

Securities and Exchange Commission

Pt. 270

as prescribed by Rule 201(a) of Regulation S-T (§232.201(a) of this chapter).

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AUTHORITY: 15 U.S.C. 80a-1 *et seq.*, 80a-34(d), 80a-37, and 80a-39, unless otherwise noted.

Section 270.0-1 also issued under sec. 38(a) (15 U.S.C. 80a-37(a));

Section 270.0-11 also issued under secs. 8, 24, 30 and 38, Investment Company Act (15 U.S.C. 80a-8, 80a-24, 80a-29 and 80a-37), secs. 6, 7, 8, 10 and 19(a), Securities Act (15 U.S.C. 77f, 77g, 77h, 77j, 77s(a)) and secs. 3(b), 12, 13, 14, 15(d) and 23(a), Exchange Act (15 U.S.C. 78c(b), 78l, 78m, 78n, 78o(d) and 78w(a));

Section 270.6c-9 is also issued under secs. 6(c) (15 U.S.C. 80a-6(c)) and 38(a) (15 U.S.C. 80a-37(a));

Section 270.6c-10 is also issued under sec. 6(c) (15 U.S.C. 80a-6(c));

Section 270.6e-3(T) is also issued under sec. 6(e), 15 U.S.C. 80a-5(e);

Section 270.8b-11 is also issued under 15 U.S.C. 77s, 80a-8, and 80a-37;

Section 270.10e-1 is also issued under 15 U.S.C. 80a-10(e);

Section 270.12d1-1 is also issued under secs. 6(c) (15 U.S.C. 80a-6(c)) and 38(a) (15 U.S.C. 80a-37(a));

Section 270.12d3-1 is also issued under 15 U.S.C. 80a-6(c);

Section 270.17a-8 is also issued under 15 U.S.C. 80a-6(c) and 80a-37(a);

Section 270.17d-1 is also issued under 15 U.S.C. 80a-6(c), 80a-17(d), and 80a-37(a);

Section 270.17e-1 is also issued under 15 U.S.C. 80a-6(c), 80a-30(a), and 80a-37(a);

Section 270.17f-5 also issued under sec. 6(c) (15 U.S.C. 80a-6(c));

Section 270.17g-1 is also issued under 15 U.S.C. 80a-6(c), 80a-17(d), 80a-17(g), and 80a-37(a);

Section 270.17j-1 is also issued under secs. 206(4) and 211(a), Investment Advisers Act (15 U.S.C. 80b-6(4) and 80b-11(a));

Section 270.19b-1 is also issued under secs. 6(c) (15 U.S.C. 80a-6(c)), 19 (a) and (b) (15 U.S.C. 80a-19 (a) and (b)), and 38(a) (15 U.S.C. 80a-37(a));

Section 270.22c-1 also issued under secs. 6(c), 22(c), and 38(a) (15 U.S.C. 80a-6(c), 80a-22(c), and 80a-37(a));

Section 270.23c-3 also issued under 15 U.S.C. 80a-23(c).

Section 270.24f-2 also issued under 15 U.S.C. 80a-24(f)(4).

Section 270.30a-1 is also issued under 15 U.S.C. 78m, 78o(d), 80a-8, and 80a-29.

Section 270.30a-2 is also issued under 15 U.S.C. 78m, 78o(d), 80a-8, and 80a-29, and secs. 3(a) and 302, Pub. L. 107-204, 116 Stat. 745.

Section 270.30a-3 is also issued under 15 U.S.C. 78m, 78o(d), 80a-8, and 80a-29, and secs. 3(a) and 302, Pub. L. 107-204, 116 Stat. 745.

Section 270.30b1-1 is also issued under 15 U.S.C. 78m, 78o(d), 80a-8, and 80a-29.

Section 270.30b2-1 is also issued under 15 U.S.C. 78m, 78o(d), 80a-8, and 80a-29, and secs. 3(a) and 302, Pub. L. 107-204, 116 Stat. 745.

Section 270.30d-1 is also issued under 15 U.S.C. 78m, 78o(d), 80a-8, and 80a-29, and secs. 3(a) and 302, Pub. L. 107-204, 116 Stat. 745.

Section 270.30e-1 is also issued under 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78l, 78m, 78n, 78o(d), 78w(a), 80a-8, 80a-29, and 80a-37;

Section 270.31a-2 is also issued under 15 U.S.C. 80a-30.

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.

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§ 270.0-1

§ 270.0-1 Definition of terms used in this part.

(a) As used in the rules and regulations prescribed by the Commission pursuant to the Investment Company Act of 1940, unless the context otherwise requires:

(1) The term *Commission* means the Securities and Exchange Commission.

(2) The term *act* means the Investment Company Act of 1940.

(3) The term *section* refers to a section of the act.

(4) The terms *rule* and *regulations* refer to the rules and regulations adopted by the Commission pursuant to the Act, including the forms for registration and reports and the accompanying instructions thereto.

(5) The term *administrator* means any person who provides significant administrative or business affairs management services to an investment company.

(6)(i) A person is an *independent legal counsel* with respect to the directors who are not interested persons of an investment company ("disinterested directors") if:

(A) A majority of the disinterested directors reasonably determine in the exercise of their judgment (and record the basis for that determination in the minutes of their meeting) that any representation by the person of the company's investment adviser, principal underwriter, administrator ("management organizations"), or any of their control persons, since the beginning of the fund's last two completed fiscal years, is or was sufficiently limited that it is unlikely to adversely affect the professional judgment of the person in providing legal representation to the disinterested directors; and

(B) The disinterested directors have obtained an undertaking from such person to provide them with information necessary to make their determination and to update promptly that information when the person begins to represent, or materially increases his representation of, a management organization or control person.

(ii) The disinterested directors are entitled to rely on the information obtained from the person, unless they know or have reason to believe that the information is materially false or

incomplete. The disinterested directors must re-evaluate their determination no less frequently than annually (and record the basis accordingly), except as provided in paragraph (iii) of this section.

(iii) After the disinterested directors obtain information that the person has begun to represent, or has materially increased his representation of, a management organization (or any of its control persons), the person may continue to be an independent legal counsel, for purposes of paragraph (a)(6)(i) of this section, for no longer than three months unless during that period the disinterested directors make a new determination under that paragraph.

(iv) For purposes of paragraphs (a)(6)(i)-(iii) of this section:

(A) The term *person* has the same meaning as in section 2(a)(28) of the Act (15 U.S.C. 80a-2(a)(28)) and, in addition, includes a partner, co-member, or employee of any person; and

(B) The term *control person* means any person (other than an investment company) directly or indirectly controlling, controlled by, or under common control with any of the investment company's management organizations.

(b) Unless otherwise specifically provided, the terms used in the rules and regulations in this part shall have the meaning defined in the Act. The terms "EDGAR," "EDGAR Filer Manual," "electronic filer," "electronic filing," "electronic format," "electronic submission," "paper format," and "signature" shall have the meanings assigned to such terms in Regulation S-T—General Rules for Electronic Filings (Part 232 of this chapter).

(c) A rule or regulation which defines a term without express reference to the act or to the rules and regulations, or to a portion thereof, defines such terms for all purposes as used both in the act and in the rules and regulations in this part, unless the context otherwise requires.

(d) Unless otherwise specified or the context otherwise requires, the term "prospectus" means a prospectus meeting the requirements of section 10(a) of the Securities Act of 1933 as amended.

§ 270.0-2

(e) Definition of separate account and conditions for availability of exemption under §§ 270.6c-6, 270.6c-7, 270.6c-8, 270.11a-2, 270.14a-2, 270.15a-3, 270.16a-1, 270.22c-1, 270.22d-3, 270.22e-1, 270.26a-1, 270.26a-2, 270.27a-1, 270.27a-2, 270.27a-3, 270.27c-1, and 270.32a-2 of this chapter.

(1) As used in the rules and regulations prescribed by the Commission pursuant to the Investment Company Act of 1940, unless otherwise specified or the context otherwise requires, the term "separate account" shall mean an account established and maintained by an insurance company pursuant to the laws of any state or territory of the United States, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains or losses of the insurance company and the term "variable annuity contract" shall mean any accumulation or annuity contract, any portion thereof, or any unit of interest or participation therein pursuant to which the value of the contract, either prior or subsequent to annuitization, or both, varies according to the investment experience of the separate account in which the contract participates.

(2) As conditions to the availability of exemptive Rules 6c-6, 6c-7, 6c-8, 11a-2, 14a-2, 15a-3, 16a-1, 22c-1, 22d-3, 22e-1, 26a-1, 26a-2, 27a-1, 27a-2, 27a-3, 27c-1, and 32a-2, the separate account shall be legally segregated, the assets of the separate account shall, at the time during the year that adjustments in the reserves are made, have a value at least equal to the reserves and other contract liabilities with respect to such account, and at all other times, shall have a value approximately equal to or in excess of such reserves and liabilities; and that portion of such assets having a value equal to, or approximately equal to, such reserves and contract liabilities shall not be chargeable with liabilities arising out

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of any other business which the insurance company may conduct.

[Rule N-1, 5 FR 4316, Oct. 31, 1940, as amended at 19 FR 6730, Oct. 20, 1954; 30 FR 829, Jan. 27, 1965; 48 FR 36098, Aug. 9, 1983; 50 FR 42682, Oct. 22, 1985; 58 FR 14859, Mar. 18, 1993; 66 FR 3757, Jan. 16, 2001]

§ 270.0-2 General requirements of papers and applications.

(a) *Filing of papers.* All papers required to be filed with the Commission pursuant to the Act or the rules and regulations thereunder shall, unless otherwise provided by the rules and regulations in this part, be delivered through the mails or otherwise to the Securities and Exchange Commission, Washington, D.C. 20549. Except as otherwise provided by the rules and regulations, the date on which papers are actually received by the Commission shall be the date of filing thereof. If the last day for the timely filing of such papers falls on a Saturday, Sunday, or holiday, such papers may be filed on the first business day following.

(b) *Formal specifications respecting applications.* Every application for an order under any provision of the Act, for which a form with instructions is not specifically prescribed, and every amendment to such application shall be filed in quintuplicate. One copy shall be signed by the applicant but the other four copies may have facsimile or typed signatures. Such applications should be on paper no larger than 8½×11 inches in size. 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. The left margin should be at least 1½ inches wide and, if the application is bound, it should be bound on the left side. The application must be typed, printed, copied or prepared by any process which, in the opinion of the commission, produces copies suitable for microfilming. All typewritten or printed matter (including deficits in financial statements) should be set forth in black so as to permit photocopying. Every application for an order under any provision of the Act and every amendment to such application shall

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be submitted to the Commission in paper only, whether or not the applicant is otherwise required to file in electronic format, unless instructions for electronic filing are included on the form, if any, prescribed for such application.

(c) Authorizations respecting applications. (1) Every application for an order under any provision of the act, for which a form with instructions is not specifically prescribed and which is executed by a corporation, partnership, or other company and filed with the Commission, shall contain a concise statement of the applicable provisions of the articles of incorporation, bylaws, or similar documents, relating to the right of the person signing and filing such application to take such action on behalf of the applicant, and a statement that all such requirements have been complied with and that the person signing and filing the same is fully authorized to do so. If such authorization is dependent on resolutions of stockholders, directors, or other bodies, such resolutions shall be attached as an exhibit to, or the pertinent provisions thereof shall be quoted in, the application.

(2) If an amendment to any such application shall be filed, such amendment shall contain a similar statement or, in lieu thereof, shall state that the authorization described in the original application is applicable to the individual who signs such amendment and that such authorization still remains in effect.

(3) When any such application or amendment is signed by an agent or attorney, the power of attorney evidencing his authority to sign shall contain similar statements and shall be filed with the Commission.

(d) Verification of applications and statements of fact. Every application for an order under any provision of the act, for which a form with instructions is not specifically prescribed and every amendment to such application, and every statement of fact formally filed in support of, or in opposition to, any application or declaration shall be verified by the person executing the same. An instrument executed on behalf of a corporation shall be verified in substantially the following form,

but suitable changes may be made in such form for other kinds of companies and for individuals:

State of _____
County of _____, ss:

The undersigned being duly sworn deposes and says that he has duly executed the attached _____ dated _____, 19____ for and on behalf of _____ (Name of Company) that he is the _____ (Title of Officer) of such company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

(Signature)

(Type or print name beneath)

Subscribed and sworn to before me a _____ (Title of Officer) this _____ day of _____, 19____.

[OFFICIAL SEAL] _____

My commission expires _____

(e) Statement of grounds for application. Each application should contain a brief statement of the reasons why the applicant is deemed to be entitled to the action requested with a reference to the provisions of the act and of the rules and regulations under which application is made.

(f) Name and address. Every application shall contain the name and address of each applicant and the name and address of any person to whom any applicant wishes any question regarding the application to be directed.

(g) Proposed notice. A proposed notice of the proceeding initiated by the filing of the application shall accompany each application as an exhibit thereto and, if necessary, shall be modified to reflect any amendments to such application.

(h) 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 Investment Company Act of 1940, as amended, shall be numbered sequentially (in addition to any internal numbering which otherwise may be present) by handwritten, typed, printed, or other

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legible form of notation from the facing 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.

(15 U.S.C. 77s (48 Stat. 85); 15 U.S.C. 78w (48 Stat. 901); 15 U.S.C. 79c and 79t (49 Stat. 810, 833); 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss (53 Stat. 1154, 1156, 1167, 1173); 15 U.S.C. 80w-37, 80c-39 (54 Stat. 841, 342); 15 U.S.C. 80b-3, 80b-4, 80b-11 (54 Stat. 850, 852, 855); secs. 38, 40, 54 Stat. 841, 842 (15 U.S.C. 80a-37, 80c-89))

[Rule N-2, 5 FR 4316, Oct. 31, 1940, as amended at 33 FR 9391, June 27, 1968; 33 FR 23325, Aug. 29, 1973; 44 FR 4666, Jan. 23, 1979; 47 FR 58239, Dec. 30, 1982; 48 FR 17065, Apr. 21, 1983; 58 FR 14859, Mar. 18, 1993]

§ 270.0-3 Amendments to registration statements and reports.

Registration statements filed with the Commission pursuant to section 8 (54 Stat. 803; 15 U.S.C. 80a-8) and reports filed with the Commission pursuant to section 30 (54 Stat. 836; 15 U.S.C. 80a-35) may be amended in the following manner:

(a) Each amendment shall conform to the requirements for the registration statement or report it amends with regard to filing, number of copies filed, size, paper, ink, margins, binding, and similar formal matters.

(b) Each amendment to a particular statement or report shall have a facing sheet as follows:

SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

Amendment No. _____
to
Form _____
File No. _____
(Describe the nature of the statement or report)
Dated _____, 19____,
Pursuant to Section _____ of the Investment Company Act of 1940

Name of Registrant

Address of Principal Office of Registrant

The facing sheet shall contain in addition any other information required on the facing sheet of the form for the statement or report which is being amended. Amendments to a particular

statement or report which is being consecutively in the order in which filed with the Commission.

(c) Each amendment shall contain in the manner required in the original statement or report the text of every item to which it relates and shall set out a complete amended answer to each such item. However, amendments to financial statements may contain only the particular statements or schedules in fact amended.

(d) Each amendment shall have a signature sheet containing the form of signature required in the statement or report it amends.

(Secs. 8, 30, 54 Stat. 803, 74 Stat. 201; 15 U.S.C. 80a-8, 80a-29)

[Rule N-3, 6 FR 3966, Aug. 8, 1941, as amended at 33 FR 3217, Feb. 21, 1968]

§ 270.0-4 Incorporation by reference.

(a) A registered investment company may, subject to the limitations of §228.10(f) and §229.10(d) of this chapter, incorporate by reference as an exhibit, in any registration statement, application or report filed with the Commission, any document or part thereof previously or concurrently filed with the Commission pursuant to any act administered by the Commission. The incorporation may be made whether the matter incorporated was filed by such registered company or any other person. If any modification has occurred in the text of any such document since the filing thereof, the company shall file with the reference a statement containing the text of any such modification and the date thereof. If the number of copies of any document previously or concurrently filed with the Commission is less than the number required to be filed with the registration statement, application or report which incorporates such document, the company shall file therewith as many additional copies of the document as may be necessary to meet the requirements of the registration statement, application or report.

(b) A registered investment company may, subject to the limitations of §201.24 of this chapter, incorporate by reference, in any registration statement, application or report filed with

the Commission any financial statement or part thereof previously or concurrently filed with the Commission pursuant to any act administered by the Commission, if it substantially conforms to the requirements of the form on which such registration statement, application or report is filed. The incorporation may be made whether the matter incorporated was filed by such registered company or any other person. If a certificate of an independent public accountant or accountants is required to accompany a financial statement in any registration statement, application or report, the incorporation by reference of a certificate previously or concurrently filed will not be deemed a compliance with such requirements unless the written consent of the accountant or accountants to such incorporation is filed with the registration statement, application or report.

(c) In each case of incorporation by reference, the matter incorporated shall be clearly identified in the reference. An express statement shall be made to the effect that the specified matter is incorporated in the registration statement, application or report at the particular place where the information is required.

(d) Notwithstanding any particular provision permitting incorporation by reference, no registration statement, application or report shall incorporate by reference any exhibit or financial statement which:

(1) Has been withdrawn, or

(2) Was filed in connection with a registration statement under the Act, or a registration on a national securities exchange, which has ceased to be effective, or

(3) Is contained in a registration statement or report subject, at the time of the incorporation by reference, to pending proceedings under section 8(b) or 8(d) of the Securities Act of 1933, section 8(e) of the Act, or to an order entered under any of those Sections, or

(4) If it is a document that has been filed in paper with respect to an electronic filer under a temporary hardship exemption (§ 232.201 of this chapter) and an electronic format copy has not been submitted.

(e) Notwithstanding any particular provision permitting incorporation by reference, the Commission may refuse to permit such incorporation in any case in which in its judgment such incorporation would render the registration statement application, or report incomplete, unclear, or confusing.

(Sec. 19, 48 Stat. 85, as amended, secs. 13, 15, 23, 48 Stat. 894, 895, 901, as amended, sec. 20, 49 Stat. 833, secs. 305, 307, 314, 319, 53 Stat. 1154, 1156, 1167, 1173, as amended, sec. 39, 54 Stat. 841; 15 U.S.C. 77s, 78m, 78o, 78w, 79t, 77eee, 77ggg, 77nnn, 77sss, 80a-38)

[Rule N-4, 9 FR 338, Jan. 8, 1944. Redesignated at 14 FR 2761, May 26, 1949, and amended at 29 FR 2421, Feb. 13, 1964; 58 FR 14860, Mar. 18, 1993; 60 FR 32825, June 23, 1995]

§ 270.0-5 Procedure with respect to applications and other matters.

The procedure herein below set forth will be followed with respect to any proceeding initiated by the filing of an application, or upon the Commission's own motion, pursuant to any section of the Act or any rule or regulation thereunder, unless in the particular case a different procedure is provided:

(a) Notice of the initiation of the proceeding will be published in the FEDERAL REGISTER and will indicate the earliest date upon which an order disposing of the matter may be entered. The notice will also provide that any interested person may, within the period of time specified therein, submit to the Commission in writing any facts bearing upon the desirability of a hearing on the matter and may request that a hearing be held, stating his reasons therefor and the nature of his interest in the matter.

(b) An order disposing of the matter will be issued as of course, following the expiration of the period of time referred to in paragraph (a) of this section, unless the Commission thereafter orders a hearing on the matter.

(c) The Commission will order a hearing on the matter, if it appears that a hearing is necessary or appropriate in the public interest or for the protection of investors, (1) upon the request of an interested person or (2) upon its own motion.

[38 FR 23325, Aug. 29, 1973, as amended at 61 FR 49961, Sept. 24, 1996]

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§ 270.0-8 Payment of fees.

All payment of fees shall be made in cash, certified check or by United States postal money order, 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. Payment of fees required by this section shall be made in accordance with the directions set forth in §202.3a of this chapter.

[61 FR 49961, Sept. 24, 1996]

§ 270.0-9 [Reserved]

§ 270.0-10 Small entities under the Investment Company Act for purposes of the Regulatory Flexibility Act.

(a) *General.* 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, the term *small business* or *small organization* for purposes of the Investment Company Act of 1940 shall mean an investment company that, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year. For purposes of this section:

(1) In the case of a management company, the term *group of related investment companies* shall mean two or more management companies (including series thereof) that:

(i) Hold themselves out to investors as related companies for purposes of investment and investor services; and

(ii) Either:

(A) Have a common investment adviser or have investment advisers that are affiliated persons of each other; or

(B) Have a common administrator; and

(2) In the case of a unit investment trust, the term *group of related investment companies* shall mean two or more unit investment trusts (including series thereof) that have a common sponsor.

(b) *Special rule for insurance company separate accounts.* In determining whether an insurance company separate account is a *small business* or *small*

entity pursuant to paragraph (a) of this section, the assets of the separate account shall be cumulated with the assets of the general account and all other separate accounts of the insurance company.

(c) *Determination of net assets.* The Commission may calculate its determination of the net assets of a group of related investment companies based on the net assets of each investment company in the group as of the end of such company's fiscal year.

[63 FR 35514, June 30, 1998]

§ 270.2a-1 Valuation of portfolio securities in special cases.

(a) Any investment company whose securities are qualified for sale, or for whose securities application for such qualification has been made, in any State in which the securities owned by such company are required by applicable State law or regulations to be valued at cost or on some other basis different from that prescribed by clause (A) of section 2(a)(41) of the Act for the purpose of determining the percentage of its assets invested in any particular type or classification of securities or in the securities of any one issuer, may, in valuing its securities for the purposes of sections 5 and 12 of the Act, use the same basis of valuation as that used in complying with such State law or regulations in lieu of the method of valuation prescribed by clause (A) of section 2(a)(41) of the Act.

(b) Any open-end company which has heretofore valued its securities at cost for the purpose of qualifying as a "mutual investment company" under the Internal Revenue Code, prior to its amendment by the Revenue Act of 1942, shall henceforth, for the purposes of sections 5 and 12 of the Act, value its securities in accordance with the method prescribed in clause (A) of section 2(a)(41) of the Act unless such company is permitted under paragraph (a) of this section to use a different method of valuation.

(c) A registered investment company which has adopted for the purposes of sections 5 and 12 of the Act a method of valuation permitted by paragraph (a) of this section, shall state in its registration statement filed pursuant to section 8 (54 Stat. 803; 15 U.S.C. 80a-8)

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of the Act, or in a report filed pursuant to section 30 (54 Stat. 836; 15 U.S.C. 80a-30) of the Act, the method of valuation adopted and the facts which justify the adoption of such method. A registered investment company which has adopted for the purposes of sections 5 and 12 of the Act a method of valuation permitted by paragraph (a) of this section, unless it shall have adopted such method for the purpose or partly for the purpose of qualifying as a "mutual investment company" under the Internal Revenue Code, shall continue to use that method until it has notified the Commission of its desire to use a different method, and has received from the Commission permission for such change. Such permission may be made effective on a fixed date or within such reasonable time thereafter as may be deemed advisable under the circumstances.

(d) If at any time it appears that the method of valuation adopted by any company pursuant to paragraph (a) of this section is no longer justified by the facts, the Commission may require a change in the method of valuation within a reasonable period of time either to the method prescribed in clause (A) of section 2(a)(41) of the Act or to some other method permitted by paragraph (a) of this section which is justified by the existing facts.

[Rule N-2A-1, 8 FR 3567, Mar. 24, 1943, as amended at 38 FR 8593, Apr. 4, 1973]

§ 270.2a-2 Effect of eliminations upon valuation of portfolio securities.

During any fiscal quarter in which elimination of securities from the portfolio of an investment company occur, the securities remaining in the portfolio shall, for the purpose of sections 5 and 12 of the Act (54 Stat. 800, 808; 15 U.S.C. 80a-5, 80a-12), be so valued as to give effect to the eliminations in accordance with one of the following methods:

- (a) Specific certificate,
- (b) First in—first out,
- (c) Last in—first out, or
- (d) Average value.

For these purposes, a single method of elimination shall be used consistently with respect to all portfolio securities. In giving effect to eliminations pursu-

ant to this section values shall be computed in accordance with section 2(a)(41)(A) of the Act (54 Stat. 790; 15 U.S.C. 80a-2(a)(41)(A)).

[38 FR 8593, Apr. 4, 1973]

§ 270.2a3-1 Investment company limited partners not deemed affiliated persons.

PRELIMINARY NOTE TO § 270.2a3-1 This § 270.2a3-1 excepts from the definition of affiliated person in section 2(a)(3) (15 U.S.C. 80a-2(a)(3)) those limited partners of investment companies organized in limited partnership form that are affiliated persons solely because they are partners under section 2(a)(3)(D) (15 U.S.C. 80a-2(a)(3)(D)). Reliance on this § 270.2a3-1 does not except a limited partner that is an affiliated person by virtue of any other provision.

No limited partner of a registered management company or a business development company, organized as a limited partnership and relying on § 270.2a19-2, shall be deemed to be an affiliated person of such company, or any other partner of such company, solely by reason of being a limited partner of such company.

[58 FR 45838, Aug. 31, 1993]

§ 270.2a-4 Definition of "current net asset value" for use in computing periodically the current price of redeemable security.

(a) The current net asset value of any redeemable security issued by a registered investment company used in computing periodically the current price for the purpose of distribution, redemption, and repurchase means an amount which reflects calculations, whether or not recorded in the books of account, made substantially in accordance with the following, with estimates used where necessary or appropriate.

(1) Portfolio securities with respect to which market quotations are readily available shall be valued at current market value, and other securities and assets shall be valued at fair value as determined in good faith by the board of directors of the registered company.

(2) Changes in holdings of portfolio securities shall be reflected no later than in the first calculation on the first business day following the trade date.

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(3) Changes in the number of outstanding shares of the registered company resulting from distributions, redemptions, and repurchases shall be reflected no later than in the first calculation on the first business day following such change.

(4) Expenses, including any investment advisory fees, shall be included to date of calculation. Appropriate provision shall be made for Federal income taxes if required. Investment companies which retain realized capital gains designated as a distribution to shareholders shall comply with paragraph (h) of § 210.6-03 of Regulation S-X.

(5) Dividends receivable shall be included to date of calculation either at ex-dividend dates or record dates, as appropriate.

(6) Interest income and other income shall be included to date of calculation.

(b) The items which would otherwise be required to be reflected by paragraphs (a) (4) and (6) of this section need not be so reflected if cumulatively, when netted, they do not amount to as much as one cent per outstanding share.

(c) Notwithstanding the requirements of paragraph (a) of this section, any interim determination of current net asset value between calculations made as of the close of the New York Stock Exchange on the preceding business day and the current business day may be estimated so as to reflect any change in current net asset value since the closing calculation on the preceding business day.

(Secs. 7, 19(a), 48 Stat. 78, 85, 908, 15 U.S.C. 77g, 77s(a); secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 3, 8, 49 Stat. 1377, 1379, secs. 3, 4, 78 Stat. 569, 570, secs. 1, 2, 82 Stat. 454, 15 U.S.C. 781, 78m, 78o(d), 78w(a); secs. 8, 22, 30, 31(c), 38(a), 54 Stat. 803, 823, 836, 838, 841, 15 U.S.C. 80a-8, 80a-22, 80a-29, 80a-30(c))

[29 FR 19101, Dec. 30, 1964, as amended at 35 FR 314, Jan. 8, 1970; 47 FR 56844, Dec. 21, 1982]

§ 270.2a-6 Certain transactions not deemed assignments.

A transaction which does not result in a change of actual control or management of the investment adviser to, or principal underwriter of, an investment company is not an assignment for

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purposes of section 15(a)(4) or section 15(b)(2) of the act, respectively.

(Secs. 6(c) and 38(a) (15 U.S.C. 80a-6(c) and 80a-37(a)))

[45 FR 1861, Jan. 9, 1980]

§ 270.2a-7 Money market funds.

(a) *Definitions.*

(1) *Acquisition* (or *Acquire*) means any purchase or subsequent rollover (but does not include the failure to exercise a Demand Feature).

(2) *Amortized Cost Method* of valuation means the method of calculating an investment company's net asset value whereby portfolio securities are valued at the fund's Acquisition cost as adjusted for amortization of premium or accretion of discount rather than at their value based on current market factors.

(3) *Asset Backed Security* means a fixed income security (other than a Government security) issued by a Special Purpose Entity (as defined in this paragraph), substantially all of the assets which consist of Qualifying Assets (as defined in this paragraph). *Special Purpose Entity* means a trust, corporation, partnership or other entity organized for the sole purpose of issuing securities that entitle their holders to receive payments that depend primarily on the cash flow from Qualifying Assets, but does not include a registered investment company. *Qualifying Assets* means 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 security holders.

(4) *Business Day* means any day, other than Saturday, Sunday, or any customary business holiday.

(5) *Collateralized Fully* means "Collateralized Fully" as defined in § 270.5b-3(c)(1).

(6) *Conditional Demand Feature* means a Demand Feature that is not an Unconditional Demand Feature. A Conditional Demand Feature is not a Guarantee.

(7) *Conduit Security* means a security issued by a Municipal Issuer (as defined in this paragraph) involving an arrangement or agreement entered into,

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directly or indirectly, with a person other than a Municipal Issuer, which arrangement or agreement provides for or secures repayment of the security. *Municipal Issuer* means a state or territory of the United States (including the District of Columbia), or any political subdivision or public instrumentality of a state or territory of the United States. A Conduit Security *does not* include a security that is:

(i) Fully and unconditionally guaranteed by a Municipal Issuer; or

(ii) Payable from the general revenues of the Municipal Issuer or other Municipal Issuers (other than those revenues derived from an agreement or arrangement with a person who is not a Municipal Issuer that provides for or secures repayment of the security issued by the Municipal Issuer); or

(iii) Related to a project owned and operated by a Municipal Issuer; or

(iv) Related to a facility leased to and under the control of an industrial or commercial enterprise that is part of a public project which, as a whole, is owned and under the control of a Municipal Issuer.

(8) *Demand Feature* means:

(i) A feature permitting the holder of a security to sell the security at an exercise price equal to the approximate amortized cost of the security plus accrued interest, if any, at the time of exercise. A Demand Feature must be exercisable either:

(A) At any time on no more than 30 calendar days' notice; or

(B) At specified intervals not exceeding 397 calendar days and upon no more than 30 calendar days' notice; or

(ii) A feature permitting the holder of an Asset Backed Security unconditionally to receive principal and interest within 397 calendar days of making demand.

(9) *Demand Feature Issued By A Non-Controlled Person* means a Demand Feature issued by:

(i) A person that, directly or indirectly, does not control, and is not controlled by or under common control with the issuer of the security subject to the Demand Feature (*control* means "control" as defined in section 2(a)(9) of the Act (15 U.S.C. 80a-2(a)(9)); or

(ii) A sponsor of a Special Purpose Entity with respect to an Asset Backed Security.

(10) *Eligible Security* means:

(i) A Rated Security with a remaining maturity of 397 calendar days or less that has received a rating from the Requisite NRSROs in one of the two highest short-term rating categories (within which there may be sub-categories or gradations indicating relative standing); or

(ii) An Unrated Security that is of comparable quality to a security meeting the requirements for a Rated Security in paragraph (a)(10)(i) of this section, as determined by the money market fund's board of directors; *Provided, however, that:*

(A) A security that at the time of issuance had a remaining maturity of more than 397 calendar days but that has a remaining maturity of 397 calendar days or less and that is an Unrated Security is not an Eligible Security if the security has received a long-term rating from any NRSRO that is not within the NRSRO's three highest long-term ratings categories (within which there may be sub-categories or gradations indicating relative standing), unless the security has received a long-term rating from the Requisite NRSROs in one of the three highest rating categories;

(B) An Asset Backed Security (other than an Asset Backed Security substantially all of whose Qualifying Assets consist of obligations of one or more Municipal Issuers, as that term is defined in paragraph (a)(7) of this section) shall not be an Eligible Security unless it has received a rating from an NRSRO.

(iii) In addition, in the case of a security that is subject to a Demand Feature or Guarantee:

(A) The Guarantee has received a rating from an NRSRO or the Guarantee is issued by a guarantor that has received a rating from an NRSRO with respect to a class of debt obligations (or any debt obligation within that class) that is comparable in priority and security to the Guarantee, *unless:*

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(1) The Guarantee is issued by a person that, directly or indirectly, controls, is controlled by or is under common control with the issuer of the security subject to the Guarantee (other than a sponsor of a Special Purpose Entity with respect to an Asset Backed Security);

(2) The security subject to the Guarantee is a repurchase agreement that is Collateralized Fully; or

(3) The Guarantee is itself a Government Security; and

(B) The issuer of the Demand Feature or Guarantee, or another institution, has undertaken promptly to notify the holder of the security in the event the Demand Feature or Guarantee is substituted with another Demand Feature or Guarantee (if such substitution is permissible under the terms of the Demand Feature or Guarantee).

(11) *Event of Insolvency* means “Event of Insolvency” as defined in § 270.5b-3(c)(2).

(12) *First Tier Security* means any Eligible Security that:

(i) Is a Rated Security that has received a short-term rating from the Requisite NRSROs in the highest short-term rating category for debt obligations (within which there may be sub-categories or gradations indicating relative standing); or

(ii) Is an Unrated Security that is of comparable quality to a security meeting the requirements for a Rated Security in paragraph (a)(12)(i) of this section, as determined by the fund’s board of directors; or

(iii) Is a security issued by a registered investment company that is a money market fund; or

(iv) Is a Government Security.

(13) *Floating Rate Security* means a security the terms of which provide for the adjustment of its interest rate whenever a specified interest rate changes and that, at any time until the final maturity of the instrument or the period remaining until the principal amount can be recovered through demand, can reasonably be expected to have a market value that approximates its amortized cost.

(14) *Government Security* means any “Government security” as defined in section 2(a)(16) of the Act (15 U.S.C. 80a-2(a)(16)).

(15) *Guarantee* means an unconditional obligation of a person other than the issuer of the security to undertake to pay, upon presentment by the holder of the Guarantee (if required), the principal amount of the underlying security plus accrued interest when due or upon default, or, in the case of an Unconditional Demand Feature, an obligation that entitles the holder to receive upon exercise the approximate amortized cost of the underlying security or securities, plus accrued interest, if any. A Guarantee includes a letter of credit, financial guaranty (bond) insurance, and an Unconditional Demand Feature (other than an Unconditional Demand Feature provided by the issuer of the security).

(16) *Guarantee Issued By A Non-Controlled Person* means a Guarantee issued by:

(i) A person that, directly or indirectly, does *not* control, and is not controlled by or under common control with the issuer of the security subject to the Guarantee (*control* means “control” as defined in section 2(a)(9) of the Act (15 U.S.C. 80a-2(a)(9)); or

(ii) A sponsor of a Special Purpose Entity with respect to an Asset Backed Security.

(17) *NRSRO* means any nationally recognized statistical rating organization, as that term is used in paragraphs (c)(2)(vi)(E), (F) and (H) of § 240.15c3-1 of this Chapter, that is not an “affiliated person,” as defined in section 2(a)(3)(C) of the Act (15 U.S.C. 80a-2(a)(3)(C)), of the issuer of, or any insurer or provider of credit support for, the security.

(18) *Penny-Rounding Method* of pricing means the method of computing an investment company’s price per share for purposes of distribution, redemption and repurchase whereby the current net asset value per share is rounded to the nearest one percent.

(19) *Rated Security* means a security that meets the requirements of paragraphs (a)(19)(i) or (ii) of this section, in each case subject to paragraph (a)(19)(iii) of this section:

(i) The security has received a short-term rating from an NRSRO, or has been issued by an issuer that has received a short-term rating from an NRSRO with respect to a class of debt obligations (or any debt obligation

within that class) that is comparable in priority and security with the security; or

(ii) The security is subject to a Guarantee that has received a short-term rating from an NRSRO, or a Guarantee issued by a guarantor that has received a short-term rating from an NRSRO with respect to a class of debt obligations (or any debt obligation within that class) that is comparable in priority and security with the Guarantee; but

(iii) A security is not a Rated Security if it is subject to an external credit support agreement (including an arrangement by which the security has become a Refunded Security) that was not in effect when the security was assigned its rating, unless the security has received a short-term rating reflecting the existence of the credit support agreement as provided in paragraph (a)(19)(i) of this section, or the credit support agreement with respect to the security has received a short-term rating as provided in paragraph (a)(19)(ii) of this section.

(20) *Refunded Security* means "Refunded Security" as defined in § 270.5b-3(c)(4).

(21) *Requisite NRSROs* means:

(i) Any two NRSROs that have issued a rating with respect to a security or class of debt obligations of an issuer; or

(ii) If only one NRSRO has issued a rating with respect to such security or class of debt obligations of an issuer at the time the fund acquires the security, that NRSRO.

(22) *Second Tier Security* means any Eligible Security that is not a First Tier Security. *Second Tier Conduit Security* means any Conduit Security that is an Eligible Security that is not a First Tier Security.

(23) *Single State Fund* means a Tax Exempt Fund that holds itself out as seeking to maximize the amount of its distributed income that is exempt from the income taxes or other taxes on investments of a particular state and, where applicable, subdivisions thereof.

(24) *Tax Exempt Fund* means any money market fund that holds itself out as distributing income exempt from regular federal income tax.

(25) *Total Assets* means, with respect to a money market fund using the Am-

ortized Cost Method, the total amortized cost of its assets and, with respect to any other money market fund, the total market-based value of its assets.

(26) *Unconditional Demand Feature* means a Demand Feature that by its terms would be readily exercisable in the event of a default in payment of principal or interest on the underlying security or securities.

(27) *United States Dollar-Denominated* means, with reference to a security, that all principal and interest payments on such security are payable to security holders in United States dollars under all circumstances and that the interest rate of, the principal amount to be repaid, and the timing of payments related to such security do not vary or float with the value of a foreign currency, the rate of interest payable on foreign currency borrowings, or with any other interest rate or index expressed in a currency other than United States dollars.

(28) *Unrated Security* means a security that is not a Rated Security.

(29) *Variable Rate Security* means a security the terms of which provide for the adjustment of its interest rate on set dates (such as the last day of a month or calendar quarter) and that, upon each adjustment until the final maturity of the instrument or the period remaining until the principal amount can be recovered through demand, can reasonably be expected to have a market value that approximates its amortized cost.

(b) *Holding Out and Use of Names and Titles.* (1) It shall be an untrue statement of material fact within the meaning of section 34(b) of the Act (15 U.S.C. 80a-33(b)) for a registered investment company, in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to the Act, including any advertisement, pamphlet, circular, form letter, or other sales literature addressed to or intended for distribution to prospective investors that is required to be filed with the Commission by section 24(b) of the Act (15 U.S.C. 80a-24(b)), to hold itself out to investors as a money market fund or the equivalent of a money market fund, unless such registered investment

company meets the conditions of paragraphs (c)(2), (c)(3) and (c)(4) of this section.

(2) It shall constitute the use of a materially deceptive or misleading name or title within the meaning of section 35(d) of the Act (15 U.S.C. 80a-34(d)) for a registered investment company to adopt the term “money market” as part of its name or title or the name or title of any redeemable securities of which it is the issuer, or to adopt a name that suggests that it is a money market fund or the equivalent of a money market fund, unless such registered investment company meets the conditions of paragraphs (c)(2), (c)(3), and (c)(4) of this section.

(3) For purposes of this paragraph, a name that suggests that a registered investment company is a money market fund or the equivalent thereof shall include one that uses such terms as “cash,” “liquid,” “money,” “ready assets” or similar terms.

(c) *Share Price Calculations.* The current price per share, for purposes of distribution, redemption and repurchase, of any redeemable security issued by any registered investment company (“money market fund” or “fund”), notwithstanding the requirements of section 2(a)(41) of the Act (15 U.S.C. 80a-2(a)(41)) and of §§ 270.2a-4 and 270.22c-1 thereunder, may be computed by use of the Amortized Cost Method or the Penny-Rounding Method; *Provided, however,* that:

(1) *Board Findings.* The board of directors of the money market fund shall determine, in good faith, that it is in the best interests of the fund and its shareholders to maintain a stable net asset value per share or stable price per share, by virtue of either the Amortized Cost Method or the Penny-Rounding Method, and that the money market fund will continue to use such method only so long as the board of directors believes that it fairly reflects the market-based net asset value per share.

(2) *Portfolio Maturity.* The money market fund shall maintain a dollar-weighted average portfolio maturity appropriate to its objective of maintaining a stable net asset value per share or price per share; *Provided, how-*

ever, that the money market fund will not:

(i) Except as provided in paragraph (c)(2)(ii) of this section, Acquire any instrument with a remaining maturity of greater than 397 calendar days; or

(ii) In the case of a money market fund not using the Amortized Cost Method, Acquire a Government Security with a remaining maturity of greater than 762 calendar days; or

(iii) Maintain a dollar-weighted average portfolio maturity that exceeds ninety days.

(3) *Portfolio Quality—(i) General.* The money market fund shall limit its portfolio investments to those United States Dollar-Denominated securities that the fund’s board of directors determines present minimal credit risks (which determination must be based on factors pertaining to credit quality in addition to any rating assigned to such securities by an NRSRO) and that are at the time of Acquisition Eligible Securities.

(ii) *Second Tier Securities.* Immediately after the Acquisition of any Second Tier Security:

(A) *Taxable Funds.* A money market fund that is not a Tax Exempt Fund shall not have invested more than five percent of its Total Assets in securities that are Second Tier Securities; and

(B) *Tax Exempt Funds.* A money market fund that is a Tax Exempt Fund shall not have invested more than five percent of its Total Assets in Conduit Securities that are Second Tier Conduit Securities.

(iii) *Securities Subject to Guarantees.* A security that is subject to a Guarantee may be determined to be an Eligible Security or a First Tier Security based solely on whether the Guarantee is an Eligible Security or First Tier Security, as the case may be.

(iv) *Securities Subject to Conditional Demand Features.* A security that is subject to a Conditional Demand Feature (“Underlying Security”) may be determined to be an Eligible Security or a First Tier Security only if:

(A) The Conditional Demand Feature is an Eligible Security or First Tier Security, as the case may be;

(B) At the time of the Acquisition of the Underlying Security, the money market fund’s board of directors has

determined that there is minimal risk that the circumstances that would result in the Conditional Demand Feature not being exercisable will occur; and

(1) The conditions limiting exercise either can be monitored readily by the fund, or relate to the taxability, under federal, state or local law, of the interest payments on the security; or

(2) The terms of the Conditional Demand Feature require that the fund will receive notice of the occurrence of the condition and the opportunity to exercise the Demand Feature in accordance with its terms; and

(C) The Underlying Security or any Guarantee of such security (or the debt securities of the issuer of the Underlying Security or Guarantee that are comparable in priority and security with the Underlying Security or Guarantee) has received either a short-term rating or a long-term rating, as the case may be, from the Requisite NRSROs within the NRSROs' two highest short-term or long-term rating categories (within which there may be sub-categories or gradations indicating relative standing) or, if unrated, is determined to be of comparable quality by the money market fund's board of directors to a security that has received a rating from the Requisite NRSROs within the NRSROs' two highest short-term or long-term rating categories, as the case may be.

(4) *Portfolio Diversification*—(i) *Issuer Diversification*. The money market fund shall be diversified with respect to issuers of securities Acquired by the fund as provided in paragraphs (c)(4)(i) and (c)(4)(ii) of this section, other than with respect to Government Securities and securities subject to a Guarantee Issued By A Non-Controlled Person.

(A) *Taxable and National Funds*. Immediately after the Acquisition of any security, a money market fund other than a Single State Fund shall not have invested more than five percent of its Total Assets in securities issued by the issuer of the security; *Provided, however*, that such a fund may invest up to twenty-five percent of its Total Assets in the First Tier Securities of a single issuer for a period of up to three Business Days after the Acquisition thereof; *Provided, further*, that the fund

may not invest in the securities of more than one issuer in accordance with the foregoing proviso in this paragraph at any time.

(B) *Single State Funds*. With respect to seventy-five percent of its Total Assets, immediately after the Acquisition of any security, a Single State Fund shall not have invested more than five percent of its Total Assets in securities issued by the issuer of the security; *Provided, however*, that a Single State Fund shall not invest more than five percent of its Total Assets in securities issued by the issuer of the security unless the securities are First Tier Securities.

(C) *Second Tier Securities*—(1) *Taxable Funds*. Immediately after the Acquisition of any Second Tier Security, a money market fund that is not a Tax Exempt Fund shall not have invested more than the greater of one percent of its Total Assets or one million dollars in securities issued by that issuer that are Second Tier Securities.

(2) *Tax Exempt Funds*. Immediately after the Acquisition of any Second Tier Conduit Security, a money market fund that is a Tax Exempt Fund shall not have invested more than the greater of one percent of its Total Assets or one million dollars in securities issued by that issuer that are Second Tier Conduit Securities.

(ii) *Issuer Diversification Calculations*. For purposes of making calculations under paragraph (c)(4)(i) of this section:

(A) *Repurchase Agreements*. The Acquisition of a repurchase agreement may be deemed to be an Acquisition of the underlying securities, provided the obligation of the seller to repurchase the securities from the money market fund is Collateralized Fully.

(B) *Refunded Securities*. The Acquisition of a Refunded Security shall be deemed to be an Acquisition of the escrowed Government Securities.

(C) *Conduit Securities*. A Conduit Security shall be deemed to be issued by the person (other than the Municipal Issuer) ultimately responsible for payments of interest and principal on the security.

(D) *Asset Backed Securities*—(1) *General*. An Asset Backed Security Acquired by a fund ("Primary ABS")

shall be deemed to be issued by the Special Purpose Entity that issued the Asset Backed Security, *Provided, however:*

(i) *Holdings of Primary ABS.* Any person whose obligations constitute ten percent or more of the principal amount of the Qualifying Assets of the Primary ABS (“Ten Percent Obligor”) shall be deemed to be an issuer of the portion of the Primary ABS such obligations represent; and

(ii) *Holdings of Secondary ABS.* If a Ten Percent Obligor of a Primary ABS is itself a Special Purpose Entity issuing Asset Backed Securities (“Secondary ABS”), any Ten Percent Obligor of such Secondary ABS also shall be deemed to be an issuer of the portion of the Primary ABS that such Ten Percent Obligor represents.

(2) *Restricted Special Purpose Entities.* A Ten Percent Obligor with respect to a Primary or Secondary ABS shall not be deemed to have issued any portion of the assets of a Primary ABS as provided in paragraph (c)(4)(ii)(D)(1) of this section if that Ten Percent Obligor is itself a Special Purpose Entity issuing Asset Backed Securities (“Restricted Special Purpose Entity”), and the securities that it issues (other than securities issued to a company that controls, or is controlled by or under common control with, the Restricted Special Purpose Entity and which is not itself a Special Purpose Entity issuing Asset Backed Securities) are held by only one other Special Purpose Entity.

(3) *Demand Features and Guarantees.* In the case of a Ten Percent Obligor deemed to be an issuer, the fund shall satisfy the diversification requirements of paragraph (c)(4)(iii) of this section with respect to any Demand Feature or Guarantee to which the Ten Percent Obligor’s obligations are subject.

(E) *Shares of Other Money Market Funds.* A money market fund that Acquires shares issued by another money market fund in an amount that would otherwise be prohibited by paragraph (c)(4)(i) of this section shall nonetheless be deemed in compliance with this section if the board of directors of the Acquiring money market fund reasonably believes that the fund in which it

has invested is in compliance with this section.

(iii) *Diversification Rules for Demand Features and Guarantees.* The money market fund shall be diversified with respect to Demand Features and Guarantees Acquired by the fund as provided in paragraphs (c)(4)(iii) and (c)(4)(iv) of this section, *other than* with respect to a Demand Feature issued by the same institution that issued the underlying security, or with respect to a Guarantee or Demand Feature that is itself a Government Security.

(A) *General.* Immediately after the Acquisition of any Demand Feature or Guarantee or security subject to a Demand Feature or Guarantee, a money market fund, with respect to seventy-five percent of its Total Assets, shall not have invested more than ten percent of its Total Assets in securities issued by or subject to Demand Features or Guarantees from the institution that issued the Demand Feature or Guarantee, subject to paragraphs (c)(4)(iii) (B) and (C) of this section.

(B) *Second Tier Demand Features or Guarantees.* Immediately after the Acquisition of any Demand Feature or Guarantee (or a security after giving effect to the Demand Feature or Guarantee) that is a Second Tier Security, a money market fund shall not have invested more than five percent of its Total Assets in securities issued by or subject to Demand Features or Guarantees from the institution that issued the Demand Feature or Guarantee.

(C) *Demand Features or Guarantees Issued by Non-Controlled Persons.* Immediately after the Acquisition of any security subject to a Demand Feature or Guarantee, a money market fund shall not have invested more than ten percent of its Total Assets in securities issued by, or subject to Demand Features or Guarantees from the institution that issued the Demand Feature or Guarantee, unless, with respect to any security subject to Demand Features or Guarantees from that institution (other than securities issued by such institution), the Demand Feature or Guarantee is a Demand Feature or Guarantee Issued By A Non-Controlled Person.

(iv) *Demand Feature and Guarantee Diversification Calculations*—(A) *Fractional Demand Features or Guarantees*. In the case of a security subject to a Demand Feature or Guarantee from an institution by which the institution guarantees a specified portion of the value of the security, the institution shall be deemed to guarantee the specified portion thereof.

(B) *Layered Demand Features or Guarantees*. In the case of a security subject to Demand Features or Guarantees from multiple institutions that have not limited the extent of their obligations as described in paragraph (c)(4)(iv)(A) of this section, each institution shall be deemed to have provided the Demand Feature or Guarantee with respect to the entire principal amount of the security.

(v) *Diversification Safe Harbor*. A money market fund that satisfies the applicable diversification requirements of paragraphs (c)(4) and (c)(5) of this section shall be deemed to have satisfied the diversification requirements of section 5(b)(1) of the Act (15 U.S.C. 80a-5(b)(1)) and the rules adopted thereunder.

(5) *Demand Features and Guarantees Not Relied Upon*. If the fund's board of directors has determined that the fund is not relying on a Demand Feature or Guarantee to determine the quality (pursuant to paragraph (c)(3) of this section), or maturity (pursuant to paragraph (d) of this section), or liquidity of a portfolio security, and maintains a record of this determination (pursuant to paragraphs (c)(9)(ii) and (c)(10)(vi) of this section), then the fund may disregard such Demand Feature or Guarantee for all purposes of this section.

(6) *Downgrades, Defaults and Other Events*—(i) *Downgrades*—(A) *General*. Upon the occurrence of either of the events specified in paragraphs (c)(6)(i)(A) (1) and (2) of this section with respect to a portfolio security, the board of directors of the money market fund shall reassess promptly whether such security continues to present minimal credit risks and shall cause the fund to take such action as the board of directors determines is in the best interests of the money market fund and its shareholders:

(1) A portfolio security of a money market fund ceases to be a First Tier Security (either because it no longer has the highest rating from the Requisite NRSROs or, in the case of an Unrated Security, the board of directors of the money market fund determines that it is no longer of comparable quality to a First Tier Security); and

(2) The money market fund's investment adviser (or any person to whom the fund's board of directors has delegated portfolio management responsibilities) becomes aware that any Unrated Security or Second Tier Security held by the money market fund has, since the security was Acquired by the fund, been given a rating by any NRSRO below the NRSRO's second highest short-term rating category.

(B) *Securities to Be Disposed Of*. The reassessments required by paragraph (c)(6)(i)(A) of this section shall not be required if, in accordance with the procedures adopted by the board of directors, the security is disposed of (or matures) within five Business Days of the specified event and, in the case of events specified in paragraph (c)(6)(i)(A)(2) of this section, the board is subsequently notified of the adviser's actions.

(C) *Special Rule for Certain Securities Subject to Demand Features*. In the event that after giving effect to a rating downgrade, more than five percent of the fund's Total Assets are invested in securities issued by or subject to Demand Features from a single institution that are Second Tier Securities, the fund shall reduce its investment in securities issued by or subject to Demand Features from that institution to no more than five percent of its Total Assets by exercising the Demand Features at the next succeeding exercise date(s), absent a finding by the board of directors that disposal of the portfolio security would not be in the best interests of the money market fund.

(ii) *Defaults and Other Events*. Upon the occurrence of any of the events specified in paragraphs (c)(6)(ii)(A) through (D) of this section with respect to a portfolio security, the money market fund shall dispose of such security as soon as practicable consistent with achieving an orderly disposition of the

security, by sale, exercise of any Demand Feature or otherwise, absent a finding by the board of directors that disposal of the portfolio security would not be in the best interests of the money market fund (which determination may take into account, among other factors, market conditions that could affect the orderly disposition of the portfolio security):

(A) The default with respect to a portfolio security (other than an immaterial default unrelated to the financial condition of the issuer);

(B) A portfolio security ceases to be an Eligible Security;

(C) A portfolio security has been determined to no longer present minimal credit risks; or

(D) An Event of Insolvency occurs with respect to the issuer of a portfolio security or the provider of any Demand Feature or Guarantee.

(iii) *Notice to the Commission.* In the event of a default with respect to one or more portfolio securities (other than an immaterial default unrelated to the financial condition of the issuer) or an Event of Insolvency with respect to the issuer of the security or any Demand Feature or Guarantee to which it is subject, where immediately before default the securities (or the securities subject to the Demand Feature or Guarantee) accounted for $\frac{1}{2}$ of 1 percent or more of a money market fund's Total Assets, the money market fund shall promptly notify the Commission of such fact and the actions the money market fund intends to take in response to such situation. Notification under this paragraph shall be made telephonically, or by means of a facsimile transmission or electronic mail, followed by letter sent by first class mail, directed to the attention of the Director of the Division of Investment Management.

(iv) *Defaults for Purposes of Paragraphs (c)(6) (ii) and (iii).* For purposes of paragraphs (c)(6) (ii) and (iii) of this section, an instrument subject to a Demand Feature or Guarantee shall not be deemed to be in default (and an Event of Insolvency with respect to the security shall not be deemed to have occurred) if:

(A) In the case of an instrument subject to a Demand Feature, the Demand

Feature has been exercised and the fund has recovered either the principal amount or the amortized cost of the instrument, plus accrued interest; or

(B) The provider of the Guarantee is continuing, without protest, to make payments as due on the instrument.

(7) *Required Procedures: Amortized Cost Method.* In the case of a money market fund using the Amortized Cost Method:

(i) *General.* In supervising the money market fund's operations and delegating special responsibilities involving portfolio management to the money market fund's investment adviser, the money market fund's board of directors, as a particular responsibility within the overall duty of care owed to its shareholders, shall establish written procedures reasonably designed, taking into account current market conditions and the money market fund's investment objectives, to stabilize the money market fund's net asset value per share, as computed for the purpose of distribution, redemption and repurchase, at a single value.

(ii) *Specific Procedures.* Included within the procedures adopted by the board of directors shall be the following:

(A) *Shadow Pricing.* Written procedures shall provide:

(1) That the extent of deviation, if any, of the current net asset value per share calculated using available market quotations (or an appropriate substitute that reflects current market conditions) from the money market fund's amortized cost price per share, shall be calculated at such intervals as the board of directors determines appropriate and reasonable in light of current market conditions;

(2) For the periodic review by the board of directors of the amount of the deviation as well as the methods used to calculate the deviation; and

(3) For the maintenance of records of the determination of deviation and the board's review thereof.

(B) *Prompt Consideration of Deviation.* In the event such deviation from the money market fund's amortized cost price per share exceeds $\frac{1}{2}$ of 1 percent, the board of directors shall promptly consider what action, if any, should be initiated by the board of directors.

(C) *Material Dilution or Unfair Results.* Where the board of directors believes

the extent of any deviation from the money market fund's amortized cost price per share may result in material dilution or other unfair results to investors or existing shareholders, it shall cause the fund to take such action as it deems appropriate to eliminate or reduce to the extent reasonably practicable such dilution or unfair results.

(8) *Required Procedures: Penny-Rounding Method.* In the case of a money market fund using the Penny-Rounding Method, in supervising the money market fund's operations and delegating special responsibilities involving portfolio management to the money market fund's investment adviser, the money market fund's board of directors undertakes, as a particular responsibility within the overall duty of care owed to its shareholders, to assure to the extent reasonably practicable, taking into account current market conditions affecting the money market fund's investment objectives, that the money market fund's price per share as computed for the purpose of distribution, redemption and repurchase, rounded to the nearest one percent, will not deviate from the single price established by the board of directors.

(9) *Specific Procedures: Amortized Cost and Penny-Rounding Methods.* Included within the procedures adopted by the board of directors for money market funds using either the Amortized Cost or Penny-Rounding Methods shall be the following:

(i) *Securities for Which Maturity is Determined by Reference to Demand Features.* In the case of a security for which maturity is determined by reference to a Demand Feature, written procedures shall require ongoing review of the security's continued minimal credit risks, and that review must be based on, among other things, financial data for the most recent fiscal year of the issuer of the Demand Feature and, in the case of a security subject to a Conditional Demand Feature, the issuer of the security whose financial condition must be monitored under paragraph (c)(3)(iv) of this section, whether such data is publicly available or provided under the terms of the security's governing documentation.

(ii) *Securities Subject to Demand Features or Guarantees.* In the case of a security subject to one or more Demand Features or Guarantees that the fund's board of directors has determined that the fund is not relying on to determine the quality (pursuant to paragraph (c)(3) of this section), maturity (pursuant to paragraph (d) of this section) or liquidity of the security subject to the Demand Feature or Guarantee, written procedures shall require periodic evaluation of such determination.

(iii) *Adjustable Rate Securities Without Demand Features.* In the case of a Variable Rate or Floating Rate Security that is not subject to a Demand Feature and for which maturity is determined pursuant to paragraphs (d)(1), (d)(2) or (d)(4) of this section, written procedures shall require periodic review of whether the interest rate formula, upon readjustment of its interest rate, can reasonably be expected to cause the security to have a market value that approximates its amortized cost value.

(iv) *Asset Backed Securities.* In the case of an Asset Backed Security, written procedures shall require the fund to periodically determine the number of Ten Percent Obligor (as that term is used in paragraph (c)(4)(ii)(D) of this section) deemed to be the issuers of all or a portion of the Asset Backed Security for purposes of paragraph (c)(4)(ii)(D) of this section; *Provided, however,* written procedures need not require periodic determinations with respect to any Asset Backed Security that a fund's board of directors has determined, at the time of Acquisition, will not have, or is unlikely to have, Ten Percent Obligor that are deemed to be issuers of all or a portion of that Asset Backed Security for purposes of paragraph (c)(4)(ii)(D) of this section, and maintains a record of this determination.

(10) *Record Keeping and Reporting—(i) Written Procedures.* For a period of not less than six years following the replacement of such procedures with new procedures (the first two years in an easily accessible place), a written copy of the procedures (and any modifications thereto) described in paragraphs (c)(6) through (c)(9) and (e) of this section shall be maintained and preserved.

(ii) *Board Considerations and Actions.* For a period of not less than six years (the first two years in an easily accessible place) a written record shall be maintained and preserved of the board of directors' considerations and actions taken in connection with the discharge of its responsibilities, as set forth in this section, to be included in the minutes of the board of directors' meetings.

(iii) *Credit Risk Analysis.* For a period of not less than three years from the date that the credit risks of a portfolio security were most recently reviewed, a written record of the determination that a portfolio security presents minimal credit risks and the NRSRO ratings (if any) used to determine the status of the security as an Eligible Security, First Tier Security or Second Tier Security shall be maintained and preserved in an easily accessible place.

(iv) *Determinations With Respect to Adjustable Rate Securities.* For a period of not less than three years from the date when the determination was most recently made, a written record shall be preserved and maintained, in an easily accessible place, of the determination required by paragraph (c)(9)(iii) of this section (that a Variable Rate or Floating Rate Security that is not subject to a Demand Feature and for which maturity is determined pursuant to paragraphs (d)(1), (d)(2) or (d)(4) of this section can reasonably be expected, upon readjustment of its interest rate at all times during the life of the instrument, to have a market value that approximates its amortized cost).

(v) *Determinations with Respect to Asset Backed Securities.* For a period of not less than three years from the date when the determination was most recently made, a written record shall be preserved and maintained, in an easily accessible place, of the determinations required by paragraph (c)(9)(iv) of this section (the number of Ten Percent Obligor (as that term is used in paragraph (c)(4)(ii)(D) of this section) deemed to be the issuers of all or a portion of the Asset Backed Security for purposes of paragraph (c)(4)(ii)(D) of this section). The written record shall include:

(A) The identities of the Ten Percent Obligor (as that term is used in para-

graph (c)(4)(ii)(D) of this section), the percentage of the Qualifying Assets constituted by the securities of each Ten Percent Obligor and the percentage of the fund's Total Assets that are invested in securities of each Ten Percent Obligor; and

(B) Any determination that an Asset Backed Security will not have, or is unlikely to have, Ten Percent Obligor deemed to be issuers of all or a portion of that Asset Backed Security for purposes of paragraph (c)(4)(ii)(D) of this section.

(vi) *Evaluations with Respect to Securities Subject to Demand Features or Guarantees.* For a period of not less than three years from the date when the evaluation was most recently made, a written record shall be preserved and maintained, in an easily accessible place, of the evaluation required by paragraph (c)(9)(ii) (regarding securities subject to one or more Demand Features or Guarantees) of this section.

(vii) *Inspection of Records.* The documents preserved pursuant to this paragraph (c)(10) shall be subject to inspection by the Commission in accordance with section 31(b) of the Act (15 U.S.C. 80a-30(b)) as if such documents were records required to be maintained pursuant to rules adopted under section 31(a) of the Act (15 U.S.C. 80a-30(a)). If any action was taken under paragraphs (c)(6)(ii) (with respect to defaulted securities and events of insolvency) or (c)(7)(ii) (with respect to a deviation from the fund's share price of more than 1/2 of 1 percent) of this section, the money market fund will file an exhibit to the Form N-SAR (17 CFR 274.101) filed for the period in which the action was taken describing with specificity the nature and circumstances of such action. The money market fund will report in an exhibit to such Form any securities it holds on the final day of the reporting period that are not Eligible Securities.

(d) *Maturity of Portfolio Securities.* For purposes of this section, the maturity of a portfolio security shall be deemed to be the period remaining (calculated from the trade date or such other date on which the fund's interest in the security is subject to market action) until the date on which, in accordance

with the terms of the security, the principal amount must unconditionally be paid, or in the case of a security called for redemption, the date on which the redemption payment must be made, except as provided in paragraphs (d)(1) through (d)(8) of this section:

(1) *Adjustable Rate Government Securities.* A Government Security that is a Variable Rate Security where the variable rate of interest is readjusted no less frequently than every 762 calendar days shall be deemed to have a maturity equal to the period remaining until the next readjustment of the interest rate. A Government Security that is a Floating Rate Security shall be deemed to have a remaining maturity of one day.

(2) *Short-Term Variable Rate Securities.* A Variable Rate Security, the principal amount of which, in accordance with the terms of the security, must unconditionally be paid in 397 calendar days or less shall be deemed to have a maturity equal to the earlier of the period remaining until the next readjustment of the interest rate or the period remaining until the principal amount can be recovered through demand.

(3) *Long-Term Variable Rate Securities.* A Variable Rate Security, the principal amount of which is scheduled to be paid in more than 397 calendar days, that is subject to a Demand Feature, shall be deemed to have a maturity equal to the longer of the period remaining until the next readjustment of the interest rate or the period remaining until the principal amount can be recovered through demand.

(4) *Short-Term Floating Rate Securities.* A Floating Rate Security, the principal amount of which, in accordance with the terms of the security, must unconditionally be paid in 397 calendar days or less shall be deemed to have a maturity of one day.

(5) *Long-Term Floating Rate Securities.* A Floating Rate Security, the principal amount of which is scheduled to be paid in more than 397 calendar days, that is subject to a Demand Feature, shall be deemed to have a maturity equal to the period remaining until the principal amount can be recovered through demand.

(6) *Repurchase Agreements.* A repurchase agreement shall be deemed to have a maturity equal to the period remaining until the date on which the repurchase of the underlying securities is scheduled to occur, or, where the agreement is subject to demand, the notice period applicable to a demand for the repurchase of the securities.

(7) *Portfolio Lending Agreements.* A portfolio lending agreement shall be treated as having a maturity equal to the period remaining until the date on which the loaned securities are scheduled to be returned, or where the agreement is subject to demand, the notice period applicable to a demand for the return of the loaned securities.

(8) *Money Market Fund Securities.* An investment in a money market fund shall be treated as having a maturity equal to the period of time within which the Acquired money market fund is required to make payment upon redemption, unless the Acquired money market fund has agreed in writing to provide redemption proceeds to the investing money market fund within a shorter time period, in which case the maturity of such investment shall be deemed to be the shorter period.

(e) *Delegation.* The money market fund's board of directors may delegate to the fund's investment adviser or officers the responsibility to make any determination required to be made by the board of directors under this section (other than the determinations required by paragraphs (c)(1) (board findings); (c)(6)(i)(C) (rule for certain securities subject to second tier Demand Features); (c)(6)(ii) (defaults and other events); (c)(7)(i) (general required procedures: Amortized Cost Method); (c)(7)(ii)(A) (shadow pricing), (B) (prompt consideration of deviation), and (C) (material dilution or unfair results); and (c)(8) (required procedures: Penny Rounding Method) of this section) provided:

(1) *Written Guidelines.* The Board shall establish and periodically review written guidelines (including guidelines for determining whether securities present minimal credit risks as required in paragraph (c)(3) of this section) and procedures under which the delegate makes such determinations:

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(2) *Oversight.* The Board shall take any measures reasonably necessary (through periodic reviews of fund investments and the delegate's procedures in connection with investment decisions and prompt review of the adviser's actions in the event of the default of a security or Event of Insolvency with respect to the issuer of the security or any Guarantee to which it is subject that requires notification of the Commission under paragraph (c)(6)(iii) of this section) to assure that the guidelines and procedures are being followed.

[62 FR 64978, Dec. 9, 1997, as amended at 66 FR 36161, July 11, 2001]

§ 270.2a19-2 Investment company general partners not deemed interested persons.

PRELIMINARY NOTE TO § 270.2a19-2 This § 270.2a19-2 conditionally excepts from the definition of interested person in section 2(a)(19) (15 U.S.C. 80a-2(a)(19)) general partners of investment companies organized in limited partnership form. Compliance with the conditions of this § 270.2a19-2 does not relieve an investment company of any other requirement of this Act, or except a general partner that is an interested person by virtue of any other provision.

(a) *Director General Partners Not Deemed Interested Persons.* A general partner serving as a director of a limited partnership investment company shall not be deemed to be an interested person of such company, or of any investment adviser of, or principal underwriter for, such company, solely by reason of being a partner of the limited partnership investment company, or a copartner in the limited partnership investment company with any investment adviser of, or principal underwriter for, the company, *provided* that the Limited Partnership Agreement contains in substance the following:

(1) Only general partners who are natural persons shall serve as, and perform the functions of, directors of the limited partnership investment company, except that any general partner may act as provided in paragraph (a)(2)(iii) of this section.

(2) A general partner shall not have the authority to act individually on behalf of, or to bind, the Limited Partnership Investment Company, except:

(i) In such person's capacity as investment adviser, principal underwriter, or administrator;

(ii) Within the scope of such person's authority as delegated by the board of directors; or

(iii) In the event that no director of the company remains, to the extent necessary to continue the Limited Partnership Investment Company, for such limited periods as are permitted under the Act to fill director vacancies.

(3) Limited partners shall have all of the rights afforded shareholders under the Act. If a limited partnership interest is transferred in a manner that is effective under the Partnership Agreement, the transferee shall have all of the rights afforded shareholders under the Act.

(4) A general partner shall not withdraw from the Limited Partnership Investment Company or reduce its Federal Tax Status Contribution without giving at least one year's prior written notice to the Limited Partnership Investment Company, if such withdrawal or reduction is likely to cause the company to lose its partnership tax classification. This paragraph (a)(4) shall not apply to an investment adviser general partner if the company terminates its advisory agreement with such general partner.

(b) *Definitions.* (1) "Federal Tax Status Contribution" shall mean the interest (including limited partnership interest) in each material item of partnership income, gain, loss, deduction, or credit, and other contributions, required to be held or made by general partners, pursuant to section 4 of Internal Revenue Service Revenue Procedure 89-12, or any successor provisions thereto.

(2) "Limited Partnership Investment Company" shall mean a registered management company or a business development company that is organized as a limited partnership under state law.

(3) "Partnership Agreement" shall mean the agreement of the partners of the Limited Partnership Investment Company as to the affairs of the limited partnership and the conduct of its business.

[58 FR 45838, Aug. 31, 1993; 58 FR 64353, Dec. 6, 1993; 59 FR 15501, Apr. 1, 1994]

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§ 270.2a19-3 Certain investment company directors not considered interested persons because of ownership of index fund securities.

If a director of a registered investment company (“Fund”) owns shares of a registered investment company (including the Fund) with an investment objective to replicate the performance of one or more broad-based securities indices (“Index Fund”), ownership of the Index Fund shares will not cause the director to be considered an “interested person” of the Fund or of the Fund’s investment adviser or principal underwriter (as defined by section 2(a)(19)(A)(iii) and (B)(iii) of the Act (15 U.S.C. 80a-2(a)(19)(A)(iii) and (B)(iii)).

[66 FR 3758, Jan. 16, 2001]

§ 270.2a41-1 Valuation of standby commitments by registered investment companies.

(a) A standby commitment means a right to sell a specified underlying security or securities within a specified period of time and at an exercise price equal to the amortized cost of the underlying security or securities plus accrued interest, if any, at the time of exercise, that may be sold, transferred or assigned only with the underlying security or securities. A standby commitment entitles the holder to receive same day settlement, and will be considered to be from the party to whom the investment company will look for payment of the exercise price. A standby commitment may be assigned a fair value of zero, Provided, That:

(1) The standby commitment is not used to affect the company’s valuation of the security or securities underlying the standby commitment; and

(2) Any consideration paid by the company for the standby commitment, whether paid in cash or by paying a premium for the underlying security or securities, is accounted for by the company as unrealized depreciation until the standby commitment is exercised or expires.

(b) [Reserved]

[51 FR 9779, Mar. 21, 1986, as amended at 56 FR 8128, Feb. 27, 1991; 61 FR 13982, Mar. 28, 1996; 62 FR 64986, Dec. 9, 1997]

§ 270.2a51-1 Definition of investments for purposes of section 2(a)(51) (definition of “qualified purchaser”); certain calculations.

(a) *Definitions.* As used in this section:

(1) The term *Commodity Interests* means commodity futures contracts, options on commodity futures contracts, and options on physical commodities traded on or subject to the rules of:

(i) Any contract market designated for trading such transactions under the Commodity Exchange Act and the rules thereunder; or

(ii) Any board of trade or exchange outside the United States, as contemplated in Part 30 of the rules under the Commodity Exchange Act [17 CFR 30.1 through 30.11].

(2) The term *Family Company* means a company described in paragraph (A)(ii) of section 2(a)(51) of the Act [15 U.S.C. 80a-2(a)(51)].

(3) The term *Investment Vehicle* means an investment company, a company that would be an investment company but for the exclusions provided by sections 3(c)(1) through 3(c)(9) of the Act [15 U.S.C. 80a-3(c)(1) through 3(c)(9)] or the exemptions provided by §§ 270.3a-6 or 270.3a-7, or a commodity pool.

(4) The term *Investments* has the meaning set forth in paragraph (b) of this section.

(5) The term *Physical Commodity* means any physical commodity with respect to which a Commodity Interest is traded on a market specified in paragraph (a)(1) of this section.

(6) The term *Prospective Qualified Purchaser* means a person seeking to purchase a security of a Section 3(c)(7) Company.

(7) The term *Public Company* means a company that:

(i) Files reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. 78m or 78o(d)]; or

(ii) Has a class of securities that are listed on a “designated offshore securities market” as such term is defined by Regulation S under the Securities Act of 1933 [17 CFR 230.901 through 230.904].

(8) The term *Related Person* means a person who is related to a Prospective Qualified Purchaser as a sibling, spouse or former spouse, or is a direct lineal

descendant or ancestor by birth or adoption of the Prospective Qualified Purchaser, or is a spouse of such descendant or ancestor, *provided that*, in the case of a Family Company, a Related Person includes any owner of the Family Company and any person who is a Related Person of such owner.

(9) The term *Relying Person* means a Section 3(c)(7) Company or a person acting on its behalf.

(10) The term *Section 3(c)(7) Company* means a company that would be an investment company but for the exclusion provided by section 3(c)(7) of the Act [15 U.S.C. 80a-3(c)(7)].

(b) *Types of Investments*. For purposes of section 2(a)(51) of the Act [15 U.S.C. 80a-2(a)(51)], the term *Investments* means:

(1) Securities (as defined by section 2(a)(1) of the Securities Act of 1933 [15 U.S.C. 77b(a)(1)]), other than securities of an issuer that controls, is controlled by, or is under common control with, the Prospective Qualified Purchaser that owns such securities, unless the issuer of such securities is:

- (i) An Investment Vehicle;
- (ii) A Public Company; or

(iii) A company with shareholders' equity of not less than \$50 million (determined in accordance with generally accepted accounting principles) as reflected on the company's most recent financial statements, *provided that* such financial statements present the information as of a date within 16 months preceding the date on which the Prospective Qualified Purchaser acquires the securities of a Section 3(c)(7) Company;

(2) Real estate held for investment purposes;

(3) Commodity Interests held for investment purposes;

(4) Physical Commodities held for investment purposes;

(5) To the extent not securities, financial contracts (as such term is defined in section 3(c)(2)(B)(ii) of the Act [15 U.S.C. 80a-3(c)(2)(B)(ii)]) entered into for investment purposes;

(6) In the case of a Prospective Qualified Purchaser that is a Section 3(c)(7) Company, a company that would be an investment company but for the exclusion provided by section 3(c)(1) of the Act [15 U.S.C. 80a-3(c)(1)], or a com-

modity pool, any amounts payable to such Prospective Qualified Purchaser pursuant to a firm agreement or similar binding commitment pursuant to which a person has agreed to acquire an interest in, or make capital contributions to, the Prospective Qualified Purchaser upon the demand of the Prospective Qualified Purchaser; and

(7) Cash and cash equivalents (including foreign currencies) held for investment purposes. For purposes of this section, cash and cash equivalents include:

(i) Bank deposits, certificates of deposit, bankers acceptances and similar bank instruments held for investment purposes; and

(ii) The net cash surrender value of an insurance policy.

(c) *Investment Purposes*. For purposes of this section:

(1) Real estate shall not be considered to be held for investment purposes by a Prospective Qualified Purchaser if it is used by the Prospective Qualified Purchaser or a Related Person for personal purposes or as a place of business, or in connection with the conduct of the trade or business of the Prospective Qualified Purchaser or a Related Person, *provided that* real estate owned by a Prospective Qualified Purchaser who is engaged primarily in the business of investing, trading or developing real estate in connection with such business may be deemed to be held for investment purposes. Residential real estate shall not be deemed to be used for personal purposes if deductions with respect to such real estate are not disallowed by section 280A of the Internal Revenue Code [26 U.S.C. 280A].

(2) A Commodity Interest or Physical Commodity owned, or a financial contract entered into, by the Prospective Qualified Purchaser who is engaged primarily in the business of investing, re-investing, or trading in Commodity Interests, Physical Commodities or financial contracts in connection with such business may be deemed to be held for investment purposes.

(d) *Valuation*. For purposes of determining whether a Prospective Qualified Purchaser is a qualified purchaser, the aggregate amount of Investments owned and invested on a discretionary

basis by the Prospective Qualified Purchaser shall be the Investments' fair market value on the most recent practicable date or their cost, *provided that*:

(1) In the case of Commodity Interests, the amount of Investments shall be the value of the initial margin or option premium deposited in connection with such Commodity Interests; and

(2) In each case, there shall be deducted from the amount of Investments owned by the Prospective Qualified Purchaser the amounts specified in paragraphs (e) and (f) of this section, as applicable.

(e) *Deductions.* In determining whether any person is a qualified purchaser there shall be deducted from the amount of such person's Investments the amount of any outstanding indebtedness incurred to acquire or for the purpose of acquiring the Investments owned by such person.

(f) *Deductions: Family Companies.* In determining whether a Family Company is a qualified purchaser, in addition to the amounts specified in paragraph (e) of this section, there shall be deducted from the value of such Family Company's Investments any outstanding indebtedness incurred by an owner of the Family Company to acquire such Investments.

(g) *Special rules for certain Prospective Qualified Purchasers—(1) Qualified institutional buyers.* Any Prospective Qualified Purchaser who is, or who a Relying Person reasonably believes is, a qualified institutional buyer as defined in paragraph (a) of § 230.144A of this chapter, acting for its own account, the account of another qualified institutional buyer, or the account of a qualified purchaser, shall be deemed to be a qualified purchaser *provided*:

(i) That a dealer described in paragraph (a)(1)(ii) of § 230.144A of this chapter shall own and invest on a discretionary basis at least \$25 million in securities of issuers that are not affiliated persons of the dealer; and

(ii) That a plan referred to in paragraph (a)(1)(i)(D) or (a)(1)(i)(E) of § 230.144A of this chapter, or a trust fund referred to in paragraph (a)(1)(i)(F) of § 230.144A of this chapter that holds the assets of such a plan, will not be deemed to be acting for its

own account if investment decisions with respect to the plan are made by the beneficiaries of the plan, except with respect to investment decisions made solely by the fiduciary, trustee or sponsor of such plan.

(2) *Joint Investments.* In determining whether a natural person is a qualified purchaser, there may be included in the amount of such person's Investments any Investments held jointly with such person's spouse, or Investments in which such person shares with such person's spouse a community property or similar shared ownership interest. In determining whether spouses who are making a joint investment in a Section 3(c)(7) Company are qualified purchasers, there may be included in the amount of each spouse's Investments any Investments owned by the other spouse (whether or not such Investments are held jointly). In each case, there shall be deducted from the amount of any such Investments the amounts specified in paragraph (e) of this section incurred by each spouse.

(3) *Investments by Subsidiaries.* For purposes of determining the amount of Investments owned by a company under section 2(a)(51)(A)(iv) of the Act [15 U.S.C. 80a-2(a)(51)(A)(iv)], there may be included Investments owned by majority-owned subsidiaries of the company and Investments owned by a company ("Parent Company") of which the company is a majority-owned subsidiary, or by a majority-owned subsidiary of the company and other majority-owned subsidiaries of the Parent Company.

(4) *Certain Retirement Plans and Trusts.* In determining whether a natural person is a qualified purchaser, there may be included in the amount of such person's Investments any Investments held in an individual retirement account or similar account the Investments of which are directed by and held for the benefit of such person.

(h) *Reasonable Belief.* The term "qualified purchaser" as used in section 3(c)(7) of the Act [15 U.S.C. 80a-3(c)(7)] means any person that meets the definition of qualified purchaser in section 2(a)(51)(A) of the Act [15 U.S.C.

80a-2(a)(51)(A)] and the rules thereunder, or that a Relying Person reasonably believes meets such definition.

[62 FR 17526, Apr. 9, 1997]

§ 270.2a51-2 Definitions of beneficial owner for certain purposes under sections 2(a)(51) and 3(c)(7) and determining indirect ownership interests.

(a) *Beneficial ownership: General.* Except as set forth in this section, for purposes of sections 2(a)(51)(C) and 3(c)(7)(B)(ii) of the Act [15 U.S.C. 80a-2(a)(51)(C) and -3(c)(7)(B)(ii)], the beneficial owners of an excepted investment company (as defined in section 2(a)(51)(C) of the Act [15 U.S.C. 80a-2(a)(51)(C)]) shall be determined in accordance with section 3(c)(1) of the Act [15 U.S.C. 80a-3(c)(1)].

(b) *Beneficial ownership: Grandfather provision.* For purposes of section 3(c)(7)(B)(ii) of the Act [15 U.S.C. 80a-3(c)(7)(B)(ii)], securities of an issuer beneficially owned by a company (without giving effect to section 3(c)(1)(A) of the Act [15 U.S.C. 80a-3(c)(1)(A)]) (“owning company”) shall be deemed to be beneficially owned by one person unless:

(1) The owning company is an investment company or an excepted investment company;

(2) The owning company, directly or indirectly, controls, is controlled by, or is under common control with, the issuer; and

(3) On October 11, 1996, under section 3(c)(1)(A) of the Act as then in effect, the voting securities of the issuer were deemed to be beneficially owned by the holders of the owning company’s outstanding securities (other than short-term paper), in which case, such holders shall be deemed to be beneficial owners of the issuer’s outstanding voting securities.

(c) *Beneficial ownership: Consent provision.* For purposes of section 2(a)(51)(C) of the Act [15 U.S.C. 80a-2(a)(51)(C)], securities of an excepted investment company beneficially owned by a company (without giving effect to section 3(c)(1)(A) of the Act [15 U.S.C. 80a-3(c)(1)(A)]) (“owning company”) shall be deemed to be beneficially owned by one person unless:

(1) The owning company is an excepted investment company;

(2) The owning company directly or indirectly controls, is controlled by, or is under common control with, the excepted investment company or the company with respect to which the excepted investment company is, or will be, a qualified purchaser; and

(3) On April 30, 1996, under section 3(c)(1)(A) of the Act as then in effect, the voting securities of the excepted investment company were deemed to be beneficially owned by the holders of the owning company’s outstanding securities (other than short-term paper), in which case the holders of such excepted company’s securities shall be deemed to be beneficial owners of the excepted investment company’s outstanding voting securities.

(d) *Indirect ownership: Consent provision.* For purposes of section 2(a)(51)(C) of the Act [15 U.S.C. 80a-2(a)(51)(C)], an excepted investment company shall not be deemed to indirectly own the securities of an excepted investment company seeking a consent to be treated as a qualified purchaser (“qualified purchaser company”) unless such excepted investment company, directly or indirectly, controls, is controlled by, or is under common control with, the qualified purchaser company or a company with respect to which the qualified purchaser company is or will be a qualified purchaser.

(e) *Required consent: Consent provision.* For purposes of section 2(a)(51)(C) of the Act [15 U.S.C. 80a-2(a)(51)(C)], the consent of the beneficial owners of an excepted investment company (“owning company”) that beneficially owns securities of an excepted investment company that is seeking the consents required by section 2(a)(51)(C) (“consent company”) shall not be required unless the owning company directly or indirectly controls, is controlled by, or is under common control with, the consent company or the company with respect to which the consent company is, or will be, a qualified purchaser.

NOTES TO § 270.2A51-2: 1. On both April 30, 1996 and October 11, 1996, section 3(c)(1)(A) of the Act as then in effect provided that: (A) Beneficial ownership by a company shall be deemed to be beneficial ownership by one person, except that, if the company owns 10

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per centum or more of the outstanding voting securities of the issuer, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper) unless, as of the date of the most recent acquisition by such company of securities of that issuer, the value of all securities owned by such company of all issuers which are or would, but for the exception set forth in this subparagraph, be excluded from the definition of investment company solely by this paragraph, does not exceed 10 per centum of the value of the company's total assets. Such issuer nonetheless is deemed to be an investment company for purposes of section 12(d)(1).

2. Issuers seeking the consent required by section 2(a)(51)(C) of the Act should note that section 2(a)(51)(C) requires an issuer to obtain the consent of the beneficial owners of its securities and the beneficial owners of securities of any "excepted investment company" that directly or indirectly owns the securities of the issuer. Except as set forth in paragraphs (d) (with respect to indirect owners) and (e) (with respect to direct owners) of this section, nothing in this section is designed to limit this consent requirement.

[62 FR 17528, Apr. 9, 1997]

§ 270.2a51-3 Certain companies as qualified purchasers.

(a) For purposes of section 2(a)(51)(A) (ii) and (iv) of the Act [15 U.S.C. 80a-2(a)(51)(A) (ii) and (iv)], a company shall not be deemed to be a qualified purchaser if it was formed for the specific purpose of acquiring the securities offered by a company excluded from the definition of investment company by section 3(c)(7) of the Act [15 U.S.C. 80a-3(c)(7)] unless each beneficial owner of the company's securities is a qualified purchaser.

(b) For purposes of section 2(a)(51) of the Act [15 U.S.C. 80a-2(a)(51)], a company may be deemed to be a qualified purchaser if each beneficial owner of the company's securities is a qualified purchaser.

[62 FR 17528, Apr. 9, 1997]

§ 270.3a-1 Certain prima facie investment companies.

Notwithstanding section 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(c)), an issuer will be deemed not to be an investment company under the Act; *Provided, That:*

(a) No more than 45 percent of the value (as defined in section 2(a)(41) of

the Act) of such issuer's total assets (exclusive of Government securities and cash items) consists of, and no more than 45 percent of such issuer's net income after taxes (for the last four fiscal quarters combined) is derived from, securities other than:

(1) Government securities;

(2) Securities issued by employees' securities companies;

(3) Securities issued by majority-owned subsidiaries of the issuer (other than subsidiaries relying on the exclusion from the definition of investment company in section 3(b)(3) or (c)(1) of the Act) which are not investment companies; and

(4) Securities issued by companies:

(i) Which are controlled primarily by such issuer;

(ii) Through which such issuer engages in a business other than that of investing, reinvesting, owning, holding or trading in securities; and

(iii) Which are not investment companies;

(b) The issuer is not an investment company as defined in section 3(a)(1)(A) or 3(a)(1)(B) of the Act (15 U.S.C. 80a-3(a)(1)(A) or 80a-3(a)(1)(B)) and is not a special situation investment company; and

(c) The percentages described in paragraph (a) of this section are determined on an unconsolidated basis, except that the issuer shall consolidate its financial statements with the financial statements of any wholly-owned subsidiaries.

[46 FR 6881, Jan. 22, 1981, as amended at 67 FR 43536, June 28, 2002]

§ 270.3a-2 Transient investment companies.

(a) For purposes of sections 3(a)(1)(A) and 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(A) and 80a-3(a)(1)(C)), an issuer is deemed not to be engaged in the business of investing, reinvesting, owning, holding or trading in securities during a period of time not to exceed one year; *Provided, That* the issuer has a *bona fide* intent to be engaged primarily, as soon as is reasonably possible (in any event by the termination of such period of time), in a business other than that of investing, reinvesting, owning, holding or trading in

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securities, such intent to be evidenced by:

(1) The issuer's business activities; and

(2) An appropriate resolution of the issuer's board of directors, or by an appropriate action of the person or persons performing similar functions for any issuer not having a board of directors, which resolution or action has been recorded contemporaneously in its minute books or comparable documents.

(b) For purposes of this rule, the period of time described in paragraph (a) shall commence on the earlier of:

(1) The date on which an issuer owns securities and/or cash having a value exceeding 50 percent of the value of such issuer's total assets on either a consolidated or unconsolidated basis; or

(2) The date on which an issuer owns or proposes to acquire investment securities (as defined in section 3(a) of the Act) having a value exceeding 40 percent of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

(c) No issuer may rely on this section more frequently than once during any three-year period.

[46 FR 6883, Jan. 22, 1981, as amended at 67 FR 43536, June 28, 2002]

§ 270.3a-3 Certain investment companies owned by companies which are not investment companies.

Notwithstanding section 3(a)(1)(A) or section 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(A) or 80a-3(a)(1)(C)), an issuer will be deemed not to be an investment company for purposes of the Act; *Provided*, That all of the outstanding securities of the issuer (other than short-term paper, directors' qualifying shares, and debt securities owned by the Small Business Administration) are directly or indirectly owned by a company which satisfies the conditions of § 270.3a-1(a) and which is:

(a) A company that is not an investment company as defined in section 3(a) of the Act;

(b) A company that is an investment company as defined in section 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(C)), but which is excluded from the definition

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of the term "investment company" by section 3(b)(1) or 3(b)(2) of the Act (15 U.S.C. 80a-3(b)(1) or 80a-3(b)(2)); or

(c) A company that is deemed not to be an investment company for purposes of the Act by rule 3a-1.

[46 FR 6884, Jan. 22, 1981, as amended at 67 FR 43536, June 28, 2002]

§ 270.3a-4 Status of investment advisory programs.

NOTE: This section is a nonexclusive safe harbor from the definition of investment company for programs that provide discretionary investment advisory services to clients. There is no registration requirement under section 5 of the Securities Act of 1933 [15 U.S.C. 77e] with respect to programs that are organized and operated in the manner described in § 270.3a-4. The section is not intended, however, to create any presumption about a program that is not organized and operated in the manner contemplated by the section.

(a) Any program under which discretionary investment advisory services are provided to clients that has the following characteristics will not be deemed to be an investment company within the meaning of the Act [15 U.S.C. 80a, *et seq.*]:

(1) Each client's account in the program is managed on the basis of the client's financial situation and investment objectives and in accordance with any reasonable restrictions imposed by the client on the management of the account.

(2)(i) At the opening of the account, the sponsor or another person designated by the sponsor obtains information from the client regarding the client's financial situation and investment objectives, and gives the client the opportunity to impose reasonable restrictions on the management of the account;

(ii) At least annually, the sponsor or another person designated by the sponsor contacts the client to determine whether there have been any changes in the client's financial situation or investment objectives, and whether the client wishes to impose any reasonable restrictions on the management of the account or reasonably modify existing restrictions;

(iii) At least quarterly, the sponsor or another person designated by the sponsor notifies the client in writing to

contact the sponsor or such other person if there have been any changes in the client's financial situation or investment objectives, or if the client wishes to impose any reasonable restrictions on the management of the client's account or reasonably modify existing restrictions, and provides the client with a means through which such contact may be made; and

(iv) The sponsor and personnel of the manager of the client's account who are knowledgeable about the account and its management are reasonably available to the client for consultation.

(3) Each client has the ability to impose reasonable restrictions on the management of the client's account, including the designation of particular securities or types of securities that should not be purchased for the account, or that should be sold if held in the account; *Provided, however*, that nothing in this section requires that a client have the ability to require that particular securities or types of securities be purchased for the account.

(4) The sponsor or person designated by the sponsor provides each client with a statement, at least quarterly, containing a description of all activity in the client's account during the preceding period, including all transactions made on behalf of the account, all contributions and withdrawals made by the client, all fees and expenses charged to the account, and the value of the account at the beginning and end of the period.

(5) Each client retains, with respect to all securities and funds in the account, to the same extent as if the client held the securities and funds outside the program, the right to:

- (i) Withdraw securities or cash;
- (ii) Vote securities, or delegate the authority to vote securities to another person;
- (iii) Be provided in a timely manner with a written confirmation or other notification of each securities transaction, and all other documents required by law to be provided to security holders; and
- (iv) Proceed directly as a security holder against the issuer of any security in the client's account and not be obligated to join any person involved in the operation of the program, or any

other client of the program, as a condition precedent to initiating such proceeding.

(b) As used in this section, the term sponsor refers to any person who receives compensation for sponsoring, organizing or administering the program, or for selecting, or providing advice to clients regarding the selection of, persons responsible for managing the client's account in the program. If a program has more than one sponsor, one person shall be designated the principal sponsor, and such person shall be considered the sponsor of the program under this section.

[62 FR 15109, Mar. 31, 1997]

§ 270.3a-5 Exemption for subsidiaries organized to finance the operations of domestic or foreign companies.

(a) A finance subsidiary will not be considered an investment company under section 3(a) of the Act (15 U.S.C. 80a-3(a)) and securities of a finance subsidiary held by the parent company or a company controlled by the parent company will not be considered "investment securities" under section 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(C)); *Provided, That:*

(1) Any debt securities of the finance subsidiary issued to or held by the public are unconditionally guaranteed by the parent company as to the payment of principal, interest, and premium, if any (except that the guarantee may be subordinated in right of payment to other debt of the parent company);

(2) Any non-voting preferred stock of the finance subsidiary issued to or held by the public is unconditionally guaranteed by the parent company as to payment of dividends, payment of the liquidation preference in the event of liquidation, and payments to be made under a sinking fund, if a sinking fund is to be provided (except that the guarantee may be subordinated in right of payment to other debt of the parent company);

(3) The parent company's guarantee provides that in the event of a default in payment of principal, interest, premium, dividends, liquidation preference or payments made under a sinking fund on any debt securities or non-voting preferred stock issued by the finance subsidiary, the holders of those

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securities may institute legal proceedings directly against the parent company (or, in the case of a partnership or joint venture, against the partners or participants in the joint venture) to enforce the guarantee without first proceeding against the finance subsidiary;

(4) Any securities issued by the finance subsidiary which are convertible or exchangeable are convertible or exchangeable only for securities issued by the parent company (and, in the case of a partnership or joint venture, for securities issued by the partners or participants in the joint venture) or for debt securities or non-voting preferred stock issued by the finance subsidiary meeting the applicable requirements of paragraphs (a)(1) through (a)(3);

(5) The finance subsidiary invests in or loans to its parent company or a company controlled by its parent company at least 85% of any cash or cash equivalents raised by the finance subsidiary through an offering of its debt securities or non-voting preferred stock or through other borrowings as soon as practicable, but in no event later than six months after the finance subsidiary's receipt of such cash or cash equivalents;

(6) The finance subsidiary does not invest in, reinvest in, own, hold or trade in securities other than Government securities, securities of its parent company or a company controlled by its parent company (or in the case of a partnership or joint venture, the securities of the partners or participants in the joint venture) or debt securities (including repurchase agreements) which are exempted from the provisions of the Securities Act of 1933 by section 3(a)(3) of that Act; and

(7) Where the parent company is a foreign bank as the term is used in rule 3a-6 (17 CFR 270.3a-6 of this chapter), the parent company may, in lieu of the guaranty required by paragraph (a)(1) or (a)(2) of this section, in favor of the holders of the finance subsidiary's debt securities or non-voting preferred stock, as the case may be, an irrevocable letter of credit in an amount sufficient to fund all of the amounts required to be guaranteed by paragraphs (a)(1) and (a)(2) of this section, *provided*, that:

(i) Payment on such letter of credit shall be conditional only upon the presentation of customary documentation, and

(ii) The beneficiary of such letter of credit is not required by either the letter of credit or applicable law to institute proceedings against the finance subsidiary before enforcing its remedies under the letter of credit.

(b) For purposes of this rule,

(1) A *finance subsidiary* shall mean any corporation—

(i) All of whose securities other than debt securities or non-voting preferred stock meeting the applicable requirements of paragraphs (a)(1) through (3) or directors' qualifying shares are owned by its parent company or a company controlled by its parent company; and

(ii) The primary purpose of which is to finance the business operations of its parent company or companies controlled by its parent company;

(2) A *parent company* shall mean any corporation, partnership or joint venture:

(i) That is not considered an investment company under section 3(a) or that is excepted or exempted by order from the definition of investment company by section 3(b) or by the rules or regulations under section 3(a);

(ii) That is organized or formed under the laws of the United States or of a state or that is a foreign private issuer, or that is a foreign bank or foreign insurance company as those terms are used in rule 3a-6 (17 CFR 270.3a-6 of this chapter); and

(iii) In the case of a partnership or joint venture, each partner or participant in the joint venture meets the requirements of paragraphs (b)(2)(i) and (ii).

(3) A *company controlled by the parent company* shall mean any corporation, partnership or joint venture:

(i) That is not considered an investment company under section 3(a) or that is excepted or exempted by order from the definition of investment company by section 3(b) or by the rules or regulations under section 3(a);

(ii) That is either organized or formed under the laws of the United States or of a state or that is a foreign private issuer, or that is a foreign bank

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or foreign insurance company as those terms are used in rule 3a-6; and

(iii) In the case of a corporation, more than 25 percent of whose outstanding voting securities are beneficially owned directly or indirectly by the parent company; or

(iv) In the case of a partnership or joint venture, each partner or participant in the joint venture meets the requirements of paragraphs (b)(3) (i) and (ii), and the parent company has the power to exercise a controlling influence over the management or policies of the partnership or joint venture.

(4) A *foreign private issuer* shall mean any issuer which is incorporated or organized under the laws of a foreign country, but not a foreign government or political subdivision of a foreign government.

[49 FR 49446, Dec. 20, 1984, as amended at 56 FR 56299, Nov. 4, 1991; 67 FR 43536, June 28, 2002]

§ 270.3a-6 Foreign banks and foreign insurance companies.

(a) Notwithstanding section 3(a)(1)(A) or section 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(A) or 80a-3(a)(1)(C)), a foreign bank or foreign insurance company shall not be considered an investment company for purposes of the Act.

(b) For purposes of this section:

(1)(i) *Foreign bank* means a banking institution incorporated or organized under the laws of a country other than the United States, or a political subdivision of a country other than the United States, that is:

(A) Regulated as such by that country's or subdivision's government or any agency thereof;

(B) Engaged substantially in commercial banking activity; and

(C) Not operated for the purpose of evading the provisions of the Act;

(ii) The term *foreign bank* shall also include:

(A) A trust company or loan company that is:

(1) Organized or incorporated under the laws of Canada or a political subdivision thereof;

(2) Regulated as a trust company or a loan company by that country's or subdivision's government or any agency thereof; and

(3) Not operated for the purpose of evading the provisions of the Act; and

(B) A building society that is:

(1) Organized under the laws of the United Kingdom or a political subdivision thereof;

(2) Regulated as a building society by the country's or subdivision's government or any agency thereof; and

(3) Not operated for the purpose of evading the provisions of the Act.

(iii) Nothing in this section shall be construed to include within the definition of *foreign bank* a common or collective trust or other separate pool of assets organized in the form of a trust or otherwise in which interests are separately offered.

(2) *Engaged substantially in commercial banking activity* means engaged regularly in, and deriving a substantial portion of its business from, extending commercial and other types of credit, and accepting demand and other types of deposits, that are customary for commercial banks in the country in which the head office of the banking institution is located.

(3) *Foreign insurance company* means an insurance company incorporated or organized under the laws of a country other than the United States, or a political subdivision of a country other than the United States, that is:

(i) Regulated as such by that country's or subdivision's government or any agency thereof;

(ii) Engaged primarily and predominantly in:

(A) The writing of insurance agreements of the type specified in section 3(a)(8) of the Securities Act of 1933 (15 U.S.C. 77c(a)(8)), except for the substitution of supervision by foreign government insurance regulators for the regulators referred to in that section; or

(B) The reinsurance of risks on such agreements underwritten by insurance companies; and

(iii) Not operated for the purpose of evading the provisions of the Act. Nothing in this section shall be construed to include within the definition of "foreign insurance company" a separate account or other pool of assets organized in the form of a trust or otherwise in which interests are separately offered.

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NOTE: Foreign banks and foreign insurance companies (and certain of their finance subsidiaries and holding companies) relying on rule 3a-6 for exemption from the Act may be required by rule 489 (17 CFR 230.489) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) to file Form F-N with the Commission in connection with the filing of a registration statement under the Securities Act of 1933.

[56 FR 56299, Nov. 4, 1991, as amended at 67 FR 43536, June 28, 2002]

§ 270.3a-7 Issuers of asset-backed securities.

(a) Notwithstanding section 3(a) of the Act, any issuer who is engaged in the business of purchasing, or otherwise acquiring, and holding eligible assets (and in activities related or incidental thereto), and who does not issue redeemable securities will not be deemed to be an investment company; *Provided That:*

(1) The issuer issues fixed-income securities or other securities which entitle their holders to receive payments that depend primarily on the cash flow from eligible assets;

(2) Securities sold by the issuer or any underwriter thereof are fixed-income securities rated, at the time of initial sale, in one of the four highest categories assigned long-term debt or in an equivalent short-term category (within either of which there may be sub-categories or gradations indicating relative standing) by at least one nationally recognized statistical rating organization that is not an affiliated person of the issuer or of any person involved in the organization or operation of the issuer, except that:

(i) Any fixed-income securities may be sold to accredited investors as defined in paragraphs (1), (2), (3), and (7) of rule 501(a) under the Securities Act of 1933 (17 CFR 230.501(a)) and any entity in which all of the equity owners come within such paragraphs; and

(ii) Any securities may be sold to qualified institutional buyers as defined in rule 144A under the Securities Act (17 CFR 230.144A) and to persons (other than any rating organization rating the issuer's securities) involved in the organization or operation of the issuer or an affiliate, as defined in rule 405 under the Securities Act (17 CFR 230.405), of such a person;

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Provided, That the issuer or any underwriter thereof effecting such sale exercises reasonable care to ensure that such securities are sold and will be resold to persons specified in paragraphs (a)(2) (i) and (ii) of this section;

(3) The issuer acquires additional eligible assets, or disposes of eligible assets, only if:

(i) The assets are acquired or disposed of in accordance with the terms and conditions set forth in the agreements, indentures, or other instruments pursuant to which the issuer's securities are issued;

(ii) The acquisition or disposition of the assets does not result in a downgrading in the rating of the issuer's outstanding fixed-income securities; and

(iii) The assets are not acquired or disposed of for the primary purpose of recognizing gains or decreasing losses resulting from market value changes; and

(4) If the issuer issues any securities other than securities exempted from the Securities Act by section 3(a)(3) thereof (15 U.S.C. 77c(a)(3)), the issuer:

(i) Appoints a trustee that meets the requirements of section 26(a)(1) of the Act and that is not affiliated, as that term is defined in rule 405 under the Securities Act (17 CFR 230.405), with the issuer or with any person involved in the organization or operation of the issuer, which does not offer or provide credit or credit enhancement to the issuer, and that executes an agreement or instrument concerning the issuer's securities containing provisions to the effect set forth in section 26(a)(3) of the Act;

(ii) Takes reasonable steps to cause the trustee to have a perfected security interest or ownership interest valid against third parties in those eligible assets that principally generate the cash flow needed to pay the fixed-income security holders, provided that such assets otherwise required to be held by the trustee may be released to the extent needed at the time for the operation of the issuer; and

(iii) Takes actions necessary for the cash flows derived from eligible assets for the benefit of the holders of fixed-income securities to be deposited periodically in a segregated account that is

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maintained or controlled by the trustee consistent with the rating of the outstanding fixed-income securities.

(b) For purposes of this section:

(1) *Eligible assets* means 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 security holders.

(2) *Fixed-income securities* means any securities that entitle the holder to receive:

(i) A stated principal amount; or

(ii) Interest on a principal amount (which may be a notional principal amount) calculated by reference to a fixed rate or to a standard or formula which does not reference any change in the market value or fair value of eligible assets; or

(iii) Interest on a principal amount (which may be a notional principal amount) calculated by reference to auctions among holders and prospective holders, or through remarketing of the security; or

(iv) An amount equal to specified fixed or variable portions of the interest received on the assets held by the issuer; or

(v) Any combination of amounts described in paragraphs (b)(2) (i), (ii), (iii), and (iv) of this section;

Provided, That substantially all of the payments to which the holders of such securities are entitled consist of the foregoing amounts.

[57 FR 56256, Nov. 27, 1992]

§ 270.3c-1 Definition of beneficial ownership for certain 3(c)(1) funds.

(a) As used in this section:

(1) The term *Covered Company* means a company that is an investment company, a Section 3(c)(1) Company or a Section 3(c)(7) Company.

(2) The term *Section 3(c)(1) Company* means a company that would be an investment company but for the exclusion provided by section 3(c)(1) of the Act [15 U.S.C. 80a-3(c)(1)].

(3) The term *Section 3(c)(7) Company* means a company that would be an investment company but for the exclusion provided by section 3(c)(7) of the Act [15 U.S.C. 80a-3(c)(7)].

(b) For purposes of section 3(c)(1)(A) of the Act [15 U.S.C. 80a-3(c)(1)(A)], beneficial ownership by a Covered Company owning 10 percent or more of the outstanding voting securities of a Section 3(c)(1) Company shall be deemed to be beneficial ownership by one person, *provided that*:

(1) On April 1, 1997, the Covered Company owned 10 percent or more of the outstanding voting securities of the Section 3(c)(1) Company or non-voting securities that, on such date and in accordance with the terms of such securities, were convertible into or exchangeable for voting securities that, if converted or exchanged on or after such date, would have constituted 10 percent or more of the outstanding voting securities of the Section 3(c)(1) Company; and

(2) On the date of any acquisition of securities of the Section 3(c)(1) Company by the Covered Company, the value of all securities owned by the Covered Company of all issuers that are Section 3(c)(1) or Section 3(c)(7) Companies does not exceed 10 percent of the Covered Company's total assets.

[62 FR 17529, Apr. 9, 1997]

§ 270.3c-2 Definition of beneficial ownership in small business investment companies.

For the purpose of section 3(c)(1) of the Act, beneficial ownership by a company owning 10 per centum or more of the outstanding voting securities of any issuer which is a small business investment company licensed to operate under the Small Business Investment Act of 1958, or which has received from the Small Business Administration notice to proceed to qualify for a license, which notice or license has not been revoked, shall be deemed to be beneficial ownership by one person (a) if and so long as the value of all securities of small business investments companies owned by such company does not exceed 5 per centum of the value of its total assets; or (b) if and so long as such stock of the small business investment company shall be owned by a state development corporation which has been created by or pursuant to an act of the State legislature to promote and assist the growth and development of the economy within such State on a

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state-wide basis: *Provided*, That such State development corporation is not, or as a result of its investment in the small business investment company (considering such investment as an investment security) would not be, an investment company as defined in section 3 of the Act.

(Sec. 6, 74 Stat. 412; 15 U.S.C. 80a-6)

[33 FR 11451, Aug. 13, 1968]

§ 270.3c-3 Definition of certain terms used in section 3(c)(1) of the Act with respect to certain debt securities offered by small business investment companies.

The term *public offering* as used in section 3(c)(1) of the Act shall not be deemed to include the offer and sale by a small business investment company, licensed under the Small Business Investment Act of 1958, of any debt security issued by it which is (a) not convertible into, exchangeable for, or accompanied by any equity security, and (b) guaranteed as to timely payment of principal and interest by the Small Business Administration and backed by the full faith and credit of the United States. The holders of any securities offered and sold as described in this section shall be counted, in the aggregate, as one person for purposes of section 3(c)(1) of the Act.

[37 FR 7590, Apr. 18, 1972]

§ 270.3c-4 Definition of "common trust fund" as used in section 3(c)(3) of the Act.

The term *common trust fund* as used in section 3(c)(3) of the Act (15 U.S.C. 80a-3(c)(3)) 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 main-

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taining such fund and any other contributing banks were the same entity; 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. 80a-6(c), 80a-37(a))

[43 FR 2393, Jan 17, 1978]

§ 270.3c-5 Beneficial ownership by knowledgeable employees and certain other persons.

(a) As used in this section:

(1) The term *Affiliated Management Person* means an affiliated person, as such term is defined in section 2(a)(3) of the Act [15 U.S.C. 80a-2(a)(3)], that manages the investment activities of a Covered Company. For purposes of this definition, the term "investment company" as used in section 2(a)(3) of the Act includes a Covered Company.

(2) The term *Covered Company* means a Section 3(c)(1) Company or a Section 3(c)(7) Company.

(3) The term *Executive Officer* means the president, any vice president 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 a Covered Company or for an Affiliated Management Person of the Covered Company.

(4) The term *Knowledgeable Employee* with respect to any Covered Company means any natural person who is:

(i) An Executive Officer, director, trustee, general partner, advisory board member, or person serving in a similar capacity, of the Covered Company or an Affiliated Management Person of the Covered Company; or

(ii) An employee of the Covered Company or an Affiliated Management Person of the Covered Company (other than an employee performing solely clerical, secretarial or administrative functions with regard to such company or its investments) who, in connection with his or her regular functions or duties, participates in the investment activities of such Covered Company,

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other Covered Companies, or investment companies the investment activities of which are managed by such Affiliated Management Person of the Covered Company, *provided that* such employee has been performing such functions and duties for or on behalf of the Covered Company or the Affiliated Management Person of the Covered Company, or substantially similar functions or duties for or on behalf of another company for at least 12 months.

(5) The term *Section 3(c)(1) Company* means a company that would be an investment company but for the exclusion provided by section 3(c)(1) of the Act [15 U.S.C. 80a-3(c)(1)].

(6) The term *Section 3(c)(7) Company* means a company that would be an investment company but for the exclusion provided by section 3(c)(7) of the Act [15 U.S.C. 80a-3(c)(7)].

(b) For purposes of determining the number of beneficial owners of a Section 3(c)(1) Company, and whether the outstanding securities of a Section 3(c)(7) Company are owned exclusively by qualified purchasers, there shall be excluded securities beneficially owned by:

(1) A person who at the time such securities were acquired was a Knowledgeable Employee of such Company;

(2) A company owned exclusively by Knowledgeable Employees;

(3) Any person who acquires securities originally acquired by a Knowledgeable Employee in accordance with this section, provided that such securities were acquired by such person in accordance with § 270.3c-6

[62 FR 17529, Apr. 9, 1997]

§ 270.3c-6 Certain transfers of interests in section 3(c)(1) and section 3(c)(7) funds.

(a) As used in this section:

(1) The term *Donee* means a person who acquires a security of a Covered Company (or a security or other interest in a company referred to in paragraph (b)(3) of this section) as a gift or bequest or pursuant to an agreement relating to a legal separation or divorce.

(2) The term *Section 3(c)(1) Company* means a company that would be an investment company but for the exclu-

sion provided by section 3(c)(1) of the Act [15 U.S.C. 80a-3(c)(1)].

(3) The term *Section 3(c)(7) Company* means a company that would be an investment company but for the exclusion provided by section 3(c)(7) of the Act [15 U.S.C. 80a-3(c)(7)].

(4) The term *Transferee* means a Section 3(c)(1) Transferee or a Qualified Purchaser Transferee, in each case as defined in paragraph (b) of this section.

(5) The term *Transferor* means a Section 3(c)(1) Transferor or a Qualified Purchaser Transferor, in each case as defined in paragraph (b) of this section.

(b) Beneficial ownership by any person ("Section 3(c)(1) Transferee") who acquires securities or interests in securities of a Section 3(c)(1) Company from a person other than the Section 3(c)(1) Company shall be deemed to be beneficial ownership by the person from whom such transfer was made ("Section 3(c)(1) Transferor"), and securities of a Section 3(c)(7) Company that are owned by persons who received the securities from a qualified purchaser other than the Section 3(c)(7) Company ("Qualified Purchaser Transferor") or a person deemed to be a qualified purchaser by this section shall be deemed to be acquired by a qualified purchaser ("Qualified Purchaser Transferee"), provided that the Transferee is:

(1) The estate of the Transferor;

(2) A Donee; or

(3) A company established by the Transferor exclusively for the benefit of (or owned exclusively by) the Transferor and the persons specified in paragraphs (b)(1) and (b)(2) of this section.

[62 FR 17529, Apr. 9, 1997]

§ 270.5b-1 Definition of "total assets."

The term *total assets*, when used in computing values for the purposes of sections 5 and 12 of the Act, shall mean the gross assets of the company with respect to which the computation is made, taken as of the end of the fiscal quarter of the company last preceding the date of computation. This section shall not apply to any company which has adopted either of the alternative methods of valuation permitted by § 270.2a-1.

[Rule N-5B-1, 6 FR 5920, Nov. 22, 1941]

§ 270.5b-2 Exclusion of certain guarantees as securities of the guarantor.

(a) For the purposes of section 5 of the act, a guarantee of a security shall not be deemed to be a security issued by the guarantor: *Provided*, That the value of all securities issued or guaranteed by the guarantor, and owned by the management company, does not exceed 10 percent of the value of the total assets of such management company.

(b) Notwithstanding paragraph (a) of this section, for the purposes of section 5 of the Act, a guarantee by a railroad company of a security issued by a terminal company, warehouse company, switching company, or bridge company, shall not be deemed to be a security issued by such railroad company: *Provided*:

(1) The security is guaranteed jointly or severally by more than one railroad company; and

(2) No one of such guaranteeing railroad companies directly or indirectly controls all of its co-guarantors.

(c) For the purposes of section 5 of the Act, a lease or other arrangement whereby a railroad company is or becomes obligated to pay a stipulated annual sum of rental either to another railroad company or to the security holders of such other railroad company shall not be deemed in itself a guarantee.

[Rule N-5B-2, 10 FR 581, Jan. 16, 1945]

§ 270.5b-3 Acquisition of repurchase agreement or refunded security treated as acquisition of underlying securities.

(a) *Repurchase Agreements*. For purposes of sections 5 and 12(d)(3) of the Act (15 U.S.C. 80a-5 and 80a-12(d)(3)), the acquisition of a repurchase agreement may be deemed to be an acquisition of the underlying securities, provided the obligation of the seller to repurchase the securities from the investment company is Collateralized Fully.

(b) *Refunded Securities*. For purposes of section 5 of the Act (15 U.S.C. 80a-5), the acquisition of a Refunded Security is deemed to be an acquisition of the escrowed Government Securities.

(c) *Definitions*. As used in this section:

(1) *Collateralized Fully* in the case of a repurchase agreement means that:

(i) The value of the securities collateralizing the repurchase agreement (reduced by the transaction costs (including loss of interest) that the investment company reasonably could expect to incur if the seller defaults) is, and during the entire term of the repurchase agreement remains, at least equal to the Resale Price provided in the agreement;

(ii) The investment company has perfected its security interest in the collateral;

(iii) The collateral is maintained in an account of the investment company with its custodian or a third party that qualifies as a custodian under the Act;

(iv) The collateral consists entirely of:

(A) Cash items;

(B) Government Securities;

(C) Securities that at the time the repurchase agreement is entered into are rated in the highest rating category by the Requisite NRSROs; or

(D) Unrated Securities that are of comparable quality to securities that are rated in the highest rating category by the Requisite NRSROs, as determined by the investment company's board of directors or its delegate; and

(v) Upon an Event of Insolvency with respect to the seller, the repurchase agreement would qualify under a provision of applicable insolvency law providing an exclusion from any automatic stay of creditors' rights against the seller.

(2) *Event of Insolvency* means, with respect to a person:

(i) An admission of insolvency, the application by the person for the appointment of a trustee, receiver, rehabilitator, or similar officer for all or substantially all of its assets, a general assignment for the benefit of creditors, the filing by the person of a voluntary petition in bankruptcy or application for reorganization or an arrangement with creditors; or

(ii) The institution of similar proceedings by another person which proceedings are not contested by the person; or

(iii) The institution of similar proceedings by a government agency responsible for regulating the activities

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of the person, whether or not contested by the person.

(3) *Government Security* means any "Government Security" as defined in section 2(a)(16) of the Act (15 U.S.C. 80a-2(a)(16)).

(4) *Refunded Security* means a debt security the principal and interest payments of which are to be paid by Government Securities ("deposited securities") that have been irrevocably placed in an escrow account pursuant to an agreement between the issuer of the debt security and an escrow agent that is not an "affiliated person," as defined in section 2(a)(3)(C) of the Act (15 U.S.C. 80a-2(a)(3)(C)), of the issuer of the debt security, and, in accordance with such escrow agreement, are pledged only to the payment of the debt security and, to the extent that excess proceeds are available after all payments of principal, interest, and applicable premiums on the Refunded Securities, the expenses of the escrow agent and, thereafter, to the issuer or another party; *provided that*:

(i) The deposited securities are not redeemable prior to their final maturity;

(ii) The escrow agreement prohibits the substitution of the deposited securities unless the substituted securities are Government Securities; and

(iii) At the time the deposited securities are placed in the escrow account, or at the time a substitution of the deposited securities is made, an independent certified public accountant has certified to the escrow agent that the deposited securities will satisfy all scheduled payments of principal, interest and applicable premiums on the Refunded Securities; *provided, however*, an independent public accountant need not have provided the certification described in this paragraph (c)(4)(iii) if the security, as a Refunded Security, has received a rating from an NRSRO in the highest category for debt obligations (within which there may be subcategories or gradations indicating relative standing).

(5) *NRSRO* means any nationally recognized statistical rating organization, as that term is used in paragraphs (c)(2)(vi)(E), (F) and (H) of § 240.15c3-1 of this chapter, that is not an "affiliated person," as defined in section 2(a)(3)(C)

of the Act (15 U.S.C. 80a-2(a)(3)(C)), of the issuer of, or any insurer or provider of credit support for, the security.

(6) *Requisite NRSROs* means:

(i) Any two NRSROs that have issued a rating with respect to a security or class of debt obligations of an issuer; or

(ii) If only one NRSRO has issued a rating with respect to such security or class of debt obligations of an issuer at the time the investment company acquires the security, that NRSRO.

(7) *Resale Price* means the acquisition price paid to the seller of the securities plus the accrued resale premium on such acquisition price. The accrued resale premium is the amount specified in the repurchase agreement or the daily amortization of the difference between the acquisition price and the resale price specified in the repurchase agreement.

(8) *Unrated Securities* means securities that have not received a rating from the Requisite NRSROs.

[66 FR 36161, July 11, 2001]

§ 270.6b-1 Exemption of employees' securities company pending determination of application.

Any employees' securities company which files an application for an order of exemption under section 6(b) of the Act (54 Stat. 801; 15 U.S.C. 80a-6) shall be exempt, pending final determination of such application by the Commission, from all provisions of the Act applicable to investment companies as such.

[Rule N-6B-1, 6 FR 6126, Dec. 2, 1941]

§ 270.6c-3 Exemptions for certain registered variable life insurance separate accounts.

A separate account which meets the requirements of paragraph (a) of Rule 6e-2 (17 CFR 270.6e-2) or paragraph (a) of Rule 6e-3(T) (17 CFR 270.6e-3(T)) and registers as an investment company under section 8(a) of the Act (15 U.S.C. 80a-8(a)), and the investment adviser, principal underwriter and depositor of such separate account, shall be exempt from the provisions of the Act specified in paragraph (b) of Rule 6e-2 or paragraph (b) of Rule 6e-3(T), except for sections 7 (15 U.S.C. 80a-7) and 8(a) of the Act, under the same terms and conditions as a separate account claiming

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exemption under Rule 6e-2 or Rule 6e-3(T).

(Secs. 6(c); 15 U.S.C. 80a-6(C) and 38(a))
[49 FR 49228, Dec. 3, 1984]

§ 270.6c-6 Exemption for certain registered separate accounts and other persons.

(a) As used in this section,

(1) *Revenue Ruling* shall mean Revenue Ruling 81-225, 1981-41 I.R.B. (October 13, 1981), issued by the Internal Revenue Service on September 25, 1981.

(2) *Existing separate account* shall mean a separate account which is, or is a part of, a unit investment trust registered under the Act, engaged in a continuous offering of its securities on September 25, 1981.

(3) *Existing portfolio company* shall mean a registered open-end management investment company, engaged in a continuous offering of its securities on September 25, 1981, all or part of whose securities were owned by an existing separate account on September 25, 1981.

(4) *New portfolio company* shall mean any registered open-end management investment company the shares of which will be sold to one or more registered separate accounts for the purpose of minimizing the impact of the Revenue Ruling on the contractowners of an existing separate account, which new portfolio company has the same:

- (i) Investment objectives,
- (ii) Fundamental policies, and
- (iii) Voting rights as the existing

portfolio company and has an advisory fee schedule, including expenses assumed by the adviser, that is at least as advantageous to the new portfolio company as was the fee schedule of the existing portfolio company.

(5) *New separate account* shall mean a separate account which

- (i) Is, or is a part of, a unit investment trust registered under the Act;
- (ii) Is intended to minimize the impact of the Revenue Ruling on the contractowners of an existing separate account;
- (iii) Invests solely in one or more new portfolio companies;
- (iv) Has the same
 - (A) Sales loads,
 - (B) Depositor, and
 - (C) Custodial arrangements

As the existing separate account; and

(v) Has

(A) Asset charges,

(B) Administrative fees, and

(C) Any other fees and charges (not including taxes) that correspond only to fees of the existing separate account and are no greater than those corresponding fees.

(b) Any order of the Commission under the Act, granted to an existing separate account on or before September 25, 1981, shall remain in full force and effect notwithstanding that the existing separate account invests in one or more new portfolio companies in lieu of, or in addition to, investing in one or more existing portfolio companies; *Provided, That:*

(1) No material changes in the facts upon which the order was based have occurred;

(2) All representations, undertakings, and conditions made or agreed to by the existing separate account, and any other person or persons, other than any existing portfolio company, in connection with the issuance of the order are, and continue to be, applicable to the existing separate account and any such other person or persons, unless modified in accordance with this section;

(3) All representations, undertakings, and conditions made or agreed to by the existing portfolio company in connection with the issuance of the order are made or agreed to by the new portfolio company, unless modified in accordance with this section; and

(4) Part II of the Registration Statement under the Securities Act of 1933 of the existing separate account

(i) Indicates that the existing separate account is relying upon paragraph (b) of this section,

(ii) Lists the Investment Company Act release numbers of any orders upon which the existing separate account intends to rely, and

(iii) Contains a representation that the provisions of this paragraph (b) have been complied with.

(c) Any order of the Commission under the Act, granted to an existing separate account on or before September 25, 1981, shall apply with full force and effect to a new separate account and the depositor of and principal underwriter for the new separate

account notwithstanding that the new separate account invests in one or more new portfolio companies; *Provided*, That:

(1) No material changes in the facts upon which the order was based have occurred;

(2) All representations, undertakings, and conditions made or agreed to by the depositor, principal underwriter, and any other person or persons other than the existing separate account or any existing portfolio companies, in connection with the issuance of the order are, and continue to be, applicable to such depositor, principal underwriter, and other person or persons, unless modified in accordance with this section;

(3) All representations, undertakings, and conditions made or agreed to by the existing separate account in connection with the issuance of the order are made or agreed to by the new separate account, unless modified in accordance with this section;

(4) All representations, undertakings, and conditions made or agreed to by an existing portfolio company in connection with the issuance of the order are made or agreed to by the new portfolio company, unless modified in accordance with this section; and

(5) Part II of the Registration Statement under the Securities Act of 1933 of the new separate account

(i) Indicates that the new separate account is relying upon paragraph (c) of this section,

(ii) Lists the Investment Company Act release numbers of any orders upon which the new separate account intends to rely, and

(iii) Contains a representation that the provisions of this paragraph (c) have been complied with.

(d) Any affiliated person or depositor of or principal underwriter for a new or existing separate account or any affiliated person of or principal underwriter for a new or existing portfolio company, and any affiliated person of such persons, principal underwriters, or depositor shall be exempt from section 17(d) of the Act (15 U.S.C 80a-17(d)) and rule 17d-1 thereunder (17 CFR 270.17d-1) to the extent necessary to permit the organization of one or more new portfolio companies; *Provided*, That, any

expenses borne by the existing portfolio company or the new portfolio company in connection with such organization are necessary and appropriate and are allocated in a manner that is fair and reasonable to all of the shareholders of these companies.

(e) Any affiliated person or depositor of or principal underwriter for a new or existing separate account and any affiliated persons of such a person, principal underwriter, or depositor shall be exempt from section 17(d) of the Act and Rule 17d-1 thereunder to the extent necessary to permit such person to bear any reasonable expenses arising out of the organization of one or more new portfolio companies or the new separate account.

(f) Any affiliated persons or depositor of or principal underwriter for a new or existing separate account or any affiliated person of or principal underwriter for a new or existing portfolio company, and any affiliated person of such persons, principal underwriters, or depositor shall be exempt from section 17(a) (15 U.S.C. 80a-17(a)), and any existing portfolio company which has made an election pursuant to Rule 18f-1 (17 CFR 270.18f-1) shall be permitted to revoke that election to the extent necessary to permit transactions involving the transfer of assets from the existing portfolio company to a new portfolio company; *Provided*, That:

(1) Such assets are transferred without the imposition of any fees or charges;

(2) The board of directors of the existing portfolio company, including a majority of the directors of the company who are not interested persons of such company, determines that the transfer of assets is fair and reasonable to all shareholders of the company and such determination, and the basis upon which it was made, is recorded in the minute book of the existing portfolio company;

(3) Any securities involved are valued by the existing portfolio company for purposes of the transfer in accordance with its valuation practices for determining net asset value per share; and

(4) With respect to Rule 18f-1, the existing separate account requests that the existing portfolio company redeem

in kind the shares of the portfolio company held by the separate account.

(g) The new portfolio company shall be exempt from section 2(a)(41) (15 U.S.C. 80a-2(a)(41)) of the Act and rules 2a-4 (17 CFR 270.2a-4) and 22c-1 (17 CFR 270.22c-1) under the Act to the extent necessary to permit it to use the same method of valuation for the purpose of pricing its shares for sale, redemption, and repurchase, as the existing portfolio company; *Provided*, That:

(1) The existing portfolio company had on September 25, 1981, an order of the Commission exempting it, for the purposes of pricing its shares for sale, redemption, and repurchase, from:

(i) Section 2(a)(41) of the Act and rules 2a-4 and 22c-1 under the Act to the extent necessary to permit it to use the amortized cost valuation method or

(ii) Rules 2a-4 and 22c-1 under the Act to the extent necessary to permit it to calculate its net asset value per share to the nearest one cent on share values of \$1.00;

(2) All representations, undertakings, and conditions made or agreed to by the existing portfolio company in connection with the order are made or agreed to by the new portfolio company unless modified in accordance with this section; and

(3) Part II of the Registration Statement under the Securities Act of 1933 of the new portfolio company

(i) Indicates that the new portfolio company is relying upon paragraph (g) of this section,

(ii) Lists the Investment Company Act release numbers of any orders upon which the new portfolio company intends to rely, and

(iii) Contains a representation that the provisions of paragraph (g) have been complied with.

(h) The depositor or trustee of an existing separate account shall be exempt from section 26(c) of the Act (15 U.S.C. 80a-26(c)) to the extent necessary to permit the substitution of securities of the new portfolio company for securities of the existing portfolio company; *Provided*, That, within thirty days of such substitution:

(1) The existing separate account notifies all contractowners of the substitution of securities and any determina-

tions of the board of directors of the new portfolio company required by paragraph (d) of this section;

(2) The existing separate account delivers a copy of the prospectus of the new portfolio company to all contractowners; and

(3) The existing separate account, concurrently with the notification referred to in paragraph (h)(1) of this section or the delivery of the prospectus of the new portfolio company referred to in paragraph (h)(2) of this section, whichever is later, offers to those contractowners who would otherwise have surrender rights under their contracts the right, for a period of at least thirty days from the receipt of this offer, to surrender their contracts without the imposition of any withdrawal charge or contingent deferred sales load, and any surrendering contractowner receives the price next determined after the request for surrender is received by the insurance company.

(i) The existing separate account shall be exempt from section 22(d) of the Act (15 U.S.C. 80a-22(d)) to the extent necessary to permit it to comply with paragraph (h) of this section and the principal underwriter for or depositor of the existing separate account shall be exempt from section 26(a)(4)(B) of the Act (15 U.S.C. 80a-26(a)(4)(B)) to the extent necessary to permit them to rely on paragraph (h) of this section.

(j) Notwithstanding section 11 of the Act (15 U.S.C. 80a-11), the existing separate account or any principal underwriter for the existing separate account may make or cause to be made to the contractowners of the existing separate account an offer to exchange a security funded by an existing portfolio company for a security funded by a new portfolio company without the terms of that offer having first been submitted to and approved by the Commission; *Provided*, That the exchange is to be made on the basis of the relative net asset values of the securities to be exchanged without the imposition of any fees or charges.

(k) Notwithstanding section 11 of the Act, the new separate account or any principal underwriter for the new separate account may make or cause to be made an offer to the contractowners of

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the existing separate account to exchange their securities for securities of the new separate account without the terms of that offer having first been submitted to and approved by the Commission;

Provided, That:

(1) The exchange is to be made on the basis of the relative net asset values of the securities to be exchanged without the imposition of any fees or charges; and

(2) If the new separate account imposes a contingent deferred sales load ("sales load") on the securities to be acquired in the exchange

(i) At the time this sales load is imposed, it is calculated as if

(A) The contractowner had been a contractowner of the new separate account from the date on which he became a contractowner of the existing separate account, in the case of a sales load based on the amount of time the contractowner has been invested in the new separate account, and

(B) Amounts attributable to purchase payments made to the existing separate account had been made to the new separate account on the date on which they were made to the existing separate account, in the case of a sales load based on the amount of time purchase payments have been invested in the new separate account, and

(ii) The total sales load imposed does not exceed 9 percent of the sum of the purchase payments made to the new separate account and that portion of purchase payments made to the existing separate account attributable to the securities exchanged.

(1) Notwithstanding the foregoing, the provisions of this section will be available to a new separate account or new portfolio company, or to any affiliated person or depositor of or principal underwriter for such a new separate account, to any affiliated person of or principal underwriter for such a new portfolio company, to any affiliated person of such persons, depositor, or principal underwriters, or to any substitution of securities effected in reliance on this section, only if such new separate account or new portfolio company is registered under the Act or

such substitution is effected prior to September 21, 1983.

[47 FR 42559, Sept. 28, 1982, as amended at 67 FR 43536, June 28, 2002]

§ 270.6c-7 Exemptions from certain provisions of sections 22(e) and 27 for registered separate accounts offering variable annuity contracts to participants in the Texas Optional Retirement Program.

A registered separate account, and any depositor of or underwriter for such account, shall be exempt from the provisions of sections 22(e), 27(c)(1), and 27(d) of the Act (15 U.S.C. 80a-22(e), 80a-27(c)(1), and 80a-27(d), respectively) with respect to any variable annuity contract participating in such account to the extent necessary to permit compliance with the Texas Optional Retirement Program ("Program"), *Provided*, That the separate, account, depositor, or underwriter for such account:

(a) Includes appropriate disclosure regarding the restrictions on redemption imposed by the Program in each registration statement, including the prospectus, used in connection with the Program;

(b) Includes appropriate disclosure regarding the restrictions on redemption imposed by the Program in any sales literature used in connection with the offer of annuity contracts to potential Program participants;

(c) Instructs salespeople who solicit Program participants to purchase annuity contracts specifically to bring the restrictions on redemption imposed by the Program to the attention of potential Program participants;

(d) Obtains from each Program participant who purchases an annuity contract in connection with the Program, prior to or at the time of such purchase, a signed statement acknowledging the restrictions on redemption imposed by the Program; and

(e) Includes in Part II of the separate account's registration statement under the Securities Act of 1933 a representation that this section is being relied upon and that the provisions of paragraphs (a) through (d) of this section have been complied with.

(Secs. 6(c) and 38(a) of the Act (15 U.S.C. 80a-6(c) and 80a-37(a), respectively))

[49 FR 1479, Jan. 12, 1984]

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§ 270.6c-8 Exemptions for registered separate accounts to impose a deferred sales load and to deduct certain administrative charges.

(a) As used in this section *Deferred sales load* shall mean any sales load, including a contingent deferred sales load, that is deducted upon redemption or annuitization of amounts representing all or a portion of a securityholder's interest in a registered separate account.

(b) A registered separate account, and any depositor of or principal underwriter for such account, shall be exempt from the provisions of sections 2(a)(32), 2(a)(35), 22(c), 26(a)(2)(C), 27(c)(1), 27(c)(2), and 27(d) of the Act (15 U.S.C. 80a-2(a)(32), 80a-2(a)(35), 80a-22(c), 80a-26(a)(2)(C), 80a-27(c)(1), 80a-27(c)(2), and 80a-27(d), respectively) and rule 22c-1 under the Act (17 CFR 270.22c-1) to the extent necessary to permit them to impose a deferred sales load on any variable annuity contract participating in such account, *Provided*, That:

(1) The amount of any such sales load imposed, when added to any sales load previously paid on such contract, shall not exceed 9 percent of purchase payments made to date for such contract; and

(2) The terms of any offer to exchange another contract for the contract are in compliance with the requirements of paragraph (d) or (e) of rule 11a-2 under the Act (17 CFR 270.11a-2).

(c) A registered separate account, and any depositor of or principal underwriter for such account, shall be exempt from sections 2(a)(32), 22(c), 27(c)(1), and 27(d) of the Act (15 U.S.C. 80a-2(a)(32), 80a-22(c), 80a-27(c)(1), and 80a-27(d), respectively) and rule 22c-1 under the Act (17 CFR 270.22c-1) to the extent necessary to permit them to deduct from the value of any variable annuity contract participating in such account, upon total redemption of the contract prior to the last day of the year, the full annual fee for administrative services that otherwise would have been deducted on that date.

(Secs. 6(c) and 38(a) of the Act (15 U.S.C. 80a-6(c) and 80a-37(a)))

[48 FR 36098, Aug. 9, 1983]

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§ 270.6c-10 Exemption for certain open-end management investment companies to impose deferred sales loads.

(a) A company and any exempted person shall be exempt from the provisions of sections 2(a)(32), 2(a)(35), and 22(d) of the Act [15 U.S.C. 80a-2(a)(32), 80a-2(a)(35), and 80a-22(d), respectively] and § 270.22c-1 to the extent necessary to permit a deferred sales load to be imposed on shares issued by the company, *Provided*, that:

(1) The amount of the deferred sales load does not exceed a specified percentage of the net asset value or the offering price at the time of purchase;

(2) The terms of the deferred sales load are covered by the provisions of Rule 2830 of the Conduct Rules of the National Association of Securities Dealers, Inc.; and

(3) The same deferred sales load is imposed on all shareholders, except that scheduled variations in or elimination of a deferred sales load may be offered to a particular class of shareholders or transactions, *Provided*, that the conditions in § 270.22d-1 are satisfied. Nothing in this paragraph (a) shall prevent a company from offering to existing shareholders a new scheduled variation that would waive or reduce the amount of a deferred sales load not yet paid.

(b) For purposes of this section:

(1) *Company* means a registered open-end management investment company, other than a registered separate account, and includes a separate series of the company;

(2) *Exempted person* means any principal underwriter of, dealer in, and any other person authorized to consummate transactions in, securities issued by a company; and

(3) *Deferred sales load* means any amount properly chargeable to sales or promotional expenses that is paid by a shareholder after purchase but before or upon redemption.

[61 FR 49016, Sept. 17, 1996]

§ 270.6d-1 Exemption for certain closed-end investment companies.

(a) An application under section 6(d) of the Act shall contain the following information:

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(1) A brief description of the character of the business and investment policy of the applicant.

(2) The information relied upon by the applicant to satisfy the conditions of paragraphs (1) and (2) of section 6(d) of the Act.

(3) The number of holders of each class of the applicant's outstanding securities.

(4) An unconsolidated balance sheet as of a date not earlier than the end of the applicant's first fiscal year, together with a schedule specifying the title, the amount, the book value and, if determinable, the market value of each security in the applicant's portfolio.

(5) An unconsolidated profit and loss statement for the applicant's last fiscal year.

(6) A statement of each provision of the act from which the applicant seeks exemption, together with a statement of the facts by reason of which, in the applicant's opinion, such exemption is not contrary to the public interest or inconsistent with the protection of investors.

(b) There shall be attached to each copy of the application a copy of Form N-8A. The form need not be executed, but it shall be clearly marked on its facing page as an exhibit to the application. The filing of Form N-8A in this manner shall not be construed as the filing of a notification of registration under section 8(a) of the Act.

(c) The application may contain any additional information which the applicant desires to submit.

[Rule N-6D-1, 5 FR 4346, Nov. 2, 1940]

§ 270.6e-2 Exemptions for certain variable life insurance separate accounts.

(a) A separate account, and the investment adviser, principal underwriter and depositor of such separate account, shall, except for the exemptions provided in paragraph (b) of this Rule 6e-2, be subject to all provisions of the Act and rules and regulations promulgated thereunder as though such separate account were a registered investment company issuing periodic payment plan certificates if:

(1) Such separate account is established and maintained by a life insur-

ance company pursuant to the insurance laws or code of (i) any state or territory of the United States or the District of Columbia, or (ii) Canada or any province thereof, if it complies to the extent necessary with Rule 7d-1 (17 CFR 270.7d-1) under the Act;

(2) The assets of the separate account are derived solely from the sale of variable life insurance contracts as defined in paragraph (c)(1) of this Rule 6e-2, and advances made by the life insurance company which established and maintains the separate account ("life insurer") in connection with the operation of such separate account;

(3) The separate account is not used for variable annuity contracts or for funds corresponding to dividend accumulations or other contract liabilities not involving life contingencies;

(4) The income, gains and losses, whether or not realized, from assets allocated to such separate account, are, in accordance with the applicable variable life insurance contract, credited to or charged against such account without regard to other income, gains or losses of the life insurer;

(5) The separate account is legally segregated, and that portion of its assets having a value equal to, or approximately equal to, the reserves and other contract liabilities with respect to such separate account are not chargeable with liabilities arising out of any other business that the life insurer may conduct;

(6) The assets of the separate account have, at each time during the year that adjustments in the reserves are made, a value at least equal to the reserves and other contract liabilities with respect to such separate account, and at all other times, except pursuant to an order of the Commission, have a value approximately equal to or in excess of such reserves and liabilities; and

(7) The investment adviser of the separate account is registered under the Investment Advisers Act of 1940.

(b) If a separate account meets the requirements of paragraph (a) of this section, then such separate account and the other persons described in paragraph (a) of this section shall be exempt from the provisions of the Act as follows:

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(1) Section 2(a)(35): *Provided, however,* That the term “sales load,” as used in the Act and rules and regulations thereunder, shall have the meaning set forth in paragraph (c)(4) of this Rule.

(2) Section 7.

(3) Section 8 to the extent that:

(i) For purposes of paragraph (a) of section 8, the separate account shall file with the Commission a notification on Form N-6EI-1 which identifies such separate account; and

(ii) For purposes of paragraph (b) of section 8, the separate account shall file with the Commission a form to be designated by the Commission within ninety days after filing the notification on Form N-6EI-1: *Provided, however,* That if the fiscal year of the separate account ends within this ninety day period the form may be filed within ninety days after the end of such fiscal year.

(4) Section 9 to the extent that:

(i) The eligibility restrictions of section 9(a) of the Act shall not be applicable to those persons who are officers, directors and employees of the life insurer or its affiliates who do not participate directly in the management or administration of the separate account or in the sale of variable life insurance contracts funded by such separate account; and

(ii) A life insurer shall be ineligible pursuant to paragraph (3) of section 9(a) of the Act to serve as investment adviser, depositor or principal underwriter for a variable life insurance separate account only if an affiliated person of such life insurer, ineligible by reason of paragraph (1) or (2) of section 9(a), participates directly in the management or administration of the separate account or in the sale of variable life insurance contracts funded by such separate account.

(5) Section 13(a) to the extent that:

(i) An insurance regulatory authority may required pursuant to insurance law or regulation that the separate account make (or refrain from making) certain investments which would result in changes in the sub-classification or investment policies of the separate account;

(ii) Changes in the investment policy of the separate account initiated by contractholders or the board of direc-

tors of the separate account may be disapproved by the life insurer, provided that such disapproval is reasonable and is based upon a determination by the life insurer in good faith that:

(A) Such change would be contrary to state law; or

(B) Such change would be inconsistent with the investment objectives of the separate account or would result in the purchase of securities for the separate account which vary from the general quality and nature of investments and investment techniques utilized by other separate accounts of the life insurer or of an affiliated life insurance company, which separate accounts have investment objectives similar to the separate account;

(iii) Any action taken in accordance with paragraph (b)(5) (i) or (ii) of this section and the reasons therefor shall be disclosed in the proxy statement for the next meeting of variable life insurance contractholders of the separate account.

(6) Section 14(a): *Provided,* That until the separate account has total assets of at least \$100,000 the life insurer shall have (i) a combined capital and surplus, if a stock company, or (ii) an unassigned surplus, if a mutual company, of not less than \$1,000,000 as set forth in the balance sheet of such life insurer contained in the registration statement, or any amendment thereto, relating to variable life insurance contracts funded by such separate account filed pursuant to the Securities Act of 1933, as amended.

(7)(i) Section 15(a) to the extent this section requires that the initial written contract pursuant to which the investment adviser serves or acts shall have been approved by the vote of a majority of the outstanding voting securities of the registered company: *Provided, That:*

(A) Such investment adviser is selected and a written contract is entered into before the effective date of the registration statement under the Securities Act of 1933, as amended, for variable life insurance contracts which are funded by the separate account, and that the terms of the contract are fully disclosed in such registration statement, and

(B) A written contract is submitted to a vote of variable life insurance contractholders at their first meeting after the effective date of the registration statement under the Securities Act of 1933, as amended, on condition that such meeting shall take place within one year after such effective date, unless the time for the holding of such meeting shall be extended by the Commission upon written request for good cause shown;

(ii) Sections 15 (a), (b) and (c) to the extent that:

(A) An insurance regulatory authority may disapprove pursuant to insurance law or regulation any contract between the separate account and an investment adviser or principal underwriter;

(B) Changes in the principal underwriter for the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer: *Provided*, That such disapproval is reasonable;

(C) Changes in the investment adviser of the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer: *Provided*, That such disapproval is reasonable and is based upon a determination by the life insurer in good faith that:

(1) The rate of the proposed investment advisory fee will exceed the maximum rate that is permitted to be charged against the assets of the separate account for such services as specified by any variable life insurance contract funded by such separate account; or

(2) The proposed investment adviser may be expected to employ investment techniques which vary from the general techniques utilized by the current investment adviser to the separate account, or advise the purchase or sale of securities which would be inconsistent with the investment objectives of the separate account, or which would vary from the quality and nature of investments made by other separate accounts of the life insurer or of an affiliated life insurance company, which separate accounts have investment objectives similar to the separate account;

(D) Any action taken in accordance with paragraph (b)(7)(ii) (A), (B) or (C) of this section and the reasons therefor shall be disclosed in the proxy statement for the next meeting of variable life insurance contractholders of the separate account.

(8) Section 16(a) to the extent that:

(i) Persons serving as directors of the separate account prior to the first meeting of such account's variable life insurance contractholders are exempt from the requirement of section 16(a) of the Act that such persons be elected by the holders of outstanding voting securities of such account at an annual or special meeting called for that purpose, *Provided*, That:

(A) Such persons have been appointed directors of such account by the life insurer before the effective date of the registration statement under the Securities Act of 1933, as amended, for variable life insurance contracts which are funded by the separate account and are identified in such registration statement (or are replacements appointed by the life insurer for any such persons who have become unable to serve as directors), and

(B) An election of directors for such account shall be held at the first meeting of variable life insurance contractholders after the effective date of the registration statement under the Securities Act of 1933, as amended, relating to contracts funded by such account, which meeting shall take place within one year after such effective date, unless the time for holding such meeting shall be extended by the Commission upon written request for good cause shown;

(ii) A member of the board of directors of such separate account may be disapproved or removed by the appropriate insurance regulatory authority if such person is ineligible to serve as a director of the separate account pursuant to insurance law or regulation of the jurisdiction in which the life insurer is domiciled.

(9) Section 17(f) to the extent that the securities and similar investments of the separate account may be maintained in the custody of the life insurer or an insurance company which is an affiliated person of such life insurer: *Provided*, That:

(i) The securities and similar investments allocated to such separate account are clearly identified as to ownership by such account, and such securities and similar investments are maintained in the vault of an insurance company which meets the qualifications set forth in paragraph (b)(9)(ii) of this section, and whose procedures and activities with respect to such safekeeping function are supervised by the insurance regulatory authorities of the jurisdiction in which the securities and similar investments will be held;

(ii) The insurance company maintaining such investments must file with an insurance regulatory authority of a State or territory of the United States or the District of Columbia an annual statement of its financial condition in the form prescribed by the National Association of Insurance Commissioners, must be subject to supervision and inspection by such authority and must be examined periodically as to its financial condition and other affairs by such authority, must hold the securities and similar investments of the separate account in its vault, which vault must be equivalent to that of a bank which is a member of the Federal Reserve System, and must have a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than \$1,000,000 as set forth in its most recent annual statement filed with such authority;

(iii) Access to such securities and similar investments shall be limited to employees of or agents authorized by the Commission, representatives of insurance regulatory authorities, independent public accountants for the separate account, accountants for the life insurer and to no more than 20 persons authorized pursuant to a resolution of the board of directors of the separate account, which persons shall be directors of the separate account, officers and responsible employees of the life insurer or officers and responsible employees of the affiliated insurance company in whose vault such investments are maintained (if applicable), and access to such securities and similar investments shall be had only by two or more such persons jointly, at least one

of whom shall be a director of the separate account or officer of the life insurer;

(iv) The requirement in paragraph (b)(9)(i) of this section that the securities and similar investments of the separate account be maintained in the vault of a qualified insurance company shall not apply to securities deposited with insurance regulatory authorities or deposited in a system for the central handling of securities established by a national securities exchange or national securities association registered with the Commission under the Securities Exchange Act of 1934, as amended, or such person as may be permitted by the Commission, or to securities on loan which are collateralized to the extent of their full market value, or to securities hypothecated, pledged, or placed in escrow for the account of such separate account in connection with a loan or other transaction authorized by specific resolution of the board of directors of the separate account, or to securities in transit in connection with the sale, exchange, redemption, maturity or conversion, the exercise of warrants or rights, assents to changes in terms of the securities, or to other transactions necessary or appropriate in the ordinary course of business relating to the management of securities;

(v) Each person when depositing such securities or similar investments in or withdrawing them from the depository or when ordering their withdrawal and delivery from the custody of the life insurer or affiliated insurance company, shall sign a notation in respect of such deposit, withdrawal or order which shall show (A) the date and time of the deposit, withdrawal or order, (B) the title and amount of the securities or other investments deposited, withdrawn or ordered to be withdrawn, and an identification thereof by certificate numbers or otherwise, (C) the manner of acquisition of the securities or similar investments deposited or the purpose for which they have been withdrawn, or ordered to be withdrawn, and (D) if withdrawn and delivered to another person the name of such person. Such notation shall be transmitted promptly to an officer or director of the separate account or the life insurer

designated by the board of directors of the separate account who shall not be a person designated for the purpose of paragraph (b)(9)(iii) of this section. Such notation shall be on serially numbered forms and shall be preserved for at least one year;

(vi) Such securities and similar investments shall be verified by complete examination by an independent public accountant retained by the separate account at least three times during each fiscal year, at least two of which shall be chosen by such accountant without prior notice to such separate account. A certificate of such accountant stating that he has made an examination of such securities and investments and describing the nature and extent of the examination shall be transmitted to the Commission by the accountant promptly after each examination;

(vii) Securities and similar investments of a separate account maintained with a bank or other company whose functions and physical facilities are supervised by Federal or state authorities pursuant to any arrangement whereby the directors, officers, employees or agents of the separate account or the life insurer are authorized or permitted to withdraw such investments upon their mere receipt are deemed to be in the custody of the life insurer and shall be exempt from the requirements of section 17(f) so long as the arrangement complies with all provisions of this paragraph (b)(9), except that such securities will be maintained in the vault of a bank or other company rather than the vault of an insurance company.

(10) Section 18(i) to the extent that:

(i) For the purposes of any section of the Act which provides for the vote of securityholders on matters relating to the investment company:

(A) Variable life insurance contract-holders shall have one vote for each \$100 of cash value funded by the separate account, with fractional votes allocated for amounts less than \$100;

(B) The life insurer shall have one vote for each \$100 of assets of the separate account not otherwise attributable to contractholders pursuant to paragraph (b)(10)(i)(A) of this section, with fractional votes allocated for

amounts less than \$100: *Provided*, That after the commencement of sales of variable life insurance contracts funded by the separate account, the life insurer shall cast its votes for and against each matter which may be voted upon by contractholders in the same proportion as the votes cast by contractholders; and

(C) The number of votes to be allocated shall be determined as of a record date not more than 90 days prior to any meeting at which such vote is held: *Provided*, That if a quorum is not present at the meeting, the meeting may be adjourned for up to 60 days without fixing a new record date;

(ii) The requirement of this section that every share of stock issued by a registered management investment company (except a common-law trust of the character described in section 16(b)) shall be a voting stock and have equal voting rights with every other outstanding voting stock shall not be deemed to be violated by actions specifically permitted by any provision of this Rule.

(11) Section 19 to the extent that the provisions of this section shall not be applicable to any dividend or similar distribution paid or payable pursuant to provisions of participating variable life insurance contracts.

(12) Sections 22(d), 22(e), and 27(c)(1) and Rule 22c-1 promulgated under section 22(c) to the extent:

(i) That the amount payable on death and the cash surrender value of each variable life insurance contract shall be determined on each day during which the New York Stock Exchange is open for trading, not less frequently than once daily as of the time of the close of trading on such exchange: *Provided*, That the amount payable on death need not be determined more than once each contract month if such determination does not reduce the participation of the contract in the investment experience of the separate account: *Provided further, however*, That if the net valuation premium for such contract is transferred at least annually, then the amount payable on death need be determined only when such net premium is transferred;

(ii) Necessary for compliance with this Rule 6e-2 or with insurance laws

and regulations and established administrative procedures of the life insurer with respect to issuance, transfer and redemption procedures for variable life insurance contracts funded by the separate account including, but not limited to, premium rate structure and premium processing, insurance underwriting standards, and the particular benefit afforded by the contract: *Provided, however*, That any procedure or action shall be reasonable, fair and not discriminatory to the interests of the affected contractholder and to all other holders of contracts of the same class or series funded by the separate account: *And, further provided*, That any such action shall be disclosed in the form required to be filed by the separate account with the Commission pursuant to paragraph (b)(3)(ii) of this Rule 6e-2.

(13) Section 27 to the following extent:

(i) Sections 27(a)(1) and 27(h)(1) to the extent that the sales load, as defined in paragraph (c)(4) of this section, on any variable life insurance contract which is funded by the separate account shall not exceed 9 per centum of the payments to be made thereon during the period equal to the lesser of 20 years or the anticipated life expectancy of the insured named in the contract based on the 1958 Commissioners Standard Ordinary Mortality Table;

(ii) Sections 27(a)(3) and 27(h)(3): *Provided*, That the proportionate amount of sales load deducted from any payment during the contract period shall not exceed the proportionate amount deducted from any prior payment during the contract period except that such amount may exceed the amount deducted from a prior payment if the increase is caused by the grading of cash values into reserves or reductions in the annual cost of insurance;

(iii) Sections 27(c)(2), 26(a)(1) and 26(a)(2): *Provided*, That the life insurer complies, to the extent applicable, with all other provisions of section 26 as if it were a trustee, depositor or custodian for the separate account, and:

(A) Files with the insurance regulatory authority of a state or territory of the United States or of the District of Columbia an annual statement of its financial condition in the form pre-

scribed by the National Association of Insurance Commissioners, which most recent statement indicates that it has a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than \$1,000,000;

(B) Is examined from time to time by the insurance regulatory authority of such state, territory or District of Columbia as to its financial condition and other affairs and is subject to supervision and inspection with respect to its separate account operations; and

(C) Limits the fees for administrative services to amounts that are reasonable in relation to services rendered and expenses incurred. The Commission shall retain jurisdiction regarding the determination of such fees;

(iv) Sections 27(c)(1) and 27(d), to the extent that such sections require that the variable life insurance contract be redeemable or provide for a refund in cash: *Provided*, That such contract provides for election by the contractholder of a cash surrender value or certain non-forfeiture and settlement options which are required or permitted by the insurance law or regulation of the jurisdiction in which the contract is offered: *And further provided*, That unless required by the insurance law or regulation of the jurisdiction in which the contract is offered or unless elected by the contractholder, such contract shall not provide for the automatic imposition of any option, including, but not limited to, an automatic premium loan, which would involve the accrual or payment of an interest or similar charge;

(v) Section 27(d): *Provided*, That the variable life insurance contract gives the holder thereof the right to:

(A) Surrender the contract at any time during the first 24 months after issuance and receive in cash an amount not less than the sum of the present value of his contract which is the cash surrender value next computed after receipt by the life insurer of the request for surrender in proper form, plus, depending upon the period over which such contract has been retained by the contractholder, an amount which is a refund of any excess paid for sales loading prior to surrender: *Provided, however*, That if payments for

the contract have not been duly paid on the date the request for surrender is received by the life insurer, and if the sum of the cash surrender value and the amount of any excess sales loading which would otherwise be refundable in cash were applied to provide (without sales loading) a nonforfeiture benefit in accordance with the contract, then the contractholder shall be entitled to receive in cash the present value, next computed after receipt by the life insurer of the request for surrender in proper form, of any non-forfeiture benefit then in force. The amount of sales loading to be refunded shall be equal to that part of the excess paid for sales loading which is over the sum of 30 per centum of payments made for the first contract year plus 10 per centum of the payments made for the second contract year; and

(B) Convert the contract at any time during the first 24 months after issuance so long as payments are duly made to a life insurance policy on the life of the insured which provides for fixed death benefits and cash surrender values pursuant to a plan of insurance specified in the contract issued by the life insurer, or by a life insurance company affiliated with such insurer, which provides for the same initial amount of insurance as the variable life insurance contract and premiums which are based on the same issue age and risk classification of the insured as the variable life insurance contract, which conversion shall be subject to an equitable adjustment in payments and cash values to reflect variances, if any, in the payments and cash values under the original contract and the new policy: *Provided*, That the method of computing such adjustment shall be filed with the Commission as an exhibit to the form required pursuant to paragraph (b)(3)(ii) of this Rule;

(vi) A depositor or principal underwriter for a variable life insurance contract sold subject to section 27(d) or section 27(f) of the Act, or both, shall be exempt from the requirements of Rule 27d-1 if an insurance company undertakes in writing to guarantee the performance of all obligations of such depositor or principal underwriter under sections 27(d) and 27(f) of the Act to refund charges and such insurance

company, depositor and principal underwriter comply with all provisions of Rule 27d-2;

(vii) Section 27(e) and Rule 27e-1 thereunder to the extent that the separate account and the depositor and principal underwriter therefor, when such persons are subject to paragraph (b)(13)(v) of this Rule, are required to provide a notice of right of withdrawal and refund to holders of variable life insurance contracts, if the life insurer or a duly authorized agent provides a notice of withdrawal and refund rights on Form N-27I-1, to the holder of any variable life insurance contract under which a refund may be available, provided that such notice shall be sent by first class mail to the contractholder:

(A) At issuance of the variable life insurance contract, which notice may be sent together with the issued variable life insurance contract and an illustration, in a form appropriate for inclusion in the prospectus for the variable life insurance contract, of gross annual payments, death benefits and cash surrender values applicable to the age, sex and underwriting classification of the insured; and

(B) If the contractholder has failed to make a payment prior to the expiration of the refund right provided by paragraph (b)(13)(v) of this Rule and the contract has not been reinstated within 30 days following the expiration of the grace period provided in the variable life insurance contract for making of any payment due: *Provided, however*, In any event, if a payment is not made when due such notice shall be sent not less than 15 days prior to the expiration of the refund right, which notice may be sent together with a notification that the payment is overdue or an offer to reinstate the contract;

(viii) Section 27(f) and Rule 27f-1: *Provided*, That:

(A) The contractholder may elect to return the contract within 45 days of the date of the execution of the application for insurance or within 10 days after receipt of the issued contract by the contractholder, or within 10 days after mailing of the notice of the right of withdrawal, whichever is later, and receive a refund of all payments made for such contract;

(B) A refund of all payments to redeeming contractholders will not in any way affect the interests in the separate account or the benefits of other variable life insurance contractholders;

(C) Notice of such withdrawal right and a statement of charges on Form N-271-2 is sent by first class mail to the contractholder, which notice and statement may be accompanied by the variable life insurance contract and an illustration, in a form appropriate for inclusion in the prospectus for the variable life insurance contract, of payments, death benefits and cash surrender values applicable to the age, sex and underwriting classification of the insured;

(D) The contractholder, in conjunction with the notice of withdrawal right referred to in paragraph (b)(13)(viii)(C) of this rule, is provided with a form of request for refund of payments made, which form shall set forth;

(1) Instructions as to the manner in which a refund may be obtained including the address to which the request form should be mailed; and

(2) Spaces necessary to indicate the date of such request, the contract number and the signature of the contractholder; and

(E) Within 7 days from the receipt of such duly executed timely request for refund, the life insurer will refund in cash to the contractholder the entire amount of payments made on the contract;

(ix) Solely for purposes of paragraphs (b)(13)(v) and (viii) of this Rule, the postmark date on the envelope containing the variable life insurance contract shall determine whether such contract has been submitted for surrender or conversion within the designated period.

(14) Section 32(a)(2): *Provided, That:*

(i) The independent public accountant is selected before the effective date of the registration statement under the Securities Act of 1933, as amended, for variable life insurance contracts which are funded by the separate account, and the identity of such accountant is disclosed in such registration statement, and

(ii) The selection of such accountant is submitted for ratification or rejection

to variable life insurance contractholders at their first meeting after the effective date of the registration statement under the Securities Act of 1933, as amended, on condition that such meeting shall take place within one year after such effective date, unless the time for the holding of such meeting shall be extended by the Commission upon written request for good cause shown.

(15) If the separate account is organized as a unit investment trust, all the assets of which consist of the shares of one or more registered management investment companies which offer their shares exclusively to variable life insurance separate accounts of the life insurer or of any affiliated life insurance company:

(i) The eligibility restrictions of section 9(a) of the Act shall not be applicable to those persons who are officers, directors and employees of the life insurer or its affiliates who do not participate directly in the management or administration of any registered management investment company described above;

(ii) The life insurer shall be ineligible pursuant to paragraph (3) of section 9(a) of the Act to serve as investment adviser of or principal underwriter for any registered management investment company described in this paragraph (b)(15) only if an affiliated person of such life insurer, ineligible by reason of paragraph (1) or (2) of section 9(a), participates in the management or administration of such company;

(iii) The life insurer may vote shares of the registered management investment companies held by the separate account without regard to instructions from contractholders of the separate account if such instructions would require such shares to be voted:

(A) To cause such companies to make (or refrain from making) certain investments which would result in changes in the sub-classification or investment objectives of such companies or to approve or disapprove any contract between such companies and an investment adviser when required to do so by an insurance regulatory authority subject to the provisions of paragraphs (b)(5)(i) and (7)(ii)(A) of this section; or

(B) In favor of changes in investment objectives, investment adviser of or principal underwriter for such companies subject to the provisions of paragraphs (b)(5)(ii) and (7)(ii) (B) and (C) of this section;

(iv) Any action taken in accordance with paragraph (b)(15)(iii)(A) or (B) of this section and the reasons therefor shall be disclosed in the next report to contractholders made pursuant to section 30(e) (15 U.S.C. 80a-29(e)) and § 270.30e-2;

(v) Any registered management investment company established by the insurer and described in this paragraph (b)(15) shall be exempt from section 14(a) provided that until such company has total assets of at least \$100,000 the life insurer shall have at least the minimum net worth prescribed in paragraph (b)(6) of this section; and

(vi) Any registered management investment company established by the insurer and described in this paragraph (b)(15) shall be exempt from sections 15(a), 16(a), and 32(a)(2) of the Act, to the extent prescribed by paragraphs (b)(7)(i), (b)(8)(i), and (b)(14), provided that such company complies with the conditions set forth in those paragraphs as if it were a separate account.

(c) When used in this rule:

(1) *Variable life insurance contract* means a contract of life insurance, subject to regulation under the insurance laws or code of every jurisdiction in which it is offered, funded by a separate account of a life insurer, which contract, so long as payments are duly paid in accordance with its terms, provides for:

(i) A death benefit and cash surrender value which vary to reflect the investment experience of the separate account;

(ii) An initial stated dollar amount of death benefit, and payment of a death benefit guaranteed by the life insurer to be at least equal to such stated amount; and

(iii) Assumption of the mortality and expense risks thereunder by the life insurer for which a charge against the assets of the separate account may be assessed. Such charge shall be disclosed in the prospectus and shall not be less than fifty per centum of the maximum charge for risk assumption as disclosed

in the prospectus and as provided for in the contract.

(2) *Incidental insurance benefits* means insurance benefits provided pursuant to the variable life insurance contract, other than the minimum and variable death benefit, which do not vary in amount or duration in accordance with the investment performance of the separate account, and include, but are not limited to, accidental death and dismemberment benefits, disability income benefits, guaranteed insurability options, and family income or fixed benefit term riders.

(3) *Minimum death benefit* is the amount guaranteed by the life insurer to be paid pursuant to a variable life insurance contract in the event of the death of the insured without regard to the investment performance of the separate account funding the variable life insurance contract, if payments are duly made and if there are no outstanding loans, partial withdrawals or partial surrenders, but does not include any incidental insurance benefits.

(4) *Sales load* charged on any payment is the excess of the payment over the sum of the following:

(i) The amount of the cash value for the first contract year, if any, and the amount of the increase in the cash value for each subsequent contract year, that is attributable to payments made and not attributable to investment earnings;

(ii) The cost of insurance for the period for which the payment is made based on the 1958 Commissioners Standard Ordinary Mortality Table and the assumed investment rate specified in the contract;

(iii) A reasonable charge necessary to cover the risk assumed by the life insurer that the variable death benefit will be less than the guaranteed minimum death benefit;

(iv) Any administrative expenses or fees which are reasonable and in amounts not exceeding anticipated administrative expenses and fees not properly chargeable to sales or promotional activities;

(v) A deduction approximately equal to state premium taxes;

(vi) Any additional charge assessed if the insured does not meet standard underwriting requirements;

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(vii) Any additional charge assessed specifically for any incidental insurance benefits which do not vary in relation to the performance of the separate account;

(viii) Any additional charge, in the nature of an interest or service charge or administrative fee, assessed when payments are made more frequently than annually;

(ix) For a participating variable life insurance contract, a deduction for dividends to be paid or credited in accordance with the dividend scale in effect on the issue date of the contract assuming a gross annual investment return for the separate account which funds such contract of 4 percent after deduction for any Federal income taxes, which deduction may be determined pursuant to either of the following methods, provided that the same method must be applied with respect to each payment under the contract:

(A) The actuarial level annual equivalent of dividends to be paid or credited over the period described in paragraph (b)(13)(i) of this section, based upon the mortality, interest and lapse assumptions used in computing the dividend scale for such contract multiplied by the fraction of the contract year for which the payment is made; or

(B) That portion of the dividend to be paid for the contract year which does not depend on the making of additional payments.

(5) *Assumed investment rate* is the rate of investment return specified in the contract which would be required to be credited to a variable life insurance contract, after deduction of charges for Federal income taxes, investment management fees, portfolio transaction expenses and mortality and expense guarantees, to maintain the variable death benefit equal at all times to the amount of death benefit, other than incidental insurance benefits, which would be payable pursuant to the variable life insurance contract if the death benefit did not vary according to the investment experience of the separate account.

(6) *Variable death benefit* is the amount of death benefit, other than incidental insurance benefits, payable under a variable life insurance contract

which varies to reflect the investment performance of the separate account, and which would be payable in the absence of the minimum death benefit.

(7) *Payment*, as used in paragraphs (b)(13)(i), (b)(13)(ii) and (b)(13)(v)(A) of this section and in sections 27(a)(2) and 27(h)(2) solely with respect to variable life insurance contracts, means the gross premium payment made less any portion of such gross premium charged for or attributable to the items specified in paragraphs (c)(4)(vi), (vii) and (viii) of this section. "Payment," as used in any other section of the Rule, means the gross premiums paid or payable for the variable life insurance contract.

(Secs. 6(c) and 38(a) of the Act (15 U.S.C. 80a-6(c) and 80a-37(a), respectively))

[41 FR 47027, Oct. 27, 1976; 41 FR 52668, Dec. 1, 1976, as amended at 49 FR 1477, Jan. 12, 1984; 67 FR 43536, June 28, 2002]

§ 270.6e-3(T) Temporary exemptions for flexible premium variable life insurance separate accounts.

(a) A separate account, and its investment adviser, principal underwriter and depositor, shall, except as provided in paragraph (b) of this Rule, comply with all provisions of the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) and the rules under it that apply to a registered investment company issuing periodic payment play certificates if:

(1) It is a separate account within the meaning of section 2(a)(37) of the Act (15 U.S.C. 80a-2(a)(37)) and is established and maintained by a life insurance company pursuant to the insurance laws or code of (i) any state or territory of the United States or the District of Columbia, or (ii) Canada or any province thereof, if it complies with Rule 7d-1 (17 CFR 270.7d-1) under the Act (the "life insurer");

(2) The assets of the separate account are derived solely from (i) the sale of flexible premium variable life insurance contracts ("flexible contracts") as defined in paragraph (c)(1) of this Rule, (ii) the sale of scheduled premium variable life insurance contracts ("scheduled contracts") as defined in paragraph (c)(1) of Rule 6e-2 (17 CFR 270.6e-2) under the Act, (iii) funds corresponding to dividend accumulations

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with respect to such contracts, and (iv) advances made by the life insurer in connection with the operation of such separate account;

(3) The separate account is not used for variable annuity contracts or other contract liabilities not involving life contingencies;

(4) The separate account is legally segregated, and that part of its assets with a value approximately equal to the reserves and other contract liabilities for such separate account are not chargeable with liabilities arising from any other business of the life insurer;

(5) The value of the assets of the separate account, each time adjustments in the reserves are made, is at least equal to the reserves and other contract liabilities of the separate account, and at all other times approximately equals or exceeds the reserves and liabilities; and

(6) The investment adviser of the separate account is registered under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.).

(b) A separate account that meets the requirements of paragraph (a) of this Rule, and its investment adviser, principal underwriter and depositor shall be exempt with respect to flexible contracts funded by the separate account from the following provisions of the Act:

(1) Section 2(a)(35) (15 U.S.C. 80a-2(a)(35)), *Provided, however*, That the term "sales load," as used in the Act and rules under it, shall have the meaning set forth in paragraph (c)(4) of this Rule. *And provided further*, That in connection with any sales load deducted pursuant to paragraph (d)(1) of this Rule, the separate account and other persons shall be exempt from sections 2(a)(32) (15 U.S.C. 80a-2(a)(32)), 12(b) (15 U.S.C. 80a-12(b)), 22(c) (15 U.S.C. 80a-22(c)), 26(a) (15 U.S.C. 80a-26(a)), 27(c)(1) (15 U.S.C. 80a-27(c)(1)), 27(c)(2) (15 U.S.C. 80a-27(c)(2)), and 27(d) (15 U.S.C. 80a-27(d)), and Rules 12b-1 (17 CFR 270.12b-1) and 22c-1 (17 CFR 270.22c-1).

(2) Section 7 (15 U.S.C. 80a-7).

(3) Section 8 (15 U.S.C. 80a-8), to the extent that:

(i) For purposes of paragraph (a) of section 8, the separate account filed with the Commission a notification on

Form N-6EI-1 (17 CFR 274.301) which identifies the separate account; and

(ii) For purposes of paragraph (b) of section 8, the separate account shall file with the Commission the form designated by the Commission within ninety days after filing the notification on Form N-6EI-1, *Provided, however*, That if the fiscal year of the separate account end within this ninety day period, the form may be filed within ninety days after the end of such fiscal year.

(4) Section 9 (15 U.S.C. 80a-9), to the extent that:

(i) The eligibility restrictions of section 9(a) shall not apply to persons who are officers, directors or employees of the life insurer or its affiliates and who do not participate directly in the management or administration of the separate account or in the sale of flexible contracts; and

(ii) A life insurer shall be ineligible under paragraph (3) of section 9(a) to serve as investment adviser, depositor of or principal underwriter for the separate account only if an affiliated person of such life insurer, ineligible by reason of paragraphs (1) or (2) of section 9(a), participates directly in the management or administration of the separate account or in the sale of flexible contracts.

(5) Section 13(a) (15 U.S.C. 80a-13(a)), to the extent that:

(i) An insurance regulatory authority may require pursuant to insurance law or regulation that the separate account make (or refrain from making) certain investments which would result in changes in the sub-classification or investment policies of the separate account;

(ii) Changes in the investment policy of the separate account initiated by its contractholders or board of directors may be disapproved by the life insurer, if the disapproval is reasonable and is based on a good faith determination by the life insurer that:

(A) The change would violate state law; or

(B) The change would not be consistent with the investment objectives of the separate account or would result in the purchase of securities for the separate account which vary from the

general quality and nature of investments and investment techniques used by other separate accounts of the life insurer or of an affiliated life insurance company with similar investment objectives;

(iii) Any action described in paragraph (b)(5)(i) or (ii) of this Rule and the reasons for it shall be disclosed in the next communication to contractholders, but in no case, later than twelve months from the date of such action.

(6) Section 14(a) (15 U.S.C. 80a-14(a)), *Provided*, That until the separate account has total assets of at least \$100,000, the life insurer shall have (i) a combined capital and surplus, if a stock company, or (ii) an unassigned surplus, if a mutual company, of not less than \$1,000,000 as set forth in the balance sheet of such life insurer contained in the registration statement for flexible contracts filed under the Securities Act of 1933 (15 U.S.C. 77a et seq.) (the "1933 Act").

(7)(i) Section 15(a) (15 U.S.C. 80a-15(a)), to the extent it requires that the initial written contract with the investment adviser shall have been approved by the vote of a majority of the outstanding voting securities of the registered investment company, *Provided*, That:

(A) The investment adviser is selected and a written contract is entered into before the effective date of the 1933 Act registration statement for flexible contracts, and that the terms of the contract are fully disclosed in the registration statement, and

(B) A written contract is submitted to a vote of contractholders at their first meeting and within one year after the effective date of the 1933 Act registration statement, unless the Commission upon written request and for good cause shown extends the time for the holding of such meeting;

(ii) Sections 15 (a), (b) and (c), to the extent that:

(A) An insurance regulatory authority may disapprove pursuant to insurance law or regulation any contract between the separate account and an investment adviser or principal underwriter;

(B) Changes in the principal underwriter for the separate account initi-

ated by contractholders or the board of directors of the separate account may be disapproved by the life insurer, *Provided*, That such disapproval is reasonable;

(C) Changes in the investment adviser of the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer, *Provided*, That such disapproval is reasonable and is based on a good faith determination by the life insurer that:

(1) The proposed investment advisory fee will exceed the maximum rate specified in any flexible contract that may be charged against the assets of the separate account for such services; or

(2) The proposed investment adviser may be expected to employ investment techniques which vary from the general techniques used by the current investment adviser to the separate account, or advise the purchase or sale of securities which would not be consistent with the investment objectives of the separate account, or which would vary from the quality and nature of investments made by other separate accounts with similar investment objectives of the life insurer or an affiliated life insurance company;

(D) Any action described in paragraph (b)(7)(ii) (A), (B) or (C) of this Rule and the reasons for it shall be disclosed in the next communication to contractholders, but in no case, later than twelve months from the date of such action.

(8) Section 16(a) (15 U.S.C. 80a-16(a)), to the extent that:

(i) Directors of the separate account serving before the first meeting of the account's contractholders are exempt from the requirement of section 16(a) that they be elected by the holders of outstanding voting securities of the account at an annual or special meeting called for that purpose, *Provided*, That:

(A) Such persons were appointed directors of the account by the life insurer before the effective date of the 1933 Act registration statement for flexible contracts and are identified in the registration statement (or are replacements appointed by the life insurer for any such persons who have become unable to serve as directors), and

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(B) An election of directors for the account is held at the first meeting of contractholders and within one year after the effective date of the 1933 Act registration statement for flexible contracts, unless the time for holding the meeting is extended by the Commission upon written request and for good cause shown;

(ii) A member of the board of directors of the separate account may be disapproved or removed by an insurance regulatory authority if the person is not eligible to be a director of the separate account under the law of the life insurer's domicile.

(9) Section 17(f) (15 U.S.C. 80a-17(f)), to the extent that the securities and similar investments of a separate account organized as a management investment company may be maintained in the custody of the life insurer or of an affiliated life insurance company, *Provided, That:*

(i) The securities and similar investments allocated to the separate account are clearly identified as owned by the account, and the securities and similar investments are kept in the vault of an insurance company which meets the qualifications in paragraph (b)(9)(i) of this Rule, and whose safekeeping function is supervised by the insurance regulatory authorities of the jurisdiction in which the securities and similar investments will be held;

(ii) The insurance company maintaining such investments must file with an insurance regulatory authority of a state or territory of the United States or the District of Columbia an annual statement of its financial condition in the form prescribed by the National Association of Insurance Commissioners, must be subject to supervision and inspection by such authority and must be examined periodically as to its financial condition and other affairs by such authority, must hold the securities and similar investments of the separate account in its vault, which vault must be equivalent to that of a bank which is a member of the Federal Reserve System, and must have a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than \$1,000,000 as set forth in its most

recent annual statement filed with such authority;

(iii) Access to such securities and similar investments shall be limited to employees of the Commission, representatives of insurance regulatory authorities, independent public accountants retained by the separate account (or on its behalf by the life insurer), accountants for the life insurer, and to no more than 20 persons authorized by a resolution of the board of directors of the separate account, which persons shall be directors of the separate account, officers and responsible employees of the life insurer or officers and responsible employees of the affiliated life insurance company in whose vault the investments are kept (if applicable), and access to such securities and similar investments shall be had only by two or more such persons jointly, at least one of whom shall be a director of the separate account or officer of the life insurer;

(iv) The requirement in paragraph (b)(9)(i) of this Rule that the securities and similar investments of the separate account be maintained in the vault of a qualified insurance company shall not apply to securities deposited with insurance regulatory authorities or deposited in accordance with any rule under section 17(f), or to securities on loan which are collateralized to the extent of their full market value, or to securities hypothecated, pledged, or placed in escrow for the account of such separate account in connection with a loan or other transaction authorized by specific resolution of the board of directors of the separate account, or to securities in transit in connection with the sale, exchange, redemption, maturity or conversion, the exercise of warrants or rights, assents to changes in terms of the securities, or to other transactions necessary or appropriate in the ordinary course of business relating to the management of securities;

(v) Each person when depositing such securities or similar investments in or withdrawing them from the depository or when ordering their withdrawal and delivery from the custody of the life insurer or affiliated life insurance company, shall sign a notation showing (A)

the date and time of the deposit, withdrawal or order, (B) the title and amount of the securities or other investments deposited, withdrawn or ordered to be withdrawn, and an identification thereof by certificate numbers or otherwise, (C) the manner of acquisition of the securities or similar investments deposited or the purpose for which they have been withdrawn, or ordered to be withdrawn, and (D) if withdrawn and delivered to another person, the name of such person. The notation shall be sent promptly to an officer or director of the separate account or the life insurer designated by the board of directors of the separate account who is not himself permitted to have access to the securities or investments under paragraph (b)(9)(iii) of this Rule. The notation shall be on serially numbered forms and shall be kept for at least one year;

(vi) The securities and similar investments shall be verified by complete examination by an independent public accountant retained by the separate account (or on its behalf by the life insurer) at least three times each fiscal year, at least two of which shall be chosen by the accountant without prior notice to the separate account. A certificate of the accountant stating that he has made an examination of such securities and investments and describing the nature and extent of the examination shall be sent to the Commission by the accountant promptly after each examination;

(vii) Securities and similar investments of a separate account maintained with a bank or other company whose functions and physical facilities are supervised by federal or state authorities under any arrangement whereby the directors, officers, employees or agents of the separate account or the life insurer are authorized or permitted to withdraw such investments upon their mere receipt are deemed to be in the custody of the life insurer and shall be exempt from the requirements of section 17(f) so long as the arrangement complies with all provisions of this paragraph (b)(9), except that such securities will be maintained in the vault of a bank or other company rather than the vault of an insurance company.

(10) Section 18(i) (15 U.S.C. 80a-18(i)), to the extent that:

(i) For the purposes of any section of the Act which provides for the vote of securityholders on matters relating to the investment company:

(A) Flexible contractholders shall have one vote for each \$100 of cash value funded by the separate account, with fractional votes allocated for amounts less than \$100;

(B) The life insurer shall have one vote for each \$100 of assets of the separate account not otherwise attributable to contractholders under paragraph (b)(10)(i)(A) of this Rule, with fractional votes allocated for amounts less than \$100, *Provided*, That after the commencement of sales of flexible contracts, the life insurer shall cast its votes for and against each matter which may be voted upon by contractholders in the same proportion as the votes cast by contractholders; and

(C) The number of votes to be allocated shall be determined as of a record date not more than 90 days before any meeting at which such vote is held, *Provided*, That if a quorum is not present at the meeting, the meeting may be adjourned for up to 60 days without fixing a new record date;

(ii) The requirement of this section that every share of stock issued by a registered management investment company (except a common-law trust of the character described in section 16(c) (15 U.S.C. 80a-16(c))) shall be a voting stock and have equal voting rights with every other outstanding voting stock shall not be deemed to be violated by actions specifically permitted by any provisions of this Rule.

(11) Section 19 (15 U.S.C. 80a-19), to the extent that the provisions of this section shall not apply to any dividend or similar distribution paid or payable under provisions of participating flexible contracts.

(12) Sections 22(c), 22(d) (15 U.S.C. 80a-22(d)), 22(e) (15 U.S.C. 80a-22(e)), and 27(c)(1) and Rule 22c-1 to the extent:

(i) The cash value of each flexible contract shall be computed in accordance with Rule 22c-1(b) under the Act; *Provided, however*, That where actual computation is not necessary for the operation of a particular contract, then

the cash value of that contract must only be capable of computation; *And provided further*, That to the extent the calculation of the cash value reflects deductions for the cost of insurance and other insurance benefits or administrative expenses and fees or sales loads, such deductions need only be made at such times as specified in the contract or as necessary for compliance with insurance laws and regulations; and

(ii) The death benefit, unless required by insurance laws and regulations, shall be computed on any day that the investment experience of the separate account would affect the death benefit under the terms of the contract provided that such terms are reasonable, fair, and nondiscriminatory;

(iii) Necessary to comply with this Rule or with insurance laws and regulations and established administrative procedures of the life insurer for issuance, increases in or additions of insurance benefits, transfer and redemption of flexible contracts, including, but not limited to, premium rate structure and premium processing, insurance underwriting standards, and the particular benefit afforded by the contract, *Provided, however*, That any procedure or action shall be reasonable, fair and not discriminatory to the interests of the affected contract-holders and to all other holders of contracts of the same class or series funded by the separate account, *And provided further*, That any such action shall be disclosed in the form filed by the separate account with the Commission under paragraph (b)(3)(ii) of this Rule.

(13) Section 27 (15 U.S.C. 80a-27), to the following extent:

(i) Section 27(a)(1) (15 U.S.C. 80a-27(a)(1)), 27(h)(1) (15 U.S.C. 80a-27(h)(1)), and 27(h)(4) (15 U.S.C. 80a-27(h)(4)), to the extent that sales load, as defined in paragraph (c)(4) of this Rule, deducted does not exceed that permitted by either paragraph (b)(13)(i)(A) or (b)(13)(i)(B) of this section:

(A) 9 per centum of the sum of the guideline annual premiums that would be paid during the period equal to the lesser of 20 years or the anticipated life expectancy of the insured named in the contract based on the 1980 Commis-

sioners Standard Ordinary Mortality Table, *Provided*, That this paragraph (b)(13)(i)(A) shall not prohibit deduction of sales load, in any manner permitted by this Rule, from payments made in excess of the sum of the guideline annual premiums that would be paid during the lesser of 20 years or the anticipated life expectancy of the insured based on the 1980 Commissioners Standard Ordinary Mortality Table; or

(B) 9 per centum of payments made thereon; *Provided*, That the separate account elects by written notice to the Commission to be governed (with respect to each class of flexible contract offered) by either paragraph (b)(13)(i)(A) or (B); *Provided, however*, That for each class of flexible contract that requires more than four guideline annual premiums within the first two contract periods following issuance of the contract or of an increase in or addition of insurance benefits (within the meaning of paragraph (d)(2) of this section), the separate account must elect to be governed by paragraph (b)(13)(i)(B) of this section.

(ii) Sections 27(a)(3) (15 U.S.C. 80a-27(a)(3)) and 27(h)(3) (15 U.S.C. 80a-27(h)(3)), *Provided*, That the proportionate amount of sales load deducted from any payment shall not exceed the proportionate amount deducted from any prior payment unless an increase is caused by reductions in the annual cost of insurance, or a reduction in the sales load deducted from amounts transferred to a flexible contract from another plan of insurance;

(iii) Sections 27(c)(2), 26(a)(1) (15 U.S.C. 80a-26(a)(1)), and 26(a)(2) (15 U.S.C. 80a-26(a)(2)), to the extent necessary to permit the actions described in paragraphs (A) through (F) of this section, *Provided*, That the life insurer complies with all other applicable provisions of section 26 as if it were a trustee, depositor or custodian for the separate account; files with the insurance regulatory authority of a state or territory of the United States or of the District of Columbia an annual statement of its financial condition in the form prescribed by the National Association of Insurance Commissioners, which most recent statement indicates

that it has a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than \$1,000,000; and is examined from time to time by the insurance regulatory authority of such state, territory or District of Columbia as to its financial condition and other affairs and is subject to supervision and inspection with respect to its separate account operations.

(A) Payment of a fee to the life insurer, or to any affiliated person or agent of the insurer, for bookkeeping or other administrative services provided to the separate account, or for administrative services or expenses incurred in underwriting, issuing, and maintaining flexible contracts, *Provided*, That the fee is not greater than the expenses, without profit:

(1) Actually paid by the life insurer for the services provided; and

(2) Increased by the value of any services provided directly by the life insurer, as determined in accordance with generally accepted accounting principles consistently applied.

The standard set forth in this paragraph shall be applied as follows: if the separate account reserves the right to increase the fee, the fee shall not exceed the cost of the services to be provided for one year; or if the fee is guaranteed not to increase for a specified period of time, the fee shall not exceed the average expected cost of the services to be provided during the period of the guarantee;

(B) The holding of the assets of the separate account by the life insurer without a trust indenture or other such instrument;

(C) When the separate account is organized as a unit investment trust, the holding of the securities of any registered management investment company which offers its shares to the separate account in uncertificated form;

(D) When the separate account is organized as a management investment company, the holding of its assets in any manner permitted by paragraph (b)(9) of this Rule or by section 17(f) or the rules under it;

(E) The deduction of premium or other taxes imposed by any state or other governmental entity, the cost of insurance, charges assessed for inci-

dental insurance benefits or if the insured does not meet standard underwriting requirements, and, if the separate account is organized as a management investment company, an investment advisory fee;

(F) The deduction of a charge for mortality, expense, and any guaranteed death benefit risks assumed by the life insurer under the flexible contracts (collectively, a "risk charge"), *Provided*, That the registration statement under the 1933 Act for flexible contracts includes:

(1) A representation that this paragraph is being relied upon;

(2) A representation that the level of the risk charge either is:

(i) Within the range of industry practice for comparable flexible or scheduled contracts, or

(ii) Reasonable in relation to the risks assumed by the life insurer under the contracts;

(3) A brief description of the methodology used to support the representation made in response to paragraph (b)(13)(iii)(F)(2) of this Rule and an undertaking to keep and make available to the Commission upon request the documents used to support that representation;

(4) A representation that either:

(i) The proceeds from explicit sales loads will be sufficient to cover the expected costs of distributing the flexible contracts; or

(ii)(A) The life insurer has concluded that there is a reasonable likelihood that the distribution financing arrangement of the separate account will benefit the separate account and contractholders and will keep and make available to the Commission on request a memorandum setting forth the basis for this representation; and

(B) If the separate account is organized as a management investment company, a representation that the account will have a board of directors, a majority of whom are not interested persons of the separate account, formulate and approve any plan under Rule 12b-1 to finance distribution expenses. If the separate account is organized as a unit investment trust, a representation that the account will invest only in management investment companies which have undertaken to have a board

of directors, a majority of whom are not interested persons of the company, formulate and approve any plan under Rule 12b-1 to finance distribution expenses.

Notwithstanding the provisions of this paragraph (b)(13)(iii)(F), no risk charge may be deducted in reliance thereupon if the registration statement or amendment thereto which initially sets forth the deduction of such charge or its increase becomes effective by lapse of time pursuant to section 8(a) of the 1933 Act or Rule 485 (17 CFR 230.485) thereunder. Such charge shall be disclosed in the prospectus and shall not be less than fifty per centum of the maximum charge for risk assumption as disclosed in the prospectus and as provided for in the contract. Any separate account organized under the Act as a management investment company and deducting a risk charge pursuant to this section shall be exempt from section 12(b) and Rule 12b-1 thereunder to the extent that monies derived from the risk charge may be used to finance distribution of the flexible contracts;

(iv) Sections 27(c)(1) and 27(d), and sections 2(a)(32) and 22(c) and Rule 22c-1 thereunder, to the extent that:

(A) Such sections require that the flexible contract be redeemable or provide for a refund in cash, *Provided*, That the contract provides for election by the contractholder of a cash surrender value or certain non-forfeiture and settlement options which are required or permitted by the insurance law or regulation of the jurisdiction in which the contract is offered, *And provided further*, That unless required by the insurance law or regulation of the jurisdiction in which the contract is offered or unless elected by the contractholder, the contract shall not provide for the automatic imposition of any option, including, but not limited to, an automatic premium loan, which would involve the accrual or payment of an interest or similar charge.

(B) Notwithstanding the provisions of paragraph (b)(13)(iv)(A) of this Rule, if the amounts available under the contract to pay the charges due under the contract on any contract processing day are less than such charges due, the contract may provide that the cash surrender value (and any excess paid

for sales loading not used to keep the contract in force pursuant to paragraph (b)(13)(iv)(B)(2) of this Rule) shall be applied to purchase a non-forfeiture option specified by the life insurer in such contract, *Provided*, That the contract also provides that:

(1) Contract processing days occur not less frequently than monthly, and

(2) the amount of any excess paid for sales loading (as provided in paragraph (b)(13)(v)(A) of this Rule) shall first be applied to keep the contract in force, *Provided, however*, That if the contractholder subsequently makes a payment, the life insurer may recover such excess loading;

(C) Subject to other provisions of this Rule, sales loads and administrative expenses or fees may be deducted upon redemption.

(v) Section 27(d), *Provided*, That the flexible contract gives the holder thereof the right to:

(A) Surrender the contract at any time during the first 24 months after issuance and receive in cash an amount not less than the sum of the present value of his contract which is the cash surrender value next computed after receipt by the life insurer of the request for surrender in proper form, plus, an amount which is a refund of any excess paid for sales loading prior to or in connection with the surrender. The amount of sales loading to be refunded shall be equal to that part of the sales loading in excess of (1) the sum of 30 per centum of payments in aggregate amount less than or equal to one guideline annual premium, plus 10 per centum of payments in aggregate amount greater than one guideline annual premium but not more than two guideline annual premiums, and (2) 9 per centum of each payment made in excess of two guideline annual premiums;

(B) Convert the contract at any time during the first 24 months after issuance, so long as the contract is in force, to a life insurance policy on the life of the insured under a plan of insurance (other than a plan involving a flexible contract as defined in paragraph (c)(1) of this Rule or a scheduled contract as defined in paragraph (c)(1) of Rule 6e-2) specified in the contract,

issued by the life insurer or by an affiliated life insurance company, which provides for (1) at the election of the contractholder, either the same death benefit or the same net amount at risk as the flexible contract at the time of conversion and (2) premiums (or cost of insurance or other charges, “charges”) if such plan of insurance provides for flexible premiums) which are based on the same issue age and risk classification of the insured as the flexible contract. The conversion shall be subject to an equitable adjustment in payments and cash values to reflect variances, if any, in the payments (or charges), dividends, and cash values under the flexible contract and the new policy. The method of computing such adjustment shall be filed with the Commission as an exhibit to the form required under paragraph (b)(3)(ii) of this Rule;

(vi) A depositor or principal underwriter for a flexible contract sold subject to section 27(d) or section 27(f), or both, shall be exempt from the requirements of Rule 27d-1 (17 CFR 270.27d-1) if an insurance company undertakes in writing to guarantee the performance of all obligations of such depositor or principal underwriter under sections 27(d) and 27(f) to refund charges, and such insurance company, depositor and principal underwriter comply with all provisions of Rule 27d-2 (17 CFR 270.27d-2);

(vii) Section 27(e) [15 U.S.C. 80a-27(e)] and Rule 27e-1 (17 CFR 270.27e-1) thereunder, to the extent that the separate account and the depositor and principal underwriter therefor, when such persons are subject to paragraph (b)(13)(v)(A) of this Rule, are required to provide a notice of right of surrender and refund to holders of flexible contracts, if the life insurer or a duly authorized agent provides a notice of surrender and refund rights on a written document containing information comparable to that required by Form N-27I-1 (17 CFR 274.301) to the holder of any flexible contract under which a refund may be available, *Provided*, That such notice shall be sent by first class mail or personal delivery to the contractholder:

(A) Upon issuance of the flexible contract, which notice may be sent to-

gether with the issued contract and an illustration, in a form appropriate for inclusion in the prospectus for the flexible contract, of guideline annual premiums, death benefits and cash surrender values applicable to the age, sex and underwriting classification of the insured; and

(B) On any contract processing day, prior to the expiration of the surrender and refund right provided in paragraph (b)(13)(v)(A) of this Rule, on which the amounts available under the contract on such day to pay the charges authorized by the contract are less than the amount necessary to keep the contract in force until the next following contract processing day. This notice may be sent together with any notice required by applicable state authority to be sent in these circumstances; *Provided, however*, That the right of surrender and refund provided by paragraph (b)(13)(v)(A) of this Rule shall not expire until not less than 15 days after the mailing or receipt, if personally delivered, of the last notice referred to in this paragraph (b)(13)(vii)(B) of this section;

(viii) Section 27(f) and Rule 27f-1 thereunder (17 CFR 270.27f-1), *Provided*, That:

(A) The contractholder may elect to return the contract within 45 days of the date of the execution of the application for insurance, or within 10 days after receipt of the issued contract by the contractholder, or within 10 days after mailing or personal delivery of the notice of the right of withdrawal referred to in paragraph (b)(13)(viii)(C) of this Rule, whichever is later, and receive a refund equal to the sum of (1) the difference between the payments made, including any contract fees or other charges, and the amounts allocated to the separate account under the contract, (2) the value of the amounts allocated to the separate account under the contract on the date the returned contract is received by the insurer or its agent, and (3) any contract fees and other changes imposed on the amounts allocated to such separate account, *Provided, however*, That if state law or the contract so require, the redeeming contractholder shall receive a refund of all payments made for such contract;

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(B) A refund in accordance with paragraph (b)(13)(viii)(A) of this Rule to redeeming contractholders will not in any way affect the interests in the separate account or the benefits of other flexible or scheduled contractholders;

(C) Notice of such withdrawal right and a statement of contract fees and other charges on a written document containing information comparable to that required by Form N-271-2 (17 CFR 274.303) is sent by first class mail or personal delivery to the contractholder, which notice and statement may be accompanied by the flexible contract, and an illustration, in a form appropriate for inclusion in the prospectus for the flexible contract, of guideline annual premiums (or, if the contract is subject to paragraph (b)(13)(i)(B), payments), death benefits and cash surrender values applicable to the age, sex and underwriting classification of the insured;

(D) The contractholder, in conjunction with the notice of withdrawal right referred to in paragraph (b)(13)(viii)(C) of this section, is provided with a form of request for refund of the amount computed in accordance with paragraph (b)(13)(viii)(A), which form shall set forth:

(1) Instructions as to the manner in which a refund may be obtained, including the address to which the request form should be mailed; and

(2) Spaces necessary to indicate the date of such request, the contract number and the signature of the contractholder; and

(E) Within 7 days from the receipt of such duly executed timely request for refund, the life insurer will refund in cash to the contractholder the amount computed in accordance with paragraph (b)(13)(viii)(A) of this Rule; and

(ix) Solely for purposes of paragraphs (b)(13)(v) and (b)(13)(viii) of this Rule, the postmark date on the envelope containing the flexible contract shall determine whether such contract has been submitted for surrender, conversion, or withdrawal within the designated period.

(14) Section 32(a)(2) (15 U.S.C. 80a-31(a)(2)), *Provided*, That:

(i) The independent public accountant is selected before the effective date of the 1933 Act registration statement

for flexible contracts, and the identity of the accountant is disclosed in the registration statement, and

(ii) The selection of the accountant is submitted for ratification or rejection to flexible contractholders at their first meeting and within one year after the effective date of the 1933 Act registration statement for flexible contracts, unless the time for holding the meeting is extended by order of the Commission.

(15) If the separate account is organized as a unit investment trust, all the assets of which consist of the shares of one or more registered management investment companies which offer their shares exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company, or which offer their shares to any such life insurance company in consideration solely for advances made by the life insurer in connection with the operation of the separate account; *Provided*, That: the board of directors of each investment company, constituted with a majority of disinterested directors, will monitor such company for the existence of any material irreconcilable conflict between the interests of variable annuity contractholders and scheduled or flexible contractholders investing in such company; the life insurer agrees that it will be responsible for reporting any potential or existing conflicts to the directors; and if a conflict arises, the life insurer will, at its own cost, remedy such conflict up to and including establishing a new registered management investment company and segregating the assets underlying the variable annuity contracts and the scheduled or flexible contracts; *Then*:

(i) The eligibility restrictions of section 9(a) shall not apply to those persons who are officers, directors or employees of the life insurer or its affiliates who do not participate directly in the management or administration of any registered management investment company described in this paragraph (b)(15);

(ii) The life insurer shall be ineligible under paragraph (3) of section 9(a) to serve as investment adviser or principal underwriter for any registered management investment company described in this paragraph (b)(15) only if an affiliated person of such life insurer, ineligible by reason of paragraphs (1) or (2) of section 9(a), participates in the management or administration of such company;

(iii) For purposes of any section of the Act which provides for the vote of securityholders on matters relating to the separate account or the underlying registered investment company, the voting provisions of paragraph (b)(10)(i) and (ii) of this Rule apply, *Provided*, That:

(A) The life insurer may vote shares of the registered management investment companies held by the separate account without regard to instructions from contractholders of the separate account if such instructions would require such shares to be voted:

(1) To cause such companies to make (or refrain from making) certain investments which would result in changes in the sub-classification or investment objectives of such companies or to approve or disapprove any contract between such companies and an investment adviser when required to do so by an insurance regulatory authority subject to the provisions of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of this Rule; or

(2) In favor of changes in investment objectives, investment adviser or principal underwriter for such companies subject to the provisions of paragraphs (b)(5)(ii) and (b)(7)(ii) (B) and (C) of this Rule;

(B) Any action taken in accordance with paragraph (b)(15)(iii)(A)(1) or (2) of this section and the reasons therefor shall be disclosed in the next report contractholders made under section 30(e) (15 U.S.C. 80a-29(e)) and § 270.30e-2;

(iv) Any registered management investment company established by the life insurer and described in this paragraph (b)(15) shall be exempt from section 14(a), *Provided*, That until the company has total assets of at least \$100,000, the life insurer shall have at least the minimum net worth pre-

scribed in paragraph (b)(6) of this Rule; and

(v) Any registered management investment company established by the life insurer and described in this paragraph (b)(15) shall be exempt from sections 15(a), 16(a), and 32(a)(2), to the extent prescribed by paragraphs (b)(7)(i), (b)(8)(i), and (b)(14) of this Rule, *Provided*, That the company complies with the conditions set forth in those paragraphs as if it were a separate account.

(c) When used in this Rule:

(1) *Flexible premium variable life insurance contract* means a contract of life insurance, subject to regulation under the insurance laws or code of every jurisdiction in which it is offered, funded by a separate account of a life insurer, which contract provides for:

(i) Payments which are not fixed by the life insurer as to both timing and amount: *Provided, however*, That the life insurer may fix the timing and minimum amount of payments for the first two contract periods following issuance of the contract or of an increase in or addition of insurance benefits (within the meaning of paragraph (d)(2) of this section), and may prescribe a reasonable minimum amount for any additional payment;

(ii) A death benefit the amount or duration of which may vary to reflect the investment experience of the separate account;

(iii) A cash value which varies to reflect the investment experience of the separate account; and

(iv) There is a reasonable expectation that subsequent payments will be made.

(2) *Incidental insurance benefits* means insurance benefits provided pursuant to the flexible contract, other than any guaranteed and variable death benefit, which do not have discrete cash values that may vary in amount in accordance with the investment experience of the separate account, and include, but are not limited to, accidental death and dismemberment benefits, disability income benefits, guaranteed insurability options, and family income or fixed benefit term riders.

(3) *Guaranteed death benefit* is any amount guaranteed by the life insurer to be paid pursuant to a flexible contract in the event of the death of the

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insured without regard to the investment experience of the separate account, if there are no outstanding loans or partial surrenders, but does not include any incidental insurance benefits.

(4) *Sales load* charged during a contract period is the excess of any payments made during the period over the sum of the following:

(i) The amount of the change (whether it is an increase or decrease) in the cash value for the period that is not attributable to net investment earnings or to dividends for a participating flexible contract for the period;

(ii) The cost of insurance for the period based on:

(A) For a flexible contract subject to paragraph (b)(13)(i)(A) of this section, the 1980 Commissioners Standard Ordinary Mortality Table and net interest at the annual effective rate specified for purposes of paragraph (c)(8)(i)(B) of this Rule; or

(B) For a flexible contract subject to paragraph (b)(13)(i)(B) of this section, either the 1980 Commissioners Standard Ordinary Mortality Table or the 1958 Commissioners Ordinary Mortality Table (whichever relates to rates guaranteed by the contract) and the assumed investment rate specified in the contract, *Provided, however*, That the 1958 Commissioners Ordinary Mortality Table may only be used for those contracts issued before 1990, or such earlier mandatory date for implementation of the 1980 Commissioners Standard Ordinary Mortality Table under the applicable Standard Nonforfeiture Law for life insurance;

(iii) A reasonable charge necessary to cover the risk assumed by the life insurer that the variable death benefit will be less than any guaranteed death benefit;

(iv) Any administrative expenses or fees which are deducted pursuant to paragraph (b)(13)(iii)(A) of this Rule;

(v) A deduction for and approximately equal to state premium taxes;

(vi) Any additional charge assessed if the insured does not meet standard underwriting requirements, including, but not limited to, any additional cost of insurance charge for a contract purchased on a simplified underwriting or guaranteed issue basis;

(vii) Any additional charge assessed specifically for any incidental insurance benefits;

(viii) Any additional charge, the nature of an interest charge, assessed when payments are made more frequently than annually, but only to the extent that such payments are made to fulfill a minimum payment requirement imposed pursuant to paragraph (c)(1)(i) of this Rule;

(ix) Any amounts redeemed by the contractholder or paid out to the beneficiary upon the death of the insured which are not attributable to net investment earnings for the period; and

(x) For a participating flexible contract, a deduction for dividends to be paid or credited in accordance with the dividend scale in effect on the issue date of the contract assuming a net annual investment return for the separate account which funds the contract of 5 per centum. The deduction may be determined by either of the following methods, but the same method must be used for each contract period:

(A) The actuarial level annual equivalent of dividends to be paid or credited over the contract periods described in paragraph (b)(13)(i) of this Rule, based upon the mortality, interest and lapse assumptions used in computing the dividend scale for the contract (and, if the contract is subject to paragraph (b)(13)(i)(A) of this section, the assumption that the guideline annual premium will be paid in each contract period) multiplied by the fraction of the contract year represented by the contract period; or

(B) That portion of the dividend to be paid for the contract year which does not depend on the making of payments in addition to those made during the period.

(5) *Contract period* means the period from a contract issue or anniversary date to the earlier of the next following anniversary date (or, if later, the last day of any grace period commencing before such next following anniversary date) or the termination date of the contract.

(6) *Variable death benefit* is the amount of death benefit, other than incidental insurance benefits, payable under a flexible contract which varies to reflect the investment experience of

the separate account and which would be payable in the absence of any guaranteed death benefit.

(7) *Payment*, as used in paragraphs (b)(13)(i), (b)(13)(ii), and (b)(13)(v)(A) of this Rule and in sections 27(a)(2) and 27(h)(2) solely with respect to flexible contracts, means for a contract period the gross premiums paid less any portion of such gross premiums charged for the items specified in paragraphs (c)(4)(vi), (c)(4)(vii), and (c)(4)(viii) of this Rule. "Payment," as used in any other section of this Rule, means the gross premiums paid or payable for the flexible contract, *Except*, That "Payment" shall not include any amount deducted by the life insurer to recover excess sales loading previously applied to keep the contract in force pursuant to paragraph (b)(13)(iv)(B)(2) of this Rule.

(8)(i) *Guideline annual premium* means the level annual amount that would be payable through the maturity date specified in paragraph (c)(8)(ii)(B) of this Rule for the future benefits under the contract if, subject to the provisions of paragraph (c)(8)(ii) of this Rule:

(A) The payments were fixed by the life insurer as to both timing and amount, and

(B) The payments were based on the 1980 Commissioners Standard Ordinary Mortality Table, net investment earnings at the greater of an annual effective rate of 5 per centum or rate or rates guaranteed at issuance of the flexible contract, the sales load under the contract, and the fees and charges associated with the contract specified in paragraphs (c)(4)(iii), (c)(4)(iv), (c)(4)(v), (c)(4)(vi), (c)(4)(vii), (c)(4)(viii) (for the first two contract periods as permitted by paragraphs (c)(1)(i), and (c)(4)(x) of this Rule.

(ii) In computing the future benefits under the flexible contract for determining the guideline annual premium:

(A) The excess of the amount payable by reason of the death of the insured (determined without regard to any incidental insurance benefits) over the cash value of the contract shall be deemed to be not greater than such excess at the time the contract was issued,

(B) The maturity date shall be the latest maturity date permitted under the contract but not less than 20 years after the date of issue or (if earlier) age 95, and

(C) The amount of any endowment benefit (or sum of endowment benefits) shall be deemed not to exceed the least amount payable by reason of the death of the insured (determined without regard to any incidental insurance benefits) at any time under the contract.

(9) *Cash value* means the amount that would be available in cash upon voluntary termination of a contract by its owner before it becomes payable by death or maturity, without regard to any charges that may be assessed upon such termination and before deduction of any outstanding contract loan.

(10) *Cash surrender value* means the amount available in cash upon voluntary termination of a contract by its owner before it becomes payable by death or maturity, after any charges assessed in connection with the termination have been deducted and before deduction of any outstanding contract loan.

(11) *Net investment earnings* means investment earnings in the separate account after deduction of any asset charges, including but not limited to, such charges for income tax; brokerage and other investment expenses; mortality, expense, and guaranteed death benefit risks; and an investment advisory fee, but not including deductions for sales load. However, "net investment earnings" as used in paragraph (c)(4)(i) of this Rule shall not include any amount deducted pursuant to paragraphs (ii) through (viii) of paragraph (c)(4).

(12) *Contract processing day* means any day on which charges under the contract are deducted from the separate account.

(d) The following computational rules shall be used in applying this Rule:

(1) Paragraphs (b)(13)(i) and (b)(13)(ii) of this Rule shall be deemed to be satisfied with respect to any flexible contract under which sales load is deducted other than from payments prior to the allocation of net payments to the separate account if:

(i) From issuance of the contract through each contract period, the aggregate amount of sales load deducted is not more than the aggregate amount of sales load that could be deducted under an otherwise identical flexible contract that deducted sales load only from payments prior to their allocation to the separate account; and

(ii)(A) The amount of sales load deducted pursuant to any method permitted under this paragraph (other than asset-based sales loads) does not exceed the proportionate amount of sales load deducted prior thereto pursuant to the same method, unless an increase in such proportionate amount is caused by reductions in the annual cost of insurance, or a reduction in the sales load deducted from amounts transferred to a flexible contract from another plan of insurance; or

(B) For asset-based sales load structures, the percentage of assets taken as sales load does not exceed any of the percentages previously taken pursuant to the same method, unless an increase in such percentage is caused by a reduction in the percentage taken on amounts transferred to a flexible contract from another plan of insurance.

(2)(i) Solely with respect to increases in or additions of insurance benefits requested by a contractholder after issuance of a flexible contract, the contract shall be deemed to satisfy paragraphs (b)(13)(i)(A), (b)(13)(ii), (b)(13)(v), (b)(13)(viii), and (d)(1)(ii) of this Rule, *Provided*, That from issuance of the contract through each contract period the aggregate amount of sales load imposed is not more than the aggregate amount of sales load that would be permissible under the base test contract, as defined in paragraph (d)(2)(iii)(B) of this Rule, and the incremental test contract, as defined in paragraph (d)(2)(iii)(C) of this Rule.

(ii) The following procedures shall be used in applying paragraph (d)(2)(i) of this section:

(A) Payments for the actual contract, as defined in paragraph (d)(2)(iii)(A) of this Rule, and the base and incremental test contracts shall, for purposes of demonstrating compliance with the sales load provisions of this Rule, be deemed paid in the following proportionate amounts: level

annual payments for the base test contract equal to the guideline annual premium for the contract, commencing upon issuance; level annual payments for the incremental test contract equal to the difference between the guideline annual premium for the actual contract after the increase in or addition of insurance benefits and before such increase or addition, commencing upon such increase or addition; and level annual payments for the actual contract equal to the guideline annual premium for such contract, commencing upon issuance and adjusted for such increase or addition as of the date of such increase or addition, *Provided* that the guideline annual premium used is that defined in paragraph (c)(8) of this section;

(B) To the extent that the increases in, or additions of, insurance benefits are funded out of cash value, such cash value shall be proportionately allocated between the base test contract and incremental test contract according to the ratio of their respective guideline annual payments, as described in (d)(2)(ii)(A); and

(C) It is assumed that no redemptions are made under the actual and test contracts.

(D) An incremental test contract may deduct, in any manner permitted by this Rule, not more than 50 per centum of the sales load which would otherwise be permitted under the base test contract, and not be subject to the surrender, conversion, and withdrawal provisions set forth in paragraphs (b)(13)(v) (A) and (B) and (b)(13)(viii) of this Rule, *Provided, however*, That the increased or added benefit will be subject to the surrender, conversion, and withdrawal provisions referenced above if more than such 50 per centum of sales load is assessed.

(iii) For purposes of this paragraph (d)(2):

(A) *Actual contract* shall mean the flexible contract issued to the contractholder, and adjusted for the increase in or addition of insurance benefits, as of the date of the increase or addition;

(B) *Base test contract* shall mean the actual contract had the increase or addition not occurred;

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(C) *Incremental test contract* shall mean a flexible contract that, (1) is issued on the date of the increase or addition, and (2) provides insurance benefits identical to the incremental change in insurance benefits under the actual contract upon such increase or addition; and

(D) Any change in insurance benefits which would occur automatically under a contract, with or without the opportunity for contractholder disapproval, or any change in death benefit operation shall not be considered an “increase in or addition of insurance benefits requested by a contractholder” for purposes of imposing additional sales load.

[52 FR 11208, Apr. 8, 1987, as amended at 59 FR 43467, Aug. 24, 1994; 67 FR 43536, June 28, 2002]

§ 270.7d-1 Specification of conditions and arrangements for Canadian management investment companies requesting order permitting registration.

(a) A management investment company organized under the laws of Canada or any province thereof may obtain an order pursuant to section 7(d) permitting its registration under the act and the public offering of its securities, if otherwise appropriate, upon the filing of an application complying with paragraph (b) of this section. All such applications will be considered by the Commission pursuant to the procedure set forth in § 270.0-5 and other applicable rules. Conditions and arrangements proposed by investment companies organized under the laws of other countries will be considered by the Commission in the light of the special circumstances and local laws involved in each case.

(b) An application filed pursuant to this section shall contain, inter alia, the following undertakings and agreements of the applicant:

(1) Applicant will cause each present and future officer, director, investment adviser, principal underwriter and custodian of the applicant to enter into an agreement, to be filed by applicant with the Commission upon the filing of its registration statement or upon the assumption of such office by such person which will provide, among other

things, that each such person agrees (i) to comply with the applicant’s Letters Patent (Charter) and By Laws, the act and the rules thereunder, and the undertakings and agreements contained in said application insofar as applicable to such person; (ii) to do nothing inconsistent with the applicant’s undertakings and agreements required by this section; (iii) that the undertakings enumerated as paragraphs (b)(1)(i) and (ii) of this section constitute representations and inducements to the Commission to issue its order in the premises and continue the same in effect, as the case may be; (iv) that each such agreement constitutes a contract between such person and the applicant and its shareholders with the intent that applicant’s shareholders shall be beneficiaries of and shall have the status of parties to such agreement so as to enable them to maintain actions at law or in equity within the United States and Canada for any violation thereof. In addition the agreement of each officer and director will contain provisions similar to those contained in paragraph (b)(6) of this section.

(2) That every agreement and undertaking of the applicant, its officers, directors, investment adviser, principal underwriter and custodian required by this section (i) constitute inducements to the Commission for the issuance and continuance in effect of, and conditions to, the Commission’s order to be entered under this section; (ii) constitute a contract among applicant and applicant’s shareholders with the same intent as set forth in paragraph (b)(1)(iv) of this section; and (iii) failure by the applicant or any of the above enumerated persons to comply with any such agreement and undertaking, unless permitted by the Commission, shall constitute a violation of the order entered under this section.

(3) That the Commission, in its discretion, may revoke its order permitting registration of the applicant and the public offering of its securities if it shall find after notice and opportunity for hearing that there shall have been a violation of such order or the act and may determine whether distribution of applicant’s assets is necessary or appropriate in the interests of investors and may so direct.

(4) That applicant will perform every action and thing necessary to cause and assist the custodian of its assets to distribute the same, or the proceeds thereof, if the Commission or a court of competent jurisdiction, shall have so directed by a final order.

(5) That any shareholder of the applicant or the Commission on its own motion or on request of shareholders shall have the right to initiate a proceeding (i) before the Commission for the revocation of the order permitting registration of the applicant or (ii) before a court of competent jurisdiction for the liquidation of applicant and a distribution of its assets to its shareholders and creditors. Such court may enter such order in the event that it shall find, after notice and opportunity for hearing that applicant, its officers, directors, investment adviser, principal underwriter or custodian shall have violated any provision of the act or the Commission's order of registration of the applicant.

A court of competent jurisdiction for the purpose of paragraphs (b)(4) and (5) of this paragraph means the District Court of the United States of the district in which the assets of the applicant are maintained.

(6) That any shareholder of the applicant shall have the right to bring suit at law or in equity, in any court of the United States or Canada having jurisdiction over applicant, its assets or any of its officers or directors to enforce compliance by applicant, its officers and directors with any provision of applicant's Charter or By Laws, the act and the rules thereunder, or undertakings and agreements required by this section, insofar as applicable to such persons. That such court may appoint a trustee or receiver of the applicant with all powers necessary to implement the purposes of such suit, including the administration of the estate, the collection of corporate property including choses-in-action, and distribution of applicant's assets to its creditors and shareholders. That applicant and its officers and directors waive any objection they may be entitled to raise and any right they may have to object to the power and right of any shareholder of the applicant to bring such suit, reserving, however,

their right to maintain that they have complied with the aforesaid provisions, undertakings and agreements, and otherwise to dispute such suit on its merits. Applicant, its officers and directors also agree that any final judgment or decree of any United States court as aforesaid, may be granted full faith and credit by a court of competent jurisdiction of Canada and consent that such Canadian court may enter judgment or decree thereon at the instance of any shareholder, receiver or trustee of the applicant.

(7) Applicant will file, and will cause each of its present or future directors, officers, or investment advisers who is not a resident of the United States to file with the Commission irrevocable designation of the applicant's custodian as an agent in the United States to accept service of process in any suit, action or proceeding before the Commission or any appropriate court to enforce the provisions of the acts administered by the Commission, or to enforce any right or liability based upon applicant's Charter, By Laws, contracts, or the respective undertakings and agreements of any such person required by this section, or which alleges a liability on the part of any such persons arising out of their service, acts of transactions relating to the applicant.

(8) Applicant's Charter and By Laws, taken together, will contain, so long as applicant is registered under the act in substance the following:

(i) The provisions of the Act as follows: Section 2(a): *Provided*, That the term "government securities" defined in section 2(a)(16) may include securities issued or guaranteed by Canada or any instrumentality of the government of Canada; the term "value" defined in section 2(a)(41) may be defined solely for the purposes of sections 5 and 12 in accordance with the provisions of § 270.2a-1 (Rule 2a-1) if the same shall be necessary or desirable to comply with Canadian regulatory or revenue laws or rules or regulations thereunder; the term "bank" defined in section 2(a)(5) shall be defined solely for the purposes of section 9 and 10, as any banking institution; section 4; section 5; section 6(c); section 9; section 10 (a), (b), (c), (e), (f) and (g): *Provided*, That the provisions of section 10(d) may be

substituted for the provisions of section 10(a) and 10(b)(2) if applicable; section 11; section 12 (a), (b), (c), and (d); section 13(a); section 15 (a), (b), and (c); section 16(a); sections 17, 18, 19, 20 and 21; section 22(d); section 22(e): *Provided*, That the Toronto Stock Exchange or the Montreal Stock Exchange or both may be included in addition to the New York Stock Exchange; section 22(f); section 22(g); section 23; section 25 (a) and (b); section 30 (a), (b), (d), (e), and (f); section 31; section 32(a): *Provided*, That provision may be made for the selection and termination of employment of the accountant in compliance with The Companies Act of Canada; section 32(b). Where a provision of the act prohibits or directs action by an investment company, or its directors, officers or employees, the Charter or By Laws shall state that the applicant of its directors, officers or employees shall or shall not act, as the case may be, in conformity with the intent of the statute; where the provision applies to others, such as principal underwriters, investment advisers, controlled companies and affiliated persons, the Charter or By Laws shall also state that the applicant will not permit the prohibited conduct or will obtain the required action. Any of the provisions of sections 11, 12, 15, 18, 22, 23, 30, and 31 may be omitted if not applicable to a company of applicant's classification or subclassification as defined in section 4 or 5 of the act or if not applicable because the subject matter of such provisions is prohibited by the Charter or By Laws. Other provisions of the act not specified above may be incorporated in the applicant's Charter or By Laws at its option.

(ii) Any question of interpretation of any term or provision of the Charter or By Laws having a counterpart in or otherwise derived from a term or provision of the act shall be resolved by reference to interpretations, if any, of the corresponding term or provision of the act by the courts of the United States of America or, in the absence of any controlling decision of any such court, by rules, regulations, orders or interpretations of the Commission.

(iii) Applicant will maintain the original or duplicate copies of its books and records at the office of its custo-

dian or other office located within the United States.

(iv) At least a majority of the directors and of the officers of the applicant will be United States citizens of whom a majority will be resident in the United States.

(v) Except as provided in §270.17f-5 and §270.17f-7, applicant will appoint, by contract, a bank, as defined in section 2(a)(5) of the Act (15 U.S.C. 80a-2(a)(5)) and having the qualification described in section 26(a)(1) of the Act (15 U.S.C. 80a-26(a)(1)), to act as trustee of, and maintain in its sole custody in the United States, all of applicant's securities and cash, other than cash necessary to meet applicant's current administrative expenses. The contract will provide, *inter alia*, that the custodian will:

(A) Consummate all purchases and sales of securities by applicant, other than purchases and sales on an established securities exchange, through the delivery of securities and receipt of cash, or *vice versa* as the case may be, within the United States, and (B) redeem in the United States such of applicant's shares as shall be surrendered therefor, and (C) distribute applicant's assets, or the proceeds thereof, to applicant's creditors and shareholders, upon service upon the custodian of an order of the Commission or court directing such distribution as provided in paragraphs (b) (3) and (5) of this section.

(vi) Applicant's principal underwriter for the sale of its shares will be a citizen and resident of the United States or a corporation organized under the laws of a state of the United States, and having its principal place of business therein, and if redeemable shares are offered, also a member in good standing of a securities association registered under section 15A of the Securities Exchange Act of 1934.

(vii) Applicant will appoint an accountant, qualified to act as an independent public accountant for the applicant under the act and the rules thereunder, who maintains a permanent office and place of business in the United States.

(viii) Any contract entered into between the applicant and its investment adviser and principal underwriter will

contain provisions in compliance with the requirements of sections 15, 17(i) and 31 and the rules thereunder, and require that the investment adviser maintain in the United States its books and records or duplicate copies thereof relating to applicant.

(ix) Applicant's Charter and By Laws will not be changed in any manner inconsistent with this paragraph or the Act and the rules thereunder unless authorized by the Commission.

(9) Contracts of the applicant, other than those executed on an established securities exchange which do not involve affiliated persons, will provide that:

(i) Such contracts, irrespective of the place of their execution or performance, will be performed in accordance with the requirements of the Act, the Securities Act of 1933, and the Securities Exchange Act of 1934, if the subject matter of such contracts is within the purview of such acts; and

(ii) In effecting the purchase or sale of assets the parties thereto will utilize the United States mails or means of interstate commerce.

(10) Applicant will furnish to the Commission with its registration statement filed under the Act a list of persons affiliated with it and with its investment adviser and principal underwriter and will furnish revisions of such list, if any, concurrently with the filing of periodic reports required to be filed under the Act.

(Sec. 7, 54 Stat. 802; 15 U.S.C. 80a-7; secs. 6(c); 15 U.S.C. 80a-6(c); and 38(a); 15 U.S.C. 80a-37(a) of the Act)

[19 FR 2585, May 5, 1954, as amended at 38 FR 8593, Apr. 4, 1973; 49 FR 36084, Sept. 14, 1984; 65 FR 25637, May 3, 2000]

§ 270.7d-2 Definition of "public offering" as used in section 7(d) of the Act with respect 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

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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) *Public Offering*. For purposes of section 7(d) of the Act (15 U.S.C. 80a-7(d)), the term “public offering” does not include the offer to a Participant, or the sale to his or her Canadian Retirement Account, of Eligible Securities issued by a Qualified Company, if the Qualified Company:

(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, and the Qualified Company that issued the Eligible Security, are not registered with the U.S. Securities and Exchange Commission, and that the Eligible Security and the Qualified Company are relying on exemptions 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 37677, June 15, 2000]

§ 270.8b-1 Scope of §§ 270.8b-1 to 270.8b-32.

The rules contained in §§ 270.8b-1 to 270.8b-32 shall govern all registration statements pursuant to section 8 of the Act, including notifications of registration pursuant to section 8(a), and all reports pursuant to section 30 (a) or (b) of the Act, including all amendments to such statements and reports, except that any provision in a form covering the same subject matter as any such rule shall be controlling.

[18 FR 8575, Dec. 19, 1953]

§ 270.8b-2 Definitions.

Unless the context otherwise requires, the terms in paragraphs (a) through (m) of this section, when used in the rules contained in §§ 270.8b-1 through 270.8b-32, in the rules under section 30(a) or (b) of the Act or in the

forms for registration statements and reports pursuant to section 8 or 30(a) or (b) of the Act, shall have the respective meanings indicated in this section. The terms “EDGAR,” “EDGAR Filer Manual,” “electronic filer,” “electronic filing,” “electronic format,” “electronic submission,” “paper format,” and “signature” shall have the meanings assigned to such terms in Regulation S-T—General Rules for Electronic Filings (Part 232 of this chapter).

(a) *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.

(b) *Certified*. The term “certified”, when used in regard to financial statements, means certified by an independent public or independent certified public accountant or accountants.

(c) *Charter*. The term “charter” includes articles of incorporation, declaration of trust, articles of association or partnership, or any similar instrument, as amended, effecting (either with or without filing with any governmental agency) the organization or creation of an incorporated or unincorporated person.

(d) *Employee*. The term “employee” does not include a director, trustee, officer or member of the advisory board.

(e) *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.

(f) *Investment income*. The term “investment income” means the aggregate of net operating income or loss from real estate and gross income from interest, dividends and all other sources, exclusive of profit or loss on sales of securities or other properties.

(g) *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 as to which an average prudent investor ought reasonably to be informed before buying or selling any security of the particular company.

(h) *Parent*. A “parent” of a specified person is an affiliated person who controls the specified person directly or

indirectly through one or more intermediaries.

(i) *Previously filed or reported.* The terms “previously filed” and “previously reported” means previously filed with, or reported in, a registration statement filed under section 8 of the Act or under the Securities Act of 1933, a report filed under section 30 of the Act or section 13 or 15(d) of the Securities Exchange Act of 1934, a definitive proxy statement filed under section 20 of the Act or section 14 of the Securities Exchange Act of 1934, or a prospectus filed under the Securities Act of 1933; *Provided*, That information contained in any such document shall be deemed to have been previously filed with, or reported to, an exchange only if such document is filed with such exchange.

(j) *Share.* The term “share” means a share of stock in a corporation or unit of interest in an unincorporated person.

(k) *Significant subsidiary.* The term “significant subsidiary” means a subsidiary meeting any one of the following conditions:

(1) The value of the investments in and advances to the subsidiary by its parent and the parent’s other subsidiaries, if any exceed 10 percent of the value of the assets of the parent or, if a consolidated balance sheet is filed, the value of the assets of the parent and its consolidated subsidiaries.

(2) The total investment income of the subsidiary or, in the case of a non-investment company subsidiary, the net income exceeds 10 percent of the total investment income of the parent or, if consolidated statements are filed, 10 percent of the total investment income of the parent and its consolidated subsidiaries.

(3) The subsidiary is the parent of one or more subsidiaries and, together with such subsidiaries would, if considered in the aggregate, constitute a significant subsidiary.

(l) *Subsidiary.* A “subsidiary” of a specified person is an affiliated person who is controlled by the specified person, directly or indirectly, through one or more intermediaries.

(m) *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.

[18 FR 8575, Dec. 19, 1953, as amended at 19 FR 2779, May 14, 1954; 58 FR 14860, Mar. 18, 1993; 65 FR 24802, Apr. 27, 2000]

§ 270.8b-3 Title of securities.

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 noncumulative; 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.

[18 FR 8575, Dec. 19, 1953]

§ 270.8b-4 Interpretation of requirements.

Unless the context clearly shows otherwise:

(a) The forms require information only as to the company filing the registration statement or report.

(b) Whenever any fixed period of time in the past is indicated, such period shall be computed from the date of filing.

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(c) Whenever words relate to the future, they have reference solely to present intention.

(d) Any words indicating the holder of a position or office include persons, by whatever titles designated, whose duties are those ordinarily performed by holders of such positions or officers.

[18 FR 8575, Dec. 18, 1953]

§ 270.8b-5 Time of filing original registration statement.

An investment company shall file a registration statement with the Commission on the appropriate form within three months after the filing of notification of registration under section 8(a) of the Act, provided that if the fiscal year of the company ends within the three months period, its registration statement may be filed within three months after the end of such fiscal year.

[19 FR 2779, May 14, 1954]

§ 270.8b-6 [Reserved]

§ 270.8b-10 Requirements as to proper form.

Every registration statement or report shall be prepared in accordance with the form prescribed therefor by the Commission, as in effect on the date of filing. Any such statement or report shall be deemed to be filed on the proper form unless objection to the form is made by the Commission within thirty days after the date of filing.

[18 FR 8576, Dec. 19, 1953]

§ 270.8b-11 Number of copies; signatures; binding.

(a) Three complete copies of each registration statement or report, including exhibits and all other papers and documents filed as a part thereof, shall be filed with the Commission.

(b) 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), three complete copies of each part of the registration statement (including, if applicable, exhibits and all other pa-

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pers and documents filed as part of Part C of the registration statement) shall be filed with the Commission.

(c) At least one copy of the registration statement or report shall be signed in the manner prescribed by the appropriate form. Unsigned copies shall be conformed. If the signature of any person is affixed pursuant to a power of attorney or other similar authority, a copy of such power of attorney or other authority shall also be filed with the registration statement or report.

(d) Each copy of a registration statement or report filed with the Commission shall be bound in one or more parts without stiff covers. The binding shall be made on the left-hand side and in such manner as to leave the reading matter legible.

(e) *Signatures.* Where the Act or the rules thereunder, including paragraph (c) of this section, require a document filed with or furnished to the Commission to be signed, the document should be manually signed, or signed using either typed signatures or duplicated or facsimile versions of manual signatures. When 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. Execute each such document before or at the time the filing is made and retain 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.

[49 FR 32059, Aug. 10, 1984, as amended at 50 FR 26160, June 25, 1985; 57 FR 56835, Dec. 1, 1992; 60 FR 26622, May 17, 1995; 63 FR 13944, Mar. 23, 1998; 67 FR 19870, Apr. 23, 2002]

§ 270.8b-12 Requirements as to paper, printing and language.

(a) Registration statements 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) 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), Part C of the registration statement shall be filed on good quality, unglazed, white paper, no larger than 8½×11 inches in size, insofar as practicable. The prospectus and, if applicable, the Statement of Additional Information, however, may be filed on smaller-sized paper provided that the size of paper used in each document is uniform.

(c) The registration statement or report and, insofar as practicable all papers and documents filed as a part thereof, shall be printed, lithographed, mimeographed or typewritten. However, the registration statement or report or any portion thereof may be prepared by any similar process which, in the opinion of the Commission, produces copies suitable for 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.

(d) The body of all printed registration statements and reports and all notes to financial statements and other tabular data included therein shall be in roman type at least as large as 10-point modern type. However, to the extent necessary for convenient presentation, financial statements and other statistical or tabular data, including tabular data in notes, may be set in type at least as large and as legible as 8-point modern type. All type shall be leaded at least 2-points.

(e) Registration statements and reports shall be in the English language. If any exhibit or other paper or document filed with a registration statement or report is in a foreign language, it shall be accompanied by a translation into the English language.

(f) Where a registration statement or report 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.

[49 FR 32060, Aug. 10, 1984, as amended at 50 FR 26160, June 25, 1985; 57 FR 56836, Dec. 1, 1992; 61 FR 24657, May 15, 1996; 67 FR 19870, Apr. 23, 2002]

§ 270.8b-13 Preparation of registration statement or report.

The registration statement or report shall contain the numbers and captions of all items of the appropriate form, but the text of the items may be omitted provided the answers thereto are so prepared as to indicate to the reader the coverage of the items without the necessity of his referring to the text of the items or instructions thereto. However, where any item requires information to be given in tabular form, it shall be given in substantially the tabular form specified in the item. All instructions, whether appearing under the items of the form or elsewhere therein, are to be omitted from the registration statement or report. Unless expressly provided otherwise, if any item is inapplicable or the answer thereto is in the negative, an appropriate statement to that effect shall be made.

[18 FR 8576, Dec. 19, 1953]

§ 270.8b-14 Riders; inserts.

Riders shall not be used. If the registration statement or report is typed on a printed form, and the space provided for the answer to any given item is insufficient, reference shall be made in such space to a full insert page or pages on which the item number and caption and the complete answer are given.

[18 FR 8576, Dec. 19, 1953]

§ 270.8b-15 Amendments.

All amendments shall be filed under cover of the facing sheet of the appropriate form, shall be clearly identified as amendments, and shall comply with all pertinent requirements applicable to registration statements and reports.

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Amendments shall be filed separately for each separate registration or report amended. Except as permitted under rule 102(b) of Regulation S-T (§232.102(b) of this chapter), any amendment filed under this section shall state the complete text of each item amended. An amendment to any report required to include the certification as specified in §270.30a-2 must provide a new certification by each principal executive officer and principal financial officer of the registrant.

[18 FR 8576, Dec. 19, 1953, as amended at 58 FR 14860, Mar. 18, 1993; 68 FR 5365, Feb. 3, 2003]

§ 270.8b-16 Amendments to registration statement.

(a) Every registered management investment company which is required to file a semi-annual report on Form N-SAR, as prescribed by rule 30b1-1 (17 CFR 270.30b1-1), shall amend the registration statement required pursuant to Section 8(b) by filing, not more than 120 days after the close of each fiscal year ending on or after the date upon which such registration statement was filed, the appropriate form prescribed for such amendments.

(b) Paragraph (a) of this section shall not apply to a registered closed-end management investment company whose registration statement was filed on Form N-2; provided that the following information is transmitted to shareholders in its annual report to shareholders:

(1) If the company offers a dividend reinvestment plan to shareholders, information about the plan required to be disclosed in the company's prospectus by Item 10.1.e of Form N-2 (17 CFR 274.11a-1);

(2) Any material changes in the company's investment objectives or policies (described in Item 8.2 of Form N-2) that have not been approved by shareholders;

(3) Any changes in the company's charter or by-laws that would delay or prevent a change of control of the company (described in Item 10.1.f of Form N-2) that have not been approved by shareholders;

(4) Any material changes in the principal risk factors associated with investment in the company (described in Item 8.3 of Form N-2); and

(5) Any changes in the persons who are primarily responsible for the day-to-day management of the company's portfolio (described in Item 9.1.c of Form N-2), including any new person's business experience during the past five years and the length of time he or she has been responsible for the management of the portfolio.

(c) In lieu of including a description of the dividend reinvestment plan in its annual report, a company may comply with the disclosure requirement of paragraph (b)(1) of this section concerning a company's dividend reinvestment plan by delivering to each shareholder annually a separate document containing the information about the plan required to be disclosed in the company's prospectus by Item 10.1.e of Form N-2. Any such document shall be deemed to be a record or document subject to the record-keeping requirements of section 31 (15 U.S.C. 80a-30) and the rules adopted thereunder (17 CFR 270.31a-1 *et seq.*).

(d) The changes required to be disclosed by paragraphs (b)(2) through (b)(5) of this section are those that occurred since the later of either the effective date of the company's registration statement relating to its initial offering of securities under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) (or the most recent post-effective amendment thereto) or the close of the period covered by the previously transmitted annual shareholder report.

[54 FR 10321, Mar. 13, 1989, as amended at 57 FR 56836, Dec. 1, 1992]

§ 270.8b-20 Additional information.

In addition to the information expressly required to be included in a registration statement or report, 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.

[18 FR 8576, Dec. 19, 1953]

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§ 270.8b-21 Information unknown or not 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 would 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.

[18 FR 8576, Dec. 19, 1953]

§ 270.8b-22 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.

[18 FR 8576, Dec. 19, 1953]

§ 270.8b-23 Incorporation by reference.

(a) Any registrant may incorporate by reference, in answer or partial answer to any item of a registration statement or report, any information contained elsewhere in the statement or report or any information contained in any other statement, report or prospectus filed with the Commission under any Act administered by it, so long as a copy of the other statement, report or prospectus is filed with each copy of the registration statement or report in which it is incorporated by reference. In the case of a registration statement, report, or prospectus filed

in electronic format, the registrant need not file a copy of the document incorporated by reference if that document also was filed in electronic format. A registrant may incorporate by reference matter contained in an exhibit, however, only to the extent permitted by §§ 270.8b-24 and 270.8b-32.

(b) Any financial statement filed with the Commission pursuant to any act administered by the Commission may be incorporated by reference in a registration statement or report, filed with the Commission by the same or any other person, if it substantially conforms to the requirements of the form on which the statement or report is filed.

(c) Material incorporated by reference 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 or report where the information is required. Matter shall not be incorporated by reference in any case where such incorporation would render the statement incomplete, unclear or confusing.

[18 FR 8576, Dec. 19, 1953, as amended at 19 FR 2779, May 14, 1954; 58 FR 14860, Mar. 18, 1993; 64 FR 27896, May 21, 1999; 65 FR 24802, Apr. 27, 2000]

§ 270.8b-24 Summaries or outlines of documents.

Where an item requires a summary or outline of the provisions of any document, only a brief statement shall be made, in succinct and condensed form, as to the most important provisions of the document. In addition to such statement, 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. Matter contained in an exhibit may be incorporated by reference in answer to an item only to the extent permitted by this section.

[18 FR 8576, Dec. 19, 1953]

§ 270.8b-25 Extension of time for furnishing information.

(a) Subject to paragraph (b) of this section, if it is impractical to furnish any required information, document or

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report at the time it is required to be filed, there may be filed with the Commission as a separate document an application (a) identifying the information, document or report in question, (b) stating why the filing thereof at the time required is impracticable, and (c) requesting an extension of time for filing the information, document or report to a specified date not more than 60 days after the date it would otherwise have to be filed. The application shall be deemed granted unless the Commission, within 10 days after receipt thereof, shall enter an order denying the application. Section 270.0-5 (Rule N-5) shall not apply to such applications.

(b) If it is impracticable to furnish any document or report required to be filed in electronic format at the time it is required to be filed, the electronic filer may file under the temporary hardship provision of rule 201 of Regulation S-T (§232.201 of this chapter) or may submit a written application for a continuing hardship exemption, in accordance with rule 202 of Regulation S-T (§232.202 of this chapter). Applications for such exemptions shall be considered in accordance with the provisions of those sections and paragraphs (h) and (i) of §200.30-5 of this chapter.

[18 FR 8576, Dec. 19, 1953, as amended at 58 FR 14860, Mar. 18, 1993; 60 FR 14630, Mar. 20, 1995]

§ 270.8b-30 Additional exhibits.

A company 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.

[18 FR 8576, Dec. 19, 1953]

§ 270.8b-31 Omission of substantially identical documents.

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, copies of only one of such documents need be filed, with a schedule identifying the other documents omitted and setting forth the material

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details in which such documents differ from the documents filed. The Commission may at any time in its discretion require the filing of copies of any documents so omitted.

[18 FR 8576, Dec. 19, 1953]

§ 270.8b-32 Incorporation of exhibits by reference.

(a) Except as provided in paragraph (c) of this section, 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 §229.10(d) of this chapter, be incorporated by reference as an exhibit to any registration statement or report filed with the Commission by the same or any other person.

(b) If any modification has occurred in the text of any document incorporated by reference since the filing thereof, a statement containing the text of such modification and the date thereof shall be filed with the reference.

(c) *Electronic filings.* A registrant may incorporate by reference into a registration statement or report required to be filed electronically only exhibits that have been filed in electronic format, unless the exhibit 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.

(Sec. 19, 48 Stat. 85, as amended, secs. 13, 15, 23, 48 Stat. 894, 895, 901, as amended, sec. 20, 49 Stat. 833, secs. 305, 307, 314, 319, 53 Stat. 1154, 1156, 1167, 1173, as amended, sec. 39, 54 Stat. 841; 15 U.S.C. 77s, 78m, 78o, 78w, 79t, 77eee, 77ggg, 77nnn, 77sss, 80a-38)

[18 FR 8576, Dec. 19, 1953, as amended at 29 FR 2421, Feb. 13, 1964; 58 FR 14860, Mar. 18, 1993; 60 FR 32825, June 23, 1995; 64 FR 27896, May 21, 1999; 65 FR 24802, Apr. 27, 2000]

§ 270.8f-1 Deregistration of certain registered investment companies.

A registered investment company that seeks a Commission order declaring that it is no longer an investment company may file an application with the Commission on Form N-8F (17 CFR 274.218) if the investment company:

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(a) Has sold substantially all of its assets to another registered investment company or merged into or consolidated with another registered investment company;

(b) Has distributed substantially all of its assets to its shareholders and has completed, or is in the process of, winding up its affairs;

(c) Qualifies for an exclusion from the definition of “investment company” under section 3(c)(1) (15 U.S.C. 80a-3(c)(1)) or section 3(c)(7) (15 U.S.C. 80a-3(c)(7)) of the Act; or

(d) Has become a business development company.

NOTE TO § 270.8F-1: Applicants who are not eligible to use Form N-8F to file an application to deregister may follow the general guidance for filing applications under rule 0-2 (17 CFR 270.0-2) of this chapter.

[64 FR 19471, Apr. 21, 1999]

§ 270.10b-1 Definition of regular broker or dealer.

The term *regular broker or dealer* of an investment company shall mean:

(a) One of the ten brokers or dealers that received the greatest dollar amount of brokerage commissions by virtue of direct or indirect participation in the company’s portfolio transactions during the company’s most recent fiscal year;

(b) One of the ten brokers or dealers that engaged as principal in the largest dollar amount of portfolio transactions of the investment company during the company’s most recent fiscal year; or

(c) One of the ten brokers or dealers that sold the largest dollar amount of securities of the investment company during the company’s most recent fiscal year.

[49 FR 40572, Oct. 17, 1984]

§ 270.10e-1 Death, disqualification, or bona fide resignation of directors.

If a registered investment company, by reason of the death, disqualification, or bona fide resignation of any director, does not meet any requirement of the Act or any rule or regulation thereunder regarding the composition of the company’s board of directors, the operation of the relevant subsection of the Act, rule, or regulation will be suspended as to the company:

(a) For 90 days if the vacancy may be filled by action of the board of directors; or

(b) For 150 days if a vote of stockholders is required to fill the vacancy.

[66 FR 3758, Jan. 16, 2001]

§ 270.10f-1 Conditional exemption of certain underwriting transactions.

Any purchase or other acquisition by a registered management company acting, pursuant to a written agreement, as an underwriter of securities of an issuer which is not an investment company shall be exempt from the provisions of section 10(f) (54 Stat. 806; 15 U.S.C. 80a-10) upon the following conditions:

(a) The party to such agreement other than such registered company is a principal underwriter of such securities, which principal underwriter (1) is a person primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, or related activities, whose gross income normally is derived principally from such business or related activities, and (2) does not control or is not under common control with such registered company.

(b) No public offering of the securities underwritten by such agreement has been made prior to the execution thereof.

(c) Such securities have been effectively registered pursuant to the Securities Act of 1933 (48 Stat. 74; 15 U.S.C. 77a-aa) prior to the execution of such agreement.

(d) In regard to any securities underwritten, whether or not purchased, by the registered company pursuant to such agreement, such company shall be allowed a rate of gross commission, spread, concession or other profit not less than the amount allowed to such principal underwriter, exclusive of any amounts received by such principal underwriter as a management fee from other principal underwriters.

(e) Such agreement is authorized by resolution adopted by a vote of not less than a majority of the board of directors of such registered company, none of which majority is an affiliated person of such principal underwriter, of

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the issuer of the securities underwritten pursuant to such agreement or of any person engaged in a business described in paragraph (a)(1) of this section.

(f) The resolution required in paragraph (e) of this section shall state that it has been adopted pursuant to this section, and shall incorporate the terms of the proposed agreement by attaching a copy thereof as an exhibit or otherwise.

(g) A copy of the resolution required in paragraph (e) of this section, signed by each member of the board of directors of the registered company who voted in favor of its adoption, shall be transmitted to the Commission not later than the fifth day succeeding the date on which such agreement is executed.

[Rule N-10F-1, 6 FR 1191, Feb. 28, 1941]

§ 270.10f-2 Exercise of warrants or rights received on portfolio securities.

Any purchase or other acquisition of securities by a registered investment company pursuant to the exercise of warrants or rights to subscribe to or to purchase securities shall be exempt from the provisions of section 10(f) (section 10(f), 54 Stat. 807; 15 U.S.C. 80a-10) of the Act, *Provided*, That the warrants or rights so exercised (a) were offered or issued to such company as a security holder on the same basis as all other holders of the class or classes of securities to whom such warrants or rights were offered or issued, and (b) do not exceed 5 percent of the total amount of such warrants or rights so issued.

[Rule N-10F-2, 9 FR 339, Jan. 8, 1944]

§ 270.10f-3 Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate.

(a) *Definitions*—(1) *Domestic Issuer* means any issuer other than 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.

(2) *Eligible Foreign Offering* means a public offering of securities, conducted under the laws of a country other than

the United States, that meets the following conditions:

(i) The offering is subject to regulation by a “foreign financial regulatory authority,” as defined in section 2(a)(50) of the Act [15 U.S.C. 80a-2(a)(50)], in such country;

(ii) The securities are offered at a fixed price to all purchasers in the offering (except for any rights to purchase securities that are required by law to be granted to existing security holders of the issuer);

(iii) Financial statements, prepared and audited in accordance with standards required or permitted by the appropriate foreign financial regulatory authority in such country, for the two years prior to the offering, are made available to the public and prospective purchasers in connection with the offering; and

(iv) If the issuer is a Domestic Issuer, it meets the following conditions:

(A) It has a class of securities registered pursuant to section 12(b) or 12(g) of the Securities Exchange Act of 1934 [15 U.S.C. 78l(b) or 78l(g)] or is required to file reports pursuant to section 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. 78o(d)]; and

(B) It has filed all the material required to be filed pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. 78m(a) or 78o(d)] for a period of at least twelve months immediately preceding the sale of securities made in reliance upon this (or for such shorter period that the issuer was required to file such material).

(3) *Eligible Municipal Securities* means “municipal securities,” as defined in section 3(a)(29) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(29)], that have received an investment grade rating from at least one NRSRO; *provided*, that if the issuer of the municipal securities, or the entity supplying the revenues or other payments from which the issue is to be paid, has been in continuous operation for less than three years, including the operation of any predecessors, the securities shall have received one of the three highest ratings from an NRSRO.

(4) *Eligible Rule 144A Offering* means an offering of securities that meets the following conditions:

(i) The securities are offered or sold in transactions exempt from registration under section 4(2) of the Securities Act of 1933 [15 U.S.C. 77d(2)], rule 144A thereunder [§ 230.144A of this chapter], or rules 501-508 thereunder [§§ 230.501-230.508 of this chapter];

(ii) The securities are sold to persons that the seller and any person acting on behalf of the seller reasonably believe to include qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter; and

(iii) The seller and any person acting on behalf of the seller reasonably believe that the securities are eligible for resale to other qualified institutional buyers pursuant to § 230.144A of this chapter.

(5) *NRSRO* has the same meaning as that set forth in § 270.2a-7(a)(14).

(6) *Managed portion* of a portfolio of a registered investment company means a discrete portion of a portfolio of a registered investment company for which a subadviser is responsible for providing investment advice, provided that:

(i) The subadviser is not an affiliated person of any investment adviser, promoter, underwriter, officer, director, member of an advisory board, or employee of the registered investment company; and

(ii) The subadviser's advisory contract:

(A) Prohibits it from consulting with any subadviser of the investment company that is a principal underwriter or an affiliated person of a principal underwriter concerning transactions of the investment company in securities or other assets; and

(B) Limits its responsibility in providing advice to providing advice with respect to such portion.

(7) *Series of a series company* means any class or series of a registered investment company that issues two or more classes or series of preferred or special stock, each of which is preferred over all other classes or series with respect to assets specifically allocated to that class or series.

(8) *Subadviser* means an investment adviser as defined in section 2(a)(20)(B) of the Act (15 U.S.C. 80a-2(a)(20)(B)).

(b) *Exemption for purchases by series companies and investment companies with*

managed portions. For purposes of this section and section 10(f) of the Act (15 U.S.C. 80a-10(f)), each Series of a Series Company, and each Managed Portion of a registered investment company, is deemed to be a separate investment company. Therefore, a purchase or acquisition of a security by a registered investment company is exempt from the prohibitions of section 10(f) of the Act if section 10(f) of the Act would not prohibit such purchase if each Series and each Managed Portion of the company were a separately registered investment company.

(c) *Exemption for other purchases.* Any purchase of securities by a registered investment company prohibited by section 10(f) of the Act [15 U.S.C. 80a-10(f)] shall be exempt from the provisions of such section if the following conditions are met:

(1) *Type of Security.* The securities to be purchased are:

(i) Part of an issue registered under the Securities Act of 1933 (15 U.S.C. 77a-aa) that is being offered to the public;

(ii) Part of an issue of government securities, as defined in section 2(a)(16) of the Act (15 U.S.C. 80a-2(a)(16));

(iii) Eligible Municipal Securities;

(iv) Securities sold in an Eligible Foreign Offering; or

(v) Securities sold in an Eligible Rule 144A Offering.

(2) *Timing and Price.* (i) The securities are purchased prior to the end of the first day on which any sales are made, at a price that is not more than the price paid by each other purchaser of securities in that offering or in any concurrent offering of the securities (except, in the case of an Eligible Foreign Offering, for any rights to purchase that are required by law to be granted to existing security holders of the issuer); and

(ii) If the securities are offered for subscription upon exercise of rights, the securities shall be purchased on or before the fourth day preceding the day on which the rights offering terminates.

(3) *Reasonable Reliance.* For purposes of determining compliance with paragraphs (b)(1)(iv) and (b)(2)(i) of this section, an investment company may reasonably rely upon written statements

made by the issuer or a syndicate manager, or by an underwriter or seller of the securities through which such investment company purchases the securities.

(4) *Continuous operation.* If the securities to be purchased are part of an issue registered under the Securities Act of 1933 (15 U.S.C. 77a-aa) that is being offered to the public, are government securities (as defined in section 2(a)(16) of the Act (15 U.S.C. 80a-2(a)(16))), or are purchased pursuant to an Eligible Foreign Offering or an Eligible Rule 144A Offering, the issuer of the securities must have been in continuous operation for not less than three years, including the operations of any predecessors.

(5) *Firm Commitment Underwriting.* The securities are offered pursuant to an underwriting or similar agreement under which the underwriters are committed to purchase all of the securities being offered, except those purchased by others pursuant to a rights offering, if the underwriters purchase any of the securities.

(6) *Reasonable Commission.* The commission, spread or profit received or to be received by the principal underwriters is reasonable and fair compared to the commission, spread or profit received by other such persons in connection with the underwriting of similar securities being sold during a comparable period of time.

(7) *Percentage limit.* (i) *Generally.* The amount of securities of any class of such issue to be purchased by the investment company, aggregated with purchases by any other investment company advised by the investment company's investment adviser, and any purchases by another account with respect to which the investment adviser has investment discretion if the investment adviser exercised such investment discretion with respect to the purchase, does not exceed the following limits:

(A) If purchased in an offering other than an Eligible Rule 144A Offering, 25 percent of the principal amount of the offering of such class; or

(B) If purchased in an Eligible Rule 144A Offering, 25 percent of the total of:

(1) The principal amount of the offering of such class sold by underwriters

or members of the selling syndicate to qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter; plus

(2) The principal amount of the offering of such class in any concurrent public offering.

(ii) *Exemption from percentage limit.* The requirement in paragraph (c)(7)(i) of this section applies only if the investment adviser of the investment company is, or is an affiliated person of, a principal underwriter of the security; and

(iii) *Separate aggregation.* The requirement in paragraph (c)(7)(i) of this section applies independently with respect to each investment adviser of the investment company that is, or is an affiliated person of, a principal underwriter of the security.

(8) *Prohibition of Certain Affiliate Transactions.* Such investment company does not purchase the securities being offered directly or indirectly from an officer, director, member of an advisory board, investment adviser or employee of such investment company or from a person of which any such officer, director, member of an advisory board, investment adviser or employee is an affiliated person; *provided*, that a purchase from a syndicate manager shall not be deemed to be a purchase from a specific underwriter if:

(i) Such underwriter does not benefit directly or indirectly from the transaction; or

(ii) In respect to the purchase of Eligible Municipal Securities, such purchase is not designated as a group sale or otherwise allocated to the account of any person from whom this paragraph prohibits the purchase.

(9) *Periodic Reporting.* The existence of any transactions effected pursuant to this section shall be reported on the Form N-SAR [§ 274.101 of this chapter] of the investment company and a written record of each such transaction, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the transaction, and the information or materials upon which the determination described in paragraph (b)(10)(iii) of this section was made shall be attached thereto.

(10) *Board Review.* The board of directors of the investment company, including a majority of the directors who are not interested persons of the investment company:

(i) Has approved procedures, pursuant to which such purchases may be effected for the company, that are reasonably designed to provide that the purchases comply with all the conditions of this section;

(ii) Approves such changes to the procedures as the board deems necessary; and

(iii) Determines no less frequently than quarterly that all purchases made during the preceding quarter were effected in compliance with such procedures.

(11) *Board Composition, Selection, and Representation.* (i) A majority of the directors of the investment company are not interested persons of the company, and those directors select and nominate any other disinterested directors of the company; and

(ii) Any person who acts as legal counsel for the disinterested directors of the company is an independent legal counsel.

(12) *Maintenance of Records.* The investment company:

(i) Shall maintain and preserve permanently in an easily accessible place a written copy of the procedures, and any modification thereto, described in paragraphs (b)(10)(i) and (b)(10)(ii) of this section; and

(ii) Shall maintain and preserve for a period not less than six years from the end of the fiscal year in which any transactions occurred, the first two years in an easily accessible place, a written record of each such transaction, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the transaction, and the information or materials upon which the determination described in paragraph (b)(10)(iii) of this section was made.

[62 FR 42408, Aug. 7, 1997, as amended at 66 FR 3758, Jan. 16, 2001; 67 FR 31079, May 8, 2002; 68 FR 3152, Jan. 22, 2003]

§ 270.11a-1 Definition of “exchange” for purposes of section 11 of the Act.

(a) For the purposes of section 11 of the Act, the term *exchange* as used therein shall include the issuance of any security by a registered investment company in an amount equal to the proceeds, or any portion of the proceeds, paid or payable—

(1) Upon the repurchase, by or at the instance of such issuer, of an outstanding security the terms of which provide for its termination, retirement or cancellation, or

(2) Upon the termination, retirement or cancellation of an outstanding security of such issuer in accordance with the terms thereof.

(b) A security shall not be deemed to have been repurchased by or at the instance of the issuer, or terminated, retired or canceled in accordance with the terms of the security if—

(1) The security was redeemed or repurchased at the instance of the holder; or

(2) A security holder's account was closed for failure to make payments as prescribed in the security or instruments pursuant to which the security was issued, and notice of intention to close the account was mailed to the security holder, and he had a reasonable time in which to meet the deficiency; or

(3) Sale of the security was restricted to a specified, limited group of persons and, in accordance with the terms of the security or the instruments pursuant to which the security was issued, upon its being transferred by the holder to a person not a member of the group eligible to purchase the security, the issuer required the surrender of the security and paid the redemption price thereof.

(c) The provisions of paragraph (a) of this section shall not apply if, following the repurchase of an outstanding security by or at the instance of the issuer or the termination, retirement or cancellation of an outstanding security in accordance with the terms thereof—

(1) The proceeds are actually paid to the security holder by or on behalf of the issuer within 7 days, and

(2) No sale and no offer (other than by way of exchange) of any security of the issuer is made by or on behalf of the issuer to the person to whom such proceeds were paid, within 60 days after such payment.

(d) The provisions of paragraph (a) of this section shall not apply to the repurchase, termination, retirement, or cancellation of a security outstanding on the effective date of this section or issued pursuant to a subscription agreement or other plan of acquisition in effect on such date.

(Sec. 11, 54 Stat. 808; 15 U.S.C. 80a-11)

[32 FR 10728, July 21, 1967]

§ 270.11a-2 Offers of exchange by certain registered separate accounts or others the terms of which do not require prior Commission approval.

(a) As used in this section:

(1) *Deferred sales load* shall mean any sales load, including a contingent deferred sales load, that is deducted upon redemption or annuitization of amounts representing all or a portion of a securityholder's interest in a separate account;

(2) *Exchanged security* shall include not only the security or securities (or portion[s] thereof) of a securityholder actually exchanged pursuant to an exchange offer but also any security or securities (or portion[s] thereof) of the securityholder previously exchanged for the exchanged security or its predecessors;

(3) *Front-end sales load* shall mean any sales load that is deducted from one or more purchase payments made by a securityholder before they are invested in a separate account; and

(4) *Purchase payments made for the acquired security*, as used in paragraphs (c)(2) and (d)(2) of this section, shall not include any purchase payments made for the exchanged security or any appreciation attributable to those purchase payments that are transferred to the offering account in connection with an exchange.

(b) Notwithstanding section 11 of the Act [15 U.S.C. 80a-11], any registered separate account or any principal underwriter for such an account (collectively, the "offering account") may make or cause to be made an offer to the holder of a security of the offering

account, or of any other registered separate account having the same insurance company depositor or sponsor as the offering account or having an insurance company depositor or sponsor that is an affiliate of the offering account's depositor or sponsor, to exchange his security (or portion thereof) (the "exchanged security") for a security (or portion thereof) of the offering account (the "acquired security") without the terms of such exchange offer first having been submitted to and approved by the Commission, as provided below:

(1) If the securities (or portions thereof) involved are variable annuity contracts, then

(i) The exchange must be made on the basis of the relative net asset values of the securities to be exchanged, except that the offering account may deduct at the time of the exchange

(A) An administrative fee which is disclosed in the part of the offering account's registration statement under the Securities Act of 1933 relating to the prospectus, and

(B) Any front-end sales load permitted by paragraph (c) of this section, and

(ii) Any deferred sales load imposed on the acquired security by the offering account shall be calculated in the manner prescribed by paragraph (d) or (e) of this section; or

(2) If the securities (or portions thereof) involved are variable life insurance contracts offered by a separate account registered under the Act as a unit investment trust, then the exchange must be made on the basis of the relative net asset values of the securities to be exchanged, except that the offering account may deduct at the time of the exchange an administrative fee which is disclosed in the part of the offering account's registration statement under the Securities Act of 1933 relating to the prospectus.

(c) If the offering account imposes a front-end sales load on the acquired security, then such sales load

(1) Shall be a percentage that is no greater than the excess of the rate of the front-end sales load otherwise applicable to that security over the rate of any front-end sales load previously paid on the exchanged security, and

(2) Shall not exceed 9 percent of the sum of the purchase payments made for the acquired security and the exchanged security.

(d) If the offering account imposes a deferred sales load on the acquired security and the exchanged security was also subject to a deferred sales load, then any deferred sales load imposed on the acquired security:

(1) Shall be calculated as if

(i) The holder of the acquired security had been the holder of that security from the date on which he became the holder of the exchanged security and

(ii) Purchase payments made for the exchanged security had been made for the acquired security on the date on which they were made for the exchanged security; and

(2) Shall not exceed 9 percent of the sum of the purchase payments made for the acquired security and the exchanged security.

(e) If the offering account imposes a deferred sales load on the acquired security and a front-end sales load was paid on the exchanged security, then any deferred sales load imposed on the acquired security may not be imposed on purchase payments made for the exchanged security or any appreciation attributable to purchase payments made for the exchanged security that are transferred in connection with the exchange.

(f) Notwithstanding the foregoing, no offer of exchange shall be made in reliance on this section if both a front-end sales load and a deferred sales load are to be imposed on the acquired security or if both such sales loads are imposed on the exchanged security.

(Sec. 11(a) (15 U.S.C. 80a-11(a)) and sec. 38(a) (15 U.S.C. 80a-37(a)) of the Act)

[48 FR 36245, Aug. 10, 1983]

§ 270.11a-3 Offers of exchange by open-end investment companies other than separate accounts.

(a) For purposes of this rule:

(1) *Acquired security* means the security held by a securityholder after completing an exchange pursuant to an exchange offer;

(2) *Administrative fee* means any fee, other than a sales load, deferred sales load or redemption fee, that is

(i) Reasonably intended to cover the costs incurred in processing exchanges of the type for which the fee is charged, *Provided that:* the offering company will maintain and preserve records of any determination of the costs incurred in connection with exchanges for a period of not less than six years, the first two years in an easily accessible place. The records preserved under this provision shall be subject to inspection by the Commission in accordance with section 31(b) of the Act (15 U.S.C. 80a-30(b)) as if such records were records required to be maintained under rules adopted under section 31(a) of the Act (15 U.S.C. 80a-30a)); or

(ii) A nominal fee as defined in paragraph (a)(8) of this section;

(3) *Deferred sales load* means any amount properly chargeable to sales or promotional expenses that is paid by a shareholder after purchase but before or upon redemption;

(4) *Exchanged security* means

(i) The security actually exchanged pursuant to an exchange offer, and

(ii) Any security previously exchanged for such security or for any of its predecessors;

(5) *Group of investment companies* means any two or more registered open-end investment companies that hold themselves out to investors as related companies for purposes of investment and investor services, and

(i) That have a common investment adviser or principal underwriter, or

(ii) The investment adviser or principal underwriter of one of the companies is an affiliated person as defined in section 2(a)(3) of the Act (15 U.S.C. 80a-2(a)(3)) of the investment adviser or principal underwriter of each of the other companies;

(6) *Offering company* means a registered open-end investment company (other than a registered separate account) or any principal underwriter thereof that makes an offer (an "exchange offer") to the holder of a security of that company, or of another open-end investment company within the same group of investment companies as the offering company, to exchange that security for a security of the offering company;

(7) *Redemption fee* means any fee (other than a sales load, deferred sales

load or administrative fee) that is paid to the fund and is reasonably intended to compensate the fund for expenses directly related to the redemption of fund shares; and

(8) *Nominal fee* means a slight or *de minimis* fee.

(b) Notwithstanding section 11(a) of the Act (15 U.S.C. 80a-11(a)), and except as provided in paragraphs (d) and (e) of this section, in connection with an exchange offer an offering company may cause a securityholder to be charged a sales load on the acquired security, a redemption fee, an administrative fee, or any combination of the foregoing, *Provided that:*

(1) Any administrative fee or scheduled variation thereof is applied uniformly to all securityholders of the class specified;

(2) Any redemption fee charged with respect to the exchanged security or any scheduled variation thereof

(i) Is applied uniformly to all securityholders of the class specified, and

(ii) Does not exceed the redemption fee applicable to a redemption of the exchanged security in the absence of an exchange.

Any scheduled variation of a redemption fee must be reasonably related to the costs to the fund of processing the type of redemptions for which the fee is charged;

(3) No deferred sales load is imposed on the exchanged security at the time of an exchange;

(4) Any sales load charged with respect to the acquired security is a percentage that is no greater than the excess, if any, of the rate of the sales load applicable to that security in the absence of an exchange over the sum of the rates of all sales loads previously paid on the exchanged security, *Provided that:*

(i) The percentage rate of any sales load charged when the acquired security is redeemed, that is solely the result of a deferred sales load imposed on the exchanged security, may be no greater than the excess, if any, of the applicable rate of such sales load, calculated in accordance with paragraph (b)(5) of this section, over the sum of the rates of all sales loads previously paid on the acquired security, and

(ii) In no event may the sum of the rates of all sales loads imposed prior to and at the time the acquired security is redeemed, including any sales load paid or to be paid with respect to the exchanged security, exceed the maximum sales load rate, calculated in accordance with paragraph (b)(5) of this section, that would be applicable in the absence of an exchange to the security (exchanged or acquired) with the highest such rate;

(5) Any deferred sales load charged at the time the acquired security is redeemed is calculated as if the holder of the acquired security had held that security from the date on which he became the holder of the exchanged security, *Provided that:*

(i) The time period during which the acquired security is held need not be included when the amount of the deferred sales load is calculated, if the deferred sales load is

(A) reduced by the amount of any fees collected on the acquired security under the terms of any plan of distribution adopted in accordance with rule 12b-1 under the Act (17 CFR 270.12b-1) (a "12b-1 plan"), and

(B) Solely the result of a sales load imposed on the exchanged security, and no other sales loads, including deferred sales loads, are imposed with respect to the acquired security,

(ii) The time period during which the exchanged security is held need not be included when the amount of the deferred sales load on the acquired security is calculated, if

(A) The deferred sales load is reduced by the amount of any fees previously collected on the exchanged security under the terms of any 12b-1 plan, and

(B) The exchanged security was not subject to any sales load, and

(iii) The holding periods in this subsection may be computed as of the end of the calendar month in which a security was purchased or redeemed;

(6) The prospectus of the offering company discloses

(i) The amount of any administrative or redemption fee imposed on an exchange transaction for its securities, as well as the amount of any administrative or redemption fee imposed on its

securityholders to acquire the securities of other investment companies in an exchange transaction, and

(ii) If the offering company reserves the right to change the terms of or terminate an exchange offer, that the exchange offer is subject to termination and its terms are subject to change;

(7) Any sales literature or advertising that mentions the existence of the exchange offer also discloses

(i) The existence of any administrative fee or redemption fee that would be imposed at the time of an exchange; and

(ii) If the offering company reserves the right to change the terms of or terminate the exchange offer, that the exchange offer is subject to termination and its terms are subject to change;

(8) Whenever an exchange offer is to be terminated or its terms are to be amended materially, any holder of a security subject to that offer shall be given prominent notice of the impending termination or amendment at least 60 days prior to the date of termination or the effective date of the amendment, *Provided that:*

(i) No such notice need be given if the only material effect of an amendment is to reduce or eliminate an administrative fee, sales load or redemption fee payable at the time of an exchange, and

(ii) No notice need be given if, under extraordinary circumstances, either

(A) There is a suspension of the redemption of the exchanged security under section 22(e) of the Act [15 U.S.C. 80a-22(e)] and the rules and regulations thereunder, or

(B) The offering company temporarily delays or ceases the sale of the acquired security because it is unable to invest amounts effectively in accordance with applicable investment objectives, policies and restrictions; and

(9) In calculating any sales load charged with respect to the acquired security:

(i) If a securityholder exchanges less than all of his securities, the security upon which the highest sales load rate was previously paid is deemed exchanged first; and

(ii) If the exchanged security was acquired through reinvestment of divi-

dends or capital gains distributions, that security is deemed to have been sold with a sales load rate equal to the sales load rate previously paid on the security on which the dividend was paid or distribution made.

(c) If either no sales load is imposed on the acquired security or the sales load imposed is less than the maximum allowed by paragraph (b)(4) of this section, the offering company may require the exchanging securityholder to have held the exchanged security for a minimum period of time previously established by the offering company and applied uniformly to all securityholders of the class specified.

(d) Any offering company that has previously made an offer of exchange may continue to impose fees or sales loads permitted by an order under section 11(a) of the Act upon shares purchased before the earlier of (1) One year after the effective date of this section, or (2) When the offer has been brought into compliance with the terms of this section, and upon shares acquired through reinvestment of dividends or capital gains distributions based on such shares, until such shares are re-deemed.

(e) Any offering company that has previously made an offer of exchange cannot rely on this section to amend such prior offer unless

(1) The offering company's prospectus disclosed, during at least the two year period prior to the amendment of the offer (or, if the fund is less than two years old, at all times the offer has been outstanding) that the terms of the offer were subject to change, or

(2) The only effect of such change is to reduce or eliminate an administrative fee, sales load or redemption fee payable at the time of an exchange.

[54 FR 35185, Aug. 24, 1989, as amended at 61 FR 49016, Sept. 17, 1996]

§ 270.12b-1 Distribution of shares by registered open-end management investment company.

(a)(1) Except as provided in this section, it shall be unlawful for any registered open-end management investment company (other than a company complying with the provisions of section 10(d) of the Act (15 U.S.C. 80a-

10(d))) to act as a distributor of securities of which it is the issuer, except through an underwriter.

(2) For purposes of this section, such a company will be deemed to be acting as a distributor of securities of which it is the issuer, other than through an underwriter, if it engages directly or indirectly in financing any activity which is primarily intended to result in the sale of shares issued by such company, including, but not necessarily limited to, advertising, compensation of underwriters, dealers, and sales personnel, the printing and mailing of prospectuses to other than current shareholders, and the printing and mailing of sales literature.

(b) A registered, open-end management investment company ("Company") may act as a distributor of securities of which it is the issuer: *Provided*, That any payments made by such company in connection with such distribution are made pursuant to a written plan describing all material aspects of the proposed financing of distribution and that all agreements with any person relating to implementation of the plan are in writing: *And further provided*, That:

(1) Such plan has been approved by a vote of at least a majority of the outstanding voting securities of such company, if adopted after any public offering of the company's voting securities or the sale of such securities to persons who are not affiliated persons of the company, affiliated persons of such persons, promoters of the company, or affiliated persons of such promoters;

(2) Such plan, together with any related agreements, has been approved by a vote of the board of directors of such company, and of the directors who are not interested persons of the company and have no direct or indirect financial interest in the operation of the plan or in any agreements related to the plan, cast in person at a meeting called for the purpose of voting on such plan or agreements; and

(3) Such plan or agreement provides, in substance:

(i) That it shall continue in effect for a period of more than one year from the date of its execution or adoption only so long as such continuance is specifically approved at least annually

in the manner described in paragraph (b)(2) of this section;

(ii) That any person authorized to direct the disposition of monies paid or payable by such company pursuant to the plan or any related agreement shall provide to the company's board of directors, and the directors shall review, at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made; and

(iii) In the case of a plan, that it may be terminated at any time by vote of a majority of the members of the board of directors of the company who are not interested persons of the company and have no direct or indirect financial interest in the operation of the plan or in any agreements related to the plan or by vote of a majority of the outstanding voting securities of such company; and

(iv) In the case of an agreement related to a plan,

(A) That it may be terminated at any time, without the payment of any penalty, by vote of a majority of the members of the board of directors of such company who are not interested persons of the company and have no direct or indirect financial interest in the operation of the plan or in any agreements related to the plan or by vote of a majority of the outstanding voting securities of such company on not more than sixty days' written notice to any other party to the agreement, and

(B) For its automatic termination in the event of its assignment; and

(4) Such plan provides that it may not be amended to increase materially the amount to be spent for distribution without shareholder approval and that all material amendments of the plan must be approved in the manner described in paragraph (b)(2) of this section;

(5) Such plan is implemented and continued in a manner consistent with the provisions of paragraphs (c), (d), and (e) of this section;

(c) A registered open-end management investment company may rely on the provisions of paragraph (b) of this section only if:

(1) A majority of the directors of the company are not interested persons of

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the company, and those directors select and nominate any other disinterested directors of the company; and

(2) Any person who acts as legal counsel for the disinterested directors of the company is an independent legal counsel;

(d) In considering whether a registered open-end management investment company should implement or continue a plan in reliance on paragraph (b) of this section, the directors of such company shall have a duty to request and evaluate, and any person who is a party to any agreement with such company relating to such plan shall have a duty to furnish, such information as may reasonably be necessary to an informed determination of whether such plan should be implemented or continued; in fulfilling their duties under this paragraph the directors should consider and give appropriate weight to all pertinent factors, and minutes describing the factors considered and the basis for the decision to use company assets for distribution must be made and preserved in accordance with paragraph (f) of this section;

NOTE: For a discussion of factors which may be relevant to a decision to use company assets for distribution, see Investment Company Act Releases Nos. 10862, September 7, 1979, and 11414, October 28, 1980.

(e) A registered open-end management investment company may implement or continue a plan pursuant to paragraph (b) of this section only if the directors who vote to approve such implementation or continuation conclude, in the exercise of reasonable business judgment and in light of their fiduciary duties under state law and under sections 36(a) and (b) (15 U.S.C. 80a-35 (a) and (b)) of the Act, that there is a reasonable likelihood that the plan will benefit the company and its shareholders; and

(f) A registered open-end management investment company must preserve copies of any plan, agreement or report made pursuant to this section for a period of not less than six years from the date of such plan, agreement or report, the first two years in an easily accessible place.

(g) If a plan covers more than one series or class of shares, the provisions of the plan must be severable for each series or class, and whenever this section

provides for any action to be taken with respect to a plan, that action must be taken separately for each series or class affected by the matter. Nothing in this paragraph (g) shall affect the rights of any purchase class under § 270.18f-3(e)(2)(iii).

[45 FR 73905, Nov. 7, 1980, as amended at 60 FR 11885, Mar. 2, 1995; 61 FR 49011, Sept. 17, 1996; 62 FR 51765, Oct. 3, 1997; 66 FR 3758, Jan. 16, 2001]

§ 270.12d2-1 Definition of insurance company for purposes of sections 12(d)(2) and 12(g) of the Act.

For purposes of sections 12(d)(2) and 12(g) of the Act [15 U.S.C. 80a-12(d)(2) and 80a-12(g)], *insurance company* shall include a foreign insurance company as that term is used in rule 3a-6 under the Act (17 CFR 270.3a-6).

[56 FR 56300, Nov. 4, 1991]

§ 270.12d3-1 Exemption of acquisitions of securities issued by persons engaged in securities related businesses.

(a) Notwithstanding section 12(d)(3) of the Act, a registered investment company, or any company or companies controlled by such registered investment company (“acquiring company”) may acquire any security issued by any person that, in its most recent fiscal year, derived 15 percent or less of its gross revenues from securities related activities unless the acquiring company would control such person after the acquisition.

(b) Notwithstanding section 12(d)(3) of the Act, an acquiring company may acquire any security issued by a person that, in its most recent fiscal year, derived more than 15 percent of its gross revenues from securities related activities, *provided that*:

(1) Immediately after the acquisition of any equity security, the acquiring company owns not more than five percent of the outstanding securities of that class of the issuer’s equity securities;

(2) Immediately after the acquisition of any debt security, the acquiring company owns not more than ten percent of the outstanding principal amount of the issuer’s debt securities; and

(3) Immediately after any such acquisition, the acquiring company has invested not more than five percent of the value of its total assets in the securities of the issuer.

(c) Notwithstanding paragraphs (a) and (b) of this section, this section does not exempt the acquisition of:

- (1) A general partnership interest; or
- (2) A security issued by the acquiring company's promoter, principal underwriter, or any affiliated person of such promoter, or principal underwriter; or
- (3) A security issued by the acquiring company's investment adviser, or an affiliated person of the acquiring company's investment adviser, other than a security issued by a subadviser or an affiliated person of a subadviser of the acquiring company provided that:

(i) *Prohibited relationships.* The subadviser that is (or whose affiliated person is) the issuer is not, and is not an affiliated person of, an investment adviser responsible for providing advice with respect to the portion of the acquiring company that is acquiring the securities, or of any promoter, underwriter, officer, director, member of an advisory board, or employee of the acquiring company;

(ii) *Advisory contract.* The advisory contracts of the Subadviser that is (or whose affiliated person is) the issuer, and any Subadviser that is advising the portion of the acquiring company that is purchasing the securities:

(A) Prohibit them from consulting with each other concerning transactions of the acquiring company in securities or other assets, other than for purposes of complying with the conditions of paragraphs (a) and (b) of this section; and

(B) Limit their responsibility in providing advice to providing advice with respect to a discrete portion of the acquiring company's portfolio.

(d) For purposes of this section:

(1) *Securities related activities* are a person's activities as a broker, a dealer, an underwriter, an investment adviser registered under the Investment Advisers Act of 1940, as amended, or as an investment adviser to a registered investment company.

(2) An issuer's gross revenues from its own securities related activities and from its ratable share of the securities

related activities of enterprises of which it owns 20 percent or more of the voting or equity interest should be considered in determining the degree to which an issuer is engaged in securities related activities. Such information may be obtained from the issuer's annual report to shareholders, the issuer's annual reports or registration statement filed with the Commission, or the issuer's chief financial officer.

(3) *Equity security* is as defined in § 240.3a-11 of this chapter.

(4) *Debt security* includes all securities other than equity securities.

(5) Determination of the percentage of an acquiring company's ownership of any class of outstanding equity securities of an issuer shall be made in accordance with the procedures described in the rules under § 240.16 of this chapter.

(6) Where an acquiring company is considering acquiring or has acquired options, warrants, rights, or convertible securities of a securities related business, the determination required by paragraph (b) of this section shall be made as though such options, warrants, rights, or conversion privileges had been exercised.

(7) The following transactions will not be deemed to be an acquisition of securities of a securities related business:

(i) Receipt of stock dividends on securities acquired in compliance with this section;

(ii) Receipt of securities arising from a stock-for-stock split on securities acquired in compliance with this section;

(iii) Exercise of options, warrants, or rights acquired in compliance with this section;

(iv) Conversion of convertible securities acquired in compliance with this section; and

(v) Acquisition of Demand Features or Guarantees, as these terms are defined in §§ 270.2a-7(a)(8) and 270.2a-7(a)(15) respectively, provided that, immediately after the acquisition of any Demand Feature or Guarantee, the company will not, with respect to 75 percent of the total value of its assets, have invested more than ten percent of the total value of its assets in securities underlying Demand Features or Guarantees from the same institution.

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For the purposes of this section, a Demand Feature or Guarantee will be considered to be from the party to whom the company will look for a payment of the exercise price.

(8) Any class or series of an investment company that issues two or more classes or series of preferred or special stock, each of which is preferred over all other classes or series with respect to assets specifically allocated to that class or series, shall be treated as if it is a registered investment company.

(9) *Subadviser* means an investment adviser as defined in section 2(a)(20)(B) of the Act (15 U.S.C. 80a-2(a)(20)(B)).

[58 FR 49427, Sept. 23, 1993, as amended at 61 FR 13982, Mar. 28, 1996; 62 FR 64986, Dec. 9, 1997; 66 FR 36162, July 11, 2001; 68 FR 3152, Jan. 22, 2003]

§ 270.13a-1 Exemption for change of status by temporarily diversified company.

A change of its subclassification by a registered management company from that of a diversified company to that of a nondiversified company shall be exempt from the provisions of section 13(a)(1) of the Act (54 Stat. 811; 15 U.S.C. 80a-13), if such change occurs under the following circumstances:

(a) Such company was a non-diversified company at the time of its registration pursuant to section 8(a) (54 Stat. 803; 15 U.S.C. 80a-8), or thereafter legally became a nondiversified company.

(b) After its registration and within 3 years prior to such change, such company became a diversified company.

(c) At the time such company became a diversified company, its registration statement filed pursuant to section 8(b) (54 Stat. 803; 15 U.S.C. 80a-8), as supplemented and modified by any amendments and reports theretofore filed, did not state that the registrant proposed to become a diversified company.

[Rule N-13A-1, 6 FR 3967, Aug. 8, 1941]

§ 270.14a-1 Use of notification pursuant to regulation E under the Securities Act of 1933.

For the purposes of section 14(a)(3) of the Act, registration of securities under the Securities Act of 1933 by a small business investment company operating under the Small Business In-

vestment Act of 1958 shall be deemed to include the filing of a notification under Rule 604 of Regulation E promulgated under said Act if provision is made in connection with such notification which in the opinion of the Commission adequately insures (a) that after the effective date of such notification such company will not issue any security or receive any proceeds of any subscription for any security until firm agreements have been made with such company by not more than twenty-five responsible persons to purchase from it securities to be issued by it for an aggregate net amount which plus the then net worth of the company, if any, will equal at least \$100,000; (b) that said aggregate net amount will be paid into such company before any subscriptions for such securities will be accepted from any persons in excess of twenty-five; (c) that arrangements will be made whereby any proceeds so paid in, as well as any sales load, will be refunded to any subscriber on demand without any deduction, in the event that the net proceeds so received by the company do not result in the company having a net worth of at least \$100,000 within ninety days after such notification becomes effective.

[25 FR 3512, Apr. 22, 1960]

§ 270.14a-2 Exemption from section 14(a) of the Act for certain registered separate accounts and their principal underwriters.

(a) A registered separate account, and any principal underwriter for such account, shall be exempt from section 14(a) of the Act (15 U.S.C. 80a-14(a)) with respect to a public offering of variable annuity contracts participating in such account if, at the commencement of such offering, the insurance company establishing and maintaining such separate account shall have (1) a combined capital and surplus, if a stock company, or (2) an unassigned surplus, if a mutual company, of not less than \$1,000,000 as set forth in the balance sheet of such insurance company contained in the registration statement or any amendment thereto relating to such contracts filed pursuant to the Securities Act of 1933.

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(b) Any registered management investment company which has as a promoter an insurance company meeting the requirements of paragraph (a) of this section and which offers its securities to separate accounts of such insurance company registered under the Act as unit investment trusts ("trust accounts"), and any principal underwriter for such investment company, shall be exempt from section 14(a) with respect to such offering and to the offering of such securities to trust accounts of other insurance companies meeting the requirements of paragraph (a) of this section.

(c) Any registered management investment company exempt from section 14(a) of the Act pursuant to paragraph (b) of this section shall be exempt from sections 15(a), 16(a), and 32(a)(2) of the Act (15 U.S.C. 80a-15(a), 80a-16(a), and 80a-31(a)(2)), to the extent prescribed in rules 15a-3, 16a-1, and 32a-2 under the Act (17 CFR 270.15a-3, 270.16a-1, and 270.32a-2), provided that such investment company complies with the conditions set forth in those rules as if it were a separate account.

(Secs. 6(c) and 38(a) of the Act (15 U.S.C. 80a-6(c) and 80a-37(a), respectively))

[49 FR 1479, Jan. 12, 1984]

§ 270.14a-3 Exemption from section 14(a) of the Act for certain registered unit investment trusts and their principal underwriters.

(a) A registered unit investment trust (hereinafter referred to as the "Trust") engaged exclusively in the business of investing in eligible trust securities, and any principal underwriter for the Trust, shall be exempt from section 14(a) of the Act with respect to a public offering of Trust units: *Provided, That:*

(1) At the commencement of such offering the Trust holds at least \$100,000 principal amount of eligible trust securities (or delivery statements relating to contracts for the purchase of any such securities which, together with cash or an irrevocable letter of credit issued by a bank in the amount required for their purchase, are held by the Trust for purchase of the securities);

(2) If, within ninety days from the time that the Trust's registration statement has become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.) the net worth of the Trust declines to less than \$100,000 or the Trust is terminated, the sponsor for the Trust shall—

(i) Refund, on demand and without deduction, all sales charges to any unitholders who purchased Trust units from the sponsor (or from any underwriter or dealer participating in the distribution), and

(ii) Liquidate the eligible trust securities held by the Trust and distribute the proceeds thereof to the unitholders of the Trust;

(3) The sponsor instructs the trustee when the eligible trust securities are deposited in the Trust that, in the event that redemptions by the sponsor or any underwriter of units constituting a part of the unsold units results in the Trust having a net worth of less than 40 percent of the principal amount of the eligible trust securities (or delivery statements relating to contracts for the purchase of any such securities which, together with cash or an irrevocable letter of credit issued by a bank in the amount required for their purchase, are held by the Trust for purchase of the securities) initially deposited in the Trust—

(i) The trustee shall terminate the Trust and distribute the assets thereof to the unitholders of the Trust, and

(ii) The sponsor for the Trust shall refund, on demand and without deduction, all sales charges to any unitholder who purchased Trust units from the sponsor or from any underwriter or dealer participating in the distribution.

(b) For the purposes of determining the availability of the exemption provided by the foregoing subsection, the term "eligible trust securities" shall mean:

(1) Securities (other than convertible securities) which are issued by a corporation and which have their interest or dividend rate fixed at the time they are issued;

(2) Interest bearing obligations issued by a state, or by any agency, instrumentality, authority or political subdivision thereof;

(3) Government securities; and

(4) Units of a previously issued series of the Trust: *Provided, That:*

(i) The aggregate principal amount of units of existing series so deposited shall not exceed 10% of the aggregate principal amount of the portfolio of the new series;

(ii) The aggregate principal amount of units of any particular existing series so deposited shall not exceed 5% of the aggregate principal amount of the portfolio of the new series;

(iii) No units shall be so deposited which do not substantially meet investment quality criteria at least as high as those applicable to the new series in which such units are deposited;

(iv) The value of the eligible trust securities underlying units of an existing series deposited in a new series shall not, by reason of maturity of such securities according to their terms within ten years following the date of deposit, be reduced sufficiently for such existing series to be voluntarily terminated;

(v) Units of existing series so deposited shall constitute units purchased by the sponsor as market maker and not remaining unsold units from the original distribution of such units; and

(vi) The sponsor shall deposit units of existing series in the new series without a sales charge.

(Secs. 6(c) and 38(a) (15 U.S.C. 80a-6(c) and 15 U.S.C. 80a-37(a)))

[44 FR 29646, May 22, 1979; 44 FR 40064, July 9, 1979]

§ 270.15a-1 Exemption from stockholders' approval of certain small investment advisory contracts.

An investment adviser of a registered investment company shall be exempt from the requirement of sections 15(a) and 15(e) of the Act (54 Stat. 812; 15 U.S.C. 80a-15) that the written contract pursuant to which he acts shall have been approved by the vote of a majority of the outstanding voting securities of such company, if the following conditions are met:

(a) Such investment adviser is not an affiliated person of such company (except as investment adviser) nor of any principal underwriter for such company.

(b) His compensation as investment adviser of such company in any fiscal year of the company during which any such contract is in effect either (1) is not more than \$100 or (2) is not more than \$2,500 and not more than $\frac{1}{40}$ of 1 percent of the value of the company's net assets averaged over the year or taken as of a definite date or dates within the year.

(c) The aggregate compensation of all investment advisers of such company exempted pursuant to this section in any fiscal year of the company either (1) is not more than \$200 or (2) is not more than $\frac{1}{20}$ of 1 percent of the value of the company's net assets averaged over the year or taken as of a definite date or dates within the year.

[Rule N-15A-1, 6 FR 2275, Jan. 8, 1944]

§ 270.15a-2 Annual continuance of contracts.

(a) For purposes of sections 15(a) and 15(b) of the Act, the continuance of a contract for a period more than two years after the date of its execution shall be deemed to have been specifically approved at least annually by the board of directors or by a vote of a majority of the outstanding voting securities of a registered investment company if such approval occurs:

(1) With respect to the first continuance of a contract, during the 90 days prior to and including the earlier of (i) the date specified in such contract for its termination in the absence of such approval, or (ii) the second anniversary of the date upon which such contract was executed; or

(2) With respect to any subsequent continuance of a contract, during the 90 days prior to and including the first anniversary of the date upon which the most recent previous annual continuance of such contract became effective.

(b) The provisions of paragraph (a) of this section shall not apply to any continuance of a contract which shall have been approved not later than 90 days after the date of adoption of this section, provided that such contract shall expire, by its terms, not later than 17 months from the date of adoption of this section.

NOTE: This section does not establish the exclusive method of complying with the Act.

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It provides one procedure by which a registered investment company may comply with the applicable provisions of sections 15(a) and 15(b) of the Act; it does not preclude any other appropriate procedure. Any annual continuance of a contract approved in accordance with the provisions of paragraph (a)(1) or (a)(2) of § 270.15a-2 will constitute a renewal of such contract for the purposes of section 15(c) of the Act, and therefore such renewal must be approved by the disinterested directors within the times specified in the section for a continuance.

[41 FR 41911, Sept. 24, 1976]

§ 270.15a-3 Exemption for initial period of investment adviser of certain registered separate accounts from requirement of security holder approval of investment advisory contract.

(a) An investment adviser of a registered separate account shall be exempt from the requirement under section 15(a) of the Act that the initial written contract pursuant to which the investment adviser serves or acts shall have been approved by the vote of a majority of the outstanding voting securities of such registered separate account, subject to the following conditions:

(1) Such registered separate account qualifies for exemption from section 14(a) of the Act pursuant to § 270.14a-2, or is exempt therefrom by order of the Commission upon application; and

(2) Such written contract shall be submitted to a vote of variable annuity contract owners at their first meeting after the effective date of the registration statement under the Securities Act of 1933, as amended (15 U.S.C. 77a et seq.) relating to variable annuity contracts participating in such account: *Provided*, That such meeting shall take place within 1 year after such effective date, unless the time for the holding of such meeting shall be extended by the Commission upon written request showing good cause therefor.

(Sec. 6, 54 Stat. 800; 15 U.S.C. 80a-6)

[34 FR 12695, Aug. 5, 1969]

§ 270.15a-4 Temporary exemption for certain investment advisers.

(a) For purposes of this section:

(1) *Fund* means an investment company, and includes a separate series of the company.

(2) *Interim contract* means a written investment advisory contract:

(i) That has not been approved by a majority of the fund's outstanding voting securities; and

(ii) That has a duration no greater than 150 days following the date on which the previous contract terminates.

(3) *Previous contract* means an investment advisory contract that has been approved by a majority of the fund's outstanding voting securities and has been terminated.

(b) Notwithstanding section 15(a) of the Act (15 U.S.C. 80a-15(a)), a person may act as investment adviser for a fund under an interim contract after the termination of a previous contract as provided in paragraphs (b)(1) or (b)(2) of this section:

(1) In the case of a previous contract terminated by an event described in section 15(a)(3) of the Act (15 U.S.C. 80a-15(a)(3)), by the failure to renew the previous contract, or by an assignment (other than an assignment by an investment adviser or a controlling person of the investment adviser in connection with which assignment the investment adviser or a controlling person directly or indirectly receives money or other benefit):

(i) The compensation to be received under the interim contract is no greater than the compensation the adviser would have received under the previous contract; and

(ii) The fund's board of directors, including a majority of the directors who are not interested persons of the fund, has approved the interim contract within 10 business days after the termination, at a meeting in which directors may participate by any means of communication that allows all directors participating to hear each other simultaneously during the meeting.

(2) In the case of a previous contract terminated by an assignment by an investment adviser or a controlling person of the investment adviser in connection with which assignment the investment adviser or a controlling person directly or indirectly receives money or other benefit:

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(i) The compensation to be received under the interim contract is no greater than the compensation the adviser would have received under the previous contract;

(ii) The board of directors, including a majority of the directors who are not interested persons of the fund, has voted in person to approve the interim contract before the previous contract is terminated;

(iii) The board of directors, including a majority of the directors who are not interested persons of the fund, determines that the scope and quality of services to be provided to the fund under the interim contract will be at least equivalent to the scope and quality of services provided under the previous contract;

(iv) The interim contract provides that the fund's board of directors or a majority of the fund's outstanding voting securities may terminate the contract at any time, without the payment of any penalty, on not more than 10 calendar days' written notice to the investment adviser;

(v) The interim contract contains the same terms and conditions as the previous contract, with the exception of its effective and termination dates, provisions governed by paragraphs (b)(2)(i), (b)(2)(iv), and (b)(2)(vi) of this section, and any other differences in terms and conditions that the board of directors, including a majority of the directors who are not interested persons of the fund, finds to be immaterial;

(vi) The interim contract contains the following provisions:

(A) The compensation earned under the contract will be held in an interest-bearing escrow account with the fund's custodian or a bank;

(B) If a majority of the fund's outstanding voting securities approve a contract with the investment adviser by the end of the 150-day period, the amount in the escrow account (including interest earned) will be paid to the investment adviser; and

(C) If a majority of the fund's outstanding voting securities do not approve a contract with the investment adviser, the investment adviser will be paid, out of the escrow account, the lesser of:

(1) Any costs incurred in performing the interim contract (plus interest earned on that amount while in escrow); or

(2) The total amount in the escrow account (plus interest earned); and

(vii)(A) A majority of the directors of the investment company are not interested persons of the company, and those directors select and nominate any other disinterested directors of the company; and

(B) Any person who acts as legal counsel for the disinterested directors of the company is an independent legal counsel.

[64 FR 68023, Dec. 6, 1999, as amended 66 FR 3758, Jan. 16, 2001]

§ 270.16a-1 Exemption for initial period of directors of certain registered accounts from requirements of election by security holders.

(a) Persons serving as the directors of a registered separate account shall, prior to the first meeting of such account's variable annuity contract owners, be exempt from the requirement of section 16(a) of the Act that such persons be elected by the holders of outstanding voting securities of such account at an annual or special meeting called for that purpose, subject to the following conditions:

(1) Such registered separate account qualifies for exemption from section 14(a) of the Act pursuant to § 270.14a-1 or is exempt therefrom by order of the Commission upon application; and

(2) Such persons have been appointed directors of such account by the establishing insurance company; and

(3) An election of directors for such account shall be held at the first meeting of variable annuity contract owners after the effective date of the registration statement under the Securities Act of 1933, as amended (15 U.S.C. 77a et seq.), relating to contracts participating in such account: *Provided*, That such meeting shall take place within 1 year after such effective date, unless the time for the holding of such meeting shall be extended by the Commission upon written request showing good cause therefor.

(Sec. 6, 54 Stat. 800; 15 U.S.C. 80a-6)

[34 FR 12695, Aug. 5, 1969]

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§ 270.17a-1 Exemption of certain underwriting transactions exempted by § 270.10f-1.

Any transaction exempted pursuant to § 270.10f-1 shall be exempt from the provisions of section 17(a)(1) of the Act (54 Stat. 815; 15 U.S.C. 80a-17).

[Rule N-17A-1, 6 FR 1191, Feb. 28, 1941]

§ 270.17a-2 Exemption of certain purchase, sale, or borrowing transactions.

Purchase, sale or borrowing transactions occurring in the usual course of business between affiliated persons of registered investment companies shall be exempt from section 17(a) of the Act provided (a) the transactions involve notes, drafts, time payment contracts, bills of exchange, acceptance or other property of a commercial character rather than of an investment character; (b) the buyer or lender is a bank; and (c) the seller or borrower is a bank or is engaged principally in the business of installment financing.

[Rule N-17A-2, 12 FR 5008, July 29, 1947]

§ 270.17a-3 Exemption of transactions with fully owned subsidiaries.

(a) The following transactions shall be exempt from section 17(a) of the Act:

(1) Transactions solely between a registered investment company and one or more of its fully owned subsidiaries or solely between two or more fully owned subsidiaries of such company.

(2) Transactions solely between any subsidiary of a registered investment company and one or more fully owned subsidiaries of such subsidiary or solely between two or more fully owned subsidiaries of such subsidiary.

(b) The term *fully owned subsidiary* as used in this section, means a subsidiary (1) all of whose outstanding securities, other than directors' qualifying shares, are owned by its parent and/or the parent's other fully owned subsidiaries, and (2) which is not indebted to any person other than its parent and/or the parent's other fully owned subsidiaries in an amount which is material in relation to the particular subsidiary, excepting (i) indebtedness incurred in the ordinary course of business which is not overdue and which

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matures within one year from the date of its creation, whether evidenced by securities or not, and (ii) any other indebtedness to one or more banks or insurance companies.

[Rule N-17A-3, 12 FR 3442, May 28, 1947]

§ 270.17a-4 Exemption of transactions pursuant to certain contracts.

Transactions pursuant to a contract shall be exempt from section 17(a) of the Act if at the time of the making of the contract and for a period of at least six months prior thereto no affiliation or other relationship existed which would operate to make such contract or the subsequent performance thereof subject to the provisions of said section 17(a).

[Rule N-17A-4, 12 FR 5008, July 29, 1947]

§ 270.17a-5 Pro rata distribution neither "sale" nor "purchase."

When a company makes a pro rata distribution in cash or in kind among its common stockholders without giving any election to any stockholder as to the specific assets which such stockholders shall receive, such distribution shall not be deemed to involve a sale to or a purchase from such distributing company as those terms are used in section 17(a) of the Act.

[20 FR 7447, Oct. 6, 1955]

§ 270.17a-6 Exemption for transactions with portfolio affiliates.

(a) *Exemption for transactions with portfolio affiliates.* A transaction to which a fund, or a company controlled by a fund, and a portfolio affiliate of the fund are parties is exempt from the provisions of section 17(a) of the Act (15 U.S.C. 80a-17(a)), provided that none of the following persons is a party to the transaction, or has a direct or indirect financial interest in a party to the transaction other than the fund:

(1) An officer, director, employee, investment adviser, member of an advisory board, depositor, promoter or principal underwriter for the fund;

(2) A person directly or indirectly controlling the fund;

(3) A person directly or indirectly owning, controlling or holding with power to vote five percent or more of

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the outstanding voting securities of the fund;

(4) A person directly or indirectly under common control with the fund, other than:

(i) A portfolio affiliate of the fund; or
(ii) A fund whose sole interest in the transaction or a party to the transaction is an interest in the portfolio affiliate; or

(5) An affiliated person of any of the persons mentioned in paragraphs (a)(1)–(4) of this section, other than the fund or a portfolio affiliate of the fund.

(b) *Definitions.* (1) *Financial interest.* (i) The term *financial interest* as used in this section does not include:

(A) Any interest through ownership of securities issued by the fund;

(B) Any interest of a wholly-owned subsidiary of a fund;

(C) Usual and ordinary fees for services as a director;

(D) An interest of a non-executive employee;

(E) An interest of an insurance company arising from a loan or policy made or issued by it in the ordinary course of business to a natural person;

(F) An interest of a bank arising from a loan or account made or maintained by it in the ordinary course of business to or with a natural person, unless it arises from a loan to a person who is an officer, director or executive of a company which is a party to the transaction, or from a loan to a person who directly or indirectly owns, controls, or holds with power to vote, five percent or more of the outstanding voting securities of a company which is a party to the transaction;

(G) An interest acquired in a transaction described in paragraph (d)(3) of § 270.17d-1; or

(H) Any other interest that the board of directors of the fund, including a majority of the directors who are not interested persons of the fund, finds to be not material, provided that the directors record the basis for that finding in the minutes of their meeting.

(ii) A person has a financial interest in any party in which it has a financial interest, in which it had a financial interest within six months prior to the transaction, or in which it will acquire a financial interest pursuant to an ar-

rangement in existence at the time of the transaction.

(2) *Fund* means a registered investment company or separate series of a registered investment company.

(3) *Portfolio affiliate of a fund* means a person that is an affiliated person (or an affiliated person of an affiliated person) of a fund solely because the fund, a fund under common control with the fund, or both:

(i) Controls such person (or an affiliated person of such person); or

(ii) Owns, controls, or holds with power to vote five percent or more of the outstanding voting securities of such person (or an affiliated person of such person).

[68 FR 3153, Jan. 22, 2003]

§ 270.17a-7 Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof.

A purchase or sale transaction between registered investment companies or separate series of registered investment companies, which are affiliated persons, or affiliated persons of affiliated persons, of each other, between separate series of a registered investment company, or between a registered investment company or a separate series of a registered investment company and a person which is an affiliated person of such registered investment company (or affiliated person of such person) solely by reason of having a common investment adviser or investment advisers which are affiliated persons of each other, common directors, and/or common officers, is exempt from section 17(a) of the Act; *Provided, That:*

(a) The transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available;

(b) The transaction is effected at the independent current market price of the security. For purposes of this paragraph the “current market price” shall be:

(1) If the security is a “reported security” as that term is defined in rule 11Aa3-1 under the Securities Exchange Act of 1934 [17 CFR 240.11Aa3-1], the

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last sale price with respect to such security reported in the consolidated transaction reporting system (“consolidated system”) or the average of the highest current independent bid and lowest current independent offer for such security (reported pursuant to rule 11Ac1-1 under the Securities Exchange Act of 1934 [17 CFR 240.11Ac1-1]) if there are no reported transactions in the consolidated system that day; or

(2) If the security is not a reported security, and the principal market for such security is an exchange, then the last sale on such exchange or the average of the highest current independent bid and lowest current independent offer on such exchange if there are no reported transactions on such exchange that day; or

(3) If the security is not a reported security and is quoted in the NASDAQ System, then the average of the highest current independent bid and lowest current independent offer reported on Level 1 of NASDAQ; or

(4) For all other securities, the average of the highest current independent bid and lowest current independent offer determined on the basis of reasonable inquiry;

(c) The transaction is consistent with the policy of each registered investment company and separate series of a registered investment company participating in the transaction, as recited in its registration statement and reports filed under the Act;

(d) No brokerage commission, fee (except for customary transfer fees), or other remuneration is paid in connection with the transaction;

(e) The board of directors of the investment company, including a majority of the directors who are not interested persons of such investment company,

(1) Adopts procedures pursuant to which such purchase or sale transactions may be effected for the company, which are reasonably designed to provide that all of the conditions of this section in paragraphs (a) through (d) have been complied with,

(2) Makes and approves such changes as the board deems necessary, and

(3) Determines no less frequently than quarterly that all such purchases or sales made during the preceding

quarter were effected in compliance with such procedures;

(f)(1) A majority of the directors of the investment company are not interested persons of the company, and those directors select and nominate any other disinterested directors of the company; and

(2) Any person who acts as legal counsel for the disinterested directors of the company is an independent legal counsel; and

(g) The investment company (1) maintains and preserves permanently in an easily accessible place a written copy of the procedures (and any modifications thereto) described in paragraph (e) of this section, and (2) maintains and preserves for a period not less than six years from the end of the fiscal year in which any transactions occurred, the first two years in an easily accessible place, a written record of each such transaction setting forth a description of the security purchased or sold, the identity of the person on the other side of the transaction, the terms of the purchase or sale transaction, and the information or materials upon which the determinations described in paragraph (e)(3) of this section were made.

[46 FR 17013, Mar. 17, 1981, as amended at 58 FR 49921, Sept. 24, 1993; 66 FR 3758, Jan. 16, 2001]

§ 270.17a-8 Mergers of affiliated companies.

(a) *Exemption of affiliated mergers.* A Merger of a registered investment company (or a series thereof) and one or more other registered investment companies (or series thereof) or Eligible Unregistered Funds is exempt from sections 17(a)(1) and (2) of the Act (15 U.S.C. 80a-17(a)(1)-(2)) if:

(1) *Surviving company.* The Surviving Company is a registered investment company (or a series thereof).

(2) *Board determinations.* As to any registered investment company (or series thereof) participating in the Merger (“Merging Company”):

(i) The board of directors, including a majority of the directors who are not interested persons of the Merging Company or of any other company or series participating in the Merger, determines that:

(A) Participation in the Merger is in the best interests of the Merging Company; and

(B) The interests of the Merging Company's existing shareholders will not be diluted as a result of the Merger.

NOTE TO PARAGRAPH (A)(2)(I): For a discussion of factors that may be relevant to the determinations in paragraph (a)(2)(i) of this section, see Investment Company Act Release No. 25666, July 18, 2002.

(ii) The directors have requested and evaluated such information as may reasonably be necessary to their determinations in paragraph (a)(2)(i) of this section, and have considered and given appropriate weight to all pertinent factors.

(iii) The directors, in making the determination in paragraph (a)(2)(i)(B) of this section, have approved procedures for the valuation of assets to be conveyed by each Eligible Unregistered Fund participating in the Merger. The approved procedures provide for the preparation of a report by an Independent Evaluator, to be considered in assessing the value of any securities (or other assets) for which market quotations are not readily available, that sets forth the fair value of each such asset as of the date of the Merger.

(iv) The determinations required in paragraph (a)(2)(i) of this section and the bases thereof, including the factors considered by the directors pursuant to paragraph (a)(2)(ii) of this section, are recorded fully in the minute books of the Merging Company.

(3) *Shareholder approval.* Participation in the Merger is approved by the vote of a majority of the outstanding voting securities (as provided in section 2(a)(42) of the Act (15 U.S.C. 80a-2(a)(42))) of any Merging Company that is not a Surviving Company, unless—

(i) No policy of the Merging Company that under section 13 of the Act (15 U.S.C. 80a-13) could not be changed without a vote of a majority of its outstanding voting securities, is materially different from a policy of the Surviving Company;

(ii) No advisory contract between the Merging Company and any investment adviser thereof is materially different from an advisory contract between the Surviving Company and any investment adviser thereof, except for the

identity of the investment companies as a party to the contract;

(iii) Directors of the Merging Company who are not interested persons of the Merging Company and who were elected by its shareholders, will comprise a majority of the directors of the Surviving Company who are not interested persons of the Surviving Company; and

(iv) Any distribution fees (as a percentage of the fund's average net assets) authorized to be paid by the Surviving Company pursuant to a plan adopted in accordance with §270.12b-1 are no greater than the distribution fees (as a percentage of the fund's average net assets) authorized to be paid by the Merging Company pursuant to such a plan.

(4) *Board composition; independent directors.* (i) A majority of the directors are not interested persons of the Merging Company and those directors select and nominate any other disinterested directors.

(ii) Any person who acts as legal counsel for the disinterested directors is an independent legal counsel.

(5) *Merger records.* Any Surviving Company preserves written records that describe the Merger and its terms for six years after the Merger (and for the first two years in an easily accessible place).

(b) *Definitions.* For purposes of this section:

(1) *Merger* means the merger, consolidation, or purchase or sale of substantially all of the assets between a registered investment company (or a series thereof) and another company;

(2) *Eligible Unregistered Fund* means:

(i) A collective trust fund, as described in section 3(c)(11) of the Act (15 U.S.C. 80a-3(c)(11));

(ii) A common trust fund or similar fund, as described in section 3(c)(3) of the Act (15 U.S.C. 80a-3(c)(3)); or

(iii) A separate account, as described in section 2(a)(37) of the Act (15 U.S.C. 80a-2(a)(37)), that is neither registered under section 8 of the Act, nor required to be so registered;

(3) *Independent Evaluator* means a person who has expertise in the valuation of securities and other financial assets and who is not an interested person, as defined in section 2(a)(19) of the

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Act (15 U.S.C. 80a-2(a)(19)), of the Eligible Unregistered Fund or any affiliate thereof except the Merging Company; and

(4) *Surviving Company* means a company in which shareholders of a Merging Company will obtain an interest as a result of a Merger.

[67 FR 48518, July 24, 2002]

§ 270.17a-9 Purchase of certain securities from a money market fund by an affiliate, or an affiliate of an affiliate.

The purchase of a security that is no longer an Eligible Security (as defined in paragraph (a)(10) of §270.2a-7) from an open-end investment company holding itself out as a “money market” fund shall be exempt from section 17(a) of the Act [15 U.S.C. 80a-17(a)], provided that:

(a) The purchase price is paid in cash; and

(b) The purchase price is equal to the greater of the amortized cost of the security or its market price (in each case, including accrued interest).

[61 FR 13983, Mar. 28, 1996, as amended at 62 FR 64986, Dec. 9, 1997]

§ 270.17a-10 Exemption for transactions with certain subadvisory affiliates.

(a) *Exemption.* A person that is prohibited by section 17(a) of the Act (15 U.S.C. 80a-17(a)) from entering into a transaction with a fund solely because such person is, or is an affiliated person of, a subadviser of the fund, or a subadviser of a fund that is under common control with the fund, may nonetheless enter into such transaction, if:

(1) *Prohibited relationship.* The person is not, and is not an affiliated person of, an investment adviser responsible for providing advice with respect to the portion of the fund for which the transaction is entered into, or of any promoter, underwriter, officer, director, member of an advisory board, or employee of the fund.

(2) *Prohibited conduct.* The advisory contracts of the subadviser that is (or whose affiliated person is) entering into the transaction, and any subadviser that is advising the fund (or portion of the fund) entering into the transaction:

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(i) Prohibit them from consulting with each other concerning transactions for the fund in securities or other assets; and

(ii) If both such subadvisers are responsible for providing investment advice to the fund, limit the subadvisers' responsibility in providing advice with respect to a discrete portion of the fund's portfolio.

(b) *Definitions.*

(1) *Fund* means a registered investment company and includes a separate series of a registered investment company.

(2) *Subadviser* means an investment adviser as defined in section 2(a)(20)(B) of the Act (15 U.S.C. 80a-2(a)(20)(B)).

[68 FR 3153, Jan. 22, 2003]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans.

(a) No affiliated person of or principal underwriter for any registered investment company (other than a company of the character described in section 12(d)(3) (A) and (B) of the Act) and no affiliated person of such a person or principal underwriter, acting as principal, shall participate in, or effect any transaction in connection with, any joint enterprise or other joint arrangement or profit-sharing plan in which any such registered company, or a company controlled by such registered company, is a participant, and which is entered into, adopted or modified subsequent to the effective date of this rule, unless an application regarding such joint enterprise, arrangement or profit-sharing plan has been filed with the Commission and has been granted by an order entered prior to the submission of such plan or modification to security holders for approval, or prior to such adoption or modification if not so submitted, except that the provisions of this rule shall not preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

(b) In passing upon such applications, the Commission will consider whether the participation of such registered or controlled company in such joint enterprise, joint arrangement or profit-

sharing plan on the basis proposed is consistent with the provisions, policies and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

(c) "Joint enterprise or other joint arrangement or profit-sharing plan" as used in this section shall mean any written or oral plan, contract, authorization or arrangement, or any practice or understanding concerning an enterprise or undertaking whereby a registered investment company or a controlled company thereof and any affiliated person of or a principal underwriter for such registered investment company, or any affiliated person of such a person or principal underwriter, have a joint or a joint and several participation, or share in the profits of such enterprise or undertaking, including, but not limited to, any stock option or stock purchase plan, but shall not include an investment advisory contract subject to section 15 of the Act.

(d) Notwithstanding the requirements of paragraph (a) of this section, no application need be filed pursuant to this section with respect to any of the following:

(1) Any profit-sharing, stock option or stock purchase plan provided by any controlled company which is not an investment company for its officers, directors or employees, or the purchase of stock or the granting, modification or exercise of options pursuant to such a plan, provided:

(i) No individual participates therein who is either: (a) An affiliated person of any investment company which is an affiliated person of such controlled company; or (b) an affiliated person of the investment adviser or principal underwriter of such investment company; and

(ii) No participant has been an affiliated person of such investment company, its investment adviser or principal underwriter during the life of the plan and for six months prior to, as the case may be: (a) Institution of the profit-sharing plan; (b) the purchase of stock pursuant to a stock purchase plan; or (c) the granting of any options pursuant to a stock option plan.

(2) Any plan provided by any registered investment company or any controlled company for its officers or employees if such plan has been qualified under section 401 of the Internal Revenue Code of 1954 and all contributions paid under said plan by the employer qualify as deductible under section 404 of said Code.

(3) Any loan or advance of credit to, or acquisition of securities or other property of, a small business concern, or any agreement to do any of the foregoing ("Investments"), made by a bank and a small business investment company (SBIC) licensed under the Small Business Investment Act of 1958, whether such transactions are contemporaneous or separated in time, where the bank is an affiliated person of either (i) the SBIC or (ii) an affiliated person of the SBIC; but reports containing pertinent details as to Investments and transactions relating thereto shall be made at such time, on such forms and by such persons as the Commission may from time to time prescribe.

(4) The issuance by a registered investment company which is licensed by the Small Business Administration pursuant to the Small Business Investment Act of 1958 of stock options which qualify under section 422 of the Internal Revenue Code, as amended, and which conform to § 107.805(b) of Chapter I of Title 13 of the Code of Federal Regulations.

(5) Any joint enterprise or other joint arrangement or profit-sharing plan ("joint enterprise") in which a registered investment company or a company controlled by such a company, is a participant, and in which a portfolio affiliate (as defined in § 270.17a-6(b)(3)) of such registered investment company is also a participant, provided that:

(i) None of the persons identified in § 270.17a-6(a) is a participant in the joint enterprise, or has a direct or indirect financial interest in a participant in the joint enterprise (other than the registered investment company);

(ii) *Financial interest.*

(A) The term *financial interest* as used in this section does not include:

(1) Any interest through ownership of securities issued by the registered investment company;

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(2) Any interest of a wholly owned subsidiary of the registered investment company;

(3) Usual and ordinary fees for services as a director;

(4) An interest of a non-executive employee;

(5) An interest of an insurance company arising from a loan or policy made or issued by it in the ordinary course of business to a natural person;

(6) An interest of a bank arising from a loan to a person who is an officer, director, or executive of a company which is a participant in the joint transaction or from a loan to a person who directly or indirectly owns, controls, or holds with power to vote, five percent or more of the outstanding voting securities of a company which is a participant in the joint transaction;

(7) An interest acquired in a transaction described in paragraph (d)(3) of this section; or

(8) Any other interest that the board of directors of the investment company, including a majority of the directors who are not interested persons of the investment company, finds to be not material, provided that the directors record the basis for that finding in the minutes of their meeting.

(B) A person has a financial interest in any party in which it has a financial interest, in which it had a financial interest within six months prior to the investment company's participation in the enterprise, or in which it will acquire a financial interest pursuant to an arrangement in existence at the time of the investment company's participation in the enterprise.

(6) The receipt of securities and/or cash by an investment company or a controlled company thereof and an affiliated person of such investment company or an affiliated person of such person pursuant to a plan of reorganization: *Provided*, That no person identified in §270.17a-6(a)(1) or any company in which such a person has a direct or indirect financial interest (as defined in paragraph (d)(5)(iii) of this section):

(7) Any arrangement regarding liability insurance policies (other than a bond required pursuant to rule 17g-1

(§270.17g-1) under the Act); *Provided*, That

(i) The investment company's participation in the joint liability insurance policy is in the best interests of the investment company;

(ii) The proposed premium for the joint liability insurance policy to be allocated to the investment company, based upon its proportionate share of the sum of the premiums that would have been paid if such insurance coverage were purchased separately by the insured parties, is fair and reasonable to the investment company;

(iii) The joint liability insurance policy does not exclude coverage for bona fide claims made against any director who is not an interested person of the investment company, or against the investment company if it is a co-defendant in the claim with the disinterested director, by another person insured under the joint liability insurance policy;

(iv) The board of directors of the investment company, including a majority of the directors who are not interested persons with respect thereto, determine no less frequently than annually that the standards described in paragraphs (d)(7)(i) and (ii) of this section have been satisfied; and

(v)(A) A majority of the directors of the investment company are not interested persons of the company, and those directors select and nominate any other disinterested directors of the company; and

(B) Any person who acts as legal counsel for the disinterested directors of the company is an independent legal counsel.

(8) An investment adviser's bearing expenses in connection with a merger, consolidation or purchase or sale of substantially all of the assets of a company which involves a registered investment company of which it is an affiliated person.

[22 FR 426, Jan. 23, 1957, as amended at 26 FR 11240, Nov. 29, 1961; 35 FR 13123, Aug. 18, 1970; 39 FR 37973, Oct. 25, 1974; 44 FR 58503, Oct. 10, 1979; 44 FR 58908, Oct. 12, 1979; 45 FR 12409, Feb. 26, 1980; 66 FR 3758, Jan. 16, 2001; 68 FR 3153, Jan. 22, 2003]

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§ 270.17d-2 Form for report by small business investment company and affiliated bank.

Form N-17D-1 is hereby prescribed as the form for reports required by paragraph (d)(3) of § 270.17d-1.

[26 FR 11240, Nov. 29, 1961]

§ 270.17d-3 Exemption relating to certain joint enterprises or arrangements concerning payment for distribution of shares of a registered open-end management investment company.

An affiliated person of, or principal underwriter for, a registered open-end management investment company and an affiliated person of such a person or principal underwriter shall be exempt from section 17(d) of the Act (15 U.S.C. 80a-17(d)) and rule 17d-1 thereunder (17 CFR 270.17d-1), to the extent necessary to permit any such person or principal underwriter to enter into a written agreement with such company whereby the company will make payments in connection with the distribution of its shares, *Provided*, That:

(a) Such agreement is made in compliance with the provisions of § 270.12b-1; and

(b) No other registered management investment company which is either an affiliated person of such company or an affiliated person of such a person is a party to such agreement.

[45 FR 73905, Nov. 7, 1980]

§ 270.17e-1 Brokerage transactions on a securities exchange.

For purposes of section 17(e)(2)(A) of the Act [15 U.S.C. 80a-17(e)(2)(A)], a commission, fee or other remuneration shall be deemed as not exceeding the usual and customary broker's commission, if:

(a) The commission, fee, or other remuneration received or to be received is reasonable and fair compared to the commission, fee or other remuneration received by other brokers in connection with comparable transactions involving similar securities being purchased or sold on a securities exchange during a comparable period of time;

(b) The board of directors, including a majority of the directors of the investment company who are not interested persons thereof:

(1) Has adopted procedures which are reasonably designed to provide that such commission, fee, or other remuneration is consistent with the standard described in paragraph (a) of this section;

(2) Makes and approves such changes as the board deems necessary; and

(3) Determines no less frequently than quarterly that all transactions effected pursuant to this section during the preceding quarter (other than transactions in which the person acting as broker is a person permitted to enter into a transaction with the investment company by § 270.17a-10) were effected in compliance with such procedures;

(c)(1) A majority of the directors of the investment company are not interested persons of the company, and those directors select and nominate any other disinterested directors of the company; and

(2) Any person who acts as legal counsel for the disinterested directors of the company is an independent legal counsel; and

(d) The investment company:

(1) Shall maintain and preserve permanently in an easily accessible place a copy of the procedures (and any modification thereto) described in paragraph (b)(1) of this section; and

(2) Shall maintain and preserve for a period not less than six years from the end of the fiscal year in which any transactions occurred, the first two years in an easily accessible place, a record of each such transaction (other than any transaction in which the person acting as broker is a person permitted to enter into a transaction with the investment company by § 270.17a-10) setting forth the amount and source of the commission, fee or other remuneration received or to be received, the identity of the person acting as broker, the terms of the transaction, and the information or materials upon which the findings described in paragraph (b)(3) of this section were made.

[44 FR 37203, June 26, 1979, as amended at 58 FR 49921, Sept. 24, 1993; 66 FR 3759, Jan. 16, 2001; 68 FR 3154, Jan. 22, 2003]

§ 270.17f-1 Custody of securities with members of national securities exchanges.

(a) No registered management investment company shall place or maintain any of its securities or similar investments in the custody of a company which is a member of a national securities exchange as defined in the Securities Exchange Act of 1934 (whether or not such company trades in securities for its own account) except pursuant to a written contract which shall have been approved, or if executed before January 1, 1941, shall have been ratified not later than that date, by a majority of the board of directors of such investment company.

(b) The contract shall require, and the securities and investments shall be maintained in accordance with the following:

(1) The securities and similar investments held in such custody shall at all times be individually segregated from the securities and investments of any other person and marked in such manner as to clearly identify them as the property of such registered management company, both upon physical inspection thereof and upon examination of the books of the custodian. The physical segregation and marking of such securities and investments may be accomplished by putting them in separate containers bearing the name of such registered management investment company or by attaching tags or labels to such securities and investments.

(2) The custodian shall have no power or authority to assign, hypothecate, pledge or otherwise to dispose of any such securities and investments, except pursuant to the direction of such registered management company and only for the account of such registered investment company.

(3) Such securities and investments shall be subject to no lien or charge of any kind in favor of the custodian or any persons claiming through the custodian.

(4) Such securities and investments shall be verified by actual examination at the end of each annual and semi-annual fiscal period by an independent public accountant retained by the investment company, and shall be exam-

ined by such accountant at least one other time, chosen by the accountant, during each fiscal year. A certificate of such accountant stating that an examination of such securities has been made, and describing the nature and extent of the examination, shall be attached to a completed Form N-17f-1 (17 CFR 274.219) and transmitted to the Commission promptly after each examination.

(5) Such securities and investments shall, at all times, be subject to inspection by the Commission through its employees or agents.

(6) The provisions of paragraphs (b) (1), (2) and (3) of this section shall not apply to securities and similar investments bought for or sold to such investment company by the company which is custodian until the securities have been reduced to the physical possession of the custodian and have been paid for by such investment company: *Provided*, That the company which is custodian shall take possession of such securities at the earliest practicable time. Nothing in this subparagraph shall be construed to relieve any company which is a member of a national securities exchange of any obligation under existing law or under the rules of any national securities exchange.

(c) A copy of any contract executed or ratified pursuant to paragraph (a) of this section shall be transmitted to the Commission promptly after execution or ratification unless it has been previously transmitted.

(d) Any contract executed or ratified pursuant to paragraph (a) of this section shall be ratified by the board of directors of the registered management investment company at least annually thereafter.

[Rule N-17F-1, 5 FR 4317, Oct. 31, 1940, as amended at 54 FR 32049, Aug. 4, 1989]

§ 270.17f-2 Custody of investments by registered management investment company.

(a) The securities and similar investments of a registered management investment company may be maintained in the custody of such company only in accordance with the provisions of this section. Investments maintained by such a company with a bank or other company whose functions and physical

facilities are supervised by Federal or State authority under any arrangement whereunder the directors, officers, employees or agents of such company are authorized or permitted to withdraw such investments upon their mere receipt, are deemed to be in the custody of such company and may be so maintained only upon compliance with the provisions of this section.

(b) Except as provided in paragraph (c) of this section, all such securities and similar investments shall be deposited in the safekeeping of, or in a vault or other depository maintained by, a bank or other company whose functions and physical facilities are supervised by Federal or State authority. Investments so deposited shall be physically segregated at all times from those of any other person and shall be withdrawn only in connection with transactions of the character described in paragraph (c) of this section.

(c) The first sentence of paragraph (b) of this section shall not apply to securities on loan which are collateralized to the extent of their full market value, or to securities hypothecated, pledged, or placed in escrow for the account of such investment company in connection with a loan or other transaction authorized by specific resolution of its board of directors, or to securities in transit in connection with the sale, exchange, redemption, maturity or conversion, the exercise of warrants or rights, assents to changes in terms of the securities, or other transactions necessary or appropriate in the ordinary course of business relating to the management of securities.

(d) Except as otherwise provided by law, no person shall be authorized or permitted to have access to the securities and similar investments deposited in accordance with paragraph (b) of this section except pursuant to a resolution of the board of directors of such investment company. Each such resolution shall designate not more than five persons who shall be either officers or responsible employees of such company and shall provide that access to such investments shall be had only by two or more such persons jointly, at least one of whom shall be an officer; except that access to such investments shall be permitted (1) to properly au-

thorized officers and employees of the bank or other company in whose safekeeping the investments are placed and (2) for the purpose of paragraph (f) of this section to the independent public accountant jointly with any two persons so designated or with such officer or employee of such bank or such other company. Such investments shall at all times be subject to inspection by the Commission through its authorized employees or agents accompanied, unless otherwise directed by order of the Commission, by one or more of the persons designated pursuant to this paragraph.

(e) Each person when depositing such securities or similar investments in or withdrawing them from the depository or when ordering their withdrawal and delivery from the safekeeping of the bank or other company, shall sign a notation in respect of such deposit, withdrawal or order which shall show (1) the date and time of the deposit, withdrawal or order, (2) the title and amount of the securities or other investments deposited, withdrawn or ordered to be withdrawn, and an identification thereof by certificate numbers or otherwise, (3) the manner of acquisition of the securities or similar investments deposited or the purpose for which they have been withdrawn, or ordered to be withdrawn, and (4) if withdrawn and delivered to another person the name of such person. Such notation shall be transmitted promptly to an officer or director of the investment company designated by its board of directors who shall not be a person designated for the purpose of paragraph (d) of this section. Such notation shall be on serially numbered forms and shall be preserved for at least one year.

(f) Such securities and similar investments shall be verified by actual examination by an independent public accountant retained by the investment company at least three times during each fiscal year, at least two of which shall be chosen by such accountant without prior notice to such company. A certificate of such accountant stating that an examination of such securities and investments has been made, and describing the nature and extent of the examination, shall be attached to a completed Form N-17f-2 (17 CFR

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274.220) and transmitted to the Commission promptly after each examination.

[Rule N-17F-2, 12 FR 6717, Oct. 11, 1947, as amended at 54 FR 32049, Aug. 4, 1989]

§ 270.17f-3 Free cash accounts for investment companies with bank custodians.

No registered investment company having a bank custodian shall hold free cash except, upon resolution of its board or directors, a petty cash account may be maintained in an amount not to exceed \$500: *Provided*, That such account is operated under the imprest system and is maintained subject to adequate controls approved by the board of directors over disbursements and reimbursements including, but not limited to fidelity bond coverage of persons having access to such funds.

(Sec. 17(f), 54 Stat. 815, 15 U.S.C. 80a-17(f), sec. 9, Pub. L. 91-547, 84 Stat. 1420)

[37 FR 9989, May 18, 1972]

§ 270.17f-4 Custody of investment company assets with a securities depository.

(a) *Custody arrangement with a securities depository.* A fund's custodian may place and maintain financial assets, corresponding to the fund's security entitlements, with a securities depository or intermediary custodian, if the custodian:

(1) Is at a minimum obligated to exercise due care in accordance with reasonable commercial standards in discharging its duty as a securities intermediary to obtain and thereafter maintain such financial assets;

(2) Is required to provide, promptly upon request by the fund, such reports as are available concerning the internal accounting controls and financial strength of the custodian; and

(3) Requires any intermediary custodian at a minimum to exercise due care in accordance with reasonable commercial standards in discharging its duty as a securities intermediary to obtain and thereafter maintain financial assets corresponding to the security entitlements of its entitlement holders.

(b) *Direct dealings with securities depository.* A fund may place and maintain financial assets, corresponding to

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the fund's security entitlements, directly with a securities depository, if:

(1) The fund's contract with the securities depository or the securities depository's written rules for its participants:

(i) Obligate the securities depository at a minimum to exercise due care in accordance with reasonable commercial standards in discharging its duty as a securities intermediary to obtain and thereafter maintain financial assets corresponding to the fund's security entitlements; and

(ii) Requires the securities depository to provide, promptly upon request by the fund, such reports as are available concerning the internal accounting controls and financial strength of the securities depository; and

(2) The fund has implemented internal control systems reasonably designed to prevent unauthorized officer's instructions (by providing at least for the form, content and means of giving, recording and reviewing all officer's instructions).

(c) *Definitions.* For purposes of this section the terms:

(1) *Clearing corporation, financial asset, securities intermediary, and security entitlement* have the same meanings as is attributed to those terms in §§ 8-102, § 8-103, and §§ 8-501 through 8-511 of the Uniform Commercial Code, 2002 Official Text and Comments, which are incorporated by reference in this section pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. The Director of the Federal Register has approved this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the Uniform Commercial Code from the National Conference of Commissioners on Uniform State Laws, 211 East Ontario Street, Suite 1300, Chicago, IL 60611. You may inspect a copy at the following addresses: Louis Loss Library, U.S. Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549, and Office of the Federal Register, National Archives and Records Administration, 800 North Capitol Street, NW, Suite 700, Washington, DC.

(2) *Custodian* means a bank or other person authorized to hold assets for the fund under section 17(f) of the Act (15 U.S.C. 80a-17(f)) or Commission rules in

this chapter, but does not include a fund itself, a foreign custodian whose use is governed by § 270.17f-5 or § 270.17f-7, or a vault, safe deposit box, or other repository for safekeeping maintained by a bank or other company whose functions and physical facilities are supervised by a federal or state authority if the fund maintains its own assets there in accordance with § 270.17f-2.

(3) *Fund* means an investment company registered under the Act and, where the context so requires with respect to a fund that is a unit investment trust or a face-amount certificate company, includes the fund's trustee.

(4) *Intermediary custodian* means any subcustodian that is a securities intermediary and is qualified to act as a custodian.

(5) *Officer's instruction* means a request or direction to a securities depository or its operator, or to a registered transfer agent, in the name of the fund by one or more persons authorized by the fund's board of directors (or by the fund's trustee, if the fund is a unit investment trust or a face-amount certificate company) to give the request or direction.

(6) *Securities depository* means a clearing corporation that is:

(i) Registered with the Commission as a clearing agency under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1); or

(ii) A Federal Reserve Bank or other person authorized to operate the federal book entry system described in the regulations of the Department of Treasury codified at 31 CFR 357, Subpart B, or book-entry systems operated pursuant to comparable regulations of other federal agencies.

[68 FR 8442, Feb. 20, 2003]

§ 270.17f-5 Custody of investment company assets outside the United States.

(a) *Definitions.* For purposes of this section:

(1) *Eligible Foreign Custodian* means an entity that is incorporated or organized under the laws of a country other than the United States and that is a Qualified Foreign Bank or a majority-owned direct or indirect subsidiary of a U.S. Bank or bank-holding company.

(2) *Foreign Assets* means any investments (including foreign currencies) for which the primary market is outside the United States, and any cash and cash equivalents that are reasonably necessary to effect the Fund's transactions in those investments.

(3) *Foreign Custody Manager* means a Fund's or a Registered Canadian Fund's board of directors or any person serving as the board's delegate under paragraphs (b) or (d) of this section.

(4) *Fund* means a management investment company registered under the Act (15 U.S.C. 80a) and incorporated or organized under the laws of the United States or of a state.

(5) *Qualified Foreign Bank* means a banking institution or trust company, incorporated or organized under the laws of a country other than the United States, that is regulated as such by the country's government or an agency of the country's government.

(6) *Registered Canadian Fund* means a management investment company incorporated or organized under the laws of Canada and registered under the Act pursuant to the conditions of § 270.7d-1.

(7) *U.S. Bank* means an entity that is:

(i) A banking institution organized under the laws of the United States;

(ii) A member bank of the Federal Reserve System;

(iii) Any other banking institution or trust company organized under the laws of any state or of the United States, whether incorporated or not, doing business under the laws of any state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by state or federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this section; or

(iv) A receiver, conservator, or other liquidating agent of any institution or firm included in paragraphs (a)(7)(i), (ii), or (iii) of this section.

(b) *Delegation.* A Fund's board of directors may delegate to the Fund's investment adviser or officers or to a

U.S. Bank or to a Qualified Foreign Bank the responsibilities set forth in paragraphs (c)(1), (c)(2), or (c)(3) of this section, *provided that*:

(1) *Reasonable Reliance*. The board determines that it is reasonable to rely on the delegate to perform the delegated responsibilities;

(2) *Reporting*. The board requires the delegate to provide written reports notifying the board of the placement of Foreign Assets with a particular custodian and of any material change in the Fund's foreign custody arrangements, with the reports to be provided to the board at such times as the board deems reasonable and appropriate based on the circumstances of the Fund's arrangements; and

(3) *Exercise of Care*. The delegate agrees to exercise reasonable care, prudence and diligence such as a person having responsibility for the safekeeping of the Fund's Foreign Assets would exercise, or to adhere to a higher standard of care, in performing the delegated responsibilities.

(c) *Maintaining Assets with an Eligible Foreign Custodian*. A Fund or its Foreign Custody Manager may place and maintain the Fund's Foreign Assets in the care of an Eligible Foreign Custodian, *provided that*:

(1) *General Standard*. The Foreign Custody Manager determines that the Foreign Assets will be subject to reasonable care, based on the standards applicable to custodians in the relevant market, if maintained with the Eligible Foreign Custodian, after considering all factors relevant to the safekeeping of the Foreign Assets, including, without limitation:

(i) The Eligible Foreign Custodian's practices, procedures, and internal controls, including, but not limited to, the physical protections available for certificated securities (if applicable), the method of keeping custodial records, and the security and data protection practices;

(ii) Whether the Eligible Foreign Custodian has the requisite financial strength to provide reasonable care for Foreign Assets;

(iii) The Eligible Foreign Custodian's general reputation and standing; and

(iv) Whether the Fund will have jurisdiction over and be able to enforce

judgments against the Eligible Foreign Custodian, such as by virtue of the existence of offices in the United States or consent to service of process in the United States.

(2) *Contract*. The arrangement with the Eligible Foreign Custodian is governed by a written contract that the Foreign Custody Manager has determined will provide reasonable care for Foreign Assets based on the standards specified in paragraph (c)(1) of this section.

(i) The contract must provide:

(A) For indemnification or insurance arrangements (or any combination) that will adequately protect the Fund against the risk of loss of Foreign Assets held in accordance with the contract;

(B) That the Foreign Assets will not be subject to any right, charge, security interest, lien or claim of any kind in favor of the Eligible Foreign Custodian or its creditors, except a claim of payment for their safe custody or administration or, in the case of cash deposits, liens or rights in favor of creditors of the custodian arising under bankruptcy, insolvency, or similar laws;

(C) That beneficial ownership of the Foreign Assets will be freely transferable without the payment of money or value other than for safe custody or administration;

(D) That adequate records will be maintained identifying the Foreign Assets as belonging to the Fund or as being held by a third party for the benefit of the Fund;

(E) That the Fund's independent public accountants will be given access to those records or confirmation of the contents of those records; and

(F) That the Fund will receive periodic reports with respect to the safekeeping of the Foreign Assets, including, but not limited to, notification of any transfer to or from the Fund's account or a third party account containing assets held for the benefit of the Fund.

(ii) The contract may contain, in lieu of any or all of the provisions specified in paragraph (c)(2)(i) of this section, other provisions that the Foreign Custody Manager determines will provide, in their entirety, the same or a greater

level of care and protection for the Foreign Assets as the specified provisions, in their entirety.

(3)(i) *Monitoring the Foreign Custody Arrangements.* The Foreign Custody Manager has established a system to monitor the appropriateness of maintaining the Foreign Assets with a particular custodian under paragraph (c)(1) of this section, and to monitor performance of the contract under paragraph (c)(2) of this section.

(ii) If an arrangement with an Eligible Foreign Custodian no longer meets the requirements of this section, the Fund must withdraw the Foreign Assets from the Eligible Foreign Custodian as soon as reasonably practicable.

(d) *Registered Canadian Funds.* Any Registered Canadian Fund may place and maintain its Foreign Assets outside the United States in accordance with the requirements of this section, *provided*

(1) The Foreign Assets are placed in the care of an overseas branch of a U.S. Bank that has aggregate capital, surplus, and undivided profits of a specified amount, which must not be less than \$500,000; and

(2) The Foreign Custody Manager is the Fund's board of directors, its investment adviser or officers, or a U.S. Bank.

NOTE TO § 270.17f-5: When a Fund's (or its custodian's) custody arrangement with an Eligible Securities Depository (as defined in § 270.17f-7) involves one or more Eligible Foreign Custodians through which assets are maintained with the Eligible Securities Depository, § 270.17f-5 will govern the Fund's (or its custodian's) use of each Eligible Foreign Custodian, while § 270.17f-7 will govern an Eligible Foreign Custodian's use of the Eligible Securities Depository.

[65 FR 25637, May 3, 2000]

§ 270.17f-6 Custody of investment company assets with Futures Commission Merchants and Commodity Clearing Organizations.

(a) A Fund may place and maintain cash, securities, and similar investments with a Futures Commission Merchant in amounts necessary to effect the Fund's transactions in Exchange-Traded Futures Contracts and Commodity Options, *Provided that:*

(1) The manner in which the Futures Commission Merchant maintains the

Fund's assets shall be governed by a written contract, which provides that:

(i) The Futures Commission Merchant shall comply with the segregation requirements of section 4d(2) of the Commodity Exchange Act (7 U.S.C. 6d(2)) and the rules thereunder (17 CFR Chapter I) or, if applicable, the secured amount requirements of rule 30.7 under the Commodity Exchange Act (17 CFR 30.7);

(ii) The Futures Commission Merchant, as appropriate to the Fund's transactions and in accordance with the Commodity Exchange Act (7 U.S.C. 1 through 25) and the rules and regulations thereunder (including 17 CFR part 30), may place and maintain the Fund's assets to effect the Fund's transactions with another Futures Commission Merchant, a Clearing Organization, a U.S. or Foreign Bank, or a member of a foreign board of trade, and shall obtain an acknowledgment, as required under rules 1.20(a) or 30.7(c) under the Commodity Exchange Act [17 CFR 1.20(a) or 30.7(c)], as applicable, that such assets are held on behalf of the Futures Commission Merchant's customers in accordance with the provisions of the Commodity Exchange Act; and

(iii) The Futures Commission Merchant shall promptly furnish copies of or extracts from the Futures Commission Merchant's records or such other information pertaining to the Fund's assets as the Commission through its employees or agents may request.

(2) Any gains on the Fund's transactions, other than de minimis amounts, may be maintained with the Futures Commission Merchant only until the next business day following receipt.

(3) If the custodial arrangement no longer meets the requirements of this section, the Fund shall withdraw its assets from the Futures Commission Merchant as soon as reasonably practicable.

(b) For purposes of this section:

(1) *Clearing Organization* means a clearing organization as defined in rule 1.3(d) under the Commodity Exchange Act (17 CFR 1.3(d)) and includes a clearing organization for a foreign board of trade.

(2) *Exchange-Traded Futures Contracts and Commodity Options* means commodity futures contracts, options on commodity futures contracts, and options on physical commodities traded on or subject to the rules of:

(i) Any contract market designated for trading such transactions under the Commodity Exchange Act and the rules thereunder; or

(ii) Any board of trade or exchange outside the United States, as contemplated in Part 30 under the Commodity Exchange Act.

(3) *Fund* means an investment company registered under the Act (15 U.S.C. 80a-1 *et seq.*).

(4) *Futures Commission Merchant* means any person that is registered as a futures commission merchant under the Commodity Exchange Act and that is not an affiliated person of the Fund or an affiliated person of such person.

(5) *U.S. or Foreign Bank* means a bank, as defined in section 2(a)(5) of the Act (15 U.S.C. 80a-2(a)(5)), or a banking institution or trust company that is incorporated or organized under the laws of a country other than the United States and that is regulated as such by the country's government or an agency thereof.

[61 FR 66212, Dec. 17, 1996]

§ 270.17f-7 Custody of investment company assets with a foreign securities depository.

(a) *Custody arrangement with an eligible securities depository.* A Fund, including a Registered Canadian Fund, may place and maintain its Foreign Assets with an Eligible Securities Depository, provided that:

(1) *Risk-limiting safeguards.* The custody arrangement provides reasonable safeguards against the custody risks associated with maintaining assets with the Eligible Securities Depository, including:

(i) *Risk analysis and monitoring.* (A) The fund or its investment adviser has received from the Primary Custodian (or its agent) an analysis of the custody risks associated with maintaining assets with the Eligible Securities Depository; and

(B) The contract between the Fund and the Primary Custodian requires the Primary Custodian (or its agent) to

monitor the custody risks associated with maintaining assets with the Eligible Securities Depository on a continuing basis, and promptly notify the Fund or its investment adviser of any material change in these risks.

(ii) *Exercise of care.* The contract between the Fund and the Primary Custodian states that the Primary Custodian will agree to exercise reasonable care, prudence, and diligence in performing the requirements of paragraphs (a)(1)(i)(A) and (B) of this section, or adhere to a higher standard of care.

(2) *Withdrawal of assets from eligible securities depository.* If a custody arrangement with an Eligible Securities Depository no longer meets the requirements of this section, the Fund's Foreign Assets must be withdrawn from the depository as soon as reasonably practicable.

(b) *Definitions.* The terms *Foreign Assets, Fund, Qualified Foreign Bank, Registered Canadian Fund,* and *U.S. Bank* have the same meanings as in § 270.17f-5. In addition:

(1) *Eligible Securities Depository* means a system for the central handling of securities as defined in § 270.17f-4 that:

(i) Acts as or operates a system for the central handling of securities or equivalent book-entries in the country where it is incorporated, or a transnational system for the central handling of securities or equivalent book-entries;

(ii) Is regulated by a foreign financial regulatory authority as defined under section 2(a)(50) of the Act (15 U.S.C. 80a-2(a)(50));

(iii) Holds assets for the custodian that participates in the system on behalf of the Fund under safekeeping conditions no less favorable than the conditions that apply to other participants;

(iv) Maintains records that identify the assets of each participant and segregate the system's own assets from the assets of participants;

(v) Provides periodic reports to its participants with respect to its safekeeping of assets, including notices of transfers to or from any participant's account; and

(vi) Is subject to periodic examination by regulatory authorities or independent accountants.

(2) *Primary Custodian* means a U.S. Bank or Qualified Foreign Bank that contracts directly with a Fund to provide custodial services related to maintaining the Fund's assets outside the United States.

NOTE TO § 270.17F-7: When a Fund's (or its custodian's) custody arrangement with an Eligible Securities Depository involves one or more Eligible Foreign Custodians (as defined in § 270.17F-5) through which assets are maintained with the Eligible Securities Depository, § 270.17F-5 will govern the Fund's (or its custodian's) use of each Eligible Foreign Custodian, while § 270.17F-7 will govern an Eligible Foreign Custodian's use of the Eligible Securities Depository.

[65 FR 25638, May 3, 2000]

§ 270.17g-1 Bonding of officers and employees of registered management investment companies.

(a) Each registered management investment company shall provide and maintain a bond which shall be issued by a reputable fidelity insurance company, authorized to do business in the place where the bond is issued, against larceny and embezzlement, covering each officer and employee of the investment company, who may singly, or jointly with others, have access to securities or funds of the investment company, either directly or through authority to draw upon such funds or to direct generally the disposition of such securities, unless the officer or employee has such access solely through his position as an officer or employee of a bank (hereinafter referred to as "covered persons").

(b) The bond may be in the form of (1) an individual bond for each covered person or a schedule or blanket bond covering such persons, (2) a blanket bond which names the registered management investment company as the only insured (hereinafter referred to as "single insured bond") or (3) a bond which names the registered management investment company and one or more other parties as insureds (hereinafter referred to as a "joint insured bond"), such other insured parties being limited to (i) persons engaged in the management or distribution of the shares of the registered investment

company, (ii) other registered investment companies which are managed and/or whose shares are distributed by the same persons (or affiliates of such persons), (iii) persons who are engaged in the management and/or distribution of shares of companies included in paragraph (b)(3)(i) of this section, (iv) affiliated persons of any registered management investment company named in the bond or of any person included in paragraph (b)(3)(i) or (b)(3)(iii) of this section who are engaged in the administration of any registered management investment company named as insured in the bond, and (v) any trust, pension, profit-sharing or other benefit plan for officers, directors or employees of persons named in the bond.

(c) A bond of the type described in paragraph (b)(1) or (b)(2) of this section shall provide that it shall not be cancelled, terminated or modified except after written notice shall have been given by the acting party to the affected party and to the Commission not less than sixty days prior to the effective date of cancellation, termination or modification. A joint insured bond described in paragraph (b)(3) of this section shall provide, that (1) it shall not be cancelled, terminated or modified except after written notice shall have been given by the acting party to the affected party, and by the fidelity insurance company to all registered investment companies named as insureds and to the Commission, not less than sixty days prior to the effective date of cancellation, termination, or modification and (2) the fidelity insurance company shall furnish each registered management investment company named as an insured with (i) a copy of the bond and any amendment thereto promptly after the execution thereof, (ii) a copy of each formal filing of a claim under the bond by any other named insured promptly after the receipt thereof, and (iii) notification of the terms of the settlement of each such claim prior to the execution of the settlement.

(d) The bond shall be in such reasonable form and amount as a majority of the board of directors of the registered management investment company who

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are not “interested persons” of such investment company as defined by section 2(a)(19) of the Act shall approve as often as their fiduciary duties require, but not less than once every twelve months, with due consideration to all relevant factors including, but not limited to, the value of the aggregate assets of the registered management investment company to which any cov-

ered person may have access, the type and terms of the arrangements made for the custody and safekeeping of such assets, and the nature of the securities in the company’s portfolio: *Provided, however,* That (1) the amount of a single insured bond shall be at least equal to an amount computed in accordance with the following schedule:

Amount of registered management investment company gross assets—at the end of the most recent fiscal quarter prior to date (in dollars)	Minimum amount of bond (in dollars)
Up to 500,000	50,000.
500,000 to 1,000,000	75,000.
1,000,000 to 2,500,000	100,000.
2,500,000 to 5,000,000	125,000.
5,000,000 to 7,500,000	150,000.
7,500,000 to 10,000,000	175,000.
10,000,000 to 15,000,000	200,000.
15,000,000 to 20,000,000	225,000.
20,000,000 to 25,000,000	250,000.
25,000,000 to 35,000,000	300,000.
35,000,000 to 50,000,000	350,000.
50,000,000 to 75,000,000	400,000.
75,000,000, to 100,000,000	450,000.
100,000,000 to 150,000,000	525,000.
150,000,000 to 250,000,000	600,000.
250,000,000 to 500,000,000	750,000.
500,000,000 to 750,000,000	900,000.
750,000,000 to 1,000,000,000	1,000,000.
1,000,000,000 to 1,500,000,000	1,250,000.
1,500,000,000 to 2,000,000,000	1,500,000.
Over 2,000,000,000	1,500,000 plus 200,000 for each 500,000,000 of gross assets up to a maximum bond of 2,500,000.

(2) A joint insured bond shall be in an amount at least equal to the sum of (i) the total amount of coverage which each registered management investment company named as an insured would have been required to provide and maintain individually pursuant to the schedule hereinabove had each such registered management investment company not been named under a joint insured bond, plus (ii) the amount of each bond which each named insured other than a registered management investment company would have been required to provide and maintain pursuant to federal statutes or regulations had it not been named as an insured under a joint insured bond.

(e) No premium may be paid for any joint insured bond or any amendment thereto unless a majority of the board of directors of each registered management investment company named as an insured therein who are not “interested persons” of such company shall approve the portion of the premium to

be paid by such company, taking all relevant factors into consideration including, but not limited to, the number of the other parties named as insured, the nature of the business activities of such other parties, the amount of the joint insured bond, and the amount of the premium for such bond, the ratable allocation of the premium among all parties named as insureds, and the extent to which the share of the premium allocated to the investment company is less than the premium such company would have had to pay if it had provided and maintained a single insured bond.

(f) Each registered management investment company named as an insured in a joint insured bond shall enter into an agreement with all of the other named insureds providing that in the event recovery is received under the bond as a result of a loss sustained by the registered management investment company and one or more other

named insureds, the registered management investment company shall receive an equitable and proportionate share of the recovery, but at least equal to the amount which it would have received had it provided and maintained a single insured bond with the minimum coverage required by paragraph (d)(1) of this section.

(g) Each registered management investment company shall:

(1) File with the Commission (i) within 10 days after receipt of an executed bond of the type described in paragraph (b)(1) or (2) of this section or any amendment thereof, (a) a copy of the bond, (b) a copy of the resolution of a majority of the board of directors who are not "interested persons" of the registered management investment company approving the form and amount of the bond, and (c) a statement as to the period for which premiums have been paid; (ii) within 10 days after receipt of an executed joint insured bond, or any amendment thereof, (a) a copy of the bond, (b) a copy of the resolution of a majority of the board of directors who are not "interested persons" of the registered management investment company approving the amount, type, form and coverage of the bond and the portion of the premium to be paid by such company, (c) a statement showing the amount of the single insured bond which the investment company would have provided and maintained had it not been named as an insured under a joint insured bond, (d) a statement as to the period for which premiums have been paid, and (e) a copy of each agreement between the investment company and all of the other named insureds entered into pursuant to paragraph (f) of this section; and (iii) a copy of any amendment to the agreement entered into pursuant to paragraph (f) of this section within 10 days after the execution of such amendment.

(2) File with the Commission, in writing, within five days after the making of any claim under the bond by the investment company, a statement of the nature and amount of the claim,

(3) File with the Commission, within five days of the receipt thereof, a copy of the terms of the settlement of any claim made under the bond by the investment company, and

(4) Notify by registered mail each member of the board of directors of the investment company at his last known residence address of (i) any cancellation, termination or modification of the bond, not less than forty-five days prior to the effective date of the cancellation or termination or modification, (ii) the filing and of the settlement of any claim under the bond by the investment company, at the time the filings required by paragraph (g) (2) and (3) of this section are made with the Commission, and (iii) the filing and of the proposed terms of settlement of any claim under the bond by any other named insured, within five days of the receipt of a notice from the fidelity insurance company.

(h) Each registered management investment company shall designate an officer thereof who shall make the filings and give the notices required by paragraph (g) of this section.

(i) Where the registered management investment company is an unincorporated company managed by a depositor, trustee or investment adviser, the terms "officer" and "employee" shall include, for the purposes of this rule, the officers and employees of the depositor, trustee, or investment adviser.

(j) Any joint insured bond provided and maintained by a registered management investment company and one or more other parties shall be a transaction exempt from the provisions of section 17(d) of the Act (15 U.S.C. 80a-17(d)) and the rules thereunder, if:

(1) The terms and provisions of the bond comply with the provisions of this section;

(2) The terms and provisions of any agreement required by paragraph (f) of this section comply with the provisions of that paragraph; and

(3)(i) A majority of the directors of the investment company are not interested persons of the company, and those directors select and nominate any other disinterested directors of the company; and

(ii) Any person who acts as legal counsel for the disinterested directors of the company is an independent legal counsel.

(k) At the next anniversary date of an existing fidelity bond, but not later than one year from the effective date

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of this rule, arrangements between registered management investment companies and fidelity insurance companies and arrangements between registered management investment companies and other parties named as insureds under joint insured bonds which would not permit compliance with the provisions of this rule shall be modified by the parties so as to effect such compliance.

[39 FR 10579, Mar. 21, 1974, as amended at 66 FR 3759, Jan. 16, 2001]

§ 270.17j-1 Personal investment activities of investment company personnel.

(a) *Definitions.* For purposes of this section:

(1) *Access Person* means:

(i) Any director, officer, general partner or Advisory Person of a Fund or of a Fund's investment adviser.

(A) If an investment adviser is primarily engaged in a business or businesses other than advising Funds or other advisory clients, the term Access Person means any director, officer, general partner or Advisory Person of the investment adviser who, with respect to any Fund, makes any recommendation, participates in the determination of which recommendation will be made, or whose principal function or duties relate to the determination of which recommendation will be made, or who, in connection with his or her duties, obtains any information concerning recommendations on Covered Securities being made by the investment adviser to any Fund.

(B) An investment adviser is "primarily engaged in a business or businesses other than advising Funds or other advisory clients" if, for each of its most recent three fiscal years or for the period of time since its organization, whichever is less, the investment adviser derived, on an unconsolidated basis, more than 50 percent of its total sales and revenues and more than 50 percent of its income (or loss), before income taxes and extraordinary items, from the other business or businesses.

(ii) Any director, officer or general partner of a principal underwriter who, in the ordinary course of business, makes, participates in or obtains information regarding, the purchase or sale

of Covered Securities by the Fund for which the principal underwriter acts, or whose functions or duties in the ordinary course of business relate to the making of any recommendation to the Fund regarding the purchase or sale of Covered Securities.

(2) *Advisory Person* of a Fund or of a Fund's investment adviser means:

(i) Any employee of the Fund or investment adviser (or of any company in a control relationship to the Fund or investment adviser) who, in connection with his or her regular functions or duties, makes, participates in, or obtains information regarding the purchase or sale of Covered Securities by a Fund, or whose functions relate to the making of any recommendations with respect to the purchases or sales; and

(ii) Any natural person in a control relationship to the Fund or investment adviser who obtains information concerning recommendations made to the Fund with regard to the purchase or sale of Covered Securities by the Fund.

(3) *Control* has the same meaning as in section 2(a)(9) of the Act [15 U.S.C. 80a-2(a)(9)].

(4) *Covered Security* means a security as defined in section 2(a)(36) of the Act [15 U.S.C. 80a-2(a)(36)], except that it does not include:

(i) Direct obligations of the Government of the United States;

(ii) Bankers' acceptances, bank certificates of deposit, commercial paper and high quality short-term debt instruments, including repurchase agreements; and

(iii) Shares issued by open-end Funds.

(5) *Fund* means an investment company registered under the Investment Company Act.

(6) An *Initial Public Offering* means an offering of securities registered under the Securities Act of 1933 [15 U.S.C. 77a], the issuer of which, immediately before the registration, was not subject to the reporting requirements of sections 13 or 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. 78m or 78o(d)].

(7) *Investment Personnel* of a Fund or of a Fund's investment adviser means:

(i) Any employee of the Fund or investment adviser (or of any company in a control relationship to the Fund or investment adviser) who, in connection

with his or her regular functions or duties, makes or participates in making recommendations regarding the purchase or sale of securities by the Fund.

(ii) Any natural person who controls the Fund or investment adviser and who obtains information concerning recommendations made to the Fund regarding the purchase or sale of securities by the Fund.

(8) A *Limited Offering* means an offering that is exempt from registration under the Securities Act of 1933 pursuant to section 4(2) or section 4(6) [15 U.S.C. 77d(2) or 77d(6)] or pursuant to rule 504, rule 505, or rule 506 [17 CFR 230.504, 230.505, or 230.506] under the Securities Act of 1933.

(9) *Purchase or sale of a Covered Security* includes, among other things, the writing of an option to purchase or sell a Covered Security.

(10) *Security Held or to be Acquired* by a Fund means:

(i) Any Covered Security which, within the most recent 15 days:

(A) Is or has been held by the Fund; or

(B) Is being or has been considered by the Fund or its investment adviser for purchase by the Fund; and

(ii) Any option to purchase or sell, and any security convertible into or exchangeable for, a Covered Security described in paragraph (a)(10)(i) of this section.

(b) *Unlawful Actions*. It is unlawful for any affiliated person of or principal underwriter for a Fund, or any affiliated person of an investment adviser of or principal underwriter for a Fund, in connection with the purchase or sale, directly or indirectly, by the person of a Security Held or to be Acquired by the Fund:

(1) To employ any device, scheme or artifice to defraud the Fund;

(2) To make any untrue statement of a material fact to the Fund or omit to state a material fact necessary in order to make the statements made to the Fund, in light of the circumstances under which they are made, not misleading;

(3) To engage in any act, practice or course of business that operates or would operate as a fraud or deceit on the Fund; or

(4) To engage in any manipulative practice with respect to the Fund.

(c) *Code of Ethics*.

(1) *Adoption and Approval of Code of Ethics*.

(i) Every Fund (other than a money market fund or a Fund that does not invest in Covered Securities) and each investment adviser of and principal underwriter for the Fund, must adopt a written code of ethics containing provisions reasonably necessary to prevent its Access Persons from engaging in any conduct prohibited by paragraph (b) of this section.

(ii) The board of directors of a Fund, including a majority of directors who are not interested persons, must approve the code of ethics of the Fund, the code of ethics of each investment adviser and principal underwriter of the Fund, and any material changes to these codes. The board must base its approval of a code and any material changes to the code on a determination that the code contains provisions reasonably necessary to prevent Access Persons from engaging in any conduct prohibited by paragraph (b) of this section. Before approving a code of a Fund, investment adviser or principal underwriter or any amendment to the code, the board of directors must receive a certification from the Fund, investment adviser or principal underwriter that it has adopted procedures reasonably necessary to prevent Access Persons from violating the Fund's, investment adviser's, or principal underwriter's code of ethics. The Fund's board must approve the code of an investment adviser or principal underwriter before initially retaining the services of the investment adviser or principal underwriter. The Fund's board must approve a material change to a code no later than six months after adoption of the material change.

(iii) If a Fund is a unit investment trust, the Fund's principal underwriter or depositor must approve the Fund's code of ethics, as required by paragraph (c)(1)(ii) of this section. If the Fund has more than one principal underwriter or depositor, the principal underwriters and depositors may designate, in writing, which principal underwriter or depositor must conduct the approval required by paragraph

(c)(1)(ii) of this section, if they obtain written consent from the designated principal underwriter or depositor.

(2) *Administration of Code of Ethics.* (i) The Fund, investment adviser and principal underwriter must use reasonable diligence and institute procedures reasonably necessary to prevent violations of its code of ethics.

(ii) No less frequently than annually, every Fund (other than a unit investment trust) and its investment advisers and principal underwriters must furnish to the Fund's board of directors, and the board of directors must consider, a written report that:

(A) Describes any issues arising under the code of ethics or procedures since the last report to the board of directors, including, but not limited to, information about material violations of the code or procedures and sanctions imposed in response to the material violations; and

(B) Certifies that the Fund, investment adviser or principal underwriter, as applicable, has adopted procedures reasonably necessary to prevent Access Persons from violating the code.

(3) *Exception for Principal Underwriters.* The requirements of paragraphs (c)(1) and (c)(2) of this section do not apply to any principal underwriter unless:

(i) The principal underwriter is an affiliated person of the Fund or of the Fund's investment adviser; or

(ii) An officer, director or general partner of the principal underwriter serves as an officer, director or general partner of the Fund or of the Fund's investment adviser.

(d) *Reporting Requirements of Access Persons—(1) Reports Required.* Unless excepted by paragraph (d)(2) of this section, every Access Person of a Fund (other than a money market fund or a Fund that does not invest in Covered Securities) and every Access Person of an investment adviser of or principal underwriter for the Fund, must report to that Fund, investment adviser or principal underwriter:

(i) *Initial Holdings Reports.* No later than 10 days after the person becomes an Access Person, the following information:

(A) The title, number of shares and principal amount of each Covered Se-

curity in which the Access Person had any direct or indirect beneficial ownership when the person became an Access Person;

(B) The name of any broker, dealer or bank with whom the Access Person maintained an account in which any securities were held for the direct or indirect benefit of the Access Person as of the date the person became an Access Person; and

(C) The date that the report is submitted by the Access Person.

(ii) *Quarterly Transaction Reports.* No later than 10 days after the end of a calendar quarter, the following information:

(A) With respect to any transaction during the quarter in a Covered Security in which the Access Person had any direct or indirect beneficial ownership:

(1) The date of the transaction, the title, the interest rate and maturity date (if applicable), the number of shares and the principal amount of each Covered Security involved;

(2) The nature of the transaction (*i.e.*, purchase, sale or any other type of acquisition or disposition);

(3) The price of the Covered Security at which the transaction was effected;

(4) The name of the broker, dealer or bank with or through which the transaction was effected; and

(5) The date that the report is submitted by the Access Person.

(B) With respect to any account established by the Access Person in which any securities were held during the quarter for the direct or indirect benefit of the Access Person:

(1) The name of the broker, dealer or bank with whom the Access Person established the account;

(2) The date the account was established; and

(3) The date that the report is submitted by the Access Person.

(iii) *Annual Holdings Reports.* Annually, the following information (which information must be current as of a date no more than 30 days before the report is submitted):

(A) The title, number of shares and principal amount of each Covered Security in which the Access Person had any direct or indirect beneficial ownership;

(B) The name of any broker, dealer or bank with whom the Access Person maintains an account in which any securities are held for the direct or indirect benefit of the Access Person; and

(C) The date that the report is submitted by the Access Person.

(2) *Exceptions from Reporting Requirements.* (i) A person need not make a report under paragraph (d)(1) of this section with respect to transactions effected for, and Covered Securities held in, any account over which the person has no direct or indirect influence or control.

(ii) A director of a Fund who is not an “interested person” of the Fund within the meaning of section 2(a)(19) of the Act [15 U.S.C. 80a-2(a)(19)], and who would be required to make a report solely by reason of being a Fund director, need not make:

(A) An initial holdings report under paragraph (d)(1)(i) of this section and an annual holdings report under paragraph (d)(1)(iii) of this section; and

(B) A quarterly transaction report under paragraph (d)(1)(ii) of this section, unless the director knew or, in the ordinary course of fulfilling his or her official duties as a Fund director, should have known that during the 15-day period immediately before or after the director’s transaction in a Covered Security, the Fund purchased or sold the Covered Security, or the Fund or its investment adviser considered purchasing or selling the Covered Security.

(iii) An Access Person to a Fund’s principal underwriter need not make a report to the principal underwriter under paragraph (d)(1) of this section if:

(A) The principal underwriter is not an affiliated person of the Fund (unless the Fund is a unit investment trust) or any investment adviser of the Fund; and

(B) The principal underwriter has no officer, director or general partner who serves as an officer, director or general partner of the Fund or of any investment adviser of the Fund.

(iv) An Access Person to an investment adviser need not make a quarterly transaction report to the investment adviser under paragraph (d)(1)(ii) of this section if all the information in

the report would duplicate information required to be recorded under §§ 275.204-2(a)(12) or 275.204-2(a)(13) of this chapter.

(v) An Access Person need not make a quarterly transaction report under paragraph (d)(1)(ii) of this section if the report would duplicate information contained in broker trade confirmations or account statements received by the Fund, investment adviser or principal underwriter with respect to the Access Person in the time period required by paragraph (d)(1)(ii), if all of the information required by that paragraph is contained in the broker trade confirmations or account statements, or in the records of the Fund, investment adviser or principal underwriter.

(3) *Review of Reports.* Each Fund, investment adviser and principal underwriter to which reports are required to be made by paragraph (d)(1) of this section must institute procedures by which appropriate management or compliance personnel review these reports.

(4) *Notification of Reporting Obligation.* Each Fund, investment adviser and principal underwriter to which reports are required to be made by paragraph (d)(1) of this section must identify all Access Persons who are required to make these reports and must inform those Access Persons of their reporting obligation.

(5) *Beneficial Ownership.* For purposes of this section, beneficial ownership is interpreted in the same manner as it would be under § 240.16a-1(a)(2) of this chapter in determining whether a person is the beneficial owner of a security for purposes of section 16 of the Securities Exchange Act of 1934 [15 U.S.C. 78p] and the rules and regulations thereunder. Any report required by paragraph (d) of this section may contain a statement that the report will not be construed as an admission that the person making the report has any direct or indirect beneficial ownership in the Covered Security to which the report relates.

(e) *Pre-approval of Investments in IPOs and Limited Offerings.* Investment Personnel of a Fund or its investment adviser must obtain approval from the Fund or the Fund’s investment adviser before directly or indirectly acquiring

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beneficial ownership in any securities in an Initial Public Offering or in a Limited Offering.

(f) *Recordkeeping Requirements.* (1) Each Fund, investment adviser and principal underwriter that is required to adopt a code of ethics or to which reports are required to be made by Access Persons must, at its principal place of business, maintain records in the manner and to the extent set out in this paragraph (f), and must make these records available to the Commission or any representative of the Commission at any time and from time to time for reasonable periodic, special or other examination:

(A) A copy of each code of ethics for the organization that is in effect, or at any time within the past five years was in effect, must be maintained in an easily accessible place;

(B) A record of any violation of the code of ethics, and of any action taken as a result of the violation, must be maintained in an easily accessible place for at least five years after the end of the fiscal year in which the violation occurs;

(C) A copy of each report made by an Access Person as required by this section, including any information provided in lieu of the reports under paragraph (d)(2)(v) of this section, must be maintained for at least five years after the end of the fiscal year in which the report is made or the information is provided, the first two years in an easily accessible place;

(D) A record of all persons, currently or within the past five years, who are or were required to make reports under paragraph (d) of this section, or who are or were responsible for reviewing these reports, must be maintained in an easily accessible place; and

(E) A copy of each report required by paragraph (c)(2)(ii) of this section must be maintained for at least five years after the end of the fiscal year in which it is made, the first two years in an easily accessible place.

(2) A Fund or investment adviser must maintain a record of any decision, and the reasons supporting the decision, to approve the acquisition by investment personnel of securities under paragraph (e), for at least five

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years after the end of the fiscal year in which the approval is granted.

[64 FR 46834, Aug. 27, 1999; 65 FR 12943, Mar. 10, 2000]

§ 270.18c-1 Exemption of privately held indebtedness.

The issuance or sale of more than one class of senior securities representing indebtedness by a small business investment company, licensed under the Small Business Investment Act of 1958, shall not be prohibited by section 18(c) so long as such small business investment company does not have outstanding any publicly held indebtedness, and all securities of any such class are (a) privately held by the Small Business Administration, or banks, insurance companies or other institutional investors, (b) not intended to be publicly distributed, and (c) not convertible into, exchangeable for, or accompanied by any option to acquire, any equity security.

[26 FR 11240, Nov. 29, 1961]

§ 270.18c-2 Exemptions of certain debentures issued by small business investment companies.

(a) The issuance or sale of any class of senior security representing indebtedness by a small business investment company licensed under the Small Business Investment Act of 1958 shall not be prohibited by section 18(c) of the Act provided such senior security representing indebtedness is (1) not convertible into, exchangeable for, or accompanied by an option to acquire any equity security; (2) fully guaranteed as to timely payment of all principal and interest by the Small Business Administration and backed by the full faith and credit of the United States; and (3) subordinated to any other debt securities not issued pursuant to this section or, if such security is not so subordinated, that such security, according to its own terms, will not be preferred over any other unsecured debt securities in the payment of principal and interest: *And further provided*, That all other debt securities then outstanding issued by such small business investment company were issued as permitted by § 270.18c-1 or this section.

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(b) Any security issued and sold as permitted by paragraph (a) of this section shall be deemed for purposes of § 270.18c-1 to be privately held by the Small Business Administration and for purposes of § 270.18c-1 shall not be deemed to be publicly held outstanding indebtedness.

(c) The issuance or sale of any security as permitted by paragraph (a) of this section shall not be deemed to be a sale to any person other than the Small Business Administration by any small business investment company licensed under the Small Business Investment Company Act of 1958 which is exempt from any provision of the Investment Company Act, if such exemption is conditioned on such company not offering or selling its securities to any person other than the Small Business Administration.

(Secs. 6(c), 38(a), 54 Stat. 800, 841, 15 U.S.C. 80a-6(c), 80a-37(a))

[37 FR 7590, Apr. 18, 1972]

§ 270.18f-1 Exemption from certain requirements of section 18(f)(1) (of the Act) for registered open-end investment companies which have the right to redeem in kind.

(a) A registered open-end investment company which has the right to redeem securities of which it is the issuer in assets other than cash may file with the Commission at any time a notification of election on Form N-18F-1 (§ 274.51 of this chapter) committing itself to pay in cash all requests for redemption by any shareholder of record, limited in amount with respect to each shareholder during any 90-day period to the lesser of

(1) \$250,000 or

(2) 1 percent of the net asset value of such company at the beginning of such period.

(b) An election pursuant to paragraph (a) of this section:

(1) Shall be described in either the prospectus or the Statement of Additional Information, at the discretion of the investment company, and

(2) Shall be irrevocable while this § 270.18f-1 is in effect unless the Commission by order upon application permits the withdrawal of such notification of election as being appropriate in

the public interest and consistent with the protection of investors.

(c) Upon making the election described in paragraph (a) of this section, an investment company shall be exempt from the requirements of section 18(f)(1) (of the Act) to the extent necessary for such company to effectuate redemptions in the manner set forth in such paragraph.

(Secs. 7, 10, and 19 of the Securities Act of 1933 (15 U.S.C. 77g, 77j, and 77s) and secs. 8, 30 and 38 of the Investment Company Act of 1940 (15 U.S.C. 80a-8, 80a-29 and 80a-37))

[36 FR 11919, June 23, 1971, as amended at 48 FR 37940, Aug. 22, 1983]

§ 270.18f-2 Fair and equitable treatment for holders of each class or series of stock of series investment companies.

(a) For purposes of this § 270.18f-2 a series company is a registered open-end investment company which, in accordance with the provisions of section 18(f)(2) of the Act, issues two or more classes or series of preferred or special stock each of which is preferred over all other classes or series in respect of assets specifically allocated to that class or series. Any matter required to be submitted by the provisions of the Act or of applicable State law, or otherwise, to the holders of the outstanding voting securities of a series company shall not be deemed to have been effectively acted upon less approved by the holders of a majority of the outstanding voting securities of each class or series of stock affected by such matter.

(b) For the purposes of paragraph (a) of this § 270.18f-2, a class or series of stock will be deemed to be affected by such a matter, unless (1) the interests of each class or series in the matter are substantially identical, or (2) the matter does not affect any interest of such class or series.

(c)(1) With respect to the submission of an investment advisory contract to the holders of the outstanding voting securities of a series company for the approval required by section 15(a) of the Act, such matter shall be deemed to be effectively acted upon with respect to any class or series of securities of such company if a majority of the outstanding voting securities of such

class or series vote for the approval of such matter, notwithstanding (i) that such matter has not been approved by the holders of a majority of the outstanding voting securities of any other class or series affected by such matter, and (ii) that such matter has not been approved by the vote of a majority of the outstanding voting securities of such company, provided that if such a majority is required by State law or otherwise, such requirement shall apply.

(2) If any class or series of securities of a series company fails to approve an investment advisory contract in the manner required by paragraph (c)(1) of this section, the investment adviser of such company may continue to serve or act in such capacity for the period of time pending such required approval of such contract, of a new contract with the same or different adviser, or other definitive action: *Provided*, That the compensation received by such investment adviser during such period is equal to no more than its actual costs incurred in furnishing investment advisory services to such class or series or the amount it would have received under the advisory contract, whichever is less.

(d) With respect to the submission of a change in investment policy to the holders of the outstanding voting securities of a series company for the approval required by section 13 of the Act, such matter shall be deemed to have been effectively acted upon with respect to any class or series of such company if a majority of the outstanding voting securities of such class or series vote for the approval of such matter, notwithstanding (1) that such matter has not been approved by the holders of a majority of the outstanding voting securities of any other class or series affected by such matter, and (2) that such matter has not been approved by the vote of a majority of the outstanding voting securities of such company: *Provided*, That if such a majority is required by State law or otherwise, such requirement shall apply.

(e) The submission to shareholders of the selection of the independent public accountant of a series company required by section 32(a) (of the Act)

shall be exempt from the separate voting requirements of paragraph (a) of this § 270.18f-2.

(f) The submission to shareholders of a contract with a principal underwriter of a series company required by section 15(b) of the Act shall be exempt from the separate voting requirements of paragraph (a) of this § 270.18f-2.

(g) The submission to shareholders of nominees for election as directors required by section 16(a) of the Act shall be exempt from the separate voting requirements of paragraph (a) of this § 270.18f-2.

(h) For the purposes of this § 270.18f-2 a “majority of the outstanding voting securities” of a class or series, (1) when used with respect to a matter required by any provision of the Act to be submitted to the outstanding voting securities of a series company, shall have the same meaning as a “majority of the outstanding voting securities of a company” as defined in section 2(a)(42) of the Act; and (2) when used with respect to any other matter required to be submitted to the outstanding voting securities of a series company, shall mean the lesser of (i) the minimum vote of the outstanding voting securities of a company required by applicable State law or other applicable requirement, or (ii) the minimum vote specified by paragraph (1) of this paragraph (h), unless State law requires approval of such matters by a specified percentage of the outstanding voting securities of a particular class or series, in which case, State law shall apply.

(Secs. 6(c), 13, 15(a), 15(b), 16(a), 18(f)(2), 32(a), 54 Stat. 800, 811, 812, 813, 817, 838, 841, 15 U.S.C. 80a-6(c), 80a-13, 80a-15(b), 80a-16(a), 80a-18(f)(2), 80a-31(a), 80a-37(a), Pub. L. 91-547, 84 Stat. 1421)

[37 FR 17386, Aug. 26, 1972]

§ 270.18f-3 Multiple class companies.

Notwithstanding sections 18(f)(1) and 18(i) of the Act (15 U.S.C. 80a-18(f)(1) and (i), respectively), a registered open-end management investment company or series or class thereof established in accordance with section 18(f)(2) of the Act (15 U.S.C. 80a-18(f)(2)) whose shares are registered on Form N-1A [§§ 239.15A and 274.11A of this chapter] (“company”) may issue more

than one class of voting stock, *provided that*:

(a) Each class:

(1)(i) Shall have a different arrangement for shareholder services or the distribution of securities or both, and shall pay all of the expenses of that arrangement;

(ii) May pay a different share of other expenses, not including advisory or custodial fees or other expenses related to the management of the company's assets, if these expenses are actually incurred in a different amount by that class, or if the class receives services of a different kind or to a different degree than other classes; and

(iii) May pay a different advisory fee to the extent that any difference in amount paid is the result of the application of the same performance fee provisions in the advisory contract of the company to the different investment performance of each class;

(2) Shall have exclusive voting rights on any matter submitted to shareholders that relates solely to its arrangement;

(3) Shall have separate voting rights on any matter submitted to shareholders in which the interests of one class differ from the interests of any other class; and

(4) Shall have in all other respects the same rights and obligations as each other class.

(b) Expenses may be waived or reimbursed by the company's adviser, underwriter, or any other provider of services to the company.

(c)(1) Income, realized gains and losses, unrealized appreciation and depreciation, and Fundwide Expenses shall be allocated based on one of the following methods (which method shall be applied on a consistent basis):

(i) To each class based on the net assets of that class in relation to the net assets of the company ("relative net assets");

(ii) To each class based on the Simultaneous Equations Method;

(iii) To each class based on the Settled Shares Method, *provided that* the company is a Daily Dividend Fund (such a company may allocate income and Fundwide Expenses based on the Settled Shares Method and realized gains and losses and unrealized appre-

ciation and depreciation based on relative net assets);

(iv) To each share without regard to class, *provided that* the company is a Daily Dividend Fund that maintains the same net asset value per share in each class; that the company has received undertakings from its adviser, underwriter, or any other provider of services to the company, agreeing to waive or reimburse the company for payments to such service provider by one or more classes, as allocated under paragraph (a)(1) of this section, to the extent necessary to assure that all classes of the company maintain the same net asset value per share; and that payments waived or reimbursed under such an undertaking may not be carried forward or recouped at a future date; or

(v) To each class based on any other appropriate method, *provided that* a majority of the directors of the company, and a majority of the directors who are not interested persons of the company, determine that the method is fair to the shareholders of each class and that the annualized rate of return of each class will generally differ from that of the other classes only by the expense differentials among the classes.

(2) For purposes of this section:

(i) *Daily Dividend Fund* means any company that has a policy of declaring distributions of net income daily, including any money market fund that determines net asset value using the amortized cost method permitted by § 270.2a-7;

(ii) *Fundwide Expenses* means expenses of the company not allocated to a particular class under paragraph (a)(1) of this section;

(iii) The *Settled Shares Method* means allocating to each class based on relative net assets, excluding the value of subscriptions receivable; and

(iv) The *Simultaneous Equations Method* means the simultaneous allocation to each class of each day's income, realized gains and losses, unrealized appreciation and depreciation, and Fundwide Expenses and reallocation to each class of undistributed net investment income, undistributed realized gains or losses, and unrealized appreciation or depreciation, based on the

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operating results of the company, changes in ownership interests of each class, and expense differentials between the classes, so that the annualized rate of return of each class generally differs from that of the other classes only by the expense differentials among the classes.

(d) Any payments made under paragraph (a) of this section shall be made pursuant to a written plan setting forth the separate arrangement and expense allocation of each class, and any related conversion features or exchange privileges. Before the first issuance of a share of any class in reliance upon this section, and before any material amendment of a plan, a majority of the directors of the company, and a majority of the directors who are not interested persons of the company, shall find that the plan as proposed to be adopted or amended, including the expense allocation, is in the best interests of each class individually and the company as a whole; initial board approval of a plan under this paragraph (d) is not required, however, if the plan does not make any change in the arrangements and expense allocations previously approved by the board under an existing order of exemption. Before any vote on the plan, the directors shall request and evaluate, and any agreement relating to a class arrangement shall require the parties thereto to furnish, such information as may be reasonably necessary to evaluate the plan.

(e)(1) A majority of the directors of the investment company are not interested persons of the company, and those directors select and nominate any other disinterested directors of the company; and

(2) Any person who acts as legal counsel for the disinterested directors of the company is an independent legal counsel.

(f) Nothing in this section prohibits a company from offering any class with:

(1) An exchange privilege providing that securities of the class may be exchanged for certain securities of another company; or

(2) A conversion feature providing that shares of one class of the company (the "purchase class") will be exchanged automatically for shares of

another class of the company (the "target class") after a specified period of time, *provided that*:

(i) The conversion is effected on the basis of the relative net asset values of the two classes without the imposition of any sales load, fee, or other charge;

(ii) The expenses, including payments authorized under a plan adopted pursuant to §270.12b-1 ("rule 12b-1 plan"), for the target class are not higher than the expenses, including payments authorized under a rule 12b-1 plan, for the purchase class; and

(iii) If the shareholders of the target class approve any increase in expenses allocated to the target class under paragraphs (a)(1)(i) and (a)(1)(ii) of this section, and the purchase class shareholders do not approve the increase, the company will establish a new target class for the purchase class on the same terms as applied to the target class before that increase.

(3) A conversion feature providing that shares of a class in which an investor is no longer eligible to participate may be converted to shares of a class in which that investor is eligible to participate, *provided that*:

(i) The investor is given prior notice of the proposed conversion; and

(ii) The conversion is effected on the basis of the relative net asset values of the two classes without the imposition of any sales load, fee, or other charge.

[60 FR 11885, Mar. 2, 1995, as amended at 62 FR 51765, Oct. 3, 1997; 66 FR 3759, Jan. 16, 2001]

§270.19a-1 Written statement to ac-company dividend payments by management companies.

(a) Every written statement made pursuant to section 19 by or on behalf of a management company shall be made on a separate paper and shall clearly indicate what portion of the payment per share is made from the following sources:

(1) Net income for the current or preceding fiscal year, or accumulated undistributed net income, or both, not including in either case profits or losses from the sale of securities or other properties.

(2) Accumulated undistributed net profits from the sale of securities or other properties (except that an open-

end company may treat as a separate source its net profits from such sales during its current fiscal year).

(3) Paid-in surplus or other capital source.

To the extent that a payment is properly designated as being made from a source specified in paragraph (a) (1) or (2) of this section, it need not be designated as having been made from a source specified in this paragraph.

(b) If the payment is made in whole or in part from a source specified in paragraph (a)(2) of this section the written statement shall indicate, after giving effect to the part of such payment so specified, the deficit, if any, in the aggregate of (1) accumulated undistributed realized profits less losses on the sale of securities or other properties and (2) the net unrealized appreciation or depreciation of portfolio securities, all as of a date reasonably close to the end of the period as of which the dividend is paid. Any statement made pursuant to the preceding sentence shall specify the amount, if any, of such deficit which represents unrealized depreciation of portfolio securities.

(c) Accumulated undistributed net income and accumulated undistributed net profits from the sale of securities or other properties shall be determined, at the option of the company, either (1) from the date of the organization of the company, (2) from the date of a reorganization, as defined in clause (A) or (B) of section 2(a)(33) of the Act (54 Stat. 790; 15 U.S.C. 80a-2(a)(33)), (3) from the date as of which a write-down of portfolio securities was made in connection with a corporate readjustment, approved by stockholders, of the type known as "quasi-reorganization," or (4) from January 1, 1925, to the close of the period as of which the dividend is paid, without giving effect to such payment.

(d) For the purpose of this section, open-end companies which upon the sale of their shares allocate to undistributed income or other similar account that portion of the consideration received which represents the approximate per share amount of undistributed net income included in the sales price, and make a corresponding deduction from undistributed net income

upon the purchase or redemption of shares, need not treat the amounts so allocated as paid-in surplus or other capital source.

(e) For the purpose of this section, the source or sources from which a dividend is paid shall be determined (or reasonably estimated) to the close of the period as of which it is paid without giving effect to such payment. If any such estimate is subsequently ascertained to be inaccurate in a significant amount, a correction thereof shall be made by a written statement pursuant to section 19(a) of the Act or in the first report to stockholders following discovery of the inaccuracy.

(f) Insofar as a written statement made pursuant to section 19(a) of the Act relates to a dividend on preferred stock paid for a period of less than a year, a company may elect to indicate only that portion of the payment which is made from sources specified in paragraph (a)(1) of this section, and need not specify the sources from which the remainder was paid. Every company which in any fiscal year elects to make a statement pursuant to the preceding sentence shall transmit to the holders of such preferred stock, at a date reasonably near the end of the last dividend period in such fiscal year, a statement meeting the requirements of paragraph (a) of this section on an annual basis.

(g) The purpose of this section, in the light of which it shall be construed, is to afford security holders adequate disclosure of the sources from which dividend payments are made. Nothing in this section shall be construed to prohibit the inclusion in any written statement of additional information in explanation of the information required by this section. Nothing in this section shall be construed to permit a dividend payment in violation of any State law or to prevent compliance with any requirement of State law regarding dividends consistent with this rule.

CROSS REFERENCE: For interpretative release applicable to §270.19a-1, see No. 71 in tabulation, part 271 of this chapter.

[Rule N-19-1, 6 FR 1114, Feb. 25, 1941. Redesignated at 36 FR 22901, Dec. 2, 1971 and amended at 38 FR 8593, Apr. 4, 1973]

§ 270.19b-1 Frequency of distribution of capital gains.

(a) No registered investment company which is a “regulated investment company” as defined in section 851 of the Internal Revenue Code of 1986 (“Code”) shall distribute more than one capital gain dividend (“distribution”), as defined in section 852(b)(3)(C) of the Code, with respect to any one taxable year of the company, other than a distribution otherwise permitted by this rule or made pursuant to section 855 of the Code which is supplemental to the prior distribution with respect to the same taxable year of the company and which does not exceed 10% of the aggregate amount distributed for such taxable year.

(b) No registered investment company which is not a “regulated investment company” as defined in section 851 of the Code shall make more than one distribution of long-term capital gains, as defined in the Code, in any one taxable year of the company: *Provided*, That a unit investment trust may distribute capital gain dividends received from a “regulated investment company” within a reasonable time after receipt.

(c) The provisions of this rule shall not apply to a unit investment trust (hereinafter referred to as the “Trust”) engaged exclusively in the business of investing in eligible trust securities (as defined in Rule 14a-3(b) (17 CFR 270.14a-3(b)) under this Act); *Provided*, That:

(1) The capital gain distribution is a result of—

(i) An issuer’s calling or redeeming an eligible trust security held by the Trust,

(ii) The sale of an eligible trust security by the Trust to provide funds for redemption of Trust units when the amount received by the Trust for such sale exceeds the amount required to satisfy the redemption distribution,

(iii) The sale of an eligible trust security to maintain qualification of the Trust as a “regulated investment company” under section 851 of the Code,

(iv) Regular distributions of principal and prepayment of principal on eligible trust securities, or

(v) The sale of an eligible trust security in order to maintain the investment stability of the Trust; and

(2) Capital gains distributions are clearly described as such in a report to the unitholder which accompanies each such distribution.

(d) For purposes of paragraph (c) of this section, sales made to maintain the investment stability of the Trust means sales made to prevent deterioration of the value of the eligible trust securities held in the Trust portfolio when one or more of the following factors exist:

(1) A default in the payment of principal or interest on an eligible trust security;

(2) An action involving the issuer of an eligible trust security which adversely affects the ability of such issuer to continue payment of principal or interest on its eligible trust securities; or

(3) A change in market, revenue or credit factors which adversely affects the ability of such issuer to continue payment of principal or interest on its eligible trust securities.

(e) If a registered investment company because of unforeseen circumstances in a particular taxable year proposes to make a distribution which would be prohibited by the provisions of this section, it may file a request with the Commission for authorization to make such a distribution. Such request shall comply with the requirements of § 270.0-2 of this chapter and shall set forth the pertinent facts and explain the circumstances which the company believes justify such distribution. The request shall be deemed granted unless the Commission within 15 days after receipt thereof shall deny such request as not being necessary or appropriate in the public interest or for the protection of investors and notify the company in writing of such denial.

(f) A registered investment company may make one additional distribution of long-term capital gains, as defined in the Code, with respect to any one taxable year of the company, which distribution is made, in whole or in part, for the purpose of not incurring any tax under section 4982 of the Code. Such additional distribution may be

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made prior or subsequent to any distribution otherwise permitted by paragraph (a) of this section.

(Secs. 6(c), 19(b) (15 U.S.C. 80a-19(b), and sec. 38(a)))

[36 FR 22901, Dec. 2, 1971, as amended at 44 FR 29647, May 22, 1979; 44 FR 40064, July 9, 1979; 52 FR 42428, Nov. 5, 1987]

§ 270.20a-1 Solicitation of proxies, consents and authorizations.

(a) No person shall solicit or permit the use of his or her name to solicit any proxy, consent, or authorization with respect to any security issued by a registered Fund, except upon compliance with Regulation 14A (§240.14a-1 of this chapter), Schedule 14A (§240.14a-101 of this chapter), and all other rules and regulations adopted pursuant to section 14(a) of the Securities Exchange Act of 1934 that would be applicable to such solicitation if it were made in respect of a security registered pursuant to section 12 of the Securities Exchange Act of 1934. Unless the solicitation is made in respect of a security registered on a national securities exchange, none of the soliciting material need be filed with such exchange.

(b) If the solicitation is made by or on behalf of the management of the investment company, then the investment adviser or any prospective investment adviser and any affiliated person thereof as to whom information is required in the solicitation shall upon request of the investment company promptly transmit to the investment company all information necessary to enable the management of such company to comply with the rules and regulations applicable to such solicitation. If the solicitation is made by any person other than the management of the investment company, on behalf of and with the consent of the investment adviser or prospective investment adviser, then the investment adviser or prospective investment adviser and any affiliated person thereof as to whom information is required in the solicitation shall upon request of the person making the solicitation promptly transmit to such person all information necessary to enable such person to comply with the rules and regulations applicable to the solicitation.

Instruction. Registrants that have made a public offering of securities and that hold security holder votes for which proxies, consents, or authorizations are not being solicited pursuant to the requirements of this section should refer to section 14(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(c)) and the information statement requirements set forth in the rules thereunder.

[25 FR 1865, Mar. 3, 1960, as amended at 37 FR 1472, Jan. 29, 1972; 52 FR 48985, Dec. 29, 1987; 57 FR 1102, Jan. 10, 1992; 59 FR 52700, Oct. 19, 1994]

§§ 270.20a-2—270.20a-4 [Reserved]

§ 270.22c-1 Pricing of redeemable securities for distribution, redemption and repurchase.

(a) No registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in, any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security: *Provided, That:*

(1) This paragraph shall not prevent a sponsor of a unit investment trust (hereinafter referred to as the "Trust") engaged exclusively in the business of investing in eligible trust securities (as defined in Rule 14a-3(b) (17 CFR 270.14a-3(b))) from selling or repurchasing Trust units in a secondary market at a price based on the offering side evaluation of the eligible trust securities in the Trust's portfolio, determined at any time on the last business day of each week, effective for all sales made during the following week, if on the days that such sales or repurchases are made the sponsor receives a letter from a qualified evaluator stating, in its opinion, that:

(i) In the case of repurchases, the current bid price is not higher than the offering side evaluation, computed on the last business day of the previous week; and

(ii) In the case of resales, the offering side evaluation, computed as of the last business day of the previous week, is not more than one-half of one percent (\$5.00 on a unit representing \$1,000 principal amount of eligible trust securities) greater than the current offering price.

(2) This paragraph shall not prevent any registered investment company from adjusting the price of its redeemable securities sold pursuant to a merger, consolidation or purchase of substantially all of the assets of a company which meets the conditions specified in § 270.17a-8.

(b) For the purposes of this section,

(1) The current net asset value of any such security shall be computed no less frequently than once daily, Monday through Friday, at the specific time or times during the day that the board of directors of the investment company sets, in accordance with paragraph (e) of this section, except on:

(i) Days on which changes in the value of the investment company's portfolio securities will not materially affect the current net asset value of the investment company's redeemable securities;

(ii) Days during which no security is tendered for redemption and no order to purchase or sell such security is received by the investment company; or

(iii) Customary national business holidays described or listed in the prospectus and local and regional business holidays listed in the prospectus; and

(2) A "qualified evaluator" shall mean any evaluator which represents it is in a position to determine, on the basis of an informal evaluation of the eligible trust securities held in the Trust's portfolio, whether—

(i) The current bid price is higher than the offering side evaluation, computed on the last business day of the previous week, and

(ii) The offering side evaluation, computed as of the last business day of the previous week, is more than one-half of one percent (\$5.00 on a unit representing \$1,000 principal amount of eligible trust securities) greater than the current offering price.

(c) Notwithstanding the provisions above, any registered separate account offering variable annuity contracts,

any person designated in such account's prospectus as authorized to consummate transactions in such contracts, and any principal underwriter of or dealer in such contracts shall be permitted to apply the initial purchase payment for any such contract at a price based on the current net asset value of such contract which is next computed:

(1) Not later than two business days after receipt of the order to purchase by the insurance company sponsoring the separate account ("insurer"), if the contract application and other information necessary for processing the order to purchase (collectively, "application") are complete upon receipt; or

(2) Not later than two business days after an application which is incomplete upon receipt by the insurer is made complete, *Provided*, That, if an incomplete application is not made complete within five business days after receipt,

(i) The prospective purchaser shall be informed of the reasons for the delay, and

(ii) The initial purchase payment shall be returned immediately and in full, unless the prospective purchaser specifically consents to the insurer retaining the purchase payment until the application is made complete.

(3) As used in this section:

(i) *Prospective Purchaser* shall mean either an individual contractowner or an individual participant in a group contract.

(ii) *Initial Purchase Payment* shall refer to the first purchase payment submitted to the insurer by, or on behalf of, a prospective purchaser.

(d) The board of directors shall initially set the time or times during the day that the current net asset value shall be computed, and shall make and approve such changes as the board deems necessary.

(Secs. 6(c), 22(c) and 38(a), 15 U.S.C. 80a-6(c), 80a-22(c) and 80a-37(a))

[44 FR 29647, May 22, 1979, as amended at 44 FR 48660, Aug. 20, 1979; 45 FR 12409, Feb. 26, 1980; 50 FR 7911, Feb. 27, 1985; 50 FR 24763, June 13, 1985; 50 FR 42682, Oct. 22, 1985; 58 FR 49922, Sept. 24, 1993]

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§ 270.22d-1 Exemption from section 22(d) to permit sales of redeemable securities at prices which reflect sales loads set pursuant to a schedule.

A registered investment company that is the issuer of redeemable securities, a principal underwriter of such securities or a dealer therein shall be exempt from the provisions of section 22(d) to the extent necessary to permit the sale of such securities at prices that reflect scheduled variations in, or elimination of, the sales load. These price schedules may offer such variations in or elimination of the sales load to particular classes of investors or transactions, *Provided, That*:

(a) The company, the principal underwriter and dealers in the company's shares apply any scheduled variation uniformly to all offerees in the class specified;

(b) The company furnishes to existing shareholders and prospective investors adequate information concerning any scheduled variation, as prescribed in applicable registration statement form requirements;

(c) Before making any new sales load variation available to purchasers of the company's shares, the company revises its prospectus and statement of additional information to describe that new variation; and

(d) The company advises existing shareholders of any new sales load variation within one year of the date when that variation is first made available to purchasers of the company's shares.

(Secs. 6(c) (15 U.S.C. 80a-6(c)) and 38(a) (15 U.S.C. 80a-37(a)))

[50 FR 7911, Feb. 27, 1985]

§ 270.22d-2 Exemption from section 22(d) for certain registered separate accounts.

A registered separate account, any principal underwriter for such account, any dealer in contracts or units of interest or participations in such contracts issued by such account and any insurance company maintaining such account shall, with respect to any variable annuity contracts, units, or participations therein issued by such account, be exempted from section 22(d) to the extent necessary to permit the sale of such contracts, units or partici-

pations by such persons at prices which reflect variations in the sales load or in any administrative charge or other deductions from the purchase payments; *Provided, however,* That (a) the prospectus discloses as precisely as possible the amount of the variations and the circumstances, if any, in which such variations shall be available or describes the basis for such variations and the manner in which entitlement shall be determined, and (b) any such variations reflect differences in costs or services and are not unfairly discriminatory against any person.

(Secs. 6(c) (15 U.S.C. 80a-6(c)) and 38(a) (15 U.S.C. 80a-37(a)))

[40 FR 33970, Aug. 13, 1975. Redesignated at 50 FR 7911, Feb. 27, 1985]

§ 270.22e-1 Exemption from section 22(e) of the Act during annuity payment period of variable annuity contracts participating in certain registered separate accounts.

(a) A registered separate account, shall during the annuity payment period of variable annuity contracts participating in such account, be exempt from the provisions of section 22(e) of the Act prohibiting the suspension of the right of redemption or postponement of the date of payment or satisfaction upon redemption of any redeemable security, with respect to such contracts under which payments are being made based upon life contingencies.

(Sec. 6, 54 Stat. 800; 15 U.S.C. 80a-6)

[34 FR 12696, Aug. 5, 1969]

§ 270.22e-2 Pricing of redemption requests in accordance with Rule 22c-1.

An investment company shall not be deemed to have suspended the right of redemption if it prices a redemption request by computing the net asset value of the investment company's redeemable securities in accordance with the provisions of Rule 22c-1.

[50 FR 24764, June 13, 1985]

§ 270.23c-1 Repurchase of securities by closed-end companies.

(a) A registered closed-end company may purchase for cash a security of

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which it is the issuer, subject to the following conditions:

(1) If the security is a stock entitled to cumulative dividends, such dividends are not in arrears.

(2) If the security is a stock not entitled to cumulative dividends, at least 90 percent of the net income of the issuer for the last preceding fiscal year, determined in accordance with good accounting practice and not including profits or losses realized from the sale of securities or other properties, was distributed to its shareholders during such fiscal year or within 60 days after the close of such fiscal year.

(3) If the security to be purchased is junior to any class of outstanding security of the issuer representing indebtedness (except notes or other evidences of indebtedness held by a bank or other person, the issuance of which did not involve a public offering) all securities of such class shall have an asset coverage of at least 300 percent immediately after such purchase; and if the security to be purchased is junior to any class of outstanding senior security of the issuer which is a stock, all securities of such class shall have an asset coverage of at least 200 percent immediately after such purchase, and shall not be in arrears as to dividends.

(4) The seller of the security is not to the knowledge of the issuer an affiliated person of the issuer.

(5) Payment of the purchase price is accompanied or preceded by a written confirmation of the purchase.

(6) The purchase is made at a price not above the market value, if any, or the asset value of such security, whichever is lower, at the time of such purchase.

(7) The issuer discloses to the seller or, if the seller is acting through a broker, to the seller's broker, either prior to or at the time of purchase the approximate or estimated asset coverage per unit of the security to be purchased.

(8) No brokerage commission is paid by the issuer to any affiliated person of the issuer in connection with the purchase.

(9) The purchase is not made in a manner or on a basis which discriminates unfairly against any holders of the class of securities purchased.

(10) If the security is a stock, the issuer has, within the preceding six months, informed stockholders of its intention to purchase stock of such class by letter or report addressed to all the stockholders of such class.

(11) The issuer files with the Commission, on or before the tenth day of the calendar month following the month in which the purchase occurs, two copies of a report of purchases made during the month, together with a copy of any written solicitation to purchase securities under this rule sent or given during the month by or on behalf of the issuer to ten or more persons. Form N-23C-1 is hereby prescribed as the form to be used for such report.

(b) Notwithstanding the conditions of paragraph (a) of this section, a closed-end company may purchase fractional interests in, or fractional rights to receive, any security of which it is the issuer.

(c) This rule does not apply to purchase of securities made pursuant to section 23(c)(1) or (2) of the Act (54 Stat. 825; 15 U.S.C. 80a-23). A registered closed-end company may file an application with the Commission for an order under section 23(c)(3) of the Act permitting the purchase of any security of which it is the issuer which does not meet the conditions of this rule and which is not to be made pursuant to section 23(c)(1) or (2) of the Act.

(d) This rule relates exclusively to the requirements of section 23(c) of the Act, and the provisions hereof shall not be construed to authorize any action which contravenes any other applicable law, statutory or otherwise, or the provision of any indenture or other instrument pursuant to which securities of the issuer were issued.

[Rule N-23C-1, 7 FR 10424, Dec. 15, 1942]

CROSS REFERENCE: For interpretative release applicable to §270.23c-1, see No. 78 in tabulation, part 271 of this chapter.

§ 270.23c-2 Call and redemption of securities issued by registered closed-end companies.

(a) Notwithstanding the provisions of §270.23c-1 (Rule N-23c-1), a registered closed-end investment company may call or redeem any securities of which it is the issuer, in accordance with the terms of such securities or the charter,

indenture or other instrument pursuant to which such securities were issued: *Provided*, That, if less than all the outstanding securities of a class or series are to be called or redeemed the call or redemption shall be made by lot, on a pro rata basis, or in such other manner as will not discriminate unfairly against any holder of the securities of such class or series.

(b) A registered closed-end investment company which proposes to call or redeem any securities of which it is the issuer shall file with the Commission notice of its intention to call or redeem such securities at least 30 days prior to the date set for the call or redemption; *Provided, however*, That if notice of the call or the redemption is required to be published in a newspaper or otherwise, notice shall be given to the Commission at least 10 days in advance of the date of publication. Such notice shall be filed in triplicate and shall include (1) the title of the class of securities to be called or redeemed, (2) the date on which the securities are to be called or redeemed, (3) the applicable provisions of the governing instrument pursuant to which the securities are to be called or redeemed and, (4) if less than all the outstanding securities of a class or series are to be called or redeemed, the principal amount or number of shares and the basis upon which the securities to be called or redeemed are to be selected.

[Rule N-23C-2, 7 FR 6669, Aug. 25, 1942]

§ 270.23c-3 Repurchase offers by closed-end companies.

(a) *Definitions.* For purposes of this section:

(1) *Periodic interval* shall mean an interval of three, six, or twelve months.

(2) *Repurchase offer* shall mean an offer pursuant to this section by an investment company to repurchase common stock of which it is the issuer.

(3) *Repurchase offer amount* shall mean the amount of common stock that is the subject of a repurchase offer, expressed as a percentage of such stock outstanding on the repurchase request deadline, that an investment company offers to repurchase in a repurchase offer. The repurchase offer amount shall not be less than five percent nor more than twenty-five percent

of the common stock outstanding on a repurchase request deadline. Before each repurchase offer, the repurchase offer amount for that repurchase offer shall be determined by the directors of the company.

(4) *Repurchase payment deadline* with respect to a tender of common stock shall mean the date by which an investment company must pay securities holders for any stock repurchased. A repurchase payment deadline shall occur seven days after the repurchase pricing date applicable to such tender.

(5) *Repurchase pricing date* with respect to a tender of common stock shall mean the date on which an investment company determines the net asset value applicable to the repurchase of the securities. A repurchase pricing date shall occur no later than the fourteenth day after a repurchase request deadline, or the next business day if the fourteenth day is not a business day. In no event shall an investment company determine the net asset value applicable to the repurchase of the stock before the close of business on the repurchase request deadline.

(i) For an investment company making a repurchase offer pursuant to paragraph (b) of this section, the number of days between the repurchase request deadline and the repurchase pricing date for a repurchase offer shall be the maximum number specified by the company pursuant to paragraph (b)(2)(i)(D) of this section.

(ii) For an investment company making a repurchase offer pursuant to paragraph (c) of this section, the repurchase pricing date shall be such date as the company shall disclose to security holders in the notification pursuant to paragraph (b)(4) of this section with respect to such offer.

(iii) For purposes of paragraph (b)(1) of this section, a repurchase pricing date may be a date earlier than the date determined pursuant to paragraph (a)(5) (i) or (ii) of this section if, on or immediately following the repurchase request deadline, it appears that the use of an earlier repurchase pricing date is not likely to result in significant dilution of the net asset value of either stock that is tendered for repurchase or stock that is not tendered.

(6) *Repurchase request* shall mean the tender of common stock in response to a repurchase offer.

(7) *Repurchase request deadline* with respect to a repurchase offer shall mean the date by which an investment company must receive repurchase requests submitted by security holders in response to that offer or withdrawals or modifications of previously submitted repurchase requests. The first repurchase request deadline after the effective date of the registration statement for the common stock that is the subject of a repurchase offer, or after a shareholder vote adopting the fundamental policy specifying a company's periodic interval, whichever is later, shall occur no later than two periodic intervals thereafter.

(b) *Periodic repurchase offers.* A registered closed-end company or a business development company may repurchase common stock of which it is the issuer from the holders of the stock at periodic intervals, pursuant to repurchase offers made to all holders of the stock, *Provided that:*

(1) The company shall repurchase the stock for cash at the net asset value determined on the repurchase pricing date and shall pay the holders of the stock by the repurchase payment deadline except as provided in paragraph (b)(3) of this section. The company may deduct from the repurchase proceeds only a repurchase fee, not to exceed two percent of the proceeds, that is paid to the company and is reasonably intended to compensate the company for expenses directly related to the repurchase. A company may not condition a repurchase offer upon the tender of any minimum amount of shares.

(2)(i) The company shall repurchase the security pursuant to a fundamental policy, changeable only by a majority vote of the outstanding voting securities of the company, stating:

(A) That the company will make repurchase offers at periodic intervals pursuant to this section, as this section may be amended from time to time;

(B) The periodic intervals between repurchase request deadlines;

(C) The dates of repurchase request deadlines or the means of determining the repurchase request deadlines; and

(D) The maximum number of days between each repurchase request deadline and the next repurchase pricing date.

(ii) The company shall include a statement in its annual report to shareholders of the following:

(A) Its policy under paragraph (b)(2)(i) of this section; and

(B) With respect to repurchase offers by the company during the period covered by the annual report, the number of repurchase offers, the repurchase offer amount and the amount tendered in each repurchase offer, and the extent to which in any repurchase offer the company repurchased stock pursuant to the procedures in paragraph (b)(5) of this section.

(iii) A company shall be deemed to be making repurchase offers pursuant to a policy within paragraph (b)(2)(i) of this section if:

(A) The company makes repurchase offers to its security holders at periodic intervals and, before May 14, 1993, has disclosed in its registration statement its intention to make or consider making such repurchase offers; and

(B) The company's board of directors adopts a policy specifying the matters required by paragraph (b)(2)(i) of this section, and the periodic interval specified therein conforms generally to the frequency of the company's prior repurchase offers.

(3)(i) The company shall not suspend or postpone a repurchase offer except pursuant to a vote of a majority of the directors, including a majority of the directors who are not interested persons of the company, and only:

(A) If the repurchase would cause the company to lose its status as a regulated investment company under Subchapter M of the Internal Revenue Code [26 U.S.C. 851-860];

(B) If the repurchase would cause the stock that is the subject of the offer that is either listed on a national securities exchange or quoted in an inter-dealer quotation system of a national securities association to be neither listed on any national securities exchange nor quoted on any inter-dealer quotation system of a national securities association;

(C) For any period during which the New York Stock Exchange or any other market in which the securities

owned by the company are principally traded is closed, other than customary week-end and holiday closings, or during which trading in such market is restricted;

(D) For any period during which an emergency exists as a result of which disposal by the company of securities owned by it is not reasonably practicable, or during which it is not reasonably practicable for the company fairly to determine the value of its net assets; or

(E) For such other periods as the Commission may by order permit for the protection of security holders of the company.

(ii) If a repurchase offer is suspended or postponed, the company shall provide notice to security holders of such suspension or postponement. If the company renews the repurchase offer, the company shall send a new notification to security holders satisfying the requirements of paragraph (b)(4) of this section.

(4)(i) No less than twenty-one and no more than forty-two days before each repurchase request deadline, the company shall send to each holder of record and to each beneficial owner of the stock that is the subject of the repurchase offer a notification providing the following information:

(A) A statement that the company is offering to repurchase its securities from security holders at net asset value;

(B) Any fees applicable to such repurchase;

(C) The repurchase offer amount;

(D) The dates of the repurchase request deadline, repurchase pricing date, and repurchase payment deadline, the risk of fluctuation in net asset value between the repurchase request deadline and the repurchase pricing date, and the possibility that the company may use an earlier repurchase pricing date pursuant to paragraph (a)(5)(iii) of this section;

(E) The procedures for security holders to tender their shares and the right of the security holders to withdraw or modify their tenders until the repurchase request deadline;

(F) The procedures under which the company may repurchase such shares

on a pro rata basis pursuant to paragraph (b)(5) of this section;

(G) The circumstances in which the company may suspend or postpone a repurchase offer pursuant to paragraph (b)(3) of this section;

(H) The net asset value of the common stock computed no more than seven days before the date of the notification and the means by which security holders may ascertain the net asset value thereafter; and

(I) The market price, if any, of the common stock on the date on which such net asset value was computed, and the means by which security holders may ascertain the market price thereafter.

(ii) The company shall file three copies of the notification with the Commission within three business days after sending the notification to security holders. Those copies shall be accompanied by copies of Form N-23c-3 (§274.221 of this chapter) ("Notification of Repurchase Offer"). The format of the copies shall comply with the requirements for registration statements and reports under §270.8b-12 of this chapter.

(iii) For purposes of sending a notification to a beneficial owner pursuant to paragraph (b)(4)(i) of this section, where the company knows that shares of common stock that is the subject of a repurchase offer are held of record by a broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary powers in nominee name or otherwise, the company shall follow the procedures for transmitting materials to beneficial owners of securities that are set forth in §240.14a-13 of this chapter.

(5) If security holders tender more than the repurchase offer amount, the company may repurchase an additional amount of stock not to exceed two percent of the common stock outstanding on the repurchase request deadline. If the company determines not to repurchase more than the repurchase offer amount, or if security holders tender stock in an amount exceeding the repurchase offer amount plus two percent of the common stock outstanding on the repurchase request deadline, the company shall repurchase the shares tendered on a pro rata basis; *Provided*,

however, That this provision shall not prohibit the company from:

(i) Accepting all stock tendered by persons who own, beneficially or of record, an aggregate of not more than a specified number which is less than one hundred shares and who tender all of their stock, before prorating stock tendered by others; or

(ii) Accepting by lot stock tendered by security holders who tender all stock held by them and who, when tendering their stock, elect to have either all or none or at least a minimum amount or none accepted, if the company first accepts all stock tendered by security holders who do not so elect.

(6) The company shall permit tenders of stock for repurchase to be withdrawn or modified at any time until the repurchase request deadline but shall not permit tenders to be withdrawn or modified thereafter.

(7)(i) The current net asset value of the company's common stock shall be computed no less frequently than weekly on such day and at such specific time or times during the day that the board of directors of the company shall set.

(ii) The current net asset value of the company's common stock shall be computed daily on the five business days preceding a repurchase request deadline at such specific time or times during the day that the board of directors of the company shall set.

(iii) For purposes of section 23(b) [15 U.S.C. 80a-23(b)], the current net asset value applicable to a sale of common stock by the company shall be the net asset value next determined after receipt of an order to purchase such stock. During any period when the company is offering its common stock, the current net asset value of the common stock shall be computed no less frequently than once daily, Monday through Friday, at the specific time or times during the day that the board of directors of the company shall set, except on:

(A) Days on which changes in the value of the company's portfolio securities will not materially affect the current net asset value of the common stock;

(B) Days during which no order to purchase its common stock is received,

other than days when the net asset value would otherwise be computed pursuant to paragraph (b)(7)(i) of this section; or

(C) Customary national, local, and regional business holidays described or listed in the prospectus.

(8)(i) A majority of the directors of the investment company are not interested persons of the company, and those directors select and nominate any other disinterested directors of the company; and

(ii) Any person who acts as legal counsel for the disinterested directors of the company is an independent legal counsel.

(9) Any senior security issued by the company or other indebtedness contracted by the company either shall mature by the next repurchase pricing date or shall provide for the redemption or call of such security or the repayment of such indebtedness by the company by the next repurchase pricing date, either in whole or in part, without penalty or premium, as necessary to permit the company to repurchase securities in such repurchase offer amount as the directors of the company shall determine in compliance with the asset coverage requirements of section 18 [15 U.S.C. 80a-18] or 61 [15 U.S.C. 80a-60], as applicable.

(10)(i) From the time a company sends a notification to shareholders pursuant to paragraph (b)(4) of this section until the repurchase pricing date, a percentage of the company's assets equal to at least 100 percent of the repurchase offer amount shall consist of assets that can be sold or disposed of in the ordinary course of business, at approximately the price at which the company has valued the investment, within a period equal to the period between a repurchase request deadline and the repurchase payment deadline, or of assets that mature by the next repurchase payment deadline.

(ii) In the event that the company's assets fail to comply with the requirements in paragraph (b)(10)(i) of this section, the board of directors shall cause the company to take such action as it deems appropriate to ensure compliance.

(iii) In supervising the company's operations and portfolio management by

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the investment adviser, the company's board of directors shall adopt written procedures reasonably designed, taking into account current market conditions and the company's investment objectives, to ensure that the company's portfolio assets are sufficiently liquid so that the company can comply with its fundamental policy on repurchases, and comply with the liquidity requirements of paragraph (b)(10)(i) of this section. The board of directors shall review the overall composition of the portfolio and make and approve such changes to the procedures as the board deems necessary.

(11) The company, or any underwriter for the company, shall comply, as if the company were an open-end company, with the provisions of section 24(b) [15 U.S.C. 80a-24(b)] and rules issued thereunder with respect to any advertisement, pamphlet, circular, form letter, or other sales literature addressed to or intended for distribution to prospective investors.

(c) *Discretionary repurchase offers.* A registered closed-end company or a business development company may repurchase common stock of which it is the issuer from the holders of the stock pursuant to a repurchase offer that is not made pursuant to a fundamental policy and that is made to all holders of the stock not earlier than two years after another offer pursuant to this paragraph (c) if the company complies with the requirements of paragraphs (b) (1), (3), (4), (5), (6), (7)(ii), (8), (10)(i), and (10)(ii) of this section.

(d) *Exemption from the definition of redeemable security.* A company that makes repurchase offers pursuant to paragraph (b) or (c) of this section shall not be deemed thereby to be an issuer of redeemable securities within section 2(a)(32) [15 U.S.C. 80a-2(a)(32)].

[58 FR 19343, Apr. 14, 1993; 58 FR 29695, May 21, 1993, as amended at 66 FR 3759, Jan. 16, 2001]

§ 270.24b-1 Definitions.

(a) The term *form letter* as used in section 24(b) of the Act includes (1) one of a series of identical sales letters, and (2) any sales letter a substantial portion of which consists of a statement which is in essence identical with similar statements in sales letters sent to

25 or more persons within any period of 90 consecutive days.

(b) The term *distribution* as used in section 24(b) of the Act includes the distribution or redistribution to prospective investors of the content of any written sales literature, whether such distribution or redistribution is effected by means of written or oral representations or statements.

(c) The terms *rules and regulations* as used in section 24 (a) and (c) of the Act shall include the forms for registration of securities under the Securities Act of 1933 and the related instructions thereto.

(Sec. 19, 48 Stat. 85, as amended, sec. 319, 53 Stat. 1173; 15 U.S.C. 77s, 77sss)

[Rule N-24B-1, 6 FR 3020, June 21, 1941, as amended by 21 FR 1046, Feb. 15, 1956]

§ 270.24b-2 Filing copies of sales literature.

Copies of material filed with the Commission for the sole purpose of complying with section 24(b) of the Act either shall be accompanied by a letter of transmittal which makes appropriate references to said section or shall make such appropriate reference on the face of the material. Such material shall be submitted to the Commission in paper only, whether or not the investment company to which the material relates is otherwise required to file in electronic format.

[Rule N-24B-2, 6 FR 3020, June 21, 1941, as amended at 58 FR 14860, Mar. 18, 1993]

§ 270.24b-3 Sales literature deemed filed.

Any advertisement, pamphlet, circular, form letter or other sales literature addressed to or intended for distribution to prospective investors shall be deemed filed with the Commission for purposes of section 24(b) of the Act [15 U.S.C. 80a-24(b)] upon filing with a national securities association registered under section 15A of the Securities Exchange Act of 1934 [15 U.S.C. 78o] 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.

[53 FR 3880, Feb. 10, 1988]

§ 270.24e-1 Filing of certain prospectuses as post-effective amendments to registration statements under the Securities Act of 1933.

Section 24(e) of the Act requires that when a prospectus is revised so that it may be available for use in compliance with section 10(a)(3) of the Securities Act of 1933 for a period extending beyond the time when the previous prospectus would have ceased to be available for such use, such revised prospectus, in order to meet the requirements of section 10 of said Act, must be filed as an amendment to the registration statement under said Act and such amendment must have become effective prior to the use of the revised prospectus. Except as hereinabove provided, section 24(e) of the Act shall not be deemed to govern the times and conditions under which post-effective amendments shall be filed to registration statements under the Securities Act of 1933.

(Sec. 24, 54 Stat. 825, as amended; 15 U.S.C. 80a-24)

[20 FR 2856, Apr. 28, 1955, as amended at 62 FR 47938, Sept. 12, 1997]

§ 270.24f-2 Registration under the Securities Act of 1933 of certain investment company securities.

(a) *General.* Any face-amount certificate company, open-end management company or unit investment trust ("issuer") that is deemed to have registered an indefinite amount of securities pursuant to section 24(f) of the Act (15 U.S.C. 80a-24(f)) must not later than 90 days after the end of any fiscal year during which it has publicly offered such securities, file Form 24F-2 (17 CFR 274.24) with the Commission. Form 24F-2 must be prepared in accordance with the requirements of that form, and must be accompanied by the payment of a registration fee with respect to the securities sold during the fiscal year in reliance upon registration pursuant to section 24(f) of the Act calculated in the manner specified in section 24(f) of the Act and in the Form. An issuer that pays the registration fee more than 90 days after the end of its fiscal year must pay interest in the manner specified in section 24(f) of the Act and in Form 24F-2.

(b) *Issuer ceasing operations; mergers and other transactions.* For purposes of this section, if an issuer ceases operations, the date the issuer ceases operations will be deemed to be the end of its fiscal year. In the case of a liquidation, merger, or sale of all or substantially all of the assets ("merger") of the issuer, the issuer will be deemed to have ceased operations for the purposes of this section on the date the merger is consummated; *provided, however,* that in the case of a merger of an issuer or a series of an issuer ("Predecessor Issuer") with another issuer or a series of an issuer ("Successor Issuer"), the Predecessor Issuer will not be deemed to have ceased operations and the Successor issuer will assume the obligations, fees, and redemption credits of the Predecessor Issuer incurred pursuant to section 24(f) of the Act and § 270.24e-2 (as in effect prior to October 11, 1997; see 17 CFR part 240 to end, revised as of April 1, 1997) if the Successor Issuer:

(1) had no assets or liabilities, other than nominal assets or liabilities, and no operating history immediately prior to the merger;

(2) Acquired substantially all of the assets and assumed substantially all of the liabilities and obligations of the Predecessor Issuer; and

(3) The merger is not designed to result in the Predecessor Issuer merging with, or substantially all of its assets being acquired by, an issuer (or a series of an issuer) that would not meet the conditions of paragraph (b)(1) of this section.

(c) *Counting days.* To determine the date on which Form 24F-2 must be filed with the Commission under paragraph (a) of this section, the first day of the 90-day period is the first calendar day of the fiscal year following the fiscal year for which the Form is to be filed. If the last day of the 90-day period falls on a Saturday, Sunday, or federal holiday, the period ends on the first business day thereafter.

NOTE TO PARAGRAPH (C): For example, a Form 24F-2 for a fiscal year ending on June 30 must be filed no later than September 28. If September 28 falls on a Saturday, Sunday, the Form must be filed on the following Monday.

[62 FR 47938, Sept. 12, 1997]

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§ 270.26a-1 Payment of administrative fees to the depositor or principal underwriter of a unit investment trust; exemptive relief for separate accounts.

(a) For purposes of section 26(a)(2)(C) of the Act, payment of a fee to the depositor of or a principal underwriter for a registered unit investment trust, or to any affiliated person or agent of such depositor or underwriter (collectively, “depositor”), for bookkeeping or other administrative services provided to the trust shall be allowed the custodian or trustee (“trustee”) as an expense, *Provided*, That such fee is an amount not greater than the expenses, without profit: (1) Actually paid by such depositor directly attributable to the services provided and (2) increased by the services provided directly by such depositor, as determined in accordance with generally accepted accounting principles consistently applied.

(b) A registered separate account, and any depositor of or principal underwriter for such account, shall be exempt from the provisions of sections 26(a) and 27(c)(2) of the Act [15 U.S.C. 80a-26(a) and 80a-27(c)(2)] with respect to any variable annuity contract participating in such account to the extent necessary to permit the deduction of any fee that would be allowed a trustee as an expense as provided in paragraph (a) of this section, *Provided*, That the standard used in paragraph (a) of this section shall be applied as follows: if the separate account reserves the right to increase the fee, the fee shall not be greater than the cost of the services to be provided for one year; if the fee is guaranteed not to increase for a specified period of time, the fee shall not be greater than the average expected cost of the services to be provided during the period of the guarantee.

(Sec. 6(c), 26(a), and 38(a) (15 U.S.C. 80a-6(c), 80a-26(a), and 80a-37(a)))

[49 FR 31063, Aug. 3, 1984]

§ 270.26a-2 Exemptions from certain provisions of sections 26 and 27 for registered separate accounts and others regarding custodianship of and deduction of certain fees and charges from the assets of such accounts.

A registered separate account, and any depositor of or principal underwriter for such account, shall be exempt from the provisions of Sections 26(a) and 27(c)(2) of the Act [15 U.S.C. 80a-26(a) and 80a-27(c)(2)] with respect to any variable annuity contract participating in such account to the extent necessary:

(a) To permit the insurance company that sponsors such account to hold the assets of the separate account and to hold such assets not pursuant to a trust indenture or other such instrument;

(b) To permit any separate account registered under the Act as a unit investment trust to hold the securities of any underlying portfolio companies in uncertificated form;

(c) To permit any separate account registered under the Act as a management investment company to hold its assets in any manner permitted by section 17(f) of the Act [15 U.S.C. 80a-17(f)] or any rules thereunder; and

(d) To permit the deduction from the assets of the separate account of amounts for premium taxes imposed by any State or other governmental entity and, if the separate account is registered under the Act as an open-end management investment company, an investment advisory fee.

(Secs. 6(c) and 38(a) (15 U.S.C. 80a-6(c) and 80a-37(a), respectively))

[49 FR 31064, Aug. 3, 1984]

§ 270.27a-1 Conditions for compliance with and exemptions from certain provisions of section 27(a)(1) and section 27(h)(1) of the Act for certain registered separate accounts.

(a) A registered separate account, and any depositor of or underwriter for such account, shall with respect to any variable annuity contract participating in such account, be deemed to satisfy

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the requirements of section 27(a)(1) and section 27(h)(1) of the Act if such contract provides for a sales load which will not exceed 9 per centum of the total payments to be made thereon as of a date not later than the end of the 12th year of such payments: *Provided*, That if a contract be issued for any stipulated shorter payment period the sales load under such contract shall not exceed 9 per centum of the total payments thereunder for such period.

[36 FR 11645, June 17, 1971]

§ 270.27a-2 Exemption from section 27(a)(3) and section 27(h)(3) of the Act for certain registered separate accounts.

(a) A registered separate account, and any depositor of or underwriter for such account, shall be exempt from paragraph (3) of section 27(a) and paragraph (3) of section 27(h) of the Act: *Provided*, That with respect to any variable annuity contract participating in such account the proportionate amount of sales load deducted from any payment during the contract period shall not exceed the proportionate amount deducted from any prior payment during the contract period.

[36 FR 11645, June 17, 1971]

§ 270.27a-3 Exemption from section 27(a)(4) and section 27(h)(5) of the Act for certain registered separate accounts.

(a) A registered separate account, and any depositor of or underwriter for such account, shall be exempt from paragraph (4) of section 27(a) of the Act and paragraph (5) of section 27(h) of the Act as to payments under any variable annuity contract participating in such account which (1) is purchased in connection with a plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, as amended (Code), or the requirements for deduction of the employer's contributions under section 404(a)(2) of the Code, or (2) meets the requirements of section 403(b) of the Code, but such exemptions shall apply only to contributions or payments within the exclusion allowance for any employee under section 403(b) except as clause (3) hereof applies, or (3) permits no sales load deduction from any pay-

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ment in excess of 9 per centum of such payment.

[36 FR 11645, June 17, 1971, as amended at 36 FR 23624, Dec. 11, 1971]

§ 270.27c-1 Exemption from section 27(c)(1) and section 27(d) of the Act during annuity payment period of variable annuity contracts participating in certain registered separate accounts.

(a) A registered separate account, and any depositor of or underwriter for such account, shall, during the annuity payment period of variable annuity contracts participating in such account, be exempt from the requirement of paragraph (1) of section 27(c) of the Act that a periodic payment plan certificate be a redeemable security and from section 27(d) of the Act with respect to such contracts under which payments are being made based upon life contingencies.

(Sec. 6(c), 54 Stat. 800, 841; sec. 16, 84 Stat. 1424, 15 U.S.C. 80a-27(h))

[36 FR 11645, June 17, 1971]

§ 270.27d-1 Reserve requirements for principal underwriters and depositors to carry out the obligations to refund charges required by section 27(d) and section 27(f) of the Act.

(a)(1) Every depositor of or principal underwriter for the issuer of a periodic payment plan certificate sold subject to section 27(d) or section 27(f) of the Act or both, shall deposit and maintain funds in a segregated trust account as a reserve and as security for the purpose of assuring the refund of charges required by sections 27(d) and 27(f) of the Act.

(2) The assets of such trust account may be held as cash or invested only in one or more of (i) government securities as defined in section 2(a)(16) of the Act (except equity securities) or (ii) negotiable certificates of deposit issued by a bank, as defined in section 2(a)(5) of the Act and having capital and surplus of at least \$10 million: *Provided*, That no such investment may have a maturity of more than 5 years, no more than 50 percent of the assets may be invested in obligations having a maturity of more than 1 year, and certificates of deposit of a single issuer may

not constitute more than 10 percent of the value of the assets in the account.

(3) Any income, gains, or losses from assets allocated to such account, whether or not realized, shall be credited to or charged against such account without regard to other income, gains, or losses of the depositor or principal underwriter.

(4) The assets of such trust account may be withdrawn only as permitted by paragraph (f) of this section and shall in no event be chargeable with liabilities arising out of any aspect of the business of the depositor or principal underwriter other than assuring the ability of the depositor or principal underwriter to refund the amounts required by such sections.

(b) For purposes of this section:

(1) "Excess sales load" on any payment is that portion of the sales load in excess of 15 percent of that payment.

(2) "Monthly payment" shall be the amount of the smallest monthly installment scheduled to be paid during the life of the plan. If payments are required or permitted to be made on a basis less frequently than monthly, an equivalent monthly payment shall be the amount determined by dividing the smallest minimum payment required or permitted in a payment period by the number of months included in such period.

(3) The assets in the segregated trust account shall be valued as follows: (i) With respect to securities for which market quotations are readily available, the market value of such securities; and (ii) with respect to other securities, fair value as determined in good faith by the depositor or principal underwriter.

(c) For every periodic payment plan certificate governed by section 27(d), the depositor or principal underwriter shall deposit into the segregated trust account not less than 45 percent of the excess sales load on each of the first six monthly payments or their equivalent.

(d) For all periodic payment plan certificates governed by section 27(d) which have not been surrendered in accordance with their terms, and for which the depositor or principal underwriter may be liable for the refund of any sales load, the depositor or principal underwriter shall maintain in the

segregated trust account an amount equal to not less than 15% of the total refundable sales load on the payments made on those certificates. The depositor or principal underwriter shall also maintain in the segregated trust account such additional amounts as the Commission by order may require for the depositor or principal underwriter to carry out refund obligations pursuant to sections 27(d) and 27(f) of the Act.

(e) For every periodic payment plan certificate governed by section 27(f) of the Act, and for which the depositor or principal underwriter has no obligation to refund any excess sales load pursuant to section 27(d) of the Act, the depositor or principal underwriter shall deposit and maintain during the refund period, at least the following amounts in the segregated trust account:

(1) For certificates that require monthly payments of \$100 or less, 20 percent of the difference between the gross payments made and the net amount invested;

(2) For certificates that require monthly payments in excess of \$100 and for single payment plan certificates, 30 percent of the difference between the gross payments made and the net amount invested;

(3) For certificates with respect to which the holder is entitled to receive the greater of the refund provided by section 27(f) (of the Act) or a refund of total payments and upon which a total of at least \$1,000 has been paid, 100 percent of the difference between the gross payments made and net amount invested; and

(4) Such additional amounts as the Commission by order may require to carry out the obligation to refund charges pursuant to section 27(f) of the Act.

(f) Assets may be withdrawn from the segregated trust account by each depositor or principal underwriter:

(1) To refund excess sales load to a certificate holder exercising the right of surrender specified in section 27(d) of the Act; or

(2) To refund to a certificate holder exercising the right of withdrawal specified in section 27(f) of the Act the difference between the amount of his

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gross payments and the net amount invested; or

(3) For any other purpose: *Provided, however,* That such withdrawal shall not reduce the segregated trust account to an amount less than the sum of (i) 130 percent of the amount required to be maintained by paragraph (d) of this section, if any, and (ii) 100 percent of that amount required to be maintained by paragraph (e) of this section, if any.

(g) The minimum amounts required to be maintained by paragraphs (d) and (e) of this section shall be computed at least monthly. Any additional deposits required by paragraph (d) or (e) of this section shall be made immediately after such computation, and any withdrawals permitted by paragraph (f)(3) of this section may be made only at such time.

(h) Nothing in this section shall be construed to prohibit a depositor or principal underwriter, acting as such for two or more registered investment companies issuing periodic payment plan certificates, from combining in a single segregated trust account the reserves for such companies required by this section.

(i) The refunds required to be made to certificate holders pursuant to sections 27(d) and 27(f) (of the Act) shall be paid in cash not more than 7 days from the date the certificate is received in proper form by the custodian bank or such other paying agent as may be designated under the periodic payment plan.

(j) Each depositor or principal underwriter shall file with the Commission, within the appropriate period of time specified, an Accounting of Segregated Trust Account. Form N-27D-1 (§274.127d-1 of this chapter) is hereby prescribed as such accounting form.

[36 FR 13136, July 15, 1971, as amended at 40 FR 50712, Oct. 31, 1975]

§ 270.27d-2 Insurance company undertaking in lieu of segregated trust account.

(a) Any depositor or principal underwriter for the issuer of a periodic payment plan certificate sold subject to section 27(d) or 27(f) of the Act, or both, shall be exempt from the requirements of §270.27d-1 if an insurance

company (as defined in section 2(a)(17) of the Act) undertakes in writing to guarantee the performance of all obligations of such depositor or principal underwriter to refund charges under sections 27(d) and 27(f) of the Act and paragraph (b) of this section: *Provided, however,* That:

(1) Such insurance company at all times shall have (i) combined capital paid-up, gross paid in and contributed surplus and unassigned surplus, if a stock company, or (ii) unassigned surplus, if a mutual company, at least equal to the larger of (a) \$1 million or (b) 200 percent of the amount of the total refund obligation of the depositor or underwriter pursuant to sections 27(d) and 27(f) (of the Act) less any liability reserve established by such insurance company to meet such obligations; and

(2) Such depositor or underwriter shall file or cause to be filed with the Commission as an exhibit to the registration statement or any amendment thereto pursuant to the Securities Act of 1933 of the registered investment company issuing periodic payment plan certificates (i) a copy of such written undertaking, and any amendment thereto, (ii) an annual statement certified by a responsible officer of the insurance company indicating that at least on a monthly basis throughout its fiscal year the insurance company has met the requirements of the proviso in paragraph (a)(1) of this section, and (iii) a Statement of Financial Condition (Balance Sheet) of the insurance company certified by an independent public accountant. Such balance sheet shall be filed at least annually, within 90 days after the close of the insurance company's fiscal year.

(b) The refunds required to be made to certificate holders pursuant to sections 27(d) and 27(f) (of the Act) shall be paid in cash not more than 7 days from the date the certificate is received in proper form by the custodian bank or such other paying agent as may be designated under the periodic payment plan.

[36 FR 13137, July 15, 1971]

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§ 270.27e-1 Requirements for notice to be mailed to certain purchasers of periodic payment plan certificates sold subject to section 27(d) of the Act.

(a) The notice required by section 27(e) of the Act shall be sent by first class mail and shall be accompanied by a written instruction sheet and a return form to be used in connection with the exercise of the surrender right described in the notice. No other written or graphic material may be included with such notice.

(b) In the event that regular payments throughout the first 18 months of the plan are required less frequently than monthly, such a notice shall be mailed to any certificate holder who has missed any payment or payments equal to or greater in amount than the amount of payments which, if missed, would have required the mailing of a notice if equal monthly payments had been required during such 15- or 18-month periods.

(c) Any payment not made within 31 days after it is due shall be deemed a missed payment whether or not an equivalent payment is made subsequently by the certificate holder.

(d) In the event any such notice is not mailed prior to 15 days before the expiration of the 18th month, the certificate holder shall have 15 days from the date such notice is mailed within which to exercise the right of surrender described therein. Nothing herein contained shall require a second notice to be mailed to any certificate holder who has been mailed a notice within 30 days following 15 months after the issuance of his certificate.

(e) Notwithstanding the requirements of section 27(e) of the Act, no notice need be mailed to a certificate holder if, at the time such notice would be required to be mailed, he would not be entitled to receive any refund of sales loading upon surrender of his certificate.

(f) Form N-27E-1 is hereby prescribed to inform certificate holders of their right to surrender their certificates pursuant to section 27(d) of the Act. The text of Form N-27E-1 is as follows:

FORM N-27E-1—NOTICE TO PERIODIC PAYMENT PLAN CERTIFICATE HOLDERS OF 8 MONTHS SURRENDER RIGHTS WITH RESPECT TO PERIODIC PAYMENT PLAN CERTIFICATES²

IMPORTANT

(Date of mailing)

Re: (1) _____.

DEAR (2) _____: This notice is required to be sent to all purchasers of plan certificates pursuant to laws administered by the U.S. Securities and Exchange Commission. You should read it carefully and retain it with your financial records.

You have missed (3) _____ after your (4) _____ plan certificate was issued. Until (5) _____ you will be entitled to surrender your plan certificate and receive, in addition to the value of your account on the date your certificate is received, a refund of that portion of the sales charges you have paid in excess of 15 percent of the gross payments under your plan.

For example, if your certificate had been received for surrender (6) _____ you would have received a total of \$ (7) _____ for it (the value of your account \$ (8) _____ plus a refund of \$ (9) _____ of the sales charges you have paid). After your right expires you will be entitled to receive only the value of your account. Of course, the value of your account will vary from day to day and by the date your right expires it may be more or less than it is today.

In determining whether to exercise your right to terminate your plan, you should consider that, while the average sales charge deducted from your payments has amounted to (10) _____ percent of the total payments made, the sales charge for the remainder of the payments under the plan, if you continue the plan, will be (11) _____ and the average sales charge if you complete the plan will be (12) _____ percent. Exercising your right to terminate your plan, however, will result in a net sales charge of 15 percent of your total payments. Accordingly, if you believe you may discontinue making further payments on your plan, it would probably be to your advantage to exercise this right now.

If you wish to exercise your right to terminate your plan, you may return your certificate to (13) _____ by (14) _____ in accordance with the enclosed instructions.

Very truly yours,

____ (15) _____.

FORM N-27E-1 INSTRUCTIONS

General instructions. A. The notice shall be legible and shall be printed or typed on letter-sized paper. It shall be in modern type at least as large as 10-point modern type. All

²See the General Instructions to Form N-27E-1 in paragraph (f) of §270.27e-1 of this chapter, 36 FR 13138.

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type shall be leaded at least 2 points. Parenthetical references should be completed in accordance with the itemized instructions below and need not be underlined or bold-faced.

B. The notice shall bear the letterhead of the sender and the mailing date. An inconspicuous reference to the form number may appear on the notice.

Itemized instructions. Insert the following in the corresponding numbered spaces on Form N-27E-1:

(1) The name of the plan and the account number of the certificate holder. An additional internal recordkeeping reference may also be included at the option of the sender.

(2) The name of certificate holder or an identification such as "Investor" or "Planholder."

(3) Whichever of the following statements is appropriate: "three or more payments during the first 15 months" or "a payment after the 15th month."

(4) The name of the plan.

(5) The date of the first business day which is 18 months from the date of the issuance of the certificate or in the event such notice is not mailed prior to 15 days before the expiration of the 18th month, the date of the first business day which is 15 days from the date such notice is mailed.

(6) A date which is not more than 2 business days prior to the date of the notice.

(7) The sum of Items 8 and 9.

(8) The value of the account payable to the certificate holder if the certificate had been received on the date set forth in Item 6. In the event such certificate holder has made a partial withdrawal in accordance with the terms of his certificate, the notice may state after the first sentence in the third paragraph that "The value of your account reflects the partial withdrawal which you made previously."

(9) The amount as of the date set forth in Item 6 which is equal to that part of the excess paid for sales loading which is over 15 percent of the gross payments made by the certificate holder.

(10) Average percentage deducted for sales charges to the date set forth in Item 6.

(11) The percentage to be deducted for sales charges after the date set forth in Item 6.

If the holder has made less than 12 monthly payments, the following shall be substituted for the first sentence of the third paragraph of the notice:

"In determining whether to exercise your right to terminate your plan, you should consider that, while the sales charge deducted from your payments has amounted to _____ (10) percent of the total payments made, the sales charge for the next _____ (11a) payments will be _____ (11b) percent and the sales charge for the remainder of the payments will be _____ (11c) percent. If you

complete the plan, the average sales charge will be _____ (12) percent."

(11a) The number of payments yet to be made which are subject to the initial sales to completion.

(11b) The percentage to be deducted from sales charges from such payments.

(11c) The percentage to be deducted for sales charges from all subsequent payments.

(12) Average percentage to be deducted for sales charges from inception of the plan to completion.

(13) Name and address of custodian bank or other person authorized to accept surrendered certificates.

(14) Same date as in Item 5.

(15) The name of a responsible officer of the sender, with his title.

[36 FR 13137, July 15, 1971, as amended at 36 FR 14727, Aug. 11, 1971; 37 FR 9990, May 18, 1972]

§ 270.27f-1 Notice of right of withdrawal required to be mailed to periodic payment plan certificate holders and exemption from section 27(f) for certain periodic payment plan certificates.

(a) The notice and statement of charges (notice) required by section 27(f) of the Act shall be sent by first-class mail and shall be accompanied by a written instruction sheet and a return form to be used in connection with the exercise of the right of withdrawal described in the notice. Except for a confirmation slip, the plan certificate, and any notice required by applicable State law, no other written or graphic material may be included with such notice.

(b) The notice may be mailed by the issuer, the principal underwriter for, or the depositor of, the issuer or a record-keeping agent for the issuer if the custodian bank has delegated the mailing of the notice to any of them or the issuer has been permitted to operate without a custodian bank by Commission order.

(c) Solely for purposes of section 27(f) of the Act, the postmark date on the envelope containing the certificate shall determine whether a certificate has been surrendered within the 45-day period.

(d) Form N-27F-1 is hereby prescribed to inform certificate holders, other than holders of plans upon which the amount of sales load deducted from any payment does not exceed 9 percent of any payment and variable annuity

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contracts, of their withdrawal right pursuant to section 27(f) of the Act. The text of Form N-27F-1 is as follows:

FORM N-27F-1 NOTICE TO PERIODIC PAYMENT PLAN CERTIFICATE HOLDERS OF 45-DAY WITHDRAWAL RIGHT WITH RESPECT TO PERIODIC PAYMENT PLAN CERTIFICATES

IMPORTANT

(Date of mailing)

Re: (1) _____

Dear (2) _____: This notice is required to be sent to all purchasers of plan certificates pursuant to laws administered by the U.S. Securities and Exchange Commission. You should read it carefully and retain it with your financial records.

Of the \$ (3) _____ you have paid on your (4) _____ plan, representing (5) _____ regular monthly payments, \$ (6) _____ or (7) _____ percent has been deducted for various charges.

[The following sentence is to be included when any periodic payment remains outstanding in which the sales load charges exceed 9 percent of such payment.]

A total of \$ (8) _____ or (9) _____ percent of your first (10) _____ monthly payments will be deducted from those payments for similar charges.

Charges of \$ (11) _____ or (12) _____ percent will be deducted from each subsequent payment. You have until (13) _____ to surrender your certificate for any reason and receive a refund of all of the charges which have been deducted from your payments, and, in addition, the value of your account on the date your certificate is received.

In determining whether or not to exercise your right you should consider, among other things, the projected cost of your investment and your ability to make the scheduled payments over the life of your plan as they become due. Your plan provides for (14) _____ payments of \$ (15) _____ per (16) _____, or total payments of \$ (17) _____. If you made all of the scheduled payments over the full term of your plan, the total deductions would be \$ (18) _____ or an effective charge of (19) _____ percent of your total payments. However, if you do not complete your program, the deduction of various charges from your initial payments will result in your paying effective charges in excess of that rate. For a more complete description of the charges deducted under your plan, carefully review your prospectus.

If you wish to exercise your right of withdrawal, return your plan certificate to (20) _____ by (21) _____ in accordance with the enclosed instructions.

Very truly yours,
____ (22) _____.

INSTRUCTIONS FOR USE OF FORM N-27F-1

General instructions. A. The notice shall be legible and shall be printed or typed on letter-size paper. It shall be in modern type at least as large as 10-point modern type. All type shall be leaded at least 2 points. Parenthetical references should be completed in accordance with the Itemized Instructions below and need not be underlined or bold-faced.

B. The notice shall bear the letterhead of the sender and the mailing date. An inconspicuous reference to the form number may appear on the notice.

Itemized Instructions. Insert the following in the corresponding numbered spaces on Form N-27F-1.

(1) The name of the plan and the account number of the certificate holder. An additional internal record keeping reference may also be included at the option of the sender.

(2) The name of certificate holder or an identification such as "Investor" or "Planholder."

(3) The total amount paid by the certificate holder as of the date of the mailing.

(4) The name of the plan.

(5) The number of regular monthly payments or their equivalent made by the certificate holder as of the date of mailing.

(6) The total amount deducted for all charges from the amount paid by the certificate holder as of the date of the mailing.

(7) The percentage that the total charges set forth in Item (6) are of the total payments included under Item (3) above.

(8) The total dollar amount of all charges scheduled to be deducted from the payments made by the certificate holder before the first regular payment upon which there would be a reduction in the rate of the applicable sales charge below 9 percent of the certificate holder's gross payment.

(9) The percentage that the total charges set forth in Item 8 are of the total payments included under Instruction 8 above.

(10) The number of regular monthly payments required to be made before the rate of the sales charges deducted from such regular payment is reduced to less than 9 percent of the certificate holder's gross payment.

(11) The dollar amount of the charges to be deducted from each payment made by the certificate holder after the first regular payment upon which there would be a reduction in the rate of the applicable sales charge below 9 percent of the certificate holder's gross payment. If a portion of the payments is used for the purchase of completion insurance, the amount attributable thereto shall not be included as a charge and the following phrase shall be added: "Apart from insurance premiums based upon the amount of coverage in effect at the time of payment."

(12) The percentage that the amount of the charges set forth in Item 11 are of the

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amount of the payment included under Instruction 11 above.

(13) The date which is 45 days from the date on which the notice will be mailed.

(14) The number of monthly or quarterly payments provided for under the plan.

(15) The dollar amount of each scheduled periodic payment to be made by the certificate holder.

(16) The period (e.g., month, quarter) for which payments are scheduled to be made under the plan.

(17) The dollar amount of total payments scheduled to be made over the full term of the plan by the certificate holder.

(18) The total dollar amount of all charges scheduled to be deducted over the full term of the plan.

(19) The percentage that the total charges as set forth in Item 18 are of the total payments scheduled to be made by the certificate holder over the full term of the plan.

(20) The name and address of the custodian bank or other person authorized to accept surrendered certificates.

(21) The date which is 45 days from the date on which the notice will be mailed.

(22) The name of a responsible officer of the sender with his title.

(Secs. 27(e), 27(f), 38(a), 54 Stat. 829, 841; 15 U.S.C. 80a-27(e), 80a-27(f), 80a-37(a); sec. 16, Pub. L. 91-547, 84 Stat. 1424-1425; sec. 6(c), 15 U.S.C. 80a-6(c))

[36 FR 24055, Dec. 18, 1971, as amended at 37 FR 9990, May 18, 1972; 45 FR 17958, Mar. 20, 1980]

§ 270.27g-1 Election to be governed by section 27(h).

(a) If any registered investment company which issues or intends to issue a periodic payment plan certificate chooses to be governed by the provisions of section 27(h) (of the Act) rather than the provisions of sections 27 (a) and (d) (of the Act), it shall signify such choice by filing with the Commission as an exhibit to its registration statement filed under the Securities Act of 1933 a written Notice of Election to be so governed.

(b) Any registered investment company issuing periodic payment plan certificates which has elected, in accordance with paragraph (a) of this section, to be governed by the provisions of section 27(h) of the Act may thereafter withdraw such election by filing with the Commission, in the manner specified for filing a Notice of Election, a written Notice of Withdrawal of Election: *Provided, however,* That no such

withdrawal of election shall be made within 12 months of an election by such company under paragraph (a) of this section and, provided further that such company may not thereafter elect to be governed by the provisions of section 27(h) (of the Act) until an additional 12-month period has elapsed.

[36 FR 13139, July 15, 1971]

§ 270.27h-1 Exemptions from section 27(h)(4) for certain payments.

(a) For purposes of this section and section 27(h)(4) of the Act (1) "minimum monthly payment, or its equivalent," shall be the amount of the smallest monthly installment scheduled to be made during the life of the plan; and (2) "quarter" shall be the 3-month period which commences on the date a periodic payment plan is issued and each 3-month period thereafter.

(b) The provisions of section 27(h) (4) (of the Act) shall not apply to:

(1) That portion of the first payment on a periodic payment plan certificate which equals the amount of five minimum monthly payments: *Provided, however,* That the deduction for sales load on any other payments received during the first quarter after the issuance of the certificate may not exceed the sales load applicable to payments subsequent to the first 48 monthly payments or their equivalent;

(2) A payment or payments received in any subsequent quarter which equals the amount of three minimum monthly payments: *Provided, however,* That after an amount equivalent to three minimum monthly payments (not including payments of arrears) is received in any such subsequent quarter the deduction for sales load on any additional payments received in such quarter may not exceed the sales load applicable to payments subsequent to the first 48 monthly payments or their equivalent;

(3) Payments of arrears by a certificate holder who is delinquent in his payments; and

(4) Any payments made on a periodic payment plan certificate out of the proceeds of completion insurance received upon the death of the certificate holder.

[36 FR 13139, July 15, 1971]

§ 270.28b-1 Investment in loans partially or wholly guaranteed under the Servicemen's Readjustment Act of 1944, as amended.

(a) The term *qualified investments* as used in section 28(b) of the Investment Company Act of 1940 shall include:

(1) Any loan, any portion of which is guaranteed under Title III of the Servicemen's Readjustment Act of 1944, as amended, and which is secured by a first lien on real estate: *Provided*, The amount of the loan not so guaranteed does not exceed 66⅔ percent of the reasonable value of such real estate as determined by proper appraisal made by an appraiser designated by the Administrator of Veterans' Affairs;

(2) Any secondary loan the full amount of which is guaranteed under section 505(a) of Title III of the above mentioned act and which is secured by a second lien on real estate:

Provided, however, That any such loan shall be deemed a qualified investment only so long as (i) insurance policies are required to be procured and maintained in an amount sufficient to protect the security against the risks or hazards to which it may be subjected to the extent customary in the locality, and (ii) the loan shall remain guaranteed under Title III of the Servicemen's Readjustment Act of 1944, as amended, to the extent specified in paragraph (a) (1) or (2) of this section, as the case may be.

(b) Loans made pursuant to this section shall be valued at the original principal amount of the loan less all payments made thereon which have been applied to the reduction of such principal amount.

(Secs. 28(b), 38, 54 Stat. 832, 841; 15 U.S.C. 80a-28(b), 80a-38)

[Rule N-28B-1, 11 FR 6483, June 13, 1946]

§ 270.30a-1 Annual reports for unit investment trusts.

Every registered unit investment trust shall file an annual report on Form N-SAR with respect to each calendar year not more than sixty calendar days after the close of each year. A registered unit investment trust that has filed a registration statement with the Commission registering its securities for the first time under the Securi-

ties Act of 1933 is relieved of this reporting obligation with respect to any reporting period or portion thereof prior to the date on which that registration statement becomes effective or is withdrawn.

[68 FR 5365, Feb. 3, 2003]

§ 270.30a-2 Certification of Form N-CSR.

(a) Each report filed on Form N-CSR (§§ 249.331 and 274.128 of this chapter) by a registered management investment company must include a certification containing the information set forth in paragraph (b) of this section in the form specified in the report. Each principal executive officer or officers and principal financial officer or officers of the investment company, or persons performing similar functions, at the time of filing of the report must sign the certification.

(b) The certification included in each report specified in paragraph (a) of this section must be in the form specified in the report and consist of a statement of the certifying officer that:

(1) He or she has reviewed the report being filed;

(2) Based on his or her knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by the report;

(3) Based on his or her knowledge, the financial information included in the report, and the financial statements on which the financial information is based, fairly present in all material respects the financial condition, results of operations, changes in net assets, and cash flows (if the financial statements are required to include a statement of cash flows) of the investment company as of, and for, the periods presented in the report;

(4) He or she and the other certifying officers are responsible for establishing and maintaining disclosure controls and procedures (as such term is defined in paragraph (c) of this section) for the investment company and have:

(i) Designed such disclosure controls and procedures to ensure that material

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information relating to the investment company, including its consolidated subsidiaries, is made known to them by others within those entities, particularly during the period in which the periodic reports are being prepared;

(ii) Evaluated the effectiveness of the investment company's disclosure controls and procedures as of a date within 90 days prior to the filing date of the report (the "Evaluation Date"); and

(iii) Presented in the report their conclusions about the effectiveness of the disclosure controls and procedures based on their evaluation as of the Evaluation Date;

(5) He or she and the other certifying officers have disclosed, based on their most recent evaluation, to the investment company's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function):

(i) All significant deficiencies in the design or operation of internal controls which could adversely affect the investment company's ability to record, process, summarize, and report financial data and have identified for the investment company's auditors any material weaknesses in internal controls; and

(ii) Any fraud, whether or not material, that involves management or other employees who have a significant role in the investment company's internal controls; and

(6) He or she and the other certifying officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

(c) For purposes of this section and § 270.30a-3, the term "disclosure controls and procedures" means controls and other procedures of a registered management investment company that are designed to ensure that information required to be disclosed by the investment company on Form N-CSR is recorded, processed, summarized, and reported within the time periods specified in the Commission's rules and forms. Disclosure controls and proce-

dures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an investment company in the reports that it files or submits on Form N-CSR is accumulated and communicated to the investment company's management, including its principal executive officer or officers and principal financial officer or officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.

(d) A person required to provide the certification specified in paragraph (a) of this section may not have the certification signed on his or her behalf pursuant to a power of attorney or other form of confirming authority.

[67 FR 57295, Sept. 9, 2002, as amended at 68 FR 5365, Feb. 3, 2003]

§ 270.30a-3 Disclosure controls and procedures related to preparation of required filings.

(a) Every registered management investment company, other than a small business investment company registered on Form N-5 (§§ 239.24 and 274.5 of this chapter), must maintain disclosure controls and procedures (as defined in § 270.30a-2(c)).

(b) Within the 90-day period prior to the filing date of each report requiring certification under § 270.30a-2, an evaluation must be carried out under the supervision, and with the participation of, the registered management investment company's management, including the registered management investment company's principal executive officer or officers and principal financial officer or officers, or persons performing similar functions, of the effectiveness of the design and operation of the registered management investment company's disclosure controls and procedures.

[68 FR 5365, Feb. 3, 2003]

§ 270.30b1-1 Semi-annual report for registered management investment companies.

Every registered management investment company shall file a semi-annual report on Form N-SAR (§ 274.101 of this chapter) not more than sixty calendar days after the close of each fiscal year and fiscal second quarter. A registered

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management investment company that has filed a registration statement with the Commission registering its securities for the first time under the Securities Act of 1933 is relieved of this reporting obligation with respect to any reporting period or portion thereof prior to the date on which that registration statement becomes effective or is withdrawn.

[68 FR 5365, Feb. 3, 2003]

§ 270.30b1-2 Semi-annual report for totally-owned registered management investment company subsidiary of registered management investment company.

Notwithstanding the provisions of rules 30a-1 and 30b1-1, a registered investment company that is a totally-owned subsidiary of a registered management investment company need not file a semi-annual report on Form N-SAR if financial information with respect to that subsidiary is reported in the parent's semi-annual report on Form N-SAR.

[54 FR 10321, Mar. 13, 1989]

§ 270.30b1-3 Transition reports.

Every registered management investment company filing reports on Form N-SAR that changes its fiscal year end shall file a report on Form N-SAR not more than 60 calendar days after the later of either the close of the transition period or the date of the determination to change the fiscal year end which report shall not cover a period longer than six months.

[68 FR 5365, Feb. 3, 2003]

§ 270.30b1-4 Report of proxy voting record.

Every registered management investment company, other than a small business investment company registered on Form N-5 (§§ 239.24 and 274.5 of this chapter), shall file an annual report on Form N-PX (§274.129 of this chapter) not later than August 31 of each year, containing the registrant's proxy voting record for the most recent twelve-month period ended June 30.

[68 FR 6581, Feb. 7, 2003]

EFFECTIVE DATE NOTE: At 68 FR 6581, Feb. 7, 2003, § 270.30b1-4 was added effective April 14, 2003.

§ 270.30b2-1 Filing of reports to stockholders.

(a) Every registered management investment company shall file a report on Form N-CSR (§§ 249.331 and 274.128 of this chapter) not later than 10 days after the transmission to stockholders of any report that is required to be transmitted to stockholders under § 270.30e-1.

(b) A registered investment company shall file with the Commission a copy of every periodic or interim report or similar communication containing financial statements that is transmitted by or on behalf of such registered investment company to any class of such company's security holders and that is not required to be filed with the Commission under paragraph (a) of this section. The filing shall be made not later than 10 days after the transmission to security holders.

[68 FR 5366, Feb. 3, 2003]

§ 270.30d-1 Designation of periodic reports under the Securities Exchange Act of 1934.

A registered management investment company, other than a small business investment company registered on Form N-5 (§§ 239.24 and 274.5 of this chapter), that is required to file annual and quarterly reports pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall satisfy its requirement to file such reports by the filing, in accordance with the rules and procedures specified therefor, of reports on Form N-CSR (§§ 249.331 and 274.128 of this chapter). A registered unit investment trust or a small business investment company registered on Form N-5 that is required to file annual and quarterly reports pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 shall satisfy its requirement to file such reports by the filing, in accordance with the rules and procedures specified therefor, of reports on Form N-SAR (§§ 249.330 and 274.101 of this chapter).

[68 FR 5366, Feb. 3, 2003]

§ 270.30e-1 Reports to stockholders of management companies.

(a) Every registered management company shall transmit to each stockholder of record, at least semi-annually, a report containing the information required to be included in such reports by the company's registration statement form under the 1940 Act, except that the initial report of a newly registered company shall be made as of a date not later than the close of the fiscal year or half-year occurring on or after the date on which the company's notification of registration under the 1940 Act is filed with the Commission.

(b) If any matter was submitted during the period covered by the shareholder report to a vote of shareholders, through the solicitation of proxies or otherwise, furnish the following information:

(1) The date of the meeting and whether it was an annual or special meeting.

(2) If the meeting involved the election of directors, the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting.

(3) A brief description of each matter voted upon at the meeting and the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each matter or nominee for office.

Instruction. The solicitation of any authorization or consent (other than a proxy to vote at a shareholders' meeting) with respect to any matter shall be deemed a submission of such matter to a vote of shareholders within the meaning of this paragraph (b).

(c) Each report shall be transmitted within 60 days after the close of the period for which such report is being made.

(d) An open-end company may transmit a copy of its currently effective prospectus or Statement of Additional Information, or both, under the Securities Act, in place of any report required to be transmitted to shareholders by this section, provided that the prospectus or Statement of Additional Information, or both, include all the information that would otherwise be re-

quired to be contained in the report by this section. Such prospectus or Statement of Additional Information, or both, shall be transmitted within 60 days after the close of the period for which the report is being made.

(e) The period of time within which any report prescribed by this rule shall be transmitted may be extended by the Commission upon written request showing good cause therefor. Section 270.0-5 shall not apply to such requests.

(f)(1) A company will be considered to have transmitted a report to shareholders who share an address if:

(i) The company transmits a report to the shared address;

(ii) The company addresses the report to the shareholders as a group (for example, "ABC Fund [or Corporation] Shareholders," "Jane Doe and Household," "The Smith Family") or to each of the shareholders individually (for example, "John Doe and Richard Jones"); and

(iii) The shareholders consent in writing to delivery of one report.

(2) The company need not obtain written consent from a shareholder under paragraph (f)(1)(iii) of this section if all of the following conditions are met:

(i) The shareholder has the same last name as the other shareholders, or the company reasonably believes that the shareholders are members of the same family;

(ii) The company has transmitted a notice to the shareholder at least 60 days before the company begins to rely on this section concerning transmission of reports to that shareholder. The notice must be a separate written statement and:

(A) State that only one report will be delivered to the shared address unless the company receives contrary instructions;

(B) Include a toll-free telephone number or be accompanied by a reply form that is pre-addressed with postage provided, that the shareholder can use to notify the company that he or she wishes to receive a separate report;

(C) State the duration of the consent;

(D) Explain how a shareholder can revoke consent;

(E) State that the company will begin sending individual copies to a

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shareholder within 30 days after the company receives revocation of the shareholder's consent; and

(F) 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 (f)(2)(ii): The notice should be written in plain English. See § 230.421(d)(2) of this chapter for a discussion of plain English principles.

(iii) The company has not received the reply form or other notification indicating that the shareholder wishes to continue to receive an individual copy of the report, within 60 days after the company sent the notice; and

(iv) The company transmits the report to a post office box or to a residential street address. The company can assume a street address is a residence unless it has information that indicates it is a business.

(3) At least once a year, the company must explain to shareholders who have consented under paragraph (f)(1)(iii) or paragraph (f)(2) of this section how they can revoke their consent. The explanation must be reasonably designed to reach these investors. If a shareholder, orally or in writing, revokes consent to delivery of one report to a shared address, the company must begin sending individual copies to that shareholder within 30 days after the company receives the revocation.

(4) 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 transmitted, unless otherwise provided in this section. If the company has reason to believe that the address is a street address of a multi-unit building,

the address must include the unit number.

[46 FR 36126, July 14, 1981, as amended at 48 FR 37940, Aug. 22, 1983; 48 FR 44477, Sept. 29, 1983; 50 FR 26160, June 25, 1985; 57 FR 56836, Dec. 1, 1992; 59 FR 52700, Oct. 19, 1994; 61 FR 24657, May 15, 1996; 64 FR 62547, Nov. 16, 1999. Redesignated and amended at 66 FR 3759, Jan. 16, 2001]

§ 270.30e-2 Reports to shareholders of unit investment trusts.

(a) At least semiannually every registered unit investment trust substantially all the assets of which consist of securities issued by a management company must transmit to each shareholder of record (including record holders of periodic payment plan certificates), a report containing all the applicable information and financial statements or their equivalent, required by § 270.30d-1 to be included in reports of the management company for the same fiscal period. Each of these reports must be transmitted within the period allowed the management company by § 270.30e-1 for transmitting reports to its shareholders.

(b) Any report required by this section will be considered transmitted to a shareholder of record if the unit investment trust satisfies the conditions set forth in § 270.30e-1(f) with respect to that shareholder.

[64 FR 62547, Nov. 16, 1999. Redesignated and amended at 66 FR 3759, Jan. 16, 2001]

§ 270.30h-1 Applicability of section 16 of the Exchange Act to section 30(h).

(a) The filing of any statement prescribed under section 16(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78p(a)) shall satisfy the corresponding requirements of section 30(h) of the Act (15 U.S.C. 80a-29(h)).

(b) The rules under section 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78p) shall apply to any duty, liability or prohibition imposed with respect to a transaction involving any security of a registered closed-end company under section 30(h) of the Act (15 U.S.C. 80a-29(h)).

(c) No statements need be filed pursuant to section 30(h) of the Act (15

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U.S.C. 80a-29(h)) by an affiliated person of an investment adviser in his or her capacity as such if such person is solely an employee, other than an officer, of such investment adviser.

[67 FR 43537, June 28, 2002]

§ 270.31a-1 Records to be maintained by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies.

(a) Every registered investment company, and every underwriter, broker, dealer, or investment adviser which is a majority-owned subsidiary of such a company, shall maintain and keep current the accounts, books, and other documents relating to its business which constitute the record forming the basis for financial statements required to be filed pursuant to section 30 of the Investment Company Act of 1940 and of the auditor's certificates relating thereto.

(b) Every registered investment company shall maintain and keep current the following books, accounts, and other documents:

(1) Journals (or other records of original entry) containing an itemized daily record in detail of all purchases and sales of securities (including sales and redemptions of its own securities), all receipts and deliveries of securities (including certificate numbers if such detail is not recorded by custodian or transfer agent), all receipts and disbursements of cash and all other debits and credits. Such records shall show for each such transaction the name and quantity of securities, the unit and aggregate purchase or sale price, commission paid, the market on which effected, the trade date, the settlement date, and the name of the person through or from whom purchased or received or to whom sold or delivered. In the case of a money market fund, also identify the provider of any Demand Feature or Guarantee (as defined in § 270.2a-7(a)(8) or § 270.2a-7(a)(15) respectively) and give a brief description of the nature of the Demand Feature or Guarantee (*e.g.*, unconditional demand feature, conditional demand feature, letter of credit, or bond insurance) and, in a subsidiary portfolio investment

record, provide the complete legal name and accounting and other information (including sufficient information to calculate coupons, accruals, maturities, puts, and calls) necessary to identify, value, and account for each investment.

(2) General and auxiliary ledgers (or other records) reflecting all assets, liability, reserve, capital, income and expense accounts, including:

(i) Separate ledger accounts (or other records) reflecting the following:

- (a) Securities in transfer;
- (b) Securities in physical possession;
- (c) Securities borrowed and securities loaned;
- (d) Monies borrowed and monies loaned (together with a record of the collateral therefor and substitutions in such collateral);
- (e) Dividends and interest received;
- (f) Dividends receivable and interest accrued.

Instruction. (a) and (b) of this subdivision shall be stated in terms of securities quantities only; (c) and (d) of this subdivision shall be stated in dollar amounts and securities quantities as appropriate; (e) and (f) of this subdivision shall be stated in dollar amounts only.

(ii) Separate ledger accounts (or other records) for each portfolio security, showing (as of trade dates) (a) the quantity and unit and aggregate price for each purchase, sale, receipt, and delivery of securities and commodities for such accounts, and (b) all other debits and credits for such accounts. Securities positions and money balances in such ledger accounts (or other records) shall be brought forward periodically but not less frequently than at the end of fiscal quarters. Any portfolio security, the salability of which is conditioned, shall be so noted. A memorandum record shall be available setting forth, with respect to each portfolio security account, the amount and declaration ex-dividend, and payment dates of each dividend declared thereon.

(iii) Separate ledger accounts (or other records) for each broker-dealer bank or other person with or through which transactions in portfolio securities are effected, showing each purchase or sale of securities with or through such persons, including details

as to the date of the purchase or sale, the quantity and unit and aggregate price of such securities, and the commissions or other compensation paid to such persons. Purchases or sales effected during the same day at the same price may be aggregated.

(iv) Separate ledger accounts (or other records), which may be maintained by a transfer agent or registrar, showing for each shareholder of record of the investment company the number of shares of capital stock of the company held. In respect of share accumulation accounts (arising from periodic investment plans, dividend reinvestment plans, deposit of issued shares by the owner thereof, etc.), details shall be available as to the dates and number of shares of each accumulation, and except with respect to already issued shares deposited by the owner thereof, prices of each such accumulation.

(3) A securities record or ledger reflecting separately for each portfolio security as of trade date all "long" and "short" positions carried by the investment company for its own account and showing the location of all securities long and the off-setting position to all securities short. The record called for by this paragraph shall not be required in circumstances under which all portfolio securities are maintained by a bank or banks or a member or members of a national securities exchange as custodian under a custody agreement or as agent for such custodian.

(4) Corporate charters, certificates of incorporation or trust agreements, and by-laws, and minute books of stockholders' and directors' or trustees' meetings; and minute books of directors' or trustees' committee and advisory board or advisory committee meetings.

(5) A record of each brokerage order given by or in behalf of the investment company for, or in connection with, the purchase or sale of securities, whether executed or unexecuted. Such record shall include the name of the broker, the terms and conditions of the order and of any modification or cancellation thereof, the time of entry or cancellation, the price at which executed, and the time of receipt of report of execution. The record shall indicate the name of the person who placed the

order in behalf of the investment company.

(6) A record of all other portfolio purchases or sales showing details comparable to those prescribed in paragraph (b)(5) of this section.

(7) A record of all puts, calls, spreads, straddles, and other options in which the investment company has any direct or indirect interest or which the investment company has granted or guaranteed; and a record of any contractual commitments to purchase, sell, receive or deliver securities or other property (but not including open orders placed with broker-dealers for the purchase or sale of securities, which may be cancelled by the company on notices without penalty or cost of any kind); containing, at least, an identification of the security, the number of units involved, the option price, the date of maturity, the date of issuance, and the person to whom issued.

(8) A record of the proof of money balances in all ledger accounts (except shareholder accounts), in the form of trial balances. Such trial balances shall be prepared currently at least once a month.

(9) A record for each fiscal quarter, which shall be completed within ten days after the end of such quarter, showing specifically the basis or bases upon which the allocation of orders for the purchase and sale of portfolio securities to named brokers or dealers and the division of brokerage commissions or other compensation on such purchase and sale orders among named persons were made during such quarter. The record shall indicate the consideration given to (i) sales of shares of the investment company by brokers or dealers, (ii) the supplying of services or benefits by brokers or dealers to the investment company, its investment adviser or principal underwriter or any persons affiliated therewith, and (iii) any other considerations other than the technical qualifications of the brokers and dealers as such. The record shall show the nature of the services or benefits made available, and shall describe in detail the application of any general or specific formula or other determinant used in arriving at such allocation of purchase and sale orders

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and such division of brokerage commissions or other compensation. The record shall also include the identities of the persons responsible for the determination of such allocation and such division of brokerage commissions or other compensation.

(10) A record in the form of an appropriate memorandum identifying the person or persons, committees, or groups authorizing the purchase or sale of portfolio securities. Where an authorization is made by a committee or group, a record shall be kept of the names of its members who participated in the authorization. There shall be retained as part of the record required by this paragraph any memorandum, recommendation, or instruction supporting or authorizing the purchase or sale of portfolio securities. The requirements of this paragraph are applicable to the extent they are not met by compliance with the requirements of paragraph (b)(4) of this section.

(11) Files of all advisory material received from the investment adviser, any advisory board or advisory committee, or any other persons from whom the investment company accepts investment advice, other than material which is furnished solely through uniform publications distributed generally.

(12) The term "other records" as used in the expressions "journals (or other records of original entry)" and "ledger accounts (or other records)" shall be construed to include, where appropriate, copies of voucher checks, confirmations, or similar documents which reflect the information required by the applicable rule or rules in appropriate sequence and in permanent form, including similar records developed by the use of automatic data processing systems.

(c) Every underwriter, broker, or dealer which is a majority-owned subsidiary of a registered investment company shall maintain in the form prescribed therein such accounts, books and other documents as are required to be maintained by brokers and dealers by rule adopted under section 17 of the Securities Exchange Act of 1934.

(d) Every depositor of any registered investment company, and every principal underwriter for any registered in-

vestment company other than a closed-end investment company, shall maintain such accounts, books and other documents as are required to be maintained by brokers and dealers by rule adopted under section 17 of the Securities Exchange Act of 1934, to the extent such records are necessary or appropriate to record such person's transactions with such registered investment company.

(e) Every investment advisor which is a majority-owned subsidiary of a registered investment company shall maintain in the form prescribed therein such accounts, books and other documents as are required to be maintained by registered investment advisers by rule adopted under section 204 of the Investment Advisers Act of 1940.

(f) Every investment adviser not a majority-owned subsidiary of a registered investment company shall maintain such accounts, books and other documents as are required to be maintained by registered investment advisers by rule adopted under section 204 of the Investment Advisers Act of 1940, to the extent such records are necessary or appropriate to record such person's transactions with such registered investment company.

(Sec. 31, 54 Stat. 838; 15 U.S.C. 80a-30)

[27 FR 11993, Dec. 5, 1962, as amended at 61 FR 13983, Mar. 28, 1996; 62 FR 64986, Dec. 9, 1997]

§ 270.31a-2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies.

(a) Every registered investment company shall:

(1) Preserve permanently, the first two years in an easily accessible place, all books and records required to be made pursuant to paragraphs (1) through (4) of § 270.31a-1(b);

(2) Preserve for a period not less than six years from the end of the fiscal year in which any transactions occurred, the first two years in an easily accessible place, all books and records required to be made pursuant to paragraphs (5) through (12) or § 270.31a-1(b)

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and all vouchers, memoranda, correspondence, checkbooks, bank statements, cancelled checks, cash reconciliations, cancelled stock certificates, and all schedules evidencing and supporting each computation of net asset value of the investment company shares, and other documents required to be maintained by § 270.31a-1(a) and not enumerated in § 270.31a-1(b);

(3) Preserve for a period not less than 6 years from the end of the fiscal year last used, the first 2 years in an easily accessible place, any advertisement, pamphlet, circular, form letter or other sales literature addressed to or intended for distribution to prospective investors;

(4) Preserve for a period not less than six years, the first two years in an easily accessible place, any record of the initial determination that a director is not an interested person of the investment company, and each subsequent determination that the director is not an interested person of the investment company. These records must include any questionnaire and any other document used to determine that a director is not an interested person of the company; and

(5) Preserve for a period not less than six years, the first two years in an easily accessible place, any materials used by the disinterested directors of an investment company to determine that a person who is acting as legal counsel to those directors is an independent legal counsel.

(b) Every underwriter, broker, or dealer which is a majority-owned subsidiary of a registered investment company shall preserve for the periods prescribed therein such accounts, books and other documents as are required to be preserved by brokers and dealers by rule adopted under section 17 of the Securities Exchange Act of 1934.

(c) Every depositor of any registered investment company, and every principal underwriter for any registered investment company other than a closed-end company, shall preserve for a period of not less than six years such accounts, books and other documents as are required to be maintained by brokers and dealers by rule adopted under section 17 of the Securities Exchange Act of 1934, to the extent such records

are necessary or appropriate to record such person's transactions with such registered investment company.

(d) Every investment adviser which is a majority-owned subsidiary of a registered investment company shall preserve for the periods prescribed therein such accounts, books and other documents as are required to be preserved by investment advisers by rule adopted under section 204 of the Investment Advisers Act of 1940.

(e) Every investment adviser not a majority-owned subsidiary of a registered investment company shall preserve for a period of not less than six years such accounts, books and other documents as are required to be maintained by registered investment advisers by rule adopted under section 204 of the Investment Advisers Act of 1940, to the extent such records are necessary or appropriate to record such person's transactions with such registered investment company.

(f) *Micrographic and electronic storage permitted.*—(1) *General.* The records required to be maintained and preserved under this part may be maintained and preserved for the required time by, or on behalf of, an investment company on:

(i) Micrographic media, including microfilm, microfiche, or any similar medium; or

(ii) Electronic storage media, including any digital storage medium or system that meets the terms of this section.

(2) *General requirements.* The investment company, or person that maintains and preserves records on its behalf, must:

(i) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;

(ii) Provide promptly any of the following that the Commission (by its examiners or other representatives) or the directors of the company may request:

(A) A legible, true, and complete copy of the record in the medium and format in which it is stored;

(B) A legible, true, and complete printout of the record; and

(C) Means to access, view, and print the records; and

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(iii) Separately store, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this section.

(3) *Special requirements for electronic storage media.* In the case of records on electronic storage media, the investment company, or person that maintains and preserves records on its behalf, must establish and maintain procedures:

(i) To maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction;

(ii) To limit access to the records to properly authorized personnel, the directors of the investment company, and the Commission (including its examiners and other representatives); and

(iii) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.

(4) Notwithstanding the provisions of paragraphs (a) through (e) of this section, any record, book or other document may be destroyed in accordance with a plan previously submitted to and approved by the Commission. A plan shall be deemed to have been approved by the Commission if notice to the contrary has not been received within 90 days after submission of the plan to the Commission.

[27 FR 11994, Dec. 5, 1962, as amended at 38 FR 7797, Mar. 26, 1973; 51 FR 42209, Nov. 24, 1986; 53 FR 3880, Feb. 10, 1988; 66 FR 3759, Jan. 16, 2001; 66 FR 29228, May 30, 2001]

§270.31a-3 Records prepared or maintained by other than person required to maintain and preserve them.

(a) If the records required to be maintained and preserved pursuant to the provisions of §§270.31a-1 and 270.31a-2 are prepared or maintained by others on behalf of the person required to maintain and preserve such records, the person required to maintain and preserve such records shall obtain from such other person an agreement in writing to the effect that such records are the property of the person required to maintain and preserve such records

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and will be surrendered promptly on request.

(b) In cases where a bank or member of a national securities exchange acts as custodian, transfer agent, or dividend disbursing agent, compliance with this section shall be considered to have been met if such bank or exchange member agrees in writing to make any records relating to such service available upon request and to preserve for the periods prescribed in §270.31a-2 any such records as are required to be maintained by §270.31a-1.

(Sec. 31, 54 Stat. 838; 15 U.S.C. 80a-30)

[27 FR 11994, Dec. 5, 1962]

§270.32a-1 Exemption of certain companies from affiliation provisions of section 32(a).

A registered investment company shall be exempt from the provisions of paragraph (1) of section 32(a) of the Act (54 Stat. 838; 15 U.S.C. 80a-31), insofar as said paragraph requires that independent public accounts for such company be selected by a majority of certain members of the board of directors, if:

(a) Such company meets the conditions of paragraphs (1) to (8), inclusive, of section 10(d) of the Act (54 Stat. 807; 15 U.S.C. 80a-10); and

(b) Such accountants are selected by a majority of all the members of the board of directors.

[Rule N-32A-1, 6 FR 6631, Dec. 23, 1941]

§270.32a-2 Exemption for initial period from vote of security holders on independent public accountant for certain registered separate accounts.

(a) A registered separate account shall be exempt from the requirement under paragraph (2) of section 32(a) of the Act that selection of an independent public accountant shall have been submitted for ratification or rejection at the next succeeding annual meeting of security owners, subject to the following conditions:

(1) Such registered separate account qualifies for exemption from section 14(a) of the Act pursuant to §270.14a-2, or is exempt therefrom by order of the Commission upon application; and

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(2) The selection of such accountant shall be submitted for ratification or rejection to variable annuity contract owners at their first meeting after the effective date of the registration statement under the Securities Act of 1933, as amended (15 U.S.C. 77a et seq.), relating to contracts participating in such account: *Provided*, That such meeting shall take place within 1 year after such effective date, unless the time for the holding of such meeting shall be extended by the Commission upon written request showing good cause therefor.

(Sec. 6, 54 Stat. 800; 15 U.S.C. 80a-6)

[34 FR 12696, Aug. 5, 1969]

§ 270.32a-3 Exemption from provision of section 32(a)(1) regarding the time period during which a registered management investment company must select an independent public accountant.

(a) A registered management investment company ("company") organized in a jurisdiction that does not require it to hold regular annual meetings of its stockholders, and which does not hold a regular annual stockholders' meeting in a given fiscal year, shall be exempt in that fiscal year from the requirement of section 32(a)(1) of the Act (15 U.S.C. 80a-31(a)(1)) that the independent public accountant ("accountant") be selected at a board of directors meeting held within 30 days before or after the beginning of the fiscal year or before the annual meeting of stockholders in that year, *provided*, that such company is either:

(1) In a set of investment companies as defined in paragraph (b) of this section, if not all the members of such set have an identical fiscal year end and if such company selects an accountant at a board of directors meeting held within 90 days before or after the beginning of that fiscal year; or

(2) Not in a set of investment companies, or is in a set, each of whose members has the same fiscal year end, and if such company selects an accountant at a board of directors meeting held within 30 days before or 90 days after the beginning of that fiscal year.

(b) For purposes of this rule, "set of investment companies" means any two or more registered management invest-

ment companies that hold themselves out to investors as related companies for purposes of investment and investor services, and

(1) That have a common investment adviser or principal underwriter, or

(2) If the investment adviser or principal underwriter of one of the companies is an affiliated person as defined in section 2(a)(3)(C) of the Act (15 U.S.C. 80a-2(a)(3)(C)) of the investment adviser or principal underwriter of each of the other companies.

[54 FR 31332, July 28, 1989]

§ 270.32a-4 Independent audit committees.

A registered management investment company or a registered face-amount certificate company is exempt from the requirement of section 32(a)(2) of the Act (15 U.S.C. 80a-32(a)(2)) that the selection of the company's independent public accountant be submitted for ratification or rejection at the next succeeding annual meeting of shareholders, if:

(a) The company's board of directors has established a committee, composed solely of directors who are not interested persons of the company, that has responsibility for overseeing the fund's accounting and auditing processes ("audit committee");

(b) The company's board of directors has adopted a charter for the audit committee setting forth the committee's structure, duties, powers, and methods of operation or set forth such provisions in the fund's charter or bylaws; and

(c) The company maintains and preserves permanently in an easily accessible place a copy of the audit committee's charter and any modification to the charter.

[66 FR 3759, Jan. 16, 2001]

§ 270.34b-1 Sales literature deemed to be misleading.

Any advertisement, pamphlet, circular, form letter, or other sales literature addressed to or intended for distribution to prospective investors that is required to be filed with the Commission by section 24(b) of the Act [15 U.S.C. 80a-24(b)] ("sales literature")

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shall have omitted to state a fact necessary in order to make the statements made therein not materially misleading unless the sales literature includes the information specified in paragraphs (a) and (b) of this section.

(a) Sales literature for a money market fund shall contain the information required by paragraph (a)(7) of § 230.482 of this chapter;

(b)(1) Except as provided in paragraph (b)(3) of this section:

(i) In any sales literature that contains performance data for an investment company, include the disclosure required by paragraph (a)(6) of § 230.482 of this chapter.

(ii) In any sales literature for a money market fund:

(A) Accompany any quotation of yield or similar quotation purporting to demonstrate the income earned or distributions made by the money market fund with a quotation of current yield specified by paragraph (d)(1)(i) of § 230.482 of this chapter;

(B) Accompany any quotation of the money market fund's tax equivalent yield or tax equivalent effective yield with a quotation of current yield as specified in § 230.482(d)(1)(iii) of this chapter; and

(C) Accompany any quotation of the money market fund's total return with a quotation of the money market fund's current yield specified in paragraph (d)(1)(i) of § 230.482 of this chapter. 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.

(iii) In any sales literature for an investment company other than a money market fund that contains performance data:

(A) Include the total return information required by paragraph (e)(3) of § 230.482 of this chapter;

(B) Accompany any quotation of performance adjusted to reflect the effect of taxes (not including a quotation of tax equivalent yield or other similar quotation purporting to demonstrate

the tax equivalent yield earned or distributions made by the company) with the quotations of total return specified by paragraph (e)(4) of § 230.482 of this chapter;

(C) If the sales literature (other than sales literature for a company that is permitted under § 270.35d-1(a)(4) to use a name suggesting that the company's distributions are exempt from federal income tax or from both federal and state income tax) represents or implies that the company is managed to limit or control the effect of taxes on company performance, include the quotations of total return specified by paragraph (e)(4) of § 230.482 of this chapter;

(D) Accompany any quotation of yield or similar quotation purporting to demonstrate the income earned or distributions made by the company with a quotation of current yield specified by paragraph (e)(1) of § 230.482 of this chapter; and

(E) Accompany any quotation of tax equivalent yield or other similar quotation purporting to demonstrate the tax equivalent yield earned or distributions made by the company with a quotation of tax equivalent yield specified in paragraph (e)(2) and current yield specified by paragraph (e)(1) of § 230.482 of this chapter.

(2) Any performance data included in sales literature under paragraphs (b)(1)(ii) or (iii) of this section must meet the currentness requirements of paragraph (f) of § 230.482 of this chapter.

(3) The requirements specified in paragraph (b)(1) of this section shall not apply to any quarterly, semi-annual, or annual report to shareholders under Section 30 of the Act (15 U.S.C. 80a-29) containing performance data for a period commencing no earlier than the first day of the period covered by the report; nor shall the requirements of paragraphs (e)(3)(ii), (e)(4)(ii), and (g) of § 230.482 of this chapter apply to any such periodic report containing any other performance data.

NOTE: Sales literature (except that of a money market fund) containing a quotation of yield or tax equivalent yield must also contain the total return information. In the case of sales literature, the currentness provisions apply from the date of distribution

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and not the date of submission for publication.

[58 FR 19055, Apr. 12, 1993; 58 FR 21927, Apr. 26, 1993, as amended at 62 FR 64986, Dec. 9, 1997; 63 FR 13987, Mar. 23, 1998; 66 FR 9018, Feb. 5, 2001]

§ 270.35d-1 Investment company names.

(a) For purposes of section 35(d) of the Act (15 U.S.C. 80a-34(d)), a materially deceptive and misleading name of a Fund includes:

(1) *Names suggesting guarantee or approval by the United States government.* A name suggesting that the Fund or the securities issued by it are guaranteed, sponsored, recommended, or approved by the United States government or any United States government agency or instrumentality, including any name that uses the words “guaranteed” or “insured” or similar terms in conjunction with the words “United States” or “U.S. government.”

(2) *Names suggesting investment in certain investments or industries.* A name suggesting that the Fund focuses its investments in a particular type of investment or investments, or in investments in a particular industry or group of industries, unless:

(i) The Fund has adopted a policy to invest, under normal circumstances, at least 80% of the value of its Assets in the particular type of investments, or in investments in the particular industry or industries, suggested by the Fund’s name; and

(ii) Either the policy described in paragraph (a)(2)(i) of this section is a fundamental policy under section 8(b)(3) of the Act (15 U.S.C. 80a-8(b)(3)), or the Fund has adopted a policy to provide the Fund’s shareholders with at least 60 days prior notice of any change in the policy described in paragraph (a)(2)(i) of this section that meets the requirements of paragraph (c) of this section.

(3) *Names suggesting investment in certain countries or geographic regions.* A name suggesting that the Fund focuses its investments in a particular country or geographic region, unless:

(i) The Fund has adopted a policy to invest, under normal circumstances, at least 80% of the value of its Assets in investments that are tied economically

to the particular country or geographic region suggested by its name;

(ii) The Fund discloses in its prospectus the specific criteria used by the Fund to select these investments; and

(iii) Either the policy described in paragraph (a)(3)(i) of this section is a fundamental policy under section 8(b)(3) of the Act (15 U.S.C. 80a-8(b)(3)), or the Fund has adopted a policy to provide the Fund’s shareholders with at least 60 days prior notice of any change in the policy described in paragraph (a)(3)(i) of this section that meets the requirements of paragraph (c) of this section.

(4) *Tax-exempt Funds.* A name suggesting that the Fund’s distributions are exempt from federal income tax or from both federal and state income tax, unless the Fund has adopted a fundamental policy under section 8(b)(3) of the Act (15 U.S.C. 80a-8(b)(3)):

(i) To invest, under normal circumstances, at least 80% of the value of its Assets in investments the income from which is exempt, as applicable, from federal income tax or from both federal and state income tax; or

(ii) To invest, under normal circumstances, its Assets so that at least 80% of the income that it distributes will be exempt, as applicable, from federal income tax or from both federal and state income tax.

(b) The requirements of paragraphs (a)(2) through (a)(4) of this section apply at the time a Fund invests its Assets, except that these requirements shall not apply to any unit investment trust (as defined in section 4(2) of the Act (15 U.S.C. 80a-4(2))) that has made an initial deposit of securities prior to July 31, 2002. If, subsequent to an investment, these requirements are no longer met, the Fund’s future investments must be made in a manner that will bring the Fund into compliance with those paragraphs.

(c) A policy to provide a Fund’s shareholders with notice of a change in a Fund’s investment policy as described in paragraphs (a)(2)(ii) and (a)(3)(iii) of this section must provide that:

(1) The notice will be provided in plain English in a separate written document;

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(2) The notice will contain the following prominent statement, or similar clear and understandable statement, in bold-face type: "Important Notice Regarding Change in Investment Policy"; and

(3) The statement contained in paragraph (c)(2) of this section also will appear on the envelope in which the notice is delivered or, if the notice is delivered separately from other communications to investors, that the statement will appear either on the notice or on the envelope in which the notice is delivered.

(d) For purposes of this section:

(1) *Fund* means a registered investment company and any series of the investment company.

(2) *Assets* means net assets, plus the amount of any borrowings for investment purposes.

[66 FR 8518, Feb. 1, 2001; 66 FR 14828, Mar. 14, 2001]

§ 270.45a-1 Confidential treatment of names and addresses of dealers of registered investment company securities.

(a) Exhibits calling for the names and addresses of dealers to or through whom principal underwriters of registered investment companies are currently offering securities and which are required to be furnished with registration statements filed pursuant to section 8(b) of the Act (54 Stat. 804; 15 U.S.C. 80a-8), or periodic reports filed pursuant to section 30(a) or section 30(b)(1) of the Act (54 Stat. 836; 15 U.S.C. 80a-30), shall be the subject of confidential treatment and shall not be made available to the public, except that the Commission may by order make such exhibits available to the public if, after appropriate notice and opportunity for hearing, it finds that public disclosure of such material is necessary or appropriate in the public

interest or for the protection of investors.

(b) The exhibits referred to in paragraph (a) of this section shall be filed in quadruplicate with the Commission at the time the registration statement or periodic report is filed. Such exhibits shall be enclosed in a separate envelope marked "Confidential Treatment" and addressed to the Chairman, Securities and Executive Commission, Washington, DC. Confidential treatment requests shall be submitted in paper only, whether or not the registrant is required to file in electronic format.

[Rule N-45A-1, 7 FR 197, Jan. 10, 1942, as amended at 20 FR 7036, Sept. 20, 1955; 58 FR 14860, Mar. 18, 1993]

§ 270.57b-1 Exemption for downstream affiliates of business development companies.

Notwithstanding subsection (b)(2) of section 57 of the Act, the provisions of subsection (a) of that section shall not apply to any person (a) solely because that person is directly or indirectly controlled by a business development company or (b) solely because that person is, within the meaning of section 2(a)(3) (C) or (D) of the Act [15 U.S.C. 80a-2(a)(3) (C) or (D)], an affiliated person of a person described in (a) of this section.

[46 FR 16674, Mar. 13, 1981]

§ 270.60a-1 Exemption for certain business development companies.

Section 12(d)(1) (A) and (C) of the Act shall not apply to the acquisition by a business development company of the securities of a small business investment company licensed to do business under the Small Business Investment Act of 1958 which is operated as a wholly-owned subsidiary of the business development company.

[46 FR 16674, Mar. 13, 1981]