 240.14a–3 (a) and (b) of this chapter) and which relates to (i) the effects of changing prices on the business enterprise, presented voluntarily or pursuant to Item 303 of Regulation S–K (§ 229.303 of this chapter) or Regulation S–B (§ 228.303 of this chapter) ''Management's Discussion and Analysis of Financial Condition and Results of Operations, or Item 5 of Form 20–F, Operating and Financial Review and Prospects, (§ 249.220f of this chapter)'' or Item 302 of Regulation S–K (§ 229.302 of this chapter), ''Supplementary financial information,'' or Rule 3–20(c) of Regulation S–X (§ 210.3–20(c) of this chapter), or (ii) the value of proved oil and gas reserves (such as a standardized measure of discounted future net cash flows relating to proved oil and gas reserves as set forth in paragraphs 30–34 of Statement of Financial Accounting Standards No. 69) presented voluntarily or pursuant to Item 302 of Regulation S–K (§ 229.302 of this chapter).

(c) For the purpose of this rule, the term *forward-looking statement* shall mean and shall be limited to:

(1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

(2) A statement of management's plans and objectives for future operations;

(3) A statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations included pursuant to Item 303 of Regulation S–K (§ 229.303 of this chapter) or Item 9 of Form 20–F; or Item 5 of Form 20–F.

(4) Disclosed statements of the assumptions underlying or relating to any of the statements described in paragraphs (c) (1), (2), or (3) of this section.

(d) For the purpose of this rule the term *fraudulent statement* shall mean a

statement which is an untrue statement of a material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or which constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud, as those terms are used in the Securities Act of 1933 or the rules or regulations promulgated thereunder.

[46 FR 13990, Feb. 25, 1981, as amended at 46 FR 19457, Mar. 31, 1981; 47 FR 54770, Dec. 6, 1982; 48 FR 19875, May 3, 1983; 56 FR 30054, July 1, 1991; 57 FR 36468, Aug. 13, 1992; 64 FR 53909, Oct. 5, 1999]

§ 230.176 Circumstances affecting the determination of what constitutes reasonable investigation and reasonable grounds for belief under section 11 of the Securities Act.

In determining whether or not the conduct of a person constitutes a reasonable investigation or a reasonable ground for belief meeting the standard set forth in section 11(c), relevant circumstances include, with respect to a person other than the issuer.

(a) The type of issuer;

(b) The type of security;

(c) The type of person;

(d) The office held when the person is an officer;

(e) The presence or absence of another relationship to the issuer when the person is a director or proposed director;

(f) Reasonable reliance on officers, employees, and others whose duties should have given them knowledge of the particular facts (in the light of the functions and responsibilities of the particular person with respect to the issuer and the filing);

(g) When the person is an underwriter, the type of underwriting arrangement, the role of the particular person as an underwriter and the availability of information with respect to the registrant; and

(h) Whether, with respect to a fact or document incorporated by reference, the particular person had any responsibility for the fact or document at the time of the filing from which it was incorporated.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a–37)

[47 FR 11433, Mar. 16, 1982]

§ 230.180 Exemption from registration of interests and participations issued in connection with certain H.R. 10 plans.

(a) Any interest or participation in a single trust fund or in a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, issued to an employee benefit plan shall be exempt from the provisions of section 5 of the Act if the following terms and conditions are met:

(1) The plan covers employees, some or all of whom are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954, and is either: (i) A pension or profit-sharing plan which meets the requirements for qualification under section 401 of such Code, or (ii) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code;

(2) The plan covers only employees of a single employer or employees of interrelated partnerships; and

(3) The issuer of such interest, participation or security shall have reasonable grounds to believe and, after making reasonable inquiry, shall believe immediately prior to any issuance that:

(i) The employer is a law firm, accounting firm, investment banking firm, pension consulting firm or investment advisory firm that is engaged in furnishing services of a type that involve such knowledge and experience in financial and business matters that

the employer is able to represent adequately its interests and those of its employees; or

(ii) In connection with the plan, the employer prior to adopting the plan obtains the advice of a person or entity that (A) is not a financial institution providing any funding vehicle for the plan, and is neither an affiliated person as defined in section 2(a)(3) of the Investment Company Act of 1940 of, nor a person who has a material business relationship with, a financial institution providing a funding vehicle for the plan; and (B) is, by virtue of knowledge and experience in financial and business matters, able to represent adequately the interests of the employer and its employees.

(b) Any interest or participation issued to a participant in either a pension or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954 or an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code, and which covers employees, some or all of whom are employees within the meaning of section 401(c)(1) of such Code, shall be exempt from the provisions of section 5 of the Act.

[46 FR 58291, Dec. 1, 1981]

§ 230.215 Accredited investor.

The term *accredited investor* as used in section 2(15)(ii) of the Securities Act of 1933 (15 U.S.C. 77b(15)(ii)) shall include the following persons:

(a) Any savings and loan association or other institution specified in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000; any employee benefit plan within the meaning of Table I of the Employee Retirement Income Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is a savings and loan association, or if the employee benefit plan has total assets in excess of $5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

(b) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(c) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000;

(d) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

(e) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000;

(f) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(g) Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in § 230.506(b)(2)(ii); and

(h) Any entity in which all of the equity owners are accredited investors.

[47 FR 11261, Mar. 16, 1982, as amended at 53 FR 7868, Mar. 10, 1988; 54 FR 11372, Mar. 20, 1989]

REGULATION A–R—SPECIAL EXEMPTIONS

§ 230.236 Exemption of shares offered in connection with certain transactions.

Shares of stock or similar security offered to provide funds to be distributed to shareholders of the issuer of such securities in lieu of issuing fractional shares, script certificates or order forms, in connection with a stock dividend, stock split, reverse stock split, conversion, merger or similar

transaction, shall be exempt from registration under the Act if the following conditions are met:

(a) The issuer of such shares is required to file and has filed reports with the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934.

(b) The aggregate gross proceeds from the sale of all shares offered in connection with the transaction for the purpose of providing such funds does not exceed $300,000.

(c) At least ten days prior to the offering of the shares, the issuer shall furnish to the Commission in writing the following information: (1) That it proposes to offer shares in reliance upon the exemption provided by this rule; (2) the estimated number of shares to be so offered; (3) the aggregate market value of such shares as of the latest practicable date; and (4) a brief description of the transaction in connection with which the shares are to be offered.

(Secs. 3, 4, and 19, 48 Stat. 75, 77, 85, as amended; 15 U.S.C. 77c, 77d, 77s; secs. 3(b), 4(l), 19(a), 48 Stat. 75, 77, 85; secs. 209, 48 Stat. 908; 59 Stat. 167; sec. 12, 78 Stat. 580; 84 Stat. 1480; sec. 308(a)(2), 90 Stat. 57; sec. 18, 92 Stat. 275; sec. 2, 92 Stat. 962; sec. 301, 94 Stat. 2291, 2294; secs. 12(a), 12(h), 12(i), 16(a), 23(a), 48 Stat. 892, 896, 901; sec. 203a, 49 Stat. 704; sec. 8, 49 Stat. 1379, secs. 3, 8, 78 Stat. 565–568, 579; sec. 1, 82 Stat. 454; sec. 105(b), 88 Stat. 1503; sec. 18, 89 Stat. 155; 15 U.S.C. 77c(b), 77d(l), 77s(a), 78*l*(a), 78*l*(h), 78*l*(i), 78p(a), 78w(a))

[27 FR 3289, Apr. 6, 1962, as amended at 37 FR 22978, Oct. 27, 1972; 47 FR 29652, July 8, 1982; 61 FR 49959, Sept. 24, 1996]

§ 230.237 Exemption for offers and sales to certain Canadian tax-deferred retirement savings accounts.

(a) *Definitions.* As used in this section:

(1) *Canadian law* means the federal laws of Canada, the laws of any province or territory of Canada, and the rules or regulations of any federal, provincial, or territorial regulatory authority, or any self-regulatory authority, of Canada.

(2) *Canadian Retirement Account* means a trust or other arrangement, including, but not limited to, a ''Registered Retirement Savings Plan'' or ''Registered Retirement Income Fund'' administered under Canadian law, that is managed by the Participant and:

(i) Operated to provide retirement benefits to a Participant; and

(ii) Established in Canada, administered under Canadian law, and qualified for tax-deferred treatment under Canadian law.

(3) *Eligible Security* means a security issued by a Qualified Company that:

(i) Is offered to a Participant, or sold to his or her Canadian Retirement Account, in reliance on this section; and

(ii) May also be purchased by Canadians other than Participants.

(4) *Foreign Government* means the government of any foreign country or of any political subdivision of a foreign country.

(5) *Foreign Issuer* means any issuer that is a Foreign Government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country, except an issuer meeting the following conditions:

(i) More than 50 percent of the outstanding voting securities of the issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States; and

(ii) Any of the following:

(A) The majority of the executive officers or directors are United States citizens or residents;

(B) More than 50 percent of the assets of the issuer are located in the United States; or

(C) The business of the issuer is administered principally in the United States.

(iii) For purposes of this definition, the term *resident,* as applied to security holders, means any person whose address appears on the records of the issuer, the voting trustee, or the depositary as being located in the United States.

(6) *Participant* means a natural person who is a resident of the United States, or is temporarily present in the United States, and who contributes to, or is or will be entitled to receive the income and assets from, a Canadian Retirement Account.

(7) *Qualified Company* means a Foreign Issuer whose securities are qualified for investment on a tax-deferred

basis by a Canadian Retirement Account under Canadian law.

(8) *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(b) *Exemption.* The offer to a Participant, or the sale to his or her Canadian Retirement Account, of Eligible Securities by any person is exempt from Section 5 of the Act (15 U.S.C. 77e) if the person:

(1) Includes in any written offering materials delivered to a Participant, or to his or her Canadian Retirement Account, a prominent statement that the Eligible Security is not registered with the U.S. Securities and Exchange Commission and the Eligible Security is being offered or sold in the United States under an exemption from registration.

(2) Has not asserted that Canadian law, or the jurisdiction of the courts of Canada, does not apply in a proceeding involving an Eligible Security.

[65 FR 37676, June 15, 2000]

§ 230.238 Exemption for standardized options.

(a) *Exemption.* Except as expressly provided in paragraphs (b) and (c) of this section, the Act does not apply to any standardized option, as that term is defined by section 240.9b–1(a)(4) of this chapter, that is:

(1) Issued by a clearing agency registered under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1); and

(2) Traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)) or on a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 780–3(a)).

(b) *Limitation.* The exemption provided in paragraph (a) of this section does not apply to the provisions of section 17 of the Act (15 U.S.C. 77q).

(c) *Offers and sales.* Any offer or sale of a standardized option by or on behalf of the issuer of the securities underlying the standardized option, an affiliate of the issuer, or an underwriter, will constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities as defined in section 2(a)(3) of the Act (15 U.S.C. 77b(a)(3)).

[68 FR 192, Jan. 2, 2003]

REGULATION A—CONDITIONAL SMALL ISSUES EXEMPTION

AUTHORITY: Secs. 230.251 to 230.263 issued under 15 U.S.C. 77c, 77s.

SOURCE: 57 FR 36468, Aug. 13, 1992, unless otherwise noted.

§ 230.251 Scope of exemption.

A public offer or sale of securities that meets the following terms and conditions shall be exempt under section 3(b) from the registration requirements of the Securities Act of 1933 (the ''Securities Act''):

(a) *Issuer.* The issuer of the securities:

(1) Is an entity organized under the laws of the United States or Canada, or any State, Province, Territory or possession thereof, or the District of Columbia, with its principal place of business in the United States or Canada;

(2) Is not subject to section 13 or 15(d) of the Securities Exchange Act of 1934 (the ''Exchange Act'') (15 U.S.C. 78a *et seq.*) immediately before the offering;

(3) Is not a development stage company that either has no specific business plan or purpose, or has indicated that its business plan is to merge with an unidentified company or companies;

(4) Is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*);

(5) Is not issuing fractional undivided interests in oil or gas rights as defined in § 230.300, or a similar interest in other mineral rights; and

(6) Is not disqualified because of § 230.262.

(b) *Aggregate Offering Price.* The sum of all cash and other consideration to be received for the securities (''aggregate offering price'') shall not exceed $5,000,000, including no more than $1,500,000 offered by all selling security holders, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities in reliance upon Regulation A. No affiliate resales are permitted if the issuer has

not had net income from continuing operations in at least one of its last two fiscal years.

NOTE: Where a mixture of cash and non-cash consideration is to be received, the aggregate offering price shall be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency shall be translated into United States currency at a currency exchange rate in effect on or at a reasonable time prior to the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price shall be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Valuations of non-cash consideration must be reasonable at the time made.

(c) *Integration with Other Offerings.* Offers and sales made in reliance on this Regulation A will not be integrated with:

(1) Prior offers or sales of securities; or

(2) Subsequent offers or sales of securities that are:

(i) Registered under the Securities Act, except as provided in § 230.254(d);

(ii) Made in reliance on § 230.701;

(iii) Made pursuant to an employee benefit plan;

(iv) Made in reliance on Regulation S (§ 230.901–904); or

(v) Made more than six months after the completion of the Regulation A offering.

NOTE: If the issuer offers or sells securities for which the safe harbor rules are unavailable, such offers and sales still may not be integrated with the Regulation A offering, depending on the particular facts and circumstances. See Securities Act Release No. 4552 (November 6, 1962) [27 FR 11316].

(d) *Offering Conditions*—(1) *Offers.* (i) Except as allowed by § 230.254, no offer of securities shall be made unless a Form 1–A offering statement has been filed with the Commission.

(ii) After the Form 1–A offering statement has been filed:

(A) Oral offers may be made;

(B) Written offers under § 230.255 may be made;

(C) Printed advertisements may be published or radio or television broadcasts made, if they state from whom a Preliminary Offering Circular or Final Offering Circular may be obtained, and contain no more than the following information:

(*1*) The name of the issuer of the security;

(*2*) The title of the security, the amount being offered and the per unit offering price to the public;

(*3*) The general type of the issuer's business; and

(*4*) A brief statement as to the general character and location of its property.

(iii) After the Form 1–A offering statement has been qualified, other written offers may be made, but only if accompanied with or preceded by a Final Offering Circular.

(2) *Sales.* (i) No sale of securities shall be made until:

(A) The Form 1–A offering statement has been qualified;

(B) A Preliminary Offering Circular or Final Offering Circular is furnished to the prospective purchaser at least 48 hours prior to the mailing of the confirmation of sale to that person; and

(C) A Final Offering Circular is delivered to the purchaser with the confirmation of sale, unless it has been delivered to that person at an earlier time.

(ii) Sales by a dealer (including an underwriter no longer acting in that capacity for the security involved in such transaction) that take place within 90 days after the qualification of the Regulation A offering statement may be made only if the dealer delivers a copy of the current offering circular to the purchaser before or with the confirmation of sale. The issuer or underwriter of the offering shall provide requesting dealers with reasonable quantities of the offering circular for this purpose.

(3) *Continuous or delayed offerings.* Continuous or delayed offerings may be made under this Regulation A if permitted by § 230.415.

§ 230.252 Offering statement.

(a) *Documents to be included.* The offering statement consists of the facing sheet of Form 1–A [§ 239.90 of this chapter], the contents required by the form and any other material information

necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

(b) *Paper, printing, language and pagination.* The requirements for offering statements are the same as those specified in § 230.403 for registration statements under the Act.

(c) *Confidential treatment.* A request for confidential treatment may be made under § 230.406 for information required to be filed, and § 200.83 of this chapter for information not required to be filed.

(d) *Signatures.* The issuer, its Chief Executive Officer, Chief Financial Officer, a majority of the members of its board of directors or other governing body, and each selling security holder shall sign the offering statement. If a signature is by a person on behalf of any other person, evidence of authority to sign shall be filed, except where an executive officer signs for the issuer. If the issuer is Canadian, its authorized representative in the United States shall sign. If the issuer is a limited partnership, a majority of the board of directors of any corporate general partner also shall sign.

(e) *Number of copies and where to file.* Seven copies of the offering statement, at least one of which is manually signed, shall be filed with the Commission's main office in Washington, DC.

(f) [Reserved]

(g) *Qualification.* (1) If there is no delaying notation as permitted by paragraph (g)(2) of this section or suspension proceeding under § 230.258, an offering statement is qualified without Commission action on the 20th calendar day after its filing.

(2) An offering statement containing the following notation can be qualified only by order of the Commission, unless such notation is removed prior to Commission action as described in paragraph (g)(3) of this section:

This offering statement shall only be qualified upon order of the Commission, unless a subsequent amendment is filed indicating the intention to become qualified by operation of the terms of Regulation A.

(3) The delaying notation specified in paragraph (g)(2) of this section can be removed only by an amendment to the offering statement that contains the following language:

This offering statement shall become qualified on the 20th calendar day following the filing of this amendment.

(h) *Amendments.* (1) If any information in the offering statement is amended, an amendment, signed in the same manner as the initial filing, shall be filed. Seven copies of every amendment shall be filed with the Commission's Office that accepted the initial filing. Seven copies of every amendment shall be filed with the Commission's main office in Washington, DC.

(2) An amendment to include a delaying notation pursuant to paragraph (g)(2) or to remove one pursuant to paragraph (g)(3) of this section after the initial filing of an offering statement may be made by telegram, letter or facsimile transmission. Each such telegraphic amendment shall be confirmed in writing within a reasonable time by filing a signed copy. Such confirmation shall not be deemed an amendment.

[57 FR 36468, Aug. 13, 1992, as amended at 58 FR 65542, Dec. 15, 1993; 61 FR 30401, June 14, 1996; 61 FR 49959, Sept. 24, 1996; 61 FR 67202, Dec. 20, 1996]

§ 230.253 Offering circular.

(a) *Contents.* An offering circular shall include the narrative and financial information required by Form 1–A.

(b) *Presentation of information.* (1) Information in the offering circular shall be presented in a clear, concise and understandable manner and in a type size that is easily readable. Repetition of information should be avoided; cross-referencing of information within the document is permitted.

(2) Where an offering circular is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents by presenting all required information in a format readily communicated to investors.

(c) *Date.* An offering circular shall be dated approximately as of the date of the qualification of the offering statement of which it is a part.

(d) *Cover page legend.* The cover page of every offering circular shall display

the following statement in capital letters printed in boldfaced type at least as large as that used generally in the body of such offering circular:

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION DOES NOT PASS UPON THE MERITS OF OR GIVE ITS APPROVAL TO ANY SECURITIES OFFERED OR THE TERMS OF THE OFFERING, NOR DOES IT PASS UPON THE ACCURACY OR COMPLETENESS OF ANY OFFERING CIRCULAR OR OTHER SELLING LITERATURE. THESE SECURITIES ARE OFFERED PURSUANT TO AN EXEMPTION FROM REGISTRATION WITH THE COMMISSION; HOWEVER, THE COMMISSION HAS NOT MADE AN INDEPENDENT DETERMINATION THAT THE SECURITIES OFFERED HEREUNDER ARE EXEMPT FROM REGISTRATION.

(e) *Revisions.* (1) An offering circular shall be revised during the course of an offering whenever the information it contains has become false or misleading in light of existing circumstances, material developments have occurred, or there has been a fundamental change in the information initially presented.

(2) An offering circular for a continuous offering shall be updated to include, among other things, updated financial statements, 12 months after the date the offering statement was qualified.

(3) Every revised or updated offering circular shall be filed as an amendment to the offering statement and requalified in accordance with § 230.252.

[57 FR 36468, Aug. 13, 1992, as amended at 61 FR 24654, May 15, 1996]

§ 230.254 Solicitation of interest document for use prior to an offering statement.

(a) An issuer may publish or deliver to prospective purchasers a written document or make scripted radio or television broadcasts to determine whether there is any interest in a contemplated securities offering. Following submission of the written document or script of the broadcast to the Commission, as required by paragraph (b) of this section, oral communications with prospective investors and other broadcasts are permitted. The written documents, broadcasts and oral communications are each subject to the antifraud provisions of the federal securities laws. No solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any prospective investor is permitted. No sale may be made until qualification of the offering statement.

(b) While not a condition to any exemption pursuant to this section:

(1) On or before the date of its first use, the issuer shall submit a copy of any written document or the script of any broadcast with the Commission's main office in Washington, DC. (Attention: Office of Small Business Review).The document or broadcast script shall either contain or be accompanied by the name and telephone number of a person able to answer questions about the document or the broadcast.

NOTE: Only solicitation of interest material that contains substantive changes from or additions to previously submitted material needs to be submitted.

(2) The written document or script of the broadcast shall:

(i) State that no money or other consideration is being solicited, and if sent in response, will not be accepted;

(ii) State that no sales of the securities will be made or commitment to purchase accepted until delivery of an offering circular that includes complete information about the issuer and the offering;

(iii) State that an indication of interest made by a prospective investor involves no obligation or commitment of any kind; and

(iv) Identify the chief executive officer of the issuer and briefly and in general its business and products.

(3) Solicitations of interest pursuant to this provision may not be made after the filing of an offering statement.

(4) Sales may not be made until 20 calendar days after the last publication or delivery of the document or radio or television broadcast.

(c) Any written document under this section may include a coupon, returnable to the issuer indicating interest in a potential offering, revealing the name, address and telephone number of the prospective investor.

(d) Where an issuer has a bona fide change of intention and decides to register an offering after using the process

permitted by this section without having filed the offering statement prescribed by § 230.252, the Regulation A exemption for offers made in reliance upon this section will not be subject to integration with the registered offering, if at least 30 calendar days have elapsed between the last solicitation of interest and the filing of the registration statement with the Commission, and all solicitation of interest documents have been submitted to the Commission. With respect to integration with other offerings, see § 230.251(c).

(e) Written solicitation of interest materials submitted to the Commission and otherwise in compliance with this section shall not be deemed to be a prospectus as defined in section 2(10) of the Securities Act (15 U.S.C. 77b(10)).

[57 FR 36468, Aug. 13, 1992, as amended at 58 FR 26514, May 4, 1993; 61 FR 67202, Dec. 20, 1996]

§ 230.255 Preliminary Offering Circulars.

(a) Prior to qualification of the required offering statement, but after its filing, a written offer of securities may be made if it meets the following requirements:

(1) The outside front cover page of the material bears the caption ''Preliminary Offering Circular,'' the date of issuance, and the following statement, which shall run along the left hand margin of the page and be printed perpendicular to the text, in boldfaced type at least as large as that used generally in the body of such offering circular:

An offering statement pursuant to Regulation A relating to these securities has been filed with the Securities and Exchange Commission.

Information contained in this Preliminary Offering Circular is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted prior to the time an offering circular which is not designated as a Preliminary Offering Circular is delivered and the offering statement filed with the Commission becomes qualified. This Preliminary Offering Circular shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sales of these securities in any state in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the laws of any such state.

(2) The Preliminary Offering Circular contains substantially the information required in an offering circular by Form 1–A (§ 239.90 of this chapter), except that information with respect to offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price may be omitted. The outside front cover page of the Preliminary Offering Circular shall include a bona fide estimate of the range of the maximum offering price and maximum number of shares or other units of securities to be offered or a bona fide estimate of the principal amount of debt securities to be offered.

(3) The material is filed as a part of the offering statement.

(b) If a Preliminary Offering Circular is inaccurate or inadequate in any material respect, a revised Preliminary Offering Circular or a complete Offering Circular shall be furnished to all persons to whom securities are to be sold at least 48 hours prior to the mailing of any confirmation of sale to such persons, or shall be sent to such persons under such circumstances that it would normally be received by them 48 hours prior to receipt of confirmation of the sale.

[57 FR 36468, Aug. 13, 1992, as amended at 61 FR 67202, Dec. 20, 1996]

§ 230.256 Filing of sales material.

While not a condition to an exemption pursuant to this provision, seven copies of any advertisement or written communication, or the script of any radio or television broadcast, shall be filed with the main office of the Commission in Washington, DC.

NOTE: Only sales material that contains substantive changes from or additions from previously filed material needs to be filed.

[57 FR 36468, Aug. 13, 1992, as amended at 61 FR 67202, Dec. 20, 1996]

§ 230.257 Reports of sales and use of proceeds.

While not a condition to an exemption pursuant to this provision, the issuer and/or each selling security

holder shall file seven copies of a report concerning sales and use of proceeds on Form 2–A (§ 239.91 of this chapter), or other prescribed form with the main office of the Commission in Washington, DC. This report shall be filed at the following times:

(a) Every six months after the qualification of the offering statement or any amendment until substantially all the proceeds have been applied; and

(b) within 30 calendar days after the termination, completion or final sale of securities in the offering, or the application of the proceeds from the offering, whichever is the latest event. This report should be labelled the final report. For purposes of this section, the temporary investment of proceeds pending final application shall not constitute application of the proceeds.

[57 FR 36468, Aug. 13, 1992, as amended at 61 FR 67202, Dec. 20, 1996]

§ 230.258 Suspension of the exemption.

(a) The Commission may at any time enter an order temporarily suspending a Regulation A exemption if it has reason to believe that:

(1) No exemption is available or any of the terms, conditions or requirements of the Regulation have not been complied with, including failures to provide the Commission a copy of the document or broadcast script under § 230.254, to file any sales material as required by § 230.256 or report as required by § 230.257;

(2) The offering statement, any sales or solicitation of interest material contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading;

(3) The offering is being made or would be made in violation of section 17 of the Securities Act;

(4) An event has occurred after the filing of the offering statement which would have rendered the exemption hereunder unavailable if it had occurred prior to such filing;

(5) Any person specified in paragraph (a) of § 230.262 has been indicted for any crime or offense of the character specified in paragraph (a)(3) of 230.262, or any proceeding has been initiated for the purpose of enjoining any such person from engaging in or continuing any conduct or practice of the character specified in paragraph (a)(4) of § 230.262;

(6) Any person specified in paragraph (b) of § 230.262 has been indicted for any crime or offense of the character specified in paragraph (b)(1) of § 230.262, or any proceeding has been initiated for the purpose of enjoining any such person from engaging in or continuing any conduct or practice of the character specified in paragraph (b)(2) of § 230.262; or

(7) The issuer or any promoter, officer, director or underwriter has failed to cooperate, or has obstructed or refused to permit the making of an investigation by the Commission in connection with any offering made or proposed to be made in reliance on Regulation A.

(b) Upon the entry of an order under paragraph (a) of this section, the Commission will promptly give notice to the issuer, any underwriter and any selling security holder:

(1) That such order has been entered, together with a brief statement of the reasons for the entry of the order; and

(2) That the Commission, upon receipt of a written request within 30 calendar days after the entry of the order, will within 20 calendar days after receiving the request, order a hearing at a place to be designated by the Commission.

(c) If no hearing is requested and none is ordered by the Commission, an order entered under paragraph (a) of this section shall become permanent on the 30th calendar day after its entry and shall remain in effect unless or until it is modified or vacated by the Commission. Where a hearing is requested or is ordered by the Commission, the Commission will, after notice of and opportunity for such hearing, either vacate the order or enter an order permanently suspending the exemption.

(d) The Commission may, at any time after notice of and opportunity for hearing, enter an order permanently suspending the exemption for any reason upon which it could have entered a temporary suspension order under paragraph (a) of this section. Any such

order shall remain in effect until vacated by the Commission.

(e) All notices required by this section shall be given by personal service, registered or certified mail to the addresses given by the issuer, any underwriter and any selling security holder in the offering statement.

§ 230.259 Withdrawal or abandonment of offering statements.

(a) If none of the securities which are the subject of an offering statement have been sold and such offering statement is not the subject of a proceeding under § 230.258, the offering statement may be withdrawn with the Commission's consent. The application for withdrawal shall state the reason the offering statement is to be withdrawn, shall be signed by an authorized representative of the issuer and shall be provided to the main office of the Commission in Washington, DC.

(b) When an offering statement has been on file with the Commission for nine months without amendment and has not become qualified, the Commission may, in its discretion, proceed in the following manner to determine whether such offering statement has been abandoned by the issuer. If the offering statement has been amended, the 9-month period shall be computed from the date of the latest amendment.

(1) Notice will be sent to the issuer, and to any counsel for the issuer named in the offering statement, by registered or certified mail, return receipt requested, addressed to the most recent addresses for the issuer and issuer's counsel as reflected in the offering statement. Such notice will inform the issuer and issuer's counsel that the offering statement or amendments thereto is out of date and must be either amended to comply with applicable requirements of Regulation A or be withdrawn within 30 calendar days after the notice.

(2) If the issuer or issuer's counsel fail to respond to such notice by filing a substantive amendment or withdrawing the offering statement or does not furnish a satisfactory explanation as to why the issuer has not done so within 30 calendar days, the Commission may declare the offering statement abandoned.

[57 FR 36468, Aug. 13, 1992, as amended at 61 FR 67202, Dec. 20, 1996]

§ 230.260 Insignificant deviations from a term, condition or requirement of Regulation A.

(a) A failure to comply with a term, condition or requirement of Regulation A will not result in the loss of the exemption from the requirements of section 5 of the Securities Act for any offer or sale to a particular individual or entity, if the person relying on the exemption establishes:

(1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity;

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraphs (a), (b), (d) (1) and (3) Of § 230.251 shall be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Regulation A.

(b) A transaction made in reliance upon Regulation A shall comply with all applicable terms, conditions and requirements of the regulation. Where an exemption is established only through reliance upon paragraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Act.

(c) This provision provides no relief or protection from a proceeding under § 230.258.

§ 230.261 Definitions.

As used in this Regulation A, all terms have the same meanings as in § 230.405, except that all references to ''registrant'' in those definitions shall refer to the issuer of the securities to be offered and sold under Regulation A. In addition, these terms have the following meanings:

(a) *Final Offering Circular*—The current offering circular contained in a qualified offering statement;

(b) *Preliminary Offering Circular*—The offering circular described in § 230.255(a).

§ 230.262 Disqualification provisions.

Unless, upon a showing of good cause and without prejudice to any other action by the Commission, the Commission determines that it is not necessary under the circumstances that the exemption provided by this Regulation A be denied, the exemption shall not be available for the offer or sale of securities, if:

(a) The issuer, any of its predecessors or any affiliated issuer:

(1) Has filed a registration statement which is the subject of any pending proceeding or examination under section 8 of the Act, or has been the subject of any refusal order or stop order thereunder within 5 years prior to the filing of the offering statement required by § 230.252;

(2) Is subject to any pending proceeding under § 230.258 or any similar section adopted under section 3(b) of the Securities Act, or to an order entered thereunder within 5 years prior to the filing of such offering statement;

(3) Has been convicted within 5 years prior to the filing of such offering statement of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the Commission;

(4) Is subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment or decree of any court of competent jurisdiction, entered within 5 years prior to the filing of such offering statement, permanently restraining or enjoining, such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the Commission; or

(5) Is subject to a United States Postal Service false representation order entered under 39 U.S.C. § 3005 within 5 years prior to the filing of the offering statement, or is subject to a temporary restraining order or preliminary injunction entered under 39 U.S.C. § 3007 with respect to conduct alleged to have violated 39 U.S.C. § 3005. The entry of an order, judgment or decree against any affiliated entity before the affiliation with the issuer arose, if the affiliated entity is not in control of the issuer and if the affiliated entity and the issuer are not under the common control of a third party who was in control of the affiliated entity at the time of such entry does not come within the purview of this paragraph (a) of this section.

(b) Any director, officer or general partner of the issuer, beneficial owner of 10 percent or more of any class of its equity securities, any promoter of the issuer presently connected with it in any capacity, any underwriter of the securities to be offered, or any partner, director or officer of any such underwriter:

(1) Has been convicted within 10 years prior to the filing of the offering statement required by § 230.252 of any felony or misdemeanor in connection with the purchase or sale of any security, involving the making of a false filing with the Commission, or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, or investment adviser;

(2) Is subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily enjoining or restraining, or is subject to any order, judgment, or decree of any court of competent jurisdiction, entered within 5 years prior to the filing of such offering statement, permanently enjoining or restraining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security, involving the making of a false filing with the Commission, or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, or investment adviser;

(3) Is subject to an order of the Commission entered pursuant to section 15(b), 15B(a), or 15B(c) of the Exchange Act, or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*);

(4) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a national securities exchange registered under section 6 of the Exchange Act or

a national securities association registered under section 15A of the Exchange Act for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade; or

(5) Is subject to a United States Postal Service false representation order entered under 39 U.S.C. § 3005 within 5 years prior to the filing of the offering statement required by § 230.252, or is subject to a restraining order or preliminary injunction entered under 39 U.S.C. § 3007 with respect to conduct alleged to have violated 39 U.S.C. § 3005.

(c) Any underwriter of such securities was an underwriter or was named as an underwriter of any securities:

(1) Covered by any registration statement which is the subject of any pending proceeding or examination under section 8 of the Act, or is the subject of any refusal order or stop order entered thereunder within 5 years prior to the filing of the offering statement required by § 230.252; or

(2) Covered by any filing which is subject to any pending proceeding under § 230.258 or any similar rule adopted under section 3(b) of the Securities Act, or to an order entered thereunder within 5 years prior to the filing of such offering statement.

§ 230.263 Consent to Service of Process.

(a) If the issuer is not organized under the laws of any of the states of or the United States of America, it shall at the time of filing the offering statement required by § 230.252, furnish to the Commission a written irrevocable consent and power of attorney on Form F–X [§ 239.42 of this chapter].

(b) Any change to the name or address of the agent for service of the issuer shall be communicated promptly to the Commission through amendment of the requisite form and referencing the file number of the relevant offering statement.

§§ 230.300–200.346 [Reserved]

ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S–T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S–T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

REGULATION C—REGISTRATION

AUTHORITY: Sections 230.400 to 230.499 issued under secs. 6, 8, 10, 19, 48 Stat. 78 79, 81, and 85, as amended (15 U.S.C. 77f, 77h, 77j, 77s)

Sec. 230.457 also issued under secs. 6 and 7, 15 U.S.C. 77f and 77g.

Sec. 230.499 also issued under secs. 6, 7, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 3, 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b) 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat. 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 54 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a–37.

NOTE: In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the respective rule number in Regulation C, under the Securities Act of 1933.

§ 230.400 Application of §§ 230.400 to 230.494, inclusive.

Sections 230.400 to 230.494 shall govern every registration of securities under the Act, except that any provision in a form, or an item of Regulation S–K (17 CFR 229.001 *et seq.*) referred to in such form, covering the same subject matter as any such rule shall be controlling unless otherwise specifically provided in §§ 230.400 to 230.494.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a–37)

[47 FR 11434, Mar. 16, 1982]

GENERAL REQUIREMENTS

§ 230.401 Requirements as to proper form.

(a) The form and contents of a registration statement and prospectus shall conform to the applicable rules and forms as in effect on the initial filing date of such registration statement and prospectus.

(b) If an amendment to a registration statement and prospectus is filed for the purpose of meeting the requirements of section 10(a)(3) of the Act or pursuant to the provisions of section 24(e) or 24(f) of the Investment Company Act of 1940, the form and contents of such an amendment shall conform to the applicable rules and forms as in effect on the filing date of such amendment.

(c) An amendment to a registration statement and prospectus, other than an amendment described in paragraph (b) of this section, may be filed on any shorter Securities Act registration form for which it is eligible on the filing date of the amendment. At the issuer's option, the amendment also may be filed on the same Securities Act registration form used for the most recent amendment described in paragraph (b) of this section or, if no such amendment has been filed, the initial registration statement and prospectus.

(d) The form and contents of a prospectus forming part of a registration statement which is the subject of a stop order entered under section 8(d) of the Act, if used after the date such stop order ceases to be effective, shall conform to the applicable rules and forms as in effect on the date such stop order ceases to be effective.

(e) A prospectus filed as part of an amendment to an effective registration statement, or other amendment to such registration statement, on any form may be prepared in accordance with the requirements of any other form which would then be appropriate for the registration of securities to which the prospectus or other amendment relates, provided that all of the other requirements of such other form and applicable rules (including any required undertakings) are met.

(f) Notwithstanding the provisions of this section, a registrant (1) shall comply with the rules and forms as in effect at a date different from those specified in paragraphs (a), (b), (c) and (d) of this section if the rules or forms or amendments thereto specifically so provide; and (2) may comply voluntarily with the rules and forms as in effect at dates subsequent to those specified in paragraphs (a), (b), (c) and (d) of this section, provided that all of the requirements of the particular rules and forms in effect at such dates (including any required undertakings) are met.

(g) Except for registration statements and post-effective amendments that become effective automatically pursuant to §§ 230.462 and 230.464, a registration statement or any amendment thereto is deemed filed on the proper form unless the Commission objects to the form before the effective date.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a–37)

[47 FR 11434, Mar. 16, 1982, as amended at 62 FR 39762, July 24, 1997; 64 FR 11116, Mar. 8, 1999]

§ 230.401a Requirements as to proper form.

With regard to issuers eligible to rely on Release No. 34–45589 (March 18, 2002) (which may be viewed on the Commission's website at www.sec.gov), the filing of reports in accordance with the provisions of that Release shall result in those reports being ''timely filed'' for purposes of all form eligibility standards in registration statement forms under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*).

[67 FR 13536, Mar. 22, 2002]

§ 230.402 Number of copies; binding; signatures.

(a) Three copies of the complete registration statement, including exhibits

and all other papers and documents filed as a part of the statement, shall be filed with the Commission. Each copy shall be bound, in one or more parts, without stiff covers. The binding shall be made on the side or stitching margin in such manner as to leave the reading matter legible. At least one such copy of every registration shall be signed by the persons specified in section 6(a) of the Act. Unsigned copies shall be conformed.

(b) Ten additional copies of the registration statement, similarly bound, shall be furnished for use in the examination of the registration statement, public inspection, copying and other purposes. Where a registration statement incorporates into the prospectus documents which are required to be delivered with the prospectus in lieu of prospectus presentation, the ten additional copies of the registration statement shall be accompanied by ten copies of such documents. No other exhibits are required to accompany such additional copies.

(c) Notwithstanding any other provision of this section, if a registration statement is filed on Form S–8 (§ 239.16b of this chapter), three copies of the complete registration statement, including exhibits and all other papers and documents filed as a part of the statement, shall be filed with the Commission. Each copy shall be bound, in one or more parts, without stiff covers. The binding shall be made on the side or stitching margin in such manner as to leave the reading matter legible. At least one such copy shall be signed by the persons specified in section 6(a) of the Act. Unsigned copies shall be conformed. Three additional copies of the registration statement, similarly bound, also shall be furnished to the Commission for use in the examination of the registration statement, public inspection, copying and other purposes. No exhibits are required to accompany the additional copies of registration statements filed on Form S–8.

(d) Notwithstanding any other provision of this section, if a registration statement is filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)), one copy of the complete registration statement, including exhibits and all other papers and documents filed as a part thereof shall be filed with the Commission. Such copy should not be bound and may contain facsimile versions of manual signatures in accordance with paragraph (e) of this section.

(e) *Signatures.* Where the Act or the rules thereunder, including paragraphs (a) and (c) of this section, require a document filed with or furnished to the Commission to be signed, such document shall be manually signed, or signed using either typed signatures or duplicated or facsimile versions of manual signatures. Where typed, duplicated or facsimile signatures are used, each signatory to the filing shall manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document shall be executed before or at the time the filing is made and shall be retained by the registrant for a period of five years. Upon request, the registrant shall furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

[47 FR 11434, Mar. 16, 1982, as amended at 55 FR 23922, June 13, 1990; 60 FR 26615, May 17, 1995; 61 FR 30402, June 14, 1996]

§ 230.403 Requirements as to paper, printing, language and pagination.

(a) Registration statements, applications and reports shall be filed on good quality, unglazed, white paper no larger than 8½×11 inches in size, insofar as practicable. To the extent that the reduction of larger documents would render them illegible, such documents may be filed on paper larger than 8½×11 inches in size.

(b) The registration statement and, insofar as practicable, all papers and documents filed as a part thereof shall be printed, lithographed, mimeographed or typewritten. However, the statement or any portion thereof may be prepared by any similar process which, in the opinion of the Commission, produces copies suitable for a permanent record. Irrespective of the process used, all copies of any such material shall be clear, easily readable and suitable for repeated photocopying. Debits in credit categories and credits in debit categories shall be designated

so as to be clearly distinguishable as such on photocopies.

(c)(1) All Securities Act filings and submissions must be in the English language, except as otherwise provided by this section. If a registration statement or other filing requires the inclusion of a document that is in a foreign language, the filer must submit instead a fair and accurate English translation of the entire foreign language document, except as provided by paragraph (c)(3) of this section.

(2) If a registration statement or other filing or submission subject to review by the Division of Corporation Finance requires the inclusion of a foreign language document as an exhibit or attachment, the filer must submit a fair and accurate English translation of the foreign language document if consisting of any of the following, or an amendment of any of the following:

(i) Articles of incorporation, memoranda of association, bylaws, and other comparable documents, whether original or restated;

(ii) Instruments defining the rights of security holders, including indentures qualified or to be qualified under the Trust Indenture Act of 1939;

(iii) Voting agreements, including voting trust agreements;

(iv) Contracts to which directors, officers, promoters, voting trustees or security holders named in a registration statement are parties;

(v) Contracts upon which a filer's business is substantially dependent;

(vi) Audited annual and interim consolidated financial information; and

(vii) Any document that is or will be the subject of a confidential treatment request under §230.406 or §240.24b–2 of this chapter.

(3)(i) A filer may submit an English summary instead of an English translation of a foreign language document as an exhibit or attachment to a filing subject to review by the Division of Corporation Finance as long as:

(A) The foreign language document does not consist of any of the subject matter enumerated in paragraph (c)(2) of this section; or

(B) The applicable form permits the use of an English summary.

(ii) Any English summary submitted under paragraph (c)(3) of this section must:

(A) Fairly and accurately summarize the terms of each material provision of the foreign language document; and

(B) Fairly and accurately describe the terms that have been omitted or abridged.

(4) When submitting an English summary or English translation of a foreign language document under this section, a filer must identify the submission as either an English summary or English translation. A filer may submit a copy of the unabridged foreign language document when including an English summary or English translation of a foreign language document in a filing. A filer must provide a copy of any foreign language document upon the request of Commission staff.

(5) A Canadian issuer may file an exhibit or other part of a registration statement on Form F–7, F–8, F–9, F–10, or F–80 (§§239.37, 239.38, 239.39, 239.40, or 239.41 of this chapter), that contains text in both French and English if the issuer included the French text to comply with the requirements of the Canadian securities administrator or other Canadian authority and, for an electronic filing, if the filing is an HTML document, as defined in Regulation S-T Rule 11(§232.11).

(d) The manually signed original (or in the case of duplicate originals, one duplicate original) of all registrations, applications, statements, reports or other documents filed under the Act shall be numbered sequentially (in addition to any internal numbering which otherwise may be present) by handwritten, typed, printed or other legible form of notation from the first page of the document through the last page of that document and any exhibits or attachments thereto. Further, the total number of pages contained in a numbered original shall be set forth on the first page of the document.

[47 FR 11434, Mar. 16, 1982, as amended at 47 FR 58238, Dec. 30, 1982; 67 FR 36698, May 24, 2002]

§ 230.404 Preparation of registration statement.

(a) A registration statement shall consist of the facing sheet of the applicable form; a prospectus containing the information called for by Part I of such form; the information, list of exhibits, undertakings and signatures required to be set forth in Part II of such form; financial statements and schedules; exhibits; any other information or documents filed as part of the registration statement; and all documents or information incorporated by reference in the foregoing (whether or not required to be filed).

(b) All general instructions, instructions to items of the form, and instructions as to financial statements, exhibits, or prospectuses are to be omitted from the registration statement in all cases.

(c) The prospectus shall contain the information called for by all of the items of Part I of the applicable form, except that unless otherwise specified, no reference need be made to inapplicable items, and negative answers to any item in Part I may be omitted. A copy of the prospectus may be filed as a part of the registration statement in lieu of furnishing the information in item-and-answer form. Wherever a copy of the prospectus is filed in lieu of information in item-and-answer form, the text of the items of the form is to be omitted from the registration statement, as well as from the prospectus, except to the extent provided in paragraph (d) of this rule.

(d) Where any items of a form call for information not required to be included in the prospectus, generally Part II of such form, the text of such items, including the numbers and captions thereof, together with the answers thereto shall be filed with the prospectus under cover of the facing sheet of the form as a part of the registration statement. However, the text of such items may be omitted provided the answers are so prepared as to indicate the coverage of the item without the necessity of reference to the text of the item. If any such item is inapplicable, or the answer thereto is in the negative, a statement to that effect shall be made. Any financial statements not required to be included in the prospectus shall also be filed as a part of the registration statement proper, unless incorporated by reference pursuant to Rule 411 (§ 230.411).

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a–37)

[47 FR 11435, Mar. 16, 1982, as amended at 62 FR 39763, July 24, 1997]

§ 230.405 Definitions of terms.

Unless the context otherwise requires, all terms used in §§ 230.400 to 230.494, inclusive, or in the forms for registration have the same meanings as in the Act and in the general rules and regulations. In addition, the following definitions apply, unless the context otherwise requires:

Affiliate. An *affiliate* of, or person *affiliated* with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

Amount. The term *amount,* when used in regard to securities, means the principal amount if relating to evidences of indebtedness, the number of shares if relating to shares, and the number of units if relating to any other kind of security.

Associate. The term *associate,* when used to indicate a relationship with any person, means (1) a corporation or organization (other than the registrant or a majority-owned subsidiary of the registrant) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities, (2) any trust or other estate in which such person has a substantial benefical interest or as to which such person serves as trustee or in a similar capacity, and (3) any relative or spouse

of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of the registrant or any of its parents or subsidiaries.

Business development company. The term *business development company* refers to a company which has elected to be regulated as a business development company under sections 55 through 65 of the Investment Company Act of 1940.

Certified. The term *certified,* when used in regard to financial statements, means examined and reported upon with an opinion expressed by an independent public or certified public accountant.

Charter. The term *charter* includes articles of incorporation, declarations of trust, articles of association or partnership, or any similar instrument, as amended, affecting (either with or without filing with any governmental agency) the organization or creation of an incorporated or unincorporated person.

Common equity. The term *common equity* means any class of common stock or an equivalent interest, including but not limited to a unit of beneficial interest in a trust or a limited partnership interest.

Commission. The term *Commission* means the Securities and Exchange Commission.

Control. The term *control* (including the terms *controlling, controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

Depositary share. The term *depositary share* means a security, evidenced by an American Depositary Receipt, that represents a foreign security or a multiple of or fraction thereof deposited with a depositary.

Director. The term *director* means any director of a corporation or any person performing similar functions with respect to any organization whether incorporated or unincorporated.

Dividend or interest reinvestment plan. The term *dividend or interest reinvestment plan* means a plan which is offered solely to the existing security holders of the registrant, which allows such persons to reinvest dividends or interest paid to them on securities issued by the registrant, and also may allow additional cash amounts to be contributed by the participants in the plan, provided the securities to be registered are newly issued, or are purchased for the account of plan participants, at prices not in excess of current market prices at the time of purchase, or at prices not in excess of an amount determined in accordance with a pricing formula specified in the plan and based upon average or current market prices at the time of purchase.

Electronic filer. The term *electronic filer* means a person or an entity that submits filings electronically pursuant to Rules 100 and 101 of Regulation S–T (§§ 232.100 and 232.101 of this chapter, respectively).

Electronic filing. The term *electronic filing* means a document under the federal securities laws that is transmitted or delivered to the Commission in electronic format.

Employee. The term *employee* does not include a director, trustee, or officer.

Employee benefit plan. The term *employee benefit plan* means any written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan or written compensation contract solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors. However, consultants or advisors may participate in an employee benefit plan only if:

(1) They are natural persons;

(2) They provide *bona fide* services to the registrant; and

(3) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

Equity security. The term *equity security* means any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or

certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.

Executive officer. The term *executive officer,* when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant.

Fiscal year. The term *fiscal year* means the annual accounting period or, if no closing date has been adopted, the calendar year ending on December 31.

Foreign government. The term *foreign government* means the government of any foreign country or of any political subdivision of a foreign country.

Foreign issuer. The term *foreign issuer* means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

Foreign private issuer. The term *foreign private issuer* means any foreign issuer other than a foreign government except an issuer meeting the following conditions:

(1) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and

(2) Any of the following:

(i) The majority of the executive officers or directors are United States citizens or residents;

(ii) More than 50 percent of the assets of the issuer are located in the United States; or

(iii) The business of the issuer is administered principally in the United States.

Instructions to paragraph (1) of this definition: To determine the percentage of outstanding voting securities held by U.S. residents:

A. Use the method of calculating record ownership in Rule 12g3–2(a) under the Exchange Act (§ 240.12g3–2(a) of this chapter), except that your inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in:

(1) The United States,

(2) Your jurisdiction of incorporation, and

(3) The jurisdiction that is the primary trading market for your voting securities, if different than your jurisdiction of incorporation.

B. If, after reasonable inquiry, you are unable to obtain information about the amount of shares represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

C. Count shares of voting securities beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you.

Graphic communication. The term *graphic communication,* which appears in the definition of ''write, written'' in Section 2(9) of the Securities Act, shall include magnetic impulses or other forms of computer data compilation.

Majority-owned subsidiary. The term *majority-owned subsidiary* means a subsidiary more than 50 percent of whose outstanding securities representing the right, other than as affected by events of default, to vote for the election of directors, is owned by the subsidiary's parent and/or one or more of the parent's other majority-owned subsidiaries.

Material. The term *material,* when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.

Officer. The term *officer* means a president, vice president, secretary,

treasurer or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.

Parent. A *parent* of a specified person is an affiliate controlling such person directly, or indirectly through one or more intermediaries.

Predecessor. The term *predecessor* means a person the major portion of the business and assets of which another person acquired in a single succession, or in a series of related successions in each of which the acquiring person acquired the major portion of the business and assets of the acquired person.

Principal underwriter. The term *principal underwriter* means an underwriter in privity of contract with the issuer of the securities as to which he is underwriter, the term *issuer* having the meaning given in sections 2(4) and 2(11) of the Act.

Promoter. (1) The term *promoter* includes:

(i) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer; or

(ii) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

(2) All persons coming within the definition of *promoter* in paragraph (1) of this definition may be referred to as *founders* or *organizers* or by another term provided that such term is reasonably descriptive of those persons' activities with respect to the issuer.

Prospectus. Unless otherwise specified or the context otherwise requires, the term *prospectus* means a prospectus meeting the requirements of section 10(a) of the Act.

Registrant. The term *registrant* means the issuer of the securities for which the registration statement is filed.

Share. The term *share* means a share of stock in a corporation or unit of interest in an unincorporated person.

Significant subsidiary. The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the following conditions:

(1) The registrant's and its other subsidiaries' investments in and advances to the subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year (for a proposed business combination to be accounted for as a pooling of interests, this condition is also met when the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated); or

(2) The registrant's and its other subsidiaries' proportionate share of the total assets (after intercompany eliminations) of the subsidiary exceeds 10 percent of the total assets of the registrants and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(3) The registrant's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principle of the subsidiary exceeds 10 percent of such income of the registrant and its subsidiaries consolidated for the most recently completed fiscal year.

COMPUTATIONAL NOTE. For purposes of making the prescribed income test the following guidance should be applied:

1. When a loss has been incurred by either the parent and its subsidiaries consolidated or the tested subsidiary, but not both, the equity in the income or loss of the tested subsidiary should be excluded from the income of the registrant and its subsidiaries consolidated for purposes of the computation.

2. If income of the registrant and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

Small Business Issuer. The term ''small business issuer'' means an entity that meets the following criteria:

(1) Has revenues of less than $25,000,000;

(2) Is a U.S. or Canadian issuer;

(3) Is not an investment company; and

(4) If a majority owned subsidiary, the parent corporation is also a small business issuer.

Provided however, that an entity is not a small business issuer if it has a public float (the aggregate market value of the outstanding voting and non-voting common equity held by non-affiliates) of $25,000,000 or more.

NOTE: The public float of a reporting company shall be computed by use of the price at which the stock was last sold, or the average of the bid and asked prices of such stock, on a date within 60 days prior to the end of its most recent fiscal year. The public float of a company filing an initial registration statement under the Exchange Act shall be determined as of a date within 60 days of the date the registration statement is filed.

In the case of an initial public offering of securities, public float shall be computed on the basis of the number of shares outstanding prior to the offering and the estimated public offering price of the securities.

Subsidiary. A *subsidiary* of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries. (See also *majority owned subsidiary, significant subsidiary, totally held subsidiary,* and *wholly owned subsidiary.*)

Succession. The term *succession* means the direct acquisition of the assets comprising a going business, whether by merger, consolidation, purchase, or other direct transfer. The term does not include the acquisition of control of a business unless followed by the direct acquisition of its assets. The terms *succeed* and *successor* have meanings correlative to the foregoing.

Totally held subsidiary. The term *totally held subsidiary* means a subsidiary (1) substantially all of whose outstanding securities are owned by its parent and/or the parent's other totally held subsidiaries, and (2) which is not indebted to any person other than its parent and/or the parent's other totally held subsidiaries in an amount which is material in relation to the particular subsidiary, excepting indebtedness incurred in the ordinary course of business which is not overdue and which matures within one year from the date of its creation, whether evidenced by securities or not.

Voting securities. The term *voting securities* means securities the holders of which are presently entitled to vote for the election of directors.

Wholly owned subsidiary. The term *wholly owned subsidiary* means a subsidiary substantially all of whose outstanding voting securities are owned by its parent and/or the parent's other wholly owned subsidiaries.

[47 FR 11435, Mar. 16, 1982, as amended at 47 FR 29840, July 9, 1982; 47 FR 39803, Sept. 10, 1982; 47 FR 54770, Dec. 6, 1982; 48 FR 12347, Mar. 24, 1983; 48 FR 46738, Oct. 14, 1983; 50 FR 25216, June 18, 1985; 55 FR 23923, June 13, 1990; 57 FR 36472, Aug. 13, 1992; 58 FR 14669, 14670, Mar. 18, 1993; 59 FR 67761, Dec. 30, 1994; 62 FR 26388, May 14, 1997; 62 FR 36456, July 8, 1997; 64 FR 11116, Mar. 8, 1999; 64 FR 53909, Oct. 5, 1999; 67 FR 19673, April 23, 2002]

§ 230.406 Confidential treatment of information filed with the Commission.

PRELIMINARY NOTES: (1) Confidential treatment of supplemental information or other information not required to be filed under the Act should be requested under 17 CFR 200.83 and not under this rule.

(2) All confidential treatment requests shall be submitted in paper format only, whether or not the filer is an electronic filer. *See* Rule 101(c)(1)(i) of Regulation S–T (§ 232.101(c)(1)(i) of this chapter).

(a) Any person submitting any information in a document required to be filed under the Act may make written objection to its public disclosure by following the procedure in paragraph (b) of this section, which shall be the exclusive means of requesting confidential treatment of information included in any document (hereinafter referred to as the *material filed*) required to be filed under the Act, *except*

that if the material filed is a registration statement on Form S–8 (§239.16b of this chapter) or on Form S–3, F–2, F–3 (§239.13, §239.32 or §239.33 of this chapter) relating to a dividend or interest reinvestment plan, or on Form S–4 (§239.25 of this chapter) complying with General Instruction G of that Form or if the material filed is a registration statement that does not contain a delaying amendment pursuant to Rule 473 (§230.473 of this chapter), the person shall comply with the procedure in paragraph (b) *prior* to the filing of a registration statement.

(b) The person shall omit from the material filed the portion thereof which it desires to keep undisclosed (hereinafter called the *confidential portion*). In lieu thereof, the person shall indicate at the appropriate place in the material filed that the confidential portion has been so omitted and filed separately with the Commission. The person shall file with the material filed:

(1) One copy of the confidential portion, marked ''Confidential Treatment,'' of the material filed with the Commission. The copy shall contain an appropriate identification of the item or other requirement involved and, notwithstanding that the confidential portion does not constitute the whole of the answer or required disclosure, the entire answer or required disclosure, except that in the case where the confidential portion is part of a financial statement or schedule, only the particular financial statement or schedule need be included. The copy of the confidential portion shall be in the same form as the remainder of the material filed;

(2) An application making objection to the disclosure of the confidential portion. Such application shall be on a sheet or sheets separate from the confidential portion, and shall contain:

(i) An identification of the portion;

(ii) A statement of the grounds of the objection referring to and analyzing the applicable exemption(s) from disclosure under §200.80 of this chapter, the Commission's rule adopted under the Freedom of Information Act (5 U.S.C. 552), and a justification of the period of time for which confidential treatment is sought;

(iii) A detailed explanation of why, based on the facts and circumstances of the particular case, disclosure of the information is unnecessary for the protection of investors;

(iv) A written consent to the furnishing of the confidential portion to other government agencies, offices, or bodies and to the Congress; and

(v) The name, address and telephone number of the person to whom all notices and orders issued under this rule at any time should be directed.

(3) The copy of the confidential portion and the application filed in accordance with this paragraph (b) shall be enclosed in a separate envelope marked ''Confidential Treatment'' and addressed to The Secretary, Securities and Exchange Commission, Washington, DC 20549.

(c) Pending a determination as to the objection, the material for which confidential treatment has been applied will not be made available to the public.

(d) If it is determined by the Division, acting pursuant to delegated authority, that the application should be granted, an order to that effect will be entered, and a notation to that effect will be made at the appropriate place in the material filed. Such a determination will not preclude reconsideration whenever appropriate, such as upon receipt of any subsequent request under the Freedom of Information Act and, if appropriate, revocation of the confidential status of all or a portion of the information in question.

(e) If the Commission denies the application, or the Division, acting pursuant to delegated authority, denies the application and Commission review is not sought pursuant to §201.431 of this chapter, confirmed telegraphic notice of the order of denial will be sent to the person named in the application pursuant to paragraph (b)(2)(v) of this section. In such case, if the material filed may be withdrawn pursuant to an applicable statute, rule, or regulation, the registrant shall have the right to withdraw the material filed in accordance with the terms of the applicable statute, rule, or regulation, but without the necessity of stating any

grounds for the withdrawal or of obtaining the further assent of the Commission. In the event of such withdrawal, the confidential portion will be returned to the registrant. If the material filed may not be so withdrawn, the confidential portion will be made available for public inspection in the same manner as if confidential treatment had been revoked under paragraph (h) of this section.

(f) If a right of withdrawal pursuant to paragraph (e) of this section is not exercised, the confidential portion will be made available for public inspection as part of the material filed, and the registrant shall amend the material filed to include all information required to be set forth in regard to such confidential portion.

(g) In any case where a prior grant of confidential treatment has been revoked, the person named in the application pursuant to paragraph (b)(2)(v) of this section will be so informed by registered or certified mail. Pursuant to § 201.431 of this chapter, persons making objection to disclosure may petition the Commission for review of a determination by the Division revoking confidential treatment.

(h) Upon revocation of confidential treatment, the confidential portion shall be made available to the public at the time and according to the conditions specified in paragraphs (h) (1)–(2):

(1) Upon the lapse of five days after the dispatch of notice by registered or certified mail of a determination disallowing an objection, if prior to the lapse of such five days the person shall not have communicated to the Secretary of the Commission his intention to seek review by the Commission under § 201.431 of this chapter of the determination made by the Division; or

(2) If such a petition for review shall have been filed under § 201.431 of this chapter, upon final disposition adverse to the petitioner.

(i) If the confidential portion is made available to the public, one copy thereof shall be attached to each copy of the material filed with the Commission.

[49 FR 13336, Apr. 4, 1984, as amended at 50 FR 19000, May 6, 1985; 58 FR 14669, 14670, Mar. 18, 1993; 60 FR 32824, June 23, 1995; 60 FR 47692, Sept. 14, 1995; 61 FR 30402, June 14, 1996]

§ 230.408 Additional information.

In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

[Reg. C, 12 FR 4072, June 24, 1947]

§ 230.409 Information unknown or not reasonably available.

Information required need be given only insofar as it is known or reasonably available to the registrant. If any required information is unknown and not reasonably available to the registrant, either because the obtaining thereof could involve unreasonable effort or expense, or because it rests peculiarly within the knowledge of another person not affiliated with the registrant, the information may be omitted, subject to the following conditions:

(a) The registrant shall give such information on the subject as it possesses or can acquire without unreasonable effort or expense, together with the sources thereof.

(b) The registrant shall include a statement either showing that unreasonable effort or expense would be involved or indicating the absence of any affiliation with the person within whose knowledge the information rests and stating the result of a request made to such person for the information.

[Reg. C, 12 FR 4072, June 24, 1947, as amended at 14 FR 91, Jan. 7, 1949]

§ 230.410 Disclaimer of control.

If the existence of control is open to reasonable doubt in any instance, the registrant may disclaim the existence

of control and any admission thereof; in such case, however, the registrant shall state the material facts pertinent to the possible existence of control.

[Reg. C, 12 FR 4073, June 24, 1947]

§230.411 Incorporation by reference.

(a) *Prospectus.* Except as provided by this section or unless otherwise provided in the appropriate form, information shall not be incorporated by reference in a prospectus. Where a summary or outline of the provisions of any document is required in the prospectus, the summary or outline may incorporate by reference particular items, sections or paragraphs of any exhibit and may be qualified in its entirety by such reference.

(b) *Information not required in a prospectus.* Except for exhibits covered by paragraph (c) of this section, information may be incorporated by reference in answer, or partial answer, to any item that calls for information not required to be included in a prospectus subject to the following provisions:

(1) Non-financial information may be incorporated by reference to any document;

(2) Financial information may be incorporated by reference to any document, provided any financial statement so incorporated meets the requirements of the forms on which the statement is filed. Financial statements or other financial data required to be given in comparative form for two or more fiscal years or periods shall not be incorporated by reference unless the information incorporated by reference includes the entire period for which the comparative data is given;

(3) Information contained in any part of the registration statement, including the prospectus, may be incorporated by reference in answer, or partial answer, to any item that calls for information not required to be included in the prospectus; and

(4) Unless the information is incorporated by reference to a document which complies with the time limitations of §228.10(f) and §229.10(d) of this chapter, then the document, or part thereof, containing the incorporated information is required to be filed as an exhibit.

(c) *Exhibits.* Any document or part thereof filed with the Commission pursuant to any Act administered by the Commission may, subject to the limitations of §228.10(f) and §229.11(d) of this chapter, be incorporated by reference as an exhibit to any registration statement. If any modification has occurred in the text of any document incorporated by reference since the filing thereof, the registrant shall file with the reference a statement containing the text of such modification and the date thereof.

(d) *General.* Any incorporation by reference of information pursuant to this section shall be subject to the provisions of Rule 24 of the Commission's Rules of Practice restricting incorporation by reference of documents which incorporate by reference other information. Information incorporated by reference shall be clearly identified in the reference by page, paragraph, caption or otherwise. If the information is incorporated by reference to a previously filed document, the file number of such document shall be included. Where only certain pages of a document are incorporated by reference and filed with the statement, the document from which the information is taken shall be clearly identified in the reference. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the registration statement where the information is required. Information shall not be incorporated by reference in any case where such incorporation would render the statement incomplete, unclear or confusing.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11437, Mar. 16, 1982, as amended at 60 FR 32824, June 23, 1995]

§ 230.412 Modified or superseded documents.

(a) Any statement contained in a document incorporated or deemed to be incorporated by reference shall be deemed to be modified or superseded for purposes of the registration statement or the prospectus to the extent that a statement contained in the prospectus or in any other subsequently filed document which also is or is deemed to be incorporated by reference modifies or replaces such statement.

(b) The modifying or superseding statement may, but need not, state that it has modified or superseded a prior statement or include any other information set forth in the document which is not so modified or superseded. The making of a modifying or superseding statement shall not be deemed an admission that the modified or superseded statement, when made, constituted an untrue statement of a material fact, an omission to state a material fact necessary to make a statement not misleading, or the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business or artifice to defraud, as those terms are used in the Act, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Investment Company Act of 1940, or the rules and regulations thereunder.

(c) Any statement so modified shall not be deemed in its unmodified form to constitute part of the registration statement or prospectus for purpose of the Act. Any statement so superseded shall not be deemed to constitute a part of the registration statement or the prospectus for purposes of the Act.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11438, Mar. 16, 1982]

§ 230.413 Registration of additional securities.

Except as provided in sections 24(e)(1) and 24(f) of the Investment Company Act of 1940, the registration of additional securities of the same class as other securities for which a registration statement is already in effect shall be effected through a separate registration statement relating to the additional securities.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11438, Mar. 16, 1982]

§ 230.414 Registration by certain successor issuers.

If any issuer, except a foreign issuer exempted by Rule 3a12–3 (17 CFR 240.3a12–3), incorporated under the laws of any State or foreign government and

having securities registered under the Act has been succeeded by an issuer incorporated under the laws of another State or foreign government for the purpose of changing the State or country of incorporation of the enterprises, or if any issuer has been succeeded by an issuer for the purpose of changing its form of organization, the registration statement of the predecessor issuer shall be deemed the registration statement of the successor issuer for the purpose of continuing the offering provided:

(a) Immediately prior to the succession the successor issuer had no assets or liabilities other than nominal assets or liabilities;

(b) The succession was effected by a merger or similar succession pursuant to statutory provisions or the terms of the organic instruments under which the successor issuer acquired all of the assets and assumed all of the liabilities and obligations of the predecessor issuer;

(c) The succession was approved by security holders of the predecessor issuer at a meeting for which proxies were solicited pursuant to section 14(a) of the Securities Exchange Act of 1934 or section 20(a) of the Investment Company Act of 1940 or information was furnished to security holders pursuant to section 14(c) of the Securities Exchange Act of 1934; and

(d) The successor issuer has filed an amendment to the registration statement of the predecessor issuer expressly adopting such statements as its own registration statement for all purposes of the Act and the Securities Exchange Act of 1934 and setting forth any additional information necessary to reflect any material changes made in connection with or resulting from the succession, or necessary to keep the registration statement from being misleading in any material respect, and such amendment has become effective.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11438, Mar. 16, 1982]

§ 230.415 Delayed or continuous offering and sale of securities.

(a) Securities may be registered for an offering to be made on a continuous or delayed basis in the future, *Provided*, That:

(1) The registration statement pertains only to:

(i) Securities which are to be offered or sold solely by or on behalf of a person or persons other than the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary;

(ii) Securities which are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the registrant;

(iii) Securities which are to be issued upon the exercise of outstanding options, warrants or rights;

(iv) Securities which are to be issued upon conversion of other outstanding securities;

(v) Securities which are pledged as collateral;

(vi) Securities which are registered on Form F–6 (§ 239.36 of this chapter);

(vii) Mortgage related securities, including such securities as mortgage backed debt and mortgage participation or pass through certificates;

(viii) Securities which are to be issued in connection with business combination transactions;

(ix) Securities the offering of which will be commenced promptly, will be made on a continuous basis and may continue for a period in excess of 30 days from the date of initial effectiveness;

(x) Securities registered (or qualified to be registered) on Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) which are to be offered and sold on a continuous or delayed basis by or on behalf of the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary; or

(xi) Shares of common stock which are to be offered and sold on a delayed or continuous basis by or on behalf of a registered closed-end management investment company or business development company that makes periodic repurchase offers pursuant to § 270.23c–3 of this chapter.

(2) Securities in paragraphs (a)(1)(viii) through (x) may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration.

(3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S–K (§ 229.512 of this chapter).

(4) In the case of a registration statement pertaining to an at the market offering of equity securities by or on behalf of the registrant:

(i) The offering comes within paragraph (a)(1)(x);

(ii) Where voting stock is registered, the amount of securities registered for such purposes must not exceed 10% of the aggregate market value of the registrant's outstanding voting stock held by non-affiliates of the registrant (calculated as of a date within 60 days prior to the date of filing);

(iii) The securities must be sold through an underwriter or underwriters, acting as principal(s) or as agent(s) for the registrant; and

(iv) The underwriter or underwriters must be named in the prospectus which is part of the registration statement.

As used in this paragraph, the term *at the market offering* means an offering of securities into an existing trading market for outstanding shares of the same class at other than a fixed price on or through the facilities of a national securities exchange or to or through a market maker otherwise than on an exchange.

(b) This section shall not apply to any registration statement pertaining to securities issued by a face-amount certificate company or redeemable securities issued by an open-end management company or unit investment trust under the Investment Company Act of 1940 or any registration statement filed by any foreign government or political subdivision thereof.

(Secs. 6, 7, 10, 19(a), 48 Stat 78, 81, 85; secs. 205 209, 48 Stat. 906, 908; sec. 8. 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; 15 U.S.C. 77f, 77g, 77j, 77s(a))

[48 FR 52896, Nov. 23, 1983, as amended at 59 FR 43470, Aug. 24, 1994]

§ 230.416 Securities to be issued as a result of stock splits, stock dividends and anti-dilution provisions and interests to be issued pursuant to certain employee benefit plans.

(a) If a registration statement purports to register securities to be offered pursuant to terms which provide for a change in the amount of securities being offered or issued to prevent dilution resulting from stock splits, stock dividends, or similar transactions, such registration statement shall, unless otherwise expressly provided, be deemed to cover the additional securities to be offered or issued in connection with any such provision.

(b) If prior to completion of the distribution of the securities covered by a registration statement, additional securities of the same class are issued or issuable as a result of a stock split or stock dividend, the registration statement shall, unless otherwise expressly provided therein, be deemed to cover such additional securities resulting from the split of, or the stock dividend on, the registered securities. If prior to completion of the distribution of the securities covered by a registration statement, all the securities of a class which includes the registered securities are combined by a reverse split into a lesser amount of securities of the same class, the amount of undistributed securities of such class

deemed to be covered by the registration statement shall be proportionately reduced. If paragraph (a) of this section is not applicable, the registration statement shall be amended prior to the offering of such additional or lesser amount of securities to reflect the change in the amount of securities registered.

(c) Where a registration statement on Form S–8 relates to securities to be offered pursuant to an employee benefit plan, including interests in such plan that constitute separate securities required to be registered under the Act, such registration statement shall be deemed to register an indeterminate amount of such plan interests.

[30 FR 13824, Oct. 30, 1965, as amended at 55 FR 23923, June 13, 1990]

§ 230.417 Date of financial statements.

Whenever financial statements of any person are required to be furnished as of a date within a specified period prior to the date of filing the registration statement and the last day of such period falls on a Saturday, Sunday, or holiday, such registration statement may be filed on the first business day following the last day of the specified period.

[22 FR 2328, Apr. 9, 1957]

§ 230.418 Supplemental information.

(a) The Commission or its staff may, where it is deemed appropriate, request supplemental information concerning the registrant, the registration statement, the distribution of the securities, market activities and underwriters' activities. Such information includes, but is not limited to, the following items which the registrant should be prepared to furnish promptly upon request:

(1)(i) Any reports or memoranda which have been prepared for external use by the registrant or a principal underwriter, as defined in Rule 405 (§ 230.405), in connection with the proposed offering;

(ii) A statement as to the actual or proposed use and distribution of the reports or memoranda specified in paragraph (a)(1)(i) of this section, identifying each class of persons who have received or will receive such reports or memoranda and the number of copies distributed to each such class;

(2) In the case of a registration statement relating to a business combination as defined in Rule 145(a) (17 CFR 230.145(a)), exchange offer, tender offer or similar transaction, any feasibility studies, management analyses, fairness opinions or similar reports prepared by or for any of the parties to the subject transaction in connection with such transaction;

(3) Except in the case of a registrant eligible to use Form S–2 or Form S–3 (§§ 239.12 or 239.13 of this chapter), any engineering, management or similar reports or memoranda relating to broad aspects of the business, operations or products of the registrant, which have been prepared within the past twelve months for or by the registrant, any affiliate of the registrant or any principal underwriter, as defined in Rule 405 (§ 230.405), of the securities being registered except for:

(i) Reports solely comprised of recommendations to buy, sell or hold the securities of the registrant, unless such recommendations have changed within the past six months; and

(ii) Any information contained in documents already filed with the Commission.

(4) Where there is a registration of an at–the–market offering, as defined in § 242.100 of this chapter, of more than 10 percent of the securities outstanding, where the offering includes securities owned by officers, directors or affiliates of the registrant and where there is no underwriting agreement, information (i) concerning contractual arrangements between selling security holders of a limited group or of several groups of related shareholders to comply with the anti-manipulation rules until the offering by all members of the group is completed and to inform the exchange, brokers and selling security holders when the distribution by the members of the group is over; or (ii) concerning the registrant's efforts to notify members of a large group of unrelated sellers of the applicable Commission rules and regulations;

(5) Where the registrant recently has introduced a new product or has begun to do business in a new industry segment or has made public its intentions

to introduce a new product or to do business in a new industry segment, and this action requires the investment of a material amount of the assets of the registrant or otherwise is material, copies of any studies prepared for the registrant by outside persons or any internal studies, documents, reports or memoranda the contents of which were material to the decision to develop the product or to do business in the new segment including, but not limited to, documents relating to financial requirements and engineering, competitive, environmental and other considerations, but excluding technical documents;

(6) Where reserve estimates are referred to in a document, a copy of the full report of the engineer or other expert who estimated the reserves; and

(7) With respect to the extent of the distribution of a preliminary prospectus, information concerning:

(i) The date of the preliminary prospectus distributed;

(ii) The dates or approximate dates of distribution;

(iii) The number of prospective underwriters and dealers to whom the preliminary prospectus was furnished;

(iv) The number of prospectuses so distributed;

(v) The number of prospectuses distributed to others, identifying them in general terms; and

(vi) The steps taken by such underwriters and dealers to comply with the provisions of Rule 15c2–8 under the Securities Exchange Act of 1934 (§ 240.15c2–8 of this chapter).

(b) Supplemental information described in paragraph (a) of this section shall not be required to be filed with or deemed part of the registration statement. The information shall be returned to the registrant upon request, provided that:

(1) Such request is made at the time such information is furnished to the staff;

(2) The return of such information is consistent with the protection of investors;

(3) The return of such information is consistent with the provisions of the Freedom of Information Act [5 U.S.C. 552]; and

(4) The information was not filed in electronic format.

[47 FR 11439, Mar. 16, 1982, as amended at 58 FR 14669, 14670, Mar. 18, 1993; 62 FR 543, Jan. 3, 1997]

§ 230.419 Offerings by blank check companies.

(a) *Scope of the rule and definitions.* (1) The provisions of this section shall apply to every registration statement filed under the Act relating to an offering by a blank check company.

(2) For purposes of this section, the term ''blank check company'' shall mean a company that:

(i) Is a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person; and

(ii) Is issuing ''penny stock,'' as defined in Rule 3a51–1 (17 CFR 240.3a51–1) under the Securities Exchange Act of 1934 (''Exchange Act'').

(3) For purposes of this section, the term ''purchaser'' shall mean any person acquiring securities directly or indirectly in the offering, for cash or otherwise, including promoters or others receiving securities as compensation in connection with the offering.

(b) *Deposit of securities and proceeds in escrow or trust account*—(1) *General.* (i) Except as otherwise provided in this section or prohibited by other applicable law, all securities issued in connection with an offering by a blank check company and the gross proceeds from the offering shall be deposited promptly into:

(A) An escrow account maintained by an ''insured depository institution,'' as that term is defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(C)(2)); or

(B) A separate bank account established by a broker or dealer registered under the Exchange Act maintaining net capital equal to or exceeding $25,000 (as calculated pursuant to Exchange Act Rule 15c3–1 (17 CFR 240.15c3–1), in which the broker or dealer acts as trustee for persons having the beneficial interests in the account.

(ii) If funds and securities are deposited into an escrow account maintained

by an insured depository institution, the deposit account records of the insured depository institution must provide that funds in the escrow account are held for the benefit of the purchasers named and identified in accordance with 12 CFR 330.1 of the regulations of the Federal Deposit Insurance Corporation, and the records of the escrow agent, maintained in good faith and in the regular course of business, must show the name and interest of each party to the account. If funds and securities are deposited in a separate bank account established by a broker or dealer acting as a trustee, the books and records of the broker-dealer must indicate the name, address, and interest of each person for whom the account is held.

(2) *Deposit and investment of proceeds.* (i) All offering proceeds, after deduction of cash paid for underwriting commissions, underwriting expenses and dealer allowances, and amounts permitted to be released to the registrant pursuant to paragraph (b)(2)(vi) of this section, shall be deposited promptly into the escrow or trust account; *provided, however,* that no deduction may be made for underwriting commissions, underwriting expenses or dealer allowances payable to an affiliate of the registrant.

(ii) Deposited proceeds shall be in the form of checks, drafts, or money orders payable to the order of the escrow agent or trustee.

(iii) Deposited proceeds and interest or dividends thereon, if any, shall be held for the sole benefit of the purchasers of the securities.

(iv) Deposited proceeds shall be invested in one of the following:

(A) An obligation that constitutes a ''deposit,'' as that term is defined in section 3(*1*) of the Federal Deposit Insurance Act (12 U.S.C. 1813 (*1*));

(B) Securities of any open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) that holds itself out as a money market fund meeting the conditions of paragraphs (c)(2), (c)(3), and (c)(4) of 17 CFR 270.2a–7 (Rule 2a–7) under the Investment Company Act; or

(C) Securities that are direct obligations of, or obligations guaranteed as to principal or interest by, the United States.

NOTE TO §230.419(B)(2)(IV): Issuers are cautioned that investments in government securities are inappropriate unless such securities can be readily sold or otherwise disposed of for cash at the time required without any dissipation of offering proceeds invested.

(v) Interest or dividends earned on the funds, if any, shall be held in the escrow or trust account until the funds are released in accordance with the provisions of this section. If funds held in the escrow or trust account are released to a purchaser of the securities, the purchasers shall receive interest or dividends earned, if any, on such funds up to the date of release. If funds held in the escrow or trust account are released to the registrant, interest or dividends earned on such funds up to the date of release may be released to the registrant.

(vi) The registrant may receive up to 10 percent of the proceeds remaining after payment of underwriting commissions, underwriting expenses and dealer allowances permitted by paragraph (b)(2)(i) of this section, exclusive of interest or dividends, as those proceeds are deposited into the escrow or trust account.

(3) *Deposit of securities.* (i) All securities issued in connection with the offering, whether or not for cash consideration, and any other securities issued with respect to such securities, including securities issued with respect to stock splits, stock dividends, or similar rights, shall be deposited directly into the escrow or trust account promptly upon issuance. The identity of the purchaser of the securities shall be included on the stock certificates or other documents evidencing such securities. See also 17 CFR 240.15g–8 regarding restrictions on sales of, or offers to sell, securities deposited in the escrow or trust account.

(ii) Securities held in the escrow or trust account are to remain as issued and deposited and shall be held for the sole benefit of the purchasers, who shall have voting rights, if any, with respect to securities held in their names, as provided by applicable state law. No transfer or other disposition of securities held in the escrow or trust account or any interest related to such

securities shall be permitted other than by will or the laws of descent and distribution, or pursuant to a qualified domestic relations order as defined by the Internal Revenue Code of 1986 as amended (26 U.S.C. 1 *et seq.*), or Title 1 of the Employee Retirement Income Security Act (29 U.S.C. 1001 *et seq.*), or the rules thereunder.

(iii) Warrants, convertible securities or other derivative securities relating to securities held in the escrow or trust account may be exercised or converted in accordance with their terms; *provided, however,* that securities received upon exercise or conversion, together with any cash or other consideration paid in connection with the exercise or conversion, are promptly deposited into the escrow or trust account.

(4) *Escrow or trust agreement.* A copy of the executed escrow or trust agreement shall be filed as an exhibit to the registration statement and shall contain the provisions of paragraphs (b)(2), (b)(3), and (e)(3) of this section.

(5) Request for supplemental information. Upon request by the Commission or the staff, the registrant shall furnish as supplemental information the names and addresses of persons for whom securities are held in the escrow or trust account.

NOTE TO § 230.419(B): With respect to a blank check offering subject to both Rule 419 and Exchange Act Rule 15c2–4 (17 CFR 240.15c2–4, the requirements of Rule 15c2–4 are applicable only until the conditions of the offering governed by that Rule are met (*e.g.*, reaching the minimum in a ''part-or-none'' offering). When those conditions are satisfied, Rule 419 continues to govern the use of offering proceeds.

(c) *Disclosure of offering terms.* The initial registration statement shall disclose the specific terms of the offering, including, but not limited to:

(1) The terms and provisions of the escrow or trust agreement and the effect thereof upon the registrant's right to receive funds and the effect of the escrow or trust agreement upon the purchaser's funds and securities required to be deposited into the escrow or trust account, including, if applicable, any material risk of non-insurance of purchasers' funds resulting from deposits in excess of the insured amounts; and

(2) The obligation of the registrant to provide, and the right of the purchaser to receive, information regarding an acquisition, including the requirement that pursuant to this section, purchasers confirm in writing their investment in the registrant's securities as specified in paragraph (e) of this section.

(d) *Probable acquisition post-effective amendment requirement.* If, during any period in which offers or sales are being made, a significant acquisition becomes probable, the registrant shall file promptly a post-effective amendment disclosing the information specified by the applicable registration statement form and Industry Guides, including financial statements of the registrant and the company to be acquired as well as pro forma financial information required by the form and applicable rules and regulations. Where warrants, rights or other derivative securities issued in the initial offering are exercisable, there is a continuous offering of the underlying security.

(e) *Release of deposited and funds securities*—(1) *Post-effective amendment for acquisition agreement.* Upon execution of an agreement(s) for the acquisition(s) of a business(es) or assets that will constitute the business (or a line of business) of the registrant and for which the fair value of the business(es) or net assets to be acquired represents at least 80 percent of the maximum offering proceeds, including proceeds received or to be received upon the exercise or conversion of any securities offered, but excluding amounts payable to non-affiliates for underwriting commissions, underwriting expenses, and dealer allowances, the registrant shall file a post-effective amendment that:

(i) Discloses the information specified by the applicable registration statement form and Industry Guides, including financial statements of the registrant and the company acquired or to be acquired and pro forma financial information required by the form and applicable rules and regulations;

(ii) Discloses the results of the initial offering, including but not limited to:

(A) The gross offering proceeds received to date, specifying the amounts

paid for underwriter commissions, underwriting expenses and dealer allowances, amounts disbursed to the registrant, and amounts remaining in the escrow or trust account; and

(B) The specific amount, use and application of funds disbursed to the registrant to date, including, but not limited to, the amounts paid to officers, directors, promoters, controlling shareholders or affiliates, either directly or indirectly, specifying the amounts and purposes of such payments; and

(iii) Discloses the terms of the offering as described pursuant to paragraph (e)(2) of this section.

(2) *Terms of the offering.* The terms of the offering must provide, and the registrant must satisfy, the following conditions.

(i) Within five business days after the effective date of the post-effective amendment(s), the registrant shall send by first class mail or other equally prompt means, to each purchaser of securities held in escrow or trust, a copy of the prospectus contained in the post-effective amendment and any amendment or supplement thereto;

(ii) Each purchaser shall have no fewer than 20 business days and no more than 45 business days from the effective date of the post-effective amendment to notify the registrant in writing that the purchaser elects to remain an investor. If the registrant has not received such written notification by the 45th business day following the effective date of the post-effective amendment, funds and interest or dividends, if any, held in the escrow or trust account shall be sent by first class mail or other equally prompt means to the purchaser within five business days;

(iii) The acquisition(s) meeting the criteria set forth in paragraph (e)(1) of this section will be consummated if a sufficient number of purchasers confirm their investments; and

(iv) If a consummated acquisition(s) meeting the requirements of this section has not occurred by a date 18 months after the effective date of the initial registration statement, funds held in the escrow or trust account shall be returned by first class mail or equally prompt means to the purchaser within five business days following that date.

(3) *Conditions for release of deposited securities and funds.* Funds held in the escrow or trust account may be released to the registrant and securities may be delivered to the purchaser or other registered holder identified on the deposited securities only at the same time as or after:

(i) The escrow agent or trustee has received a signed representation from the registrant, together with other evidence acceptable to the escrow agent or trustee, that the requirements of paragraphs (e)(1) and (e)(2) of this section have been met; and

(ii) Consummation of an acquisition(s) meeting the requirements of paragraph (e)(2)(iii) of this section.

(4) *Prospectus supplement.* If funds and securities are released from the escrow or trust account to the registrant pursuant to this paragraph, the prospectus shall be supplemented to indicate the amount of funds and securities released and the date of release.

NOTES TO §230.419(E): 1. With respect to a blank check offering subject to both Rule 419 and Exchange Act Rule 10b–9 (17 CFR 240.10b–9), the requirements of Rule 10b–9 are applicable only until the conditions of the offering governed by that Rule are met (*e.g.*, reaching the minimum in a ''part-or-none'' offering). When those conditions are satisfied, Rule 419 continues to govern the use of offering proceeds.

2. If the business(es) or assets are acquired for cash, the fair value shall be presumed to be equal to the cash paid. If all or part of the consideration paid consists of securities or other non-cash consideration, the fair value shall be determined by an accepted standard, such as bona fide sales of the assets or similar assets made within a reasonable time, forecasts of expected cash flows, independent appraisals, etc. Such valuation must be reasonable at the time made.

(f) *Financial statements.* The registrant shall:

(1) Furnish to security holders audited financial statements for the first full fiscal year of operations following consummation of an acquisition pursuant to paragraph (e) of this section, together with the information required by Item 303(a) of Regulation S–K (17 CFR 229.303(a)), no later than 90 days after the end of such fiscal year; and

(2) File the financial statements and additional information with the Commission under cover of Form 8–K (17 CFR 249.308); *provided, however,* that such financial statements and related information need not be filed separately if the registrant is filing reports pursuant to Section 13(a) or 15(d) of the Exchange Act.

[57 FR 18043, Apr. 28, 1992]

FORM AND CONTENT OF PROSPECTUSES

§ 230.420 Legibility of prospectus.

(a) The body of all printed prospectuses and all notes to financial statements and other tabular data included therein shall be in roman type at least as large and as legible as 10-point modern type. However, (a) to the extent necessary for convenient presentation, financial statements and other tabular data, including tabular data in notes, and (b) prospectuses deemed to be omitting prospectuses under rule 482 (17 CFR 230.482) may be in roman type at least as large and as legible as 8-point modern type. All such type shall be leaded at least 2 points.

(b) Where a prospectus is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents, such as paper size, type size and font, bold-face type, italics and red ink, by presenting all required information in a format readily communicated to investors, and where indicated, in a manner reasonably calculated to draw investor attention to specific information.

[53 FR 3878, Feb. 10, 1988, as amended at 61 FR 24655, May 15, 1996]

§ 230.421 Presentation of information in prospectuses.

(a) The information required in a prospectus need not follow the order of the items or other requirements in the form. Such information shall not, however, be set forth in such fashion as to obscure any of the required information or any information necessary to keep the required information from being incomplete or misleading. Where an item requires information to be given in a prospectus in tabular form it shall be given in substantially the tabular form specified in the item.

(b) You must present the information in a prospectus in a clear, concise and understandable manner. You must prepare the prospectus using the following standards:

(1) Present information in clear, concise sections, paragraphs, and sentences. Whenever possible, use short, explanatory sentences and bullet lists;

(2) Use descriptive headings and subheadings;

(3) Avoid frequent reliance on glossaries or defined terms as the primary means of explaining information in the prospectus. Define terms in a glossary or other section of the document only if the meaning is unclear from the context. Use a glossary only if it facilitates understanding of the disclosure; and

(4) Avoid legal and highly technical business terminology.

NOTE TO § 230.421(B): In drafting the disclosure to comply with this section, you should avoid the following:

1. Legalistic or overly complex presentations that make the substance of the disclosure difficult to understand;

2. Vague ''boilerplate'' explanations that are imprecise and readily subject to different interpretations;

3. Complex information copied directly from legal documents without any clear and concise explanation of the provision(s); and

4. Disclosure repeated in different sections of the document that increases the size of the document but does not enhance the quality of the information.

(c) All information required to be included in a prospectus shall be clearly understandable without the necessity of referring to the particular form or to the general rules and regulations. Except as to financial statements and information required in a tabular form, the information set forth in a prospectus may be expressed in condensed or summarized form. In lieu of repeating information in the form of notes to financial statements, references may be made to other parts of the prospectus where such information is set forth.

(d)(1) To enhance the readability of the prospectus, you must use plain English principles in the organization, language, and design of the front and back cover pages, the summary, and the risk factors section.

(2) You must draft the language in these sections so that at a minimum it substantially complies with each of the following plain English writing principles:

(i) Short sentences;

(ii) Definite, concrete, everyday words;

(iii) Active voice;

(iv) Tabular presentation or bullet lists for complex material, whenever possible;

(v) No legal jargon or highly technical business terms; and

(vi) No multiple negatives.

(3) In designing these sections or other sections of the prospectus, you may include pictures, logos, charts, graphs, or other design elements so long as the design is not misleading and the required information is clear. You are encouraged to use tables, schedules, charts and graphic illustrations of the results of operations, balance sheet, or other financial data that present the data in an understandable manner. Any presentation must be consistent with the financial statements and non-financial information in the prospectus. You must draw the graphs and charts to scale. Any information you provide must not be misleading.

Instruction to §230.421: You should read Securities Act Release No. 33–7497 (January 28, 1998) for information on plain English principles.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11439, Mar. 16, 1982, as amended at 63 FR 6384, Feb. 6, 1998]

§230.423 Date of prospectuses.

Except for a form of prospectus used after the effective date of the registration statement and before the determination of the offering price as permitted by Rule 430A(c) under the Securities Act (§230.430A(c) of this chapter) or before the opening of bids as permitted by Rule 445(c) under the Securities Act (§230.445(c) of this chapter), each prospectus used after the effective date of the registration statement shall be dated approximately as of such effective date; provided, however, that a revised or amended prospectus used thereafter need only bear the approximate date of its issuance. Each supplement to a prospectus shall be dated separately the approximate date of its issuance.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11440, Mar. 16, 1982, as amended at 52 FR 21260, June 5, 1987]

§230.424 Filing of prospectuses, number of copies.

(a) Except as provided in paragraph (f) of this section, five copies of every form of prospectus sent or given to any person prior to the effective date of the registration statement which varies from the form or forms of prospectus included in the registration statement as filed pursuant to §230.402(a) of this chapter shall be filed as a part of the registration statement not later than the date such form of prospectus is first sent or given to any person: *Provided, however,* That only a form of prospectus that contains substantive changes from or additions to a prospectus previously filed with the Commission as part of a registration statement need be filed pursuant to this paragraph (a).

(b) Ten copies of each form of prospectus purporting to comply with section 10 of the Securities Act (15 U.S.C. 77j), except for documents constituting a prospectus pursuant to Rule 428(a)

(§ 230.428(a) of this chapter), shall be filed with the Commission in the form in which it is used after the effectiveness of the registration statement and identified as required by paragraph (e); *Provided, however,* That only a form of prospectus that contains substantive changes from or additions to a previously filed prospectus is required to be filed; *Provided, further,* That this paragraph (b) shall not apply in respect of a form of prospectus contained in a registration statement and relating solely to securities offered at competitive bidding, which prospectus is intended for use prior to the opening of bids. The ten copies shall be filed or transmitted for filing as follows:

(1) A form of prospectus that discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance upon Rule 430A under the Securities Act (§ 230.430A of this chapter) shall be filed with the commission no later than the second business day following the earlier of the date of determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(2) A form of prospectus used in connection with a primary offering of securities on a delayed basis pursuant to Rule 415(a)(1)(vii), (viii) or (x) under the Securities Act (§ 230.415(a)(1)(vii), (viii) or (x) of this chapter) that discloses the public offering price, description of securities, specific method of distribution or similar matters shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(3) A form of prospectus that reflects facts or events other than those covered in paragraphs (b) (1), (2) and (6) of this section that constitute a substantive change from or addition to the information set forth in the last form of prospectus filed with the Commission under this section or as part of a registration statement under the Securities Act shall be filed with the Commission no later than the fifth business day after the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(4) A form of prospectus that discloses information, facts or events covered in both paragraphs (b) (1) and (3) shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(5) A form of prospectus that discloses information, facts or events covered in both paragraphs (b) (2) and (3) shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(6) A form of prospectus used in connection with an offering of securities under Canada's National Policy Statement No. 45 pursuant to rule 415 under the Securities Act (§ 230.415 of this chapter) that is not made in the United States shall be filed with the Commission no later than the date it is first used in Canada, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(7) Ten copies of a term sheet or abbreviated term sheet sent or given in reliance upon Rule 434 under the Act (§ 230.434) shall be filed with the Commission pursuant to this paragraph no later than the second business day following the earlier of the date of determination of the offering price, or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date. In addition to the information required by

paragraph (e) of this section, each copy of such term sheet or abbreviated term sheet shall include the information required by Rule 434(e) (§230.434(e)).

Instruction 1: Notwithstanding §230.424 (b)(2) and (b)(5) above, a form of prospectus or prospectus supplement relating to an offering of mortgage-related securities on a delayed basis under §230.415(a)(1)(vii) or asset-backed securities on a delayed basis under §230.415(a)(1)(x) that is required to be filed pursuant to paragraph (b) of this section shall be filed with the Commission no later than the second business day following the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

Instruction 2: Notwithstanding paragraphs (b)(1), (b)(2), (b)(4) and (b)(5) of this section, a form of prospectus sent or given in reliance on Rule 434(c) (§230.434(c)) with respect to securities registered on Form S–3 or Form F–3 (§239.13 or §239.33 of this chapter), other than an abbreviated term sheet filed pursuant to paragraph (b)(7) of this section, shall be filed with the Commission on or prior to the date on which a confirmation is sent or given.

(c) If a form of prospectus, other than one filed pursuant to paragraph (b)(1) or (b)(4) of this Rule, consists of a prospectus supplement attached to a form of prospectus that (1) previously had been filed or (2) was not required to be filed pursuant to paragraph (b) because it did not contain substantive changes from a prospectus that previously was filed, only the prospectus supplement need be filed under paragraph (b) of this rule, provided that the first page of each prospectus supplement includes a cross reference to the date(s) of the related prospectus and any prospectus supplements thereto that together constitute the prospectus required to be delivered by Section 5(b) of the Securities Act (15 U.S.C. 77e(b)) with respect to the securities currently being offered or sold. The cross reference may be set forth in longhand, provided it is legible.

NOTE: Any prospectus supplement being filed separately that is smaller than a prospectus page should be attached to an 8½'' × 11'' sheet of paper.

(d) Every prospectus consisting of a radio or television broadcast shall be reduced to writing. Five copies of every such prospectus shall be filed with the Commission in accordance with the requirements of this section.

(e) Each copy of a form of prospectus filed under this rule shall contain in the upper right corner of the cover page the paragraph of this rule, including the subparagraph if applicable, under which the filing is made, and the file number of the registration statement to which the prospectus relates. The information required by this paragraph may be set forth in longhand, provided it is legible.

(f) This rule shall not apply with respect to prospectuses of an investment company registered under the Investment Company Act of 1940 or a business development company.

[14 FR 202, Jan. 14, 1949, as amended at 16 FR 8736, Aug. 29, 1951; 19 FR 400, Jan. 22, 1954; 19 FR 6728, Oct. 20, 1954; 21 FR 1046, Feb. 15, 1956; 52 FR 21260, June 5, 1987; 53 FR 3878, Feb. 10, 1988; 55 FR 23923, June 13, 1990; 56 FR 30054, July 1, 1991; 57 FR 48975, Oct. 29, 1992; 60 FR 26615, May 17, 1995; 62 FR 39763, July 24, 1997]

§230.425 Filing of certain prospectuses and communications under §230.135 in connection with business combination transactions.

(a) All written communications made in reliance on §230.165 are prospectuses that must be filed with the Commission under this section on the date of first use.

(b) All written communications that contain no more information than that specified in §230.135 must be filed with the Commission on or before the date of first use except as provided in paragraph (d)(1) of this section. A communication limited to the information specified in §230.135 will not be deemed an offer in accordance with §230.135 even though it is filed under this section.

(c) Each prospectus or §230.135 communication filed under this section must identify the filer, the company that is the subject of the offering and the Commission file number for the related registration statement or, if that file number is unknown, the subject company's Exchange Act or Investment Company Act file number, in the upper right corner of the cover page.

(d) Notwithstanding paragraph (a) of this section, the following need not be filed under this section:

(1) Any written communication that is limited to the information specified in § 230.135 and does not contain new or different information from that which was previously publicly disclosed and filed under this section.

(2) Any research report used in reliance on § 230.137, § 230.138 and § 230.139;

(3) Any confirmation described in § 240.10b–10 of this chapter; and

(4) Any prospectus filed under § 230.424.

NOTES TO § 230.425: 1. File five copies of the prospectus or § 230.135 communication if paper filing is permitted.

2. No filing is required under § 240.13e–4(c), § 240.14a–12(b), § 240.14d–2(b), or § 240.14d–9(a), if the communication is filed under this section. Communications filed under this section also are deemed filed under the other applicable sections.

[64 FR 61450, Nov. 10, 1999]

§ 230.427 Contents of prospectus used after nine months.

There may be omitted from any prospectus used more than 9 months after the effective date of the registration statement any information previously required to be contained in the prospectus insofar as later information covering the same subjects, including the latest available certified financial statement, as of a date not more than 16 months prior to the use of the prospectus is contained therein.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11440, Mar. 16, 1982]

§ 230.428 Documents constituting a section 10(a) prospectus for Form S–8 registration statement; requirements relating to offerings of securities registered on Form S–8.

(a)(1) Where securities are to be offered pursuant to a registration statement on Form S–8 (§ 239.16b of this chapter), the following, taken together, shall constitute a prospectus that meets the requirements of section 10(a) of the Act:

(i) The document(s), or portions thereof as permitted by paragraph (b)(1)(ii) of this section, containing the employee benefit plan information required by Item 1 of the Form;

(ii) The statement of availability of registrant information, employee benefit plan annual reports and other information required by Item 2; and

(iii) The documents containing registrant information and employee benefit plan annual reports that are incorporated by reference in the registration statement pursuant to Item 3.

(2) The registrant shall maintain a file of the documents that, pursuant to paragraph (a) of this section, at any time are part of the section 10(a) prospectus, except for documents required to be incorporated by reference in the registration statement pursuant to Item 3 of Form S–8. Each such document shall be included in the file until five years after it is last used as part of the Section 10(a) prospectus to offer or sell securities pursuant to the plan. With respect to documents containing specifically designated portions that constitute part of the section 10(a) prospectus pursuant to paragraph (b)(1)(ii) of this section, the entire document shall be maintained in the file. Upon request, the registrant shall furnish to the Commission or its staff a copy of any or all of the documents included in the file.

(b) Where securities are offered pursuant to a registration statement on Form S–8:

(1)(i) The registrant shall deliver or cause to be delivered, to each employee who is eligible to participate (or selected by the registrant to participate, in the case of a stock option or other plan with selective participation) in an employee benefit plan to which the registration statement relates, the information required by Part I of Form S–8. The information shall be in written form and shall be updated in writing in a timely manner to reflect any material changes during any period in which offers or sales are being made.

When updating information is furnished, documents previously furnished need not be re-delivered, but the registrant shall furnish promptly without charge to each employee, upon written or oral request, a copy of all documents containing the plan information required by Part I that then constitute part of the section 10(a) prospectus.

(ii) The registrant may designate an entire document or only portions of a document as constituting part of the section 10(a) prospectus. If the registrant designates only portions of a document as constituting part of the prospectus, rather than the entire document, a statement clearly identifying such portions, for example, by reference to section headings, section numbers, paragraphs or page numbers within the document must be included in a conspicuous place in the forepart of the document, or such portions must be specifically designated throughout the text of the document. Registrants shall not designate only words or sentences within a paragraph as part of a prospectus. Unless the portions of a document constituting part of the section 10(a) prospectus are clearly identified, the entire document shall constitute part of the prospectus.

(iii) The registrant shall date any document constituting part of the section 10(a) prospectus or containing portions constituting part of the prospectus and shall include the following printed, stamped or typed legend in a conspicuous place in the forepart of the document, substituting the bracketed language as appropriate: ''This document [Specifically designated portions of this document] constitutes [constitute] part of a prospectus covering securities that have been registered under the Securities Act of 1933.''

(iv) The registrant shall revise the document(s) containing the plan information sent or given to newly eligible participants pursuant to paragraph (b)(1)(i) of this section, if documents containing updating information would obscure the readability of the plan information.

(2) The registrant shall deliver or cause to be delivered with the document(s) containing the information required by Part I of Form S–8, to each employee to whom such information is sent or given, a copy of any one of the following:

(i) The registrant's annual report to security holders containing the information required by Rule 14a–3(b) (§240.14a–3(b) of this chapter) under the Securities Exchange Act of 1934 (*Exchange Act*) for its latest fiscal year;

(ii) The registrant's annual report on Form 10–K and Form 10–KSB (§249.310 of this chapter), U5S (§259.5s of this chapter), 20–F (§249.220f of this chapter) or, in the case of registrants described in General Instruction A.(2) of Form 40–F, 40–F (§249.240f of this chapter) for its latest fiscal year;

(iii) The latest prospectus filed pursuant to Rule 424(b) (§230.424(b) of this chapter) under the Act that contains audited financial statements for the registrant's latest fiscal year, *Provided that* the financial statements are not incorporated by reference from another filing, and *Provided further* that such prospectus contains substantially the information required by Rule 14a–3(b) or the registration statement was on Form SB–2 (§239.28 of this chapter) or F–1 (§239.31 of this chapter); or

(iv) The registrant's effective Exchange Act registration statement on Form 10 and Form 10–SB (§249.210 of this chapter), 20–F or, in the case of registrants described in General Instruction A.(2) of Form 40–F, 40–F containing audited financial statements for the registrant's latest fiscal year.

Instructions. 1. If a registrant has previously sent or given an employee a copy of any document specified in clauses (i)–(iv) of paragraph (b)(2) for the latest fiscal year, it need not be re-delivered, but the registrant shall furnish promptly, without charge, a copy of such document upon written or oral request of the employee.

2. If the latest fiscal year of the registrant has ended within 120 days (or 190 days with respect to foreign private issuers) prior to the delivery of the documents containing the information specified by Part I of Form S–8, the registrant may deliver a document containing financial statements for the fiscal year preceding the last fiscal year, *Provided that* within the 120 or 190 day period a document containing financial statements for the latest fiscal year is furnished to each employee.

(3) The registrant shall deliver or cause to be delivered promptly, without charge, to each employee to whom

information is required to be delivered, upon written or oral request, a copy of the information that has been incorporated by reference pursuant to Item 3 of Form S–8 (not including exhibits to the information that is incorporated by reference unless such exhibits are specifically incorporated by reference into the information that the registration statement incorporates).

(4) Where interests in a plan are registered, the registrant shall deliver or cause to be delivered promptly, without charge, to each employee to whom information is required to be delivered, upon written or oral request, a copy of the then latest annual report of the plan filed pursuant to Section 15(d) of the Exchange Act, whether on Form 11–K (§ 249.311 of this chapter) or included as part of the registrant's annual report on Form 10–K and Form 10–KSB.

(5) The registrant shall deliver or cause to be delivered to all employees participating in a stock option plan or plan fund that invests in registrant securities (and other plan participants who request such information orally or in writing) who do not otherwise receive such material, copies of all reports, proxy statements and other communications distributed to its security holders generally, provided that such material is sent or delivered no later than the time it is sent to security holders.

(c) As used in this Rule, the term *employee benefit plan* is defined in Rule 405 of Regulation C (§ 230.405 of this chapter) and the term *employee* is defined in General Instruction A.1 of Form S–8.

[55 FR 23923, June 13, 1990, as amended at 57 FR 10614, Mar. 27, 1992]

§ 230.429 Prospectus relating to several registration statements.

(a) Where a registrant has filed two or more registration statements, it may file a single prospectus in the latest registration statement in order to satisfy the requirements of the Act and the rules and regulations thereunder for that offering and any other offering(s) registered on the earlier registration statement(s). The combined prospectus in the latest registration statement must include all of the information that currently would be required in a prospectus relating to all offering(s) that it covers. The combined prospectus may be filed as part of the initial filing of the latest registration statement, in a pre-effective amendment to it or in a post-effective amendment to it.

(b) Where a registrant relies on paragraph (a) of this section, the registration statement containing the combined prospectus shall act, upon effectiveness, as a post-effective amendment to any earlier registration statement whose prospectus has been combined in the latest registration statement. The registrant must identify any earlier registration statement to which the combined prospectus relates by setting forth the Commission file number at the bottom of the facing page of the latest registration statement.

[66 FR 8896, Feb. 5, 2001]

§ 230.430 Prospectus for use prior to effective date.

(a) A form of prospectus filed as a part of the registration statement shall be deemed to meet the requirements of section 10 of the Act for the purpose of section 5(b)(1) thereof prior to the effective date of the registration statement, provided such form of prospectus contains substantially the information required by the Act and the rules and regulations thereunder to be included in a prospectus meeting the requirements of section 10(a) of the Act for the securities being registered, or contains substantially that information except for the omission of information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price. Every such form of prospectus shall be deemed to have been filed as a part of the registration statement for the purpose of section 7 of the Act.

(b) A form of prospectus filed as part of a registration statement on Form N–1A (§ 239.15A and § 274.11A of this chapter), Form N–2 (§ 239.14 and § 274.11a–1 of this chapter), Form N–3 (§ 239.17a and § 274.11b of this chapter), Form N–4 (§ 239.17b and § 274.11c of this chapter), or Form N–6 (§ 239.17c and § 274.11d of this chapter) shall be deemed to meet the requirements of Section 10 of the

Act (15 U.S.C. 77j) for the purpose of Section 5(b)(1) thereof (15 U.S.C. 77e(b)(1)) prior to the effective date of the registration statement, provided that:

(1) Such form of prospectus meets the requirements of paragraph (a) of this section; and

(2) Such registration statement contains a form of Statement of Additional Information that is made available to persons receiving such prospectus upon written or oral request, and without charge, unless the form of prospectus contains the information otherwise required to be disclosed in the form of Statement of Additional Information. Every such form of prospectus shall be deemed to have been filed as part of the registration statement for the purpose of section 7 of the Act.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11440, Mar. 16, 1982, as amended at 57 FR 56834, Dec. 1, 1992; 67 FR 19868, Apr. 23, 2002]

§230.430A Prospectus in a registration statement at the time of effectiveness.

(a) The form of prospectus filed as part of a registration statement that is declared effective may omit information with respect to the public offering price, underwriting syndicate (including any material relationships between the registrant and underwriters not named therein), underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date; and such form of prospectus need not contain such information in order for the registration statement to meet the requirements of Section 7 of the Securities Act (15 U.S.C. 77g) for the purposes of Section 5 thereof (15 U.S.C. 77e), *Provided,* That:

(1) The securities to be registered are offered for cash;

(2) The registrant furnishes the undertakings required by Item 512(i) of Regulation S–K (§229.512(i) of this chapter); and

(3) The information ommitted in reliance upon paragraph (a) from the form of prospectus filed as part of a registration statement that is declared effective is contained in a form of prospectus filed with the Commission pursuant to Rule 424(b) or Rule 497(h) under the Securities Act (§§230.424(b) or 230.497(h) of this chapter); except that if such form of prospectus is not so filed by the later of fifteen business days after the effective date of the registration statement or fifteen business days after the effectiveness of a post-effective amendment thereto that contains a form of prospectus, or transmitted by a means reasonably calculated to result in filing with the Commission by that date, the information omitted in reliance upon paragraph (a) must be contained in an effective post-effective amendment to the registration statement.

Instruction to Paragraph (a): A decrease in the volume of securities offered or change in the bona fide estimate of the maximum offering price range from that indicated in the form of prospectus filed as part of a registration statement that is declared effective may be disclosed in the form of prospectus filed with the Commission pursuant to §230.424(b) or §230.497(h) under the Securities Act so long as the decrease in the volume or change in the price range would not materially change the disclosure contained in the registration statement at effectiveness. Notwithstanding the foregoing, any increase or decrease in volume (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b)(1) (§230.424(b)(1)) or Rule 497(h) (§230.497(h)) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the ''Calculation of Registration Fee'' table in the effective registration statement.

(b) The information omitted in reliance upon paragraph (a) from the form of prospectus filed as part of an effective registration statement, and contained in the form of prospectus filed with the Commission pursuant to Rule 424(b) or Rule 497(h) under the Securities Act (§§ 230.424(b) or 230.497(h) of this chapter), shall be deemed to be a part of the registration statement as of the time it was declared effective.

(c) When used prior to determination of the offering price of the securities, a form of prospectus relating to the securities offered pursuant to a registration statement that is declared effective with information omitted from the form of prospectus filed as part of such effective registration statement in reliance upon this Rule 430A need not contain information omitted pursuant to paragraph (a), in order to meet the requirements of Section 10 of the Securities Act (15 U.S.C. 77j) for the purpose of section 5(b)(1) (15 U.S.C. 77e(b)(1)) thereof. This provision shall not limit the information required to be contained in a form of prospectus meeting the requirements of section 10(a) of the Act for the purposes of section 5(b)(2) thereof or exception (a) of Section 2(10) (15 U.S.C. 77b(10)) thereof.

(d) This rule shall not apply to registration statements for securities to be offered by competitive bidding.

(e) In the case of a registration statement filed on Form N–1A (§ 239.15A and § 274.11A of this chapter), Form N–2 (§ 239.14 and § 274.11a–1 of this chapter), Form N–3 (§ 239.17a and § 274.11b of this chapter), Form N–4 (§ 239.17b and § 274.11c of this chapter), or Form N–6 (§ 239.17c and § 274.11d of this chapter), the references to ''form of prospectus'' in paragraphs (a) and (b) of this section and the accompanying Note shall be deemed also to refer to the form of Statement of Additional Information filed as part of such a registration statement.

NOTE: If information is omitted in reliance upon paragraph (a) from the form of prospectus filed as part of an effective registration statement, or effective post-effective amendment thereto, the registrant must ascertain promptly whether a form of prospectus transmitted for filing under Rule 424(b) of Rule 497(h) under the Securities Act actually was received for filing by the Commission and, in the event that it was not, promptly file such prospectus.

[52 FR 21261, June 5, 1987, as amended at 56 FR 48103, Sept. 24, 1991; 57 FR 48976, Oct. 29, 1992; 57 FR 56834, Dec. 1, 1992; 60 FR 26616, May 17, 1995; 67 FR 19869, Apr. 23, 2002]

§ 230.431 Summary prospectuses.

(a) A summary prospectus prepared and filed (except a summary prospectus filed by an open-end management investment company registered under the Investment Company Act of 1940) as part of a registration statement in accordance with this section shall be deemed to be a prospectus permitted under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)) if the form used for registration of the securities to be offered provides for the use of a summary prospectus and the following conditions are met:

(1)(i) The registrant is organized under the laws of the United States or any State or Territory or the District of Columbia and has its principal business operations in the United States or its territories; or

(ii) The registrant is a foreign private issuer eligible to use Form F–2 (§ 239.32 of this chapter);

(2) The registrant has a class of securities registered pursuant to section 12(b) of the Securities Exchange Act of 1934 or has a class of equity securities registered pursuant to section 12(g) of that Act or is required to file reports pursuant to section 15(d) of that Act;

(3) The registrant: (i) Has been subject to the requirements of section 12 or 15(d) of the Securities Exchange Act of 1934 and has filed all the material required to be filed pursuant to sections 13, 14 or 15(d) of that Act for a period of at least thirty-six calendar months immediately preceding the filing of the registration statement; and (ii) has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement and, if the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b–25(b) under the Securities Exchange Act of 1934 (§ 240.12b–25 of

this chapter) with respect to a report or portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that Rule; and

(4) Neither the registrant nor any of its consolidated or unconsolidated subsidiaries has, since the end of its last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934: (i) failed to pay any dividend or sinking fund installment on preferred stock; or (ii) defaulted on any installment or installments on indebtedness for borrowed money, or on any rental on one or more long term leases, which defaults in the aggregate are material to the financial position of the registrant and its consolidated and unconsolidated subsidiaries, taken as a whole.

(b) A summary prospectus shall contain the information specified in the instructions as to summary prospectuses in the form used for registration of the securities to be offered. Such prospectus may include any other information the substance of which is contained in the registration statement except as otherwise specifically provided in the instructions as to summary prospectuses in the form used for registration. It shall not include any information the substance of which is not contained in the registration statement except that a summary prospectus may contain any information specified in Rule 134(a) (§230.134(a)). No reference need be made to inapplicable terms and negative answers to any item of the form may be omitted.

(c) All information included in a summary prospectus, other than the statement required by paragraph (e) of this section, may be expressed in such condensed or summarized form as may be appropriate in the light of the circumstances under which the prospectus is to be used. The information need not follow the numerical sequence of the items of the form used for registration. Every summary prospectus shall be dated approximately as of the date of its first use.

(d) When used prior to the effective date of the registration statement, a summary prospectus shall be captioned a ''Preliminary Summary Prospectus'' and shall comply with the applicable requirements relating to a preliminary prospectus.

(e) A statement to the following effect shall be prominently set forth in conspicuous print at the beginning or at the end of every summary prospectus:

''Copies of a more complete prospectus may be obtained from'' (Insert name(s), address(es) and telephone number(s)).

Copies of a summary prospectus filed with the Commission pursuant to paragraph (g) of this section may omit the names of persons from whom the complete prospectus may be obtained.

(f) Any summary prospectus published in a newspaper, magazine or other periodical need only be set in type at least as large as 7 point modern type. Nothing in this rule shall prevent the use of reprints of a summary prospectus published in a newspaper, magazine, or other periodical, if such reprints are clearly legible.

(g) Eight copies of every proposed summary prospectus shall be filed as a part of the registration statement, or as an amendment thereto, at least 5 days (exclusive of Saturdays, Sundays and holidays) prior to the use thereof, or prior to the release for publication by any newspaper, magazine or other person, whichever is earlier. The Commission may, however, in its discretion, authorize such use or publication prior to the expiration of the 5-day period upon a written request for such authorization. Within 7 days after the

first use or publication thereof, 5 additional copies shall be filed in the exact form in which it was used or published.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37; secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78*l*, 78m, 78*o*(d), 78w(a), 80a–8, 80a–29, 80a–30(c), 80a–37(a))

[47 FR 11440, Mar. 16, 1982, as amended at 47 FR 54770, Dec. 6, 1982; 63 FR 13984, Mar. 23, 1998]

§ 230.432 Additional information required to be included in prospectuses relating to tender offers.

Notwithstanding the provisions of any form for the registration of securities under the Act, any prospectus relating to securities to be offered in connection with a tender offer for, or a request or invitation for tenders of, securities subject to either § 240.13e–4 or section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d)) must include the information required by § 240.13e–4(d)(1) or § 240.14d–6(d)(1) of this chapter, as applicable, in all tender offers, requests or invitations that are published, sent or given to security holders.

[64 FR 61451, Nov. 10, 1999]

§ 230.434 Prospectus delivery requirements in firm commitment underwritten offerings of securities for cash.

(a) Where securities are offered for cash in a firm commitment underwritten offering or investment grade debt securities are offered for cash on an agency basis under a medium term note program, and such securities are neither asset-backed securities nor structured securities, and the conditions described in paragraph (b) or paragraph (c) of this section are satisfied, then:

(1) The prospectus subject to completion and the term sheet described in paragraph (b) of this section, taken together, and the prospectus subject to completion and the abbreviated term sheet described in paragraph (c) of this section, taken together, shall constitute prospectuses that meet the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) for purposes of section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)) and section 2(10(a) of the Act (15 U.S.C. 77b(10)(a)); and

(2) The section 10(a) prospectus described in paragraph (a)(1) of this section shall have:

(i) Been sent or given prior to or at the same time that a confirmation is sent or given for purposes of section 2(10)(a) of the Act; and

(ii) Accompanied or preceded the transmission of the securities for purpose of sale or for delivery after sale for purposes of Section 5(b)(2) of the Act.

(b) With respect to offerings of securities that are registered on a form other than Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter), and with respect to offerings of securities by only those investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) that register their securities on Form N–2 (§ 274.11a–1 of this chapter) or Form S–6 (§ 239.16 of this chapter), the following conditions are satisfied:

(1) A prospectus subject to completion and any term sheet described in paragraph (b)(3) of this section, together or separately, are sent or given prior to or at the same time with the confirmation;

(2) Such prospectus subject to completion and term sheet, together, are not materially different from the prospectus in the registration statement at the time of its effectiveness or an effective post-effective amendment thereto (including, in both, instances, information deemed to be a part of the registration statement at the time of effectiveness pursuant to Rule 430A(b) (§230.430A(b)); and

(3) A term sheet under this paragraph (b) shall set forth all information material to investors with respect to the offering that is not disclosed in the prospectus subject to completion or the confirmation.

(c) With respect to offerings of securities registered on Form S–3 or Form F–3 (§239.13 or §239.33 of this chapter), the following conditions are satisfied.

(1) A prospectus subject to completion and the abbreviated term sheet described in paragraph (c)(3) of this section, together or separately, are sent or given prior to or at the same time with the confirmation;

(2) A form of prospectus that:

(i) Discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance upon Rule 430A (§230.430A), to the extend not set forth in the abbreviated term sheet (as described in paragraph (c)(3) of this section), shall be filed pursuant to Rule 424(b) (§230.424(b)) on or prior to the date on which a confirmation is sent or given; or

(ii) Discloses the public offering price, description of securities, to the extent not set forth in the abbreviated term sheet (as described in paragraph (c)(3) of this section), and specific method of distribution or similar matters shall be filed pursuant to Rule 424(b) (§230.424(b)) on or prior to the date on which a conformation is sent or given; and

(3) The abbreviated term sheet under this paragraph (c) shall set forth, if not previously disclosed in the prospectus subject to completion or the registrant's Exchange Act filings incorporated by reference into the prospectus:

(i) The description of securities required by Item 202 of Regulations S–K (§229.202 of this chapter) or by Items 9, 10 and 12 of Form 20–F (§249.220f of this chapter) as applicable, or a fair and accurate summary thereof; and

(ii) All material changes to the registrant's affairs required to be disclosed pursuant to ''Item 11 of Form S–3 or Item 5 of Form F–3 (§239.13 or §239.33 of this chapter)'', as applicable.

(d) Except in the case of offerings pursuant to Rule 415(a)(1)(x), (§230.415(a)(1)(x), the information contained in any term sheet or abbreviated term sheet described under this section shall be deemed to be a part of the registration statement as of the time such registration statement was declared effective. In the case of offerings pursuant to Rule 415(a)(1)(x) (§230.415(a)(1)(x)), the information contained in any term sheet or abbreviated term sheet described under this section shall be deemed to be a part of the registration statement as of the time such information is filed with the Commission.

Instruction: With respect to the obligation to file any form of prospectus, term sheet, or abbreviated term sheet used in reliance on this section, see Rule 424(b) (§230.424(b)) or Rule 497(h) (§230.497(h)).

(e) Any term sheet or abbreviated term sheet described under this section shall, in the top center of the cover page thereof, state that such document is a supplement to a prospectus and identify that prospectus by issuer name and date; clearly identify that such document is a term sheet or abbreviated term sheet used in reliance on Rule 434; set forth the approximate date of first use of such document; and clearly identify the documents that, when taken together, constitute the Section 10(a) prospectus.

(f) For purposes of this section, *asset-backed securities* shall mean asset-backed securities as defined in General Instruction 1.B.5. of Form S–3 (§239.13 of this chapter).

(g) For purposes of this section, *prospectus subject to completion* shall mean any prospectus that is either a preliminary prospectus used in reliance on Rule 430 (§230.430), a prospectus omitting information in reliance upon Rule 430A (§230.430A), or a prospectus omitting information that is not yet known concerning a delayed offering pursuant to Rule 415(a)(i)(x) (§230.415(a)(1)(x))

that is contained in a registration statement at the time of effectiveness or as subsequently revised.

(h) For purposes of this section, *structured securities* shall mean securities whose cash flow characteristics depend upon one or more indices or that have embedded forwards or options or securities where an investor's investment return and the issuer's payment obligations are contingent on, or highly sensitive to, changes in the value of underlying assets, indices, interest rates or cash flows.

(i) For purposes of this section, *investment grade securities* shall mean investment grade securities as defined in General Instruction I.B.2. of Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter).

(j) For the purposes of this section, a firm commitment underwritten offering shall include a firm commitment underwritten offering of securities by a closed-end company or by a unit investment trust registered under the Investment Company Act of 1940.

[60 FR 26616, May 17, 1995, as amended at 64 FR 53909, Oct. 5, 1999]

WRITTEN CONSENTS

§ 230.436 Consents required in special cases.

(a) If any portion of the report or opinion of an expert or counsel is quoted or summarized as such in the registration statement or in a prospectus, the written consent of the expert or counsel shall be filed as an exhibit to the registration statement and shall expressly state that the expert or counsel consents to such quotation or summarization.

(b) If it is stated that any information contained in the registration statement has been reviewed or passed upon by any persons and that such information is set forth in the registration statement upon the authority of or in reliance upon such persons as experts, the written consents of such persons shall be filed as exhibits to the registration statement.

(c) Notwithstanding the provisions of paragraph (b) of this section, a report on unaudited interim financial information (as defined in paragraph (d) of this section) by an independent accountant who has conducted a review of such interim financial information shall not be considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of the Act.

(d) The term *report on unaudited interim financial information* shall mean a report which consists of the following:

(1) A statement that the review of interim financial information was made in accordance with established professional standards for such reviews;

(2) An identification of the interim financial information reviewed;

(3) A description of the procedures for a review of interim financial information;

(4) A statement that a review of interim financial information is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is an expression of opinion regarding the financial statements taken as a whole, and, accordingly, no such opinion is expressed; and

(5) A statement about whether the accountant is aware of any material modifications that should be made to the accompanying financial information so that it conforms with generally accepted accounting principles.

(e) Where a counsel is named as having acted for the underwriters or selling security holders, no consent will be required by reason of his being named as having acted in such capacity.

(f) Where the opinion of one counsel relies upon the opinion of another counsel, the consent of the counsel whose prepared opinion is relied upon need not be furnished.

(g)(1) Notwithstanding the provisions of paragraphs (a) and (b) of this section, the security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock by a nationally recognized statistical rating organization, or with respect to registration statements on Form F–9 (§ 239.39 of this chapter) by any other rating organization specified in the Instruction to paragraph (a)(2) of General Instruction I of Form F–9, shall not be considered a part of the

registration statement prepared or certified by a person within the meaning of sections 7 and 11 of the Act.

(2) For the purpose of paragraph (g)(1) of this section, the term *nationally recognized statistical rating organization* shall have the same meaning as used in Rule 15c3–1(c)(2)(vi)(F) (17 CFR 240.15c3–1 (c)(2)(vi)(F)).

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11441, Mar. 16, 1982, as amended at 58 FR 62030, Nov. 23, 1993]

§ 230.437 Application to dispense with consent.

An application to the Commission to dispense with any written consent of an expert pursuant to section 7 of the act shall be made by the registrant and shall be supported by an affidavit or affidavits establishing that the obtaining of such consent is impracticable or involves undue hardship on the registrant. Such application shall be filed and the consent of the Commission shall be obtained prior to the effective date of the registration statement.

[Reg. C, 12 FR 4074, June 24, 1947]

§ 230.437a Written consents.

(a) This section applies only to registrants that:

(1) Are not a ''blank check company'' as defined in § 230.419(a)(2); and

(2) Are filing a registration statement containing financial statements in which Arthur Andersen LLP (or a foreign affiliate of Arthur Andersen LLP) had been acting as the independent public accountant.

(b) Notwithstanding any other Commission rule or regulation, every registrant eligible to rely on this section may dispense with the requirement for the registrant to file the written consent of Arthur Andersen LLP (or a foreign affiliate of Arthur Andersen LLP) as required by Section 7 of the Act (15 U.S.C. 77g) where:

(1) The registrant has not already obtained the written consent that would be required if not for this section;

(2) The registrant is not able to obtain the written consent after reasonable efforts; and

(3) The registrant discloses clearly any limitations on recovery by investors posed by the lack of consent.

[67 FR 13537, Mar. 22, 2002]

§ 230.438 Consents of persons about to become directors.

If any person who has not signed the registration statement is named therein as about to become a director, the written consent of such person shall be filed with the registration statement. Any such consent, however, may be omitted if there is filed with the registration statement a statement by the registrant, supported by an affidavit or affidavits, setting forth the reasons for such omission and establishing that the obtaining of such consent is impracticable or involves undue hardship on the registrant.

[Reg. C, 12 FR 4074, June 24, 1947]

§ 230.439 Consent to use of material incorporated by reference.

(a) If the Act or the rules and regulations of the Commission require the filing of a written consent to the use of any material in connection with the registration statement, such consent shall be filed as an exhibit to the registration statement even though the material is incorporated therein by reference. Where the filing of a written consent is required with respect to material incorporated in the registration statement by reference, which is to be filed subsequent to the effective date of the registration statement, such consent shall be filed as an amendment to the registration statement no later than the date on which such material is filed with the Commission, unless express consent to incorporation by reference is contained in the material to be incorporated by reference.

(b) Notwithstanding paragraph (a) of this section, any required consent may

be incorporated by reference into a registration statement filed pursuant to Rule 462(b) under the Act (§ 230.462(b)) from a previously filed registration statement relating to that offering, provided that, the consent contained in the previously filed registration statement expressly provides for such incorporation.

[47 FR 11441, Mar. 16, 1982, as amended at 60 FR 26615, 26617, May 17, 1995]

§§ 230.445–230.447 [Reserved]

FILINGS; FEES; EFFECTIVE DATE

§ 230.455 Place of filing.

All registration statements and other papers filed with the Commission shall be filed at its principal office, except for statements of Form SB–1 (§ 239.9 of this chapter) and Form SB–2 (§ 239.10 of this chapter). Registration statements on Form SB–1 or SB–2 may be filed with the Commission either at its principal office or at the Commission's regional or district offices as specified in General Instruction A to each of those forms, except that registration statements and post-effective amendments thereto on such forms that are filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)) shall be filed at the Commission's principal office. Such material may be filed by delivery to the Commission through the mails or otherwise; provided, however, that only registration statements and post-effective amendments thereto filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)) may be filed by means of facsimile transmission.

[58 FR 65542, Dec. 15, 1993, as amended at 60 FR 26617, May 17, 1995]

§ 230.456 Date of filing.

The date on which any papers are actually received by the Commission shall be the date of filing thereof, if all the requirements of the act and the rules with respect to such filing have been complied with and the required fee paid. The failure to pay an insignificant amount of the required fee at the time of filing, as the result of a bona fide error, shall not be deemed to affect the date of filing.

[16 FR 8737, Aug. 29, 1951]

§ 230.457 Computation of fee.

(a) If a filing fee based on a bona fide estimate of the maximum offering price, computed in accordance with this rule where applicable, has been paid, no additional filing fee shall be required as a result of changes in the proposed offering price. If the number of shares or other units of securities, or the principal amount of debt securities to be offered is increased by an amendment filed prior to the effective date of the registration statement, an additional filing fee, computed on the basis of the offering price of the additional securities, shall be paid. There will be no refund once the statement is filed.

(b) A required fee shall be reduced in an amount equal to any fee paid with respect to such transaction pursuant to sections 13(e) and 14(g) of the Securities Exchange Act of 1934 or any applicable provision of this section; the fee requirements under sections 13(e) and 14(g) shall be reduced in an amount equal to the fee paid the Commission with respect to a transaction under this section. No part of a filing fee is refundable.

(c) Where securities are to be offered at prices computed upon the basis of fluctuating market prices, the registration fee is to be calculated upon the basis of the price of securities of the same class, as follows: either the average of the high and low prices reported in the consolidated reporting system (for exchange traded securities and last sale reported over-the-counter securities) or the average of the bid and asked price (for other over-the-counter securities) as of a specified date within 5 business days prior to the date of filing the registration statement.

(d) Where securities are to be offered at varying prices based upon fluctuating values of underlying assets, the registration fee is to be calculated upon the basis of the market value of such assets as of a specified date within fifteen days prior to the date of filing, in accordance with the method to be used in calculating the daily offering price.

(e) Where securities are to be offered to existing security holders and the portion, if any, not taken by such security holders is to be reoffered to the general public, the registration fee is

to be calculated upon the basis of the proposed offering price to such security holders or the proposed reoffering price to the general public, whichever is higher.

(f) Where securities are to be offered in exchange for other securities (except where such exchange results from the exercise of a conversion privilege) or in a reclassification or recapitalization which involves the substitution of a security for another security, a merger, a consolidation, or a similar plan of acquisition, the registration fee is to be calculated as follows:

(1) Upon the basis of the market value of the securities to be received by the registrant or canceled in the exchange or transaction as established by the price of securities of the same class, as determined in accordance with paragraph (c) of this section.

(2) If there is no market for the securities to be received by the registrant or cancelled in the exchange or transaction, the book value of such securities computed as of the latest practicable date prior to the date of filing the registration statement shall be used, unless the issuer of such securities is in bankruptcy or receivership, or has an accumulated capital deficit, in which case one-third of the principal amount, par value or stated value of such securities shall be used.

(3) If any cash is to be received by the registrant in connection with the exchange or transaction, the amount thereof shall be added to the value of the securities to be received by the registrant or cancelled as computed in accordance with (e) (1) or (2) of this section. If any cash is to be paid by the registrant in connection with the exchange or transaction, the amount thereof shall be deducted from the value of the securities to be received by the registrant in exchange as computed in accordance with (e) (1) or (2) of this section.

(4) Securities to be offered directly or indirectly for certificates of deposit shall be deemed to be offered for the securities represented by the certificates of deposit.

(5) If a filing fee is paid under this paragraph for the registration of an offering and the registration statement also covers the resale of such securities, no additional filing fee is required to be paid for the resale transaction.

(g) Where securities are to be offered pursuant to warrants or other rights to purchase such securities and the holders of such warrants or rights may be deemed to be underwriters, as defined in section 2(11) of the Act, with respect to the warrants or rights or the securities subject thereto, the registration fee is to be calculated upon the basis of the price at which the warrants or rights or securities subject thereto are to be offered to the public. If such offering price cannot be determined at the time of filing the registration statement, the registration fee is to be calculated upon the basis of the highest of the following: (1) the price at which the warrants or rights may be exercised, if known at the time of filing the registration statement; (2) the offering price of securities of the same class included in the registration statement; or (3) the price of securities of the same class, as determined in accordance with paragraph (c) of this section. If the fee is to be calculated upon the basis of the price at which the warrants or rights may be exercised and they are exercisable over a period of time at progressively higher prices, the fee shall be calculated on the basis of the highest price at which they may be exercised. If the warrants or rights are to be registered for distribution in the same registration statement as the securities to be offered pursuant thereto, no separate registration fee shall be required.

(h)(1) Where securities are to be offered pursuant to an employee benefit plan, the aggregate offering price and the amount of the registration fee shall be computed with respect to the maximum number of the registrant's securities issuable under the plan that are covered by the registration statement. If the offering price is not known, the fee shall be computed upon the basis of the price of securities of the same class, as determined in accordance with paragraph (c) of this section. In the case of an employee stock option plan, the aggregate offering price and the fee shall be computed upon the basis of the price at which the options may be exercised, or, if such price is not known, upon the basis of the price of securities

of the same class, as determined in accordance with paragraph (c) of this section. If there is no market for the securities to be offered, the book value of such securities computed as of the latest practicable date prior to the date of filing the registration statement shall be used.

(2) If the registration statement registers securities of the registrant and also registers interests in the plan constituting separate securities, no separate fee is required with respect to the plan interests.

(3) Where a registration statement includes securities to be offered pursuant to an employee benefit plan and covers the resale of the same securities, no additional filing fee shall be paid with respect to the securities to be offered for resale. A filing fee determined in accordance with paragraph (c) of this section shall be paid with respect to any additional securities to be offered for resale.

(i) Where convertible securities and the securities into which conversion is offered are registered at the same time, the registration fee is to be calculated on the basis of the proposed offering price of the convertible securities alone, except that if any additional consideration is to be received in connection with the exercise of the conversion privilege the maximum amount which may be received shall be added to the proposed offering price of the convertible securities.

(j) Where securities are sold prior to the registration thereof and are subsequently registered for the purpose of making an offer of rescission of such sale or sales, the registration fee is to be calculated on the basis of the amount at which such securities were sold, except that where securities repurchased pursuant to such offer of rescission are to be reoffered to the general public at a price in excess of such amount the registration fee is to be calculated on the basis of the proposed reoffering price.

(k) Notwithstanding the other provisions of this rule, the proposed maximum aggregate offering price of Depositary Shares evidenced by American Depositary Receipts shall, only for the purpose of calculating the registration fee, be computed upon the basis of the maximum aggregate fees or charges to be imposed in connection with the issuance of such receipts.

(l) Notwithstanding the other provisions of this rule, the proposed maximum aggregate offering price of any put or call option which is traded on an exchange and registered by such exchange or a facility thereof or which is traded over the counter shall, for the purpose of calculating the registration fee, be computed upon the basis of the maximum aggregate fees or charges to be imposed by such registrant in connection with the issuance of such option.

(m) Notwithstanding the other provisions of this rule, where the securities to be registered include (1) any note, draft, bill of exchange, or bankers' acceptance which meets all the conditions of section 3(a)(3) hereof, and (2) any note, draft, bill of exchange or bankers' acceptance which has a maturity at the time of issuance of not exceeding nine months exclusive of days of grace, or any renewal thereof the maturity date of which is likewise limited, but which otherwise does not meet the conditions of section 3(a)(3), the registration fee shall be calculated by taking one-fiftieth of 1 per centum of the maximum principal amount of only those securities not meeting the conditions of section 3(a)(3).

(n) Where the securities to be offered are guarantees of other securities which are being registered concurrently, no separate fee for the guarantees shall be payable.

(o) Where an issuer registers an offering of securities, the registration fee may be calculated on the basis of the maximum aggregate offering price of all the securities listed in the ''Calculation of Registration Fee'' table. The number of shares or units of securities need not be included in the ''Calculation of Registration Fee'' Table. If the maximum aggregate offering price increases prior to the effective date of the registration statement, a pre-effective amendment must be filed to increase the maximum dollar value being registered and the additional filing fee shall be paid.

(p) Where all or a portion of the securities offered under a registration

statement remain unsold after the offering's completion or termination, or withdrawal of the registration statement, the aggregate total dollar amount of the filing fee associated with those unsold securities (whether computed under §230.457(a) or (o)) may be offset against the total filing fee due for a subsequent registration statement or registration statements. The subsequent registration statement(s) must be filed within five years of the initial filing date of the earlier registration statement, and must be filed by the same registrant (including a successor within the meaning of §230.405), a majority-owned subsidiary of that registrant, or a parent that owns more than 50 percent of the registrant's outstanding voting securities. A note should be added to the ''Calculation of Registration Fee'' table in the subsequent registration statement(s) stating the dollar amount of the filing fee previously paid that is offset against the currently due filing fee, the file number of the earlier registration statement from which the filing fee is offset, and the name of the registrant and the initial filing date of that earlier registration statement.

(q) Notwithstanding any other provisions of this section, no filing fee is required for the registration of an indeterminate amount of securities to be offered solely for market-making purposes by an affiliate of the registrant.

[47 FR 11442, Mar. 16, 1982, as amended at 48 FR 12347, Mar. 24, 1983; 51 FR 2475, Jan. 17, 1986; 55 FR 23924, June 13, 1990; 57 FR 48976, Oct. 29, 1992; 59 FR 21650, Apr. 26, 1994; 60 FR 26617, May 17, 1995; 66 FR 8896, Feb. 5, 2001]

§230.459 Calculation of effective date.

Saturdays, Sundays and holidays shall be counted in computing the effective date of registration statements under section 8(a) of the act. In the case of statements which become effective on the twentieth day after filing, the twentieth day shall be deemed to begin at the expiration of nineteen periods of 24 hours each from 5:30 p.m. eastern standard time or eastern daylight-saving time, whichever is in effect at the principal office of the Commission on the date of filing.

[Reg. C, 12 FR 4075, June 24, 1947]

§230.460 Distribution of preliminary prospectus.

(a) Pursuant to the statutory requirement that the Commission in ruling upon requests for acceleration of the effective date of a registration statement shall have due regard to the adequacy of the information respecting the issuer theretofore available to the public, the Commission may consider whether the persons making the offering have taken reasonable steps to make the information contained in the registration statement conveniently available to underwriters and dealers who it is reasonably anticipated will be invited to participate in the distribution of the security to be offered or sold.

(b)(1) As a minimum, reasonable steps to make the information conveniently available would involve the distribution, to each underwriter and dealer who it is reasonably anticipated will be invited to participate in the distribution of the security, a reasonable time in advance of the anticipated effective date of the registration statement, of as many copies of the proposed form of preliminary prospectus permitted by Rule 430 (§230.430) as appears to be reasonable to secure adequate distribution of the preliminary prospectus.

(2) In the case of a registration statement filed by a closed-end investment company on Form N–2 (§239.14 and §274.11a–1 of this chapter), reasonable steps to make information conveniently available would involve distribution of a sufficient number of copies of the Statement of Additional Information required by §230.430(b) as it appears to be reasonable to secure their adequate distribution either to each underwriter or dealer who it is reasonably anticipated will be invited to participate in the distribution of the security, or to the underwriter, dealer or other source named on the cover page of the preliminary prospectus as being the person investors should contact in order to obtain the Statement of Additional Information.

(c) The granting of acceleration will not be conditioned upon

(1) The distribution of a preliminary prospectus in any state where such distribution would be illegal; or

(2) The distribution of a preliminary prospectus (i) in the case of a registration statement relating solely to securities to be offered at competitive bidding, provided the undertaking in Item 512(d)(1) of Regulation S–K (§ 229.512(d)(2) of this chapter) is included in the registration statement and distribution of prospectuses pursuant to such undertaking is made prior to the publication or distribution of the invitation for bids, or

(ii) In the case of a registration statement relating to a security issued by a face-amount certificate company or a redeemable security issued by an open-end management company or unit investment trust if any other security of the same class is currently being offered or sold, pursuant to an effective registration statement by the issuer or by or through an underwriter, or

(iii) In the case of an offering of subscription rights unless it is contemplated that the distribution will be made through dealers and the underwriters intend to make the offering during the stockholders' subscription period, in which case copies of the preliminary prospectus must be distributed to dealers prior to the effective date of the registration statement in the same fashion as is required in the case of other offerings through underwriters, or

(iv) In the case of a registration statement pertaining to a security to be offered pursuant to an exchange offer or transaction described in Rule 145 (§ 230.145).

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11443, Mar. 16, 1982, as amended at 57 FR 56834, Dec. 1, 1992]

§ 230.461 Acceleration of effective date.

(a) Requests for acceleration of the effective date of a registration statement shall be made by the registrant and the managing underwriters of the proposed issue, or, if there are no managing underwriters, by the principal underwriters of the proposed issue, and shall state the date upon which it is desired that the registration statement shall become effective. Such requests may be made in writing or orally, provided that, if an oral request is to be made, a letter indicating that fact and stating that the registrant and the managing or principal underwriters are aware of their obligations under the Act must accompany the registration statement for a pre-effective amendment thereto) at the time of filing with the Commission. Written requests may be sent to the Commission by facsimile transmission. If, by reason of the expected arrangement in connection with the offering, it is to be requested that the registration statement shall become effective at a particular hour of the day, the Commission must be advised to that effect not later than the second business day before the day which it is desired that the registration statement shall become effective. A person's request for acceleration will be considered confirmation of such person's awareness of the person's obligations under the Act. Not later than the time of filing the last amendment prior to the effective date of the registration statement, the registrant shall inform the Commission as to whether or not the amount of compensation to be allowed or paid to the underwriters and any other arrangements among the registrant, the underwriters and other broker dealers participating in the distribution, as described in the registration statement, have been reviewed to the extent required by the National Association of Securities Dealers, Inc. and such Association has issued a statement expressing no objections to the compensation and other arrangements.

(b) Having due regard to the adequacy of information respecting the registrant theretofore available to the public, to the facility with which the

nature of the securities to be registered, their relationship to the capital structure of the registrant issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors, as provided in section 8(a) of the Act, it is the general policy of the Commission, upon request, as provided in paragraph (a) of this section, to permit acceleration of the effective date of the registration statement as soon as possible after the filing of appropriate amendments, if any. In determining the date on which a registration statement shall become effective, the following are included in the situations in which the Commission considers that the statutory standards of section 8(a) may not be met and may refuse to accelerate the effective date:

(1) Where there has not been a bona fide effort to make the prospectus reasonably concise, readable, and in compliance with the plain English requirements of Rule 421(d) of Regulation C (17 CFR 230.421(d)) in order to facilitate an understanding of the information in the prospectus.

(2) Where the form of preliminary prospectus, which has been distributed by the issuer or underwriter, is found to be inaccurate or inadequate in any material respect, until the Commission has received satisfactory assurance that appropriate correcting material has been sent to all underwriters and dealers who received such preliminary prospectus or prospectuses in quantity sufficient for their information and the information of others to whom the inaccurate or inadequate material was sent.

(3) Where the Commission is currently making an investigation of the issuer, a person controlling the issuer, or one of the underwriters, if any, of the securities to be offered, pursuant to any of the Acts administered by the Commission.

(4) Where one or more of the underwriters, although firmly committed to purchase securities covered by the registration statement, is subject to and does not meet the financial responsibility requirements of Rule 15c3–1 under the Securities Exchange Act of 1934 (§240.15c3–1 of this chapter). For the purposes of this paragraph underwriters will be deemed to be firmly committed even though the obligation to purchase is subject to the usual conditions as to receipt of opinions of counsel, accountants, etc., the accuracy of warranties or representations, the happening of calamities or the occurrence of other events the determination of which is not expressed to be in the sole or absolute discretion of the underwriters.

(5) Where there have been transactions in securities of the registrant by persons connected with or proposed to be connected with the offering which may have artificially affected or may artificially affect the market price of the security being offered.

(6) Where the amount of compensation to be allowed or paid to the underwriters and any other arrangements among the registrant, the underwriters and other broker dealers participating in the distribution, as described in the registration statement, if required to be reviewed by the National Association of Securities Dealers, Inc. (NASD), have been reviewed by the NASD and the NASD has not issued a statement expressing no objections to the compensation and other arrangements.

(7) Where, in the case of a significant secondary offering at the market, the registrant, selling security holders and underwriters have not taken sufficient measures to insure compliance with Regulation M (§§242.100 through 242.105 of this chapter.

(c) Insurance against liabilities arising under the Act, whether the cost of insurance is borne by the registrant, the insured or some other person, will not be considered a bar to acceleration, unless the registrant is a registered investment company or a business development company and the cost of such insurance is borne by other than an insured officer or director of the registrant. In the case of such a registrant, the Commission may refuse to accelerate the effective date of the registration statement when the registrant is organized or administered pursuant to any instrument (including a contract for insurance against liabilities arising under the Act) that protects or purports to protect any director or officer of the company against

any liability to the company or its security holders to which he or she would otherwise be subject by reason of willful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his or her office.

[47 FR 11444, Mar. 16, 1982, as amended at 58 FR 18146, Apr. 8, 1993; 60 FR 26615, 26617, May 17, 1995; 62 FR 543, Jan. 3, 1997; 63 FR 6385, Feb. 6, 1998]

§ 230.462 Immediate effectiveness of certain registration statements and post-effective amendments.

(a) A registration statement on Form S–8 (§ 239.16b of this chapter) and a registration statement on Form S–3 (§ 239.13 of this chapter) or on Form F–3 (§ 239.33 of this chapter) for a dividend or interest reinvestment plan shall become effective upon filing with the Commission.

(b) A registration statement and any post-effective amendment thereto shall become effective upon filing with the Commission if:

(1) The registration statement is for registering additional securities of the same class(es) as were included in an earlier registration statement for the same offering and declared effective by the Commission;

(2) The new registration statement is filed prior to the time confirmations are sent or given; and

(3) The new registration statement registers additional securities in an amount and at a price that together represent no more than 20% of the maximum aggregate offering price set forth for each class of securities in the ''Calculation of Registration Fee'' table contained in such earlier registration statement.

(c) If the prospectus contained in a post-effective amendment filed prior to the time confirmations are sent or given contains no substantive changes from or additions to the prospectus previously filed as part of the effective registration statement, other than price-related information omitted from the registration statement in reliance on Rule 430A of the Act (§ 230.430A), such post-effective amendment shall become effective upon filing with the Commission.

(d) A post-effective amendment filed solely to add exhibits to a registration statement shall become effective upon filing with the Commission.

[59 FR 21650, Apr. 26, 1994, as amended by 60 FR 26617, May 17, 1995; 62 FR 39763, July 24, 1997]

§ 230.463 Report of offering of securities and use of proceeds therefrom.

(a) Except as provided in this section, following the effective date of the first registration statement filed under the Act by an issuer, the issuer or successor issuer shall report the use of proceeds pursuant to Item 701 of Regulation S–B or S–K or Item 14(e) of Form 20–F, as applicable, on its first periodic report filed pursuant to Sections 13(a) and 15(d) (15 U.S.C. 78m(a) and 78o(d)) of the Securities Exchange Act of 1934 after effectiveness, and thereafter on each of its subsequent periodic reports filed pursuant to Sections 13(a) and 15(d) of the Securities Exchange Act of 1934 through the later of disclosure of the application of all the offering proceeds or disclosure of the termination of the offering.

(b) A successor issuer shall comply with paragraph (a) of this section only if a report of the use of proceeds is required with respect to the first effective registration statement of the predecessor issuer.

(c) For purposes of this section:

(1) The term *offering proceeds* shall not include any amount(s) received for the account(s) of any selling security holder(s).

(2) The term *application* shall not include the temporary investment of proceeds by the issuer pending final application.

(d) This section shall not apply to any effective registration statement for securities to be issued:

(1) In a business combination described in Rule 145(a) (§ 230.145(a));

(2) By an issuer which pursuant to a business combination described in Rule 145(a) has succeeded to another issuer that prior to such business combination had a registration statement become effective under the Act and on the date of such business combination was not subject to paragraph (a) of this section;

(3) Pursuant to an employee benefit plan;

(4) Pursuant to a dividend or interest reinvestment plan;

(5) As American depository receipts for foreign securities;

(6) By any investment company registered under the Investment Company Act of 1940 and any issuer that has elected to be regulated as a business development company under sections 54 through 65 of the Investment Company Act of 1940 (15 U.S.C. 80a–53 through 80a–64);

(7) By any public utility company or public utility holding company required to file reports with any State or Federal authority.

(8) In a merger in which a vote or consent of the security holders of the company being acquired is not required pursuant to applicable state law; or

(9) In an exchange offer for the securities of the issuer or another entity.

[46 FR 48142, Oct. 1, 1981, as amended at 50 FR 19001, May 6, 1985; 57 FR 56834, Dec. 1, 1992; 62 FR 39763, July 24, 1997; 64 FR 53910, Oct. 5, 1999]

§ 230.464 Effective date of post-effective amendments to registration statements filed on Form S–8 and on certain Forms S–3, S–4, F–2 and F–3.

Provided. That, at the time of filing of each post-effective amendment with the Commission, the issuer continues to meet the requirements of filing on Form S–8 (§ 239.16b of this chapter); or on Form S–3, F–2 or F–3 (§§ 239.13, 239.32 or 239.33 of this chapter) for a registration statement relating to a dividend or interest reinvestment plan; or in the case of a registration statement on Form S–4 (§ 239.25 of this chapter) that there is continued compliance with General Instruction G of that Form:

(a) The post-effective amendment shall become effective upon filing with the Commission: and

(b) With respect to securities sold on or after the filing date pursuant to a prospectus which forms a part of a Form S–8 registration statement; or a Form S–3, F–2, or F–3 registration statement relating to a dividend or interest reinvestment plan; or a Form S–4 registration statement complying with General Instruction G of that Form and which has been amended to include or incorporate new full year financial statments or to comply with the provisions of section 10(a)(3) of the Act, the effective date of the registration statement shall be deemed to be the filing date of the post-effective amendment.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78*l*, 78m, 78*o*(d), 78w(a), 80a–8, 80a–29, 80a–30(c), 80a–37(a))

[47 FR 54770, Dec. 6, 1982, as amended at 50 FR 19001, May 6, 1985; 61 FR 30402, June 14, 1996]

§ 230.466 Effective date of certain registration statements on Form F–6.

(a) A depositary that previously has filed a registration statement on Form F–6 (§ 239.36 of this chapter) may designate a date and time for a registration statement (including post-effective amendments) on Form F–6 to become effective and such registration statement shall become effective in accordance with such designation if the following conditions are met:

(1) The depositary previously has filed a registration statement on Form F–6 (§ 239.36 of this chapter), which the Commission has declared effective, with identical terms of deposit, except for the number of foreign securities a Depositary Share represents, and the depositary so certifies; and

(2) The designation of the effective date and time is set forth on the facing-page of the registration statement, or in any pre-effective amendment thereto. A pre-effective amendment containing such a designation properly made shall be deemed to have been filed with the consent of the Commission.

(b)(1) The Commission may, in the manner and under the circumstances

set forth in paragraph (b)(2) of this section, suspend the ability of a depositary to designate the date and time of effectiveness of a registration statement, and such suspension shall remain in effect until the Commission furnishes written notice to the depositary that the suspension has been terminated. Any suspension, so long as it is in effect, shall apply to any registration statement that has been filed but has not, at the time of such suspension, become effective and to any registration statement the depositary files after such suspension. Any such suspension applies only to the ability to designate the date and time of effectiveness under paragraph (a) of this section and does not otherwise affect the registration statement.

(2) Any suspension under paragraph (b)(1) of this section becomes effective when the Commission furnishes written notice thereof to the depositary. The Commission may issue a suspension if it appears to the Commission:

(i) That any registration statement containing a designation under this section is incomplete or inaccurate in any material respect, whether or not such registration has become effective, or

(ii) That the depositary has not complied with any of the conditions of this section. The depositary may petition the Commission to review the suspension. The Commission will order a hearing on the matter if a request for such a hearing is included in the petition.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78*l*, 78m, 78*o*(d), 78w(a))

[48 FR 12347, Mar. 24, 1983]

§ 230.467 Effectiveness of registration statements and post-effective amendments thereto made on Forms F–7, F–8, F–9, F–10 and F–80.

(a) A registration statement on Form F–7, Form F–8 or Form F–80 (§ 239.37, § 239.38 or § 239.41 of this chapter), and any amendment thereto, shall become effective upon filing with the Commission. A registration statement on Form F–9 or Form F–10 (§ 239.39 or § 239.40 of this chapter), and any amendment thereto, relating to an offering being made contemporaneously in the United States and Canada shall become effective upon filing with the Commission, unless designated as preliminary material on the Form.

(b) Where no contemporaneous offering is being made in Canada, a registrant filing on Form F–9 or Form F–10 may designate on the facing page of the registration statement, or any amendment thereto, a date and time for such filing to become effective that is not earlier than seven calendar days after the date of filing with the Commission, and such registration statement or amendment shall become effective in accordance with such designation; *provided, however,* That such registration statement or amendment may become effective prior to seven calendar days after the date of filing with the Commission if the securities regulatory authority in the review jurisdiction issues a receipt or notification of clearance with respect thereto before such time elapses, in which case the registration statement or amendment shall become effective by order of the Commission as soon as practicable after receipt of written notification by the Commission from the registrant or the applicable Canadian securities regulatory authority of the issuance of such receipt or notification of clearance.

[56 FR 30054, July 1, 1991]

AMENDMENTS; WITHDRAWALS

§ 230.470 Formal requirements for amendments.

Except for telegraphic amendments filed pursuant to Rule 473 (§ 230.473),

amendments to a registration statement shall be filed under cover of an appropriate facing sheet, shall be numbered consecutively in the order in which filed, and shall indicate on the facing sheet the applicable registration form on which the amendment is prepared and the file number of the registration statement.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11445, Mar. 16, 1982]

§ 230.471 Signatures to amendments.

(a) Except as provided in Rule 447 (§ 230.447) and in Rule 478 (§ 230.478), every amendment to a registration statement shall be signed by the persons specified in section 6(a) of the Act. At least one copy of every amendment filed with the Commission shall be signed. Unsigned copies shall be conformed.

(b) Where the Act or the rules thereunder require a document filed with or furnished to the Commission to be signed, such document shall be manually signed, or signed using either typed signatures or duplicated or facsimile versions of manual signatures. Where typed, duplicated or facsimile signatures are used, each signatory to the filing shall manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document shall be executed before or at the time the filing is made and shall be retained by the registrant for a period of five years. Upon request, the registrant shall furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11445, Mar. 16, 1982, as amended at 61 FR 30402, June 14, 1996]

§ 230.472 Filing of amendments; number of copies.

(a) Except for telegraphic amendments filed pursuant to Rule 473 (§ 230.473), there shall be filed with the Commission three complete, unmarked copies of every amendment, including exhibits and all other papers and documents filed as part of the amendment, and eight additional copies of such amendment at least five of which shall be marked to indicate clearly and precisely, by underlining or in some other appropriate manner, the changes effected in the registration statement by the amendment. Where the amendment to the registration statement incorporates into the prospectus documents which are required to be delivered with the prospectus in lieu of prospectus presentation, the eight additional copies shall be accompanied by eight copies of such documents. No other exhibits are required to accompany such additional copies.

(b) Every amendment which relates to a prospectus shall include copies of the prospectus as amended. Each such copy of the amended prospectus shall be accompanied by a copy of the cross reference sheet required by Rule 481(a) (§ 230.481(a)), where applicable, if the amendment of the prospectus resulted in any change in the accuracy of the cross reference sheet previously filed. Notwithstanding the foregoing provisions of this paragraph, only copies of the changed pages of the prospectus,

and the cross reference sheet if amended, need be included in an amendment filed pursuant to an undertaking referred to in Item 512(d) of Regulation S–K (§ 229.512(d) of this chapter).

(c) Every amendment of a financial statement which is not included in the prospectus shall include copies of the financial statement as amended. Every amendment relating to a certified financial statement shall include the consent of the certifying accountant to the use of his certificate in connection with the amended financial statement in the registration statement or prospectus and to being named as having certified such financial statement.

(d) Notwithstanding any other provision of this section, if a registration statement filed on Form S–8 (§ 239.16b of this chapter) is amended, there shall be filed with the Commission three complete, unmarked copies of every amendment, including exhibits and all other papers and documents filed as part of the amendment. Three additional, unmarked copies of such amendments shall be furnished to the Commission. No exhibits are required to accompany the additional copies of amendments to registration statements filed on Form S–8.

(e) Notwithstanding any other provision of this section, if a post-effective amendment is filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)), one copy of the complete post-effective amendment, including exhibits and all other papers and documents filed as a part thereof shall be filed with the Commission. Such copy should not be bound and may contain facsimile versions of manual signatures in accordance with Rule 402(e) (§ 230.402(e)).

[47 FR 11445, Mar. 16, 1982, as amended at 55 FR 23924, June 13, 1990; 60 FR 26618, May 17, 1995: 61 FR 30402, June 14, 1996]

§ 230.473 Delaying amendments.

(a) An amendment in the following form filed with a registration statement, or as an amendment to a registration statement which has not become effective, shall be deemed, for the purpose of section 8(a) of the Act, to be filed on such date or dates as may be necessary to delay the effective date of such registration statement (1) until the registrant shall file a further amendment which specifically states as provided in paragraph (b) of this section that such registration statement shall thereafter become effective in accordance with section 8(a) of the Act, or (2) until the registration statement shall become effective on such date as the Commission, acting pursuant to section 8(a), may determine:

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with section 8(a) of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Commission acting pursuant to said section 8(a), may determine.

(b) An amendment which for the purpose of paragraph (a)(1) of this section specifically states that a registration statement shall thereafter become effective in accordance with section 8(a) of the Act, shall be in the following form:

This registration statement shall hereafter become effective in accordance with the provisions of section 8(a) of the Securities Act of 1933.

(c) An amendment pursuant to paragraph (a) of this section which is filed with a registration statement shall be set forth on the facing page thereof following the calculation of the registration fee. Any such amendment filed after the filing of the registration statement, any amendment altering the proposed date of public sale of the securities being registered, or any amendment filed pursuant to paragraph (b) of this section may be made by telegram, letter or facsimile transmission. Each such telegraphic amendment shall be confirmed in writing within a reasonable time by the filing of a signed copy of the amendment. Such confirmation shall not be deemed an amendment.

(d) No amendments pursuant to paragraph (a) of this section may be filed with a registration statement on Form F–7, F–8 or F–80 (§ 239.37, § 239.38 or § 239.41 of this chapter); on Form F–9 or F–10 (§ 239.39 or § 239.40 of this chapter) relating to an offering being made contemporaneously in the United States

and the registrant's home jurisdiction; on Form S–8 (§ 239.16b of this chapter) ; on Form S–3, F–2 or F–3 (§ 239.13, § 239.32 or § 239.33 of this chapter) relating to a dividend or interest reinvestment plan; or on Form S–4 (§ 239.25 of this chapter) complying with General Instruction G of that Form

[47 FR 11445, Mar. 16, 1982, as amended at 56 FR 30054, 30055, July 1, 1991; 61 FR 30402, June 14, 1996]

§ 230.474 Date of filing of amendments.

The date on which amendments are actually received by the Commission shall be the date of filing thereof, if all of the requirements of the act and the rules with respect to such filing have been complied with.

[16 FR 8737, Aug. 29, 1951]

§ 230.475 Amendment filed with consent of Commission.

An application for the Commission's consent to the filing of an amendment with the effect provided in section 8(a) of the Act may be filed before or after or concurrently with the filing of the amendment. The application shall be signed and shall state fully the grounds upon which it is made. The Commission's consent shall be deemed to have been given and the amendment shall be treated as a part of the registration statement only when the Commission shall after the filing of such amendment enter an order to that effect.

[Reg. C, 12 FR 4075, June 24, 1947]

§ 230.475a Certain pre-effective amendments deemed filed with the consent of the Commission.

Amendments to a registration statement on Form F–2 (§ 239.32 of this chapter) relating to a dividend or interest reinvestment plan, or on Form S–4 (§ 239.25 of this chapter) complying with General Instruction G of that Form, filed prior to the effectiveness of such registration statement shall be deemed to have been filed with a consent of the Commission and shall accordingly be treated as part of the registration statement.

[59 FR 21650, Apr. 26, 1994]

§ 230.476 Amendment filed pursuant to order of Commission.

An amendment filed prior to the effective date of a registration statement shall be deemed to have been filed pursuant to an order of the Commission within the meaning of section 8(a) of the act so as to be treated as a part of the registration statement only when the Commission shall after the filing of such amendment enter an order declaring that it has been filed pursuant to the Commission's previous order.

[Reg. C, 12 FR 4075, June 24, 1947]

§ 230.477 Withdrawal of registration statement or amendment.

(a) Except as provided in paragraph (b) of this section, any registration statement or any amendment or exhibit thereto may be withdrawn upon application if the Commission, finding such withdrawal consistent with the public interest and the protection of investors, consents thereto.

(b) Any application for withdrawal of a registration statement filed on Form F–2 (§ 239.32 of this chapter) relating to a dividend or interest reinvestment plan, or on Form S–4 (§ 239.25 of this chapter) complying with General Instruction G of that Form, and/or any pre-effective amendment thereto, will be deemed granted upon filing if such filing is made prior to the effective date. Any other application for withdrawal of an entire registration statement made before the effective date of the registration statement will be deemed granted at the time the application is filed with the Commission unless, within 15 calendar days after the registrant files the application, the Commission notifies the registrant that the application for withdrawal will not be granted.

(c) The registrant must sign any application for withdrawal and must state fully in it the grounds on which the registrant makes the application. The fee paid upon the filing of the registration statement will not be refunded to the registrant. The registrant must state in the application that no securities were sold in connection with the offering. If the registrant applies for withdrawal in anticipation of reliance on § 230.155(c), the registrant

must, without discussing any terms of the private offering, state in the application that the registrant may undertake a subsequent private offering in reliance on § 230.155(c).

(d) Any withdrawn document will remain in the Commission's public files, as well as the related request for withdrawal.

[47 FR 11445, Mar. 16, 1982, as amended at 47 FR 54770, Dec. 6, 1982; 50 FR 19001, May 6, 1985; 59 FR 21650, Apr. 26, 1994; 66 FR 8897, Feb. 5, 2001]

§ 230.478 Powers to amend or withdraw registration statement.

All persons signing a registration statement shall be deemed, in the absence of a statement to the contrary, to confer upon the registrant, and upon the agent for service named in the registration statement, the following powers:

(a) A power to amend the registration statement (1) by filing an amendment as provided in § 230.473; (2) by filing any written consent; (3) by correcting typographical errors; (4) by reducing the amount of securities registered, pursuant to an undertaking contained in the registration statement.

(b) A power to make application pursuant to § 230.475 for the Commission's consent to the filing of an amendment.

(c) A power to withdraw the registration statement or any amendment or exhibit thereto.

(d) A power to consent to the entry of an order under section 8(b) of the act, waiving notice and hearing, such order being entered without prejudice to the right of the registrant thereafter to have the order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate on its face in any material respect.

[Reg. C, 12 FR 4076, June 24, 1947, as amended at 16 FR 8737, Aug. 29, 1951]

§ 230.479 Procedure with respect to abandoned registration statements and post-effective amendments.

When a registration statement, or a post-effective amendment to such a statement, has been on file with the Commission for a period of nine months and has not become effective the Commission may, in its discretion, proceed in the following manner to determine whether such registration statement or amendment has been abandoned by the registrant. If the registration statement has been amended, otherwise than for the purpose of delaying the effective date thereof, or if the post-effective amendment has been amended, the nine-month period shall be computed from the date of the latest such amendment.

(a) A notice will be sent to the registrant, and to the agent for service named in the registration statement, by registered or certified mail, return receipt requested, addressed to the most recent addresses for the registrant and the agent for service reflected in the registration statement. Such notice will inform the registrant and the agent for service that the registration statement or amendment is out of date and must be either amended to comply with the applicable requirements of the Act and the rules and regulations thereunder or be withdrawn within 30 days after the date of such notice.

(b) If the registrant or the agent for service fails to respond to such notice by filing a substantive amendment or withdrawing the registration statement and does not furnish a satisfactory explanation as to why it has not done so within such 30 days, the Commission may, where consistent with the public interest and the protection of investors, enter an order declaring the registration statement or amendment abandoned.

(c) When such an order is entered by the Commission the papers comprising the registration statement or amendment will not be removed from the

files of the Commission but an order shall be included in the file for the registration statement in the following manner: ''Declared abandoned by order dated _____.''

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11446, Mar. 16, 1982]

INVESTMENT COMPANIES; BUSINESS DEVELOPMENT COMPANIES

AUTHORITY: Sections 230.480 to 230.485 issued under secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a–37, unless otherwise noted.

SOURCE: Sections 230.480 to 230.485 appear at 47 FR 11446, Mar. 16, 1982, unless otherwise noted.

NOTE: The rules in this section of Regulation C (§§ 230.480 to 230.488 and §§ 230.495 to 230.498) apply only to investment companies and business development companies. Section 230.489 applies to certain entities excepted from the definition of investment company by rules under the Investment Company Act of 1940. The rules in the rest of Regulation C (§§ 230.400 to 230.479 and §§ 230.490 to 230.494), unless the context specifically indicates otherwise, also apply to investment companies and business development companies. *See* § 230.400.

§ 230.480 Title of securities.

If a registration statement is prepared on a form available solely to investment companies registered under the Investment Company Act of 1940, or a business development company which is selling or proposing to sell its securities pursuant to a registration statement which has been filed under the Act, wherever the title of securities is required to be stated there shall be given such information as will indicate the type and general character of the securities, including the following:

(a) In the case of shares, the par or stated value, if any; the rate of dividends, if fixed, and whether cumulative or non-cumulative; a brief indication of the preference, if any; and, if convertible, a statement to that effect.

(b) In the case of funded debt, the rate of interest; the date of maturity, or, if the issue matures serially, a brief indication of the serial maturities, such as ''maturing serially from 1950 to 1960''; if the payment of principal or interest is contingent, an appropriate indication of such contingency; a brief indication of the priority of the issue; and, if convertible, a statement to that effect.

(c) In the case of any other kind of security, appropriate information of comparable character.

§ 230.481 Information required in prospectuses.

Disclose the following in registration statements prepared on a form available solely to investment companies registered under the Investment Company Act of 1940 or in registration statements filed under the Act for a company that has elected to be regulated as a business development company under Sections 55 through 65 of the Investment Company Act (15 U.S.C. 80a–54—80a–64):

(a) *Facing page.* Indicate the approximate date of the proposed sale of the securities to the public.

(b) *Outside front cover page.* If applicable, include the following in plain English as required by § 230.421(d):

(1) *Commission legend.* Provide a legend that indicates that the Securities and Exchange Commission has not approved or disapproved of the securities

or passed upon the accuracy or adequacy of the disclosure in the prospectus and that any contrary representation is a criminal offense. The legend may be in one of the following or other clear and concise language:

Example A: The Securities and Exchange Commission has not approved or disapproved these securities or passed upon the adequacy of this prospectus. Any representation to the contrary is a criminal offense.

Example B: The Securities and Exchange Commission has not approved or disapproved these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

(2) *''Subject to Completion'' legend.* (i) If a prospectus or Statement of Additional Information will be used before the effective date of the registration statement, include on the outside front cover page of the prospectus or Statement of Additional Information, a prominent statement that:

(A) The information in the prospectus or Statement of Additional Information will be amended or completed;

(B) A registration statement relating to these securities has been filed with the Securities and Exchange Commission;

(C) The securities may not be sold until the registration statement becomes effective; and

(D) In a prospectus, that the prospectus is not an offer to sell the securities and it is not soliciting an offer to buy the securities in any state where offers or sales are not permitted, or in a Statement of Additional Information, that the Statement of Additional Information is not a prospectus.

(ii) The legend may be in the following language or other clear and understandable language:

The information in this prospectus (or Statement of Additional Information) is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus (or Statement of Additional Information) is not an offer to sell these securities and is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.

(iii) In the case of a prospectus that omits pricing information under § 230.430A, provide the information and legend in paragraph (b)(2) of this section if the prospectus or Statement of Additional Information is used before the initial public offering price is determined.

(c) *Table of contents.* Include on either the outside front, inside front, or outside back cover page of the prospectus, a reasonably detailed table of contents. It must show the page number of the various sections or subdivisions of the prospectus. Include this table of contents immediately following the cover page in any prospectus delivered electronically.

(d) *Stabilization and other transactions.* (1) Indicate on the front cover page of the prospectus if the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may purchase additional shares in connection with the offering, and state the amount of additional shares the underwriter may purchase under the arrangement. Provide disclosure in the prospectus that briefly describes any transaction that the underwriter intends to conduct during the offering that stabilizes, maintains, or otherwise affects the market price of the offered securities. Include information on stabilizing transactions, syndicate short covering transactions, penalty bids, or any other transactions that affect the offered security's price. Describe the nature of the transactions clearly and explain how the transactions affect the offered security's price. Identify the exchange or other market on which these transactions may occur. If true, disclose that the underwriter may discontinue these transactions at any time;

(2) If the stabilizing began before the effective date of the registration statement, disclose in the prospectus the amount of securities bought, the prices at which they were bought and the period within which they were bought. In the event that § 230.430A of this chapter is used, the prospectus filed under § 230.497(h) or included in a post-effective amendment must contain information on the stabilizing transactions that took place before the determination of the public offering price shown in the prospectus; and

(3) If you are making a warrant or rights offering of securities to existing security holders and the securities not purchased by existing security holders are to be reoffered to the public, disclose in the prospectus used in connection with the reoffering:

(i) The amount of securities bought in stabilization activities during the offering period and the price or range of prices at which the securities were bought;

(ii) The amount of the offered securities subscribed for during the offering period;

(iii) The amount of the offered securities subscribed for by the underwriters during the offering period;

(iv) The amount of the offered securities sold during the offering period by the underwriters and the price or range of prices at which the securities were sold; and

(v) The amount of the offered securities to be reoffered to the public and the public offering price.

(e) *Dealer prospectus delivery obligations.* On the outside back cover page of the prospectus, advise dealers of their prospectus delivery obligation, including the expiration date specified by Section 4(3) of the Act (15 U.S.C. 77d(3)) and §230.174. If the expiration date is not known on the effective date of the registration statement, include the expiration date in the copy of the prospectus filed under §230.497. This information need not be included if dealers are not required to deliver a prospectus under §230.174 or Section 24(d) of the Investment Company Act of 1940 (15 U.S.C. 80a–24). Use the following or other clear, plain language:

DEALER PROSPECTUS DELIVERY OBLIGATION

Until (insert date), all dealers that effect transactions in these securities, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealers' obligation to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

(f) *Electronic distribution.* Where a prospectus is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents, such as paper size, type size and font, bold-face type, italics and red ink, by presenting all required information in a format readily communicated to investors, and where indicated, in a manner reasonably calculated to draw investor attention to specific information.

[63 FR 6385, Feb. 6, 1998]

§230.482 Advertising by an investment company as satisfying requirements of section 10.

(a) An advertisement or other sales material that is not a prospectus, or an advertisement or sales material excluded from the definition of prospectus by section 2(10) of the Act (15 U.S.C. 77b(10)) and related §230.134, will be deemed to be a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purpose of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), if:

(1) It is with respect to an investment company registered under the Investment Company Act of 1940 (*1940 Act*), or a business development company which is selling or proposing to sell its securities pursuant to a registration statement which has been filed under the Act,

(2) It contains only information the substance of which is included in the section 10(a) prospectus,

(3) It includes a conspicuous statement that:

(i) Identifies a source from which an investor may obtain a prospectus containing more complete information about the investment company, which should be read carefully before investing; or

(ii) If used with a profile under §230.498 (''Profile''), indicates that information is available in the Profile about the investment company, the procedures for investing in the investment company, and the availability of the investment company's prospectus.

NOTE TO PARAGRAPH (A)(3): The fact that the statements included in the advertisement are included in the section 10(a) prospectus does not relieve the issuer, underwriter, or dealer of the obligation to ensure that the advertisement is not false or misleading.

(4) It contains the statement required by Rule 481(b)(2) under the Securities Act (§230.481(b)(2) of this chapter) when used prior to effectiveness of the company's registration statement or, in

the case of a registration statement that becomes effective omitting certain information from the prospectus contained in the registration statement in reliance upon Rule 430A under the Securities Act (§ 230.430A of this chapter), when used prior to the determination of the public offering price,

(5) It does not contain and is not accompanied by any application by which a prospective investor may invest in the investment company, except that:

(i) A prospectus meeting the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) by which a unit investment trust offers periodic payment plan certificates may contain a contract application although the prospectus includes another prospectus that, pursuant to this section, omits certain information required by section 10(a) of the Act, regarding investment companies in which the unit investment trusts invests; and

(ii) It may be used with a Profile that includes, or is accompanied by, an application to purchase shares of the investment company as permitted under § 230.498.

(6) In the case of an advertisement containing performance data of an open-end management investment company or a separate account registered under the 1940 Act as a unit investment trust offering variable annuity contracts (*trust account*), it includes a legend disclosing that the performance data quoted represents past performance and that the investment return and principal value of an investment will fluctuate so that an investor's shares, when redeemed, may be worth more or less than their original cost; *Provided, however,* That an advertisement may omit legend disclosure pertaining to the fluctuation of the principal value of an investment in a money market fund. In addition, if a sales load or any other nonrecurring fee is charged, the advertisement must disclose the maximum amount of the load or fee; if the sales load or fee is not reflected, the advertisement must also disclose that the performance data does not reflect its deduction, and that, if reflected, the load or fees would reduce the performance quoted;

NOTE TO PARAGRAPH (A)(6): All advertisements made pursuant to this rule are subject to Rule 420 [17 CFR 230.420].

(7)(i) In the case of an investment company that holds itself out to be a money market fund, it includes the following statement:

An investment in the Fund is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although the Fund seeks to preserve the value of your investment at $1.00 per share, it is possible to lose money by investing in the Fund.

(ii) A money market fund that does not hold itself out as maintaining a stable net asset value may omit the second sentence of the statement in (a)(7)(i) of this section.

(b) An advertisement made pursuant to paragraph (a) of this section need not contain the statement required by Rule 481(b)(1) (§ 230.481(b)(1)).

(c) An advertisement made pursuant to paragraph (a) of this section need not be filed as part of the registration statement filed under the Act.

NOTE: These advertisements, unless filed with the NASD, are required to be filed inaccordance with the requirements of Rule 497 (17 CFR 230.497).

(d) In the case of a money market fund:

(1) Any quotation of the money market fund's yield in an advertisement shall be based on the methods of computation prescribed in Form N–1A (§§ 239.15A and 274.11A of this chapter), Form N–3 (§§ 239.17a and 274.11b of this chapter), or Form N–4 (§§ 239.17b and 274.11c of this chapter) and may include:

(i) A quotation of current yield that identifies the length of and the date of the last day in the base period used in computing that quotation; or

(ii) A quotation of effective yield if it appears in the same advertisement as a quotation of current yield and each quotation relates to an identical base period and is presented with equal prominence; or

(iii) A quotation or quotations of tax equivalent yield or tax equivalent effective yield if it appears in the same advertisement as a quotation of current yield and each quotation relates to the same base period as the quotation of current yield, is presented

with equal prominence, and states the income tax rate used in the calculation.

(2) Accompany any quotation of the money market fund's total return in an advertisement with a quotation of the money market fund's current yield under paragraph (d)(1)(i) of this section. Place the quotations of total return and current yield next to each other, in the same size print, and if there is a material difference between the quoted total return and the quoted current yield, include a statement that the yield quotation more closely reflects the current earnings of the money market fund than the total return quotation.

(e) In the case of an open-end management investment company or a trust account (other than a money market fund referred to in paragraph (d) of this section), any quotation of the company's performance contained in an advertisement shall be limited to quotations of:

(1) A current yield that—

(i) Is based on the methods of computation prescribed in Form N–1A, N–3, or N–4;

(ii) Is accompanied by quotations of total return as provided for in paragraph (e)(3) of this section;

(iii) Is set out in no greater prominence than the required quotations of total return; and

(iv) Identifies the length of and the date of the last day in the base period used in computing the quotation.

(2) A tax equivalent yield that—

(i) Is based on the methods of computation prescribed in Form N–1A, N–3, or N–4;

(ii) Is accompanied by quotations of yield as provided for in paragraph (e)(1) of this section and total return as provided for in paragraph (e)(3) of this section;

(iii) Is set out in no greater prominence than the required quotations of yield and total return;

(iv) Relates to the same base period as the required quotation of yield; and

(v) Identifies the length of and the date of the last day in the base period used in computing the quotation.

(3) Average annual total return for one, five, and ten year periods; *Provided,* That if the company's registration statement under the Securities Act of 1933 (15 U.S.C. 77A *et seq.*) has been in effect for less than one, five, or ten years, the time period during which the registration statement was in effect is substituted for the period(s) otherwise prescribed; and *Provided further,* That such quotations—

(i) Are based on the methods of computation prescribed in Form N–1A, N–3, or N–4;

(ii) Are current to the most recent calendar quarter ended prior to the submission of the advertisement for publication;

(iii) Are set out with equal prominence; and

(iv) Identify the length of and the last day of the one, five, and ten year periods.

(4) For an open-end management investment company, average annual total return (after taxes on distributions) and average annual total return (after taxes on distributions and redemption) for one, five, and ten year periods; *Provided,* That if the company's registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) has been in effect for less than one, five, or ten years, the time period during which the registration statement was in effect is substituted for the period(s) otherwise prescribed; and *Provided further,* That such quotations:

(i) Are based on the methods of computation prescribed in Form N–1A;

(ii) Are current to the most recent calendar quarter ended prior to the submission of the advertisement for publication;

(iii) Are accompanied by quotations of total return as provided for in paragraph (e)(3) of this section;

(iv) Include both average annual total return (after taxes on distributions) and average annual total return (after taxes on distributions and redemption);

(v) Are set out with equal prominence and are set out in no greater prominence than the required quotations of total return; and

(vi) Identify the length of and the last day of the one, five, and ten year periods; and

(5) Any other historical measure of company performance (not subject to

any prescribed method of computation) if such measurement:

(i) Reflects all elements of return;

(ii) Is accompanied by quotations of total return as provided for in paragraph (e)(3) of this section;

(iii) In the case of any measure of performance adjusted to reflect the effect of taxes, is accompanied by quotations of total return as provided for in paragraph (e)(4) of this section;

(iv) Is set out in no greater prominence than the required quotations of total return; and

(v) Identifies the length of and the last day of the period for which performance is measured.

(f) An advertisement for an open-end management investment company (other than a company that is permitted under § 270.35d–1(a)(4) of this chapter to use a name suggesting that the company's distributions are exempt from federal income tax or from both federal and state income tax) that represents or implies that the company is managed to limit or control the effect of taxes on company performance shall accompany any quotation of the company's performance permitted by paragraph (e) of this section with quotations of total return as provided for in paragraph (e)(4) of this section.

(g) All performance data contained in any advertisement must be as of the most recent practicable date considering the type of investment company and the media through which the data will be conveyed; *Provided, however,* That any advertisement containing total return quotations shall be considered to have complied with this provision if the total return quotations are current to the most recent calendar quarter ended prior to the submission of the advertisement for publication.

[47 FR 11446, Mar. 16, 1982, as amended at 48 FR 55725, Dec. 15, 1983; 52 FR 21262, June 5, 1987; 53 FR 3879, Feb. 10, 1988; 53 FR 9768, Mar. 25, 1988; 56 FR 8124, Feb. 27, 1991; 61 FR 24655, May 15, 1996; 62 FR 64978, Dec. 9, 1997; 63 FR 13984, Mar. 23, 1998; 66 FR 9017, Apr. 16, 2001]

§ 230.483 Exhibits for certain registration statements.

If a registration statement is prepared on a form available solely to investment companies registered under the Investment Company Act of 1940, or a business development company which is selling or proposing to sell its securities pursuant to a registration statement which has been filed under the Act, the following provisions apply:

(a) Such registration statement shall contain an exhibit index, which should immediately precede the exhibits filed with such registration statement. The exhibit index shall indicate by handwritten, typed, printed or other legible form of notation in the manually signed original registration statement the page number in the sequential numbering system where such exhibit can be found. Where exhibits are incorporated by reference, this fact shall be noted in the exhibit index referred to in the preceding sentence. Further, the first page of the manually signed registration statement shall list the page in the filing where the exhibit index is located.

(b) If any name is signed to the registration statement pursuant to a power of attorney, copies of such powers of attorney shall be filed as an exhibit to the registration statement. In addition, if the name of any officer signing on behalf of the registrant, or attesting the registrant's seal, is signed pursuant to a power of attorney, certified copies of a resolution of the registrant's board of directors authorizing such signature shall also be filed as an exhibit to the registration statement. A power of attorney that is filed with the Commission shall relate to a specific filing, an amendment thereto, or a related registration statement that is to be effective upon filing pursuant to Rule 462(b) (§ 230.462(b)) under the Act.

(c)(1) All written consents are required to be filed as an exhibit to the registration statement, together with a list thereof. Such consents shall be dated and manually signed. Where the consent of an expert or counsel is contained in his report or opinion, a reference shall be made in the list to the report or opinion containing the consent.

(2) In a registration statement filed pursuant to Rule 462(b) (§ 230.462(b)) by a closed-end company, any required consent may be incorporated by reference into the registration statement from a previously filed registration

statement related to the offering, provided that the consent contained in the previously filed registration statement expressly provides for such incorporation. Any consent filed in a Rule 462(b) (§ 230.462(b)) registration statement may contain duplicated or facsimile versions of required signatures, and such signatures shall be considered manually filed for the purposes of the Act and the rules thereunder.

(d) The registrant:

(1) May file such exhibits as it may desire in addition to those required by the appropriate form. Such exhibits shall be so marked as to indicate clearly the subject matters to which they refer;

(2) In any case where two or more indentures, contracts, frachises, or other documents required to be filed as exhibits are substantially identical in all material respects except as to the parties thereto, the dates of execution, or other details, need file a copy of only one of such documents, with a schedule identifying the other documents omitted and setting forth the material details in which such documents differ from the document of which a copy is filed. The Commission may at any time in its discretion require filing of copies of any documents so omitted; and

(3) If an exhibit to a registration statement (other than an opinion or consent), filed in preliminary form, has been changed only (i) to insert information as to interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters' or dealers' commission, names, addresses or participation of underwriters or similar matters, which information appears elsewhere in an amendment to the registration statement, or (ii) to correct typographical errors, insert signatures or make other similar immaterial changes, then, notwithstanding any contrary requirement of any rule or form, need not refile such exhibit as so amended; provided the registrant states in the amendment to the registration statement the basis provided by this rule for not refiling such exhibit. Any such incomplete exhibit may not, however, be incorporated by reference in any subsequent filing under any Act administered by the Commission.

[47 FR 11446, Mar. 16, 1982, as amended at 58 FR 14857, Mar. 18, 1993; 59 FR 36261, July 15, 1994; 59 FR 67761, Dec. 30, 1994; 60 FR 26618, May 17, 1995; 63 FR 13943, Mar. 23, 1998; 65 FR 24799, Apr. 27, 2000]

§ 230.484 Undertaking required in certain registration statements.

If a registration statement is prepared on a form available solely to investment companies registered under the investment Company Act of 1940, or a business development company which is selling or proposing to sell its securities pursuant to a registration statement which has been filed under the Act, if

(a) Any acceleration is requested of the effective date of the registration statement pursuant to Rule 461 (§ 230.461), and

(b)(1) Any provision or arrangement exists whereby the registrant may indemnify a director, officer or controlling person of the registrant against liabilities arising under the Act, or

(2) The underwriting agreement contains provisions by which indemnification against such liabilities is given by the registrant to the underwriter or controlling persons of the underwriter and the director, officer or controlling person of the registrant is such an underwriter or controlling person thereof or a member of any firm which is an underwriter, and

(3) The benefits of such indemnification are not waived by such persons; the registration statement shall include a brief description of the indemnification provisions and an undertaking in substantially the following form:

Insofar as indemnification for liability arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the

successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

§ 230.485 Effective date of post-effective amendments filed by certain registered investment companies.

(a) *Automatic Effectiveness.* (1) Except as otherwise provided in this section, a post-effective amendment to a registration statement filed by a registered open-end management investment company, unit investment trust or separate account as defined in section 2(a)(37) of the Investment Company Act of 1940 [15 USC 80a–2(a)(37)] shall become effective on the sixtieth day after the filing thereof, or a later date designated by the registrant on the facing sheet of the amendment, which date shall be no later than eighty days after the date on which the amendment is filed.

(2) A post-effective amendment filed by a registered open-end management investment company for the purpose of adding a series shall become effective on the seventy-fifth day after the filing thereof or a later date designated by the registrant on the facing sheet of the amendment, which date shall be no later than ninety-five days after the date on which the amendment is filed.

(3) The Commission, having due regard to the public interest and the protection of investors, may declare an amendment filed under this paragraph (a) effective on an earlier date.

(b) *Immediate Effectiveness.* Except as otherwise provided in this section, a post-effective amendment to a registration statement filed by a registered open-end management investment company, unit investment trust or separate account as defined in section 2(a)(37) of the Investment Company Act of 1940 [15 USC 80a–2(a)(37)] shall become effective on the date upon which it is filed with the Commission, or a later date designated by the registrant on the facing sheet of the amendment, which date shall be not later than thirty days after the date on which the amendment is filed, except that a post-effective amendment including a designation of a new effective date pursuant to paragraph (b)(1)(iii) of this section shall become effective on the new effective date designated therein, *Provided,* that the following conditions are met:

(1) It is filed for no purpose other than one or more of the following:

(i) Bringing the financial statements up to date under section 10(a)(3) of the Securities Act of 1933 [15 U.S.C. 77j(a)(3)] or Rules 3–12 or 3–18 of Regulation S–X [17 CFR 210.3–12 and 210.3–18];

(ii) Complying with an undertaking to file an amendment containing financial statements, which may be unaudited, within four to six months after the effective date of the registrant's registration statement under the Securities Act of 1933 [15 U.S.C. 77a *et seq.*];

(iii) Designating a new effective date for a previously filed post-effective amendment pursuant to paragraph (a) of this section, which has not yet become effective, *Provided,* that the new effective date shall be no earlier than the effective date designated in the previously filed amendment under paragraph (a) of this section and no later than thirty days after that date;

(iv) Disclosing or updating the information required by Items 5 or 6(a)(2) of Form N–1A [17 CFR 239.15A and 274.11A];

(v) Making any non-material changes which the registrant deems appropriate;

(vi) In the case of a separate account registered as a unit investment trust, to make changes in the disclosure in the unit investment trust's registration statement to reflect changes to disclosure in the registration statement of the investment company in which the unit investment trust invests all of its assets; and

(vii) Any other purpose which the Commission shall approve.

(2) The registrant represents that the amendment is filed solely for one or more of the purposes specified in paragraph (b)(1) of this section and that no material event requiring disclosure in the prospectus, other than one listed in paragraph (b)(1) of this section or one

for which the Commission has approved a filing under paragraph (b)(1)(vii) of this section, has occurred since the latest of the following three dates:

(i) the effective date of the registrant's registration statement;

(ii) the effective date of its most recent post-effective amendment to its registration statement which included a prospectus; or

(iii) the filing date of a post-effective amendment filed under paragraph (a) of this section which has not become effective.

(3) The amendment recites on its facing sheet that the registrant proposes that the amendment will become effective under paragraph (b) of this section.

(4) The representations of the registrant referred to in paragraph (b)(2) of this section shall be made by certification on the signature page of the post-effective amendment that the amendment meets all the requirements for effectiveness under paragraph (b) of this section. If counsel prepared or reviewed the post-effective amendment filed under paragraph (b) of this section, counsel shall furnish to the Commission at the time the amendment is filed a written representation that the amendment does not contain disclosures that would render it ineligible to become effective under paragraph (b) of this section.

(c) *Incomplete or Inaccurate Amendments; Suspension of Use of Paragraph (b) of this section.* (1) No amendment shall become effective under paragraph (a) of this section if, prior to the effective date of the amendment, it should appear to the Commission that the amendment may be incomplete or inaccurate in any material respect, and the Commission furnishes to the registrant written notice that the effective date of the amendment is to be suspended. Following such action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for such a hearing is included in the petition. If the Commission has suspended the effective date of an amendment, the amendment shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(2) The Commission may, in the manner and under the circumstances set forth in this paragraph (c)(2), suspend the ability of registrant to file a post-effective amendment under paragraph (b) of this section. The notice of such suspension shall be in writing and shall specify the period for which such suspension shall remain in effect. The Commission may issue a suspension if it appears to the Commission that a registrant which files a post-effective amendment under paragraph (b) of this section has not complied with the conditions of that paragraph. Any suspension under this paragraph (c)(2) shall become effective at such time as the Commission furnishes written notice thereof to the registrant. Any such suspension, so long as it is in effect, shall apply to any post-effective amendment that has been filed but has not, at the time of such suspension, become effective, and to any post-effective amendment that may be filed after the suspension. Any suspension shall apply only to the ability to file a post-effective amendment pursuant to paragraph (b) of this section and shall not otherwise affect any post-effective amendment. Following this action by the Commission the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for a hearing is included in the petition.

(d) *Subsequent Amendments.* (1) Except as provided in paragraph (d)(2) of this section, a post-effective amendment that includes a prospectus shall not become effective under paragraph (a) of this section if a subsequent post-effective amendment relating to the prospectus is filed before such amendment becomes effective.

(2) A post-effective amendment that includes a prospectus shall become effective under paragraph (a) of this section notwithstanding the filing of a subsequent post-effective amendment relating to the prospectus, *Provided,* that the following conditions are met:

(i) the subsequent amendment is filed under paragraph (b) of this section; and

(ii) the subsequent amendment designates as its effective date either:

(A) the date on which the prior post-effective amendment was to become effective under paragraph (a) of this section; or

(B) a new effective date designated under paragraph (b)(1)(iii) of this section.

In this case the prior post-effective amendment filed under paragraph (a) of this section and any prior post-effective amendment filed under paragraph (b) of this section shall also become effective on the new effective date designated under paragraph (b)(1)(iii) of this section.

(3) Notwithstanding paragraphs (d)(1) and (d)(2) of this section, if another post-effective amendment relating to the same prospectus is filed under paragraph (a) of this section before the prior amendments filed pursuant to paragraphs (a) and (b) of this section have become effective, none of such prior amendments shall become effective under this section.

(e) *Certain Separate Accounts.* For purposes of this section, a post-effective amendment to a registration statement for an offering of securities by a registered open-end management investment company or unit investment trust as those terms are used in paragraphs (a), (b), and (e) of this section and as such amendments are referred to in paragraphs (c) and (d) of this section, shall include a post-effective amendment to an offering of securities by an insurance company funded through a separate account, as defined in section 2(a)(37) of the Investment Company Act of 1940 [15 U.S.C. 80a–2(a)(37)], where the separate account need not register under the Investment Company Act of 1940 under section 3(c)(11) thereof [15 U.S.C. 80a–3(c)(11)].

(f) *Electronic Filers.* When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted until notice of acceptance has been received from the Commission.

NOTE: To determine the date of automatic effectiveness, the day following the filing date is the first day of the time period. For example, a post-effective amendment filed under paragraph (a) of this section on November 1 would become effective on December 31.

[59 FR 43464, Aug. 24, 1994, as amended at 62 FR 47938, Sept. 12, 1997; 63 FR 13943, Mar. 23, 1998; 64 FR 27894, May 21, 1999]

§ 230.486 Effective date of post-effective amendments and registration statements filed by certain closed-end management investment companies.

(a) *Automatic Effectiveness.* Except as otherwise provided in this section, a post-effective amendment to a registration statement, or a registration statement filed for the purpose of registering additional shares of common stock for which a registration statement filed on Form N–2 (§§ 239.14 and 274.11a–1 of this chapter) is effective, filed by a registered closed-end management investment company or business development company which makes periodic repurchase offers under § 270.23c–3 of this chapter, shall become effective on the sixtieth day after the filing thereof, or a later date designated by the registrant on the facing sheet of the amendment or registration statement, which date shall not be later than eighty days after the date on which the amendment or registration statement is filed, *Provided,* that the Commission, having due regard to the public interest and the protection of investors, may declare an amendment or registration statement filed under this paragraph (a) effective on an earlier date.

(b) *Immediate Effectiveness.* Except as otherwise provided in this section, a post-effective amendment to a registration statement, or a registration statement for additional shares of common stock, filed by a registered closed-end management investment company or business development company which makes periodic repurchase offers under § 270.23c-3 of this chapter, shall become effective on the date on which it is filed with the Commission, or a later date designated by the registrant on the facing sheet of the amendment or registration statement, which date shall be not later than thirty days after the date on which the amendment or registration statement is filed, except that a post-effective amendment including a designation of a new effective date under paragraph (b)(1)(iii) of

this section shall become effective on the new effective date designated therein, *Provided*, that the following conditions are met:

(1) It is filed for no purpose other than one or more of the following:

(i) Registering additional shares of common stock for which a registration statement filed on Form N–2 (§§ 239.14 and 274.11a–1 of this chapter) is effective;

(ii) Bringing the financial statements up to date under section 10(a)(3) of the Act [15 U.S.C. 77j(a)(3)] or rule 3–18 of Regulation S–X [17 CFR 210.3–18];

(iii) Designating a new effective date for a previously filed post-effective amendment or registration statement for additional shares under paragraph (a) of this section, which has not yet become effective, *Provided*, that the new effective date shall be no earlier than the effective date designated in the previously filed amendment or registration statement under paragraph (a) of this section and no later than thirty days after that date;

(iv) Disclosing or updating the information required by Item 9c of Form N–2 [17 CFR 239.14 and 274.11a–1];

(v) Making any non-material changes which the registrant deems appropriate; and

(vi) Any other purpose which the Commission shall approve.

(2) The registrant represents that the amendment is filed solely for one or more of the purposes specified in paragraph (b)(1) of this section and that no material event requiring disclosure in the prospectus, other than one listed in paragraph (b)(1) or one for which the Commission has approved a filing under paragraph (b)(1)(vi) of this section, has occurred since the latest of the following three dates:

(i) the effective date of the registrant's registration statement;

(ii) the effective date of its most recent post-effective amendment to its registration statement which included a prospectus; or

(iii) the filing date of a post-effective amendment or registration statement filed under paragraph (a) of this section which has not become effective; and

(3) The amendment or registration statement recites on the facing sheet thereof that the registrant proposes that the amendment or registration statement will become effective under paragraph (b) of this section.

(4) The representations of the registrant referred to in paragraph (b)(2) of this section shall be made by certification on the signature page of the post-effective amendment or registration statement that the amendment or registration statement meets all of the requirements for effectiveness under paragraph (b) of this section. If counsel prepared or reviewed the post-effective amendment or registration statement filed under paragraph (b) of this section, counsel shall furnish to the Commission at the time the amendment or registration statement is filed a written representation that the amendment or registration statement does not contain disclosure which would render it ineligible to become effective under paragraph (b) of this section.

(c) *Incomplete or Inaccurate Amendments; Suspension of Use of Paragraph (b) of this section.* (1) No amendment or registration statement shall become effective under paragraph (a) of this section if, prior to the effective date of the amendment or registration statement, it should appear to the Commission that the amendment or registration statement may be incomplete or inaccurate in any material respect, and the Commission furnishes to the registrant written notice that the effective date of the amendment or registration statement is to be suspended. Following such action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for such a hearing is included in the petition. If the Commission has suspended the effective date of an amendment or registration statement, the amendment or registration statement shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(2) The Commission may, in the manner and under the circumstances set forth in this paragraph (c)(2), suspend the ability of a registrant to file a post-effective amendment or registration statement under paragraph (b) of

this section. The notice of such suspension shall be in writing and shall specify the period for which such suspension shall remain in effect. The Commission may issue a suspension if it appears to the Commission that a registrant which files a post-effective amendment under paragraph (b) of this section has not complied with the conditions of that paragraph. Any suspension under this paragraph shall become effective at such time as the Commission furnishes written notice thereof to the company. Any such suspension, so long as it is in effect, shall apply to any post-effective amendment or registration statement that has been filed but has not, at the time of such suspension, become effective, and to any post-effective amendment or registration statement that may be filed after the suspension. Any suspension shall apply only to the ability to file a post-effective amendment or registration statement under paragraph (b) of this section and shall not otherwise affect any post-effective amendment or registration statement. Following this action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for a hearing is included in the petition.

(d) *Subsequent Amendments.* (1) Except as provided in paragraph (d)(2) of this section, a post-effective amendment or registration statement which includes a prospectus shall not become effective under paragraph (a) of this section if a subsequent post-effective amendment or registration statement relating to the prospectus is filed before such amendment or registration statement becomes effective.

(2) A post-effective amendment or registration statement which includes a prospectus shall become effective under paragraph (a) of this section notwithstanding the filing of a subsequent post-effective amendment or registration statement relating to the prospectus, *Provided,* that the following conditions are met:

(i) The subsequent amendment or registration statement is filed under paragraph (b) of this section; and

(ii) The subsequent amendment or registration statement designates as its effective date either:

(A) The date on which the prior post-effective amendment or registration statement was to become effective under paragraph (a) of this section or

(B) A new effective date designated under paragraph (b)(1)(iii) of this section.

In this case the prior post-effective amendment or registration statement filed under paragraph (a) of this section and any prior post-effective amendment or registration statement filed under paragraph (b) of this section shall also become effective on the new effective date designated under paragraph (b)(1)(iii) of this section.

(3) Notwithstanding paragraphs (d)(1) and (d)(2) of this section, if another post-effective amendment or registration statement relating to the same prospectus is filed under paragraph (a) of this section before the prior amendments or registration statements filed under paragraphs (a) and (b) of this section have become effective, none of such prior amendments or registration statements shall become effective under this section.

(e) *Condition to Use of Paragraphs (a) or (b).* A post-effective amendment or new registration statement shall not become effective under paragraphs (a) or (b) of this section unless within two years prior to the filing thereof a post-effective amendment or registration statement relating to the common stock of the registrant has become effective.

(f) *Electronic Filers.* When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted until notice of acceptance has been received from the Commission.

NOTE: To determine the date of automatic effectiveness, the day following the filing date is the first day of the time period. For example, a post-effective amendment filed under paragraph (a) of this section on November 1 would become effective on December 31.

[59 FR 43466, Aug. 24, 1994, as amended at 64 FR 27894, May 21, 1999]

§ 230.487 Effectiveness of registration statements filed by certain unit investment trusts.

(a)(1) A unit investment trust registered under the Investment Company Act of 1940 that files a registration statement pursuant to the Act in connection with the offering of the securities of a series of the unit investment trust, except the first series of such trust, may designate a date and time for such registration statement to become effective. If the registrant complies with the conditions set forth in paragraph (b) of this section, the registration statement shall become effective in accordance with such designation.

(2) The registrant may designate the date and time of effectiveness in the registration statement or in any pre-effective amendment thereto. A pre-effective amendment to a registration statement with respect to which such a designation is properly made shall be deemed to have been filed with the consent of the Commission and shall accordingly be treated as part of the registration statement.

(b) Availability of effectiveness of a registration statement in accordance with paragraph (a) of this section is conditioned upon compliance with the following:

(1) The registrant is not engaged in the business of investing in securities issued by one or more open-end management investment companies;

(2) The designation provided for in paragraph (a) of this section is set forth on the facing sheet of such registration statement or a pre-effective amendment thereto;

(3) The registrant identifies one or more previous series of the trust for which the effective date of the registration statement was determined by the Commission or its staff, and makes the following representations:

(i) That the portfolio securities deposited in the series with respect to which the registration statement or pre-effective amendment is being filed do not differ materially in type or quality from those deposited in such previous series identified by the registrant; and

(ii) That, except to the extent necessary to identify the specific portfolio securities deposited in, and to provide essential financial information for, the series with respect to which the registration statement or pre-effective amendment thereto is being filed, the registration statement or pre-effective amendment thereto does not contain disclosures that differ in any material respect from those contained in the registration statement of such previous series identified by the registrant;

(4) The registrant represents that it has complied with rule 460 under the Act (17 CFR 230.460);

(5) The identification and representations provided for in paragraphs (b)(3) and (b)(4) of this section are made on the signature page of the registration statement or a pre-effective amendment thereto; and

(6) If counsel prepared or reviewed such registration statement or a pre-effective amendment thereto, such counsel shall furnish to the Commission at the time the registration statement or pre-effective amendment thereto is filed a written representation that such registration statement or pre-effective amendment does not contain disclosures which would render such registration statement ineligible to become effective pursuant to paragraph (a) of this section.

(c)(1) The Commission may, in the manner and under the circumstances set forth in paragraph (c)(2) of this section, suspend the ability of a unit investment trust to designate the date and time of effectiveness of a series of such trust. Any such suspension, so long as it is in effect, shall apply to any registration statement that has been filed but has not, at the time of such suspension, become effective, and to any registration statement with respect to any series of such trust that may be filed after such suspension. Any suspension shall apply only to the ability to designate the date and time of effectiveness pursuant to paragraph (a) of this section and shall not otherwise affect any registration statement.

(2) Any suspension pursuant to paragraph (c)(1) of this section shall become effective at such time as the Commission furnishes written notice thereof to the company or the sponsor

of the unit investment trust. The notice of such suspension shall be in writing and shall specify the period for which such suspension shall remain in effect. The Commission may issue such suspension if it appears to the Commission that any registration statement containing a designation pursuant to this section is incomplete or inaccurate in any material respect, whether or not such registration statement has become effective, or that the registrant has not complied with the conditions of this section. Following such action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for a hearing is included in the petition.

(d) When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted until notice of acceptance has been received from the Commission.

[47 FR 20294, May 12, 1982, as amended at 58 FR 14858, Mar. 18, 1993; 59 FR 43467, Aug. 24, 1994; 64 FR 27894, May 21, 1999]

§ 230.488 Effective date of registration statements relating to securities to be issued in certain business combination transactions.

(a) A registration statement filed on Form N–14 by a registered open-end management investment company for the purpose of registering securities to be issued in an exchange offer or other business combination transaction pursuant to Rule 145 under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) shall become effective on the thirtieth day after the date upon which it is filed with the Commission, or such later date designated by the registrant on the facing sheet of the registration statement, which date shall be not later than fifty days after the date on which the registration statement is filed, unless the Commission having due regard to the public interest and the protection of investors declares such amendment effective on an earlier date, provided the following conditions are met:

(1) Any prospectus filed as a part of the registration statement does not include disclosure relating to any other proposal to be acted on at a meeting of the shareholders of either company other than proposals related to an exchange offer, or a business combination transaction pursuant to Rule 145(a), and any other proposal relating to:

(i) Uncontested election of directors,

(ii) Ratification of the selection of accountants,

(iii) The continuation of a current advisory contract,

(iv) Increases in the number or amount of shares authorized to be issued by the registrant; and

(v) Continuation of any current contract relating to the distribution of shares issued by the registrant; and

(2) The registration statement recites on the facing sheet that the registrant proposes that the filing become effective pursuant to this rule.

(b) No registration statement shall become effective pursuant to paragraph (a) of this section if, prior to the effective date of the registration statement, it should appear to the Commission that the registration statement may be incomplete or inaccurate in any material respect and the Commission furnishes to the registrant written notice that the effective date is to be suspended. Following such action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for such a hearing is included in the petition. If the Commission has suspended the effective date of the registration statement, it shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(c) When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted until notice of acceptance has been received from the Commission.

[50 FR 48383, Nov. 25, 1985, as amended at 58 FR 14858, Mar. 18, 1993; 59 FR 67761, Dec. 30, 1994]

§ 230.489 Filing of form by foreign banks and insurance companies and certain of their holding companies and finance subsidiaries.

(a) The following foreign issuers shall file Form F–N [17 CFR 239.43] under the

Act appointing an agent for service of process when filing a registration statement under the Act:

(1) A foreign issuer that is a foreign bank or foreign insurance company excepted from the definition of investment company by rule 3a–6 (17 CFR 270.3a–6) under the Investment Company Act of 1940 (the ''1940 Act'');

(2) A foreign issuer that is a finance subsidiary of a foreign bank or foreign insurance company, as those terms are defined in rule 3a–6 under the 1940 Act, if the finance subsidiary is excepted from the definition of investment company by rule 3a–5 [17 CFR 270.3a–5] under the 1940 Act; or

(3) A foreign issuer that is excepted from the definition of investment company by rule 3a–1 (17 CFR 270.3a–1) under the 1940 Act because some or all of its majority-owned subsidiaries are foreign banks or insurance companies excepted from the definition of investment company by rule 3a–6 under the 1940 Act.

(b) The requirements of paragraph (a) of this section shall not apply to:

(1) A foreign issuer that has filed Form F–X (17 CFR 239.42) under the Securities Act of 1933 with respect to the securities being offered; and

(2) A foreign issuer filing a registration statement relating to debt securities or non-voting preferred stock that has on file with the Commission a currently accurate Form N–6C9 (17 CFR 274.304, rescinded) under the 1940 Act.

(c) Six copies of Form F–N, one of which shall be manually signed, shall be filed with the Commission at its principal office.

[56 FR 56299, Nov. 4, 1991]

REGISTRATION BY FOREIGN GOVERNMENTS OR POLITICAL SUBDIVISIONS THEREOF

SOURCE: Sections 230.490 to 230.494 contained in Regulation C, 12 FR 4076, June 24, 1947, unless otherwise noted.

§ 230.490 Information to be furnished under paragraph (3) of Schedule B.

Any issuer filing a registration statement pursuant to Schedule B of the act need not furnish the detailed information specified in paragraph (3) as to issues of outstanding funded debt the aggregate amount of which outstanding is less than 5 percent of the total funded debt outstanding and to be created by the security to be offered, provided the amount thereof is included in the statement of the total amount of funded debt outstanding and a statement is made as to the title, amount outstanding, rate of interest, and date of maturity of each such issue.

§ 230.491 Information to be furnished under paragraph (6) of Schedule B.

Any foreign government filing a registration statement pursuant to Schedule B of the act need state, in furnishing the information required by paragraph (6), the names and addresses only of principal underwriters, namely, underwriters in privity of contract with the registrant, provided they are designated as principal underwriters and a brief statement is made as to the discounts and commissions to be received by subunderwriters or dealers.

§ 230.492 Omissions from prospectuses.

In the case of a security for which a registration statement conforming to Schedule B is in effect, the following information, contained in the registration statement, may be omitted from any prospectus: Information in answer to paragraph (3) of the Schedule with respect to the amortization and retirement provisions for debt not being registered, and with respect to the provisions for the substitution of security for such debt; the addresses of underwriters in answer to paragraph (6); information in answer to paragraph (11); the addresses of counsel in answer to paragraph (12); the copy of any agreement or agreements required by paragraph (13); the agreement required by paragraph (14); and all information, whether contained in the registration statement itself or in any exhibit thereto, not required by Schedule B.

(Secs. 10(a)(4), 19(a), 48 Stat. 81, 85; sec. 209, 48 Stat. 908; 15 U.S.C. 77(j)(a)(4), 77(s)(a))

[41 FR 12010, Mar. 23, 1976]

§ 230.493 Additional Schedule B disclosure and filing requirements.

(a) The copy of the opinion or opinions of counsel required by paragraph (14) of Schedule B shall be filed either

as a part of the registration statement as originally filed, or as an amendment to the registration statement.

(b) A foreign government or political subdivision of a foreign government must file a registration statement submitted under Schedule B of the Act on the Commission's Electronic Data Gathering and Retrieval System (EDGAR) unless it has obtained a hardship exemption under § 232.201 or § 232.202 of this chapter (Regulation S–T).

(c) A foreign government or political subdivision must disclose in its Schedule B registration statement:

(1) That the Commission maintains an Internet site that contains reports and other information regarding issuers that file electronically with the Commission; and

(2) The address for the Commission Internet site (http://www.sec.gov). A foreign government or political subdivision filing on EDGAR is further encouraged to give its Internet address, if available.

[67 FR 36699, May 24, 2002]

§ 230.495 Preparation of registration statement.

(a) A registration statement on Form N–1A (§ 239.15A and § 274.11A of this chapter), Form N–2 (§ 239.14 and § 274.11a–1 of this chapter), Form N–3 (§ 239.17a and § 274.11b of this chapter), Form N–4 (§ 239.17b and § 274.11c of this chapter), or Form N–6 (§ 239.17c and § 274.11d of this chapter), shall consist of the facing sheet of the applicable form; a prospectus containing the information called for by such form; the information, list of exhibits, undertakings and signatures required to be set forth in such form; financial statements and schedules; exhibits; and other information or documents filed as part of the registration statement; and all documents or information incorporated by reference in the foregoing (whether or not required to be filed).

(b) All general instructions, instructions to items of the form, and instructions as to financial statements, exhibits, or prospectuses are to be omitted from the registration statement in all cases.

(c) In the case of a registration statement filed on Form N–1A (§ 239.15A and § 274.11A of this chapter), Form N–2 (§ 239.14 and § 274.11a–1 of this chapter), Form N–3 (§ 239.17a and § 274.11b of this chapter), Form N–4 (§ 239.17b and § 274.11c of this chapter), or Form N–6 (§ 239.17c and § 274.11d of this chapter), Parts A and B shall contain the information called for by each of the items of the applicable Part, except that unless otherwise specified, no reference need be made to inapplicable items, and negative answers to any item may be omitted. Copies of Parts A and B may be filed as part of the registration statement in lieu of furnishing the information in item-and-answer form. Wherever such copies are filed in lieu of information in item-and-answer form, the text of the items of the form is to be omitted from the registration statement, as well as from Parts A and B, except to the extent provided in paragraph (d) of the section.

(d) In the case of a registration statement filed on Form N–1A (§ 239.15A and § 274.11A of this chapter), Form N–2 (§ 239.14 and § 274.11a–1 of this chapter), Form N–3 (§ 239.17a and § 274.11b of this chapter), Form N–4 (§ 239.17b and § 274.11c of this chapter), or Form N–6 (§ 239.17c and § 274.11d of this chapter), where any item of those forms calls for information not required to be included in Parts A and B (generally Part C of such form), the text of such items, including the numbers and captions thereof, together with the answers thereto, shall be filed with Parts A or B under cover of the facing sheet of the form as part of the registration statement. However, the text of such items may be omitted, provided the answers are so prepared as to indicate the coverage of the item without the necessity of reference to the text of the item. If any such item is inapplicable, or the answer thereto is in the negative, a statement to that effect shall be made. Any financial statements not required to be included in Parts A and B shall also be filed as part of the registration statement proper, unless incorporated by reference pursuant to § 230.411.

(e) *Electronic Filings.* When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted

until notice of acceptance has been received from the Commission.

(Securities Act of 1933)

[48 FR 37938, Aug. 22, 1983, as amended at 50 FR 26159, June 25, 1985; 57 FR 56834, Dec. 1, 1992; 58 FR 14859, Mar. 18, 1993; 63 FR 13943, Mar. 23, 1998; 64 FR 27894, May 21, 1999; 67 FR 19869, Apr. 23, 2002]

§230.496 Contents of prospectus and statement of additional information used after nine months.

In the case of a registration statement filed on Form N–1A (§239.15A and §274.11A of this chapter), Form N–2 (§239.14 and §274.11a–1 of this chapter), Form N–3 (§239.17a and §274.11b of this chapter), Form N–4 (§239.17b and §274.11c of this chapter), or Form N–6 (§239.17c and §274.11d of this chapter), there may be omitted from any prospectus or Statement of Additional Information used more than 9 months after the effective date of the registration statement any information previously required to be contained in the prospectus or the Statement of Additional Information insofar as later information covering the same subjects, including the latest available certified financial statements, as of a date not more than 16 months prior to the use of the prospectus or the Statement of Additional Information is contained therein.

[67 FR 19869, Apr. 23, 2002]

§230.497 Filing of investment company prospectuses—number of copies.

(a) Five copies of every form of prospectus sent or given to any person prior to the effective date of the registration statement that varies from the form or forms of prospectus included in the registration statement filed pursuant to §230.402(a) shall be filed as part of the registration statement not later than the date that form of prospectus is first sent or given to any person, except that:

(1) An investment company advertisement under §230.482 shall be filed under this paragraph (a) (but not as part of the registration statement) unless filed under paragraph (i) of this section; and

(2) A profile under §230.498 shall be filed in accordance with paragraph (k) of this section and not as part of the registration statement.

(b) Within 5 days after the effective date of a registration statement or the commencement of a public offering after the effective date of a registration statement, whichever occurs later, 10 copies of each form of prospectus used after the effective date in connection with such offering shall be filed with the Commission in the exact form in which it was used.

(c) For investment companies filing on Form N–1A (§239.15A and §274.11A of this chapter), Form N–2 (§239.14 and §274.11a–1 of this chapter), Form N–3 (§239.17a and §274.11b of this chapter), Form N–4 (§239.17b and §274.11c of this chapter), or Form N–6 (§239.17c and §274.11d of this chapter), within five days after the effective date of a registration statement or the commencement of a public offering after the effective date of a registration statement, whichever occurs later, ten copies of each form of prospectus and form of Statement of Additional Information used after the effective date in connection with such offering shall be filed with the Commission in the exact form in which it was used.

(d) After the effective date of a registration statement no prospectus which purports to comply with section 10 of the Act and which varies from any form of prospectus filed pursuant to paragraph (b) or (c) of this rule shall be used until 10 copies thereof have been filed with, or mailed for filing to, the Commission.

(e) For investment companies filing on Form N–1A (§239.15A and §274.11A of this chapter), Form N–2 (§239.14 and §274.11a–1 of this chapter), Form N–3 (§239.17a and §274.11b of this chapter), Form N–4 (§239.17b and §274.11c of this chapter), or Form N–6 (§239.17c and §274.11d of this chapter), after the effective date of a registration statement, no prospectus that purports to comply with Section 10 of the Act (15 U.S.C. 77j) or Statement of Additional Information that varies from any form of prospectus or form of Statement of Additional Information filed pursuant to paragraph (c) of this section shall be used until five copies thereof have been filed with, or mailed for filing to the Commission.

(f) Every prospectus consisting of a radio or television broadcast shall be reduced in writing. Five copies of every such prospectus shall be filed with the Commission in accordance with the requirements of this section.

(g) Each copy of a prospectus under this rule shall contain in the upper right hand corner of the cover page the paragraph of this rule under which the filing is made and the file number of the registration statement to which the prospectus relates. In addition, each investment company advertisement deemed to be a section 10(b) prospectus pursuant to § 230.482 of this chapter shall contain in the upper right hand corner of the cover page the legend ''Rule 482 ad.'' The information required by this paragraph may be set forth in longhand, provided it is legible.

(h)(1) No later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, ten copies of every form of prospectus and Statement of Additional Information, where applicable, that discloses the information previously omitted from the prospectus filed as part of an effective registration statement in reliance upon Rule 430A under the Securities Act (§ 230.430A of this chapter) shall be filed with the Commission in the exact form in which it is used, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(2) Ten copies of each term sheet or abbreviated term sheet sent or given in reliance upon Rule 434 (§ 230.434) shall be filed with the Commission no later than the second business day following the earlier of the date of determination of the offering price, or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(i) An investment company advertisement deemed to be a section 10(b) prospectus pursuant to § 230.482 of this chapter shall be considered to be filed with the Commission upon filing with a national securities association registered under Section 15A of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*) that has adopted rules providing standards for the investment company advertising practices of its members and has established and implemented procedures to review that advertising.

(j) In lieu of filing under paragraph (b) or (c) of this section, a registrant may file a certification that:

(1) The form of prospectus and Statement of Additional Information that would have been filed under paragraph (b) or (c) of this section would not have differed from that contained in the most recent registration statement or amendment, and

(2) The text of the most recent registration statement or amendment has been filed electronically.

(k)(1) *Profile filing requirements.* A form of profile under § 230.498 shall not be used unless:

(i) The form of profile that has not been previously filed with the Commission is filed at least 30 days before the date that it is first sent or given to any person.

(A) No additional filing is required during the 30-day period for changes (material or otherwise) to a form of profile filed under this paragraph if the changes are included in the definitive profile that is filed with the Commission under paragraph (k)(2)(ii) of this section.

(B) The form of profile filed under this paragraph (k)(1)(i) can be used on the later of 30 days after the date of filing or, if the profile is filed in connection with an initial registration statement or a post-effective amendment that adds a series of an investment company to a registration statement, or reflects changes to a prospectus included in a post-effective amendment filed to update a registration statement under § 230.485, the date that the registration statement or post-effective amendment becomes effective.

(ii) A definitive form of a profile filed under paragraph (k)(1)(i) of this section is filed with the Commission no later than the fifth business day after the date that it is used.

(iii) A form of profile that differs from any definitive form of profile that was filed under this paragraph (k) is filed with the Commission in definitive

form no later than the fifth business day after the date that it is first used. This filing shall be made under one of the following according to the character of the change contained in the form of profile:

(A) A form of profile that contains a material change to the information disclosed under § 230.498 (c)(2) (i)–(iii); and

(B) A form of profile that does not contain a material change to the information under § 230.498 (c)(2) (i)–(iii).

(2) *Filing procedures.* (i) Designate, at the top of the first page of any form of profile that is filed under this paragraph (k), the paragraph and sub-paragraph under which the profile is filed.

(ii) Send two additional copies of the first definitive form of profile filed electronically under paragraph (k)(1)(ii) of this section to the Commission, in the primary form intended to be used for distribution to investors (*e.g.,* paper, electronic media), by mail or other means reasonable calculated to result in receipt by the Commission, no later than the fifth business day after the date the profile is first sent or given to any person. Send copies to the following address: Office of Disclosure and Review, Division of Investment Management, U.S. Securities and Exchange Commission, 450 Fifth St., NW., Mail Stop 5–6, Washington, DC 20549–6009. Note prominently that the submission is made in accordance with § 230.497(k)(2) of Regulation C under the Securities Act. If the profile is distributed primarily on the Internet, supply, in lieu of copies, the electronic address (''URL'') of the profile page(s) in an exhibit to the electronic filing under this paragraph (k). Filers may fulfill the requirements of this paragraph by submitting with their definitive form of profile filed electronically under paragraph (k)(1)(ii) of this section an unofficial PDF copy of the profile in accordance with § 232.104 of this chapter. This additional requirement will expire on June 1, 2000.

(Securities Act of 1933)

[48 FR 37939, Aug. 22, 1983, as amended at 50 FR 26160, June 25, 1985; 52 FR 21262, June 5, 1987; 53 FR 3880, Feb. 10, 1988; 57 FR 56835, Dec. 1, 1992; 58 FR 14859, Mar. 18, 1993; 60 FR 26618, May 17, 1995; 62 FR 39763, July 24, 1997; 63 FR 13943, 13984, Mar. 23, 1998; 63 FR 19286, Apr. 17, 1998; 64 FR 27894, May 21, 1999; 67 FR 19869, Apr. 23, 2002]

§ 230.498 Profiles for certain open-end management investment companies.

(a) *Definitions.* (1) A *Fund* means an open-end management investment company, or any series of such a company, that has, or is included in, an effective registration statement on Form N–1A (§§ 274.11A and 239.15A of this chapter) and that has a current prospectus under section 10(a) of the Act (15 U.S.C. 77j(a)).

(2) A *Profile* means a summary prospectus that is authorized under section 10(b) of the Act (15 U.S.C. 77j(b)) and section 24(g) of the Investment Company Act (15 U.S.C. 80a–24(g) for the purpose of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

(b) *General requirements.* A Fund may provide a Profile to investors, which may include, or be accompanied by, an application that investors may use to purchase the Fund's shares, if the Profile contains the information required or not precluded by paragraph (c) of this section and does not incorporate any information by reference to another document.

Instructions to paragraph (b): 1. The Profile is intended to be a standardized summary of key information in the Fund's prospectus under section 10(b) of the Act. Additional information is available in the Fund's prospectus under section 10(a) of the Act, in the Fund's Statement of Additional Information under Form N–1A, and in the Fund's annual and semi-annual shareholder reports prepared in accordance with § 270.30d–1. Funds may not use cross-references in the Profile to other Fund disclosure documents unless required or permitted by this rule. Funds should minimize cross-references and the use

of footnotes within the Profile; cross-references and footnotes should generally be used only to promote a better understanding of the information about the Fund contained in the Profile.

2. Provide clear and concise information in the Profile in a format designed to communicate the information effectively. Avoid excessive detail, technical or legal terms, and long sentences and paragraphs. Provide the information in the Profile using the plain English writing principles in § 230.421(d).

3. A Fund may use document design techniques intended to promote effective communication of the information in the Profile unless inconsistent with the requirements of this section.

4. A Profile may describe more than one Fund or class of a Fund. A Profile that offers the securities of more than one Fund or class of a Fund does not need to repeat information that is the same for each Fund or class of Fund described in the Profile.

5. File the Profile with the Commission as required by § 230.497(k).

(c) *Specific requirements.* (1) Include on the cover page of the Profile or at the beginning of the Profile:

(i) The Fund's name and, at the Fund's option, the Fund's investment objective or the type of fund or class offered, or both;

(ii) A statement identifying the document as a ''Profile,'' without using the term ''prospectus'';

(iii) The approximate date of the Profile's first use;

(iv) The following legend:

This Profile summarizes key information about the Fund that is included in the Fund's prospectus. The Fund's prospectus includes additional information about the Fund, including a more detailed description of the risks associated with investing in the Fund that you may want to consider before you invest. You may obtain the prospectus and other information about the Fund at no cost by calling _____.

(v) Provide a toll-free (or collect) telephone number that investors can use to obtain the prospectus and other information. The Fund may indicate, as applicable, that the prospectus and other information is available on the Fund's Internet site or by E-mail request. The Fund also may indicate, if applicable, that the prospectus and other information is available from a financial intermediary (such as a broker-dealer or bank) through which shares of the Fund may be purchased or sold.

Instruction to paragraph (c)(1)(v): When the Fund (or financial intermediary through which shares of the Fund may be purchased or sold) receives a request for the Fund's prospectus, the Fund's Statement of Additional Information, or the Fund's annual or semi-annual report, the Fund (or financial intermediary) must send the requested document within three business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery. Funds are encouraged to send other information requested by shareholders within the same period.

(2) Provide the information required by paragraphs (c)(2) (i) through (ix) of this section in the order indicated:

(i) *Fund objectives/goals.* Provide the information about the Fund's investment objectives or goals required by Item 2(a) of Form N–1A.

(ii) *Principal investment strategies of the Fund.* Provide the information about the Fund's principal investment strategies required by Item 2(b) of Form N–1A. In addition, a Fund (other than a Fund that has not yet been required to deliver a semi-annual or annual report under § 270.30d–1 of this chapter) must provide disclosure to the following effect:

Additional information about the Fund's investments is available in the Fund's annual and semi-annual reports to shareholders. In the Fund's annual report you will find a discussion of the market conditions and investment strategies that significantly affected the Fund's performance during the last fiscal year. You may obtain either or both of these reports at no cost by calling _____.

(iii) *Principal risks of investing in the Fund.* Provide the narrative disclosure, bar chart, and table required by Item 2(c) of Form N–1A. Provide in the table the Fund's average annual total returns and, if applicable, yield as of the end of the most recent calendar quarter prior to the Profile's first use. Update the return information as of the end of each succeeding calendar quarter as soon as practicable after the completion of the quarter. Disclose the date of the return information adjacent to the table.

Instruction to paragraph (c)(2)(iii): A Fund may reflect the updated performance information in this section of the profile by affixing a label or sticker, or by other reasonable means.

(iv) *Fees and expenses of the Fund.* Include the fee table required by Item 3 of Form N–1A.

(v) *Investment adviser, sub-adviser(s) and portfolio manager(s) of the Fund.* (A) Identify the Fund's investment adviser.

(B) Identify the Fund's sub-adviser(s) (if any) except that:

(*1*) A Fund need not identify a sub-adviser(s) whose sole responsibility for the Fund is limited to day-to-day management of the Fund's holdings of cash and cash equivalent instruments, unless the Fund is a money market fund or other Fund with a principal investment strategy of regularly holding cash and cash equivalent instruments.

(*2*) A Fund having three or more sub-advisers, each of which manages a portion of the Fund's portfolio, need not identify each such sub-adviser, except that the Fund must identify any sub-adviser that is (or is reasonably expected to be) responsible for the management of a significant portion of the Fund's net assets. For purposes of this paragraph (c)(2)(v)(B)(*2*), a significant portion of a Fund's net assets generally will be deemed to be 30% or more of the fund's net assets.

(C) State the name and length of service of the person or persons employed by or associated with the Fund's investment adviser (or the Fund) who are primarily responsible for the day-to-day management of the Fund's portfolio and summarize each person's business experience for the last five years in accordance with the Instructions to Item 6(a)(2) of Form N–1A. A Fund with three or more such persons, each of whom is (or is reasonably expected to be) responsible for the management of a portion of the Fund's portfolio, need not identify each person, except that a Fund must identify and summarize the business experience for the last five years of each person who is (or is reasonably expected to be) responsible for the management of a significant portion of the Fund's net assets. For purposes of this paragraph (c)(2)(v)(C), a significant portion of a Fund's net assets generally will be deemed to be 30% or more of the Fund's net assets.

(vi) *Purchase of Fund shares.* Disclose the Fund's minimum initial or subsequent investment requirements, the initial sales load (or other loads) to which the Fund's shares are subject, and, if applicable, the initial sales load breakpoints or waivers.

(vii) *Sale of Fund shares.* Disclose that the Fund's shares are redeemable, identify the procedures for redeeming shares (*e.g.*, on any business day by written request, telephone, or wire transfer), and identify any charges or sales loads that may be assessed upon redemption (including, if applicable, the existence of waivers of these charges).

(viii) *Fund distributions and tax information.* Describe how frequently the Fund intends to make distributions and what options for reinvestment of distributions (if any) are available to investors. State, as applicable, that the Fund intends to make distributions that may be taxed as ordinary income or capital gains (which may be taxable at different rates depending on the length of time that the Fund holds its assets) or that the Fund intends to distribute tax-exempt income. If a Fund expects that its distributions, as a result of its investment objectives or strategies, primarily will consist of ordinary income or capital gains, provide disclosure to that effect. For a Fund that holds itself out as investing in securities generating tax-exempt income, provide, as applicable, a general statement to the effect that a portion of the Fund's distributions may be subject to federal income tax.

(ix) *Other services are available from the Fund.* Provide a brief summary of services available to the Fund's shareholders (*e.g.*, any exchange privileges or automated information services), unless otherwise disclosed in response to paragraphs (c)(2)(vi) through (viii) of this section.

Instruction to paragraph (c)(2)(ix): A Fund should disclose only those services that generally are available to typical investors in the Fund.

(3) The Profile may include an application that a prospective investor can use to purchase the Fund's shares as long as the application explains with equal prominence that an investor has the option of purchasing shares of the Fund after reviewing the information in the Profile or after requesting and reviewing the Fund's prospectus (and

other information) before making a decision about investing in the Fund.

Instruction to paragraph (c)(3): A Fund may include the application in a Profile or otherwise provide an application together with a Profile in any manner reasonably designed to alert investors that the application is to be considered along with the information about the Fund disclosed in the Profile.

(d) *Modified Profile for certain funds.* (1) A Fund may modify or omit the information required by paragraphs (c)(2)(vi) through (ix) of this section for a Profile to be used for a Fund that is offered as an investment option for:

(i) A defined contribution plan that meets the requirements for qualification under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k));

(ii) A tax-deferred arrangement under section 403(b) or 457 of the Internal Revenue Code (26 U.S.C. 403(b) and 457); and

(iii) Variable contracts as defined in section 817(d) of the Internal Revenue Code (26 U.S.C. 817(d)).

(2) A Fund that uses a Profile permitted under paragraph (d)(1) of this section may:

(i) Alter the legend required by paragraph (c)(1)(iv) of this section to include a statement to the effect that the Profile is intended for use in connection with a defined contribution plan, another tax-deferred arrangement, or a variable contract, as applicable, and is not intended for use by other investors; and

(ii) Modify other disclosure in a Profile consistent with offering the Fund as a specific investment option for a defined contribution plan, tax-deferred arrangement, or variable contract.

(3) A Profile used under paragraph (d)(1)(i) or (ii), but not paragraph (d)(1)(iii), of this section may include, or be accompanied by, an enrollment form for the plan or arrangement. The enrollment form does not need to be filed with the Profile under § 230.497.

[63 FR 13985, Mar. 23, 1998; 63 FR 19286, Apr. 17, 1998]

REGULATION D—RULES GOVERNING THE LIMITED OFFER AND SALE OF SECURITIES WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933

AUTHORITY: Sections 230.501 to 230.506 issued under secs. 3(b), 4(2), 19(a), 19(c), 48 Stat. 75, 77, 85; sec. 209, 48 Stat. 908; c.122, 59 Stat. 167; sec. 12, 78 Stat. 580; 84 Stat. 1480; sec. 308(a)(2), 90 Stat. 57; sec. 18, 92 Stat. 275; sec. 2, 92 Stat. 962; secs. 505, 622, 701, 94 Stat. 2291, 2292, 2294 15 U.S.C. 77c(b), 77d(2), 77s(a), 77s(c).

SOURCE: Sections 230.501 to 230.506 appear at 47 FR 11262, Mar. 16, 1982, unless otherwise noted.

PRELIMINARY NOTES: 1. The following rules relate to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the *Act*) (15 U.S.C. 77a *et seq.*, as amended). Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required under this regulation, in light of the circumstances under which it is furnished, not misleading.

2. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities. Regulation D is intended to be a basic element in a uniform system of Federal-State limited offering exemptions consistent with the provisions of sections 18 and 19(c) of the Act. In those states that have adopted Regulation D, or any version of Regulation D, special attention should be directed to the applicable state laws and regulations, including those relating to registration of person who receive remuneration in connection with the offer and sale of securities, to disqualification of issuers and other persons associated with offerings based on state administrative orders or judgments, and to requirements for filings of notices of sales.

3. Attempted compliance with any rule in Regulation D does not act as an exclusive election; the issuer can also claim the availability of any other applicable exemption. For instance, an issuer's failure to satisfy all the terms and conditions of Rule 506 shall not raise any presumption that the exemption provided by section 4(2) of the Act is not available.

4. These rules are available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resales of the issuer's securities. The rules

provide an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.

5. These rules may be used for business combinations that involve sales by virtue of rule 145(a) (17 CFR 230.145(a)) or otherwise.

6. In view of the objectives of these rules and the policies underlying the Act, regulation D is not available to any issuer for any transaction or chain of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

7. Securities offered and sold outside the United States in accordance with Regulation S need not be registered under the Act. See Release No. 33–6863. Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this note, however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States.

[47 FR 11262, Mar. 16, 1982, as amended at 47 FR 54771, Dec. 6, 1982; 55 FR 18322, May 2, 1990]

§ 230.501 Definitions and terms used in Regulation D.

As used in Regulation D (§§ 230.501–230.508), the following terms shall have the meaning indicated:

(a) *Accredited investor. Accredited investor* shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:

(1) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of $5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

(2) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000;

(4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000;

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(7) Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in § 230.506(b)(2)(ii); and

(8) Any entity in which all of the equity owners are accredited investors.

(b) *Affiliate.* An *affiliate* of, or person *affiliated* with, a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

(c) *Aggregate offering price. Aggregate offering price* shall mean the sum of all cash, services, property, notes, cancellation of debt, or other consideration to be received by an issuer for issuance of its securities. Where securities are being offered for both cash and non-cash consideration, the aggregate offering price shall be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency shall be translated into United States currency at the currency exchange rate in effect at a reasonable time prior to or on the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price shall be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Such valuations of non-cash consideration must be reasonable at the time made.

(d) *Business combination. Business combination* shall mean any transaction of the type specified in paragraph (a) of Rule 145 under the Act (17 CFR 230.145) and any transaction involving the acquisition by one issuer, in exchange for all or a part of its own or its parent's stock, of stock of another issuer if, immediately after the acquisition, the acquiring issuer has control of the other issuer (whether or not it had control before the acquisition).

(e) *Calculation of number of purchasers.* For purposes of calculating the number of purchasers under §§ 230.505(b) and 230.506(b) only, the following shall apply:

(1) The following purchasers shall be excluded:

(i) Any relative, spouse or relative of the spouse of a purchaser who has the same principal residence as the purchaser;

(ii) Any trust or estate in which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(iii) of this section collectively have more than 50 percent of the beneficial interest (excluding contingent interests);

(iii) Any corporation or other organization of which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(ii) of this section collectively are beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests; and

(iv) Any accredited investor.

(2) A corporation, partnership or other entity shall be counted as one purchaser. If, however, that entity is organized for the specific purpose of acquiring the securities offered and is not an accredited investor under paragraph (a)(8) of this section, then each beneficial owner of equity securities or equity interests in the entity shall count as a separate purchaser for all provisions of Regulation D (§§ 230.501–230.508), except to the extent provided in paragraph (e)(1) of this section.

(3) A non-contributory employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 shall be counted as one purchaser where the trustee makes all investment decisions for the plan.

(f) *Executive officer. Executive officer* shall mean the president, any vice president in charge of a principal business unit, division or function (such as sales, administration orfinance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the issuer. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform such policy making functions for the issuer.

(g) *Issuer.* The definition of the term *issuer* in section 2(4) of the Act shall apply, except that in the case of a proceeding under the Federal Bankruptcy Code (11 U.S.C. 101 *et seq.*), the trustee or debtor in possession shall be considered the issuer in an offering under a plan or reorganization, if the securities are to be issued under the plan.

(h) *Purchaser representative. Purchaser representative* shall mean any person who satisfies all of the following conditions or who the issuer reasonably believes satisfies all of the following conditions:

(1) Is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer, except where the purchaser is:

(i) A relative of the purchaser representative by blood, marriage or adoption and not more remote than a first cousin;

(ii) A trust or estate in which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(iii) of this section collectively have more than 50 percent of the beneficial interest (excluding contingent interest) or of which the purchaser representative serves as trustee, executor, or in any similar capacity; or

(iii) A corporation or other organization of which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(ii) of this section collectively are the beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests;

(2) Has such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment;

(3) Is acknowledged by the purchaser in writing, during the course of the transaction, to be his purchaser representative in connection with evaluating the merits and risks of the prospective investment; and

(4) Discloses to the purchaser in writing a reasonable time prior to the sale of securities to that purchaser any material relationship between himself or his affiliates and the issuer or its affiliates that then exists, that is mutually understood to be contemplated, or that has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.

NOTE 1: A person acting as a purchaser representative should consider the applicability of the registration and antifraud provisions relating to brokers and dealers under the Securities Exchange Act of 1934 (*Exchange Act*) (15 U.S.C. 78a *et seq.*, as amended) and relating to investment advisers under the Investment Advisers Act of 1940.

NOTE 2: The acknowledgment required by paragraph (h)(3) and the disclosure required by paragraph (h)(4) of this section must be made with specific reference to each prospective investment. Advance blanket acknowledgment, such as for *all securities transactions* or *all private placements*, is not sufficient.

NOTE 3: Disclosure of any material relationships between the purchaser representative or his affiliates and the issuer or its affiliates does not relieve the purchaser representative of his obligation to act in the interest of the purchaser.

[47 FR 11262, Mar. 16, 1982, as amended at 53 FR 7868, Mar. 10, 1988; 54 FR 11372, Mar. 20, 1989]

§ 230.502 General conditions to be met.

The following conditions shall be applicable to offers and sales made under Regulation D (§§ 230.501–230.508):

(a) *Integration.* All sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in rule 405 under the Act (17 CFR 230.405).

NOTE: The term *offering* is not defined in the Act or in Regulation D. If the issuer offers or sells securities for which the safe harbor rule in paragraph (a) of this § 230.502 is unavailable, the determination as to whether separate sales of securities are part of the same offering (i.e. are considered *integrated*) depends on the particular facts and circumstances. Generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the

United States in compliance with Regulation S. See Release No. 33–6863.

The following factors should be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D:

(a) Whether the sales are part of a single plan of financing;

(b) Whether the sales involve issuance of the same class of securities;

(c) Whether the sales have been made at or about the same time;

(d) Whether the same type of consideration is being received; and

(e) Whether the sales are made for the same general purpose.

See Release 33–4552 (November 6, 1962) [27 FR 11316].

(b) *Information requirements*—(1) *When information must be furnished.* If the issuer sells securities under § 230.505 or § 230.506 to any purchaser that is not an accredited investor, the issuer shall furnish the information specified in paragraph (b)(2) of this section to such purchaser a reasonable time prior to sale. The issuer is not required to furnish the specified information to purchasers when it sells securities under § 230.504, or to any accredited investor.

NOTE: When an issuer provides information to investors pursuant to paragraph (b)(1), it should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.

(2) *Type of information to be furnished.* (i) If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser, to the extent material to an understanding of the issuer, its business and the securities being offered:

(A) *Non-financial statement information.* If the issuer is eligible to use Regulation A (§ 230.251–263), the same kind of information as would be required in Part II of Form 1–A (§ 239.90 of this chapter). If the issuer is not eligible to use Regulation A, the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.

(B) *Financial statement information. (1) Offerings up to $2,000,000.* The information required in Item 310 of Regulation S–B (§ 228.310 of this chapter), except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited.

(*2*) *Offerings up to $7,500,000.* The financial statement information required in Form SB–2 (§ 239.10 of this chapter). If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(*3*) *Offerings over $7,500,000.* The financial statement as would be required in a registration statement filed under the Act on the form that the issuer would be entitled to use. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(C) If the issuer is a foreign private issuer eligible to use Form 20–F (§ 249.220f of this chapter), the issuer shall disclose the same kind of information required to be included in a registration statement filed under the Act on the form that the issuer would be entitled to use. The financial statements need be certified only to the extent required by paragraph (b)(2)(i) (B) (*1*), (*2*) or (*3*) of this section, as appropriate.

(ii) If the issuer is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser the information specified in paragraph (b)(2)(ii)(A) or (B) of this section, and in either event the information specified in paragraph (b)(2)(ii)(C) of this section:

(A) The issuer's annual report to shareholders for the most recent fiscal year, if such annual report meets the requirements of § 240.14a–3 or 240.14c–3 under the Exchange Act, the definitive proxy statement filed in connection with that annual report, and, if requested by the purchaser in writing, a copy of the issuer's most recent Form 10–K and Form 10–KSB (17 CFR 249.310) under the Exchange Act.

(B) The information contained in an annual report on Form 10–K (§ 249.310 of this chapter) or 10–KSB (§ 249.310b of this chapter) under the Exchange Act or in a registration statement on Form S–1 (§ 239.11 of this chapter), SB–1 (§ 239.9 of this chapter), SB–2 (§ 239.10 of this chapter) or S–11 (§ 239.18 of this chapter) under the Act or on Form 10 (§ 249.210 of this chapter) or Form 10–SB (§ 249.210b of this chapter) under the Exchange Act, whichever filing is the most recent required to be filed.

(C) The information contained in any reports or documents required to be filed by the issuer under sections 13(a), 14(a), 14(c), and 15(d) of the Exchange Act since the distribution or filing of the report or registration statement specified in paragraphs (b)(2)(ii) (A) or (B), and a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished.

(D) If the issuer is a foreign private issuer, the issuer may provide in lieu of the information specified in paragraph (b)(2)(ii) (A) or (B) of this section, the information contained in its most recent filing on Form 20–F or Form F–1 (§ 239.31 of the chapter).

(iii) Exhibits required to be filed with the Commission as part of a registration statement or report, other than an annual report to shareholders or parts of that report incorporated by reference in a Form 10–K and Form 10–KSB report, need not be furnished to each purchaser that is not an accredited investor if the contents of material exhibits are identified and such exhibits are made available to a purchaser, upon his written request, a reasonable time prior to his purchase.

(iv) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.505 or § 230.506, the issuer shall furnish to the purchaser a brief description in writing of any material written information concerning the offering that has been provided by the issuer to any accredited investor but not previously delivered to such unaccredited purchaser. The issuer shall furnish any portion or all of this information to the purchaser, upon his written request a reasonable time prior to his purchase.

(v) The issuer shall also make available to each purchaser at a reasonable time prior to his purchase of securities in a transaction under § 230.505 or § 230.506 the opportunity to ask questions and receive answers concerning the terms and conditions of the offering and to obtain any additional information which the issuer possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of information furnished under paragraph (b)(2) (i) or (ii) of this section.

(vi) For business combinations or exchange offers, in addition to information required by Form S–4 (17 CFR 239.25), the issuer shall provide to each purchaser at the time the plan is submitted to security holders, or, with an exchange, during the course of the transaction and prior to sale, written information about any terms or arrangements of the proposed transactions that are materially different from those for all other security holders. For purposes of this subsection, an issuer which is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act may satisfy the requirements of Part I.B. or C. of Form S–4 by compliance with paragraph (b)(2)(i) of this § 230.502.

(vii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a

transaction under § 230.505 or § 230.506, the issuer shall advise the purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of this section. Such disclosure may be contained in other materials required to be provided by this paragraph.

(c) *Limitation on manner of offering.* Except as provided in § 230.504(b)(1), neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and

(2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising;*Provided, however,* that publication by an issuer of a notice in accordance with § 230.135c shall not be deemed to constitute general solicitation or general advertising for purposes of this section; *Provided further,* that, if the requirements of § 230.135e are satisfied, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed to constitute general solicitation or general advertising for purposes of this section.

(d) *Limitations on resale.* Except as provided in § 230.504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom. The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of section 2(11) of the Act, which reasonable care may be demonstrated by the following:

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;

(2) Written disclosure to each purchaser prior to sale that the securities have not been registered under the Act and, therefore, cannot be resold unless they are registered under the Act or unless an exemption from registration is available; and

(3) Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, it is not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision. In addition, § 230.502(b)(2)(vii) requires the delivery of written disclosure of the limitations on resale to investors in certain instances.

[47 FR 11262, Mar. 16, 1982, as amended at 47 FR 54771, Dec. 6, 1982; 53 FR 7869, Mar. 11, 1988; 54 FR 11372, Mar. 20, 1989; 55 FR 18322, May 2, 1990; 56 FR 30054, 30055, July 1, 1991; 57 FR 47409, Oct. 16, 1992; 58 FR 26514, May 4, 1993; 59 FR 21650, Apr. 26, 1994; 62 FR 53954, Oct. 17, 1997]

§ 230.503 Filing of notice of sales.

(a) An issuer offering or selling securities in reliance on § 230.504, § 230.505 or § 230.506 shall file with the Commission five copies of a notice on Form D (17 CFR 239.500) no later than 15 days after the first sale of securities.

(b) One copy of every notice on Form D shall be manually signed by a person duly authorized by the issuer.

(c) If sales are made under § 230.505, the notice shall contain an undertaking by the issuer to furnish to the Commission, upon the written request of its staff, the information furnished by the issuer under § 230.502(b)(2) to any purchaser that is not an accredited investor.

(d) Amendments to notices filed under paragraph (a) of this section need only report the issuer's name and the information required by Part C and any material change in the facts from those set forth in Parts A and B.

(e) A notice on Form D shall be considered filed with the Commission under paragraph (a) of this section.

(1) As of the date on which it is received at the Commission's principal office in Washington, DC; or

(2) As of the date on which the notice is mailed by means of United States registered or certified mail to the Commission's principal office in Washington, DC, if the notice is delivered to such office after the date on which it is required to be filed.

[51 FR 36386, Oct. 10, 1986, as amended at 54 FR 11373, Mar. 20, 1989]

§ 230.504 Exemption for limited offerings and sales of securities not exceeding $1,000,000.

(a) *Exemption.* Offers and sales of securities that satisfy the conditions in paragraph (b) of this § 230.504 by an issuer that is not:

(1) Subject to the reporting requirements of section 13 or 15(d) of the Exchange Act,;

(2) An investment company; or

(3) A development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person, shall be exempt from the provision of section 5 of the Act under section 3(b) of the Act.

(b) *Conditions to be met.* (1) *General conditions.* To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502 (a), (c) and (d), except that the provisions of § 230.502 (c) and (d) will not apply to offers and sales of securities under this § 230.504 that are made:

(i) Exclusively in one or more states that provide for the registration of the securities, and require the public filing and delivery to investors of a substantive disclosure document before sale, and are made in accordance with those state provisions;

(ii) In one or more states that have no provision for the registration of the securities or the public filing or delivery of a disclosure document before sale, if the securities have been registered in at least one state that provides for such registration, public filing and delivery before sale, offers and sales are made in that state in accordance with such provisions, and the disclosure document is delivered before sale to all purchasers (including those in the states that have no such procedure); or

(iii) Exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to ''accredited investors'' as defined in § 230.501(a).

(2) The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504, in reliance on any exemption under section 3(b), or in violation of section 5(a) of the Securities Act.

NOTE 1: The calculation of the aggregate offering price is illustrated as follows:

If an issuer sold $900,000 on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months.

NOTE 2: If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

[57 FR 36473, Aug. 13, 1992, as amended at 61 FR 30402, June 14, 1996; 64 FR 11094, Mar. 8, 1999]

§ 230.505 Exemption for limited offers and sales of securities not exceeding $5,000,000.

(a) *Exemption.* Offers and sales of securities that satisfy the conditions in paragraph (b) of this section by an issuer that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) *Conditions to be met*—(1) *General conditions.* To qualify for exemption under this section, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502.

(2) *Specific conditions*—(i) *Limitation on aggregate offering price.* The aggregate offering price for an offering of securities under this § 230.505, as defined in § 203.501(c), shall not exceed $5,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this section in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act.

NOTE: The calculation of the aggregate offering price is illustrated as follows:

Example 1: If an issuer sold $2,000,000 of its securities on June 1, 1982 under this § 230.505 and an additional $1,000,000 on September 1, 1982, the issuer would be permitted to sell only $2,000,000 more under this § 230.505 until June 1, 1983. Until that date the issuer must count both prior sales towards the $5,000,000 limit. However, if the issuer made its third sale on June 1, 1983, the issuer could then sell $4,000,000 of its securities because the June 1, 1982 sale would not be within the preceding twelve months.

Example 2: If an issuer sold $500,000 of its securities on June 1, 1982 under § 230.504 and an additional $4,500,000 on December 1, 1982 under this section, then the issuer could not sell any of its securities under this section until June 1, 1983. At that time it could sell an additional $500,000 of its securities.

(ii) *Limitation on number of purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section.

(iii) *Disqualifications.* No exemption under this section shall be available for the securities of any issuer described in § 230.262 of Regulation A, except that for purposes of this section only:

(A) The term ''filing of the offering statement required by § 230.252'' as used in § 230.262(a), (b) and (c) shall mean the first sale of securities under this section;

(B) The term ''underwriter'' as used in § 230.262 (b) and (c) shall mean a person that has been or will be paid directly or indirectly remuneration for solicitation of purchasers in connection with sales of securities under this section; and

(C) Paragraph (b)(2)(iii) of this section shall not apply to any issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

[47 FR 11262, Mar. 16, 1982, as amended at 54 FR 11373, Mar. 20, 1989; 57 FR 36473, Aug. 13, 1992]

§ 230.506 Exemption for limited offers and sales without regard to dollar amount of offering.

(a) *Exemption.* Offers and sales of securities by an issuer that satisfy the conditions in paragraph (b) of this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Act.

(b) *Conditions to be met*—(1) *General conditions.* To qualify for an exemption under this section, offers and sales must satisfy all the terms and conditions of §§ 230.501 and 230.502.

(2) *Specific Conditions*—(i) *Limitation on number of purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section.

NOTE: See § 230.501(e) for the calculation of the number of purchasers and § 230.502(a) for what may or may not constitute an offering under this section.

(ii) *Nature of purchasers.* Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

[47 FR 11262, Mar. 6, 1982, as amended at 54 FR 11373, Mar. 20, 1989]

§ 230.507 Disqualifying provision relating to exemptions under §§ 230.504, 230.505 and 230.506.

(a) No exemption under § 230.505, § 230.505 or § 230.506 shall be available for an issuer if such issuer, any of its predecessors or affiliates have been

subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with § 230.503.

(b) Paragraph (a) of this section shall not apply if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied.

[54 FR 11374, Mar. 20, 1989]

§ 230.508 Insignificant deviations from a term, condition or requirement of Regulation D.

(a) A failure to comply with a term, condition or requirement of § 230.504, § 230.505 or § 230.506 will not result in the loss of the exemption from the requirements of section 5 of the Act for any offer or sale to a particular individual or entity, if the person relying on the exemption shows:

(1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; and

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraph (c) of § 230.502, paragraph (b)(2) of § 230.504, paragraphs (b)(2)(i) and (ii) of § 230.505 and paragraph (b)(2)(i) of § 230.506 shall be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of § 230.504, § 230.505 or § 230.506.

(b) A transaction made in reliance on § 230.504, § 230.505 or § 230.506 shall comply with all applicable terms, conditions and requirements of Regulation D. Where an exemption is established only through reliance upon paragraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Act.

[54 FR 11374, Mar. 20, 1989, as amended at 57 FR 36473, Aug. 13, 1992]

REGULATION E—EXEMPTION FOR SECURITIES OF SMALL BUSINESS INVESTMENT COMPANIES

AUTHORITY: Sections 230.601 to 230.610a issued under sec. 19, 48 Stat. 85, as amended; 15 U.S.C. 77s.

SOURCE: Sections 230.601 to 230.610a appear at 23 FR 10484, Dec. 30, 1958, unless otherwise noted.

CROSS REFERENCE: For regulations of Small Business Administration under the Small Business Investment Act of 1958, see 13 CFR, Chapter I.

§ 230.601 Definitions of terms used in §§ 230.601 to 230.610a.

As used in §§ 230.601 to 230.610a, the following terms shall have the meaning indicated:

Act. The term *Act* refers to the Securities Act of 1933 unless specifically stated otherwise.

Affiliate. An *affiliate* of an issuer is a person controlling, controlled by or under common control with such issuer. An individual who controls an issuer is also an affiliate of such issuer.

Notification. The term *notification* means the notification required by § 230.604.

Offering Circular. The term *offering circular* means the offering circular required by § 230.605.

State. A *State* is any State, Territory or insular possession of the United States, or the District of Columbia.

Underwriter. The term *underwriter* shall have the meaning given in section 2(11) of the Act.

§ 230.602 Securities exempted.

(a) Except as hereinafter provided in this rule, securities issued by any small business investment company which is registered under the Investment Company Act of 1940, or any closed-end investment company that has elected to be regulated as a business development company under the Investment Company Act of 1940 or has notified the Commission that it intends to elect to be regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940, will be exempt from registration under the Securities Act of

1933, subject to the terms and conditions of §§ 230.601 to 230.610a. As used in this paragraph, the term *small business investment company* means any company which is licensed as a small business investment company under the Small Business Investment Act of 1958 or which has received the preliminary approval of the Small Business Administration and has been notified by the Administration that it may submit a license application. As used in this paragraph, the term *business development company* means any closed-end investment company which meets the definitional requirements of section 2(a)(48) (A) and (B) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)).

(b) No exemption under §§ 230.601 to 230.610a shall be available for the securities of any issuer if such issuer or any of its affiliates:

(1) Has filed a registration statement which is the subject of any proceeding or examination under section 8 of the Act, or is the subject of any refusal order or stop order entered thereunder within five years prior to the filing of the notification;

(2) Is subject to pending proceedings under § 230.610 or any similar rule adopted under section 3(b) of the Act, or to an order entered thereunder within five years prior to the filing of such notification;

(3) Has been convicted within five years prior to the filing of such notification of any crime or offense involving the purchase or sale of securities;

(4) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years prior to the filing of such notification, temporarily or permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of securities;

(5) Is subject to pending proceedings under section 8(e) of the Investment Company Act of 1940 or to any suspension or revocation order issued thereunder;

(6) Is subject to an injunction issued pursuant to section 35(d) of the Investment Company Act of 1940; or

(7) Is subject to a U.S. Post Office fraud order.

(c) No exemption under §§ 230.601 to 230.610a shall be available for the securities of any issuer, if any of its directors, officers or principal security holders, any investment adviser or any underwriter of the securities to be offered, or any partner, director or officer of any such investment advisor or underwriter:

(1) Has been convicted within ten years prior to the filing of the notification of any crime or offense involving the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser;

(2) Is temporarily or permanently restrained or enjoined by any court from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser;

(3) Is subject to an order of the Commission entered pursuant to section 15(b) or 15A(1) of the Securities Exchange Act of 1934; has been found by the Commission to be a cause of any such order which is still in effect; or is subject to an order of the Commission entered pursuant to section 203 (d) or (e) of the Investment Advisers Act of 1940;

(4) Is suspended or has been expelled from membership in a national securities dealers association or a national securities exchange for conduct inconsistent with just and equitable principles of trade; or

(5) Is subject to a U.S. Post Office fraud order.

(d) No exemption under §§ 230.601 to 230.610a shall be available for the securities of any issuer if any underwriter of such securities, or any director, officer or partner of any such underwriter was, or was named as, an underwriter of any securities:

(1) Covered by any registration statement which is the subject of any proceeding or examination under section 8 of the Act, or is the subject of any refusal order or stop order entered thereunder within five years prior to the filing of the notification; or

(2) Covered by any filing which is subject to pending proceedings under § 230.610 or any similar rule adopted

under section 3(b) of the Act, or to an order entered thereunder within five years prior to the filing of such notification.

(e) Paragraph (b), (c) or (d) of this section shall not apply to the securities of any issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied. Any such determination by the Commission shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

(Secs. 3(b) and 3(c) Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a–37))

[23 FR 10484, Dec. 30, 1958, as amended at 49 FR 35344, Sept. 7, 1984]

§ 230.603 Amount of securities exempted.

(a) The aggregate offering price of all of the following securities of the issuer shall not exceed $5,000,000:

(1) All securities presently being offered under §§ 230.601 to 230.610a, or specified in the notification as proposed to be so offered;

(2) All securities previously sold pursuant to an offering under §§ 230.601 to 230.610a, commenced within one year prior to the commencement of the proposed offering; and

(3) All securities sold in violation of section 5(a) of the Act within one year prior to the commencement of the proposed offering.

Notwithstanding the foregoing, the aggregate offering price of all securities so offered or sold on behalf of any one person other than the issuer shall not exceed $100,000, except that this limitation shall not apply if the securities are to be offered on behalf of the estate of a deceased person within two years after the death of such person.

(b) The aggregate offering price of securities, which have a determinable market value shall be computed upon the basis of such market value as determined from transactions or quotations on a specified date within 15 days prior to the date of filing the notification, or the offering price to the public, whichever is higher: *Provided*, That the aggregate gross proceeds actually received from the public shall not exceed the maximum aggregate offering price permitted in the particular case by paragraph (a) of this section.

(c) In computing the amount of securities which may be offered under §§ 230.601 to 230.610a, there need not be included unsold securities the offering of which has been withdrawn with the consent of the Commission by amending the pertinent notification to reduce the amount stated therein as proposed to be offered.

(15 U.S.C. 77c; secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a–37))

[23 FR 10484, Dec. 30, 1958, as amended at 36 FR 7050, Apr. 14, 1971; 49 FR 35344, Sept. 7, 1984]

§ 230.604 Filing of notification on Form 1–E.

(a) At least 10 days (Saturdays, Sundays and holidays excluded) prior to the date on which the initial offering or sale of any securities is to be made under §§ 230.601 to 230.610a, there shall be filed with the Commission four copies of a notification on Form 1–E. The Commission may, however, in its discretion, authorize the commencement of the offering or sale prior to the expiration of such 10-day period upon a written request for such authorization.

(b) The notification shall be signed by the issuer and each person, other than the issuer, for whose account any of the securities are to be offered. If the notification is signed by any person on behalf of any other person, evidence of authority to sign on behalf of such other person shall be filed with the notification, except where an officer of the issuer signs on behalf of the issuer.

(c) Any amendment to the notification shall be signed in the same manner as the original notification. Four copies of such amendment shall be filed with the Commission at least 10 days prior to any offering or sale of the securities subsequent to the filing of such amendment, or such shorter period as the Commission, in its discretion, may authorize upon a written request for such authorization.

(d) A notification or any exhibit or other document filed as a part thereof may be withdrawn upon application

unless the notification is subject to an order under § 230.610 at the time the application is filed or becomes subject to such an order within 15 days (Saturdays, Sundays and holidays excluded) thereafter: *Provided,* That a notification may not be withdrawn after any of the securities proposed to be offered thereunder have been sold. Any such application shall be signed in the same manner as the notification.

(Secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a–37))

[23 FR 10484, Dec. 30, 1958, as amended at 37 FR 1471, Jan. 29, 1972; 49 FR 35344, Sept. 7, 1984; 61 FR 49959, Sept. 24, 1996]

§ 230.605 Filing and use of the offering circular.

(a) Except as provided in paragraphs (b) or (f) of this rule and in § 230.606:

(1) No written offer of securities of any issuer shall be made under §§ 230.601 to 230.610a unless an offering circular containing the information specified in Schedule A or Schedule B, as appropriate, is concurrently given or has previously been given to the person to whom the offer is made, or has been sent to such person under such circumstances that it would normally have been received by him at or prior to the time of such written offer; and

(2) No securities of such issuer shall be sold under §§ 230.601 to 230.610a unless such an offering circular is given to the person to whom the securities were sold, or is sent to such person under such circumstances that it would normally be received by him, with or prior to any confirmation of the sale, or prior to the payment by him of all or any part of the purchase price of the securities, whichever first occurs.

(b) Any written advertisement or other written communication, or any radio or television broadcast, which states from whom an offering circular may be obtained and in addition contains no more than the following information may be published, distributed or broadcast at or after the commencement of the public offering to any person prior to sending or giving such person a copy of such circular:

(1) The name of the issuer of such security;

(2) The title of the security, the amount being offered, and the per-unit offering price to the public; and

(3) The identity of the general type of business of the issuer.

(c)(1) The offering circular may be printed, mimeographed, lithographed or typewritten, or prepared by any similar process which will result in clearly legible copies. If printed, it shall be set in roman type at least as large as ten-point modern type, except that financial statements and other statistical or tabular matter may be set in roman type at least as large as eight-point modern type. All type shall be leaded at least two points.

(2) Where an offering circular is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents by presenting all required information in a format readily communicated to investors.

(d) If the offering is not completed within nine months from the date of the offering circular, a revised offering circular shall be prepared, filed and used in accordance with §§ 230.601 to 230.610a as for an original offering circular. In no event shall an offering circular be used which is false or misleading in light of the circumstances then existing.

(e) Four copies of the offering circular required by this section, which is to be used at the commencement of the offering, shall be filed with the notification at the time such notification is filed and shall be deemed a part thereof. If the offering circular is thereafter revised or amended, four copies of such revised or amended circular shall be filed as an amendment to the notification at least 10 days prior to its use, or such shorter period as the Commission may, in its discretion, authorize upon a written request for such authorization.

(f) An offering circular filed pursuant to paragraph (e) may be distributed prior to the expiration of the 10-day waiting periods for offerings provided for in § 230.604 (a) and (c) and paragraph (e) of this section and such distribution may be accompanied or followed by oral offers related thereto, provided the conditions in paragraphs (f)(1) through (f)(4) are met. For the purposes of this

section, any offering circular distributed prior to the expiration of the ten day waiting period is called a Preliminary Offering Circular. Such Preliminary Offering Circular may be used to meet the requirements of paragraph (a)(2) of this section, provided that if a Preliminary Offering Circular is inaccurate or inadequate in any material respect, a revised Preliminary Offering Circular or an offering circular of the type referred to in paragraph (f)(4) shall be furnished to all persons to whom the securities are to be sold at least 48 hours prior to the mailing of any confirmation of sale to such persons, or shall be sent to such persons under such circumstances that it would normally be received by them 48 hours prior to their receipt of confirmation of the sale.

(1) Such Preliminary Offering Circular contains substantially the information required by this section to be included in an offering circular, or contains substantially that information except for the omission of information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price.

(2) The outside front cover page of the Preliminary Offering Circular shall bear the caption ''Preliminary Offering Circular,'' the date of its issuance, and the following statement which shall run along the left hand margin of the page and printed perpendicular to the text, in boldface type at least as large as that used generally in the body of such offering circular:

A notification pursuant to Regulation E relating to these securities has been filed with the Securities and Exchange Commission. Information contained in this Preliminary Offering Circular is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted prior to the time an offering circular which is not designated as a Preliminary Offering Circular is delivered. This Preliminary Offering Circular shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sales of these securities in any state in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state.

(3) The Preliminary Offering Circular relates to a proposed public offering of securities that is to be sold by or through one or more underwriters which are broker-dealers registered under section 15 of the Securities Exchange Act of 1934, each of which has furnished a signed Consent and Certification in the form prescribed as a condition to the use of such offering circular;

(4) An offering circular contains all of the information specified in Schedule A or Schedule B (17 CFR 230.610a) and which is not designated as a Preliminary Offering Circular is furnished with or prior to delivery of the confirmation of sale to any person who has been furnished with a Preliminary Offering Circular pursuant to this paragraph.

(Secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a–37))

[23 FR 10484, Dec. 30, 1958, as amended at 49 FR 35344, Sept. 7, 1984; 61 FR 24655, May 15, 1996]

§ 230.606 Offering not in excess of $100,000.

No offering circular need be filed or used in connection with an offering of securities under §§ 230.601 to 230.610a if the aggregate offering price of all securites of the issuer offered or sold without the use of such an offering circular does not exceed $100,000 computed in accordance with § 230.603, *Provided,* The following conditions are met:

(a) There shall be filed as an exhibit to the notification four copies of a statement setting forth the information (other than financial statements) required by Schedule A or Schedule B to be set forth in an offering circular.

(b) No advertisement, article or other communication published in any newspaper, magazine or other periodical and no radio or television broadcast in regard to the offering shall contain more than the following information:

(1) The name of the issuer of such security;

(2) The title of the security, amount offered, and the per-unit offering price to the public;

(3) The identity of the general type of business of the issuer; and

(4) By whom orders will be filled or from whom further information may be obtained.

(Secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a–37))

[23 FR 10484, Dec. 30, 1958, as amended at 49 FR 35344, Sept. 7, 1984]

§ 230.607 Sales material to be filed.

Four copies of each of the following communications prepared or authorized by the issuer or anyone associated with the issuer, any of its affiliates or any principal underwriter for use in connection with the offering of any securities under §§ 230.601 to 230.610a shall be filed with the Commission at least five days (exclusive of Saturdays, Sundays and holidays) prior to any use thereof, or such shorter period as the Commission, in its discretion, may authorize:

(a) Every advertisement, article or other communication proposed to be published in any newspaper, magazine or other periodical;

(b) The script of every radio or television broadcast; and

(c) Every letter, circular or other written communication proposed to be sent, given or otherwise communicated to more than ten persons.

§ 230.608 Prohibition of certain statements.

No offering circular or other written or oral communication used in connection with any offering under §§ 230.601 to 230.610a shall contain any language stating or implying that the Commission has in any way passed upon the merits of, or given approval to, guaranteed or recommended the securities offered or the terms of the offering or has determined that the securities are exempt from registration, or has made any finding that the statements in any such offering circular or other communication are accurate or complete.

§ 230.609 Reports of sales hereunder.

Within 30 days after the end of each six-month period following the date of the original offering circular, or of the statement required by § 230.606, the issuer or other person for whose account the securities are offered shall file with the Commission four copies of a report on Form 2–E[1] containing the information called for by that form. A final report shall be made upon completion or termination of the offering and may be made prior to the end of the six-month period in which the last sale is made.

§ 230.610 Suspension of exemption.

(a) The Commission may, at any time after the filing of a notification, enter an order temporarily suspending the exemption, if it has reason to believe that:

(1) No exemption is available under §§ 230.601 to 230.610a for the securities purported to be offered hereunder or any of the terms or conditions of §§ 230.601 to 230.610a have not been complied with, including failure to file any report as required by § 230.609.

(2) The notification, the offering circular or any other sales literature contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;

(3) The offering is being made or would be made in violation of section 17 of the Act;

(4) Any event has occurred after the filing of the notification which would have rendered the exemption hereunder unavailable if it has occurred prior to such filing;

(5) Any person specified in paragraph (b) of § 230.602 has been indicted for any crime or offense of the character specified in paragraph (b)(3) thereof, or any proceeding has been initiated for the purpose of enjoining any such person from engaging in or continuing any conduct or practice of the character specified in paragraph (b)(4);

(6) Any person specified in paragraph (c) of § 230.602 has been indicted for any crime or offense of the character specified in paragraph (c)(1) thereof, or any proceeding has been initiated for the purpose of enjoining any such person from engaging in or continuing any conduct or practice of the character specified in paragraph (c)(2); or

(7) The issuer or any officer, director or underwriter has failed to cooperate,

[1] Filed as part of original document.

or has obstructed or refused to permit the making of an investigation by the Commission in connection with any offering made or proposed to be made hereunder.

(b) Upon the entry of an order under paragraph (a) of this section, the Commission will promptly give notice to the persons on whose behalf the notification was filed (1) that such order has been entered, together with a brief statement of the reasons for the entry of the order, and (2) that the Commission, upon receipt of a written request within 30 days after the entry of such order, will, within 20 days after the receipt of such request, set the matter down for hearing at a place to be designated by the Commission. If no hearing is requested and none is ordered by the Commission, the order shall become permanent on the thirtieth day after its entry and shall remain in effect unless or until it is modified or vacated by the Commission. Where a hearing is requested or is ordered by the Commission, the Commission will, after notice of an opportunity for such hearing, either vacate the order or enter an order permanently suspending the exemption.

(c) The Commission may at any time after notice of and opportunity for hearing, enter an order permanently suspending the exemption for any reason upon which it could have entered a temporary suspension order under paragraph (a) of this section. Any such order shall remain in effect until vacated by the Commission.

(d) All notices required by this part shall be given to the person or persons on whose behalf the notification was filed by personal service, registered or certified mail or confirmed telegraphic notice at the addresses of such persons given in the notification.

[23 FR 10484, Dec. 30, 1958, as amended at 29 FR 16982, Dec. 11, 1964]

§230.610a Schedule A: Contents of offering circular for small business investment companies; Schedule B: Contents of offering circular for business development companies.

SCHEDULE A—CONTENTS OF OFFERING CIRCULAR FOR SMALL BUSINESS INVESTMENT COMPANIES

General Instructions

1. The information in the offering circular should be organized to make it easier to understand the organization and operation of the company. The required information need not be in any particular order, except that Items 1 and 2 must be the first and second items in the offering circular.

2. The offering circular, including the cover page, may contain more information than is called for by this Schedule, provided that it is not incomplete, inaccurate, or misleading. Also, the additional information should not, by its nature, quantity, or manner of presentation, obscure or impede understanding of required information.

Item 1. Cover Page

The cover page of the offering circular shall include the following information:

(a) The name of the issuer;

(b) The mailing address of the issuer's principal executive offices including the zip code and the issuer's telephone number;

(c) The date of the offering circular;

(d) A list of the type and amount of securities offered (e.g., if the securities offered include redemption or conversion features, so state);

(e) The following statement in capital letters printed in boldface roman type at least as large as ten-point modern type and at least two points leaded:

''THESE SECURITIES ARE OFFERED PURSUANT TO AN EXEMPTION FROM REGISTRATION WITH THE SECURITIES AND EXCHANGE COMMISSION; HOWEVER, THE COMMISSION HAS NOT MADE AN INDEPENDENT DETERMINATION THAT THE SECURITIES BEING OFFERED ARE EXEMPT FROM REGISTRATION. THE SECURITIES AND EXCHANGE COMMISSION DOES NOT PASS UPON THE MERITS OF OR GIVE ITS APPROVAL TO ANY SECURITIES OFFERED OR THE TERMS OF THE OFFERING, NOR DOES IT PASS UPON THE ACCURACY OR COMPLETENESS OF ANY OFFERING CIRCULAR OR OTHER SELLING LITERATURE.''

(f) The name of the underwriter or underwriters, if applicable;

(g) A cross-reference to the place in the offering circular discussing the material risks involved in purchasing the securities, printed in bold-face roman type at least as high as ten-point modern type and at least two points leaded;

(h) The approximate date when the proposed sale to the public will begin; and

(i) The information called for by the following table shall be given, in substantially the tabular form indicated, on the outside front cover page of the offering circular as to all securities being offered (estimate, if necessary):

	Offering price to public	Underwriting discounts and commissions	Proceeds to issuer or other persons
Per share or other unit basis	.....	.....	.....
Total	.....	.....	.....

If the securities are to be offered on a best efforts basis, the cover page should set forth the termination date, if any, of the offering, any minimum required sale, and any arrangements to place the funds received in an escrow, trust, or similar arrangement. The following tabular presentation of the total maximum and minimum securities to be offered should be combined with the table required above:

	Offering price to public	Underwriting discounts and commissions	Proceeds to issuer or other persons
Total Minimum	.....	.....	.....
Total Maximum	.....	.....	.....

Instructions

1. The term *commissions* shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made in connection with the sale of such security.

2. Only commissions paid by the issuer in cash are to be indicated in the table. Commissions paid by other persons or any form of non-cash compensation shall be briefly identified in a note to the table with a cross-reference to a more complete description elsewhere in the offering circular.

3. If the securities are not to be offered for cash, state the basis upon which the offering is to be made.

4. (a) If it is impracticable to state the price to the public, briefly state the method by which the price is to be determined.

(b) Any *finder's fees* or similar payments must be disclosed in a note to the table with a reference to a more complete discussion in the offering circular.

(c) The amount of the expenses of the offering borne by the issuer, including underwriting expenses to be borne by the issuer, should be disclosed in a note to the table.

5. If any of the securities are to be offered for the account of any security holder, state the identity of each selling security holder, the amount owned by him, the amount offered for his account and the amount to be owned after the offering.

Item 2. General Description of Issuer

(a) Concisely discuss the organization and operation or proposed operation of the issuer. Include the following:

(i) Basic identifying information, including:

(A) The date and form of organization of the issuer and the name of the state under whose laws it is organized;

(B) A brief description of the nature of a small business investment company; and

(C) The classification and subclassification of the issuer as specified in sections 4 and 5 of the Investment Company Act of 1940.

(ii) A concise description of the investment objectives and policies of the issuer, including:

(A) If those objectives may be changed without a vote of the holders of the majority of the voting securities, a brief statement to that effect; and

(B) A brief discussion of how the issuer proposes to achieve its objectives, including:

(1) The types of securities (for example, bonds, convertible debentures, preferred stocks, common stocks) in which it may invest, and the proportion of the assets which may be invested in each such type of security;

(2) If the issuer proposes to have a policy of concentrating in a particular industry or group of industries, identification of such industry or industries. (Concentration, for purposes of this item, is deemed to be 25% or more of the value of the issuer's total assets invested or proposed to be invested in a particular industry or group of industries).

(C) A concise description of any other policies of the issuer that may not be changed without the vote of the majority of the outstanding voting securities, including those policies which the issuer deems to be fundamental within the meaning of Section 8(b) of the Investment Company Act of 1940.

(D) A concise description of those significant investment policies or techniques (such as investing for control or management or investing in other investment companies) that are not described pursuant to subparagraphs (B) or (C) above that issuer employs or has the current intention of employing in the foreseeable future.

NOTE: If the effect of a policy is to prohibit a particular practice, or, if the policy permits a particular practice but the issuer has not employed that practice within the past year and has no current intention of doing so in the foreseeable future, do not include disclosure as to that policy.

(b) Discuss briefly the principal risk factors associated with investment in the issuer, including factors peculiar to the issuer as well as those generally attendant to investment in a small business investment company with investment policies and objectives similar to the issuer.

Item 3. Plan of Distribution

(a) If the securities are to be offered through underwriters, give the names of the principal underwriters, and state the amounts underwritten by each. Identify each underwriter having a material relationship to the issuer and state the nature of the relationship. State briefly the nature of the underwriters' obligation to take the securities.

(b) State briefly the discounts and commissions to be allowed or paid to dealers, including all cash, securities, contracts or other consideration to be received by any dealer in connection with the sale of the securities.

(c) If *finder's fees* are to be paid, identify the *finder,* the nature of the services rendered and the nature of any relationship between the *finder* and the issuer, its officers, directors, promoters, principal stockholders and underwriters (including any affiliates thereof). If a *finder* is not registered with the Commission as a broker or dealer, disclose that fact.

(d) Outline briefly the plan of distribution of any securities being issued which are to be offered through the selling efforts of brokers or dealers or otherwise than through underwriters.

(e)(1) Describe any arrangements for the return of funds to subscribers if all of the securities to be offered are not sold; if there are no such arrangements, so state.

(2) If there will be material delay in the payment of the proceeds of the offering by the underwriter to the issuer, the nature of the delay and the effects on the issuer should be briefly described.

Item 4. Management and Certain Security Holders of the Issuer

(a) Give the full names and complete addresses of all directors, officers, members of any advisory board of the issuer and any person who owns more than 5 percent of any class of securities of the issuer (other than the Small Business Administration if the issuer is a small business investment company as defined in §230.602(a) of this chapter).

(b) Identify each person who as of a specified date no more than 30 days prior to the date of filing of this registration statement, controls the issuer as specified in section 2(a)(9) of the Investment Company Act of 1940.

(c) Give the business experience over the last five years of any person named in (a) above who is or is expected to be significantly involved in the investment decisions of the issuer or in providing advisory services, direction or control of portfolio companies of the issuer.

(d) State the aggregate annual remuneration of each of the three highest-paid persons who are officers or directors of the issuer and all officers and directors as a group during the issuer's last fiscal year. State the number of persons in the group referred to above without naming them.

(e) Describe all direct and indirect interests (by security holdings or otherwise) of each person named in (a) above (i) in the issuer and (ii) in any material transactions within the past two years or in any material proposed transaction to which the issuer was or is to be a party. Include the cost to such persons of any assets or services for which any payment by or for the account of the issuer has been or is to be made.

(f) Provide, if applicable, for each investment adviser of the issuer as defined in section 2(a)(20) of the Investment Company Act of 1940:

(i) The name and address of the investment adviser and a brief description of its experience as an investment adviser, and, if the investment adviser is controlled by another person, the name of that person and the general nature of its business. (If the investment adviser is subject to more than one level of control, it is sufficient to give the name of the ultimate control person.)

(ii) A brief description of the services provided by the investment adviser. (If, in addition to providing investment advice, the investment adviser or persons employed by or associated with the investment adviser are, subject to the authority of the board of directors, responsible for overall management of issuer's business affairs, it is sufficient to state that fact in lieu of listing all services provided.)

(iii) A brief description of the investment adviser's compensation. (If the issuer has been in operation for a full fiscal year, provide the compensation paid to the adviser for the most recent fiscal year as a percentage of average net assets. No further information is required in response to this Item if the adviser is paid on the basis of a percentage of net assets and if the issuer has neither changed investment advisers nor changed the basis on which the adviser was compensated during the most recent fiscal year. If the fee is paid in some manner other than on the basis of average net assets, briefly describe the basis of payment. If the registrant has not been in operation for a full fiscal

year, state generally what the investment adviser's fee will be as a percentage of average net assets, including any breakpoints, but it is not necessary to include precise details as to how the fee is computed or paid.)

Item 5. Portfolio Companies

Furnish the following information, in the tabular form indicated, with respect to the portfolio companies of the issuer, as of a specified date within 90 days prior to the date of filing the notification with the Commission pursuant to an offering of securities under Regulation E.

Name and address of portfolio companies	Nature of its principal business	Title of securities owned, controlled or held by issuer	Number of shares or amount of loan to portfolio companies

Percentage of class of securities owned, controlled or held by issuer	Value	Percentage of total value of portfolio companies

Instructions

1. Provide the city and state for address of portfolio companies.
2. State the value as of date of balance sheet required under Item 7.

Item 6. Capital Stock and Other Securities

(a) Describe concisely the nature and most significant attributes of the security being offered, including: (i) a brief discussion of voting rights; (ii) restrictions, if any, on the right freely to retain or dispose of such security; (iii) conversion rights, if applicable; and (iv) and any material obligations or potential liability associated with ownership of such security (not including risks).

(b) If the rights of holders of such security may be modified otherwise than by a vote of majority or more of the shares outstanding, voting as a class, so state and explain briefly.

(c) If issuer has any other classes of securities outstanding (other than bank borrowings or borrowings that are not senior securities under Section 18(g) of the Investment Company Act of 1940 identify them and state whether they have any preference over the security being offered.

(d) Describe briefly the issuer's policy with respect to dividends and distributions, including any options shareholders may have as to the receipt of such dividends and distributions.

(e) Describe briefly the tax consequences to investors of an investment in the securities being offered. Such description should not include detailed discussions of applicable law. If the issuer intends to qualify for treatment under Subchapter M, it is sufficient, in the absence of special circumstances, to state briefly that in that case: (1) the issuer will distribute all of its net income and gains to shareholders and that such distributions are taxable income or capital gains; (ii) shareholders may be proportionately liable for taxes on income and gains of the issuer but that shareholders not subject to tax on their income will not be required to pay tax on amounts distributed to them; and that (iii) the issuer will inform shareholders of the amount and nature of such income or gains.

(f) Where there is a material disparity between the public offering price and the effective cash cost to officers, directors, promoters and affiliated persons for shares acquired by them in a transaction during the past three years, or which they have a right to acquire, there should be included a comparison of the public contribution under the proposed public offering and the effective cash contribution of such persons. In such cases, and in other instances where the extent of the dilution makes it appropriate, the following shall be given: (1) the net tangible book value per share before and after the distribution; (2) the amount of the increase in such net tangible book value per share attributable to the cash payment made by purchasers of the shares being offered; and (3) the amount of the immediate dilution from the public offering price which will be absorbed by such purchasers.

Item 7. Financial Statements

Furnish appropriate financial statements of the issuer as required below. Such statements shall be prepared in accordance with generally accepted accounting principles and practices. The statements required for the issuer's latest fiscal year shall be certified by an independent public accountant or certified public accountant in accordance with Regulation S–X if the issuer has filed or is required to file with the Commission certified financial statements for such fiscal year; the statements filed for the period or periods preceding such latest year need not be certified.

(a) A blance sheet as of a date within 90 days prior to the date of filing the notification with the Commission.

(b) A profit and loss or income statement for each of the last two fiscal years and for any subsequent period up to the date of the balance sheet furnished pursuant to (a) above.

SCHEDULE B: CONTENTS OF OFFERING CIRCULAR FOR BUSINESS DEVELOPMENT COMPANIES

General Instructions.

Same as General Instructions to Schedule A.

Item 1. Same as Item 1 of Schedule A.

Item 2. General Description of Issuer

(a) Concisely discuss the organization and operation or proposed operation of the issuer. Include the following:

(i) Basic identifying information, including:

(A) The date and form of organization of the issuer and the name of the state under the laws of which it is organized; and

(B) A brief description of the nature of a business development company.

NOTE: A business development company having a wholly-owned small business investment company subsidiary should disclose how the subsidiary is regulated, e.g., as an investment company registered under the Investment Company Act of 1940, and what percentage of the parent company's assets are, or are expected to be, invested in the subsidiary. The business development company should also describe the small business investment company's operations, including any material difference in investment policies between the business development company and its small business investment company subsidiary.

(ii) A concise description of the investment objectives and policies of the issuer, including:

(A) If those objectives may be changed without a vote of the holders of the majority of the voting securities, a brief statement to that effect; and

(B) A brief discussion of how the issuer proposes to achieve such objectives, including:

(1) The types of securities (for example, bonds, convertible debentures, preferred stocks, common stock) in which it may invest, indicating the proportion of the assets which may be invested in each such type of security;

(2) The issuer proposes to have a policy of concentrating in a particular industry or group of industries, identification of such industry or industries. (Concentration, for purposes of this item, is deemed to be 25% or more of the value of the issuer's total assets invested or proposed to be invested in a particular industry or group of industries).

(3) In companies for the purpose of exercising control or management;

(4) The policy with respect to any assets that are not required to be invested in eligible portfolio companies or other companies qualifying under section 55 of the Investment Company Act of 1940;

(5) The policy with respect to rendering significant managerial assistance to eligible portfolio companies or other companies qualifying under section 55 of the Investment Company Act of 1940;

(6) The policy with respect to investing as part of a group.

(C) Identification of any other policies of the issuer that may not be changed without the vote of the majority of the outstanding voting securities, including the policy not to withdraw its election as a business development company without approval by the majority of the outstanding voting securities.

(D) A concise description of those significant investment policies or techniques (such as investing for control or management) that are not described pursuant to subparagraphs (B) or (C) above that the issuer employs or has the current intention of employing in the forseeable future.

(b) Discuss briefly the principal risk factors associated with investment in the issuer, including factors peculiar to the issuer as well as those generally attendant to investment in a business development company with investment policies and objectives similar to the issuer.

Item 3. Same as Item 3 of Schedule A.

Item 4. Same as Item 4 of Schedule A.

Item 5. Same as Item 5 of Schedule A.

Item 6. Same as Item 6 of Schedule A.

Item 7. Same as Item 7 of Schedule A.

(Secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a–37))

[49 FR 35345, Sept. 7, 1984]

§§ 230.651—230.656 [Reserved]

§ 230.701 Exemption for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation.

PRELIMINARY NOTES: 1. This section relates to transactions exempted from the registration requirements of section 5 of the Act (15 U.S.C. 77e). These transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers and persons acting on their behalf have an obligation to provide investors with disclosure adequate to satisfy the antifraud provisions of the federal securities laws.

2. In addition to complying with this section, the issuer also must comply with any applicable state law relating to the offer and sale of securities.

3. An issuer that attempts to comply with this section, but fails to do so, may claim any other exemption that is available.

4. This section is available only to the issuer of the securities. Affiliates of the issuer may not use this section to offer or sell securities. This section also does not cover resales of securities by any person. This section provides an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.

5. The purpose of this section is to provide an exemption from the registration requirements of the Act for securities issued in compensatory circumstances. This section is not available for plans or schemes to circumvent this purpose, such as to raise capital. This section also is not available to exempt any transaction that is in technical compliance with this section but is part of a plan or scheme to evade the registration provisions of the Act. In any of these cases, registration under the Act is required unless another exemption is available.

(a) *Exemption.* Offers and sales made in compliance with all of the conditions of this section are exempt from section 5 of the Act (15 U.S.C. 77e).

(b) *Issuers eligible to use this section.* (1) *General.* This section is available to any issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (the ''Exchange Act'') (15 U.S.C. 78m or 78o(d)) and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*).

(2) *Issuers that become subject to reporting.* If an issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)) after it has made offers complying with this section, the issuer may nevertheless rely on this section to sell the securities previously offered to the persons to whom those offers were made.

(3) *Guarantees by reporting companies.* An issuer subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78o(d)) may rely on this section if it is merely guaranteeing the payment of a subsidiary's securities that are sold under this section.

(c) *Transactions exempted by this section.* This section exempts offers and sales of securities (including plan interests and guarantees pursuant to paragraph (d)(2)(ii) of this section) under a written compensatory benefit plan (or written compensation contract) established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. This section exempts offers and sales to former employees, directors, general partners, trustees, officers, consultants and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered. In addition, the term ''employee'' includes insurance agents who are exclusive agents of the issuer, its subsidiaries or parents, or derive more than 50% of their annual income from those entities.

(1) *Special requirements for consultants and advisors.* This section is available to consultants and advisors only if:

(i) They are natural persons;

(ii) They provide *bona fide* services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent; and

(iii) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.

(2) *Definition of ''Compensatory Benefit Plan.''* For purposes of this section, a *compensatory benefit plan* is any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan.

(3) *Definition of ''Family Member.''* For purposes of this section, *family member* includes any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, former spouse, sibling, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships, any person sharing the employee's household (other than a tenant or employee), a trust in which these persons have more than fifty percent of the beneficial interest, a foundation in which these persons (or the employee) control the management of

assets, and any other entity in which these persons (or the employee) own more than fifty percent of the voting interests.

(d) *Amounts that may be sold.* (1) *Offers.* Any amount of securities may be offered in reliance on this section. However, for purposes of this section, sales of securities underlying options must be counted as sales on the date of the option grant.

(2) *Sales.* The aggregate sales price or amount of securities sold in reliance on this section during any consecutive 12-month period must not exceed the greatest of the following:

(i) $1,000,000;

(ii) 15% of the total assets of the issuer (or of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees), measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end); or

(iii) 15% of the outstanding amount of the class of securities being offered and sold in reliance on this section, measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end).

(3) *Rules for calculating prices and amounts.* (i) *Aggregate sales price.* The term *aggregate sales price* means the sum of all cash, property, notes, cancellation of debt or other consideration received or to be received by the issuer for the sale of the securities. Non-cash consideration must be valued by reference to *bona fide* sales of that consideration made within a reasonable time or, in the absence of such sales, on the fair value as determined by an accepted standard. The value of services exchanged for securities issued must be measured by reference to the value of the securities issued. Options must be valued based on the exercise price of the option.

(ii) *Time of the calculation.* With respect to options to purchase securities, the aggregate sales price is determined when an option grant is made (without regard to when the option becomes exercisable). With respect to other securities, the calculation is made on the date of sale. With respect to deferred compensation or similar plans, the calculation is made when the irrevocable election to defer is made.

(iii) *Derivative securities.* In calculating outstanding securities for purposes of paragraph (d)(2)(iii) of this section, treat the securities underlying all currently exercisable or convertible options, warrants, rights or other securities, other than those issued under this exemption, as outstanding. In calculating the amount of securities sold for other purposes of paragraph (d)(2) of this section, count the amount of securities that would be acquired upon exercise or conversion in connection with sales of options, warrants, rights or other exercisable or convertible securities, including those to be issued under this exemption.

(iv) *Other exemptions.* Amounts of securities sold in reliance on this section do not affect ''aggregate offering prices'' in other exemptions, and amounts of securities sold in reliance on other exemptions do not affect the amount that may be sold in reliance on this section.

(e) *Disclosure that must be provided.* The issuer must deliver to investors a copy of the compensatory benefit plan or the contract, as applicable. In addition, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $5 million, the issuer must deliver the following disclosure to investors a reasonable period of time before the date of sale:

(1) If the plan is subject to the Employee Retirement Income Security Act of 1974 (''ERISA'') (29 U.S.C. 1104–1107), a copy of the summary plan description required by ERISA;

(2) If the plan is not subject to ERISA, a summary of the material terms of the plan;

(3) Information about the risks associated with investment in the securities sold pursuant to the compensatory benefit plan or compensation contract; and

(4) Financial statements required to be furnished by Part F/S of Form 1–A (Regulation A Offering Statement) (§239.90 of this chapter) under Regulation A (§§230.251 through 230.263). Foreign private issuers as defined in §230.405 must provide a reconciliation

to generally accepted accounting principles in the United States (U.S. GAAP) if their financial statements are not prepared in accordance with U.S. GAAP (Item 17 of Form 20–F (§ 249.220f of this chapter)). The financial statements required by this section must be as of a date no more than 180 days before the sale of securities in reliance on this exemption.

(5) If the issuer is relying on paragraph (d)(2)(ii) of this section to use its parent's total assets to determine the amount of securities that may be sold, the parent's financial statements must be delivered. If the parent is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), the financial statements of the parent required by Rule 10–01 of Regulation S–X (§ 210.10–01 of this chapter) and Item 310 of Regulation S–B (§ 228.310 of this chapter), as applicable, must be delivered.

(6) If the sale involves a stock option or other derivative security, the issuer must deliver disclosure a reasonable period of time before the date of exercise or conversion. For deferred compensation or similar plans, the issuer must deliver disclosure to investors a reasonable period of time before the date the irrevocable election to defer is made.

(f) *No integration with other offerings.* Offers and sales exempt under this section are deemed to be a part of a single, discrete offering and are not subject to integration with any other offers or sales, whether registered under the Act or otherwise exempt from the registration requirements of the Act.

(g) *Resale limitations.* (1) Securities issued under this section are deemed to be ''restricted securities'' as defined in § 230.144.

(2) Resales of securities issued pursuant to this section must be in compliance with the registration requirements of the Act or an exemption from those requirements.

(3) Ninety days after the issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), securities issued under this section may be resold by persons who are not affiliates (as defined in § 230.144) in reliance on § 230.144, without compliance with paragraphs (c), (d), (e) and (h) of § 230.144, and by affiliates without compliance with paragraph (d) of § 230.144.

[64 FR 11101, Mar. 8, 1999, as amended at 64 FR 61498, Nov. 12, 1999]

§§ 230.702(T)–230.703(T) [Reserved]

EXEMPTIONS FOR CROSS-BORDER RIGHTS OFFERINGS, EXCHANGE OFFERS AND BUSINESS COMBINATIONS

SOURCE: Sections 230.800 to 230.802 appear at 64 FR 61400, unless otherwise noted.

GENERAL NOTES TO §§ 230.800, 230.801 AND 230.802

1. Sections 230.801 and 230.802 relate only to the applicability of the registration provisions of the Act (15 U.S.C. 77e) and not to the applicability of the anti-fraud, civil liability or other provisions of the federal securities laws.

2. The exemptions provided by § 230.801 and § 230.802 are not available for any securities transaction or series of transactions that technically complies with § 230.801 and § 230.802 but are part of a plan or scheme to evade the registration provisions of the Act.

3. An issuer who relies on § 230.801 or an offeror who relies on § 230.802 must still comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) and any other applicable provisions of the federal securities laws.

4. An issuer who relies on § 230.801 or an offeror who relies on § 230.802 must still comply with any applicable state laws relating to the offer and sale of securities.

5. Attempted compliance with § 230.801 or § 230.802 does not act as an exclusive election; an issuer making an offer or sale of securities in reliance on § 230.801 or § 230.802 may also rely on any other applicable exemption from the registration requirements of the Act.

6. Section 230.801 and § 230.802 provide exemptions only for the issuer of the securities and not for any affiliate of that issuer or for any other person for resales of the issuer's securities. These sections provide exemptions only for the transaction in which the issuer or other person offers or sells the securities, not for the securities themselves. Securities acquired in a § 230.801 or § 230.802 transaction may be resold in the United States only if they are registered under the Act or an exemption from registration is available.

7. Unregistered offers and sales made outside the United States will not affect contemporaneous offers and sales made in compliance with § 230.801 or § 230.802. A transaction that complies with § 230.801 or § 230.802

will not be integrated with offerings exempt under other provisions of the Act, even if both transactions occur at the same time.

8. Securities acquired in a rights offering under §230.801 are ''restricted securities'' within the meaning of §230.144(a)(3) to the same extent and proportion that the securities held by the security holder as of the record date for the rights offering were restricted securities. Likewise, securities acquired in an exchange offer or business combination subject to §230.802 are ''restricted securities'' within the meaning of §230.144(a)(3) to the same extent and proportion that the securities tendered or exchanged by the security holder in that transaction were restricted securities.

9. Section 230.801 does not apply to a rights offering by an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company. Section 230.802 does not apply to exchange offers or business combinations by an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company.

§230.800 Definitions for §§230.800, 230.801 and 230.802.

The following definitions apply in §§230.800, 230.801 and 230.802.

(a) *Business combination. Business combination* means a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of security holders of one or more of the participating companies. It also includes a statutory short form merger that does not require a vote of security holders.

(b) *Equity security. Equity security* means the same as in §240.3a11–1 of this chapter, but for purposes of this section only does not include:

(1) Any debt security that is convertible into an equity security, with or without consideration;

(2) Any debt security that includes a warrant or right to subscribe to or purchase an equity security;

(3) Any such warrant or right; or

(4) Any put, call, straddle, or other option or privilege that gives the holder the option of buying or selling a security but does not require the holder to do so.

(c) *Exchange offer. Exchange offer* means a tender offer in which securities are issued as consideration.

(d) *Foreign private issuer. Foreign private issuer* means the same as in §230.405 of Regulation C.

(e) *Foreign subject company. Foreign subject company* means any foreign private issuer whose securities are the subject of the exchange offer or business combination.

(f) *Home jurisdiction. Home jurisdiction* means both the jurisdiction of the foreign subject company's (or in the case of a rights offering, the foreign private issuer's) incorporation, organization or chartering and the principal foreign market where the foreign subject company's (or in the case of a rights offering, the issuer's) securities are listed or quoted.

(g) *Rights offering. Rights offering* means offers and sales for cash of equity securities where:

(1) The issuer grants the existing security holders of a particular class of equity securities (including holders of depositary receipts evidencing those securities) the right to purchase or subscribe for additional securities of that class; and

(2) The number of additional shares an existing security holder may purchase initially is in proportion to the number of securities he or she holds of record on the record date for the rights offering. If an existing security holder holds depositary receipts, the proportion must be calculated as if the underlying securities were held directly.

(h) *U.S. holder. U.S. holder* means any security holder resident in the United States. To determine the percentage of outstanding securities held by U.S. holders:

(1) Calculate percentage of outstanding securities held by U.S. holders as of the record date for a rights offering, or 30 days before the commencement of an exchange offer or the solicitation for a business combination.

(2) Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are

the subject of the exchange offer, business combination or rights offering, such as warrants, options and convertible securities. Exclude from those calculations securities held by persons who hold more than 10 percent of the subject securities in an exchange offer, business combination or rights offering, or that are held by the offeror in an exchange offer or business combination;

(3) Use the method of calculating record ownership in Rule 12g3–2(a) under the Exchange Act (§ 240.12g3–2(a) of this chapter), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company's jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different from the subject company's jurisdiction of incorporation;

(4) If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this provision, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

(5) Count securities as owned by U.S. holders when publicly filed reports of beneficial ownership or information that is otherwise provided to you indicates that the securities are held by U.S. residents.

(i) *United States. United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

§ 230.801 Exemption in connection with a rights offering.

A rights offering is exempt from the provisions of Section 5 of the Act (15 U.S.C. 77e), so long as the following conditions are satisfied:

(a) *Conditions.*—(1) *Eligibility of issuer.* The issuer is a foreign private issuer on the date the securities are first offered to U.S. holders.

(2) *Limitation on U.S. ownership.* U.S. holders hold no more than 10 percent of the outstanding class of securities that is the subject of the rights offering (as determined under the definition of ''U.S. holder'' in § 230.800(h)).

(3) *Equal treatment.* The issuer permits U.S. holders to participate in the rights offering on terms at least as favorable as those offered the other holders of the securities that are the subject of the offer. The issuer need not, however, extend the rights offering to security holders in those states or jurisdictions that require registration or qualification.

(4) *Informational documents.* (i) If the issuer publishes or otherwise disseminates an informational document to the holders of the securities in connection with the rights offering, the issuer must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination. If the issuer is a foreign company, it must also file a Form F–X (§ 239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

(ii) The issuer must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction.

(iii) If the issuer disseminates by publication in its home jurisdiction, the issuer must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(5) *Eligibility of securities.* The securities offered in the rights offering are equity securities of the same class as the securities held by the offerees in the United States directly or through American Depositary Receipts.

(6) *Limitation on transferability of rights.* The terms of the rights prohibit transfers of the rights by U.S. holders except in accordance with Regulation S (§ 230.901 through § 230.905).

(b) *Legends.* The following legend or an equivalent statement in clear, plain

language, to the extent applicable, appears on the cover page or other prominent portion of any informational document the issuer disseminates to U.S. holders:

This rights offering is made for the securities of a foreign company. The offer is subject to the disclosure requirements of a foreign country that are different from those of the United States. Financial statements included in the document, if any, have been prepared in accordance with foreign accounting standards that may not be comparable to the financial statements of United States companies.

It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue the foreign company or its officers or directors in a foreign court for violations of the U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment.

§ 230.802 Exemption for offerings in connection with an exchange offer or business combination for the securities of foreign private issuers.

Offers and sales in any exchange offer for a class of securities of a foreign private issuer, or in any exchange of securities for the securities of a foreign private issuer in any business combination, are exempt from the provisions of section 5 of the Act (15 U.S.C. 77e), if they satisfy the following conditions:

(a) *Conditions to be met.*—(1) *Limitation on U.S. ownership.* Except in the case of an exchange offer or business combination that is commenced during the pendency of a prior exchange offer or business combination made in reliance on this paragraph, U.S. holders of the foreign subject company must hold no more than 10 percent of the securities that are the subject of the exchange offer or business combination (as determined under the definition of ''U.S. holder'' in § 230.800(h)). In the case of a business combination in which the securities are to be issued by a successor registrant, U.S. holders may hold no more than 10 percent of the class of securities of the successor registrant, as if measured immediately after completion of the business combination.

(2) *Equal treatment.* The issuer must permit U.S. holders to participate in the exchange offer or business combination on terms at least as favorable as those offered any other holder of the subject securities. The issuer, however, need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the issuer must offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction.

(3) *Informational documents.* (i) If the issuer publishes or otherwise disseminates an informational document to the holders of the subject securities in connection with the exchange offer or business combination, the issuer must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination. If the bidder is a foreign company, it must also file a Form F–X (§ 239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

(ii) The issuer must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the foreign subject company's home jurisdiction.

(iii) If the issuer disseminates by publication in its home jurisdiction, the issuer must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(b) *Legends.* The following legend or an equivalent statement in clear, plain language, to the extent applicable, must be included on the cover page or other prominent portion of any informational document the offeror publishes or disseminates to U.S. holders:

This exchange offer or business combination is made for the securities of a foreign company. The offer is subject to disclosure requirements of a foreign country that are different from those of the United States. Financial statements included in the document, if any, have been prepared in accordance with foreign accounting standards that

may not be comparable to the financial statements of United States companies.

It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue a foreign company or its officers or directors in a foreign court for violations of the U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment.

You should be aware that the issuer may purchase securities otherwise than under the exchange offer, such as in open market or privately negotiated purchases.

(c) *Presumption for certain offers.* For exchange offers conducted by persons other than the issuer of the subject securities or its affiliates, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities, unless:

(1) The exchange offer is made pursuant to an agreement with the issuer of the subject securities;

(2) The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States, on the Nasdaq market or on the OTC market, as reported to the NASD, over the 12-calendar-month period ending 30 days before commencement of the offer, exceeds 10 percent of the worldwide aggregate trading volume of that class of securities over the same period;

(3) The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission indicates that U.S. holders hold more than 10 percent of the outstanding subject class of securities; or

(4) The offeror knows, or has reason to know, that U.S. ownership exceeds 10 percent of the subject securities.

REGULATION S—RULES GOVERNING OFFERS AND SALES MADE OUTSIDE THE UNITED STATES WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933

SOURCE: Sections 230.901 to 230.904 appear at 55 FR 18322, May 2, 1990, unless otherwise noted.

PRELIMINARY NOTES: 1. The following rules relate solely to the application of Section 5 of the Securities Act of 1933 (the *Act*) [15 U.S.C. 77e] and not to antifraud or other provisions of the federal securities laws.

2. In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

3. Nothing in these rules obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act (the *Exchange Act*), whenever such requirements are applicable.

4. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities.

5. Attempted compliance with any rule in Regulation S does not act as an exclusive election; a person making an offer or sale of securities may also claim the availability of any applicable exemption from the registration requirements of the Act. The availability of the Regulation S safe harbor to offers and sales that occur outside of the United States will not be affected by the subsequent offer and sale of these securities into the United States or to U.S. persons during the distribution compliance period, as long as the subsequent offer and sale are made pursuant to registration or an exemption therefrom under the Act.

6. Regulation S is available only for offers and sales of securities outside the United States. Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the Act or an exemption from registration is available.

7. Nothing in these rules precludes access by journalists for publications with a general circulation in the United States to offshore press conferences, press releases and meetings with company press spokespersons in which an offshore offering or tender offer is discussed, provided that the information is made available to the foreign and United States press generally and is not intended to induce purchases of securities by persons in the United States or tenders of securities by United States holders in the case of exchange offers. Where applicable, issuers and bidders may also look to § 230.135e and § 240.14d–1(c) of this chapter.

8. The provisions of this Regulation S shall not apply to offers and sales of securities issued by open-end investment companies or unit investment trusts registered or required to be registered or closed-end investment companies required to be registered, but not registered, under the Investment Company

Act of 1940 [15 U.S.C. 80a–1 *et seq.*] (the *1940 Act*).

[55 FR 18322, May 2, 1990, as amended at 62 FR 53954, Oct. 17, 1997; 63 FR 9642, Feb. 25, 1998]

§ 230.901 General statement.

For the purposes only of section 5 of the Act (15 U.S.C. § 77e), the terms *offer, offer to sell, sell, sale,* and *offer to buy* shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.

§ 230.902 Definitions.

As used in Regulation S, the following terms shall have the meanings indicated.

(a) *Debt securities.* ''Debt securities'' of an issuer is defined to mean any security other than an equity security as defined in § 230.405, as well as the following:

(1) Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; and

(2) Asset-backed securities, which are securities of a type that either:

(i) Represent an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its affiliates; or

(ii) Are secured by one or more assets or certificates of interest or participation in such assets, and the securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of paragraph (a)(2)(i) of this section, or certificates of interest or participations in assets meeting such requirements.

(iii) For purposes of paragraph (a)(2) of this section, the term ''assets'' means securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time.

(b) *Designated offshore securities market.* ''Designated offshore securities market'' means:

(1) The Eurobond market, as regulated by the International Securities Market Association; the Alberta Stock Exchange; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bermuda Stock Exchange; the Bourse de Bruxelles; the Copenhagen Stock Exchange; the European Association of Securities Dealers Automated Quotation; the Frankfurt Stock Exchange; the Helsinki Stock Exchange; The Stock Exchange of Hong Kong Limited; the Irish Stock Exchange; the Istanbul Stock Exchange; the Johannesburg Stock Exchange; the London Stock Exchange; the Bourse de Luxembourg; the Mexico Stock Exchange; the Borsa Valori di Milan; the Montreal Stock Exchange; the Oslo Stock Exchange; the Bourse de Paris; the Stock Exchange of Singapore Ltd.; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; the Warsaw Stock Exchange and the Zurich Stock Exchange; and

(2) Any foreign securities exchange or non-exchange market designated by the Commission. Attributes to be considered in determining whether to designate an offshore securities market, among others, include:

(i) Organization under foreign law;

(ii) Association with a generally recognized community of brokers, dealers, banks, or other professional intermediaries with an established operating history;

(iii) Oversight by a governmental or self-regulatory body;

(iv) Oversight standards set by an existing body of law;

(v) Reporting of securities transactions on a regular basis to a governmental or self-regulatory body;

(vi) A system for exchange of price quotations through common communications media; and

(vii) An organized clearance and settlement system.

(c) *Directed selling efforts.* (1) ''Directed selling efforts'' means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes). Such activity includes placing an advertisement in a publication ''with a general circulation in the United States'' that refers to the offering of securities being made in reliance upon this Regulation S.

(2) Publication ''with a general circulation in the United States'':

(i) Is defined as any publication that is printed primarily for distribution in the United States, or has had, during the preceding twelve months, an average circulation in the United States of 15,000 or more copies per issue; and

(ii) Will encompass only the U.S. edition of any publication printing a separate U.S. edition if the publication, without considering its U.S. edition, would not constitute a publication with a general circulation in the United States.

(3) The following are not ''directed selling efforts'':

(i) Placing an advertisement required to be published under U.S. or foreign law, or under rules or regulations of a U.S. or foreign regulatory or self-regulatory authority, provided the advertisement contains no more information than legally required and includes a statement to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903) absent registration or an applicable exemption from the registration requirements;

(ii) Contact with persons excluded from the definition of ''U.S. person'' pursuant to paragraph (k)(2)(vi) of this section or persons holding accounts excluded from the definition of ''U.S. person'' pursuant to paragraph (k)(2)(i) of this section, solely in their capacities as holders of such accounts;

(iii) A tombstone advertisement in any publication with a general circulation in the United States, provided:

(A) The publication has less than 20% of its circulation, calculated by aggregating the circulation of its U.S. and comparable non-U.S. editions, in the United States;

(B) Such advertisement contains a legend to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903) absent registration or an applicable exemption from the registration requirements; and

(C) Such advertisement contains no more information than:

(*1*) The issuer's name;

(*2*) The amount and title of the securities being sold;

(*3*) A brief indication of the issuer's general type of business;

(*4*) The price of the securities;

(*5*) The yield of the securities, if debt securities with a fixed (non-contingent) interest provision;

(*6*) The name and address of the person placing the advertisement, and whether such person is participating in the distribution;

(*7*) The names of the managing underwriters;

(*8*) The dates, if any, upon which the sales commenced and concluded;

(*9*) Whether the securities are offered or were offered by rights issued to security holders and, if so, the class of securities that are entitled or were entitled to subscribe, the subscription ratio, the record date, the dates (if any) upon which the rights were issued and expired, and the subscription price; and

(*10*) Any legend required by law or any foreign or U.S. regulatory or self-regulatory authority;

(iv) Bona fide visits to real estate, plants or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer, a distributor, any of their respective affiliates or a person acting on behalf of any of the foregoing;

(v) Distribution in the United States of a foreign broker-dealer's quotations

by a third-party system that distributes such quotations primarily in foreign countries if:

(A) Securities transactions cannot be executed between foreign broker-dealers and persons in the United States through the system; and

(B) The issuer, distributors, their respective affiliates, persons acting on behalf of any of the foregoing, foreign broker-dealers and other participants in the system do not initiate contacts with U.S. persons or persons within the United States, beyond those contacts exempted under §240.15a–6 of this chapter; and

(vi) Publication by an issuer of a notice in accordance with §230.135 or §230.135c.

(vii) Providing any journalist with access to press conferences held outside of the United States, to meetings with the issuer or selling security holder representatives conducted outside the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if the requirements of §230.135e are satisfied.

(d) *Distributor.* ''Distributor'' means any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on this Regulation S (§230.901 through §230.905, and Preliminary Notes).

(e) *Domestic issuer/Foreign issuer.* ''Domestic issuer'' means any issuer other than a ''foreign government'' or ''foreign private issuer'' (both as defined in §230.405). ''Foreign issuer'' means any issuer other than a ''domestic issuer.''

(f) *Distribution compliance period.* ''Distribution compliance period'' means a period that begins when the securities were first offered to persons other than distributors in reliance upon this Regulation S (§230.901 through §230.905, and Preliminary Notes) or the date of closing of the offering, whichever is later, and continues until the end of the period of time specified in the relevant provision of §230.903, except that:

(1) All offers and sales by a distributor of an unsold allotment or subscription shall be deemed to be made during the distribution compliance period;

(2) In a continuous offering, the distribution compliance period shall commence upon completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions;

(3) In a continuous offering of nonconvertible debt securities offered and sold in identifiable tranches, the distribution compliance period for securities in a tranche shall commence upon completion of the distribution of such tranche, as determined and certified by the managing underwriter or person performing similar functions; and

(4) That in a continuous offering of securities to be acquired upon the exercise of warrants, the distribution compliance period shall commence upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person performing similar functions, if requirements of §230.903(b)(5) are satisfied.

(g) *Offering restrictions.* ''Offering restrictions'' means:

(1) Each distributor agrees in writing:

(i) That all offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in §230.903, as applicable, shall be made only in accordance with the provisions of §230.903 or §230.904; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act; and

(ii) For offers and sales of equity securities of domestic issuers, not to engage in hedging transactions with regard to such securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in §230.903, as applicable, unless in compliance with the Act; and

(2) All offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph

(b)(2) or (b)(3)) in § 230.903, as applicable, shall include statements to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are registered under the Act, or an exemption from the registration requirements of the Act is available. For offers and sales of equity securities of domestic issuers, such offering materials and documents also must state that hedging transactions involving those securities may not be conducted unless in compliance with the Act. Such statements shall appear:

(i) On the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;

(ii) In the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and

(iii) In any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in advertisements.

(h) *Offshore transaction.* (1) An offer or sale of securities is made in an ''offshore transaction'' if:

(i) The offer is not made to a person in the United States; and

(ii) Either:

(A) At the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States; or

(B) For purposes of:

(*1*) Section 230.903, the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States; or

(*2*) Section 230.904, the transaction is executed in, on or through the facilities of a designated offshore securities market described in paragraph (b) of this section, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

(2) Notwithstanding paragraph (h)(1) of this section, offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, shall not be deemed to be made in ''offshore transactions.''

(3) Notwithstanding paragraph (h)(1) of this section, offers and sales of securities to persons excluded from the definition of ''U.S. person'' pursuant to paragraph (k)(2)(vi) of this section or persons holding accounts excluded from the definition of ''U.S. person'' pursuant to paragraph (k)(2)(i) of this section, solely in their capacities as holders of such accounts, shall be deemed to be made in ''offshore transactions.''

(i) *Reporting issuer.* ''Reporting issuer'' means an issuer other than an investment company registered or required to register under the 1940 Act that:

(1) Has a class of securities registered pursuant to Section 12(b) or 12(g) of the Exchange Act (15 U.S.C. 78*l*(b) or 78*l*(g)) or is required to file reports pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78*o*(d)); and

(2) Has filed all the material required to be filed pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78*o*(d)) for a period of at least twelve months immediately preceding the offer or sale of securities made in reliance upon this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) (or for such shorter period that the issuer was required to file such material).

(j) *Substantial U.S. market interest.* (1) ''Substantial U.S. market interest'' with respect to a class of an issuer's equity securities means:

(i) The securities exchanges and inter-dealer quotation systems in the United States in the aggregate constituted the single largest market for such class of securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation; or

(ii) 20 percent or more of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States

and less than 55 percent of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.

(2) ''Substantial U.S. market interest'' with respect to an issuer's debt securities means:

(i) Its debt securities, in the aggregate, are held of record (as that term is defined in § 240.12g5–1 of this chapter and used for purposes of paragraph (j)(2) of this section) by 300 or more U.S. persons;

(ii) $1 billion or more of: The principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons; and

(iii) 20 percent or more of: The principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons.

(3) Notwithstanding paragraph (j)(2) of this section, substantial U.S. market interest with respect to an issuer's debt securities is calculated without reference to securities that qualify for the exemption provided by Section 3(a)(3) of the Act (15 U.S.C. 77c(a)(3)).

(k) *U.S. person*. (1) ''U.S. person'' means:

(i) Any natural person resident in the United States;

(ii) Any partnership or corporation organized or incorporated under the laws of the United States;

(iii) Any estate of which any executor or administrator is a U.S. person;

(iv) Any trust of which any trustee is a U.S. person;

(v) Any agency or branch of a foreign entity located in the United States;

(vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;

(vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) Any partnership or corporation if:

(A) Organized or incorporated under the laws of any foreign jurisdiction; and

(B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in § 230.501(a)) who are not natural persons, estates or trusts.

(2) The following are not ''U.S. persons'':

(i) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(ii) Any estate of which any professional fiduciary acting as executor or administrator is a U.S. person if:

(A) An executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and

(B) The estate is governed by foreign law;

(iii) Any trust of which any professional fiduciary acting as trustee is a U.S. person, if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

(iv) An employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country;

(v) Any agency or branch of a U.S. person located outside the United States if:

(A) The agency or branch operates for valid business reasons; and

(B) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance

or banking regulation, respectively, in the jurisdiction where located; and

(vi) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(l) *United States.* ''United States'' means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

[63 FR 9642, Feb. 25, 1998]

§ 230.903 Offers or sales of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; conditions relating to specific securities.

(a) An offer or sale of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if:

(1) The offer or sale is made in an offshore transaction;

(2) No directed selling efforts are made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; and

(3) The conditions of paragraph (b) of this section, as applicable, are satisfied.

(b) *Additional conditions*—(1) *Category 1.* No conditions other than those set forth in § 230.903(a) apply to securities in this category. Securities are eligible for this category if:

(i) The securities are issued by a foreign issuer that reasonably believes at the commencement of the offering that:

(A) There is no substantial U.S. market interest in the class of securities to be offered or sold (if equity securities are offered or sold);

(B) There is no substantial U.S. market interest in its debt securities (if debt securities are offered or sold);

(C) There is no substantial U.S. market interest in the securities to be purchased upon exercise (if warrants are offered or sold); and

(D) There is no substantial U.S. market interest in either the convertible securities or the underlying securities (if convertible securities are offered or sold);

(ii) The securities are offered and sold in an overseas directed offering, which means:

(A) An offering of securities of a foreign issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country; or

(B) An offering of non-convertible debt securities of a domestic issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country, provided that the principal and interest of the securities (or par value, as applicable) are denominated in a currency other than U.S. dollars and such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner that in effect converts the securities to U.S. dollar-denominated securities.

(iii) The securities are backed by the full faith and credit of a foreign government; or

(iv) The securities are offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States, and customary practices and documentation of such country, provided that:

(A) The securities are issued in compensatory circumstances for bona fide services rendered to the issuer or its affiliates in connection with their businesses and such services are not rendered in connection with the offer or sale of securities in a capital-raising transaction;

(B) Any interests in the plan are not transferable other than by will or the laws of descent or distribution;

(C) The issuer takes reasonable steps to preclude the offer and sale of interests in the plan or securities under the plan to U.S. residents other than employees on temporary assignment in the United States; and

(D) Documentation used in connection with any offer pursuant to the plan contains a statement that the securities have not been registered under the Act and may not be offered or sold in the United States unless registered or an exemption from registration is available.

(2) *Category 2.* The following conditions apply to securities that are not eligible for Category 1 (paragraph (b)(1)) of this section and that are equity securities of a reporting foreign issuer, or debt securities of a reporting issuer or of a non-reporting foreign issuer.

(i) Offering restrictions are implemented;

(ii) The offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(iii) Each distributor selling securities to a distributor, a dealer, as defined in section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of a 40-day distribution compliance period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(3) *Category 3.* The following conditions apply to securities that are not eligible for Category 1 or 2 (paragraph (b)(1) or (b)(2)) of this section:

(i) Offering restrictions are implemented;

(ii) In the case of debt securities:

(A) The offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) The securities are represented upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day distribution compliance period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(iii) In the case of equity securities:

(A) The offer or sale, if made prior to the expiration of a one-year distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) The offer or sale, if made prior to the expiration of a one-year distribution compliance period, is made pursuant to the following conditions:

(*1*) The purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(*2*) The purchaser of the securities agrees to resell such securities only in accordance with the provisions of this Regulation S (§230.901 through §230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the Act;

(*3*) The securities of a domestic issuer contain a legend to the effect that transfer is prohibited except in accordance with the provisions of this Regulation S (§230.901 through §230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and that hedging transactions involving those securities may not be conducted unless in compliance with the Act;

(*4*) The issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer

of the securities not made in accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; *provided, however,* that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend described in paragraph (b)(3)(iii)(B)(*3*) of this section) are implemented to prevent any transfer of the securities not made in accordance with the provisions of this Regulation S; and

(iv) Each distributor selling securities to a distributor, a dealer (as defined in section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day distribution compliance period in the case of debt securities, or a one-year distribution compliance period in the case of equity securities, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(4) *Guaranteed securities.* Notwithstanding paragraphs (b)(1) through (b)(3) of this section, in offerings of debt securities fully and unconditionally guaranteed as to principal and interest by the parent of the issuer of the debt securities, only the requirements of paragraph (b) of this section that are applicable to the offer and sale of the guarantee must be satisfied with respect to the offer and sale of the guaranteed debt securities.

(5) *Warrants.* An offer or sale of warrants under Category 2 or 3 (paragraph (b)(2) or (b)(3)) of this section also must comply with the following requirements:

(i) Each warrant must bear a legend stating that the warrant and the securities to be issued upon its exercise have not been registered under the Act and that the warrant may not be exercised by or on behalf of any U.S. person unless registered under the Act or an exemption from such registration is available;

(ii) Each person exercising a warrant is required to give:

(A) Written certification that it is not a U.S. person and the warrant is not being exercised on behalf of a U.S. person; or

(B) A written opinion of counsel to the effect that the warrant and the securities delivered upon exercise thereof have been registered under the Act or are exempt from registration thereunder; and

(iii) Procedures are implemented to ensure that the warrant may not be exercised within the United States, and that the securities may not be delivered within the United States upon exercise, other than in offerings deemed to meet the definition of ''offshore transaction'' pursuant to § 230.902(h), unless registered under the Act or an exemption from such registration is available.

[63 FR 9645, Feb. 25, 1998]

§ 230.904 Offshore resales.

(a) An offer or sale of securities by any person other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if:

(1) The offer or sale are made in an offshore transaction;

(2) No directed selling efforts are made in the United States by the seller, an affiliate, or any person acting on their behalf; and

(3) The conditions of paragraph (b) of this section, if applicable, are satisfied.

(b) *Additional conditions.* (1) *Resales by dealers and persons receiving selling concessions.* In the case of an offer or sale of securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) of § 230.903, as applicable, by a dealer, as defined in Section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold:

(i) Neither the seller nor any person acting on its behalf knows that the

offeree or buyer of the securities is a U.S. person; and

(ii) If the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, as defined in Section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the distribution compliance period only in accordance with the provisions of this Regulation S (§230.901 through §230.905, and Preliminary Notes); pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act.

(2) *Resales by certain affiliates.* In the case of an offer or sale of securities by an officer or director of the issuer or a distributor, who is an affiliate of the issuer or distributor solely by virtue of holding such position, no selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

[63 FR 9646, Feb. 25, 1998]

§230.905 Resale limitations.

Equity securities of domestic issuers acquired from the issuer, a distributor, or any of their respective affiliates in a transaction subject to the conditions of §230.901 or §230.903 are deemed to be ''restricted securities'' as defined in §230.144. Resales of any of such restricted securities by the offshore purchaser must be made in accordance with this Regulation S (§230.901 through §230.905, and Preliminary Notes), the registration requirements of the Act or an exemption therefrom. Any ''restricted securities,'' as defined in §230.144, that are equity securities of a domestic issuer will continue to be deemed to be restricted securities, notwithstanding that they were acquired in a resale transaction made pursuant to §230.901 or §230.904.

[63 FR 9647, Feb. 25, 1998]

REGULATION CE—COORDINATED EXEMPTIONS FOR CERTAIN ISSUES OF SECURITIES EXEMPT UNDER STATE LAW

§230.1001 Exemption for transactions exempt from qualification under §25102(n) of the California Corporations Code.

PRELIMINARY NOTES: (1) Nothing in this section is intended to be or should be construed as in any way relieving issuers or persons acting on behalf of issuers from providing disclosure to prospective investors necessary to satisfy the antifraud provisions of the federal securities laws. This section only provides an exemption from the registration requirements of the Securities Act of 1933 (''the Act'') [15 U.S.C. 77a *et seq.*].

(2) Nothing in this section obviates the need to comply with any applicable state law relating to the offer and sales of securities.

(3) Attempted compliance with this section does not act as an exclusive election; the issuer also can claim the availability of any other applicable exemption.

(4) This exemption is not available to any issuer for any transaction which, while in technical compliance with the provision of this section, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

(a) *Exemption.* Offers and sales of securities that satisfy the conditions of paragraph (n) of §25102 of the California Corporations Code, and paragraph (b) of this section, shall be exempt from the provisions of Section 5 of the Securities Act of 1933 by virtue of Section 3(b) of that Act.

(b) *Limitation on and computation of offering price.* The sum of all cash and other consideration to be received for the securities shall not exceed $5,000,000, less the aggregate offering price for all other securities sold in the same offering of securities, whether pursuant to this or another exemption.

(c) *Resale limitations.* Securities issued pursuant to this §230.1001 are deemed to be ''restricted securities'' as defined in Securities Act Rule 144 [§230.144]. Resales of such securities must be made in compliance with the registration requirements of the Act or an exemption therefrom.

[61 FR 21359, May 9, 1996]

PART 231—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER

Subject	Release No.	Date	Fed. Reg. Vol. and page
Partial text of letter of Chief of Securities Division of Federal Trade Commission relating to section 11(e)(2).	45	Sept. 22, 1933	11 FR 10947.
Letter of Federal Trade Commission relating to offers of sale prior to the effective date of the registration statement.	70	Nov. 6, 1933	11 FR 10948.
Opinion of Federal Trade Commission relating to registration of stock issued by certain mortgage loan companies.	86	Dec. 13, 1933	Do.
Extracts from letters of Federal Trade Commission relating to applications of various sections of the Act.	97	Dec. 28, 1933	11 FR 10949.
Extract from letter of Federal Trade Commission discussing availability of a ''broker's exemption'' to the customer of the broker.	131	Mar. 13, 1934	11 FR 10951.
Statement by Federal Trade Commission discussing the amendment of the Securities Act to include fractional undivided interests in oil, gas or other mineral rights in the definition of security.	185	June 20, 1934	Do.
Statement by Federal Trade Commission relating to the availability of an exemption from registration where a secondary distribution involves sales outside the State of incorporation.	201	July 20, 1934	11 FR 10952.
Letter of General Counsel discussing factors to be considered in determining the availability of the exemption from registration provided by the second clause of section 4(1).	285	Jan. 24, 1935	Do.
Letter of General Counsel discussing the availability of an exemption from registration for securities issued in exchange for other securities where terms of the issuance and exchange are subject to approval by a State public utility commission.	312	Mar. 15, 1935	11 FR 10953.
Letter of General Counsel discussing availability of an exemption from registration for collateral trust notes.	401	June 18, 1935	Do.
Letter of General Counsel discussing distribution by statistical service of bulletins and circulars describing securities for which registration statements have been filed.	464	Aug. 19, 1935	Do.
Letter of General Counsel discussing the availability of an exemption from registration for the issuance of securities under deposit agreements where solicitations under the agreements were begun prior to the effective date of the registration requirements of the Securities Act.	538	Oct. 26, 1935	11 FR 10955.
Letter of General Counsel discussing the availability of exemption from registration of the second clause of section 4(1).	603	Dec. 16, 1935	Do.
Letters of General Counsel discussing application of section 3(a)(9)	646	Feb. 3, 1936	11 FR 10956.
Letter by General Counsel discussing circulation by underwriters and dealers of summaries of information contained in registration statements prior to the effective date of such statements.	802	May 23, 1936	11 FR 10957.
Letter of General Counsel discussing the application of section 5(b)(2)	828	June 4, 1936	Do.
Opinion of the Director of the Division of Forms and Regulations relating to Rule 821(a) (17 CFR 230.821(a)).	874	July 2, 1936	Do.
Letter of General Counsel discussing whether a sale of a security is involved in the payment of a dividend.	929	July 29, 1936	Do.
Letter of General Counsel discussing solicitation by financial and security houses of brokerage orders for the purchase of securities prior to the effective date of a registration statement for such securities.	1256	Feb. 9, 1937	11 FR 10958.
Opinion of the Director of the Division of Forms and Regulations discussing the definition of ''parent'' as used in various forms under Securities Act of 1933 and Securities Exchange Act of 1934.	1376	Apr. 7, 1937	Do.
Letter of General Counsel discussing nature of exemption from registration provided by section 3(a)(11).	1459	May 29, 1937	Do.
Opinion of the Director of the Division of Forms and Regulations relating to Rule 821(a) (17 CFR 230.821(a)).	1503	July 12, 1937	11 FR 10959.
Letter of the Director of the Division of Forms and Regulations relating to Rule 821(a) (17 CFR 230.821(a)).	1580	Oct. 19, 1937	11 FR 10961.
Opinion of General Counsel relating to Rule 142 (17 CFR 230.142)	1862	Dec. 14, 1938	11 FR 10962.
Letter of General Counsel concerning the services of former employees of the Commission in connection with matters with which such employees became familiar during their course of employment with the Commission.	1934	Apr. 5, 1939	11 FR 10963.
Letter of General Counsel relating to sections 3(a)(9) and 4(1)	2029	Aug. 8, 1939	11 FR 10953.
Statement of Commission policy with respect to the acceleration of the effective date of registration statements.	2340	Aug. 23, 1940	11 FR 10964.
Opinion of General Counsel concerning the application of the third clause of section 4(1) in various situations.	2623	July 25, 1941	Do.
Extract from letter of Director of the Corporation Finance Division	2899	Feb. 5, 1943	11 FR 10965.
Opinion of Director of the Trading and Exchange Division relating to the violation of the anti-fraud provisions of the Securities Act by manipulation of prices of securities not registered on a national securities exchange.	2955	Nov. 16, 1943	Do.

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Opinion of Director of the Trading and Exchange Division relating to the violation of the anti-fraud provisions of the Securities Act in cases of a ''syndicate account'' while members of the syndicate or selling group are engaged in the retail distribution of such security.	2956	Nov. 11, 1943	Do.
Statement of the Commission relating to the anti-fraud provisions of section 17(a) of the Securities Act of 1933 and sections 10(b) and 15(c)(1) of the Securities Exchange Act of 1934.	2997	June 1, 1944	Do.
Opinion of Chief Counsel to the Corporation Finance Division relating to section 3(a)(10).	3000	June 7, 1944	11 FR 10965.
Opinion of Chief Counsel to the Corporation Finance Division relating to section 3(a)(10).	3011	Aug. 28, 1944	11 FR 10966.
Statement by Commission relating to section 3(a)(10)	3038	Jan. 4, 1945	Do.
Opinion of Director of the Trading and Exchange Division relating to section 206 of the Investment Advisers Act of 1940, section 17(a) of the Securities Act of 1933, and sections 10(b) and 15(c)(1) of the Securities Exchange Act of 1934.	3043	Feb. 5, 1945	Do.
Statement of Commission policy as to acceleration of the effective date of a registration statement where a selling stockholder does not bear his equitable proportion of the expense of registration.	3055	Apr. 7, 1945	Do.
Statement of Commission policy as to the acceleration of the effective date of a registration statement in cases where an inadequate ''red herring'' prospectus has been issued.	3061	Apr. 30, 1945	Do.
Statement by Commission with respect to representations that the Commission has approved the price of a security offered to the public under a registration statement.	3115	Jan. 24, 1946	11 FR 10967.
Statements of the Commission accompanying adoption of § 230.131 (Rule 131)	3177	Dec. 30, 1946	11 FR 14726.
Letter of the Director of the Corporation Finance Division regarding registration under the Securities Act of 1933 of certain warrants.	3210	Apr. 9, 1947	12 FR 2513.
Opinion of General Counsel relating to ''when-issued'' trading	3343	May 24, 1949	14 FR 2831.
Statement of the Commission relating to § 230.220(i) of this chapter	3399	Dec. 6, 1950	15 FR 8965.
Opinion of the General Counsel relating to the use of ''hedge clauses'' by brokers, dealers, investment advisers, and others.	3411	Apr. 18, 1951	16 FR 3387.
Statements of the Commission respecting purpose of § 230.132 (Rule 132); respecting acceleration of identifying statements and proposed prospectuses pursuant to § 230.131 and § 230.132 (Rules 131 and 132); and respecting acceleration policy where there has been no bona fide effort to prepare a reasonably concise and readable prospectus.	3453	Oct. 1, 1952	17 FR 8900.
Statement of the Commission relating to publication of information prior to or after the effective date of a registration statement.	3844	Oct. 4, 1957	22 FR 8359.
Statement of the Commission concerning the interpretation and application of § 230.133 (Rule 133).	3846	Oct. 8, 1957	22 FR 8361.
Statement of the Commission regarding trading stamps	3890	Jan. 21, 1958	23 FR 498.
Statement of the Commission regarding public offerings of investment contracts providing for the acquisition, sale or servicing of mortgages or deeds of trust.	3892	Jan. 31, 1958	23 FR 840.
Statement of the Commission as to the applicability of the Federal securities laws to real estate investment trusts.	4298	Nov. 18, 1960	25 FR 12177.
Statement of the Commission concerning interpretation of section 39(a)(3) of the Securities Act of 1933.	4412	Sept. 20, 1961	26 FR 9158.
Statement of the Commission concerning exemption for local offerings from registration.	4434	Dec. 6, 1961	26 FR 11896.
Statement of the Commission concerning standards of conduct for registered broker-dealers in the distribution of unregistered securities.	4445	Feb. 2, 1962	27 FR 1251.
Statement of the Commission in regard to the wide variation of certificates used by independent accountants in their registration statements concerning verification of inventories (income statements) of prior years in first audits.	4458	Mar. 1, 1962	27 FR 2312.
Statement of the Commission in regard to the increase of time between the filing and the effective dates of a substantial volume of registration statements and suggested assistance to issuers, counsels, and others preparing registration statements to remedy this delay.	4475	Apr. 13, 1962	27 FR 3990.
Statement of the Commission cautioning broker-dealers about violating the anti-fraud provisions of the Federal securities laws when making short sales in which they delay effecting the covering transaction to acquire the security.	4476	Apr. 16, 1962	27 FR 3991.
Opinion of the Commission that ''Equity Funding'', ''Secured Funding'', or ''Life Funding'' constitutes an investment contract and when publicly offered is required to be registered under the Securities Act of 1933.	4491	May 22, 1962	27 FR 5190.
Statement of the Commission regarding limitations of the availability of so-called ''private offering exemption.''.	4552	Nov. 6, 1962	27 FR 11316.
Statement of the Commission showing circumstances in 7 cases where profits in real estate transactions were not earned at time transactions were recorded but that the sales were designed to create the illusion of profits or value as a basis for the sales of securities.	4566	Dec. 28, 1962	28 FR 276.
Commission's publication of policies and practices of its Division of Corporation Finance to be used as guide for preparation and filing of registration statements.	4666	Feb. 7, 1964	29 FR 2490.

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Statement of the Commission explaining the operation of section 5 of the Securities Act of 1933 in the offer and sale of securities by underwriters and dealers prior to and after the filing of a registration statement.	4697	May 28, 1964	29 FR 7317.
Statement of the Commission re applicability of Securities Act of 1933 to offerings of securities outside the U.S. and re applicability of section 15(a) of the Securities Exchange Act of 1934 to foreign underwriters as part of program of Presidential Task Force to reduce U.S. balance of payments deficit and protect U.S. gold reserves.	4708	July 9, 1964	29 FR 9828.
Letter of Chief Counsel of Division of Corporation Finance recommending against proposed amendment to Rule 134 under the Securities Act of 1933 (17 CFR 230.134) with specific interpretations valuable to would be users of ''tombstone'' advertisements.	4709	July 14, 1964	29 FR 9827.
Summary and interpretation by the Commission of amendments to the Securities Act of 1933 and Securities Exchange Act of 1934 as contained in the Securities Acts Amendments of 1964.	4725	Sept. 14, 1964	29 FR 13455.
Statement of the Commission re the registration of securities purchased through employee stock purchase plans and warning that plans not subject to registration should be limited to securities of reliable companies.	4790	July 13, 1965	30 FR 9059.
Opinion and statement of the Commission in regard to proper reporting of deferred income taxes arising from installment sales.	4811	Dec. 7, 1965	30 FR 15420.
Statement of the Commission to clarify the meaning of ''beneficial ownership of securities'' as relates to beneficial ownership of securities held by family members.	4817	Jan. 19, 1966	31 FR 1005.
Restatement (superseding Release No. 4669) of the Commission alerting the financial community to the limitations of Rule 154 (17 CFR 230.154) under the Securities Act of 1933.	4818	Jan. 21, 1966	31 FR 2544.
Statement of the Commission setting the date of May 1, 1966 after which filings must reflect beneficial ownership of securities held by family members.	4819	Feb. 14, 1966	31 FR 3175.
Request by the Commission to issuers to use language that can be understood readily by employees in prospectuses for securities registered under the Securities Act of 1933 on Form S–8 (17 CFR 239.16b).	4844	Aug. 5, 1966	31 FR 10667.
Statement of the Commission prepared in conjunction with Maryland, Virginia, and District of Columbia authorities re applicability of Federal Securities Laws as to registration requirements and antifraud provisions in real estate syndications.	4877	Aug. 8, 1967	32 FR 11705.
Opinions of the Commission on the acceleration of the effective date of a registration statement under the Securities Act of 1933 and on the clearance of proxy material such as convertible preferred shares considered residual securities in determining earnings per share applicable to common stock.	4910	June 18, 1968	33 FR 10086.
Statement of the Commission to alert prospective borrowers obtaining loans for real estate development about recent fraudulent schemes.	4913	July 5, 1968	33 FR 10134.
Statement of the Commission clarifying that industrial revenue bonds sold under Rule 131 (17 CFR 230.131) and Rule 3b–5 (17 CFR 240.3b–5) are not effected if acquired and paid for by the underwriters on or before December 31, 1968.	4923	Sept. 16, 1968	33 FR 14545.
Statement of the Commission setting forth certain procedures for the staff of its Division of Corporation Finance to adopt in order to expedite the filing of registration statements.	4934	Nov. 21, 1968	33 FR 17900.
Statement of the Director of the Commission's Division of Corporate Regulation re the filing of supplements to investment company prospectuses under the Securities Act of 1933 as a result of changes in stock exchange rules effective December 5, 1968 relating to ''customer-directed give ups''.	IC–5554	Dec. 3, 1968	33 FR 18576.
Guides for preparation and filing of registration statements under the Securities Act of 1933.	4936	Dec. 9, 1968	33 FR 18617.
Letter of Chief Counsel of Division of Corporate Regulation setting forth the Commission's interpretation as to references to certain financial services in ''Tombstone'' advertisements.	4940	Dec. 23, 1968	34 FR 382.
Statement of the Commission setting forth emergency procedures adopted by the Division of Corporate Regulation to expedite processing of registration statements, amendments, and proxy statements.	4955	Mar. 12, 1969	34 FR 5547.
Proposed guide for prospective registrants re the use of misleading names	4959	Apr. 7, 1969	34 FR 6575.
Declaration of the Commission that prior delivery of preliminary prospectus to underwriters and dealers will accelerate the effective date of a registration statement.	4968	Apr. 24, 1969	34 FR 7235.
Policy of Commission's Division of Corporation Finance to send only one letter of comments re registration statement to the issuer or its counsel and one to the principal underwriter or its counsel if there are underwriters.	4970	May 1, 1969	34 FR 7613.
Statement of the Commission cautioning brokers and dealers with respect to effecting transactions of ''spin offs'' and ''shell corporations''.	4982	July 2, 1969	34 FR 11581.
Commission's proposed guide for prospectuses relating to public offering of interests in oil and gas drilling programs to assist issuers in preparing registration statements and to help investors in understanding and analysis.	5001	Aug. 27, 1969	34 FR 14125.

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Proposed guide for prospective registrants re the use of misleading names adopted unchanged.	5005	Sept. 17, 1969	34 FR 15245.
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Commission's statement about publicity concerning the petroleum discoveries on the North Slope of Alaska.	5016	Oct. 20, 1969	34 FR 17433.
Commission's warning statement re sale and distribution of whisky warehouse receipts.	5018	Nov. 4, 1969	34 FR 18160.
The Commission's views re preparation of prospectuses relating to public offerings of interests in oil and gas programs are represented by Guide No. 55 set forth here and in Securities Act Release No. 4936 rather than the proposed guide in Securities Act Release No. 5001.	5036	Jan. 19, 1970	35 FR 1233.
Conclusion by the Commission that a registration statement will be considered defective under the 1933 Act when the certificate does not meet the requirements of 17 CFR 210.2–02 because the accountant qualifies his opinion due to doubt as to whether the company will continue as a going concern.	5049	Feb. 17, 1970	35 FR 4121.
Publication of the Commission's guidelines re applicability of Federal securities laws to offer and sale outside the U.S. of shares of registered open-end investment companies.	5068	June 23, 1970	35 FR 12103.
Statement of the Commission reminding reporting companies of obligation re Commission's rules to file reports on a timely basis.	5092	Oct. 15, 1970	35 FR 16733.
Publication by the Commission of a registration guide relating to the interest of legal counsel and experts in the registrant.	5094	Oct. 21, 1970	35 FR 16919.
Commission's Guide No. 58 requiring disclosure in prospectus of address and telephone number of the registrant's principal executive offices.	5102	Nov. 12, 1970	35 FR 17990.
Commission's statement re exemption of certain industrial revenue bonds from registration, etc. requirements in view of amendment of Securities Act of 1933 and of Securities Exchange Act of 1934 by ''section 401'' (PL 91–373).	5103	Nov. 6, 1970	35 FR 17990.
Commission's views relating to important questions re the accounting by registered investment companies for investment securities in their financial statements and in the periodic computations of net asset value for the purpose of pricing their shares.	5120	Dec. 23, 1970	35 FR 19986.
Commission's statement setting forth its policy on use of legends and stop-transfer instructions as evidence of nonpublic offering.	5121	Dec. 30, 1970	36 FR 1525.
Publication of the Commission's procedure to be followed if requests are to be met for no action or interpretative letters and responses thereto to be made available for public use.	5127	Jan. 25, 1971	36 FR 2600.
Interpretations of the Commission in regard to requirements for registration statements and reports concerning information requested re description of business, summary of operations, and financial statements.	5133	Feb. 18, 1971	36 FR 4483.
Third in a series of statements by the Commission on problems arising under PL 91–547 re registration and regulation of insurance company separate accounts used as funding vehicles for certain employee stock bonus, pension and profit sharing plans.	5137	Apr. 2, 1971	36 FR 7897.
Statement of the Commission warning the public about novel unsecured debt securities which appear to invite unwarranted comparisons with bank savings accounts, savings and loan association accounts, and bank time deposit certificates.	34–9143	Apr. 12, 1971	36 FR 8238.
Statement of the Commission prohibiting the reduction of fixed charges by amounts representing interest or investment income or gains on retirement of debt in registration statements or reports filed with the Commission.	5158	June 16, 1971	36 FR 11918.
Statement of the Commission calling attention to requirements in its forms and rules under the Securities Act of 1933 and the Securities and Exchange Act of 1934 for disclosure of legal proceedings and descriptions of registrant's business as these requirements relate to material matters involving the environment and civil rights.	5170	July 19, 1971	36 FR 13989.
Commission's authorization of publication of amended Registration Guide No. 8 which sets forth the policy of the Commission's Division of Corporation Finance with respect to pictorial or graphic representations in prospectives.	5171	July 20, 1971	36 FR 13915.
Commission's policy requiring the inclusion in financial statements of the ratio of earnings to fixed charges for the total enterprise in equivalent prominence with the ratio for the registrant or registrant and consolidated subsidiaries.	5176	Aug. 10, 1971	36 FR 15527.
Commission's guidelines for release of information by issuers whose securities are ''in registration''.	5180	Aug. 16, 1971	36 FR 16506.
Policy of Commission's Division of Corporation Finance to defer processing registration statements and amendments filed under the Securities Act of 1933 by issuers whose reports are delinquent until such reports are brought up to date.	5196	Sept. 27, 1971	36 FR 19362.
Publication by the Commission of a registration guide relating to ''insurance premium funding'' programs.	5209	Nov. 8, 1971	36 FR 22013.

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Commission's statement concerning applicability of securities laws to multilevel distributorships and other business opportunities offered through pyramid sales plans.	5211	Nov. 30, 1971	36 FR 23289.
Commission's statement concerning offering and sale of securities in nonpublic offerings and applicability of antifraud provisions of securities acts.	5226	Jan. 14, 1972	37 FR 600.
Commission's statement of procedures followed by the staff of its Division of Corporation Finance in examining registration statements; request to issuers to follow certain procedures to expedite registration.	5231	Mar. 2, 1972	37 FR 4327.
Commission endorses the establishment by all publicly held companies of audit committees composed of outside directors.	5237	Apr. 5, 1972	37 FR 6850.
Applicability of Commission's policy statement on the future structure of securities markets to selection of brokers and payment of commissions by institutional managers.	5250	May 18, 1972	37 FR 9988.
Commission's statement and policy on misleading pro rata stock distributions to shareholders.	5255	June 9, 1972	37 FR 11559.
Commission's guidelines prepared by the Division of Corporate Regulation for use in preparing and filing registration statements for open-end and closed-end management investment companies on Forms S–4 and S–5.	5259	June 29, 1972	37 FR 12790.
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Commission's procedures for processing post effective amendments filed by all registered investment companies.	5305	Sept. 29, 1972	37 FR 20317.
Interpretations of rules concerning underwriters by the Commission's Corporate Finance Division.	5306	Oct. 31, 1972	37 FR 23180.
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Commission reaffirms proper accounting treatment to be followed by a lessee when the lessor is created as a conduit for debt financing.	5333	Dec. 13, 1972	37 FR 26516.
Commission's statement to builders and sellers of condominiums of their obligations under the Securities Act.	5347	Jan. 18, 1973	38 FR 1735.
Amendment of previous interpretation (AS–130) of risk-sharing test in pooling-of-interest accounting.	5348	Jan. 18, 1973	38 FR 1734.
Commission's policy on the use of ''sales literature'' in Investment Company prospectuses.	5359	Mar. 19, 1973	38 FR 7220.
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Commission expresses concern with failure of issuers to timely and properly file periodic and current reports.	5492	July 10, 1973	38 FR 18366.
Commission's statement on exceptions for filing registration statements for variable life insurance contracts.	5413	Aug. 16, 1973	38 FR 22121.
Commission's conclusions as to certain problems relating to the effect of treasury stock transactions on accounting for business combinations.	5416	Sept. 10, 1973	38 FR 24635.
Commission requests comments on Accounting Series Release No. 146	5429	Oct. 17, 1973	38 FR 28819.
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Commission recommends certain techniques in drafting trust indentures to the attention of persons registering offerings of debt securities under the Securities Act of 1933.	6090	July 11, 1979	44 FR 43466.
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Section 232.302 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.

SOURCE: 58 FR 14670, Mar. 18, 1993, unless otherwise noted.

GENERAL

§ 232.10 Application of part 232.

(a) This part, in conjunction with the EDGAR Filer Manual and the electronic filing provisions of applicable rules, regulations and forms, shall govern the electronic submission of documents filed or otherwise submitted to the Commission and shall be controlling for an electronic format document in the manner and respects provided in this part.

(b) Each registrant, third party, or agent must file in paper format a Form ID (§§ 239.63, 249.446, 259.602, 269.7 and 274.402 of this chapter), the uniform application for access codes to file on EDGAR, before beginning to file electronically.

NOTE: The Commission strongly urges any person or entity about to become subject to the disclosure and filing requirements of the federal securities laws to submit a Form ID well in advance of the first required filing, including a registration statement relating to an initial public offering, in order to facilitate electronic filing on a timely basis.

[58 FR 14670, Mar. 18, 1993, as amended at 62 FR 36456, July 8, 1997; 64 FR 27894, May 21, 1999]

§ 232.11 Definition of terms used in part 232.

Unless otherwise specifically provided, the terms used in Regulation S–T (part 232 of this chapter) have the same meanings as in the federal securities laws and the rules, regulations and forms promulgated thereunder. In addition, the following definitions of terms apply specifically to electronic format documents and shall apply wherever they appear in laws, rules, regulations and forms governing such documents, unless the context otherwise specifies:

Animated graphics. The term *animated graphics* means text or images that do not remain static but that may move when viewed in a browser.

ASCII document. The term *ASCII document* means an electronic text document with contents limited to American Standard Code for Information Interchange (ASCII) characters and that is tagged with Standard Generalized Mark Up Language (SGML) tags in the format required for ASCII/SGML documents by the EDGAR Filer Manual.

Business development company. The term *business development company* has the meaning set forth in section 2(a)(48) of the Investment Company Act.

Direct transmission. The term *direct transmission* means the transmission of one or more electronic submissions via a telephonic communication session.

Disruptive code. The term *disruptive code* means any active content or other executable code, or any program or set of electronic computer instructions inserted into a computer, operating system, or program that replicates itself or that actually or potentially modifies or in any way alters, damages, destroys or disrupts the file content or the operation of any computer, computer file, computer database, computer system, computer network or software, and as otherwise set forth in the EDGAR Filer Manual.

EDGAR. The term *EDGAR* (Electronic Data Gathering, Analysis, and Retrieval) means the computer system for the receipt, acceptance, review and dissemination of documents submitted in electronic format.

EDGAR Filer Manual. The term *EDGAR Filer Manual* means the current version of the manual prepared by the Commission setting out the technical format requirements for an electronic submission.

NOTE: See Rule 301 of Regulation S–T (§ 232.301).

Electronic document. The term *electronic document* means the portion of an electronic submission separately tagged as an individual document in the format required by the EDGAR Filer Manual.

Electronic filer. The term *electronic filer* means a person or an entity that submits filings electronically pursuant to Rules 100 and 101 of Regulation S–T (§§ 232.100 and 232.101, respectively).

Electronic filing. The term *electronic filing* means one or more electronic documents filed under the federal securities laws that are transmitted or delivered to the Commission in electronic format.

Electronic format. The term *electronic format* means the computerized format

of a document prepared in accordance with the EDGAR Filer Manual.

Electronic submission. The term *electronic submission* means any document, such as a filing, correspondence, or modular submission, or any discrete set of documents, transmitted or delivered to the Commission in electronic format.

Exchange Act. The term *Exchange Act* means the Securities Exchange Act of 1934.

Executable code. The term *executable code* means instructions to a computer to carry out operations that use features beyond the viewer's, reader's, or Internet browser's native ability to interpret and display HTML, PDF, and static graphic files. Such code may be in binary (machine language) or in script form. Executable code includes disruptive code.

Header information. The term *header information* means information designated by the EDGAR Filer Manual to precede the text of each electronic submission and document submitted therewith via EDGAR that identifies characteristics of the submission and documents in order to facilitate electronic processing by the EDGAR system.

HTML document. The term *HTML document* means an electronic text document tagged with HyperText Markup Language tags in the format required by the EDGAR Filer Manual.

Hypertext links or hyperlinks. The term *hypertext links* or *hyperlinks* means the representation of an Internet address in a form that an Internet browser application can recognize as an Internet address.

Investment Company Act. The term *Investment Company Act* means the Investment Company Act of 1940.

Modular submission. The term *modular submission* means an electronic submission that contains one or more documents, or portions of a document, submitted for storage in the non-public EDGAR data storage area for purposes of subsequent inclusion in one or more electronic filings pursuant to Rule 501(a) of Regulation S–T (§ 232.501(a)).

Official filing. The term *official filing* means any filing that is received and accepted by the Commission, regardless of filing medium and exclusive of header information, tags and any other technical information required in an electronic filing.

Original. The term *original,* when used or implied in the securities laws, rules, regulations or forms, includes the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

Paper format. The term *paper format* means a paper document.

Public Utility Act. The term *Public Utility Act* means the Public Utility Holding Company Act of 1935.

Registrant. The term *registrant* means an issuer of securities for which a Securities Act registration statement is required to be filed and/or an issuer of securities with respect to which an Exchange Act registration statement or report is required to be filed and/or an investment company required to file an Investment Company Act registration statement or report.

Securities Act. The term *Securities Act* means the Securities Act of 1933.

Segmented Filing. The term *segmented filing* means an electronic format document assembled from segments previously submitted to the non-public EDGAR data storage for one-time inclusion in an electronic filing pursuant to Rule 501(b) of Regulation S–T (§ 232.501(b)).

Tag. The term *tag* means an identifier that highlights specific information to EDGAR that is in the format required by the EDGAR Filer Manual.

Third party filer. The term *third party filer* means any person or entity that files documents with the Commission with respect to another entity.

Trust Indenture Act. The term *Trust Indenture Act* means the Trust Indenture Act of 1939.

Unofficial PDF copy. The term *unofficial PDF copy* means an optional copy of an electronic document that may be included in an EDGAR submission tagged as a Portable Document Format document in the format required by

the EDGAR Filer Manual and submitted in accordance with Rule 104 of Regulation S-T (§ 232.104).

[58 FR 14670, Mar. 18, 1993, as amended at 62 FR 36456, July 8, 1997; 64 FR 27894, May 21, 1999; 65 FR 24800, Apr. 27, 2000]

§ 232.12 Business hours of the Commission.

(a) *General.* The principal office of the Commission, at 450 Fifth Street, NW., Washington, DC 20549, is open each day, except Saturdays, Sundays, and federal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, *provided that* hours for the filing of documents pursuant to the Acts or the rules and regulations thereunder are as set forth in paragraphs (b) and (c) of this section.

(b) *Submissions made in paper or on magnetic cartridge.* Filers may submit paper documents filed with or otherwise furnished to the Commission, as well as electronic filings and submissions on magnetic cartridge under cover of Form ET (§§ 239.62, 249.445, 259.601, 269.6 and 274.401 of this chapter), to the Commission each day, except Saturdays, Sundays and federal holidays, from 8 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect. Filers may file submissions on magnetic cartridge either at the address indicated in paragraph (a) of this section or at the Commission's Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413.

(c) *Submissions by direct transmission.* Electronic filings and other documents may be submitted by direct transmission, via dial-up modem or Internet, to the Commission each day, except Saturdays, Sundays and federal holidays, from 8 a.m. to 10 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect.

[58 FR 14670, Mar. 18, 1993; 58 FR 21349, Apr. 21, 1993, as amended at 59 FR 67761, Dec. 30, 1994; 65 FR 24800, Apr. 27, 2000; 65 FR 24800, Apr. 27, 2000]

§ 232.13 Date of filing; adjustment of filing date.

(a) *General.* (1) Except as provided in paragraph (b) of this section, the business day on which a filing is received by the Commission shall be the date of filing thereof, if:

(i) All requirements of the Acts and rules applicable to such filing have been complied with;

(ii) The filing conforms to the applicable technical standards regarding electronic format in the EDGAR Filer Manual; and

(iii) With respect to Securities Act filings, including filings under section 24(f) of the Investment Company Act (15 U.S.C. 80a–24(f)), the required fee payment has been confirmed, *provided that* the failure to pay an insignificant amount of the fee at the time of the filing, as a result of a *bona fide* error, shall not affect the date of filing.

(2) If the conditions of paragraph (a)(1) of this section are otherwise satisfied, all filings submitted by direct transmission commencing on or before 5:30 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, shall be deemed filed on the same business day, and all filings submitted by direct transmission commencing after 5:30 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, shall be deemed filed as of the next business day.

(3) Notwithstanding paragraph (a)(2) of this section, any registration statement or any post-effective amendment thereto filed pursuant to Rule 462(b) (§ 230.462(b) of this chapter) by direct transmission commending on or before 10 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect, shall be deemed filed on the same business day.

NOTE: Electronic filings that have an automatic or immediate effective date must be deemed filed, as provided in paragraph (a) of this section, before any waiting period for automatic effectiveness commences or before the filing becomes immediately effective, whichever applies.

(b) *Adjustment of the filing date.* If an electronic filer in good faith attempts to file a document with the Commission in a timely manner but the filing is delayed due to technical difficulties beyond the electronic filer's control, the electronic filer may request an adjustment of the filing date of such document. The Commission, or the staff

acting pursuant to delegated authority, may grant the request if it appears that such adjustment is appropriate and consistent with the public interest and the protection of investors.

(c) *Payment of fees.* Fees required with respect to a filing that is submitted electronically shall be paid in accordance with the procedures set forth in Instructions for Filing Fees—Rule 3a of the Commission's Informal and Other Procedures (§ 202.3a of this chapter).

NOTE: All filing fees paid by electronic filers must be submitted to the lockbox depository, as provided in Rule 3a, including those pertaining to documents filed in paper pursuant to a hardship exemption.

(d) Where the Commission's rules, schedules and forms provide that a document must be filed on the same day it is published, furnished, sent or given to security holders or others, an electronic filer may file the document with the Commission electronically before or on the date the document is published, furnished, sent or given, or if such publication or distribution does not occur during the official business hours of the Commission, as soon as practicable on the next business day. Any associated time periods shall be calculated on the basis of the publication or distribution date (as applicable), and not on the basis of the date of filing.

[58 FR 14670, Mar. 18, 1993, as amended at 59 FR 67761, Dec. 30, 1994; 60 FR 26618, May 17, 1995; 62 FR 47938, Sept. 12, 1997; 64 FR 61451, Nov. 10, 1999]

§ 232.14 Paper filings not accepted without exemption.

The Commission will not accept in paper format any filing required to be submitted electronically under Rules 100 and 101 of Regulation S–T (§§ 232.100 and 232.101 respectively), unless the filing satisfies the requirements for a temporary or continuing hardship exemption under Rule 201 or 202 of Regulation S–T (§§ 232.201 or 232.202 respectively).

[62 FR 58649, Oct. 30, 1997]

ELECTRONIC FILING REQUIREMENTS

§ 232.100 Persons and entities subject to mandated electronic filing.

The following persons or entities shall be subject to the electronic filing requirements of this part 232:

(a) Registrants whose filings are subject to review by the Division of Corporation Finance;

(b) Registrants whose filings are subject to review by the Division of Investment Management; and

(c) Any party (including natural persons) that files a document jointly with, or as a third party filer with respect to, a registrant that is subject to mandated electronic filing requirements.

[62 FR 36456, July 8, 1997, as amended at 67 FR 36699, May 24, 2002]

§ 232.101 Mandated electronic submissions and exceptions.

(a) *Mandated electronic submissions.* (1) The following filings, including any related correspondence and supplemental information, except as otherwise provided, shall be submitted in electronic format:

(i) Registration statements and prospectuses filed pursuant to the Securities Act (15 U.S.C. 77a, *et seq.*) or registration statements filed pursuant to Sections 12(b) or 12(g) of the Exchange Act (15 U.S.C. 78*l*(b) or (g));

(ii) Statements and applications filed with the Commission pursuant to the Trust Indenture Act (15 U.S.C. 77aaa *et seq.*), other than applications for exemptive relief filed pursuant to section 304 (15 U.S.C. 77ddd) and section 310 (15 U.S.C. 77jjj) of that Act;

(iii) Statements, reports and schedules filed with the Commission pursuant to section 13, 14, or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n, and 78*o*(d)), and proxy materials required to be furnished for the information of the Commission in connection with annual reports on Form 10–K (§ 249.310 of this chapter) or Form 10–KSB (§ 249.310b of this chapter) filed pursuant to section 15(d) of the Exchange Act;

NOTE 1. Electronic filers filing Schedules 13D and 13G with respect to foreign private issuers should include in the submission

header all zeroes (*i.e.*, 00–0000000) for the IRS tax identification number because the EDGAR system requires an IRS number tag to be inserted for the subject company as a prerequisite to acceptance of the filing.

NOTE 2. Foreign private issuers must file or submit their Form 6-K reports (§249.306 of this chapter) in electronic format, except as otherwise permitted by paragraphs (b)(1) and (b)(7) of this section.

(iv) Documents filed with the Commission pursuant to sections 8, 17, 20, 23(c), 24(e), 24(f), and 30 of the Investment Company Act (15 U.S.C. 80a–8, 80a–17, 80a–20, 80a–23(c), 80a–24(e), 80a–24(f) and 80a–29); *provided, however,* that submissions under section 6(c) or 17(g) of that Act (15 U.S.C. 80a–6(c) or 80a–17(g), or documents related to applications for exemptive relief under any section of that Act, shall not be made in electronic format;

(v) Documents filed with the Commission pursuant to the Public Utility Act (15 U.S.C. 79a *et seq.*);

(vi) Form CB (§§239.800 and 249.480 of this chapter) filed or submitted under §230.801 or 230.802 of this chapter or §240.13e–4(h)(8), 240.14d–1(c), or 240.14e–2(d) of this chapter if the party filing or submitting the Form CB is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d));

(vii) Form F–X (§239.42 of this chapter) except as otherwise provided by §232.101(b)(9); and

(viii) Form F–N (§239.43 of this chapter) filed by foreign banks and insurance companies and certain of their holding companies and finance subsidiaries under §230.489 of this chapter.

(2) The following amendments to filings, including any related correspondence and supplemental information except as otherwise provided, shall be submitted as follows:

(i) Any amendment to a filing by or relating to a registrant required to file electronically, including any amendment to a paper filing, shall be submitted in electronic format;

(ii) The first electronic amendment to a paper format Schedule 13D (§240.13d–101 of this chapter) or Schedule 13G (§240.13d–102 of this chapter), shall restate the entire text of the Schedule 13D or 13G, but previously filed paper exhibits to such Schedules are not required to be restated electronically. *See* Rule 102 (§232.102) regarding amendments to exhibits previously filed in paper format. Notwithstanding the foregoing, if the sole purpose of filing the first electronic Schedule 13D or 13G amendment is to report a change in beneficial ownership that would terminate the filer's obligation to report, the amendment need not include a restatement of the entire text of the Schedule being amended.

(3) Supplemental information shall be submitted in electronic format except as provided in paragraph (c)(2) of this section. The information shall be stored in the non-public EDGAR data storage area as correspondence. Supplemental information that is submitted in electronic format shall not be returned.

NOTE: Failure to submit a required electronic filing pursuant to this paragraph (a), as well as any required confirming electronic copy of a paper filing made in reliance on a hardship exemption, as provided in Rules 201 and 202 of Regulation S–T (§§232.201 and 232.202), will result in ineligibility to use Forms S–2, S–3, S–8, F–2 and F–3 (see §§239.12, 239.13, 239.16b, 239.32 and 239.33 of this chapter, respectively), restrict incorporation by reference of the document submitted in paper (see Rule 303 of Regulation S–T (§232.303)), or toll certain time periods associated with tender offers (see Rule 13e–4(f)(12) (§240.13e–4(f)(12) of this chapter) and Rule 14e–1(e) (§240.14e–1(e) of this chapter)).

(b) *Permitted electronic submissions.* The following documents may be submitted to the Commission in electronic format, at the option of the electronic filer:

(1) Annual reports to security holders furnished for the information of the Commission under §240.14a–3(c) of this chapter or §240.14c–3(b) of this chapter, under the requirements of Form 10–K or Form 10–KSB (§§249.310 or 249.310b of this chapter) filed by registrants under Exchange Act Section 15(d) (15 U.S.C. 78o(d)), or by foreign private issuers filed on Form 6–K (§249.306 of this chapter) under §240.13a–16 of this chapter or §240.15d–16 of this chapter;

(2) Notices of exempt solicitation furnished for the information of the Commission pursuant to Rule 14a–6(g) (§240.14a–6(g) of this chapter) and notices of exempt preliminary roll-up communications furnished for the information of the Commission pursuant

to Rule 14a–6(n) (§ 240.14a–6(n) of this chapter);

(3) Form 11–K (§ 249.311 of this chapter). Registrants who satisfy their Form 11–K filing obligations by filing amendments to Forms 10–K or 10–KSB, as provided by Rule 15d–21 (§ 240.15d–21 of this chapter), also may choose to file such amendments in paper or electronic format;

(4) Forms 3, 4 and 5 (§§ 249.103, 249.104 and 249.105 of this chapter);

(5) Form 144 (§ 239.144 of this chapter), where the issuer of the securities is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d), respectively);

(6) Periodic reports and reports with respect to distributions of primary obligations filed by:

(i) The International Bank for Reconstruction and Development under Section 15(a) of the Bretton Woods Agreements Act (22 U.S.C. 286k–1(a)) and Part 285 of this chapter;

(ii) The Inter-American Development Bank under Section 11(a) of the Inter-American Development Bank Act (22 U.S.C. 283h(a)) and Part 286 of this chapter;

(iii) The Asian Development Bank under Section 11(a) of the Asian Development Bank Act (22 U.S.C. 285h(a)) and Part 287 of this chapter;

(iv) The African Development Bank under Section 9(a) of the African Development Bank Act (22 U.S.C. 290i–9(a)) and Part 288 of this chapter;

(v) The International Finance Corporation under Section 13(a) of the International Finance Corporation Act (22 U.S.C. 282k(a)) and Part 289 of this chapter; and

(vi) The European Bank for Reconstruction and Development under Section 9(a) of the European Bank for Reconstruction and Development Act (22 U.S.C. 290*l*–7(a)) and Part 290 of this chapter;

(7) A report or other document submitted by a foreign private issuer under cover of Form 6–K (§ 249.306 of this chapter) that the issuer must furnish and make public under the laws of the jurisdiction in which the issuer is incorporated, domiciled or legally organized (the foreign private issuer's ''home country''), or under the rules of the home country exchange on which the issuer's securities are traded, as long as the report or other document is not a press release, is not required to be and has not been distributed to the issuer's security holders, and, if discussing a material event, has already been the subject of a Form 6–K or other Commission filing or submission on EDGAR;

(8) Form CB (§§ 239.800 and 249.480 of this chapter) if the party filing or submitting the Form CB is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d));

(9) Form F–X (§ 239.42 of this chapter) if:

(i) The party filing or submitting a Form CB (§§ 239.800 and 249.480 of this chapter) is not subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 78o(d)); or

(ii) Filed by a Canadian issuer when qualifying an offering statement pursuant to the provisions of Regulation A (§§ 230.251–230.263 of this chapter); and

(10) Form 25 (§ 249.25 of this chapter).

(c) *Documents to be submitted in paper only*. The following shall not be submitted in electronic format:

(1)(i) Confidential treatment requests and the information with respect to which confidential treatment is requested;

(ii) Preliminary proxy materials and information statements with respect to a matter specified in Item 14 of Schedule 14A (§ 240.14a–101 of this chapter) for which confidential treatment has been requested in the manner prescribed by Rule 14a–6(e)(2) (§ 240.14a–6(e)(2) of this chapter) or Rule 14c–5(d)(2) (§ 240.14c–5(d)(2) of this chapter);

(2) Supplemental information, if the submitter requests that the information be protected from public disclosure under the Freedom of Information Act (5 U.S.C. 552) pursuant to a request for confidential treatment under Rule 83 (§ 200.83 of this chapter) or if the submitter requests that the information be returned after staff review and the information is of the type typically returned by the staff pursuant to Rule 418(b) of Regulation C (§ 230.418(b) of this chapter) or Rule 12b–4 of Regulation 12B (§ 240.12b–4 of this chapter);

(3) Shareholder proposals and all related correspondence submitted pursuant to Rule 14a–8 of the Exchange Act (§ 240.14a–8 of this chapter);

(4) No-action and interpretive letter requests (§ 200.81 of this chapter and 15 U.S.C. 78*l*(h));

(5) Applications for exemptive relief filed pursuant to Sections 304 and 310 of the Trust Indenture Act;

(6) Filings relating to offerings exempt from registration under the Securities Act, including filings made pursuant to Regulation A (§§ 230.251–230.263 of this chapter), Regulation D (§§ 230.501–230.506 of this chapter) and Regulation E (§§ 230.601–230.610a of this chapter), as well as filings on Form 144 (§ 239.144 of this chapter) where the issuer of the securities is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d), respectively);

(7) Promotional and Sales Material submitted pursuant to Securities Act Industry Guide 5 (§ 229.801(e) of this chapter) or otherwise supplementally furnished for review by the staff of the Division of Corporation Finance; and sales literature submitted under Rule 24b–2 of the Investment Company Act (§ 270.24b–2 of this chapter);

(8) Documents and symbols in a foreign language (see Rule 306 of Regulation S–T (§ 232.306));

(9) Exchange Act filings submitted to the Division of Market Regulation, except for Form 25 (§ 249.25 of this chapter).

(10) Documents relating to investigations and litigation submitted pursuant to the Subpart D of Part 201 of this chapter;

(11) Submissions under Sections 6(c), 17(g), and 33 of the Investment Company Act (15 U.S.C. 80a–6(c), 80a–17(g), and 80a–32) and documents related to applications for exemptive relief under any section of the Act;

(12) Annual Reports to Security Holders furnished by Public Utility Holding Companies under Exhibit A to Form U5S (§ 259.5s of this chapter) or under rule 29 (§ 250.29 of this chapter);

(13) Reports to State Commissions, if furnished by Public Utility Holding Companies under Exhibit E to Form U5S (§ 259.5s of this chapter);

(14) Maps furnished by Public Utility Holding Companies under Exhibits E to Forms U5B and U–1 (§§ 259.5b and 259.101 of this chapter);

(15) Annual reports filed with the Commission by indenture trustees pursuant to Section 313 of the Trust Indenture Act (15 U.S.C. 77mmm); and

(16) Applications for an exemption from Exchange Act reporting obligations filed pursuant to Section 12(h) of the Exchange Act (15 U.S.C. 78*l*(h)).

[58 FR 14670, Mar. 18, 1993; 58 FR 26383, May 3, 1993, as amended at 59 FR 67761, Dec. 30, 1994; 60 FR 32824, June 23, 1995; 60 FR 57684, Nov. 17, 1995; 61 FR 67202, Dec. 20, 1996; 62 FR 36456, July 8, 1997; 62 FR 39763, July 24, 1997; 64 FR 2849, Jan. 19, 1999; 64 FR 19471, Apr. 21, 1999; 64 FR 27894, May 21, 1999; 67 FR 36699, May 24, 2002]

§ 232.102 Exhibits.

(a) Exhibits to an electronic filing that have not previously been filed with the Commission shall be filed in electronic format, absent a hardship exemption. Previously filed exhibits, whether in paper or electronic format, may be incorporated by reference into an electronic filing to the extent permitted by § 228.10(f) and § 229.10(d) of this chapter, Rule 411 under the Securities Act (§ 230.411 of this chapter), Rule 12b–23 or 12b–32 under the Exchange Act (§ 240.12b–23 or § 240.12b–32 of this chapter), Rule 22 under the Public Utility Holding Company Act (§ 250.22 of this chapter), Rules 0–4, 8b–23, and 8b–32 under the Investment Company Act (§ 270.0–4, § 270.8b–23 and § 270.8b–32 of this chapter) and Rule 303 of Regulation S–T (§ 232.303). An electronic filer may, at its option, restate in electronic format an exhibit incorporated by reference that originally was filed in paper format.

NOTE TO PARAGRAPH A: Exhibits to a Commission schedule filed pursuant to Section 13 or 14(d) of the Exchange Act may be filed in paper under cover of Form SE where such exhibits previously were filed in paper (prior to a registrant's becoming subject to mandated electronic filing or pursuant to a hardship exemption) and are required to be refiled pursuant to the schedule's general instructions. *See* Rule 311(b) of Regulation S–T (17 CFR 232.311(b)).

(b) Amendments to all exhibits shall be filed in electronic format, absent a hardship exemption.

(c) Notwithstanding any other provision of this section, an electronic filer shall, upon amendment, restate in electronic format its articles of incorporation, by-laws or investment advisory agreement (in the case of a registered investment company or a business development company).

(d) Each electronic filing requiring exhibits shall contain an exhibit index, which should immediately precede the exhibits filed with the document. The index shall list each exhibit filed. Whenever an exhibit is filed in paper pursuant to a temporary or continuing hardship exemption, the letter ''P'' shall be placed next to the listed exhibit in the exhibit index to reflect that the exhibit was filed in paper pursuant to such exemption. Whenever an electronic confirming copy of an exhibit is filed pursuant to a hardship exemption (§ 232.201 or § 232.202(d)), the exhibit index should specify where the confirming electronic copy can be located; in addition, the designation ''CE'' (confirming electronic) should be placed next to the listed exhibit in the exhibit index.

(e) Notwithstanding the provisions of paragraphs (a) through (d) of this section, any incorporation by reference by a registered investment company or a business development company must relate only to documents that have been filed in electronic format, unless the document has been filed in paper under a hardship exemption (§ 232.201 or 232.202) and any required confirming copy has been submitted.

(f) Persons submitting filings electronically under the Public Utility Act shall not be subject to paragraph (c) of this section.

[58 FR 14670, Mar. 18, 1993, as amended at 59 FR 67762, Dec. 30, 1994; 60 FR 32824, June 23, 1995; 62 FR 36457, July 8, 1997; 64 FR 27894, May 21, 1999]

§ 232.103 Liability for transmission errors or omissions in documents filed via EDGAR.

An electronic filer shall not be subject to the liability and anti-fraud provisions of the federal securities laws with respect to an error or omission in an electronic filing resulting solely from electronic transmission errors beyond the control of the filer, where the filer corrects the error or omission by the filing of an amendment in electronic format as soon as reasonably practicable after the electronic filer becomes aware of the error or omission.

[65 FR 24800, Apr. 27, 2000]

§ 232.104 Unofficial PDF copies included in an electronic submission.

(a) An electronic submission may include one unofficial PDF copy of each electronic document contained within that submission, tagged in the format required by the EDGAR Filer Manual.

(b) Except as provided in paragraphs (c) and (f) of this section, each unofficial PDF copy must be substantively equivalent to its associated electronic document contained in the electronic submission. An unofficial PDF copy may contain graphic and image material (but not animated graphics, or audio or video material), notwithstanding the fact that its HTML or ASCII document counterpart may not contain such material but instead may contain a fair and accurate narrative description or tabular representation of any omitted graphic or image material.

(c) If a filer omits an unofficial PDF copy from, or submits one or more flawed unofficial PDF copies in, the electronic submission of an official filing, the filer may add or resubmit an unofficial PDF copy by electronically submitting an amendment to the filing to which it relates. The amendment must include an explanatory note that the purpose of the amendment is to add or to correct an unofficial PDF copy.

(1) If such an amendment is filed, the official amendment may consist solely of the cover page (or first page of the document), the explanatory note, and the signature page and exhibit index (where appropriate). The corresponding unofficial copy must include the complete text of the official filing document for which the amendment is being submitted.

(2) If the amendment is being filed to add or resubmit an unofficial PDF copy of one or more exhibits, the submission may consist of the following: the official filing—consisting of the cover page (or first page of the document), the explanatory note, the signature page

(where appropriate), the exhibit index, and a separate electronic exhibit document for each exhibit for which an unofficial PDF copy is being submitted—and the corresponding unofficial PDF copy of each exhibit document. However, the text of the official exhibit document need not repeat the text of the exhibit; that document may contain only the following legend:

RESUBMITTED TO ADD/REPLACE UNOFFICIAL PDF COPY OF EXHIBIT.

(d) An unofficial PDF copy is not filed for purposes of section 11 of the Securities Act (15 U.S.C. 77k), section 18 of the Exchange Act (15 U.S.C. 78r), section 16 of the Public Utility Act (15 U.S.C. 79p), section 323 of the Trust Indenture Act (15 U.S.C. 77www), or section 34(b) of the Investment Company Act (15 U.S.C. 80a-33(b)), or otherwise subject to the liabilities of such sections, and is not part of any registration statement to which it relates. An unofficial PDF copy is, however, subject to all other civil liability and antifraud provisions of the above Acts or other laws.

(e) Unofficial PDF copies that are prospectuses are subject to liability under Section 12 of the Securities Act (15 U.S.C. 77*l*).

(f) An unofficial PDF copy of a correspondence document contained in an electronic submission need not be substantively equivalent to that correspondence document.

[64 FR 27895, May 21, 1999, as amended at 65 FR 24800, Apr. 27, 2000]

§ 232.105 Limitation on use of HTML documents and hypertext links.

(a) Electronic filers must submit the following documents in ASCII: Form N–SAR (§ 274.101 of this chapter) and Form 13F (§ 249.325 of this chapter). Notwithstanding the provisions of this section, electronic filers may submit exhibits to Form N–SAR in HTML.

(b) Electronic filers may not include in any HTML document hypertext links to sites, locations, or documents outside the HTML document, except to links to officially filed documents within the current submission and to documents previously filed electronically and located in the EDGAR database on the Commission's public web site (www.sec.gov). Electronic filers also may include within an HTML document hypertext links to different sections within that single HTML document.

(c) If a filer includes an external hypertext link within a filed document, the information contained in the linked material will not be considered part of the document for determining compliance with reporting obligations, but the inclusion of the link will cause the filer to be subject to the civil liability and antifraud provisions of the federal securities laws with reference to the information contained in the linked material.

[65 FR 24800, Apr. 27, 2000]

§ 232.106 Prohibition against electronic submissions containing executable code.

(a) Electronic submissions must not contain executable code. Attempted submissions identified as containing executable code will be suspended, unless the executable code is contained only in one or more PDF documents, in which case the submission will be accepted but the PDF document(s) containing executable code will be deleted and not disseminated.

(b) If an electronic submission has been accepted, and the Commission staff later determines that the accepted submission contains executable code, the staff may delete from the EDGAR system the entire accepted electronic submission or any document contained in the accepted electronic submission. The Commission staff may direct the electronic filer to resubmit electronically replacement document(s) or a replacement submission in its entirety, in compliance with this provision and the EDGAR Filer Manual.

NOTE TO § 232.106: A violation of this section or the relevant EDGAR Filer Manual section also may be a violation of the Computer Fraud and Abuse Act of 1986, as amended, and other statutes and laws.

[64 FR 27895, May 21, 1999]

HARDSHIP EXEMPTIONS

§ 232.201 Temporary hardship exemption.

(a) If an electronic filer experiences unanticipated technical difficulties preventing the timely preparation and submission of an electronic filing, the electronic filer may file the subject filing, under cover of Form TH (§§ 239.65, 249.447, 259.604, 269.10 and 274.404 of this chapter), in paper format no later than one business day after the date on which the filing was to be made.

(1) A microfiche copy of the paper format document shall be the official filing of the registrant for purposes of the federal securities laws.

(2) The following legend shall be set forth in capital letters on the cover page of the paper format document:

IN ACCORDANCE WITH RULE 201 OF REGULATION S–T, THIS (*specify document*) IS BEING FILED IN PAPER PURSUANT TO A TEMPORARY HARDSHIP EXEMPTION

(3) Signatures to the paper format document may be in typed form rather than manual format. See Rule 302 of Regulation S–T (§ 232.302). All other requirements relating to paper format filings shall be satisfied.

(4) If the exemption pertains to a document filed pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)) or section 30 of the Investment Company Act and the paper format document is filed in the manner specified in paragraph (a) of this section, the filing shall be deemed to have been filed by its required due date.

NOTE: 1. Where a temporary hardship exemption relates to an exhibit only, the paper format exhibit shall be filed under cover of Form SE (§§ 239.64, 249.444, 259.603, 269.8, and 274.403 of this chapter).

2. Filers unable to submit a report within a prescribed time period because of electronic difficulties shall comply with the provisions of this section and shall not use Form 12b–25 (§ 249.322 of this chapter) as a notification of late filing.

(b) An electronic format copy of the filed paper format document shall be submitted to the Commission within six business days of filing the paper format document. The electronic format version shall contain the following statement in capital letters at the top of the first page of the document:

THIS DOCUMENT IS A COPY OF THE (*specify document*) FILED ON (*date*) PURSUANT TO A RULE 201 TEMPORARY HARDSHIP EXEMPTION

NOTE 1: Failure to submit the confirming electronic copy of a paper filing made in reliance on the temporary hardship exemption, as required in paragraph (b) of this section, will result in ineligibility to use Forms S–2, S–3, S–8, F–2 and F–3 (*see* §§ 239.12, 239.13, 239.16b, 239.32 and 239.33 of this section, respectively), restrict incorporation by reference of the document submitted in paper (*see* Rule 303 of Regulation S–T (§ 232.303)), and toll certain time periods associated with tender offers (*see* Rule 13e–4(f)(12) (§ 240.13e–4(f)(12) of this chapter) and Rule 14e–1(e) (§ 240.14e–1(e) of this chapter).

NOTE 2: If the exemption relates to an exhibit only, the requirement to submit a confirming electronic copy shall be satisfied by refiling the exhibit in electronic format in an amendment to the filing to which it relates. The confirming copy tag should not be used. The amendment should note that the purpose of the amendment is to add an electronic copy of an exhibit previously filed in paper pursuant to a temporary hardship exemption.

[58 FR 14670, Mar. 18, 1993, as amended at 62 FR 36457, July 8, 1997]

§ 232.202 Continuing hardship exemption.

(a) An electronic filer may apply in writing for a continuing hardship exemption if all or part of a filing or group of filings otherwise to be filed in electronic format cannot be so filed without undue burden or expense. Such written application shall be made at least ten business days prior to the required due date of the filing(s) or the proposed filing date, as appropriate, or within such shorter period as may be permitted. The written application shall contain the information set forth in paragraph (b) of this section.

(1) The application shall not be deemed granted until the applicant is notified by the Commission or the staff.

(2) If the Commission, or the staff acting pursuant to delegated authority, denies the application for a continuing hardship exemption, the electronic filer shall file the required document in electronic format on the required due date or the proposed filing date or such other date as may be permitted.

(3) If the Commission, or the staff acting pursuant to delegated authority, determines that the grant of the exemption is appropriate and consistent with the public interest and the protection of investors and so notifies the applicant, the electronic filer shall follow the procedures set forth in paragraph (c) of this section.

(b) The request for the continuing hardship exemption shall include, but not be limited to, the following:

(1) The reason(s) that the necessary hardware and software is not available without unreasonable burden and expense;

(2) The burden and expense involved to employ alternative means to make the electronic submission; and/or

(3) The reasons for not submitting electronically the document or group of documents, as well as justification for the requested time period.

(c) If the request is granted, the electronic filer shall submit the document or group of documents for which the continuing hardship exemption is granted in paper format on the required due date specified in the applicable form, rule or regulation, or the proposed filing date, as appropriate. The following legend shall be placed in capital letters at the top of the cover page of the paper format document(s):

IN ACCORDANCE WITH RULE 202 OF REGULATION S–T, THIS (*specify document*) IS BEING FILED IN PAPER PURSUANT TO A CONTINUING HARDSHIP EXEMPTION

(d) If a continuing hardship exemption is granted for a limited time period, the grant may be conditioned upon the filing of the document or group of documents that is the subject of the exemption in electronic format upon the expiration of the period for which the exemption is granted. The electronic format version shall contain the following statement in capital letters at the top of the first page of the document:

THIS DOCUMENT IS A COPY OF THE (*specify document*) FILED ON (DATE) PURSUANT TO A RULE 202(d) CONTINUING HARDSHIP EXEMPTION.

NOTE 1: Where a continuing hardship exemption is granted with respect to an exhibit only, the paper format exhibit shall be filed under cover of Form SE (§§ 239.64, 249.444, 259.603, 269.8 and 274.403 of this chapter).

NOTE 2: If the exemption relates to an exhibit only and a confirming electronic copy of the exhibit is required to be submitted, the exhibit should be refiled in electronic format in an amendment to the filing to which it relates. The confirming copy tag should not be used. The amendment should note that the purpose of the amendment is to add an electronic copy of an exhibit previously filed in paper pursuant to a continuing hardship exemption.

NOTE 3: Failure to submit a required confirming electronic copy of a paper filing made in reliance on a continuing hardship exemption granted pursuant to paragraph (d) of this section will result in ineligibility to use Forms S–2, S–3, S–8, F–2 and F–3 (*see*, §§ 239.12, 239.13, 239.16b, 239.32 and 239.33, respectively), restrict incorporation by reference of the document submitted in paper (*see* Rule 303 of Regulation S–T (§ 232.303), and toll certain time periods associated with tender offers (*see* Rule 13e–4(f)(12) (§ 240.13e–4(f)(12)) and Rule 14e–1(e) (§ 240.14e–1(e))).

[58 FR 14670, Mar. 18, 1993, as amended at 62 FR 36457, July 8, 1997]

PREPARATION OF ELECTRONIC SUBMISSIONS

§ 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for filers using modernized EDGARLink are set forth in EDGAR Filer Manual (Release 8.0), Volume I—Modernized EDGARLink, dated September 2001. Additional provisions applicable to Form N–SAR filers are set forth in EDGAR Filer Manual (Release 7.0), Volume II—N–SAR Supplement, dated July 2001. All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 450 5th Street, NW, Washington, DC 20549–0102 or by calling Thomson Financial

Corp at (800) 638–8241. Electronic format copies are available on the Commission's Web Site. The address for the Filer Manual is <http://www.sec.gov/info/edgar/filerman.htm>. You can also photocopy the document at the Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC.

[66 FR 49830, Oct. 1, 2001]

§ 232.302 Signatures.

(a) Required signatures to, or within, any electronic submission (including, without limitation, signatories within the certifications required by §§ 240.13a–14, 240.15d–14 and 270.30a–2 of this chapter) must be in typed form rather than manual format. Signatures in an HTML document that are not required may, but are not required to, be presented in an HTML graphic or image file within the electronic filing, in compliance with the formatting requirements of the EDGAR Filer Manual. When used in connection with an electronic filing, the term ''signature'' means an electronic entry in the form of a magnetic impulse or other form of computer data compilation of any letters or series of letters or characters comprising a name, executed, adopted or authorized as a signature. Signatures are not required in unofficial PDF copies submitted in accordance with § 232.104.

(b) Each signatory to an electronic filing (including, without limitation, each signatory to the certifications required by §§ 240.13a-14, 240.15d–14 and 270.30a–2 of this chapter) shall manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing. Such document shall be executed before or at the time the electronic filing is made and shall be retained by the filer for a period of five years. Upon request, an electronic filer shall furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

(c) Where the Commission's rules require a registrant to furnish to a national securities exchange or national securities association paper copies of a document filed with the Commission in electronic format, signatures to such paper copies may be in typed form.

[58 FR 14670, Mar. 18, 1993, as amended at 59 FR 67762, Dec. 30, 1994; 64 FR 27895, May 21, 1999; 65 FR 24800, Apr. 27, 2000; 67 FR 57287, Sept. 9, 2002]

§ 232.303 Incorporation by reference.

(a) The following documents shall not be incorporated by reference into an electronic filing:

(1) Any document filed in paper in violation of mandated electronic filing requirements;

(2) Any document filed in paper pursuant to a hardship exemption for which a required confirming electronic copy has not been submitted.

(3) For a registered investment company or a business development company, documents that have not been filed in electronic format, unless the document has been filed in paper under a hardship exemption (§ 232.201 or 232.202 of this chapter) and any required confirming copy has been submitted.

(b) If a filer incorporates by reference into an electronic filing any portion of an annual or quarterly report to security holders, it must also file the portion of the annual or quarterly report to security holders in electronic format as an exhibit to the filing, as required by Regulation S–K Item 601(b)(13) (§ 229.601(b)(13) of this chapter) and Regulation S–B Item 601(b)(13) (§ 228.601(b)(13) of this chapter). If a foreign private issuer incorporates by reference into an electronic filing any portion of an annual or other report to security holders, or of a Form 6–K report (§ 249.306 of this chapter) filed or submitted in paper, it also must file the incorporated portion in electronic format as an exhibit to the filing. The requirements of this paragraph do not apply to incorporation by reference by an investment company from an annual or quarterly report to security holders.

[58 FR 14670, Mar. 18, 1993, as amended at 59 FR 67762, Dec. 30, 1994; 62 FR 36457, July 8, 1997; 64 FR 27895, May 21, 1999; 65 FR 24800, Apr. 27, 2000; 67 FR 36700, May 24, 2002]

§232.304 Graphic, image, audio and video material.

(a) If a filer includes graphic, image, audio or video material in a document delivered to investors and others that is not reproduced in an electronic filing, the electronically filed version of that document must include a fair and accurate narrative description, tabular representation or transcript of the omitted material. Such descriptions, representations or transcripts may be included in the text of the electronic filing at the point where the graphic, image, audio or video material is presented in the delivered version, or they may be listed in an appendix to the electronic filing. Immaterial differences between the delivered and electronically filed versions, such as pagination, color, type size or style, or corporate logo need not be described.

NOTE TO PARAGRAPH (A): If the omitted graphic, image, audio or video material includes data, filers must include a tabular representation or other appropriate representation of that data in the electronically filed version of the document.

(b)(1) The graphic, image, audio and video material in the version of a document delivered to investors and others is deemed part of the electronic filing and subject to the civil liability and anti-fraud provisions of the federal securities laws.

(2) Narrative descriptions, tabular representations or transcripts of graphic, image, audio and video material included in an electronic filing or appendix thereto also are deemed part of the filing. However, to the extent such descriptions, representations or transcripts represent a good faith effort to fairly and accurately describe omitted graphic, image, audio or video material, they are not subject to the civil liability and anti-fraud provisions of the federal securities laws.

(c) An electronic filer must retain for a period of five years a copy of each publicly distributed document, in the format used, that contains graphic, image, audio or video material where such material is not included in the version filed with the Commission. The five-year period shall commence as of the filing date, or the date that appears on the document, whichever is later. Upon request, an electronic filer shall furnish to the Commission or its staff a copy of any or all of the documents contained in the file.

(d) For electronically filed ASCII documents, the performance graph that is to appear in registrant proxy and information statements relating to annual meetings of security holders (or special meetings or written consents in lieu of such meetings) at which directors will be elected, as required by Item 402(*l*) of Regulation S–K (§229.402(*l*) of this chapter), and the line graph that is to appear in registrant annual reports to security holders or prospectuses, as required by paragraph (b) of Item 5 of Form N–1A (§274.11A of this chapter), must be furnished to the Commission by presenting the data in tabular or chart form within the electronic ASCII document, in compliance with paragraph (a) of this section and the formatting requirements of the EDGAR Filer Manual.

(e) Notwithstanding the provisions of paragraphs (a) through (d) of this section, electronically filed HTML documents must present the following information in an HTML graphic or image file within the electronic submission in compliance with the formatting requirements of the EDGAR Filer Manual: the performance graph that is to appear in registrant proxy and information statements relating to annual meetings of security holders (or special meetings or written consents in lieu of such meetings) at which directors will be elected, as required by Item 402(*l*) of Regulation S–K (§229.402(*l*) of this chapter); the line graph that is to appear in registrant annual reports to security holders or prospectuses, as required by paragraph (b) of Item 5 of Form N–1A (§274.11A of this chapter); and any other graphic material required by rule or form to be filed with the Commission. Filers may, but are not required to, submit any other graphic material in an HTML document by presenting the data in an HTML graphic or image file within the electronic filing, in compliance with the formatting requirements of the EDGAR Filer Manual. However, filers may not present in a graphic or image file information such as text or tables that users must be able to search and/or download into spreadsheet form

(*e.g.*, financial statements); filers must present such material as text in an ASCII document or as text or an HTML table in an HTML document.

(f) Electronic filers may not include animated graphics in any EDGAR document.

[58 FR 14670, Mar. 18, 1993, as amended at 59 FR 67762, Dec. 30, 1994; 61 FR 24655, May 15, 1996; 62 FR 36458, July 8, 1997; 63 FR 13944, Mar. 23, 1998; 64 FR 27895, May 21, 1999; 65 FR 24800, Apr. 27, 2000]

§ 232.305 Number of characters per line; tabular and columnar information.

(a) The narrative portion of a document shall not exceed 80 characters per line, including blank spaces, and shall not be presented in multi-column newspaper format. Non-narrative information (*e.g.*, financial statements) may be presented in tabular or columnar format and may exceed 80 positions only if it is tagged as specified in the EDGAR Filer Manual. In no event shall information presented in tabular or columnar format exceed 132 positions wide.

(b) Paragraph (a) of this section does not apply to HTML documents.

[58 FR 14670, Mar. 18, 1993, as amended at 64 FR 27896, May 21, 1999]

§ 232.306 Foreign language documents and symbols.

(a) All electronic filings and submissions must be in the English language, except as otherwise provided by paragraph (d) of this section. If a filing or submission requires the inclusion of a document that is in a foreign language, a party must submit instead a fair and accurate English translation of the foreign language document in accordance with § 230.403(c) or § 240.12b–12(d) of this chapter, except as otherwise provided by paragraph (c) of this section. Alternatively, if the foreign language document is an exhibit or attachment to a filing or submission subject to review by the Division of Corporation Finance, a party may provide a fair and accurate English summary of the foreign language document if permitted by § 230.403(c)(3) or § 240.12b–12(d)(3) of this chapter.

(b) When including an English summary or English translation of a foreign language document in an electronic filing or submission, a party may also submit a copy of the unabridged foreign language document in paper under cover of Form SE (§§ 239.64, 249.444, 259.603, 269.8, and 274.403 of this chapter) in accordance with § 232.311 of this chapter. A filer must provide a copy of any foreign language document upon the request of Commission staff.

(c) A foreign government or its political subdivision must electronically file a fair and accurate English translation, if available, of its latest annual budget as presented to its legislative body, as Exhibit B to Form 18 (§ 249.218 of this chapter) or Exhibit (c) to Form 18–K (§ 249.318 of this chapter). If no English translation is available, a foreign government or political subdivision must submit a copy of the foreign language version of its latest annual budget in paper under cover of Form SE (§§ 239.64, 249.444, 259.603, 269.8, and 274.403 of this chapter).

(d) A Canadian issuer may file an HTML document, as defined in § 232.11 of this chapter, that contains text in both French and English if the issuer included the French text to comply with the requirements of the Canadian securities administrator or other Canadian authority, and the French text is in an exhibit to or part of:

(1) A registration statement on Form F–7, F–8, F–9, F–10, or F–80 (§§ 239.37, 239.38, 239.39, 239.40, and 239.41 of this chapter);

(2) A registration statement or annual report on Form 40–F (§ 249.240f of this chapter); or

(3) A Schedule 13E–4F (§ 240.13e–102 of this chapter), Schedule 14D–1F (§ 240.14d–102), or Schedule 14D–9F (§ 240.14d–103).

(e) Foreign currency denominations must be expressed in words or letters in the English language rather than representative symbols, except that HTML documents may include any representative foreign currency symbols that the EDGAR Filer Manual specifies. The limitations of this paragraph do not apply to unofficial PDF copies

submitted in accordance with Rule 104 of Regulation S–T (§232.104).

[58 FR 14670, Mar. 18, 1993; 58 FR 21349, Apr. 21, 1993, as amended at 59 FR 67762, Dec. 30, 1994; 64 FR 27896, May 21, 1999; 67 FR 36700, May 24, 2002]

§232.307 Bold face type.

(a) Provisions requiring presentation of information in bold face type shall be satisfied in an electronic format document by presenting such information in capital letters.

(b) Paragraph (a) of this section does not apply to HTML documents.

[62 FR 36458, July 8, 1997, as amended at 64 FR 27896, May 21, 1999]

§232.308 Type size and font; legibility.

Provisions relating to type size, font and other legibility requirements shall not apply to electronic format documents.

§232.309 Paper size; binding; sequential numbering; number of copies.

(a) Requirements as to paper size, binding, and sequential page numbering shall not apply to electronic format documents.

(b) An electronic format document, submitted in the manner prescribed by the EDGAR Filer Manual, shall satisfy any requirement that more than one copy of such document be filed with or provided to the Commission.

§232.310 Marking changed material.

Provisions requiring the marking of changed materials are satisfied in ASCII and HTML documents by inserting the tag <R> before and the tag </R> following a paragraph containing changed material. HTML documents may be marked to show changed materials within paragraphs. Financial statements and notes thereto need not be marked for changed material.

[64 FR 27896, May 21, 1999]

§232.311 Documents submitted in paper under cover of Form SE.

Form SE (§§239.64, 249.444, 259.603, 269.8, and 274.403 of this chapter) shall be filed as a paper cover sheet to the following documents submitted to the Commission in paper:

(a) Exhibits filed in paper pursuant to a hardship exemption shall be filed under cover of Form SE. See Rules 201 and 202 of Regulation S–T (§§232.201 and 232.202).

(b) Exhibits to a Commission schedule filed pursuant to Section 13 or 14(d) of the Exchange Act may be filed in paper under cover of Form SE where such exhibits previously were filed in paper (prior to a registrant's becoming subject to mandated electronic filing or pursuant to a hardship exemption) and are required to be refiled pursuant to the schedule's general instructions.

(c) Annual Reports to Security Holders furnished by Public Utility Holding Companies as Exhibit A to Form U5S (§259.5s of this chapter) or under rule 29 (§250.29 of this chapter) shall be filed in paper under cover of Form SE.

(d) Reports to State Commissions, if furnished by Public Utility Holding Companies as Exhibit E to Form U5S (§259.5s of this chapter), shall be filed in paper under cover of Form SE.

(e) Maps furnished by Public Utility Holding Companies under Exhibits E to Forms U5B and U–1(§259.5b and 259.101 of this chapter) shall be filed in paper under cover of Form SE.

(f) A party may submit a copy of an unabridged foreign language document in paper under cover of Form SE if the electronic filing or submission includes an English summary or English translation of the foreign language document in accordance with §232.306(b) or if permitted by the applicable form.

(g) A foreign government or political subdivision that is not filing in electronic format an English translation of its latest annual budget submitted as Exhibit B to Form 18 (§249.218 of this chapter) or Exhibit (c) to Form 18–K (§249.318 of this chapter) must file a copy of the foreign language version of its latest annual budget in paper under cover of Form SE in accordance with §232.306(c) of this chapter.

(h) The Form SE shall be submitted in the following manner:

(1) If the subject of a temporary hardship exemption is an exhibit only, the exhibit shall be filed under cover of Form SE no later than one business day after the date the exhibit was to be filed electronically.

(2) An exhibit filed pursuant to a continuing hardship exemption, or any other document filed in paper under cover of Form SE (other than an exhibit filed pursuant to a temporary hardship exemption), as allowed by paragraphs (a) through (g) of this section, may be filed up to six business days prior to, or on the date of filing of, the electronic format document to which it relates but shall not be filed after such filing date. If a paper document is submitted in this manner, requirements that the document be filed with, provided with or accompany the electronic filing shall be satisfied.

(i) Any requirements as to delivery or furnishing the information to persons other than the Commission shall not be affected by this section.

(j) Computational materials filed as an exhibit to Form 8–K (§ 249.308) by issuers of an ''asset-backed security,'' as that term is defined in General Instruction I.B.5 of Form S–3 (§ 239.13 of this chapter).

[58 FR 14670, Mar. 18, 1993, as amended at 59 FR 67763, Dec. 30, 1994; 61 FR 30402, June 14, 1996; 62 FR 36458, July 8, 1997; 65 FR 24801, Apr. 27, 2000; 67 FR 36700, May 24, 2002]

§§ 232.401–232.402 [Reserved]

EDGAR FUNCTIONS

§ 232.501 Modular submissions and segmented filings.

An electronic filer may use the following procedures to submit information to the EDGAR system for subsequent inclusion in an electronic filing:

(a) *Modular submissions.* (1) One or more electronic format documents may be submitted for storage in the non-public EDGAR data storage area as a modular submission for subsequent inclusion in one or more electronic submissions.

(2) An electronic filer shall be permitted a maximum of ten modular submissions in the non-public EDGAR data storage area at any time, not to exceed a total of one megabyte of digital information. If an electronic filer attempts to submit a modular filing which would cause either of these limits to be exceeded, EDGAR will suspend the modular submission and notify the electronic filer by electronic mail. After six business days, the modular submission held in suspense will be deleted from the system.

(3) A modular submission may be corrected or amended only by resubmitting the entire modular submission.

(b) *Segmented filings.* (1) Segments of a document intended to become an electronic filing may be submitted to the non-public EDGAR data storage area for assembly as a segmented filing.

(2) Segments shall be submitted no more than six business days in advance of the anticipated filing date and are not limited in number or size. They may be submitted from several geographic locations by more than one filing entity. Segments may be included in only one electronic filing. Once used, segments will be removed from the non-public EDGAR data storage area. The assembly of segments into a segmented filing shall be effected pursuant to the applicable provisions of the EDGAR Filer Manual. If segments are not prepared in accordance with the EDGAR Filer Manual, the filing will not be constructed. The filing date of a segmented filing shall be the date upon which the filing is assembled and satisfies the requirements of Rule 13(a) of Regulation S–T (§ 232.13(a)).

(3) Segments may be corrected or amended only by resubmitting the entire segment.

(c) A modular submission or segment shall not:

(1) be publicly available;

(2) Be deemed filed with the Commission for purposes of Securities Act section 11 (15 U.S.C. 77k), Exchange Act section 18 (15 U.S.C. 78r), Public Utility Act section 16 (15 U.S.C. 79p), Trust Indenture Act section 323 (15 U.S.C. 77www), or Investment Company Act section 34(b) (15 U.S.C. 80a–33(b)) prior to its inclusion in a filing; or

(3) Be deemed to constitute an official filing prior to its inclusion in a filing under the federal securities laws. Once a modular submission or segment has been included in an electronic filing, the liability and anti-fraud provisions of the Securities Act, the Exchange Act, the Trust Indenture Act,

the Public Utility Act and the Investment Company Act shall apply to the electronic filing.

[58 FR 14670, Mar. 18, 1993; 58 FR 21349, Apr. 21, 1993, as amended at 65 FR 24801, Apr. 27, 2000]

FOREIGN PRIVATE ISSUERS AND FOREIGN GOVERNMENTS

§§ 232.600–232.903 [Reserved]

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

Sec.

239.0–1 Availability of forms.

Subpart A—Forms for Registration Statements

239.4–239.8 [Reserved]
239.9 Form SB–1, optional form for the registration of securities to be sold to the public by certain small business issuers.
239.10 Form SB–2, optional form for the registration of securities to be sold to the public by small business issuers.
239.11 Form S–1, registration statement under the Securities Act of 1933.
239.12 Form S–2, for registration under the Securities Act of 1933 of securities of certain issuers.
239.13 Form S–3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.
239.14 Form N–2, for closed-end management investment companies registered on Form N–8A.
239.15 Form N–1, for open-end management investment companies registered on Form N–8A.
239.15A Form N–1A, registration statement of open-end management investment companies.
239.16 Form S–6, for unit investment trusts registered on Form N–8B–2.
239.16b Form S–8, for registration under the Securities Act of 1933 of securities to be offered to employees pursuant to employee benefit plans.
239.17 [Reserved]
239.17a Form N–3, registration statement for separate accounts organized as management investment companies.
239.17b Form N–4, registration statement for separate accounts organized as unit investment trusts.
239.17c Form N–6, registration statement for separate accounts organized as unit investment trusts that offer variable life insurance policies.
239.18 Form S–11, for registration under the Securities Act of 1933 of securities of certain real estate companies.
239.19 [Reserved]
239.20 Form S–20, for standardized options.
239.23 Form N–14, for the registration of securities issued in business combination transactions by investment companies and business development companies.
239.24 Form N–5, form for registration of small business investment company under the Securities Act of 1933 and the Investment Company Act of 1940.
239.25 Form S–4, for the registration of securities issued in business combination transactions.
239.26–239.30 [Reserved]
239.31 Form F–1, registration statement under the Securities Act of 1933 for securities of certain foreign private issuers.
239.32 Form F–2, for registration under the Securities Act of 1933 for securities of certain foreign private issuers.
239.33 Form F–3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.
239.34 Form F–4, for registration of securities of foreign private issuers issued in certain business combination transactions.
239.35 [Reserved]
239.36 Form F–6, for registration under the Securities Act of 1933 of depositary shares evidenced by American Depositary Receipts.
239.37 Form F–7, for registration under the Securities Act of 1933 of securities of certain Canadian issuers offered for cash upon the exercise of rights granted to existing securityholders.
239.38 Form F–8, for registration under the Securities Act of 1933 of securities of certain Canadian issuers to be issued in exchange offers or a business combination.
239.39 Form F–9, for registration under the Securities Act of 1933 of certain investment grade debt or investment grade preferred securities of certain Canadian issuers.
239.40 Form F–10, for registration under the Securities Act of 1933 of securities of certain Canadian issuers.
239.41 Form F–80, for registration under the Securities Act of 1933 of securities of certain Canadian issuers to be issued in exchange offers or a business combination.
239.42 Form F–X, for appointment of agent for service of process and undertaking for issuers registering securities on Form F–8, F–9, F–10, or F–80 (§§ 239.38, 239.39, 239.40, or 239.41 of this chapter) or registering securities or filing periodic reports on Form 40–F (§ 249.240f of this chapter), or by any issuer or other non-U.S. person filing tender offer documents on Schedule 13E–4F, 14D–1F or 14D–9F

(§§ 240.13e–102, 240.14d–102 or 240.14d–103 of this chapter), by any non-U.S. person acting as trustee with respect to securities registered on Form F–7 (§ 239.37 of this chapter), F–8, F–9, F–10, F–80 or SB–2 (§ 239.10 of this chapter), or by a Canadian issuer qualifying an offering statement pursuant to Regulation A (§ 230.251 et seq.) on Form 1–A (§ 239.90 of this chapter), or registering securities on Form SB–2.
239.43 Form F–N, appointment of agent for service of process by foreign banks and foreign insurance companies and certain of their holding companies and finance subsidiaries making public offerings of securities in the United States.
239.44–239.61 [Reserved]
239.62 Form ET, transmittal form for electronic format documents on magnetic tape or diskette to be filed on the EDGAR system.
239.63 Form ID, uniform application for access codes to file on EDGAR.
239.64 Form SE, form for submission of paper format exhibits by electronic filers.
239.65 Form TH, Notification of reliance on temporary hardship exemption.

Subpart B—Forms Pertaining to Exemptions

239.90 Form 1–A, offering statement under Regulation A.
239.91 Form 2–A, report pursuant to Rule 257 of Regulation A.
239.92–239.143 [Reserved]
239.144 Form 144, for notice of proposed sale of securities pursuant to § 230.144 of this chapter.
239.145–239.199 [Reserved]
239.200 Form 1–E, notification under Regulation E.
239.201 Form 2–E, report of sales pursuant to Rule 609 of Regulation E.
239.202–239.300 [Reserved]
239.500 Form D, notice of sales of securities under Regulation D and section 4(6) of the Securities Act of 1933.
239.701 [Reserved]
239.800 Form CB, report of sales of securities in connection with an exchange offer or a rights offering.

AUTHORITY: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.
Sections 239.31, 239.32 and 239.33 are also issued under 15 U.S.C. 78*l*, 78m, 78*o*, 78w, 80a–8, 80a–29, 80a–30, 80a–37 and 12 U.S.C. 241.

Secs. 239.62, 239.63 and 239.64 also issued under secs. 6, 7, 8, 10 and 19(a) of the Securities Act (15 U.S.C. 77f, 77g, 77h, 77j, 77s(a)); secs. 3(b), 12, 13, 14, 15(d) and 23(a) of the Exchange Act (15 U.S.C. 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a)); secs. 5, 6, 7, 10, 12, 13, 14, 17 and 20 of the Holding Company Act (15 U.S.C. 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q and 79t); sec. 319(a) of the Trust Indenture Act (15 U.S.C. 77sss(a)) and secs. 8, 24, 30 and 38 of the Investment Company Act (15 U.S.C. 80a–8, 80a–29 and 80a–37).

SOURCE: 33 FR 18991, Dec. 20, 1968, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 239 appear at 57 FR 36501, Aug. 13, 1992.

§ 239.0–1 Availability of forms.

(a) This part identifies and describes the forms prescribed for use under the Securities Act of 1933.

(b) Any person may obtain a copy of any form prescribed for use in this part by written request to the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Any persons may inspect the forms at this address and at the Commission's regional and district offices. (See § 200.11 of this chapter for the addresses of SEC regional and district offices.)

[46 FR 17757, Mar. 20, 1981, as amended at 47 FR 26820, June 22, 1982; 59 FR 5945, Feb. 9, 1994]

Subpart A—Forms for Registration Statements

§§ 239.4—239.8 [Reserved]

§ 239.9 Form SB–1, optional form for the registration of securities to be sold to the public by certain small business issuers.

Small business issuers, as defined in Rule 405 (17 CFR 230.405 of this chapter), may use this form to register up to $10,000,000 of securities to be sold for cash, if they have not registered more than $10,000,000 in securities offerings in any continuous 12-month period, including the transaction being registered. In calculating the $10,000,000 ceiling, issuers should include all offerings which were registered under the Securities Act, other than any amounts registered on Form S–8 (§ 239.16b).

[58 FR 26515, May 4, 1993]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form SB–1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.10 Form SB–2, optional form for the registration of securities to be sold to the public by small business issuers.

Small business issuers defined in Rule 405 (17 CFR 230.405 of this chapter) may use this form to register securities to be sold for cash. For further information concerning eligibility toward this form see Item 10(a) of Regulation S–B (17 CFR 228.10 et seq.)

[57 FR 36473, Aug. 13, 1992]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form SB–2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.11 Form S–1, registration statement under the Securities Act of 1933.

This form shall be used for registration under the Securities Act of 1933 of securities of all issuers for which no other form is authorized or prescribed, except that this form shall not be used for securities of foreign governments or political subdivisions thereof.

(Secs. 7, 10, 19(a), 48 Stat. 78, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 8, 68 Stat. 685; 15 U.S.C. 77g, 77j, 77s(a); secs. 12, 13, 14, 15(d), 23, 48 Stat. 892, 894, 895, 901; sec. 203(a), 49 Stat. 704; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 3, 4, 5, 6, 10, 78 Stat. 565–568, 569, 570–574, 88a; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 1, 2, 3–5, 28(c), 84 Stat. 1435, 1479; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155 (15 U.S.C. 78*l*, 78m, 78n, 78*o*(d), 1979))

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form S–1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.12 Form S–2, for registration under the Securities Act of 1933 of securities of certain issuers.

This form may be used for registration of securities under the Securities Act of 1933 which are offered or to be offered in any transaction other than an exchange offer for securities of another person by any registrant which meets the following conditions:

(a) The registrant is organized under the laws of the United States or any State or Territory or the District of Columbia and has its principal business operations in the United States or its territories;

(b) The registrant has a class of securities registered pursuant to section 12(b) of the Securities Exchange Act of 1934 (*Exchange Act*) or has a class of equity securities registered pursuant to section 12(g) of the Exchange Act or is required to file reports pursuant to section 15(d) of the Exchange Act;

(c) The registrant:

(1) Has been subject to the requirements of section 12 of 15(d) of the Exchange Act and has filed all the material required to be filed pursuant to section 13, 14 or 15(d) for a period of at least thirty-six calendar months immediately preceding the filing of the registration statement on this Form; and

(2) Has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement and, if the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b–25(b) (§ 240.12b–25(b) of this chapter) under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule; and

(d) Neither the registrant nor any of its consolidated or unconsolidated subsidiaries have, since the end of their last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to section 13(a) or 15(d) of the Exchange Act:

(1) Failed to pay any dividend or sinking fund installment on preferred stock; or

(2) Defaulted (i) on any installment or installments on indebtedness for borrowed money, or (ii) on any rental on one or more long term leases, which defaults in the aggregate are material to the financial position of the registrant and its consolidated and unconsolidated subsidiaries, taken as a whole.

(e) A foreign issuer, other than a foreign government, which satisfies all of the above provisions of these registrant

eligibility requirements except the provisions in paragraph (a) of this section relating to organization and principal business shall be deemed to have met these registration eligibility requirements provided that such foreign issuer files the same reports with the Commission under section 13(a) or 15(d) of the Exchange Act as a domestic registrant pursuant to paragraph (c) of this section.

(f) If a registrant is a successor registrant it shall be deemed to have met conditions in paragraphs (a), (b), (c) and (d) of this section if:

(1) Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor of forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

(2) All predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

(g) If a registrant is a majority-owned subsidiary which does not itself meet the conditions of the eligibility requirements, it shall nevertheless be deemed to have met such conditions if its parent meets the conditions and if the parent fully guarantees the securities being registered as to principal and interest. Note: In such an instance the parent-guarantor is the issuer of a separate security consisting of the guarantee which must be concurrently registered but may be registered on the same registration statement as are the guaranteed securities.

(h) *Electronic filings.* In addition to satisfying the foregoing conditions of this section, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have filed with the Commission:

(1) all required electronic filings, including confirming electronic copies of documents submitted in paper pursuant to a temporary hardship exemption as provided in Rule 201 of Regulation S–T (§ 232.201 of this chapter); and

(2) all Financial Data Schedules required to be submitted pursuant to Item 601(c) of Regulation S–K (§ 229.601(c) of this chapter) and Item 601(c) of Regulation S–B (§ 228.601(c) of this chapter).

[47 FR 11451, Mar. 16, 1982, as amended at 56 FR 30055, July 1, 1991; 58 FR 14678, Mar. 18, 1993]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form S–2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.13 Form S–3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

This form may be used by any registrant which meets the requirements of paragraph (a) of this section (*Registrant Requirements*) for the registration of securities under the Securities Act of 1933 (*Securities Act*) which are offered in any transaction specified in paragraph (b) of this section (*Transaction Requirements*), provided that the requirements applicable to the specified transaction are met. With respect to majority-owned subsidiaries, see paragraph (c) below.

(a) *Registrant requirements.* Registrants must meet the following conditions in order to use this Form for registration under the Securities Act of securities offered in the transactions specified in paragraph (b) of this section:

(1) The registrant is organized under the laws of the United States or any State or Territory or the District of Columbia and has its principal business operations in the United States or its territories.

(2) The registrant has a class of securities registered pursuant to section 12(b) of the Securities Exchange Act of 1934 (*Exchange Act*) or a class of equity securities registered pursuant to section 12(g) of the Exchange Act or is required to file reports pursuant to section 15(d) of the Exchange Act;

(3) The registrant: (i) Has been subject to the requirements of section 12 or 15(d) of the Exchange Act and has filed all the material required to be filed pursuant to sections 13, 14 or 15(d) for a period of at least twelve calendar

months immediately preceding the filing of the registration statement on this Form; and

(ii) Has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement and, if the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b–25(b) (§ 240.12b–25(b) of this chapter) under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by the Rule; and

(4) The provisions of paragraphs (a)(2) and (a)(3)(i) of this section do not apply to any registered offerings of investment grade asset-backed securities as defined in paragraph (b)(5) of this section.

(5) Neither the registrant nor any of its consolidated or unconsolidated subsidiaries have, since the end of the last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to section 13(a) or 15(d) of the Exchange Act: (i) Failed to pay any dividend or sinking fund installment on preferred stock; or (ii) defaulted (A) on any installment or installments on indebtedness for borrowed money, or (B) on any rental on one or more long term leases, which defaults in the aggregate are material to the financial position of the registrant and its consolidated and unconsolidated subsidiaries, taken as a whole.

(6) A foreign issuer, other than a foreign government, which satisfies all of the above provisions of these registrant eligibility requirements except the provisions in paragraph (a)(1) of this section relating to organization and principal business shall be deemed to have met these registrant eligibility requirements provided that such foreign issuer files the same reports with the Commission under section 13(a) or 15(d) of the Exchange Act as a domestic registrant pursuant to paragraph (a)(3) of this section.

(7) If the registrant is a successor registrant, it shall be deemed to have met conditions in paragraph (a)(1), (2), (3), and (5) of this section if:

(i) its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

(ii) If all predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

(8) *Electronic filings.* In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have filed with the Commission:

(i) All required electronic filings, including confirming electronic copies of documents submitted in paper pursuant to a temporary hardship exemption as provided in Rule 201 of Regulation S–T (§ 232.201 of this chapter); and

(ii) All Financial Data Schedules required to be submitted pursuant to Item 601(c) of Regulation S–K (§ 229.601(c) of this chapter) and Item 601(c) of Regulation S–B (§ 228.601(c) of this chapter).

(b) *Transaction requirements.* Security offerings meeting any of the following conditions and made by registrants meeting the Registrant Requirements above may be registered on this Form:

(1) *Primary and secondary offerings by certain registrants.* Securities to be offered for cash by or on behalf of a registrant, or outstanding securities to be offered for cash for the account of any person other than the registrant, including securities acquired by standby underwriters in connection with the call or redemption by the registrant of warrants or a class of convertible securities; *provided* that the aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant is $75 million or more.

Instruction: The aggregate market value of the registrant's outstanding voting stock shall be computed by use of the price at which the stock was last sold, or the average of the bid and asked prices of such stock, as of a date within 60 days prior to the date of filing. See the definition of affiliate in Securities Act Rule 405 (§ 230.405 of this chapter).

(2) *Primary offerings of non-convertible investment grade securities.* Non-convertible securities to be offered for cash by or on behalf of a registrant, provided such securities at the time of sale are investment grade securities, as defined below. A non-convertible security is an investment grade security if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in Rule 15c3–1(c)(2)(vi)(F) under the Securities Exchange Act of 1934 (§ 240.15c3–1(c)(2)(vi)(F) of this chapter)) has rated the security in one of its generic rating categories which signifies investment grade; typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

(3) *Transactions involving secondary offerings.* Outstanding securities to be offered for the account of any person other than the issuer, including securities acquired by standby underwriters in connection with the call or redemption by the issuer of warrants or a class of convertible securities, if securities of the same class are listed and registered on a national securities exchange or are quoted on the automated quotation system of a national securities association. In addition, Form S–3 may be used by affiliates to register securities for resale pursuant to the conditions specified in General Instruction C to Form S–8 (§ 239.16b of this chapter).

(4) *Rights offerings, dividend or interest reinvestment plans, and conversions, warrants and options.* (i) Securities to be offered:

(A) Upon the exercise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted on a *pro rata* basis to all existing security holders of the class of securities to which the rights attach;

(B) Under a dividend or interest reinvestment plan; or

(C) Upon the conversion of outstanding convertible securities or the exercise of outstanding warrants or options issued by the issuer of the securities to be offered, or an affiliate of that issuer.

(ii) However, Form S–3 is available for registering these securities only if the issuer has sent, within the twelve calendar months immediately before the registration statement is filed, material containing the information required by § 240.14a–3(b) of this chapter under the Exchange Act to:

(A) All record holders of the rights;

(B) All participants in the plans; or

(C) All record holders of the convertible securities, warrants or options, respectively.

(iii) The issuer also must have provided, within the twelve calendar months immediately before the Form S–3 registration statement is filed, the information required by Items 401, 402 and 403 of Regulation S–K (§§ 229.401 through 229.403 of this chapter) to:

(A) Holders of rights exercisable for common stock;

(B) Holders of securities convertible into common stock; and

(C) Participants in plans that may invest in common stock, securities convertible into common stock, or warrants or options exercisable for common stock, respectively.

(5) *Offerings of investment grade asset-backed securities.* Asset-backed securities to be offered for cash, provided the securities are investment grade securities, as defined in paragraph (b)(2) of this section (Primary offerings of non-convertible investment grade securities). For purposes of this Form, the term ''asset-backed security'' means a security that is primarily serviced by the cashflows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.

(c) *Majority-owned subsidiaries.* If a registrant is a majority-owned subsidiary, security offerings may be registered on this Form if:

(1) The registrant-subsidiary itself meets the Registrant Requirements and the applicable Transaction Requirement;

(2) The parent of the registrant-subsidiary meets the Registrant Requirements and the conditions of Transaction Requirement in paragraph (b)(2) of this section (Primary offerings of

non-convertible investment grade securities) are met; or

(3) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities. Note: In such an instance, the parent-guarantor is the issuer of a separate security consisting of the guarantee which must be concurrently registered but may be registered on the same registration statement as are the guaranteed securities.

(d) *Rights offerings by foreign private issuers.* A Foreign private issuer meeting eligibility requirements in paragraphs (a)(2), (a)(3) and (a)(4) of this section may use Form S–3 to register securities to be offered upon the exercise of outstanding rights granted by the issuer of the securities to be offered if such rights are granted pro rata to all existing security holders of the class of securities to which the rights attach. In complying with Item 11 of this Form, the registrant shall describe those material changes that have occurred since the end of the latest fiscal year for which certified financial statements were included in the registrant's latest filing on Form 20–F (17 CFR 249.220f). In complying with Item 12 of this Form, the registrant shall incorporate by reference its latest filing on Form 20–F. The registrant also shall:

(1) Furnish with the prospectus (or have furnished previously) to all its shareholders resident in the United States, including those holding under American Depository Receipts or similar arrangements, a copy of its latest annual report to security holders, if in the English language. Such annual reports or prospectus shall contain the registrant's undertaking to send promptly to any such United States holder, upon written request, a copy of the registrant's latest filing on Form 20–F; or

(2) Furnish with the prospectus a copy of its latest filing on Form 20–F.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498–1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37)

[47 FR 11453, Mar. 16, 1982, as amended at 56 FR 30055, July 1, 1991; 57 FR 48976, Oct. 29, 1992; 58 FR 14679, Mar. 18, 1993; 58 FR 16771, Mar. 31, 1993; 62 FR 26388, May 14, 1997; 64 FR 11116, Mar. 8, 1999]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form S–3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.14 Form N–2 for closed end management investment companies registered on Form N–8A.

Form N–2 shall be used for registration under the Securities Act of 1933 of securities of all closed end management investment companies registered under the Investment Company Act of 1940 on form N–8A (§ 274.10 of this chapter). This form is also to be used for the registration statement of such companies pursuant to section 8(b) of the Investment Company Act of 1940 (§ 274.11a–1 of this chapter). This form is not applicable for small business investment companies which register pursuant to §§ 239.24 and 274.5 of this chapter.

[43 FR 39554, Sept. 5, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form N–2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.15 Form N–1 for open-end management investment companies registered on Form N–8A.

Form N–1 shall be used for the registration under the Securities Act of 1933 of securities of all open-end management investment companies that are separate accounts of insurance companies as defined by section 2(a)(37) of the Investment Company Act of 1940 registered under the Investment Company Act of 1940 on form N–8A (§ 274.10 of this chapter). This form is also to be used for the registration statement of such companies pursuant to section 8(b) of the Investment Company Act of 1940 (§ 274.11 of this chapter). This form is not applicable for small business investment companies which register pursuant to § 239.24 and § 274.5 of this chapter.

(Sec. 19, Securities Act of 1933 (15 U.S.C. 77s; secs. 8 and 38, Investment Company Act of 1940 (15 U.S.C. 80a–8 and 80a–37)))

[49 FR 32060, Aug. 10, 1984]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form N–1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.15A Form N–1A, registration statement of open-end management investment companies.

Form N–1A shall be used for the registration under the Securities Act of 1933 of securities of open-end management investment companies other than separate accounts of insurance companies registered under the Investment Company Act of 1940 (on form N–1) (§ 270.11 of this chapter). This form is also to be used for the registration statement of such companies pursuant to section 8(b) of the Investment Company Act of 1940 (§ 270.11A of this chapter). This form is not applicable for small business investment companies which register pursuant to §§ 239.24 and 274.5 of this chapter.

[48 FR 37940, Aug. 22, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form N–1A, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.16 Form S–6, for unit investment trusts registered on Form N–8B–2.

This form may be used for registration under the Securities Act of 1933 of securities of any unit investment trust registered under the Investment Company Act of 1940 on Form N–8B–2 (§ 274.12 of this chapter).

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form S–6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.16b Form S–8, for registration under the Securities Act of 1933 of securities to be offered to employees pursuant to employee benefit plans.

(a) Any registrant that, immediately prior to the time of filing a registration statement on this form, is subject to the requirement to file reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934, and has filed all reports and other materials required to be filed by such requirements during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials), may use this form for registration under the Securities Act of 1933 (the *Act*) of the following securities:

(1) Securities of the registrant to be offered to its employees or employees of its subsidiaries or parents under any employee benefit plan. The form also is available for the exercise of employee benefit plan options by an employee's family member (as defined in General Instruction A.1(a)(5) to Form S–8) who has acquired the options from the employee through a gift or a domestic relations order.

(2) Interests in the above plans, if such interests constitute securities and are required to be registered under the Act. (*See* Release No. 33–6188 (February 1, 1980) and section 3(a)(2) of the Act.)

(b) *Electronic filings.* In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have filed with the Commission:

(1) All required electronic filings, including confirming electronic copies of

documents submitted in paper pursuant to a temporary hardship exemption as provided in Rule 201 of Regulation S–T (§ 232.201 of this chapter); and

(2) All Financial Data Schedules required to be submitted pursuant to Item 601(c) of Regulation S–K (§ 229.601(c) of this chapter) and Item 601(c) of Regulation S–B (§ 228.601(c) of this chapter).

[55 FR 23925, June 13, 1990, as amended at 58 FR 14680, Mar. 18, 1993; 64 FR 11116, Mar. 8, 1999]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form S–8, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.17 [Reserved]

§ 239.17a Form N–3, registration statement for separate accounts organized as management investment companies.

Form N–3 shall be used for registration under the Securities Act of 1933 of securities of separate accounts that offer variable annuity contracts and which register under the Investment Company Act of 1940 as management investment companies, and certain other separate accounts. This form is also to be used for the registration statement of such separate accounts pursuant to section 8(b) of the Investment Company Act of 1940 (§ 274.11b of this chapter).

[50 FR 26160, June 25, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form N–3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.17b Form N–4, registration statement for separate accounts organized as unit investment trusts.

Form N–4 shall be used for registration under the Securities Act of 1933 of securities of separate accounts that offer variable annuity contracts and which register under the Investment Company Act of 1940 as unit investment trusts, and certain other separate accounts. This form is also to be used for the registration statement of such separate accounts pursuant to section 8(b) of the Investment Company Act of 1940 (§ 274.11c of this chapter).

[50 FR 26160, June 25, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form N–4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.17c Form N–6, registration statement for separate accounts organized as unit investment trusts that offer variable life insurance policies.

Form N–6 shall be used for registration under the Securities Act of 1933 of securities of separate accounts that offer variable life insurance policies and that register under the Investment Company Act of 1940 as unit investment trusts. This form is also to be used for the registration statement of such separate accounts pursuant to section 8(b) of the Investment Company Act of 1940 (§ 274.11d of this chapter).

[67 FR 19870, Apr. 23, 2002]

§ 239.18 Form S–11, for registration under the Securities Act of 1933 of securities of certain real estate companies.

This form shall be used for registration under the Securities Act of 1933 of (a) securities issued by real estate investment trusts, as defined in section 356 of the Internal Revenue Code, or (b) securities issued by other issuers whose business is primarily that of acquiring and holding for investment real estate or interests in real estate or interests in other issuers whose business is primarily that of acquiring and holding real estate or interests in real estate for investment. This form shall not be used, however, by any issuer which is an investment company registered or required to register under the Investment Company Act of 1940.

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form S–11, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.19 [Reserved]

§ 239.20 Form S–20, for standardized options.

This form may be used to register standardized options under the Securities Act of 1933 where the issuer undertakes not to issue, clear, guarantee or accept an option registered on Form S–20 unless there is a definitive options disclosure document meeting the requirements of Rule 9b–1 of the Securities Exchange Act of 1934.

[47 FR 41955, Sept. 23, 1982]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form S–20, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.23 Form N–14, for the registration of securities issued in business combination transactions by investment companies and business development companies.

This form shall be used by a registered investment company or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 for registration under the Securities Act of 1933 of securities to be issued:

(a) In a transaction of the type specified in paragraph (a) of Rule 145 (§ 230.145 of this chapter);

(b) In a merger in which the applicable state law would not require the solicitation of the votes or consents of all the security holders of the company being acquired;

(c) In an exchange offer for securities of the issuer or another entity;

(d) In a public reoffering or resale of any such securities acquired pursuant to this registration statement;

(e) In more than one of the kinds of transactions listed in paragraphs (a) through (d) registered on one registration statement.

[50 FR 48383, Nov. 25, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form N–14, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.24 Form N–5, form for registration of small business investment company under the Securities Act of 1933 and the Investment Company Act of 1940.

This form shall be used for registration under the Securities Act of 1933 of securities issued by any small business investment company which is registered under the Investment Company Act of 1940, and which is licensed under the Small Business Investment Company Act of 1958 or which has received the preliminary approval of the Small Business Administration and has been notified by the Administration that it may submit a license application. This form may also be used for the registration statement of such company pursuant to section 8(b) of the Investment Company Act of 1940. The initial registration of such company on this form will be deemed to be filed under both the Securities Act of 1933 and the Investment Company Act of 1940 unless it is indicated that the filing is made only for the purpose of one of such acts. (Same as § 274.5 of this chapter.)

EDITORIAL NOTE: For FEDERAL REGISTER citations Form N–5, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.25 Form S–4, for the registration of securities issued in business combination transactions.

This form may be used for registration under the Securities Act of 1933 of securities to be issued (a) in a transaction of the type specified in paragraph (a) of Rule 145 (§ 230.145 of this chapter); (b) in a merger in which the applicable state law would not require the solicitation of the votes or consents of all of the security holders of the company being acquired; (c) in an exchange offer for securities of the issuer or another entity; (d) in a public reoffering or resale of any such securities acquired pursuant to this registration statement; or (e) in more than one of the kinds of transactions listed in paragraphs (a) through (d) registered on one registration statement.

[50 FR 19001, May 6, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form S–4, see the List of CFR Sections Affected, which appears in the

Finding Aids section of the printed volume and on GPO Access.

§§ 239.26–239.30 [Reserved]

§ 239.31 Form F–1, registration statement under the Securities Act of 1933 for securities of certain foreign private issuers.

(a) Form F–1 shall be used for registration under the Securities Act of 1933 (''Securities Act'') of securities of all foreign private issuers, as defined in rule 405 (§ 230.405 of this chapter) for which no other form is authorized or prescribed.

(b) If a registrant is a majority-owned subsidiary, which does not itself meet the conditions of these eligibility requirements, it shall nevertheless be deemed to have met such conditions if its parent meets the conditions and if the parent fully guarantees the securities being registered as to principal and interest.

[47 FR 54771, Dec. 6, 1982, as amended at 56 FR 30055, 30056, July 1, 1991]

EDITORIAL NOTE: For FEDERAL REGISTER citations Form F–1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.32 Form F–2, for registration under the Securities Act of 1933 for securities of certain foreign private issuers.

Any foreign private issuer, as defined in Rule 405 (§ 230.405 of this chapter), which meets the following conditions may use this form for the registration of securities under the Securities Act of 1933 (*Securities Act*) which are offered or to be offered in any transaction other than an exchange offer for securities of another person:

(a) The registrant has a class of securities registered pursuant to section 12(b) of the Securities Exchange Act of 1934 (the ''Exchange Act'') or has a class of equity securities registered pursuant to section 12(g) of the Exchange Act or is required to file reports pursuant to section 15(d) of the Exchange Act and has filed annual reports on Form 20–F (§ 249.220f of this chapter), on Form 10–K and Form 10–KSB (§ 249.310 of this chapter) or, in the case of registrants described in General Instruction A. (2) of Form 40–F, on Form 40–F (§ 249.240f of this chapter) under the Exchange Act.

(b)(1) The Registrant (i) has been subject to the requirements of section 12 or 15(d) of the Exchange Act and has filed all the information required to be filed pursuant to Section 13, 14 or 15(d) for a period of at least thirty-six calendar months immediately preceding the filing of the registration statement on this form; (ii) has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement and, if the issuer has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b–25(b) (§ 240.12b–25(b) of this chapter) under the Exchange Act with respect to a report or portion of a report, that report or portion thereof has actually been filed within the time period prescribed by the Rule.

(2) The provisions of paragraph (b)(1)(i) of this section do not apply to any registrant if:

(i) The aggregate market value worldwide of the voting and non-voting common equity of the registrant held by non-affiliates is the equivalent of $75 million or more, or if non-convertible securities that are ''investment grade securities,'' as defined in Instructions to paragraph (b) of this section, are being registered; and

(ii) The registrant has filed at least one Form 20–F (§ 249.220f of this chapter), Form 40–F (§ 249.240f of this chapter) or Form 10–K (§ 249.310 of this chapter) that is the latest required to have been filed.

Instructions to paragraph (b): 1. The aggregate market value of the registrant's outstanding voting stock shall be computed by use of the price at which the stock was last sold, or the average of the bid and asked prices of such stock in the principal market for such stock, as of a date within 60 days prior to the date of filing [See the definition of *affiliate* in Securities Act Rule 405 (§ 230.405 of this chapter)].

2. A non-convertible security is an *investment grade security* if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in § 240.15c3–1(c)(2)(vi)(F) of this chapter) has rated the security in one of its generic rating categories that signifies investment grade;

typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

(c) Neither the registrant nor any of its consolidated or unconsolidated subsidiaries have, since the end of their last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to section 13(a) or 15(d) of the Exchange Act: (1) Failed to pay any dividend or sinking fund installment on preferred stock; or (2) defaulted (A) on any installment or installments on indebtedness for borrowed money, or (B) on any rental on one or more long term leases, which defaults in the aggregate are material to the financial position of the registrant and its consolidated and unconsolidated subsidiaries, taken as a whole.

(d) The financial statements included in this registration statement comply with Item 18 of Form 20–F (§ 249.220f of this chapter); *provided, however,* that if the securities being registered are non-convertible securities that are ''investment grade securities,'' as defined in Instructions to paragraph (b) of this section, such financial statements comply with either Item 17 or Item 18 of Form 20–F (§ 249.220f of this chapter).

(e) The provisions of paragraphs (b)(1)(i) and (d) of this section do not apply if the Registrant has filed at least one Form 20–F, Form 40–F or Form 10–K and Form 10–KSB that is the latest required to have been filed and if the only securities being registered are to be offered:

(1) Upon the exercise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted pro rata to all existing securityholders of the class of securities to which the rights attach;

(2) Pursuant to a dividend or interest reinvestment plan; or

(3) Upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer of the securities to be offered, or by an affiliate of such issuer. The exemptions in this paragraph (e) are unavailable if securities are to be offered or sold in a standby underwriting in the United States or similar arrangement.

(f) If a registrant is a successor registrant it shall be deemed to have met conditions, paragraphs (a), (b), (c), (d) and (e) of this section if: (1) Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state or other jurisdiction of incorporation of the predecessor of forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or (2) all predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

(g) If a registrant is a majority-owned subsidiary that does not meet the conditions of these eligibility requirements, it nevertheless shall be deemed to have met such conditions if its parent meets the conditions and if the parent fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities.

NOTE: In such an instance the parent-guarantor is the issuer of a separate security consisting of the guarantee which must be concurrently registered but may be registered on the same registration statement as are the guaranteed securities. Both the parent-guarantor and the subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the subsidiary will not be eligible to file annual reports on Form 20–F or Form 40–F after the effective date of the registration statement, then it shall disclose the information specified in Form S–2 (§ 239.12 of this chapter). Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter) specifies the financial statements required.

(h) *Electronic filings.* In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have filed with the Commission all required electronic filings, including confirming electronic copies of documents submitted in paper pursuant to a temporary hardship exemption as provided

in Rule 201 of Regulation S–T (§ 232.201 of this chapter).

[47 FR 54773, Dec. 6, 1982, as amended at 56 FR 30055, 30056, July 1, 1991; 58 FR 14681, Mar. 18, 1993; 59 FR 21651, Apr. 26, 1994; 62 FR 26388, May 14, 1997]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form F–2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.33 Form F–3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

This instruction sets forth registrant requirements and transaction requirements for the use of Form F–3. Any foreign private issuer, as defined in Rule 405 (§ 230.405 of this chapter), which meets the requirements of paragraph (a) of this section (*Registrant requirements*) may use this Form for the registration of securities under the Securities Act of 1933 (the *Securities Act*) which are offered in any transaction specified in paragraph (b) of this section (*Transaction requirements*), provided that the requirements applicable to the specified transaction are met. With respect to majority-owned subsidiaries, see Instruction (a)(6) below.

(a) *Registrant requirements.* Except as set forth in this paragraph (a), all registrants must meet the following conditions in order to use this Form F–3 for registration under the Securities Act of securities offered in the transactions specified in paragraph (b) of this section:

(1) The registrant has a class of securities registered pursuant to section 12(b) of the Securities Exchange Act of 1934 (''Exchange Act'') or has a class of equity securities registered pursuant to section 12(g) of the Exchange Act or is required to file reports pursuant to section 15(d) of the Exchange Act and has filed at least one annual report on Form 20–F (§ 249.220f of this chapter), on Form 10–K (§ 249.310 of this chapter) or, in the case of registrants described in General Instruction A(2) of Form 40–F, on Form 40–F (§ 249.240f of this chapter) under the Exchange Act.

(2) The registrant:

(i) Has been subject to the requirements of section 12 or 15(d) of the Exchange Act and has filed all the material required to be filed pursuant to sections 13, 14 or 15(d) of the Exchange Act for a period of at least twelve calendar months immediately preceding the filing of the registration statement on this form; and

(ii) Has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement and, if the registrant has used (during those twelve calendar months and that portion of a month) § 240.12b–25(b) of this chapter with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by § 240.12b–25(b) of this Chapter.

(3) Neither the registrant nor any of its consolidated or unconsolidated subsidiaries have, since the end of their last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to section 13(a) or 15(d) of the Exchange Act: (i) Failed to pay any dividend or sinking fund installment on preferred stock; or (ii) defaulted (A) on any installment or installments on indebtedness for borrowed money, or (B) on any rental on one or more long term leases, which defaults in the aggregate are material to the financial position of the registrant and its consolidated and unconsolidated subsidiaries, taken as a whole.

(4) If the registrant is a successor registrant, it shall be deemed to have met conditions 1, 2, 3 and 4 above if: (i) Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state or other jurisdiction of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or (ii) all predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

(5) *Majority-Owned Subsidiaries.* If a registrant is a majority-owned subsidiary, security offerings may be registered on this form if:

(i) The registrant-subsidiary itself meets the Registrant Requirements and the applicable Transaction Requirement;

(ii) The parent of the registrant-subsidiary meets the Registrant Requirements and the conditions of the Transaction Requirement set forth in paragraph (b)(2) of this section (Offerings of Certain Debt or Preferred Securities) are met; or

(iii) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement and fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities.

NOTE: In the situation described in paragraph (a)(6)(iii) of this section, the parent-guarantor is the issuer of a separate security consisting of the guarantee which must be concurrently registered but may be registered on the same registration statement as are the guaranteed securities. Both the parent-guarantor and the subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the subsidiary will not be eligible to file annual reports on Form 20–F or Form 40–F after the effective date of the registration statement, then it shall disclose the information specified in Form S–3 (§ 239.13 of this chapter). Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter) specifies the financial statements required.

(6) *Electronic filings.* In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have filed with the Commission all required electronic filings, including confirming electronic copies of documents submitted in paper pursuant to a temporary hardship exemption as provided in Rule 201 of Regulation S–T (§ 232.201 of this chapter).

(b) *Transaction requirements.* Security offerings meeting any of the following conditions and made by registrants meeting the Registrant Requirements above may be registered on this Form:

(1) *Primary offerings by certain registrants.* Securities to be offered for cash by or on behalf of a registrant, *provided* that the aggregate market value worldwide of the voting and non-voting common equity held by non-affiliates of the registrant is the equivalent of $75 million or more. In the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement must comply with Item 18 of Form 20–F (§ 249.220f of this chapter).

Instruction to Paragraph (b)(1): The aggregate market value of the registrant's outstanding voting stock shall be computed by use of the price at which the stock was last sold, or the average of the bid and asked prices of such stock, in the principal market for such stock as of a date within 60 days prior to the date of filing. *See* the definition of ''affiliate'' in Securities Act Rule 405 (§ 230.405 of this chapter).

(2) *Primary offerings of non-convertible investment grade securities.* Non-convertible securities to be offered for cash if such securities are *investment grade securities.* A non-convertible security is an *investment grade security* if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in § 240.15c3–1(c)(2)(vi)(F) of this chapter) has rated the security in one of its generic rating categories that signifies investment grade; typically, the four highest rating categories (within which there may be subcategories or gradations indicating relative standing) signify investment grade. In the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement may comply with Item 17 or 18 of Form 20–F (§ 249.220f of this chapter).

(3) *Transactions involving secondary offerings.* Outstanding securities to be offered for the account of any person other than the issuer, including securities acquired by standby underwriters in connection with the call or redemption by the issuer of warrants or a class of convertible securities. In the case of such securities, the financial statements included in this registration statement may comply with Item 17 or 18 of Form 20–F (§ 249.220f of this chapter). In addition, Form F–3 (§ 239.33) may be used by affiliates to register securities for resale pursuant to the conditions specified in General Instruction C to Form S–8 (§ 239.16b). In the case of such securities, the financial statements included in this registration

statement must comply with Item 18 of Form 20–F (§ 249.220f of this chapter).

(4) *Rights offerings, dividend or interest reinvestment plans, and conversions or warrants.* Securities to be offered:

(i) Upon the exercise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted pro rata to all existing security holders of the class of securities to which the rights attach; or

(ii) Pursuant to a dividend or interest reinvestment plan; or

(iii) Upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer of the securities to be offered, or by an affiliate of such issuer. In the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement may comply with Item 17 or 18 of Form 20–F (§ 249.220f of this chapter). The registration of securities to be offered or sold in a standby underwriting in the United States or similar arrangement is not permitted pursuant to this paragraph. See paragraphs (b) (1), (2) and (3) of this section.

[47 FR 54776, Dec. 6, 1982, as amended at 56 FR 30055, 30057, July 1, 1991; 58 FR 14681, Mar. 18, 1993; 59 FR 21652, Apr. 26, 1994; 62 FR 26388, May 14, 1997]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form F–3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.34 Form F–4, for registration of securities of foreign private issuers issued in certain business combination transactions.

This form may be used by any foreign private issuer, as defined in rule 405 (§ 230.405 of this chapter), for registration under the Securities Act of 1933 (''Securities Act'') of securities to be issued:

(a) In a transaction of the type specified in paragraph (a) of rule 145 (§ 230.145 of this chapter);

(b) In a merger in which the applicable law would not require the solicitation of the votes or consents of all of the securityholders of the company being acquired;

(c) In an exchange offer for securities of the issuer or another entity;

(d) In a public reoffering or resale of any such securities acquired pursuant to this registration statement; or

(e) In more than one of the kinds of transactions listed in paragraphs (a) through (d) registered on one registration statement.

[56 FR 30058, July 1, 1991]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form F–4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.35 [Reserved]

§ 239.36 Form F–6, for registration under the Securities Act of 1933 of depositary shares evidenced by American Depositary Receipts.

Form F–6 may be used for the registration under the Securities Act of 1933 (the *Securities Act*) of Depositary shares evidenced by American Depositary Receipts (*ADRs*) issued by a depositary against the deposit of the securities of a foreign issuer (regardless of the physical location of the certificates) if the following conditions are met:

(a) The holder of the ADRs is entitled to withdraw the deposited securities at any time subject only to (1) temporary delays caused by closing transfer books of the depositary or the issuer of the deposited securities or the deposit of shares in connection with voting at a shareholders' meeting, or the payment of dividends, (2) the payment of fees, taxes, and similar charges, and (3) compliance with any laws or governmental regulations relating to ADRs or to the withdrawal of deposited securities;

(b) The deposited securities are offered or sold in transactions registered under the Securities Act or in transactions that would be exempt therefrom if made in the United States; and

(c) As of the filing date of this registration statement, the issuer of the deposited securities is reporting pursuant to the periodic reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 or the deposited securities are exempt therefrom by Rule 12g3–2(b) (§ 240.12g3–2(b) of this chapter) unless the issuer of the

deposited securities concurrently files a registration statement on another form for the deposited securities.

[48 FR 12348, Mar. 24, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting the General Instructions to Form F–6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.37 Form F–7, for registration under the Securities Act of 1933 of securities of certain Canadian issuers offered for cash upon the exercise of rights granted to existing securityholders.

(a) Form F–7 may be used for the registration under the Securities Act of 1933 (the ''Securities Act'') of the registrant's securities offered for cash upon the exercise of rights to purchase or subscribe for such securities that are granted to its existing securityholders in proportion to the number of securities held by them as of the record date for the rights offer.

(b) Form F–7 is available to any registrant that:

(1) Is incorporated or organized under the laws of Canada or any Canadian province or territory;

(2) Is a foreign private issuer; and

(3) Has had a class of its securities listed on The Montreal Exchange, The Toronto Stock Exchange or the Senior Board of the Vancouver Stock Exchange for the 12 calendar months immediately preceding the filing of this Form, has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 36 calendar months immediately preceding the filing of this Form, and is currently in compliance with obligations arising from such listing and reporting.

Instruction: For purposes of this Form, ''foreign private issuer'' shall be construed in accordance with Rule 405 under the Securities Act.

(c) If the registrant is a successor registrant subsisting after a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of shareholders of the participating companies (a ''business combination''), the registrant shall be deemed to meet the 36-month reporting requirement and the 12-month listing requirement of paragraph (b)(3) of this section if:

(1) The time the successor registrant has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada, when added separately to the time each predecessor had been subject to such requirements at the time of the business combination, in each case equals at least 36 calendar months, *provided, however,* that any predecessor need not be considered for purposes of the reporting history calculation if the reporting histories of predecessors whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of such participating companies' most recently completed fiscal years immediately prior to the business combination, when combined with the reporting history of the successor registrant in each case satisfy such 36-month reporting requirement;

(2) The time the successor registrant has been subject to the listing requirements of the specified exchanges, when added separately to the time each predecessor had been subject to such requirements at the time of the business combination, in each case equals at least 12 calendar months, *provided, however,* that any predecessor need not be considered for purposes of the listing history calculation if the listing histories of predecessors whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of such participating companies' most recently completed fiscal years immediately prior to the business combination, when combined with the listing history of the successor registrant in each case satisfy such 12-month listing requirement; and

(3) The successor registrant has been subject to such continuous disclosure requirements and listing requirements

since the business combination, and is currently in compliance with its obligations thereunder.

(d) The rights in connection with the transaction granted to securityholders that are U.S. holders shall be granted upon terms and conditions not less favorable than those extended to any other holder of the same class of securities. The securities offered or sold upon exercise of rights granted to U.S. holders may not be registered on this Form if such rights are transferable other than in accordance with Regulation S under the Securities Act.

Instruction: For purposes of this Form, the term ''U.S. holder'' shall mean any person whose address appears on the records of the registrant, any voting trustee, any depositary, any share transfer agent or any person acting on behalf of the registrant as being located in the United States.

(e) This Form shall not be used if the registrant is an investment company registered or required to be registered under the Investment Company Act of 1940.

(f) Any non-U.S. person acting as trustee with respect to the securities being registered shall file a Form F–X (§ 239.42 of this chapter) with the Commission at the time of filing this Form.

[56 FR 30060, July 1, 1991]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form F–7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.38 Form F–8, for registration under the Securities Act of 1933 of securities of certain Canadian issuers to be issued in exchange offers or a business combination.

(a) Form F–8 may be used for registration under the Securities Act of 1933 (''Securities Act'') of securities to be issued in an exchange offer or in connection with a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of shareholders of the participating companies (a ''business combination''). Securities may be registered on this Form whether they constitute the sole consideration for such exchange offer or business combination, or are offered in conjunction with cash.

(b) This Form shall not be used for registration of securities if no takeover bid circular or issuer bid circular (in the case of an exchange offer) or information circular (in the case of a business combination) is prepared pursuant to the requirements of any Canadian jurisdiction due to the availability of an exemption from such requirements.

(c) This Form may not be used for registration of derivative securities except:

(1) Warrants, options and rights, provided that such securities and the underlying securities to which they relate are issued by the registrant, its parent or an affiliate of either; and

(2) Convertible securities, provided that such securities are convertible only into securities of the registrant, its parent or an affiliate of either.

Instruction: For purposes of this Form, an ''affiliate'' of a person is anyone who beneficially owns, directly or indirectly, or exercises control or direction over, more than 10 percent of the outstanding equity shares of such person. The determination of a person's affiliates shall be made as of the end of such person's most recently completed fiscal year.

(d) In the case of an exchange offer, Form F–8 is available to any registrant that:

(1) Is incorporated or organized under the laws of Canada, or any Canadian province or territory;

(2) Is a foreign private issuer;

(3) Has had a class of its securities listed on The Montreal Exchange, The Toronto Stock Exchange or the Senior Board of the Vancouver Stock Exchange for the 12 calendar months immediately preceding the filing of this Form, has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 36 calendar months immediately preceding the filing of this Form, and is currently in compliance with obligations arising from such listing and reporting; and

(4) Has an aggregate market value of the public float of its outstanding equity shares of (CN) $75 million or more; *provided, however,* that such public float requirement need not be satisfied if the issuer of the securities to be exchanged is also the registrant on this Form.

Instructions: 1. For purposes of this Form, ''foreign private issuer'' shall be construed in accordance with rule 405 under the Securities Act.

2. For purposes of this Form, ''equity shares'' shall mean common shares, non-voting equity shares and subordinate or restricted voting equity shares, but shall not include preferred shares.

3. For purposes of this Form, the ''public float'' of specified securities shall mean only such securities held by persons other than affiliates of the issuer.

4. For purposes of this Form, the market value of the public float of outstanding equity shares shall be computed by use of the price at which such shares were last sold, or the average of the bid and asked prices of such shares, in the principal market for such shares as of a date within 60 days prior to the date of filing. If there is no market for any of such securities, the book value of such securities computed as of the latest practicable date prior to the filing of this Form shall be used for purposes of calculating the market value, unless the issuer of such securities is in bankruptcy or receivership or has an accumulated capital deficit, in which case one-third of the principal amount, par value or stated value of such securities shall be used.

(e) In the case of an exchange offer, the securities to be registered on this Form shall be offered to U. S. holders upon terms and conditions not less favorable than those offered to any other holder of the same class of the securities to be exchanged (the ''subject securities'') for the securities of the registrant.

(f) In the case of an exchange offer, if the registrant is a successor registrant subsisting after a business combination, the registrant shall be deemed to meet the 36-month reporting requirement and the 12-month listing requirement of paragraph (d)(3) of this section if:

(1) The time the successor registrant has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada, when added separately to the time each predecessor had been subject to such requirements at the time of the business combination, in each case equals at least 36 calendar months, *provided, however,* that any predecessor need not be considered for purposes of the reporting history calculation if the reporting histories of predecessors whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of such participating companies' most recently completed fiscal years immediately prior to the business combination, when combined with the reporting history of the successor registrant in each case satisfy such 36-month reporting requirement;

(2) The time the successor registrant has been subject to the listing requirements of the specified exchanges, when added separately to the time each predecessor had been subject to such requirements at the time of the business combination, in each case equals at least 12 calendar months, *provided, however,* that any predecessor need not be considered for purposes of the listing history calculation if the listing histories of predecessors whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of such participating companies' most recently completed fiscal years immediately prior to the business combination, when combined with the listing history of the successor registrant in each case satisfy such 12-month listing requirement; and

(3) The successor registrant has been subject to such continuous disclosure requirements and listing requirements since the business combination, and is currently in compliance with its obligations thereunder.

(g) In the case of an exchange offer, the issuer of the subject securities shall be incorporated or organized under the laws of Canada or any Canadian province or territory and be a foreign private issuer, and less than 25 percent of the class of subject securities outstanding shall be held by U. S. holders.

Instructions: 1. For purposes of exchange offers, the term ''U. S. holder'' shall mean any person whose address appears on the records of the issuer of the subject securities, any voting trustee, any depositary, any share transfer agent or any person acting in a

similar capacity on behalf of the issuer of the subject securities as being located in the United States.

2. With respect to any tender offer, including any exchange offer, otherwise eligible to proceed in accordance with rule 14d–1(b) under the Securities Exchange Act of 1934 (the ''Exchange Act''), the issuer of the subject securities will be presumed to be a foreign private issuer and U. S. holders will be presumed to hold less than 25 percent of such outstanding securities, *unless* (a) the aggregate trading volume of that class on national securities exchanges in the United States and on NASDAQ exceeded its aggregate trading volume on securities exchanges in Canada and on the Canadian Dealing Network, Inc. (''CDN'') over the 12 calendar month period prior to commencement of this offer, or if commenced in response to a prior offer, over the 12 calendar month period prior to commencement of the initial offer (based on volume figures published by such exchanges and NASDAQ and CDN) ; (b) the most recent annual report or annual information form filed or submitted by the issuer with securities regulators of Ontario, Quebec, British Columbia or Alberta (or, if the issuer of the subject securities is not a reporting issuer in any of such provinces, with any other Canadian securities regulator) or with the Commission indicates that U. S. holders hold 25 percent or more of the outstanding subject class of securities; or (c) the offeror has actual knowledge that the level of U. S. ownership equals or exceeds 25 percent of such securities.

3. For purposes of this Form, if this Form is filed during the pendency of one or more ongoing cash tender or exchange offers for securities of the class subject to the offer that was commenced or was eligible to be commenced on Schedule 13E–4F, Schedule 14D–1F, and/or Form F–8 or Form F–80, the date for calculation of U.S. ownership shall be the same as that date used by the initial bidder or issuer.

4. For purposes of this Form, the class of subject securities shall not include any securities that may be converted into or are exchangeable for the subject securities.

5. For purposes of exchange offers, the calculation of U. S. holders shall be made as of the end of the subject issuer's last quarter or, if such quarter terminated within 60 days of the filing date, as of the end of such issuer's preceding quarter.

(h) In the case of a business combination, Form F–8 is available if:

(1) Each company participating in the business combination, including the successor registrant, is incorporated or organized under the laws of Canada or any Canadian province or territory and is a foreign private issuer;

(2) Each company participating in the business combination other than the successor registrant has had a class of its securities listed on The Montreal Exchange, The Toronto Stock Exchange or the Senior Board of the Vancouver Stock Exchange for the 12 calendar months immediately preceding the filing of this Form, has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 36 calendar months immediately preceding the filing of this Form, and is currently in compliance with obligations arising from such listing and reporting; *provided, however,* that any such participating company shall not be required to meet such 36-month reporting requirement or 12-month listing requirement if other participating companies whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of the participating companies' most recently completed fiscal years, each meet such reporting and listing requirements; and

(3) The aggregate market value of the public float of the outstanding equity shares of each company participating in the business combination other than the successor registrant is (CN) $75 million or more; *provided, however,* that any such participating company shall not be required to meet such public float requirement if other participating companies whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of the participating companies' most recently completed fiscal years, each meet such public float requirement; and, *provided further,* that such public float requirement shall be deemed satisfied in the case of a participating company whose equity shares were the subject of an exchange offer that was registered or would have been eligible for registration on Form F–8, Form F–9, Form F–10 or Form F–

80, or a tender offer in connection with which Schedule 13E–4F or 14D–1F was filed or could have been filed, that terminated within the last twelve months, if the participating company would have satisfied such public float requirement immediately prior to commencement of such exchange or tender offer.

(i) In the case of a business combination, less than 25 percent of the class of securities to be offered by the successor registrant shall be held by U.S. holders as if measured immediately after completion of the business combination.

Instructions: 1. For purposes of business combinations, the term ''U.S. holder'' shall mean any person whose address appears on the records of a participating company, any voting trustee, any depositary, any share transfer agent or any person acting in a similar capacity on behalf of a participating company as being located in the United States.

2. For purposes of business combinations, the calculation of U.S. holders shall be made by a participant as of the end of such participant's last quarter or, if such quarter terminated within 60 days of the filing date, as of the end of such participant's preceding quarter.

(j) In the case of a business combination, the securities to be registered on this Form shall be offered to U.S. holders upon terms and conditions not less favorable than those offered to any other holder of the same class of such securities of the participating company.

(k) This Form shall not be used if the registrant or, in the case of an exchange offer, the issuer of the subject securities, is an investment company registered or required to be registered under the Investment Company Act of 1940.

(l) Registrants and any non-U.S. person acting as trustee with respect to the securities being registered shall each file a Form F–X (§ 239.42 of this chapter) with the Commission at the time of filing this Form.

[56 FR 30061, July 1, 1991]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form F–8, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.39 Form F–9, for registration under the Securities Act of 1933 of certain investment grade debt or investment grade preferred securities of certain Canadian issuers.

(a) Form F–9 may be used for the registration under the Securities Act of 1933 (the ''Securities Act'') of investment grade debt or investment grade preferred securities that are:

(1) Offered for cash or in connection with an exchange offer; and

(2) Either non-convertible or not convertible for a period of at least one year from the date of issuance and, except as noted in paragraph (e) of this section, are thereafter only convertible into a security of another class of the issuer.

Instruction: Securities shall be ''investment grade'' if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in relation to Rule 15c3–1(c)(2)(vi)(F) under the Securities Exchange Act of 1934 (the ''Exchange Act'') (§ 240.15c3–1(c)(2)(vi)(F) of this chapter)) or at least one Approved Rating Organization (as defined in National Policy Statement No. 45 of the Canadian Securities Administrators, as the same may be amended from time to time) has rated the security in one of its generic rating categories that signifies investment grade; typically the four highest rating categories (within which there may be subcategories or gradations indicating relative standing) signify investment grade.

(b) Form F–9 is available to any registrant that:

(1) Is incorporated or organized under the laws of Canada or any Canadian province or territory;

(2) Is a foreign private issuer or a crown corporation;

(3) Has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 12 calendar months immediately preceding the filing of this Form, and is currently in compliance with such obligations; and

(4) Has an aggregate market value of the public float of its outstanding equity shares of $75 million or more; *provided, however,* that the requirement set forth in this paragraph (b)(4) shall not apply if the securities being registered on this Form are not convertible into another security.

Instructions: 1. For purposes of this Form, ''foreign private issuer'' shall be construed in accordance with rule 405 under the Securities Act.

2. For purposes of this Form, the term ''crown corporation'' shall mean a corporation all of whose common shares or comparable equity is owned directly or indirectly by the Government of Canada or a Province or Territory of Canada.

3. For purposes of this Form, the ''public float'' of specified securities shall mean only such securities held by persons other than affiliates of the issuer.

4. For purposes of this Form, an ''affiliate'' of a person is anyone who beneficially owns, directly or indirectly, or exercises control or direction over, more than 10 percent of the outstanding equity shares of such person. The determination of a person's affiliates shall be made as of the end of such person's most recently completed fiscal year.

5. For purposes of this Form, ''equity shares'' shall mean common shares, non-voting equity shares and subordinate or restricted voting equity shares, but shall not include preferred shares.

6. For purposes of this Form, the market value of outstanding equity shares (whether or not held by affiliates) shall be computed by use of the price at which such shares were last sold, or the average of the bid and asked prices of such shares, in the principal market for such shares as of a date within 60 days prior to the date of filing. If there is no market for any of such securities, the book value of such securities computed as of the latest practicable date prior to the filing of this Form shall be used for purposes of calculating the market value, unless the issuer of such securities is in bankruptcy or receivership or has an accumulated capital deficit, in which case one-third of the principal amount, par value or stated value of such securities shall be used.

(c) In the case of an exchange offer, the securities to be registered on this Form shall be offered to U.S. holders upon terms and conditions not less favorable than those offered to any other holder of the same class of the securities to be exchanged (the ''subject securities'') for the securities of the registrant.

(d) In the case of an exchange offer, the issuer of the subject securities shall be incorporated or organized under the laws of Canada or any Canadian province or territory and be a foreign private issuer or a crown corporation.

Instructions: 1. For purposes of this Form, the term ''U.S. holder'' shall mean any person whose address appears on the records of the issuer of the subject securities, any voting trustee, any depositary, any share transfer agent or any person acting in a similar capacity on behalf of the issuer of the subject securities as being located in the United States.

2. For purposes of this Form, the class of subject securities shall not include any securities that may be converted into or are exchangeable for the subject securities.

(e) If the registrant is a majority-owned subsidiary offering debt securities or preferred securities, it shall be deemed to meet the requirements of paragraphs (b)(3) and (b)(4) of this section if the parent of the registrant-subsidiary meets the requirements of paragraph (b) of this section, as applicable, and fully and unconditionally guarantees the securities being registered as to principal and interest (if debt securities) or as to liquidation preference, redemption price and dividends (if preferred securities); *provided, however,* that the securities of the subsidiary are only convertible or exchangeable, if at all, for the securities of the parent.

(f) If the registrant is a successor registrant subsisting after a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of shareholders of the participating companies (a ''business combination''), the registrant shall be deemed to meet the 12-month reporting requirement of paragraph (b)(3) of this section if:

(1) The time the successor registrant has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada, when added separately to the time each predecessor had been subject to such requirements at the time of the business combination, in each case equals at least 12 calendar months, *provided, however,* that any predecessor need not be considered for purposes of the reporting history calculation if the reporting histories of predecessors whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of such participating companies' most recently completed fiscal years immediately prior to the business combination, when

combined with the reporting history of the successor registrant in each case satisfy such 12-month reporting requirement; and

(2) The successor registrant has been subject to such continuous disclosure requirements since the business combination, and is currently in compliance with its obligations thereunder.

(g) This Form shall not be used for registration of securities if no takeover bid circular or issuer bid circular (in the case of an exchange offer) or prospectus (in all other cases) is prepared pursuant to the requirements of any Canadian jurisdiction due to the availability of an exemption from such requirements.

(h) This Form shall not be used if the registrant or, in the case of an exchange offer, the issuer of the subject securities is an investment company registered or required to be registered under the Investment Company Act of 1940.

(i) Registrants and any non-U.S. person acting as trustee with respect to the securities being registered shall each file a Form F–X (§ 239.42 of this chapter) with the Commission at the time of filing this Form.

[56 FR 30063, July 1, 1991, as amended at 58 FR 62030, Nov. 23, 1993; 59 FR 243, Jan. 4, 1994]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form F–9, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.40 Form F–10, for registration under the Securities Act of 1933 of securities of certain Canadian issuers.

(a) Form F–10 may be used for the registration of securities under the Securities Act of 1933 (the ''Securities Act''), including securities to be issued in an exchange offer or in connection with a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of shareholders of the participating companies (a ''business combination'').

(b) This Form may not be used for registration of derivative securities except:

(1) Warrants, options and rights, provided that such securities and the underlying securities to which they relate are issued by the registrant, its parent or an affiliate of either; and

(2) Convertible securities, provided that such securities are convertible only into securities of the registrant, its parent or an affiliate of either.

Instruction: For purposes of this Form, an ''affiliate'' of a person is anyone who beneficially owns, directly or indirectly, or exercises control or direction over, more than 10 percent of the outstanding equity shares of such person. The determination of a person's affiliates shall be made as of the end of such person's most recently completed fiscal year.

(c) Form F–10 is available to any registrant that:

(1) Is incorporated or organized under the laws of Canada or any Canadian province or territory;

(2) Is a foreign private issuer;

(3) Has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 12 calendar months immediately preceding the filing of this Form, and is currently in compliance with such obligations, *provided, however,* that in the case of a business combination, each participating company other than the successor registrant must meet such 12-month reporting obligation, except that any such participating company shall not be required to meet such reporting requirement if other participating companies whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of the participating companies' most recently completed fiscal years, each meet such reporting requirement; and

(4) Has an aggregate market value of the public float of its outstanding equity shares of $75 million or more; *provided, however,* that in the case of a business combination, the aggregate market value of the public float of the outstanding equity shares of each participating company other than the successor registrant is $75 million or more, except that any such participating company shall not be required to meet such public float requirement if other participating companies whose assets and gross revenues, respectively, would

contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of the participating companies' most recently completed fiscal years, each meet such public float requirement; and *provided, further,* that in the case of a business combination, such public float requirement shall be deemed satisfied in the case of a participating company whose equity shares were the subject of an exchange offer that was registered or would have been eligible for registration on Form F–8, Form F–9, Form F–10 or Form F–80 (§§ 239.38, 239.39, 239.40 or 239.41) or a tender offer in connection with which Schedule 13E–4F or 14D–1F (§§ 240.13e–102 or 240.14d–102 of this chapter) was filed or could have been filed, that terminated within the last twelve months, if the participating company would have satisfied such public float requirement immediately prior to commencement of such exchange or tender offer.

Instructions: 1. For purposes of this Form, ''foreign private issuer'' shall be construed in accordance with rule 405 under the Securities Act.

2. For purposes of this Form, the ''public float'' of specified securities shall mean only such securities held by persons other than affiliates of the issuer.

3. For purposes of this Form, ''equity shares'' shall mean common shares, non-voting equity shares and subordinate or restricted voting equity shares, but shall not include preferred shares.

4. For purposes of this Form, the market value of outstanding equity shares (whether or not held by affiliates) shall be computed by use of the price at which such shares were last sold, or the average of the bid and asked prices of such shares, in the principal market for such shares as of a date within 60 days prior to the date of filing. If there is no market for any of such securities, the book value of such securities computed as of the latest practicable date prior to the filing of this Form shall be used for purposes of calculating the market value, unless the issuer of such securities is in bankruptcy or receivership or has an accumulated capital deficit, in which case one-third of the principal amount, par value or stated value of such securities shall be used.

(d) In the case of an exchange offer, the issuer of the securities to be exchanged (the ''subject securities'') for securities of the registrant shall be incorporated or organized under the laws of Canada or any Canadian province or territory and be a foreign private issuer.

(e) In the case of a business combination, each participating company shall be incorporated or organized under the laws of Canada or any Canadian province or territory and be a foreign private issuer.

(f) In the case of an exchange offer, the securities to be registered on this Form shall be offered to U.S. holders upon terms and conditions not less favorable than those offered to any other holder of the same class of the subject securities.

(g) In the case of a business combination, the securities to be registered on this Form shall be offered to U.S. holders upon terms and conditions not less favorable than those offered to any other holder of the same class of such securities of the participating company.

Instructions: 1. For purposes of exchange offers, the term ''U.S. holder'' shall mean any person whose address appears on the records of the issuer of the subject securities, any voting trustee, any depositary, any share transfer agent or any person acting in a similar capacity on behalf of the issuer of the subject securities as being located in the United States.

2. For purposes of business combinations, the term ''U.S. holder'' shall mean any person whose address appears on the records of a participating company, any voting trustee, any depositary, any share transfer agent or any person acting in a similar capacity on behalf of a participating company as being located in the United States.

3. For purposes of this Form, the class of subject securities shall not include any securities that may be converted into or are exchangeable for the subject securities.

(h) With respect to registration of debt securities or preferred securities on this Form, if the registrant is a majority-owned subsidiary, it shall be deemed to meet the requirements of paragraphs (c)(3) and (c)(4) of this section if the parent of the registrant-subsidiary meets the requirements of paragraph (c) of this section and fully and unconditionally guarantees the securities being registered as to principal and interest (if debt securities) or as to liquidation preference, redemption price and dividends (if preferred shares); *provided, however,* that the securities of the subsidiary are only convertible or

exchangeable, if at all, for the securities of the parent.

(i) If the registrant is a successor registrant subsisting after a business combination, it shall be deemed to meet the 12-month reporting requirement of paragraph (c)(3) of this section if:

(1) The time the successor registrant has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada, when added separately to the time each predecessor had been subject to such requirements at the time of the business combination, in each case equals at least 12 calendar months, *provided, however,* that any predecessor need not be considered for purposes of the reporting history calculation if the reporting histories of predecessors whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of such participating companies' most recently completed fiscal years immediately prior to the business combination, when combined with the reporting history of the successor registrant in each case satisfy such 12-month reporting requirement; and

(2) The successor registrant has been subject to such continuous disclosure requirements since the business combination, and is currently in compliance with its obligations thereunder.

(j) This Form shall not be used for registration of securities if no takeover bid circular or issuer bid circular (in the case of an exchange offer) or information circular (in the case of a business combination) or prospectus (in all other cases) is prepared pursuant to the requirements of any Canadian jurisdiction due to the availability of an exemption from such requirements.

(k) This Form shall not be used if the registrant or, in the case of an exchange offer, the issuer of the subject securities is an investment company registered or required to be registered under the Investment Company Act of 1940.

(l) Registrants and any non-U.S. person acting as trustee with respect to the securities being registered shall each file a Form F–X (§ 239.42 of this chapter) with the Commission at the time of filing this Form.

[56 FR 30064, July 1, 1991, as amended at 58 FR 62030, Nov. 23, 1993]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form F–10, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.41 Form F–80, for registration under the Securities Act of 1933 of securities of certain Canadian issuers to be issued in exchange offers or a business combination.

(a) Form F–80 may be used for registration under the Securities Act of 1933 (''Securities Act'') of securities to be issued in an exchange offer or in connection with a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of shareholders of the participating companies (a ''business combination''). Securities may be registered on this Form whether they constitute the sole consideration for such exchange offer or business combination, or are offered in conjunction with cash.

(b) This Form shall not be used for registration of securities if no takeover bid circular or issuer bid circular (in the case of an exchange offer) or information circular (in the case of a business combination) is prepared pursuant to the requirements of any Canadian jurisdiction due to the availability of an exemption from such requirements.

(c) This Form may not be used for registration of derivative securities except:

(1) Warrants, options and rights, provided that such securities and the underlying securities to which they relate are issued by the registrant, its parent or an affiliate of either; and

(2) Convertible securities, provided that such securities are convertible only into securities of the registrant, its parent or an affiliate of either.

Instruction: For purposes of this Form, an ''affiliate'' of a person is anyone who beneficially owns, directly or indirectly, or exercises control or direction over, more than 10 percent of the outstanding equity shares of such person. The determination of a person's affiliates shall be made as of the end of such person's most recently completed fiscal year.

(d) In the case of an exchange offer, Form F–80 is available to any registrant that:

(1) Is incorporated or organized under the laws of Canada or any Canadian province or territory;

(2) Is a foreign private issuer;

(3) Has had a class of its securities listed on The Montreal Exchange, The Toronto Stock Exchange or the Senior Board of the Vancouver Stock Exchange for the 12 calendar months immediately preceding the filing of this Form, has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 36 calendar months immediately preceding the filing of this Form, and is currently in compliance with obligations arising from such listing and reporting; and

(4) Has an aggregate market value of the public float of its outstanding equity shares of (CN) $75 million or more; *provided, however,* that such public float requirement need not be satisfied if the issuer of the securities to be exchanged is also the registrant on this Form.

Instructions: 1. For purposes of this Form, ''foreign private issuer'' shall be construed in accordance with Rule 405 under the Securities Act.

2. For purposes of this Form, ''equity shares'' shall mean common shares, non-voting equity shares and subordinate or restricted voting equity shares, but shall not include preferred shares.

3. For purposes of this Form, the ''public float'' of specified securities shall mean only such securities held by persons other than affiliates of the issuer.

4. For purposes of this Form, the market value of the public float of outstanding equity shares shall be computed by use of the price at which such shares were last sold, or the average of the bid and asked prices of such shares, in the principal market for such shares as of a date within 60 days prior to the date of filing. If there is no market for any of such securities, the book value of such securities computed as of the latest practicable date prior to the filing of this Form shall be used for purposes of calculating the market value, unless the issuer of such securities is in bankruptcy or receivership or has an accumulated capital deficit, in which case one-third of the principal amount, par value or stated value of such securities shall be used.

(e) In the case of an exchange offer, the securities to be registered on this Form shall be offered to U. S. holders upon terms and conditions not less favorable than those offered to any other holder of the same class of the securities to be exchanged (the ''subject securities'') for the securities of the registrant.

(f) In the case of an exchange offer, if the registrant is a successor registrant subsisting after a business combination, the registrant shall be deemed to meet the 36-month reporting requirement and the 12-month listing requirement of paragraph (d) (3) of this section if:

(1) The time the successor registrant has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada, when added separately to the time each predecessor had been subject to such requirements at the time of the business combination, in each case equals at least 36 calendar months, *provided, however,* that any predecessor need not be considered for purposes of the reporting history calculation if the reporting histories of predecessors whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of such participating companies' most recently completed fiscal years immediately prior to the business combination, when combined with the reporting history of the successor registrant in each case satisfy such 36-month reporting requirement;

(2) The time the successor registrant has been subject to the listing requirements of the specified exchanges, when added separately to the time each predecessor had been subject to such requirements at the time of the business combination, in each case equals at least 12 calendar months, *provided, however,* that any predecessor need not be considered for purposes of the listing history calculation if the listing histories of predecessors whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from

continuing operations of the successor registrant, as measured based on pro forma combination of such participating companies' most recently completed fiscal years immediately prior to the business combination, when combined with the listing history of the successor registrant in each case satisfy such 12-month listing requirement; and

(3) The successor registrant has been subject to such continuous disclosure requirements and listing requirements since the business combination, and is currently in compliance with its obligations thereunder.

(g) In the case of an exchange offer, the issuer of the subject securities shall be incorporated or organized under the laws of Canada or any Canadian province or territory and be a foreign private issuer, and less than 40 percent of the class of subject securities outstanding shall be held by U.S. holders.

Instructions: 1. For purposes of exchange offers, the term ''U.S. holder'' shall mean any person whose address appears on the records of the issuer of the subject securities, any voting trustee, any depositary, any share transfer agent or any person acting in a similar capacity on behalf of the issuer of the subject securities as being located in the United States.

2. With respect to any tender offer, including any exchange offer, otherwise eligible to proceed in accordance with Rule 14d–1(b) under the Securities Exchange Act of 1934 (the ''Exchange Act''), the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold less than 40 percent of such outstanding securities, unless (a) the aggregate trading volume of that class on national securities exchanges in the United States and on NASDAQ exceeded its aggregate trading volume on securities exchanges in Canada and on the Canadian Dealing Network, Inc. (''CDN'') over the 12 calendar month period prior to commencement of this offer, or if commenced in response to a prior offer, over the 12 calendar month period prior to commencement of the initial offer (based on volume figures published by such exchanges and NASDAQ and CDN); (b) the most recent annual report or annual information form filed or submitted by the issuer with securities regulators of Ontario, Quebec, British Columbia or Alberta (or, if the issuer of the subject securities is not a reporting issuer in any of such provinces, with any other Canadian securities regulator) or with the Commission indicates that U.S. holders hold 40 percent or more of the outstanding subject class of securities; or (c) the offeror has actual knowledge that the level of U.S. ownership equals or exceeds 40 percent of such securities.

3. For purposes of this Form, if this Form is filed during the pendency of one or more ongoing cash tender or exchange offers for securities of the class subject to the offer that was commenced or was eligible to be commenced on Schedule 13E–4F, Schedule 14D–1F, and/or Form F–8 or Form F–80, the date for calculation of U.S. ownership shall be the same as that date used by the initial bidder or issuer.

4. For purposes of this Form, the class of subject securities shall not include any securities that may be converted into or are exchangeable for the subject securities.

5. For purposes of exchange offers, the calculation of U.S. holders shall be made as of the end of the subject issuer's last quarter or, if such quarter terminated within 60 days of the filing date, as of the end of such issuer's preceding quarter.

(h) In the case of a business combination, Form F–80 is available if:

(1) Each company participating in the business combination, including the successor registrant, is incorporated or organized under the laws of Canada or any Canadian province or territory and is a foreign private issuer;

(2) Each company participating in the business combination other than the successor registrant has had a class of its securities listed on The Montreal Exchange, The Toronto Stock Exchange or the Senior Board of the Vancouver Stock Exchange for the 12 calendar months immediately preceding the filing of this Form, has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 36 calendar months immediately preceding the filing of this Form, and is currently in compliance with obligations arising from such listing and reporting; *provided, however,* that any such participating company shall not be required to meet such 36-month reporting requirement or 12-month listing requirement if other participating companies whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of the

participating companies' most recently completed fiscal years, each meet such reporting and listing requirements; and

(3) The aggregate market value of the public float of the outstanding equity shares of each company participating in the business combination other than the successor registrant is (CN) $75 million or more; *provided, however,* that any such participating company shall not be required to meet such public float requirement if other participating companies whose assets and gross revenues, respectively, would contribute at least 80 percent of the total assets and gross revenues from continuing operations of the successor registrant, as measured based on pro forma combination of the participating companies' most recently completed fiscal years, each meet such public float requirement; and, *provided further,* that such public float requirement shall be deemed satisfied in the case of a participating company whose equity shares were the subject of an exchange offer that was registered or would have been eligible for registration on Form F–8, Form F–9, Form F–10 or Form F–80, or a tender offer in connection with which Schedule 13E–4F or 14D–1F was filed or could have been filed, that terminated within the last twelve months, if the participating company would have satisfied such public float requirement immediately prior to commencement of such exchange or tender offer.

(i) In the case of a business combination, less than 40 percent of the class of securities to be offered by the successor registrant shall be held by U.S. holders, as if measured immediately after completion of the business combination.

Instructions: 1. For purposes of business combinations, the term ''U.S. holder'' shall mean any person whose address appears on the records of a participating company, any voting trustee, any depositary, any share transfer agent or any person acting in a similar capacity on behalf of a participating company as being located in the United States.

2. For purposes of business combinations, the calculation of U.S. holders shall be made by a participant as of the end of such participant's last quarter or, if such quarter terminated within 60 days of the filing date, as of the end of such participant's preceding quarter.

(j) In the case of a business combination, the securities to be registered on this Form shall be offered to U.S. holders upon terms and conditions not less favorable than those offered to any other holder of the same class of such securities of the participating company.

(k) This Form shall not be used if the registrant or, in the case of an exchange offer, the issuer of the subject securities is an investment company registered or required to be registered under the Investment Company Act of 1940.

(l) Registrants and any non-U.S. person acting as trustee with respect to the securities being registered shall each file a Form F–X (§ 239.42 of this chapter) with the Commission at the time of filing this Form.

[56 FR 30065, July 1, 1991]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form F–80, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.42 Form F–X, for appointment of agent for service of process and undertaking for issuers registering securities on Form F–8, F–9, F–10, or F–80 (§§ 239.38, 239.39, 239.40, or 239.41 of this chapter) or registering securities or filing periodic reports on Form 40–F (§ 249.240f of this chapter), or by any issuer or other non-U.S. person filing tender offer documents on Schedule 13E–4F, 14D–1F or 14D–9F (§§ 240.13e–102, 240.14d–102 or 240.14d–103 of this chapter), by any non-U.S. person acting as trustee with respect to securities registered on Form F–7 (§ 239.37 of this chapter), F–8, F–9, F–10, F–80 or SB–2 (§ 239.10 of this chapter), or by a Canadian issuer qualifying an offering statement pursuant to Regulation A (§ 230.251 et seq.) on Form 1–A (§ 239.90 of this chapter), or registering securities on Form SB–2, or by any non-U.S. issuer providing Form CB to the Commission in connection with a tender offer, rights offering or business combination.

Form F–X shall be filed with the Commission:

(a) By any issuer registering securities on Form F–8, F–9, F–10, F–80 or SB–2 under the Securities Act of 1933;

(b) By any issuer registering securities on Form 40–F under the Securities Exchange Act of 1934;

(c) By any issuer filing a periodic report on Form 40–F, if it has not previously filed a Form F–X in connection with the class of securities in relation to which the obligation to file a report on Form 40–F arises;

(d) By any issuer or other non-U.S. person filing tender offer documents on Schedule 13E–4F, 14D–1F or 14D–9F;

(e) By any non-U.S. person acting as trustee with respect to securities registered on Form F–7, F–8, F–9, F–10 or F–80;

(f) By a Canadian issuer qualifying an offering statement pursuant to the provisions of Regulation A, or registering securities on Form SB–2; and

(g) By any non-U.S. issuer providing Form CB to the Commission in connection with a tender offer, rights offering or business combination.

[56 FR 30067, July 1, 1991, as amended at 57 FR 36475, Aug. 13, 1992; 64 FR 61402, Nov. 10, 1999]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form F–X, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.43 Form F–N, appointment of agent for service of process by foreign banks and foreign insurance companies and certain of their holding companies and finance subsidiaries making public offerings of securities in the United States.

Form F–N shall be filed with the Commission in connection with the filing of a registration statement under the Act by those entities specified in rule 489 (17 CFR 230.489).

[56 FR 56299, Nov. 4, 1991]

§§ 239.44–239.61 [Reserved]

§ 239.62 Form ET, transmittal form for electronic format documents on magnetic tape or diskette to be filed on the EDGAR system.

This form shall accompany electronic filings submitted on magnetic tape or diskette under the EDGAR system.

[57 FR 18218, Apr. 29, 1992]

EDITORIAL NOTE: For FEDERAL REGISTER Citations affecting Form ET, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.63 Form ID, uniform application for access codes to file on EDGAR.

(a) Form ID is to be used by registrants, third party filers, or their agents for the purpose of requesting assignment of access codes to permit filing on EDGAR, as follows:

(1) Central Index Key (CIK)—uniquely identifies each filer, filing agent, and training agent.

(2) CIK Confirmation Code (CCC)—used in the header of a filing in conjunction with the CIK of the filer to ensure that the filing has been authorized by the filer.

(3) Password (PW)—allows a filer, filing agent or training agent to log on to the EDGAR system, submit filings, and change its CCC.

(4) Password Modification Authorization Code (PMAC)—allows a filer, filing agent or training agent to change its Password.

(b) Form ID also may be used or the purpose of requesting a reassignment of their CCC, PW and PMAC.

[57 FR 18218, Apr. 29, 1992]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form ID, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.64 Form SE, form for submission of paper format exhibits by electronic filers.

This form shall be used by an electronic filer for the submission of any paper format document relating to an otherwise electronic filing, as provided in Rule 311 of Regulation S–T (§ 232.311 of this chapter).

[58 FR 14682, Mar. 18, 1993]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form SE, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.65 Form TH—Notification of reliance on temporary hardship exemption.

Form TH shall be filed by any electronic filer who submits to the Commission, pursuant to a temporary hardship exemption, a document in paper format that otherwise would be required to be submitted electronically, as prescribed by Rule 201(a) of Regulation S–T (§ 232.201(a) of this chapter).

[58 FR 14682, Mar. 18, 1993]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form TH, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

Subpart B—Forms Pertaining to Exemptions

§ 239.90 Form 1–A, offering statement under Regulation A.

This form shall be used for filing under Regulation A (§§ 230.251–230.263 of this chapter).

[57 FR 36476, Aug. 13, 1992]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form 1–A, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.91 Form 2–A, report pursuant to Rule 257 of Regulation A.

This form shall be used for reports of sales and use of proceeds pursuant to Rule 257 of Regulation A (§ 230.257 of this chapter).

[57 FR 36476, Aug. 13, 1992]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form 2–A, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§§ 239.92–239.143 [Reserved]

§ 239.144 Form 144, for notice of proposed sale of securities pursuant to § 230.144 of this chapter.

(a) Except as indicated in paragraph (b) of this section, this form shall be filed in triplicate with the Commission at its principal office in Washington, DC, by each person who intends to sell securities in reliance upon § 230.144 of this chapter and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities or the execution directly with a market maker of a sale of securities.

(b) This form need not be filed if the amount of securities to be sold during any period of 3 months does not exceed 500 shares or other units and the aggregate sale price thereof does not exceed $10,000.

(c) Under sections 2(11), 4(1), 4(2), 4(4) and 19(a) of the Securities Act of 1933 (17 CFR 230) and Rule 144 thereunder, the Commission is authorized to solicit the information required to be supplied by this form by persons desiring to sell unregistered securities. Disclosure of the information specified in this form is mandatory before processing notices of proposed sale of securities under § 230.144 of this chapter. The information will be used for the primary purpose of disclosing the proposed sale of unregistered securities by persons deemed not to be engaged in the distribution of securities. This notice will be made a matter of public record. Therefore, any information given will be available for inspection by any member of the public. Because of the public nature of the information, the Commission can utilize it for a variety of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statutes or provisions. Social security account numbers, if furnished, will assist the Commission in identifying persons desiring to sell unregistered securities and, therefore, in promptly processing notices of proposed sale of securities. Failure to disclose the information requested by Form 144 would make an exception under § 230.144 of this chapter unavailable and may result in civil or criminal action for violations of the Federal securities laws.

[37 FR 4329, Mar. 2, 1972, as amended at 40 FR 55319, Nov. 28, 1975; 43 FR 5423, Nov. 21, 1978; 62 FR 35340, July 1, 1997]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form 144, see the List of CFR Sections Affected, which appears in the

Finding Aids section of the printed volume and on GPO Access.

§§ 239.145–239.199 [Reserved]

§ 239.200 Form 1–E, notification under Regulation E.

This form shall be used for notification pursuant to Rule 604 (§ 230.604 of this chapter) of Regulation E (§§ 230.601–230.610a of this chapter) by a small business investment company or business development company described in Rule 602 (§ 230.602 of this chapter).

(Secs 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a–37))

[49 FR 35347, Sept. 7, 1984]

EDITORIAL NOTE: For FEDERAL REGISTER citations Form 1–E, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.201 Form 2–E, report of sales pursuant to Rule 609 of Regulation E.

This form shall be used for report of sales of securities under Regulation E (§§ 230.601—230.610a of this chapter) by a small business investment company described in Rule 602 (§ 230.602 of this chapter) as required by Rule 609 of Regulation E (§ 230.609 of this chapter).

§§ 239.202–239.300 [Reserved]

§ 239.500 Form D, notice of sales of securities under Regulation D and section 4(6) of the Securities Act of 1933.

(a) Five copies of a notice on this form shall be filed with the Commission no later than 15 days after the first sale of securities in an offering under Regulation D (§ 230.501—§ 230.508 of this chapter) or under section 4(6) of the Securities Act of 1933.

(b) One copy of every notice on Form D shall be manually signed by a person duly authorized by the issuer.

(c) When sales are made under § 230.505, the notice shall contain an undertaking by the issuer to furnish to the Commission, upon the written request of its staff, the information furnished to non-accredited investors.

(d) Amendments to notices filed under paragraph (a) need only report the issuer's name and the information required by Part C and any material change in the facts from those set forth in Parts A and B.

(e) A notice on Form D shall be considered filed with the Commission under paragraph (a) of this section:

(1) As of the date on which it is received at the Commission's principal office in Washington DC; or

(2) As of the date on which the notice is mailed by means of United States registered or certified mail to the Commission's principal office in Washington, DC, if the notice is delivered to such office after the date on which it is required to be filed.

[54 FR 11374, Mar. 20, 1989]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form D, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 239.701 [Reserved]

§ 239.800 Form CB, report of sales of securities in connection with an exchange offer or a rights offering.

This Form is used to report sales of securities in connection with a rights offering in reliance upon § 230.801 of this chapter and to report sales of securities in connection with an exchange offer or business combination in reliance upon § 230.802 of this chapter.

[64 FR 61403, Nov. 10, 1999]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form CB, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.