registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any price-related information omitted from the earlier registration statement in reliance on Rule 430A that the registrant chooses to include in the new registration statement. The information contained in such a Rule 462(b) registration statement shall be deemed to be a part of the earlier registration statement as of the date of effectiveness of the Rule 462(b) registration statement. Any opinion or consent required in the Rule 462(b) registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). *See* Rule 411(c) and Rule 439(b) under the Securities Act.

H. Eligibility to Use Incorporation by Reference.

If a registrant meets the following requirements immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Items 3 through 28 of this Form in accordance with Item 28A and Item 29 of this Form:

1. The registrant is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934.

2. The registrant has filed all reports and other materials required to be filed by Section 13(a), 14, or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials).

3. The registrant has filed an annual report required under Section 13(a) or 15(d) of the Exchange Act for its most recently completed fiscal year.

4. The registrant is not:

(a) And during the past three years neither the registrant nor any of its predecessors was:

(i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2) of this chapter);

(ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405 of this chapter); or

(iii) A registrant for an offering of penny stock as defined in Rule 3a51-1 of the Exchange Act (§ 240.3a51-1 of this chapter).

(b) Registering an offering that effectuates a business combination transaction as defined in Rule 165(f)(1) (§ 230.165(f)(1) of this chapter).

5. If a registrant is a successor registrant it shall be deemed to have satisfied conditions 1, 2, 3, and 4(b) above if:

(a) Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

(b) All predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

6. The registrant makes its periodic and current reports filed pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference pursuant to Item 28A or Item 29 of this Form readily available and accessible on a Web site maintained by or for the registrant and containing information about the registrant.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

. . . .

(Exact name of registrant as specified in governing instruments)

. . . .

(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

. . . .

(Name, address, including zip code, and telephone number, including area code, of agent for service)

Approximate date of commencement of proposed sale to the public . . . .

If any of the Securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act, check the following box: [ ]

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐ . . . .

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐ . . . .

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐ . . . .

If delivery of the prospectus is expected to be made pursuant to Rule 434, please check the following box. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of **large accelerated filer, accelerated filer** and **smaller reporting company** in Rule 12b-2 of the Exchange Act. (Check one):

[ ] Large accelerated filer

[ ]Accelerated filer

[ ] Non-accelerated filer (Do not check if a smaller reporting company)

[ ] Smaller reporting company

Calculation of Registration Fee

Title of securities being registered	Amount being registered	Proposed maximum offering price per unit	Proposed maximum aggregate offering price	Amount of registration fee

Note: Specific details relating to the fee calculation shall be furnished in notes to the table, including references to provisions of Rule 457 (§ 230.457 of this chapter) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the table. If the filing fee is calculated pursuant to Rule 457(o) under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a)

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of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine.*

PART I. INFORMATION REQUIRED IN PROSPECTUS

Item 1. Forepart of Registration Statement and Outside Front Cover Page of Prospectus.

(a) Set forth on the outside front cover page of the prospectus the information required by Item 501 of Regulation S-K (§ 229.501 of this chapter).

(b) If there are any limitations on the transferability of the securities being registered, so state on the outside front cover page of the prospectus and refer to a statement elsewhere in the prospectus as to the nature of such limitations. If there is no market for securities of the same class as those being registered, so state on the outside front cover page of the prospectus; otherwise, state elsewhere in the prospectus the nature of the market for such securities and the market price thereof as of the latest practicable date prior to the filing of the registration statement or amendment thereto.

Item 2. Inside Front and Outside Back Cover Pages of Prospectus.

Set forth on the inside front cover page of the prospectus or, where permitted, on the outside back cover page, the information required by Item 502 of Regulation S-K (§ 229.502 of this chapter).

Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges.

(a) Furnish the information required by Item 503 of Regulation S-K (§ 229.503 of this chapter).

(b) Where appropriate to a clear understanding by investors, an introductory statement shall be made in the forepart of the prospectus, in a series of short, concise paragraphs, summarizing the principal factors which make the offering speculative. Where appropriate, statements with respect to the following shall also be set forth:

(1) A comparison in percentages of the securities being offered to the public and those issued or to be issued to affiliated persons;

(2) The extent to which security holders may be liable for the acts or obligations of the registrant;

(3) Allocation of cash distributions between the public security holders and security holders who are affiliated persons;

(4) The compensation and other forms of compensation and benefits to be received, directly or indirectly, by affiliated persons, including in the case of underwriters a comparison of the aggregate compensation to be received by them with the aggregate net proceeds from the sale of the securities being registered.

Item 4. Determination of Offering Price.

Furnish the information required by Item 505 of Regulation S-K (§ 229.505 of this chapter).

Item 5. Dilution.

Furnish the information required by Item 506 of Regulation S-K (§ 229.506 of this chapter).

Item 6. Selling Security Holders.

Furnish the information required by Item 507 of Regulation S-K (§ 229.507 of this chapter).

Item 7. Plan of Distribution.

Furnish the information required by Item 508 of Regulation S-K (§ 229.508 of this chapter).

Item 8. Use of Proceeds.

Furnish the information required by Item 504 of Regulation S-K (§ 229.504 of this chapter).

Item 9. Selected Financial Data.

Furnish the information required by Item 301 of Regulation S-K (§ 229.301 of this chapter).

Instruction. If, pursuant to this Item, a statement showing the pro forma taxable operating results of the registrant is included in the registration statement, the Commission or its staff may request as supplemental information, which the registrant should be prepared to furnish promptly upon request, a schedule reconciling such pro forma results with the historical operating results (*see* Rule 3-14 of Regulation S-X).

Item 10. Management's Discussion and Analysis of Financial Condition and Results of Operations.

Furnish the information required by Item 303 of Regulation S-K (§ 229.303 of this chapter).

Item 11. General Information as to Registrant.

(a) State the name and form of organization of the registrant and the name of the State or other jurisdiction the laws of which govern with respect to the organization of the registrant.

(b) State the date on which the governing instruments became operative and the date on which they will expire. If the duration of the registrant may be sooner terminated or may be extended, outline briefly the pertinent provisions.

* Inclusion of this paragraph is optional. See Rule 473.

(c) If the registrant is not a corporation state briefly the provisions of the governing instruments with respect to the holding of annual or other meetings of security holders. If the governing instruments do not provide for such meetings state the policy or proposed policy of the registrant with respect to holding annual or other meetings of security holders.

(d) If the registrant was organized within the last five years, give the full names of all promoters and indicate all positions and offices with the registrant now held or intended to be held by each such promoter.

Instruction. If any person named as a promoter is no longer connected with the registrant in any capacity, so state.

Item 12. Policy with Respect to Certain Activities.

Describe the policy of the registrant with respect to each of the following types of activities, indicating whether such policy may be changed by the officers and directors without a vote of security holders. Indicate the extent to which the registrant proposes to engage in such activities and the extent to which it has engaged in such activities during the past three years.

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(a) To issue senior securities.

(b) To borrow money.

(c) To make loans to other persons.

(d) To invest in the securities of other issuers for the purpose of exercising control.

(e) To underwrite securities of other issuers.

(f) To engage in the purchase and sale (or turnover) of investments.

(g) To offer securities in exchange for property.

(h) To repurchase or otherwise reacquire its shares or other securities.

(i) To make annual or other reports to security holders, indicating the nature and scope of such reports and whether they will contain financial statements certified by independent public accountants.

Instructions.

1. The policy or proposed policy of the registrant with respect to each activity shall be described separately. If the registrant does not propose to engage in a particular activity, a specific statement to that effect shall be made. The information shall be given in such manner and detail as will be meaningful to investors.

2. For the purpose of (c), the purchasing of a portion of publicly distributed bonds, debentures or other securities, whether or not the purchase was made upon the original issuance of the securities, is not to be considered the making of a loan by the registrant.

Item 13. Investment Policies of Registrant.

Describe the policy of the registrant with respect to investing in each of the following types of investments, indicating whether such policy may be changed by the directors without a vote of security holders, the percentage of assets which the registrant may invest in any one type of investment and, in the case of securities, the percentage of securities of any one issuer which the registrant may acquire and the principles and procedures the registrant will employ in connection with the acquisition of assets.

(a) *Investments in real estate or interests in real estate.*

Instructions.

1. Indicate the geographic area or areas in which the registrant proposes to acquire real estate or interests in real estate.

2. The types of real estate and interests in real estate in which the registrant may invest shall be indicated; for example, office buildings, apartment buildings, shopping centers, industrial and commercial properties, special purpose buildings and undeveloped acreage.

3. The method or proposed method of operating and financing the registrant's real estate shall be briefly described. Indicate any limitations on the number or amount of mortgages which may be placed on any one piece of property.

4. The answer to this item shall be such as will be appropriate in view of the nature of the registrant's business, its history and its experience and the proposed nature of its business and activities.

5. Include a specific statement as to whether or not it is the registrant's policy to acquire assets primarily for possible capital gain or primarily for income.

6. State the registrant's policy as to the amount or percentage of assets which will be invested in any specific property.

7. Include a statement with respect to any other material policy with respect to real estate activities.

(b) *Investments in real estate mortgages.*

Instructions.

1. Indicate the types of mortgages; for example, first or second mortgages and whether such mortgages are to be insured by the Federal Housing Administration or guaranteed by the Veterans Administration or otherwise guaranteed or insured, and the proportion of assets which may be invested in each type of mortgage or in any single mortgage.

2. Include a description of each type of mortgage activity in which the registrant intends to engage such as originating, servicing and warehousing of mortgages and its portfolio turnover policy.

3. Indicate the types of properties subject to mortgages in which the registrant invests or proposes to invest; for example, single family dwellings, apartment buildings, office buildings, bowling alleys, commercial properties and unimproved land.

(c) *Securities of or interests in persons primarily engaged in real estate activities.*

Instructions.

1. Indicate separately the types of securities of or interests in persons engaged in real estate activities (for example, common stock, interests in real estate investment trusts, partnership interests, joint venture interests) in which the registrant may invest and the proportion of its assets which may be invested in each such type of security or interest.

2. Indicate the primary activities of persons in which the registrant will invest such as mortgage sales, investment in office buildings or investments in undeveloped acreage and the investment policies of such persons.

3. State the criteria followed in the purchase of such securities and interests (for example, securities listed on a national securities exchange, minimum net income requirements, period of operation of issuer).

(d) *Investments in other securities.*

Instructions.

1. Indicate the type of securities (for example, bonds, preferred stocks, common stocks) and the industry groups in which the registrant may invest and the percentage of its assets which it may invest in each such type or industry group.

2. Instruction 3 to paragraph (c) shall also apply to this paragraph.

Item 14. Description of Real Estate.

(a) State the location and describe the general character of all materially important real properties now held or intended to be acquired by or leased to the registrant or its subsidiaries. Include information as to the present or proposed use of such properties and their suitability and adequacy for such use. Properties not yet acquired shall be identified as such.

(b) State the nature of the registrant's or subsidiary's title to, or other interest in such properties and the nature and amount of all material mortgages, or other liens or encumbrances against such properties. Set forth briefly the current principal amount of each such material encumbrance, its interest and amortization provisions, its pre-payment provisions and its maturity date and balance to be due at maturity assuming no payment has been made on principal in advance of its due date.

(c) Outline briefly the principal terms of any lease of any of such properties or any option or contract to purchase or sell any of such properties.

(d) Outline briefly any proposed program for the renovation, improvement or development of such properties, including the estimated cost thereof and the method of financing to be used. If there are no present plans for the improvement or development of any unimproved or undeveloped property, so state and indicate the purpose for which the property is to be held or acquired.

(e) Describe the general competitive conditions to which the properties described above are or may be subject.

Instructions.

1. What is required is information essential to an investor's understanding of the securities being registered. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and should not be given. If the registrant has a number of properties, the information may be given in tabular form to the extent that it is practicable to do so.

2. The information shall be furnished separately as to each property the book value of which amounts to ten percent or more of the total assets of the registrant and its consolidated subsidiaries or the gross revenue from which for the last fiscal year amounted to ten percent or more of the aggregate gross revenues of the registrant and its consolidated subsidiaries for the registrant's last fiscal year. With respect to other properties the information shall be given by such classes or groups and in such detail as will reasonably convey the information required.

3. Include a statement as to whether, in the opinion of the management of the registrant, the properties are adequately covered by insurance.

Item 15. Operating Data.

Furnish the following information with respect to each improved property which is separately described in answer to Item 14.

(a) Occupancy rate expressed as a percentage for each of the last five years.

(b) Number of tenants occupying ten percent or more of the rentable square footage and principal nature of business of such tenant.

(c) Principal business, occupations and professions carried on in, or from the building.

(d) The principal provisions of the leases between the tenants referred to in (b) above including, but not limited to: rental per annum, expiration date, and renewal options.

(e) The average effective annual rental per square foot or unit for each of the last five years prior to the date of filing.

(f) Schedule of the lease expirations for each of the ten years starting with the year in which the registration statement is filed, stating (i) the number of tenants whose leases will expire, (ii) the total area in square feet covered by such leases,

(iii) the annual rental represented by such leases, and (iv) the percentage of gross annual rental represented by such leases.

(g) Each of the properties and components thereof upon which depreciation is taken, setting forth the (i) Federal tax basis, (ii) rate, (iii) method, and (iv) life claimed with respect to such property or component thereof for purposes of depreciation.

(h) The realty tax rate, annual realty taxes and estimated taxes on any proposed improvements.

Instruction. Instruction 3 to Item 14 shall apply to this Item.

Item 16. Tax Treatment of Registrant and Its Security Holders.

(a) Briefly describe the material aspects of the tax treatment of registrant under Federal income tax laws and the Federal tax treatment of registrant's security holders with respect to distributions by registrant, including the tax treatment of gains from the sale of securities or property and distributions in excess of annual net income.

(b) If any of the securities being registered are to be offered in exchange for other securities or property indicate the tax effect upon such exchanges of the Federal income tax laws.

Item 17. Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters.

Furnish the information required by Item 201 of Regulation S-K (§ 229.201 of this chapter).

Item 18. Description of Registrant's Securities.

Furnish the information required by Item 202 of Regulation S-K (§ 229.202 of this chapter).

Item 19. Legal Proceedings.

Furnish the information required by Item 103 of the Regulation S-K (§ 229.103 of this chapter).

Item 20. Security Ownership of Certain Beneficial Owners and Management.

Furnish the information required by Item 403 of Regulation S-K (§ 229.403 of this chapter).

Item 21. Directors and Executive Officers.

Furnish the information required by Item 401 of Regulation S-K (§ 229.401 of this chapter).

Item 22. Executive Compensation.

Furnish the information required by Item 402 of Regulation S-K (§ 229.402 of this chapter), and the information required by paragraph (e)(4) of Item 407 of Regulation S-K (§ 229.407(e)(4) of this chapter).

Item 23. Certain Relationships and Related Transactions and Director Independence.

Furnish the information required by Items 404 and 407(a) of Regulation S-K (§§ 229.404 and 229.407(a) of this chapter). If a transaction involves the purchase or sale of assets by or to the registrant, otherwise than in the ordinary course of business, state the cost of the assets to the purchaser and, if acquired by the seller within two years prior to the transaction, the cost thereof to the seller. Furthermore, if the assets have been acquired by the seller within five years prior to the transaction, disclose the aggregate depreciation claimed by the seller for federal income tax purposes. Indicate the principle followed in determining the registrant's purchase or sale price and the name of the person making such determination.

Item 24. Selection, Management and Custody of Registrant's Investments.

(a) Describe the arrangements made or proposed to be made by the registrant with respect to the following:

(1) Management of the registrant's real estate, including arranging for purchases, sales, leases, maintenance and insurance.

(2) The purchase, sale and servicing of mortgages for the registrant.

(3) Investment advisory services.

(b) If any of the services specified in paragraph (a) are performed or to be performed by any affiliated person, furnish the following information as to such person:

(1) Name and address.

(2) Nature of principal business.

(3) Principal occupations during the last five years.

(4) Nature of all existing direct or indirect material interests in or business connections with the registrant or any of its other affiliated persons.

(5) Nature of all services rendered to the registrant and its subsidiaries.

(6) Aggregate compensation received from the registrant and its subsidiaries, directly or indirectly, during the registrant's last fiscal year and the capacities in which such remuneration was received.

Instructions.

1. If any person whose principal occupations during the last five years are described in answer to paragraph (b)(3) is a corporation or other organization, include the name and principal occupations during the last five years of each principal executive officer of such corporation or other organization.

2. The information required by paragraph (b) need not be furnished with respect to any director or officer of the registrant who performs the services specified solely in his capacity

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as such director or officer and who receives no additional compensation directly or indirectly for such services.

Item 25. Policies with Respect to Certain Transactions.

Outline briefly any provisions of the governing instruments limiting any director, officer, security holder or affiliate of the registrant, or any other person in the following respects. If the governing instruments contain no such provisions, describe the policy of the registrant with respect to such matters.

(a) Having any direct or indirect pecuniary interest in any investment to be acquired or disposed of by the registrant or any of its subsidiaries or in any transaction to which the registrant or any of its subsidiaries is a party or has an interest.

(b) Engaging for their own account in business activities of the types conducted or to be conducted by the registrant and its subsidiaries.

Item 26. Limitations of Liability.

Outline briefly the principal provisions of the governing instruments or of any contract or arrangement to which the registrant or a subsidiary is a party with respect to limitations on the liability of affiliated persons or any of their directors, officers or employees.

Instructions. If any of such provisions are broad enough to cover liability arising under the Securities Act of 1933, the effect of Section 14 of that Act upon such provisions should be indicated.

Item 27. Financial Statements and Information.

Include in the prospectus the financial statements required by Regulation S-X, the supplementary financial information required in Item 302 of Regulation S-K (§ 229.302 of this chapter) and the information concerning changes in and disagreements with accountants on accounting and financial disclosure required by Item 304 of Regulation S-K (§ 229.304 of this chapter). Although all schedules required by Regulation S-X are to be included in the registration statement, all such schedules other than those prepared in accordance with Rules 12-12, 12-28, and 12-29 of Regulation S-X (§§ 210.12-12, 12-28, and 12-29 of this chapter) may be omitted from the prospectus. A smaller reporting company may provide the information in Article 8 of Regulation S-X (§ 210.8 of this chapter) in lieu of the financial information required by other parts of Regulation S-X, and need not provide the supplementary financial information required in Item 302 of Regulation S-K.

Item 28. Interests of Named Experts and Counsel.

Furnish the information required by Item 509 of Regulation S-K (§ 229.509 of this chapter).

Item 28A. Material Changes.

If the registrant elects to incorporate information by reference pursuant to General Instruction H, describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest Form 10-K and which have not been described in a Form 10-Q or Form 8-K filed under the Exchange Act.

Item 29. Incorporation of Certain Information by Reference.

If the registrant elects to incorporate information by reference pursuant to General Instruction H:

(a) It must specifically incorporate by reference into the prospectus contained in the registration statement the following documents by means of a statement to that effect in the prospectus listing all such documents:

(1) The registrant's latest annual report on Form 10-K filed pursuant to Section 13(a) or Section 15(d) of the Exchange Act which contains financial statements for the registrant's latest fiscal year for which a Form 10-K was required to have been filed; and

(2) All other reports filed pursuant to Section 13(a) or Section 15(d) of the Exchange Actor proxy or information statements filed pursuant to Section 14 of the Exchange Act since the end of the fiscal year covered by the annual report referred to in paragraph (a)(1) of this Item.

Note to Item 29(a). Attention is directed to Rule 439 (§ 230.439 of this chapter) regarding consent to use of material incorporated by reference.

(b)(1) The registrant must state:

(i) That it will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the reports or documents that have been incorporated by reference in the prospectus contained in the registration statement but not delivered with the prospectus;

(ii) That it will provide these reports or documents upon written or oral request;

(iii) That it will provide these reports or documents at no cost to the requester;

(iv) The name, address, telephone number, and e-mail address, if any, to which the request for these reports or documents must be made; and

(v) The registrant's Web site address, including the uniform resource locator (URL) where the incorporated reports and other documents may be accessed.

Note to Item 29(b)(1). If the registrant sends any of the information that is incorporated by reference in the prospectus contained in the registration statement to security holders, it also must send any exhibits that are specifically incorporated by reference in that information.

(2) The registrant must:

(i) Identify the reports and other information that it files with the SEC; and

(ii) State that the public may read and copy any materials it files with the SEC at the SEC's Public Reference Room at 100 F Street, NE, Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If the registrant is an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (*http://www.sec.gov*).

Item 29A. Disclosure of Commission Position on Indemnification for Securities Act Liabilities.

Furnish the information required by Item 510 of Regulation S-K (§ 229.510 of this chapter).

Item 30. Quantitative and Qualitative Disclosures About Market Risk.

Furnish the information required by Item 305 of Regulation S-K (§ 229.305 of this chapter).

PART II. INFORMATION NOT REQUIRED IN PROSPECTUS

Item 31. Other Expenses of Issuance and Distribution.

Furnish the information required by Item 511 of Regulation S-K (§ 229.511 of this chapter).

Item 32. Sales to Special Parties.

Name each person or specify each class of persons (other than underwriters or dealers, as such) to whom any securities have been sold within the past six months, or are to be sold, by the registrant or any security holder for whose account any of the securities being registered are to be offered, at a price varying from that at which securities of the same class are to be offered to the general public pursuant to this registration. State the consideration given or to be given by each such person or class.

Item 33. Recent Sales of Unregistered Securities.

Furnish the information required by Item 701 of Regulation S-K (§ 229.701 of this chapter).

Item 34. Indemnification of Directors and Officers.

Furnish the information required by Item 702 of Regulation S-K (§ 229.702 of this chapter).

Item 35. Treatment of Proceeds from Stock Being Registered.

If the capital shares are being registered hereunder and any portion of the consideration to be received by the registrant for such shares is to be credited to an account other than the appropriate capital share account, state to what other account such portion is to be credited and the estimated amount per share. If the consideration from the sale of par value shares is less than par value, state the amount per share involved and its treatment in the accounts.

Item 36. Financial Statements and Exhibits.

(a) List all financial statements filed as part of the registration statement, indicating those included in the prospectus.

(b) Furnish the exhibits required by Item 601 of Regulation S-K (§ 229.601 of this chapter).

Item 37. Undertakings.

Furnish the information required by Item 512 of Regulation S-K (§ 229.512 of this chapter).

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-11 and has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of . . . ., State of . . . ., on . . . ., 19. . . . . .

(Issuer) . . . .

By (Signature and Title) . . . .

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

(Signature) . . . .

(Title) . . . .

(Date) . . . .

Instructions. 1. The registration statement shall be signed by the registrant, its principal executive officer or

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officers, its principal financial officer, its controller or principal accounting officer, and by at least a majority of the board of directors or persons performing similar functions. If the registrant is a foreign person, the registration statement shall also be signed by its authorized representative in the United States. Where the registrant is a limited partnership, the registration statement shall be signed by a majority of the board of directors of any corporate general partner signing the registration statement.

2. The name of each person who signs the registration statement shall be typed or printed beneath his signature. Any person who occupies more than one of the specified positions shall indicate each capacity in which he signs the registration statement. Attention is directed to Rule 402 concerning manual signatures and Item 601 of Regulation S-K concerning signatures pursuant to powers of attorney.

[Amended in Release No. 33-8909, effective April 15, 2008, 73 F.R. 20512.]

[¶ 8471] Form S-20

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-20

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

. . . .
(Exact name of registrant as specified in its charter)

. . . .
(Address, including zip code, and telephone number, including area code, or registrant's principal executive offices)

. . . .
(Name, address, including zip code, and telephone number, including area code, of agent for service)

Approximate date of commencement of proposed sale to public . . . .

Calculation of Registration Fee

Title of securities to be registered	*Amount to be registered*	*Proposed maximum fee or charge per unit*	*Proposed maximum aggregate fee or charge*	*Amount of registration fee*

Note: Specific details relating to the fee calculation shall be furnished in notes to the table, including references to provisions of Rule 457 (§ 230.457 of this chapter) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the table.

GENERAL INSTRUCTIONS

I. Eligibility Requirement for Use of Form S-20.

This form may be used for registration of standardized options under the Securities Act of 1933 ("Securities Act") provided that the registrant undertakes not to issue, clear, guarantee or accept an option registered on Form S-20 unless there is a definitive options disclosure document meeting the requirements of Rule 9b-1 of the Securities Exchange Act of 1934 with respect to the options class.

II. Application of General Rules and Regulations.

A. Attention is directed to the General Rules and Regulations under the Securities Act, particularly those comprising Regulation C [17 CFR 230.400 to 230.494] thereunder. That Regulation contains general requirements regarding the preparation and filing of the registration statement.

B. Attention is directed to Regulation S-K [17 CFR Part 229] for the requirements applicable to the content of the nonfinancial statement portions of registration statements under the Securities Act. Where this Form directs the registration to furnish information required by Regulation S-K and the item of Regulation S-K so provides, information need only be furnished to the extent appropriate.

PART I

INFORMATION REQUIRED IN PROSPECTUS

Item 1. Forepart of the Registration Statement and Outside Front Cover Page of Prospectus.

Set forth in the forepart of the registration statement and on the outside front cover page of the prospectus the information required by Item 501 of Regulation S-K [§ 229.501 of this chapter]. In the case of a foreign registrant, the information required by Item 101(g) of Regulation S-K [§ 229.101(g) of this chapter] also shall be included. In addition, the outside front cover page of the prospectus shall contain a statement to the effect that (1) an options disclosure document containing a description of the risks of options transactions is required to be furnished to option investors and stating from whom such a document may be obtained; (2) the financial statements and certain additional information required by Part II of the registration statement, other than exhibits, can be obtained without charge upon request from the registrant; and (3) the exhibits required by Part II of the registration statement can be in-

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(b) 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 Securities Exchange Act of 1934, as amended, shall be numbered sequentially (in addition to any internal numbering which otherwise may be present) by handwritten, typed, printed, or other legible form of notation from the 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.

(c) Each document filed shall contain an exhibit index, which should immediately precede the exhibits filed with such document. The index shall list each exhibit filed and identify by handwritten, typed, printed, or other legible form of notation in the manually signed original, the page number in the sequential numbering system described in paragraph (b) of this section where such exhibit can be found or where it is stated that the exhibit is incorporated by reference. Further, the first page of the manually signed document shall list the page in the filing where the exhibit index is located.

[As last amended in Release No. 34-17095, effective October 6, 1980, 45 F.R. 58822.]

[¶ 20,031] Non-disclosure of Information Obtained in Examinations and Investigations

Reg. § 240.0-4. Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to Section 17(a) or 21(a) shall, unless made a matter of public record, be deemed confidential. Except as provided by 17 CFR 203.2, officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer or employee of the Commission, unless the Commission or the General Counsel, pursuant to delegated authority, authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this rule. Any officer or employee who is served with such a subpoena shall promptly advise the General Counsel of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear upon the desirability of making available such information or documents.

[As last amended in Release No. 34-25683, May 10, 1988, 53 F.R. 17458.]

[¶ 20,041] Reference to Rule by Obsolete Designation

Reg. § 240.0-5. Wherever in any rule, form, or instruction book specific reference is made to a rule by number or other designation which is now obsolete, such reference shall be deemed to be made to the corresponding rule or rules in these existing General Rules and Regulations.

[As adopted in Release No. 34-1887, September 10, 1938, 13 F.R. 8177.]

[¶ 20,051] Disclosure Detrimental to the National Defense or Foreign Policy

Reg. § 240.0-6. (a) Any requirement to the contrary notwithstanding, no registration statement, report, proxy statement or other document filed with the Commission or any securities exchange shall contain any document or information which, pursuant to Executive order, has been classified by an appropriate department or agency of the United States for protection in the interests of national defense or foreign policy.

(b) Where a document or information is omitted pursuant to paragraph (a) of this section, there shall be filed, in lieu of such document or information, a statement from an appropriate department or agency of the United States to the effect that such document or information has been classified or that the status thereof is awaiting determination. Where a document is omitted pursuant to paragraph (a) of this section, but information relating to the subject matter of such document is nevertheless included in material filed with the Commission pursuant to a determination of an appropriate department or agency of the United States that disclosure of such information would not be contrary to the interests of national defense or foreign policy, a statement from such department or agency to that effect shall be submitted for the information of the Commission. A registrant may rely upon any such statement in filing or omitting any document or information to which the statement relates.

(c) The Commission may protect any information in its possession which may require classification in the interests of national defense or foreign policy pending determination by an appropriate department or agency as to whether such information should be classified.

(d) It shall be the duty of the registrant to submit the documents or information referred to in paragraph (a) of this section to the appropriate department or agency of the United States prior to filing them with the Commission and to obtain and submit to the Commission, at the time of filing such

documents or information, or in lieu thereof, as the case may be, the statements from such department or agency required by paragraph (b) of this section. All such statements shall be in writing.

[As last amended in Release No. 34-8313, May 14, 1968, 33 F.R. 7682.]

[¶ 20,071] Application of Rules to Registered Broker-Dealers

Reg. § 240.0-8. Any provisions of any rule or regulation under the Act which prohibits any act, practice, or course of business by any person if the mails or any means or instrumentality of interstate commerce are used in connection therewith, shall also prohibit any such act, practice, or course of business by any broker or dealer registered pursuant to Section 15(b) of the Act, or any person acting on behalf of such a broker or dealer, irrespective of any use of the mails or by any means or instrumentality of interstate commerce.

[As adopted in Release No. 34-7406, September 3, 1964, 29 F.R. 12554.]

[¶ 20,081] Payment of Fees

Reg. § 240.0-9. All payment of fees shall be made by wire transfer, or by certified check, bank cashier's check, United States postal money order, or bank money order payable to the Securities and Exchange Commission, omitting the name or title of any official of the Commission. Payment of filing fees required by this section shall be made in accordance with the directions set forth in § 202.3a of this chapter.

[As last amended in Release No. 33-8885, effective February 1, 2008, 73 F.R. 6011.]

[¶ 20,091] Small Entities Under the Securities Exchange Act for Purposes of the Regulatory Flexibility Act

Reg. § 240.0-10. For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act [5 U.S.C. § 601 *et seq.*], and unless otherwise defined for purposes of a particular rulemaking proceeding, the term "small business" or "small organization" shall—

(a) When used with reference to an "issuer" or a "person," other than an investment company, mean an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less;

(b) When used with reference to an "issuer" or "person" that is an investment company, have the meaning ascribed to those terms by § 270.0-10 of this chapter;

(c) When used with reference to a broker or dealer, mean a broker or dealer that:

(1) Had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a-5(d) or, if not required to file such statements, a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and

(2) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section;

(d) When used with reference to a clearing agency, mean a clearing agency that:

(1) Compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year (or in the time that it has been in business, if shorter);

(2) Had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and

(3) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section;

(e) When used with reference to an exchange, mean any exchange that:

(1) Has been exempted from the reporting requirements of § 242.601 of this chapter; and

(2) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section;

(f) When used with reference to a municipal securities dealer that is a bank (including any separately identifiable department or division of a bank), mean any such municipal securities dealer that:

(1) Had, or is a department of a bank that had, total assets of less than $10 million dollars at all times during the preceding fiscal year (or in the time that it has been in business, if shorter);

(2) Had an average monthly volume of municipal securities transactions in the preceding fiscal year (or in the time it has been registered, if shorter) of less than $100,000; and

(3) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section;

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(g) When used with reference to a securities information processor, mean a securities information processor that:

(1) Had gross revenues of less than $10 million during the preceding fiscal year (or in the time it has been in business, if shorter);

(2) Provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and

(3) Is not affiliated with any person (other than a natural person) that is not a small business or small organization under this section; and

(h) When used with reference to a transfer agent, mean a transfer agent that:

(1) Received less than 500 items for transfer and less than 500 items for processing during the preceding six months (or in the time that it has been in business, if shorter);

(2) Transferred items only of issuers that would be deemed "small businesses" or "small organizations" as defined in this section; and

(3) Maintained master shareholder files that in the aggregate contained less than 1,000 shareholder accounts or was the named transfer agent for less than 1,000 shareholder accounts at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and

(4) Is not affiliated with any person (other than a natural person) that is not a small business or small organization under this section.

(i) For purposes of paragraph (c) of this section, a broker or dealer is affiliated with another person if:

(1) Such broker or dealer controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25 percent or more of the voting securities of such other person or is entitled to receive 25 percent or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person; or

(2) Such broker or dealer introduces transactions in securities, other than registered investment company securities or interests or participations in insurance company separate accounts, to such other person, or introduces accounts of customers or other brokers or dealers, other than accounts that hold only registered investment company securities or interests or participations in insurance company separate accounts, to such other person that carries such accounts on a fully disclosed basis.

(j) For purposes of paragraphs (d) through (h) of this section, a person is affiliated with another person if that person controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25 percent or more of the voting securities of such other person or is entitled to receive 25 percent or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person.

(k) For purposes of paragraph (g) of this section, "interrogation device" shall refer to any device that may be used to read or receive securities information, including quotations, indications of interest, last sale data and transaction reports, and shall include proprietary terminals or personal computers that receive securities information via computer-to-computer interfaces or gateway access.

[As last amended in Release No. 34-51808, effective August 29, 2005, 70 F.R. 37496.]

[¶ 20,092] Filing Fees for Certain Acquisitions, Dispositions and Similar Transactions

Reg. § 240.0-11. (a) *General.*

(1) At the time of filing a disclosure document described in paragraphs (b) through (d) of this section relating to certain acquisitions, dispositions, business combinations, consolidations or similar transactions, the person filing the specified document shall pay a fee payable to the Commission to be calculated as set forth in paragraph (b) through (d) of this section.

(2) Only one fee per transaction is required to be paid. A required fee shall be reduced in an amount equal to any fee paid with respect to such transaction pursuant to either Section 6(b) of the Securities Act of 1933 or any applicable provision of this rule; the fee requirements under Section 6(b) shall be reduced in an amount equal to the fee paid the Commission with respect to a transaction under this regulation. No part of a filing fee is refundable.

(3) If at any time after the initial payment the aggregate consideration offered is increased, an additional filing fee based upon such increase shall be paid with the required amended filing.

(4) When the fee is based upon the market value of securities, such market value shall be established by either the average of the high and low prices reported in the consolidated reporting system (for exchange traded securities and last sale reported over-the-counter securities) or the average of the bid and asked price (for other over-the-counter securities) as of a specified date within 5 business days prior to the date of the filing. If there is no market for the securities, the value shall be based upon

the book value of the securities computed as of the latest practicable date prior to the date of the filing, unless the issuer of the securities is in bankruptcy or receivership or has an accumulated capital deficit, in which case one-third of the principal amount, par value or stated value of the securities shall be used.

(5) The cover page of the filing shall set forth the calculation of the fee in tabular format, as well as the amount offset by a previous filing and the identification of such filing, if applicable.

(b) *Section 13(e)(1) Filings.* At the time of filing such statement as the Commission may require pursuant to section 13(e)(1) of the Exchange Act, a fee of one-fiftieth of one percent of the value of the securities proposed to be acquired by the acquiring person. The value of the securities proposed to be acquired shall be determined as follows:

(1) The value of the securities to be acquired solely for cash shall be the amount of cash to be paid for them;

(2) The value of the securities to be acquired with securities or other non-cash consideration, whether or not in combination with a cash payment for the same securities, shall be based upon the market value of the securities to be received by the acquiring person as established in accordance with paragraph (a)(4) of this section.

(c) *Proxy and information statement filings.* At the time of filing a preliminary proxy statement pursuant to Rule 14a-6(a) or preliminary information statement pursuant to Rule 14c-5(a) that concerns a merger, consolidation, acquisition of a company, or proposed sale or other disposition of substantially all the assets of the registrant (including a liquidation), the following fee:

(1) For preliminary material involving a vote upon a merger, consolidation or acquisition of a company, a fee of one-fiftieth of one percent of the proposed cash payment or of the value of the securities and other property to be transferred to security holders in the transaction. The fee is payable whether the registrant is acquiring another company or being acquired.

(i) The value of securities or other property to be transferred to security holders, whether or not in combination with a cash payment for the same securities, shall be based upon the market value of the securities to be received by the acquiring person as established in accordance with paragraph (a)(4) of this section.

(ii) Notwithstanding the above, where the acquisition, merger or consolidation is for the sole purpose of changing the registrant's domicile, no filing fee is required to be paid.

(2) For preliminary material involving a vote upon a proposed sale or other disposition of substantially all the assets of the registrant, a fee of one-fiftieth of one percent of the aggregate of the cash and the value of the securities (other than its own) and other property to be received by the registrant. In the case of a disposition in which the registrant will not receive any property, such as a liquidation or spin-off, the fee shall be one-fiftieth of one percent of the aggregate of the cash and the value of the securities and other property to be distributed to security holders.

(i) The value of the securities to be received (or distributed in the case of a spin-off or liquidation) shall be based upon the market value of such securities as established in accordance with paragraph (a)(4) of this section.

(ii) The value of other property shall be a bona fide estimate of the fair market value of such property.

(3) Where two or more companies are involved in the transaction, each shall pay a proportionate share of such fee, determined by the persons involved.

(4) Notwithstanding the above, the fee required by this paragraph (c) shall not be payable for a proxy statement filed by a company registered under the Investment Company Act of 1940.

(d) *Section 14(d)(1) filings.* At the time of filing such statement as the Commission may require pursuant to section 14(d)(1) of the Act, a fee of one-fiftieth of one percent of the aggregate of the cash or of the value of the securities or other property offered by the bidder. Where the bidder is offering securities or other non-cash consideration for some or all of the securities to be acquired, whether or not in combination with a cash payment for the same securities, the value of the consideration to be offered for such securities shall be based upon the market value of the securities to be received by the bidder as established in accordance with paragraph (a)(4) of this section.

[As last amended in Release No. 34-55146A, effective April 1, 2008, 73 F.R. 17809 (technical correction).]

[¶ 20,093] Commission Procedures for Filing Applications for Orders For Exemptive Relief Under Section 36 of the Exchange Act

Reg. § 240.0-12. (a) The application shall be in writing in the form of a letter, must include any supporting documents necessary to make the application complete, and otherwise must comply with § 240.0-3. All applications must be submitted to the Office of the Secretary of the Commission. Requestors may seek confidential treatment of their applications to the extent provided under § 200.81 of

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(iii) Unlisted options, which shall mean any options other than those traded on a national securities exchange or automated facility of a national securities association;

(iv) Municipal securities, which shall have the same meaning as in Section 3(a)(29) of the Act, (15 U.S.C. 78c(a)(29));

(v) Corporate debt securities, which shall mean any securities that:

(A) Evidence a liability of the issuer of such securities;

(B) Have a fixed maturity date that is at least one year following the date of issuance; and

(C) Are not exempted securities, as defined in section 3(a)(12) of the Act, (15 U.S.C. 78c(a)(12));

(vi) Foreign corporate debt securities, which shall mean any securities that:

(A) Evidence a liability of the issuer of such debt securities;

(B) Are issued by a corporation or other organization incorporated or organized under the laws of any foreign country; and

(C) Have a fixed maturity date that is at least one year following the date of issuance; and

(vii) Foreign sovereign debt securities, which shall mean any securities that:

(A) Evidence a liability of the issuer of such debt securities;

(B) Are issued or guaranteed by the government of a foreign country, any political subdivision of a foreign country or any supranational entity; and

(C) Do not have a maturity date of a year or less following the date of issuance.

[As last amended by Release No. 34-60789, effective November 12, 2009, 74 F.R. 52358.]

[¶ 20,095] Associated Persons of an Issuer Deemed Not to Be Brokers

Reg. § 240.3a4-1. (a) An associated person of an issuer of securities shall not be deemed to be a broker solely by reason of his participation in the sale of the securities of such issuer if the associated person:

(1) Is not subject to a statutory disqualification, as that term is defined in Section 3(a)(39) of the Act, at the time of his participation; and

(2) Is not compensated in connection with his participation by the payment of commissions or other remuneration based either directly or indirectly on transactions in securities; and

(3) Is not at the time of his participation an associated person of a broker or dealer; and

(4) Meets the conditions of any one of paragraphs (a)(4)(i), (ii), or (iii) of this section.

(i) The association person restricts his participation to transactions involving offers and sales of securities:

(A) To a registered broker or dealer; a registered investment company (or registered separate account); an insurance company; a bank; a savings and loan association; a trust company or simliar institution supervised by a state or federal banking authority; or a trust for which a bank, a savings and loan association, a trust company, or a registered investment adviser either is the trustee or is authorized in writing to make investment decisions; or

(B) That are exempted by reason of Section 3(a)(7), 3(a)(9) or 3(a)(10) of the Securities Act of 1933 from the registration provisions of that Act; or

(C) That are made pursuant to a plan or agreement submitted for the vote or consent of the security holders who will receive securities of the issuer in connection with a reclassification of securities of the issuer, a merger or consolidation or a similar plan of acquisition involving an exchange of securities, or a transfer of assets of any other person to the issuer in exchange for securities of the issuer; or

(D) That are made pursuant to a bonus, profit-sharing, pension, retirement, thrift, savings, incentive, stock purchase, stock ownership, stock appreciation, stock option, dividend reinvestment or similar plan for employees of an issuer or a subsidiary of the issuer;

(ii) The associated person meets all of the following conditions:

(A) The associated person primarily performs, or is intended primarily to perform at the end of the offering, substantial duties for or on behalf of the issuer otherwise than in connection with transactions in securities; and

(B) The associated person was not a broker or dealer, or an associated person of a broker or dealer, within the preceding 12 months; and

(C) The associated person does not participate in selling an offering of securities for any issuer more than once every 12 months other than in reliance on paragraphs (a)(4)(i) or (a)(4)(iii) of this section, except that for securities issued pursuant to Rule 415 under the Securities Act of 1933, the 12 months shall begin with the last sale of any security included within one Rule 415 registration.

(iii) The associated person restricts his participation to any one or more of the following activities:

(A) Preparing any written communication or delivering such communication through the mails or other means that does not involve oral solicitation by the associated person of a potential purchaser; *provided, however,* that the content of such communication is approved by a partner, officer or director of the issuer;

(B) Responding to inquiries of a potential purchaser in a communication initiated by the potential purchaser; *provided, however,* that the content of such responses are limited to information contained in a registration statement filed under the Securities Act of 1933 or other offering document; or

(C) Performing ministerial and clerical work involved in effecting any transaction.

(b) No presumption shall arise that an associated person of an issuer has violated Section 15(a) of the Act solely by reason of his participation in the sale of securities of the issuer if he does not meet the conditions specified in paragraph (a) of this section.

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

(1) The term "associated person of an issuer" means any natural person who is a partner, officer, director, or employee of:

(i) The issuer;

(ii) A corporate general partner of a limited partnership that is the issuer;

(iii) A company or partnership that controls, is controlled by, or is under common control with, the issuer; or

(iv) An investment adviser registered under the Investment Advisers Act of 1940 to an investment company registered under the Investment Company Act of 1940 which is the issuer.

(2) The term "associated person of a broker or dealer" means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial and any person who is required under the laws of any state to register as a broker or dealer in that state solely because such person is an issuer of securities or associated person of an issuer of securities shall not be included in the meaning of such term for purposes of this section.

[As adopted in Release No. 34-22172, June 27, 1985, 50 F.R. 26584.]

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DEFINITIONS

[¶ 20,281] Definition of "Penny Stock"

Reg. § 240.3a51-1. For purposes of Section 3(a)(51) of the Act, the term "penny stock" shall mean any equity security other than a security:

(a) That is an NMS stock, as defined in § 242.600(b)(47), provided that:

(1) The security is registered, or approved for registration upon notice of issuance, on a national securities exchange that has been continuously registered as a national securities exchange since April 20, 1992 (the date of the adoption of Rule 3a51-1 (§ 240.3a51-1) by the Commission); and the national securities exchange has maintained quantitative listing standards that are substantially similar to or stricter than those listing standards that were in place on that exchange on January 8, 2004; or

(2) The security is registered, or approved for registration upon notice of issuance, on a national securities exchange, or is listed, or approved for listing upon notice of issuance on, an automated quotation system sponsored by a registered national securities association, that:

(i) Has established initial listing standards that meet or exceed the following criteria:

(A) The issuer shall have:

(1) Stockholders' equity of $5,000,000;

(2) Market value of listed securities of $50 million for 90 consecutive days prior to applying for the listing (market value means the closing bid price multiplied by the number of securities listed); or

(3) Net income of $750,000 (excluding extraordinary or non-recurring items) in the most recently completed fiscal year or in two of the last three most recently completed fiscal years;

(B) The issuer shall have an operating history of at least one year or a market value of listed securities of $50 million (market value means the closing bid price multiplied by the number of securities listed);

(C) The issuer's stock, common or preferred, shall have a minimum bid price of $4 per share;

(D) In the case of common stock, there shall be at least 300 round lot holders of the security (a round lot holder means a holder of a normal unit of trading);

(E) In the case of common stock, there shall be at least 1,000,000 publicly held shares and such shares shall have a market value of at least $5 million (market value means the closing bid price multiplied by number of publicly held shares, and shares held directly or indirectly by an officer or director of the issuer and by any person who is the beneficial owner of more than 10 percent of the total shares outstanding are not considered to be publicly held);

(F) In the case of a convertible debt security, there shall be a principal amount outstanding of at least $10 million;

(G) In the case of rights and warrants, there shall be at least 100,000 issued and the underlying security shall be registered on a national securities exchange or listed on an automated quotation system sponsored by a registered national securities association and shall satisfy the requirements of paragraph (a) or (e) of this section;

(H) In the case of put warrants (that is, instruments that grant the holder the right to sell to the issuing company a specified number of shares of the company's common stock, at a specified price until a specified period of time), there shall be at least 100,000 issued and the underlying security shall be registered on a national securities exchange or listed on an automated quotation system sponsored by a registered national securities association and shall satisfy the requirements of paragraph (a) or (e) of this section;

(I) In the case of units (that is, two or more securities traded together), all component parts shall be registered on a national securities exchange or listed on an automated quotation system sponsored by a registered national securities association and shall satisfy the requirements of paragraph (a) or (e) of this section; and

(J) In the case of equity securities (other than common and preferred stock, convertible debt securities, rights and warrants, put warrants, or units), including hybrid products and derivative securities products, the national securities exchange or registered national securities association shall establish quantitative listing standards that are substantially similar to those found in paragraphs (a)(2)(i)(A) through (a)(2)(i)(I) of this section; and

(ii) Has established quantitative continued listing standards that are reasonably related to the initial listing standards set forth in paragraph (a)(2)(i) of this section, and that are consistent with the maintenance of fair and orderly markets;

(b) That is issued by an investment company registered under the Investment Company Act of 1940;

(c) That is a put or call option issued by the Options Clearing Corporation;

(d) Except for purposes of Section 7(b) of the Securities Act and Rule 419 (17 CFR 230.419), that has a price of five dollars or more;

(1) For purposes of paragraph (d) of this section:

(i) A security has a price of five dollars or more for a particular transaction if the security is purchased or sold in that transaction at a price of five dollars or more, excluding any broker or dealer commission, commission equivalent, mark-up, or mark-down; and

(ii) Other than in connection with a particular transaction, a security has a price of five dollars or more at a given time if the inside bid quotation is five dollars or more; *provided, however,* that if there is no such inside bid quotation, a security has a price of five dollars or more at a given time if the average of three or more interdealer bid quotations at specified prices displayed at that time in an interdealer quotation system, as defined in 17 CFR 240.15c2-7(c)(1), by three or more market makers in the security, is five dollars or more.

(iii) The term "inside bid quotation" shall mean the highest bid quotation for the security displayed by a market maker in the security on an automated interdealer quotation system that has the characteristics set forth in Section 17B(b)(2) of the Act, or such other automated interdealer quotation system designated by the Commission for purposes of this section, at any time in which at least two market makers are contemporaneously displaying on such system bid and offer quotations for the security at specified prices.

(2) If a security is a unit composed of one or more securities, the unit price divided by the number of shares of the unit that are not warrants, options, rights, or similar securities must be five dollars or more, as determined in accordance with paragraph (d)(1) of this section, and any share of the unit that is a warrant, option, right, or similar security, or a convertible security, must have an exercise price or conversion price of five dollars or more;

(e)(1) That is registered, or approved for registration upon notice of issuance, on a national securities exchange that makes transaction reports available pursuant to § 242.601, provided that:

(i) Price and volume information with respect to transactions in that security is required to be reported on a current and continuing basis and is made available to vendors of market information pursuant to the rules of the national securities exchange;

(ii) The security is purchased or sold in a transaction that is effected on or through the facilities of the national securities exchange, or that is part of the distribution of the security; and

(iii) The security satisfies the requirements of paragraph (a)(1) or (a)(2) of this section;

(2) A security that satisfies the requirements of this paragraph (e), but does not otherwise satisfy the requirements of paragraph (a), (b), (c), (d), (f), or (g) of this section, shall be a penny stock for purposes of section 15(b)(6) of the Act (15 U.S.C. 78o(b)(6));

(f) That is a security futures product listed on a national securities exchange or an automated quotation system sponsored by a registered national securities association; or

(g) Whose issuer has:

(1) Net tangible assets (*i.e.*, total assets less intangible assets and liabilities) in excess of $2,000,000, if the issuer has been in continuous operation for at least three years, or $5,000,000, if the issuer has been in continuous operation for less than three years; or

(2) Average revenue of at least $6,000,000 for the last three years.

(3) For purposes of paragraph (g) of this section, net tangible assets or average revenues must be demonstrated by financial statements dated less than fifteen months prior to the date of the transaction that the broker or dealer has reviewed and has a reasonable basis for believing are accurate in relation to the date of the transaction, and:

(i) If the issuer is other than a foreign private issuer, are the most recent financial statements for the issuer that have been audited and reported on by an independent public accountant in accordance with the provisions of 17 CFR 210.2-02; or

(ii) If the issuer is a foreign private issuer, are the most recent financial statements for the issuer that have been filed with the Commission or furnished to the Commission pursuant to 17 CFR 240.12g3-2(b) of this chapter; *provided, however,* that if financial statements for the issuer dated less than fifteen months prior to the date of the transaction have not been filed with or furnished to the Commission, financial statements dated within fifteen months prior to the transaction shall be prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction;

(4) The broker or dealer shall preserve, as part of its records, copies of the financial statements required by paragraph (g)(3) of this section for the period specified in 17 CFR 240.17a-4(b) of this chapter.

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[As last amended in Release No. 34-51983A, effective September 12, 2005, 70 F.R. 46089.]

[¶ 20,286] Method for Determining Market Capitalization and Dollar Value of Average Daily Trading Volume; Application of the Definition of Narrow-Based Security Index

Reg. § 240.3a55-1. (a) *Market capitalization.* For purposes of Section 3(a)(55)(C)(i)(III)(bb) of the Act (15 U.S.C. 78c(a)(55)(C)(i)(III)(bb)):

(1) On a particular day, a security shall be 1 of 750 securities with the largest market capitalization as of the preceding 6 full calendar months when it is included on a list of such securities designated by the Commission and the CFTC as applicable for that day.

(2) In the event that the Commission and the CFTC have not designated a list under paragraph (a)(1) of this section:

(i) The method to be used to determine market capitalization of a security as of the preceding 6 full calendar months is to sum the values of the market capitalization of such security for each U.S. trading day of the preceding 6 full calendar months, and to divide this sum by the total number of such trading days.

(ii) The 750 securities with the largest market capitalization shall be identified from the universe of all NMS securities as defined in § 242.600 of this chapter that are common stock or depositary shares.

(b) *Dollar value of ADTV.*

(1) For purposes of Section 3(a)(55)(B) of the Act (15 U.S.C. 78c(a)(55)(B)):

(i)(A) The method to be used to determine the dollar value of ADTV of a security is to sum the dollar value of ADTV of all reported transactions in such security in each jurisdiction as calculated pursuant to paragraphs (b)(1)(ii) and (iii).

(B) The dollar value of ADTV of a security shall include the value of all reported transactions for such security and for any depositary share that represents such security.

(C) The dollar value of ADTV of a depositary share shall include the value of all reported transactions for such depositary share and for the security that is represented by such depositary share.

(ii) For trading in a security in the United States, the method to be used to determine the dollar value of ADTV as of the preceding 6 full calendar months is to sum the value of all reported transactions in such security for each U.S. trading day during the preceding 6 full calendar months, and to divide this sum by the total number of such trading days.

(iii)(A) For trading in a security in a jurisdiction other than the United States, the method to be used to determine the dollar value of ADTV as of the preceding 6 full calendar months is to sum the value in U.S. dollars of all reported transactions in such security in such jurisdiction for each trading day during the preceding 6 full calendar months, and to divide this sum by the total number of trading days in such jurisdiction during the preceding 6 full calendar months.

(B) If the value of reported transactions used in calculating the ADTV of securities under paragraph (b)(1)(iii)(A) is reported in a currency other than U.S. dollars, the total value of each day's transactions in such currency shall be converted into U.S. dollars on the basis of a spot rate of exchange for that day obtained from at least one independent entity that provides or disseminates foreign exchange quotations in the ordinary course of its business.

(iv) The dollar value of ADTV of the lowest weighted 25% of an index is the sum of the dollar value of ADTV of each of the component securities comprising the lowest weighted 25% of such index.

(2) For purposes of Section 3(a)(55)(C)(i)(III)(cc) of the Act (15 U.S.C. 78c(a)(55)(C)(i)(III)(cc)):

(i) On a particular day, a security shall be 1 of 675 securities with the largest dollar value of ADTV as of the preceding 6 full calendar months when it is included on a list of such securities designated by the Commission and the CFTC as applicable for that day.

(ii) In the event that the Commission and the CFTC have not designated a list under paragraph (b)(2) of this section:

(A) The method to be used to determine the dollar value of ADTV of a security as of the preceding 6 full calendar months is to sum the value of all reported transactions in such security in the United States for each U.S. trading day during the preceding 6 full calendar months, and to divide this sum by the total number of such trading days.

(B) The 675 securities with the largest dollar value of ADTV shall be identified from the universe of all NMS securities as defined in § 242.600 of this chapter that are common stock or depositary shares.

(c) *Depositary Shares and Section 12 Registration.* For purposes of Section 3(a)(55)(C) of the Act (15 U.S.C. 78c(a)(55)(C)), the requirement that each component security of an index be registered pursuant to Section 12 of the Act (15 U.S.C. 78*l*) shall be satisfied with respect to any security that is a depositary share if the deposited securities underlying the depositary share are registered pursuant to Section 12 of the Act and the depositary share is registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) on Form F-6 (17 CFR 239.36).

(d) *Definitions.* For purposes of this section:

(1) *CFTC* means Commodity Futures Trading Commission.

(2) *Closing price* of a security means:

(i) If reported transactions in the security have taken place in the United States, the price at which the last transaction in such security took place in the regular trading session of the principal market for the security in the United States.

(ii) If no reported transactions in a security have taken place in the United States, the closing price of such security shall be the closing price of any depositary share representing such security divided by the number of shares represented by such depositary share.

(iii) If no reported transactions in a security or in a depositary share representing such security have taken place in the United States, the closing price of such security shall be the price at which the last transaction in such security took place in the regular trading session of the principal market for the security. If such price is reported in a currency other than U.S. dollars, such price shall be converted into U.S. dollars on the basis of a spot rate of exchange relevant for the time of the transaction obtained from at least one independent entity that provides or disseminates foreign exchange quotations in the ordinary course of its business.

(3) *Depositary share* has the same meaning as in § 240.12b-2.

(4) *Foreign financial regulatory authority* has the same meaning as in Section 3(a)(52) of the Act (15 U.S.C. 78c(a)(52)).

(5) *Lowest weighted 25% of an index.*

With respect to any particular day, the lowest weighted component securities comprising, in the aggregate, 25% of an index's weighting for purposes of Section 3(a)(55)(B)(iv) of the Act (15 U.S.C. 78c(a)(55)(B)(iv)) ("lowest weighted 25% of an index") means those securities:

(i) That are the lowest weighted securities when all the securities in such index are ranked from lowest to highest based on the index's weighting methodology; and

(ii) For which the sum of the weight of such securities is equal to, or less than, 25% of the index's total weighting.

(6) *Market capitalization* of a security on a particular day:

(i) If the security is not a depositary share, is the product of:

(A) The closing price of such security on that same day; and

(B) The number of outstanding shares of such security on that same day.

(ii) If the security is a depositary share, is the product of:

(A) The closing price of the depositary share on that same day divided by the number of deposited securities represented by such depositary share; and

(B) The number of outstanding shares of the security represented by the depositary share on that same day.

(7) *Outstanding shares* of a security means the number of outstanding shares of such security as reported on the most recent Form10-K, Form10-Q, Form 10-KSB, Form 10-QSB, or Form 20-F (17 CFR 249.310, 249.308a, 249.310b, 249.308b, or 249.220f) filed with the Commission by the issuer of such security, including any change to such number of outstanding shares subsequently reported by the issuer on a Form 8-K (17 CFR 249.308).

(8) *Preceding 6 full calendar months* means, with respect to a particular day, the period of time beginning on the same day of the month 6 months before and ending on the day prior to such day.

(9) *Principal market* for a security means the single securities market with the largest reported trading volume for the security during the preceding 6 full calendar months.

(10) *Reported transaction* means:

(i) With respect to securities transactions in the United States, any transaction for which a transaction report is collected, processed, and made available pursuant to an effective transaction reporting plan, or for which a transaction report, last sale data, or quotation information is disseminated through an automated quotation system as described in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii); and

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(ii) With respect to securities transactions outside the United States, any transaction that has been reported to a foreign financial regulatory authority in the jurisdiction where such transaction has taken place.

(11) *U.S. trading day* means any day on which a national securities exchange is open for trading.

(12) *Weighting* of a component security of an index means the percentage of such index's value represented, or accounted for, by such component security.

[As last amended in Release No. 33-52115, effective August 29, 2005, 70 F.R. 43748.]

[¶ 20,287] Indexes Underlying Futures Contracts Trading for Fewer Than 30 Days

Reg. § 240.3a55-2. (a) An index on which a contract of sale for future delivery is trading on a designated contract market, registered derivatives transaction execution facility, or foreign board of trade is not a narrow-based security index under Section 3(a)(55) of the Act (15 U.S.C. 78c(a)(55)) for the first 30 days of trading, if:

(1) Such index would not have been a narrow-based security index on each trading day of the preceding 6 full calendar months with respect to a date no earlier than 30 days prior to the commencement of trading of such contract;

(2) On each trading day of the preceding 6 full calendar months with respect to a date no earlier than 30 days prior to the commencement of trading such contract:

(i) Such index had more than 9 component securities;

(ii) No component security in such index comprised more than 30 percent of the index's weighting;

(iii) The 5 highest weighted component securities in such index did not comprise, in the aggregate, more than 60 percent of the index's weighting; and

(iv) The dollar value of the trading volume of the lowest weighted 25% of such index was not less than $50 million (or in the case of an index with 15 or more component securities, $30 million); or

(3) On each trading day of the preceding 6 full calendar months, with respect to a date no earlier than 30 days prior to the commencement of trading such contract:

(i) Such index had at least 9 component securities;

(ii) No component security in such index comprised more than 30 percent of the index's weighting; and

(iii) Each component security in such index was:

(A) Registered pursuant to Section 12 of the Act (15 U.S.C. 78) or was a depositary share representing a security registered pursuant to Section 12 of the Act;

(B) 1 of 750 securities with the largest market capitalization that day; and

(C) 1 of 675 securities with the largest dollar value of trading volume that day.

(b) An index that is not a narrow-based security index for the first 30 days of trading pursuant to paragraph (a) of this section, shall become a narrow-based security index if such index has been a narrow-based security index for more than 45 business days over 3 consecutive calendar months.

(c) An index that becomes a narrow-based security index solely because it was a narrow-based security index for more than 45 business days over 3 consecutive calendar months pursuant to paragraph (b) of this section shall not be a narrow-based security index for the following 3 calendar months.

(d) *Definitions.* For purposes of this section:

(1) *Market capitalization* has the same meaning as in § 240.3a55-1(d)(6).

(2) *Dollar value of trading volume* of a security on a particular day is the value in U.S. dollars of all reported transactions in such security on that day. If the value of reported transactions used in calculating dollar value of trading volume is reported in a currency other than U.S. dollars, the total value of each day's transactions shall be converted into U.S. dollars on the basis of a spot rate of exchange for that day obtained from at least one independent entity that provides or disseminates foreign exchange quotations in the ordinary course of its business.

(3) *Lowest weighted 25% of an index* has the same meaning as in § 240.3a55-1(d)(5).

(4) *Preceding 6 full calendar months* has the same meaning as in § 240.3a55-1(d)(8).

(5) *Reported transaction* has the same meaning as in § 240.3a55-1(d)(10).

[As adopted in Release No. 34-44724, effective August 21, 2001, 66 F.R. 44490.]

[¶ 20,288] Futures Contracts on Security Indexes Trading on or Subject to the Rules of a Foreign Board of Trade

Reg. § 240.3a55-3. When a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market or registered derivatives transaction execution facility.

[As adopted in Release No. 34-44724, effective August 21, 2001, 66 F.R. 44490.]

[¶ 20,301] Definition of "Listed"

Reg. § 240.3b-1. The term *listed* means admitted to full trading privileges upon application by the issuer or its fiscal agent or, in the case of the securities of a foreign corporation, upon application by a banker engaged in distributing them; and includes securities for which authority to add to the list on official notice of issuance has been granted.

[As last amended in Release No. 34-1887, September 10, 1938.]

[¶ 20,311] Definition of "Officer"

Reg. § 240.3b-2. The term *officer* means a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.

[As last amended in Release No. 34-18524, effective for all documents filed on or after May 24, 1982, 47 F.R. 11380.]

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[¶ 20,331] Definition of "Foreign Government", "Foreign Issuer" and "Foreign Private Issuer"

Reg. § 240.3b-4. (a) The term *foreign government* means the government of any foreign country or of any political subdivision of a foreign country.

(b) The term *foreign issuer* means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

(c) The term *foreign private issuer* means any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

(1) More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and

(2) Any of the following:

(i) The majority of the executive officers or directors are United States citizens or residents;

(ii) More than 50 percent of the assets of the issuer are located in the United States; or

(iii) The business of the issuer is administered principally in the United States.

Instruction to paragraph (c)(1): To determine the percentage of outstanding voting securities held by U.S. residents:

A. Use the method of calculating record ownership in Rule 12g3-2(a) under the Act (§ 240.12g3-2(a)), except that your inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in

(1) the United States,

(2) your jurisdiction of incorporation, and

(3) the jurisdiction that is the primary trading market for your voting securities, if different than your jurisdiction of incorporation.

B. If, after reasonable inquiry, you are unable to obtain information about the amount of shares represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

C. Count shares of voting securities beneficially owned by residents of the United States as reported on reports of beneficial ownership provided to you or filed publicly and based on information otherwise provided to you.

(d) Notwithstanding paragraph (c) of this section, in the case of a new registrant with the Commission, the determination of whether an issuer is a foreign private issuer will be made as of a date within 30 days prior to the issuer's filing of an initial registration statement under either the Act or the Securities Act of 1933.

(e) Once an issuer qualifies as a foreign private issuer, it will immediately be able to use the forms and rules designated for foreign private issuers until it fails to qualify for this status at the end of its most recently completed second fiscal quarter. An issuer's determination that it fails to qualify as a foreign private issuer governs its eligibility to use the forms and rules designated for foreign private issuers beginning on the first day of the fiscal year following the determination date. Once an issuer fails to qualify for foreign private issuer status, it will remain unqualified unless it meets the requirements for foreign private issuer status as of the last business day of its second fiscal quarter.

[As last amended in Release No. 33-8959, effective December 5, 2008, 73 F.R. 58300.]

[¶ 20,341] Non-Exempt Securities Issued Under Governmental Obligations

Reg. § 240.3b-5. (a) Any part of an obligation evidenced by any bond, note, debenture, or other evidence of indebtedness issued by any governmental unit specified in Section 3(a)(12) of the Act which is payable from payments to be made in respect of property or money which is or will be used, under a lease, sale, or loan arrangement, by or for industrial or commercial enterprise, shall be deemed to be a separate "security" within the meaning of Section 3(a)(10) of the Act, issued by the lessee, or obligor under the lease, sale or loan arrangement.

(b) An obligation shall not be deemed a separate "security" as defined in paragraph (a) hereof if, (1) the obligation is payable from the general revenues of a governmental unit, specified in Section 3(a)(12) of the Act, having other resources which may be used for payment of the obligation, or (2) the obligation relates to a public project or facility owned and operated by or on behalf of and under the control of a governmental unit specified in such section, or (3) the obligation relates to a facility which is leased to and under the control of an industrial or commercial enterprise but is a part of a public project which, as a whole, is owned by and under the general control of a governmental unit specified in such section, or an instrumentality thereof.

(c) This rule shall apply to transactions of the character described in paragraph (a) only with respect to bonds, notes, debentures or other evidences of indebtedness sold after December 31, 1968.

[As last amended in Release No. 34-8850, March 31, 1970, 35 F.R. 6000.]

[¶ 20,351] Liability for Certain Statements by Issuers

Reg. § 240.3b-6. (a) A statement within the coverage of paragraph (b) of this section which is made by or on behalf of an issuer or by an outside reviewer retained by the issuer shall be deemed not to be a fraudulent statement (as defined in paragraph (d) of this section), unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.

(b) This rule applies to the following statements:

(1) A forward-looking statement (as defined in paragraph (c) of this section) made in a document filed with the Commission, in Part I of a quarterly report on Form 10-Q, § 249.308a of this chapter, or in an annual report to security holders meeting the requirements of Rules 14a-3(b) and (c) or 14c-3(a) and (b) (§ § 240.14a-3(b) and (c) or 240.14c-3(a) and (b)), a statement reaffirming such forward-looking statement after the date the document was filed or the annual report was made publicly available, or a forward-looking statement made before the date the document was filed or the date the annual report was made publicly available if such statement is reaffirmed in a filed document, in Part I of a quarterly report on Form 10-Q, or in an annual report made publicly available within a reasonable time after the making of such forward-looking statement; *Provided*, that:

(i) At the time such statements are made or reaffirmed, either the issuer is subject to the reporting requirements of Section 13(a) or 15(d) of the Act and has complied with the requirements of Rule 13a-1 or 15d-1 thereunder, if applicable, to file its most recent annual report on Form 10-K, Form 20-F or Form 40-F; or if the issuer is not subject to the reporting requirements of Section 13(a) or 15(d) of the Act, the statements are made in a registration statement filed under the Securities Act of 1933 offering statement or solicitation of interest, written document or broadcast script under Regulation A or pursuant to Section 12 (b) or (g) of the Securities Exchange Act of 1934; and

(ii) The statements are not made by or on behalf of an issuer that is an investment company registered under the Investment Company Act of 1940; and

(2) Information that is disclosed in a document filed with the Commission in Part I of a quarterly report on Form 10-Q (§ 249.308a of this chapter) or in an annual report to security holders meeting the requirements of Rules 14a-3(b) and (c) or 14c-3(a) and (b) under the Act (§ § 240.14a-3(b) and (c) or 240.14c-3(a) and (b) of this chapter) and that relates to:

(i) The effects of changing prices on the business enterprise, presented voluntarily or pursuant to Item 303 of Regulation S-K (§ 229.303 of this chapter), "Management's Discussion and Analysis of Financial Condition and Results of Operations," Item 5 of Form 20-F (§ 240.220(f) of this chapter), "Operating and Financial Review and Prospects," Item 302 of Regulation S-K (§ 229.302 of this

chapter) "Supplementary Financial Information," or Rule 3-20(c) of Regulation S-X (§ 210.3-20(c)) of this chapter); or

(ii) The value of proved oil and gas reserves (such as a standardized measure of discounted future net cash flows relating to proved oil and gas reserves as set forth in FASB ASC paragraphs 932-235-50-29 through 932-235-50-36 (Extractive Activities - Oil and Gas Topic)), presented voluntarily or pursuant to Item 302 of Regulation S-K (§ 229.302 of this chapter).

(c) For the purpose of this rule, the term *forward-looking statement* shall mean and shall be limited to:

(1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

(2) A statement of management's plans and objectives for future operations;

(3) A statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations included pursuant to Item 303 of Regulation S-K (§ 229.303 of this chapter) or Item 5 of Form 20-F or

(4) Disclosed statements of the assumptions underlying or relating to any of the statements described in paragraphs (c) (1), (2), or (3) of this section.

(d) For the purpose of this rule the term *fraudulent statement* shall mean a statement which is an untrue statement of a material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or which constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud, as those terms are used in the Securities Exchange Act of 1934 or the rules or regulations promulgated thereunder.

[As last amended in Release No. 33-9250, effective August 12, 2011, 76 F.R. 50117.]

[¶ 20,361] Definition of "Executive Officer"

Reg. § 240.3b-7. The term "executive officer," when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration, or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant.

[As last amended in Release No. 34-28869, February 8, 1991, effective May 1, 1991, 56 F.R. 7242.]

[¶ 20,371] Definitions of "Qualified OTC Market Maker," "Qualified Third Market Maker" and "Qualified Block Positioner"

Reg. § 240.3b-8. For the purposes of Regulation U under the Act (12 CFR 221):

(a) The term "Qualified OTC Market Maker" in an over-the-counter ("OTC") margin security means a dealer in any "OTC Margin Security" [as that term is defined in Section 2(j) of Regulation U (12 CFR 221.2(j)] who (1) is a broker or dealer registered pursuant to Section 15 of the Act, (2) is subject to and is in compliance with Rule 15c3-1 (17 CFR 240.15c3-1), (3) has and maintains minimum net capital, as defined in Rule 15c3-1, of the lesser of (i) $250,000 or (ii) $25,000 plus $5,000 for each security in excess of five with regard to which the broker or dealer is, or is seeking to become a Qualified OTC Market Maker, and (4) except when such activity is unlawful, meets all of the following conditions with respect to such security: (i) he regularly publishes bona fide, competitive bid and offer quotations in a recognized inter-dealer quotation system, (ii) he furnishes bona fide, competitive bid and offer quotations to other brokers and dealers on request, (iii) he is ready, willing and able to effect transactions in reasonable amounts, and at his quoted prices, with other brokers and dealers, and (iv) he has a reasonable average rate of inventory turnover in such security.

(b) The term "Qualified Third Market Maker" means a dealer in any stock registered on a national securities exchange ("exchange") who (1) is a broker or dealer registered pursuant to Section 15 of the Act, (2) is subject to and is in compliance with Rule 15c3-1 (17 CFR 240.15c3-1), (3) has and maintains minimum net capital, as defined in Rule 15c3-1, of the lesser of (i) $500,000 or (ii) $100,000 plus $20,000 for each security in excess of five with regard to which the broker or dealer is, or is seeking to become, a Qualified Third Market Maker, and (4) except when such activity is unlawful, meets all of the following conditions with respect to such security: (i) he furnishes bona fide, competitive bid and offer quotations at all times to other brokers and dealers on request, (ii) he is ready, willing and able to effect transactions for his own account in reasonable amounts, and at his quoted prices with other brokers and dealers, and (iii) he has a reasonable average rate of inventory turnover in such security.

(c) The term "Qualified Block Positioner" means a dealer who (1) is a broker or dealer registered pursuant to Section 15 of the Act, (2) is subject to and in compliance with Rule 15c3-1 (17 CFR 240.15c3-1), (3) has and maintains minimum net capital, as defined in Rule 15c3-1 of $1,000,000 and (4)

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It has long been recognized that no income accrues to the shareholder as a result of such stock distributions or dividends, nor is there any change in either the corporate assets or the shareholders' interests therein. However, it is also recognized that many recipients of such stock distributions, which are called or otherwise characterized as dividends, consider them to be distributions of corporate earnings equivalent to the fair value of the additional shares received. In recognition of these circumstances, the AICPA has specified in ARB 43, Chapter 7, paragraph 10, that ". . . the corporation should in the public interest account for the transaction by transferring from earned surplus to the category of permanent capitalization (represented by the capital stock and capital surplus accounts) an amount equal to the fair value of the additional shares issued. Unless this is done, the amount of earnings which the shareholder may believe to have been distributed will be left, except to the extent otherwise dictated by legal requirements, in earned surplus subject to possible further similar stock issuances or cash distributions."

The Commission also considers that if such stock distributions are not accounted for in this manner, the shareholders may be misled. In a stop order proceeding,* the Commission found that a registration statement was materially misleading because a series of four stock distributions made between 1966 and 1968 ". . . were 'part of a frequent recurrence of issuances of shares' . . . [and] . . . under generally accepted accounting principles they should have been accounted for as stock dividends."

If, in addition to failing to account for the distribution properly, the registrant does not have sufficient retained earnings or current income to cover the appropriate transfer to permanent capital, a question immediately arises whether these factors may be part of a manipulative or fraudulent scheme, and as such are proscribed under Rule 10b-5 of the Exchange Act. The Commission has stated in published opinions,[**] in situations where companies did not have retained or current earnings, that the declaration of a dividend not warranted by the business condition of a company is characteristic of a manipulative scheme.

The Commission emphasizes that it will deem the types of transactions noted above to be misleading if the accounting is improper or disclosure is inadequate, and if there is a question of whether the condition of the business warrants the distribution, a further investigation will be considered to determine whether such distribution may be part of a manipulative or fraudulent scheme.

[¶ 38,141] 215. Creation of Surplus by Appraisal

ASR 8:

The Commission issued the following statement relating to the creation of surplus by appraisal in balance sheets representing the accounts of promotional companies:

In connection with a registration statement, an industrial company in its promotional stages with no record of business or earning capacity, filed a balance sheet in which Property, Plant and Equipment, acquired in an arms-length transaction at a cost of $200,000, was carried at $720,042.81 which represented its "sound value" derived from an independent appraisal of the estimated "replacement value new less (observed) depreciation". Thus, the balance sheet figure exceeded cost by $520,042.81, which excess was carried as "surplus arising from revaluation of property".

In the appraisal report filed, the term "sound value" was qualified by the appraiser as being "the value for use by a going concern having prospects for the profitable use, at normal plant capacity, of the properties appraised".

The registrant was required to amend its balance sheet to eliminate the surplus and to show the fixed assets at cost.

[¶ 38,145] 216. Disclosure of Unusual Charges and Credits to Income

[The Commission adopted amendments to certain forms requiring increased disclosure of unusual charges and credits to income. The requirements were later deleted when, in March 1975, the FASB issued SFAS 5, "Accounting for Contingencies." The following comments were made in the release which adopted the disclosure requirements in January 1973.]

ASR 138:

The Commission noted that it had observed an increasing number of large charges to income which often appeared without warning and were not generally understood by investors. While many of such charges result from an identifiable event, many also appear to be made on the basis of a discretionary decision to dispose of marginal facilities or operations or to write off deferred development or excess production costs. In the latter situations, where facilities or operations gradually deteriorate or the outlook for a contract or program gradually worsens to the point where a write-off is deemed necessary, registrants have an obligation to forewarn public investors of the deteriorating conditions which, unless reversed, may result in a subsequent write-off. This includes an obligation to provide information regarding the magnitude of exposure to loss.

* *Monmouth Capital Corporation,* Securities Act Release No. 5169 (July 14, 1971).

[**] *Gob Shops of America, Inc.* 39 S.E.C. 92 (1959); *Mac Robbins & Co., Inc.* 41 S.E.C. 116 (1962).

The Commission, therefore, reiterates its view that registrants should make special efforts to recognize incipient problems that might lead to such charges and to identify them clearly at the earliest possible time in financial statements and other forms of public disclosure, including public reports filed with the Commission, so that public investors may recognize the risks involved. In this connection, registrants should consider disclosure of the investment involved in divisions operating at a loss; the undepreciated cost of plant and equipment currently considered to be obsolete or of marginal utility; and other similar items where significant uncertainties exist as to realization.

In addition to disclosure of incipient problems, the Commission believes that substantial additional disclosure in regard to extraordinary items and material unusual charges and credits to income or major provisions for loss is necessary to enable public investors to assess the impact of such items. This would include transactions that are classfied as extraordinary items under GAAP and other unusual or nonrecurring material transactions or provisions for loss, such as (but not restricted to) material write-downs of inventories, receivables, provisions for loss on major long-term contracts or purchase commitments, and losses on disposition of assets or business segments.

[¶ 38,146] Sec. 217. Accounting for Extinguishment of Debt

[*Sec. 217 added by* FRR-15.]

Sec. 217.01. Background

FRR-15:

In Financial Reporting Release (FRR) No. 3, issued in August 1982 (47 FR 38868), the Commission announced its support of the tentative view of the FASB that, except in certain limited circumstances, debt should not be accounted for as extinguished unless the debtor has no further legal obligation. The Commission indicated that, to avoid inconsistent accounting, registrants should follow that tentative position while the FASB was considering the issue. Recently, after study and deliberation, the FASB issued Statement of Financial Accounting Standards (SFAS) No. 76, "Extinguishment of Debt", which clarifies the accounting for such "quasi-defeasance" or "in-substance defeasance" arrangements. Accordingly, the Commission has determined to rescind FRR No. 3.

Sec. 217.02. Requirements for Extinguishment of Debt

FRR-15:

SFAS No. 76 provides that a debtor shall consider debt to be extinguished under three circumstances. The first two are the traditional criteria for extinguishment of debt (payment of the debt and legal release as primary obligor). The third, described in paragraph 3(c), is new and provides for extinguishment under certain conditions when eligible assets are irrevocably placed in a trust to be used solely for satisfying scheduled payments on the debt.

SFAS No. 76 does not have any specific eligibility requirements for the trustee of the trust created pursuant to paragraph 3(c) of that standard. The Commission believes, however, that paragraph 3(c) of the standard contemplates that the trustee should be independent with respect to the company.[1]

Paragraph 4 of SFAS No. 76 provides that the assets used to effect an extinguishment of debt under paragraph 3(c) must be monetary assets essentially risk free as to the amount, timing, and collection of interest and principal. These requirements are designed to assure that all interest and principal payments are made on time. Accordingly, they are very important and must be strictly interpreted.

Paragraph 4 lists the three types of assets in U.S. dollars that might meet those requirements: (1) direct obligations of the U.S. government, (2) obligations guaranteed by the U.S. government, and (3) securities that are backed by U.S. government obligations as collateral under an arrangement by which the interest and principal payments on the collateral generally flow immediately through to the holder of the security (for example, as in a closed trust). The Commission believes that very few securities of the types listed in (2) and (3) above can satisfy the essentially risk free requirements, particularly because the requirement for the assets to be risk free as to timing of collection applies to the risk of late as well as early payments. For example, if a guarantee provides only for the ultimate collection, but not for the collection of interest and principal in sufficient time to ensure payments on the defeased debt as they become due, the security would not qualify.

The Commission notes that the determination whether debt can be considered to be extinguished requires an assessment as to the likelihood of the debtor being required to make future payments with respect to the debt, not only because of an inadequacy of trust assets attributable to a failure to realize scheduled cash flows, but also because of an acceleration of the debt's maturity. An acceleration might occur because if a

[1] Trustess that meet the eligibility requirements for trustees under Sections 310(a)(1) and 310(a)(2) of the Trust Indenture Act of 1939 (the "1939 Act"), for example, will be presumed by the Staff of the Commission to be appropriate trustees. Those sections of the 1939 Act provide that a trustee must be a corporation organized and doing business under the laws of the United States or of any State or Territory or of the District of Columbia, which (a) is authorized under such laws to exercise corporate trust powers, (b) is subject to supervision or examination by Federal, State, Territorial or District of Columbia authority, and (c) has combined capital and surplus of at least $150,000.

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violation of a covenant of the debt issue being extinguished, or under cross-default provisions, because of a violation of a covenant of another debt issue.

The determination whether debt can be considered to be extinguished is also affected by the irrevocable nature of the trust. The trust must be designed so that neither the corporation nor its creditors or others can rescind or revoke it, or obtain access to the assets.

The Commission emphasizes that the qualifications of the trustee and nature of the trust and of the assets in the trust are areas of concern and that it expects registrants which extinguish debt under paragraph 3(c) to carefully evaluate those areas.

[¶ 38,147] Sec. 218. Costs of Internally Developing Computer Software for Sale or Lease to Others

[Sec. 218 added by FRR-12.]

Sec. 218.01. Background

FRR-12:

As a result of its concern about the increasing costs of internal development of computer software, on April 14, 1983 the Commission authorized the publication of proposed Rule 3-21 of Regulation S-X and Item 21(j) of Form S-18 for public comment.[1A] The Commission's concerns resulted from the fact that this trend created a source of incomparability in financial reporting between those registrants that are capitalizing such costs and those that are following the predominant practice of expensing them as incurred. The existing accounting literature in this area is unclear[2] and has not been interpreted consistently. Therefore, similar factual situations are being accounted for differently. This inhibits meaningful comparison of the financial position and results of operations of registrants engaged in these activities. Further, while acknowledging that the computer software industry and the accounting profession have begun activities intended to result in clarification of the accounting literature, the Commission expressed its concern about continuation of the trend towards capitalization in the intervening period, not only because it would exacerbate the problems of financial comparison, but also because of the potential for inappropriate capitalization in the absence of clear guidance.

Therefore, the proposed rules were intended to accomplish two purposes. The first was to maintain present practice in place during the time the private sector develops clearer guidance for the classification of the costs of these activities. Guidance is needed regarding both the relationship of internal development of computer software to research and development and the proper accounting for the costs of any such activities which are not research and development activities. The latter issue is not explicitly addressed by the existing accounting literature. The second purpose of the proposal was to facilitate comparison of financial information of companies engaged in these activities by requiring disclosure of the effect of not expensing all such costs as incurred which the Commission understands to be the predominant accounting practice in the industry.

Sec. 218.02. Views of Commentators and Final Rules

FRR-12:

The Commission received a total of 49 letters during the comment period which expired May 31, 1983.[3] The principal comments and the Commission's response to them are discussed below.

Sec. 218.02.a. Prohibition of Adoption of Practice of Capitalization

FRR-12:

The proposed prohibition on adoption of the practice of capitalizing internal software development costs was supported by financial analysts, as well as by several other commentators.

The analysts indicated that their major concern is comparability of financial information. The analysts' letter referred to in footnote 3 also stated that the committee and a substantial majority of the aforementioned 40 industry specialists believe that internal software development costs should never be capitalized. This belief is based on the following:

1. Such costs are very similar to research and development expenditures, which must be expensed.

2. The substantial degree of competition in the industry as well as the very rapid pace of change makes capitalized software development costs a highly questionable asset.

[1A] Securities Act Release No. 6461 [48 FR 1717]. The proposing release specified that the proposed rules would provide that companies which had not disclosed the practice of capitalizing internal software development costs either in audited financial statements issued prior to the date of the proposing release (i.e., April 14, 1983) or in a report or registration statement filed with the Commission prior to that date shall not follow such a practice in financial statements filed with the Commission after that date.

[2] The Financial Accounting Standards Board's ("FASB") pronouncements in this area address accounting for noncontractual internal software development costs, in the context of their relationship to research and development costs, which are required to be expensed as incurred. *See*, Release No. 33-6461 for a description of these pronouncements and certain recent developments in the interpretation thereof.

[3] Representation among the commentators was as follows: industry and related groups (38); accounting firms and groups (8); others (3).

The latter group includes a letter prepared by the Financial Accounting Policy Committee of the Financial Analysts Federation which stated that it encompassed the views of approximately 40 analysts who specialize in the securities of registrants in the computer services industry.

3. There is potential for abuse in this area because of the subjectivity involved.

The letter also states that a significant minority of the industry specialists believe that the costs are different from research and development and that capitalization of such costs may be appropriate in some circumstances. This latter group would like to see the FASB establish guidelines governing capitalization.

Most of the commentators from industry and public accounting expressed the view that adoption of such a prohibition by the Commission would be undesirable and unnecessary. Many of them acknowledged the existence of diverse accounting practices in this area, but emphasized that they believed that a prohibition would be inequitable because companies that had previously disclosed a capitalization practice would be allowed to continue it, while others who, for various reasons, had not made such a disclosure would be precluded from adopting an accounting practice that would be appropriate for their software development activities. Included in this latter group would be those companies that have not disclosed capitalized internal software development costs because they had not incurred any such costs in the past (or had not incurred material amounts thereof), nonpublic companies desirous of registering with the Commission that had not previously issued audited financial statements, and companies that had capitalized material amounts of such costs but had not disclosed that fact because it was not believed to be required by either Regulation S-X or generally accepted accounting principles ("GAAP").[4] Thus, it was argued, the Commission's proposal would have the effect of prohibiting the practice of capitalization for certain companies in the absence of clear evidence that capitalization is always inappropriate for those companies. Most of these commentators also expressed concerns that such an action by the Commission conveyed a bias against the practice of capitalization and thus would prejudge the outcome of the private sector standards-setting activities which had already begun prior to the Commission's proposal, and unfavorably impact the credibility of private sector standards-setting in general. Finally, many of the critical commentators expressed views about the competitive impact of adoption of the proposed rules. They maintained that those companies prevented from adopting the practice of capitalization (and especially smaller companies) would not be able to effectively compete in the capital markets for funds necessary for growth due to the fact that their financial statements would suffer in comparison with others in the industry permitted to continue capitalizing. As an alternative that would prevent these consequences, it was suggested that the Commission limit its activities in this area to a requirement for disclosure of the practice being followed.

The Commission, after careful consideration of the views of all commentators on the proposed rules, has determined that it should issue final rules prohibiting the adoption of the practice of capitalizing costs of internal development of computer software to be sold or leased to others. The Commission recognized at the time of issuance of its proposal that such rules would permit the continuation of diverse accounting practices during the period necessary to develop specific accounting guidance in this area. As a result, the final rules (as did the proposed rules) contain a disclosure requirement to facilitate comparison of financial information among companies following different practices. However, disclosure requirements alone would not alleviate the Commission's concerns that in the absence of clear accounting guidance (which is not expected before 1984), continuation of the recent trend towards increased use of capitalization, including inconsistencies in the application of that practice, will result in increasing disparity among companies engaged in these activities notwithstanding the fact that they have essentially the same facts and circumstances. Further, it may result in inappropriate capitalization by some registrants. The only alternative action that would alleviate those concerns would be development by the Commission of definitive accounting guidelines in this area which, as stated in the proposing release, the Commission determined not to undertake in view of the current and expected private sector activities. Additionally, the Commission has determined that its rules will terminate when an FASB pronouncement which provides specific accounting guidance in this area becomes effective. Thus, the Commission views its action as consistent with its previous expressions of its policy of relying on the FASB for leadership in establishing financial accounting and reporting standards.[5] Further, the Commission believes that concerns about the effect of its action on competition and access to capital markets must be evaluated in the context of its understanding, disputed by none of the commentators, that the predominant practice in accounting for such costs is to charge them all to expense as incurred. The Commission believes that it would be preferable for a change from such predominant practice to occur only after deliberation of the issues in the context of standards-setting.

[4] It is important to note that no specific instances of nondisclosure of material amounts of such costs were brought to the Commission's attention as a result of the comment process.

[5] *See* Accounting Series Release Nos. 150 and 280, reproduced in pertinent part in Section 101 of the Commission's Codification of Financial Reporting Policies, announced in Financial Reporting Release No. 1 (April 15, 1982) [47 FR 21028].

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The final rules predicate the ability to continue a previously adopted practice of capitalization on prior disclosure of that practice. The Commission does not anticipate that its action will require companies that have capitalized material amounts of internal software development costs to change their accounting practice.[6] With respect to existing registrants, the Commission believes that the requirements of Regulation S-X in Rules 5-02.15 and .16 (Intangible Assets) or, alternatively, 5-02.17 (Other Assets) and GAAP[7] would require disclosure of amounts of software costs capitalized and related amortization, together with the method and period of amortization, as well as the bases therefor. Not all of the disclosures are specifically required by GAAP, but the APB 22 disclosures would permit formerly nonpublic companies to meet the test of having previously disclosed the practice of capitalizing software costs.[8]

Sec. 218.02.b. Disclosure of Effect of Capitalization

FRR-12:

As noted above many commentators agreed that diverse accounting practices for internal software development costs exist. Some stated that the proposed requirement to disclose the effect on net income and earnings per share of not following the predominant practice of expensing such costs as incurred would provide an adequate basis for comparison of financial information during the time specific accounting guidance is being developed. Several commentators, however, expressed the view that disclosure of these amounts would be potentially confusing and may imply that the financial statements are not prepared in conformity with GAAP.

In response to these latter comments, the final rules have been modified to require disclosure, for each period for which an income statement is required to be presented, only of the amount of internal software development costs capitalized during the period, less amortization. These disclosures will enable financial statement users to ascertain the impact of capitalization on the financial statements.

Sec. 218.02.c. Other Matters

FRR-12:

The final rules have been modified in several other respects in response to comments.

It was pointed out by one commentator that the text of the proposed rules would literally require their application to development activities undertaken pursuant to contractual arrangements. This was not the Commission's intent and the final rules clarify their applicability only to costs of internal development of software not subject to accounting for contracts.

Several commentators addressed the applicability of the proposed rules to development of computer software to be used as part of a product or process to be sold or leased to others. Since the existing accounting literature[9] discusses the relationship of such activities to research and development activities in the same context as it does software developed solely as a product or process to be sold or leased, the Commission intended that the new rules apply to such development costs. The text of the rules has been modified to make this clear.

There were several comments about the Commission's views on appropriate amortization periods for capitalized software costs. While not incorporated in the final rules, the Commission deems it appropriate to reaffirm the views expressed in Release No. 33-6461. GAAP requires that the determination of an appropriate amortization period for such amounts be based on careful consideration of the relevant facts. The Commission believes that computer software (whether internally developed or purchased) is an area characterized by both rapid technological development and increased industry competition and growth. Therefore, the use of very short amortization periods is indicated. Further, the Commission reminds registrants that have capitalized such costs that careful periodic evaluation of the recoverability thereof is necessary.

[¶ 38,148] 219. Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments

[Added by FR-48]

219.01. Background

During the last several years, a significant number of issues relating to the accounting for derivatives have been raised. The FASB is working on a project that will address comprehensively the accounting for derivatives. However, currently there is little authoritative literature on the accounting for options and complex derivatives.[35]

In the absence of comprehensive accounting literature, registrants have developed accounting practices for options and complex derivatives by analogy to the limited amount of literature that does exist. Those analogies are complicated because, under existing accounting literature, there are at least three distinctly different methods of accounting for derivatives (e.g., fair value accounting, deferral accounting, and accrual accounting).[36] Further, the underlying concepts and criteria used in determining the applicability of those accounting methods are not consistent.[37] As a result, during its 1994 and 1995 reviews of annual reports, the SEC staff observed that registrants with similar risk management objectives often accounted for derivatives with similar economic characteristics in different ways.[38] Thus, it was difficult to ascertain and compare the financial statement effects of derivatives among registrants.

To provide a better understanding of the accounting for derivative financial instruments, paragraph 8 of FAS 119 requires disclosure of the policies used to account for those instruments, pursuant to the requirements of APB 22.[39] Specifically, FAS 119 emphasizes the disclosure of "policies for recognizing (or not recognizing) and measuring derivative financial instruments . . . and when recognized, where those instruments and related gains and losses are reported in the statements of financial position and income."[40] Notwithstanding its helpful guidance, FAS 119 does not explicitly indicate the type of information that should be included in the accounting policies footnote to help investors understand the effects of derivatives on the statements of financial position, cash flows, and results of operations. FAS 119 also does not address disclosure of accounting policies for derivative commodity instruments.

.02. Rule 4-08(n) of Regulation S-X and Item 310 of Regulation S-B

To facilitate a more informed assessment of the effects of derivatives on financial statements, Rule 4-08(n) and Item 310 explicitly require that seven items be disclosed in the derivatives accounting policies footnote, when material. For example, Rule 4-08(n) and Item 310 require a description of the methods used to account for derivatives, the types of derivatives accounted for under each method, and the criteria required to be met for each accounting method used. See Rule 4-08(n) and Item 310 for further requirements.

When assessing materiality under Rule 4-08(n) and Item 310, the Commission expects registrants to consider (i) the financial statement effects of all derivatives, including those not recognized in the statement of financial position and (ii) the relative effects of using the accounting method selected as compared to the other methods available (e.g., accrual, deferral, or fair value methods of accounting).

In essence, Rule 4-08(n) and Item 310 clarify how the accounting policy disclosure requirements in FAS 119 should be applied to derivative financial instruments. They also extend those requirements to derivative commodity instruments.

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[6] Obviously this conclusion would not apply to companies whose capitalization practices are clearly inconsistent with the existing accounting literature (e.g., costs associated with the "conceptual formulation or translation of knowledge into a design" phase of a software development project).

[7] Paragraph 12b of Accounting Principles Board Opinion No. 22, "Disclosure of Accounting Policies," ("APB 22") provides that disclosure of accounting policies should encompass "principles and methods peculiar to the industry in which the reporting entity operates, even if such principles and methods are predominantly followed in that industry." Paragraph 13 of APB 22 cites policies with respect to amortization of intangibles as an example of a disclosure that would commonly be required.

[8] After consideration of the comments received, the Commission has amended the final rules to permit disclosure in a document for an offering of securities by the issuer, other than a registration statement, which document was used in such offering prior to April 14, 1983 (e.g., offering documents prepared under Regulation D under the Securities Act [17 CFR 230.501-.506]), as an additional exception to the prohibition of the practice of capitalization.

[9] FASB Interpretation No. 6, "Applicability of FASB Statement No. 2 to Computer Software," paragraph 9.

[35] The authoritative accounting literature for options and complex derivatives generally is limited to a few consensuses from the FASB Emerging Issues Task Force ("EITF"), which by their nature address the accounting for specific transactions. See, e.g., EITF Issues 88-8, "Mortgage Swaps," and 90-17, "Hedging Foreign Currency Risks with Purchased Options."

[36] Under the fair value method, derivatives are carried on the balance sheet at fair value with changes in that value recognized in earnings or stockholders' equity (see, e.g., FASB, Statement of Financial Accounting Standards No. 52, "Foreign Currency Translation," ("FAS 52") (December 1981), and FAS 80. Under the deferral method, gains and losses from derivatives are deferred on the balance sheet and recognized in earnings in conjunction with earnings of designated items (see, e.g., FAS 52 and FAS 80). Under the accrual method, each net payment/receipt due or owed under the derivative is recognized in earnings during the period to which the payment/receipt relates; there is no recognition on the balance sheet for changes in the derivative's fair value (see, e.g., EITF Issue 84-36, "Interest Rate Swap Transactions").

[37] For example, the risk reduction criterion in FAS 52 is different from the risk reduction criterion in FAS 80. FAS 52 specifies risk reduction on a transaction basis, while FAS 80 specifies risk reduction on an enterprise basis. In addition, FAS 80 permits the use of deferral accounting for futures contracts used to hedge probable, but not firmly committed, anticipated transactions, while FAS 52 prohibits deferral accounting for foreign currency forward exchange contracts used to hedge those same types of anticipated transactions.

[38] The Commission does not mean to imply by this statement that registrants may justify the use of any method of accounting for derivatives. Registrants must select appropriate accounting methods that are consistent with generally accepted accounting principles. In particular, generally accepted accounting principles require registrants using derivatives for trading, dealing, or speculative purposes to recognize those instruments on the balance sheet at fair value and to recognize changes in that value immediately in earnings (see, e.g., FAS 80 3).

[39] APB 22 12 states:

Disclosure of accounting policies should identify and describe the accounting policies followed by the reporting entity and the methods of applying those principles that materially affect the determination of financial position, cash flows or results of operations. In general, the disclosure should encompass important judgments as to the appropriateness of principles relating to recognition of revenue and allocation of asset costs to current and future periods; in particular, it should encompass those accounting principles and methods that involve . . . a selection from existing acceptable alternatives.

The Accounting Principles Board was the predecessor to the FASB. Unless superseded by FASB Statements, APB Opinions continue to be regarded as the highest level of generally accepted accounting principles followed by the accounting profession. See generally AICPA, Statements on Auditing Standards No. 69, "The Meaning of Present Fairly in Conformity With Generally Accepted Accounting Principles in the Independent Auditor's Report," 5 (March 1992); AU §411.05.

[40] See FAS 119 60.

The Commission expects to reconsider the effectiveness of and the need for the accounting policy disclosures, prescribed under Rule 4-08(n) and Item 310, when a new accounting standard for derivatives is issued by the FASB.

[¶ 38,149] 220. Cash Equivalents

[Added by FR-84]

Current U.S. GAAP defines cash equivalents as "short-term, highly liquid investments that are readily convertible to known amounts of cash and that are so near their maturity that they present insignificant risk of changes in value because of changes in interest rates."[425] U.S. GAAP includes an investment in a money market fund as an example of a cash equivalent.[426] The Commission's position continues to be that, under normal circumstances, an investment in a money market fund that has the ability to impose a fee or gate under rule 2a-7(c)(2) qualifies as a "cash equivalent" for purposes of U.S. GAAP.[427] However, as is currently the case, events may occur that give rise to credit and liquidity issues for money market funds. If such events occur, including the imposition of a fee or gate by a money market fund under rule 2a-7(c)(2), shareholders would need to reassess if their investments in that money market fund continue to meet the definition of a cash equivalent. A more formal pronouncement (as requested by some commenters) to confirm this position is not required because the federal securities laws provide the Commission with plenary authority to set accounting standards, and we are doing so here.[428]

If events occur that cause shareholders to determine that their money market fund shares are not cash equivalents, the shares would need to be classified as investments, and shareholders would have to treat them either as trading securities or available-for-sale securities.[429] For example, during the financial crisis, certain money market funds experienced unexpected declines in the fair value of their investments due to deterioration in the creditworthiness of their assets and, as a result, portfolios of money market funds became less liquid. Investors in these money market funds would have needed to determine whether their investments continued to meet the definition of a cash equivalent.

The adoption of a floating NAV alone for certain rule 2a-7 funds will not preclude shareholders from classifying their investments in money market funds as cash equivalents, under normal circumstances, because fluctuations in the amount of cash received upon redemption would likely be small and would be consistent with the concept of a 'known' amount of cash. As already exists today with stable share price money market funds, events may occur that give rise to credit and liquidity issues for money market funds so that shareholders would need to reassess if their investments continue to meet the definition of a cash equivalent.

[425] *See* FASB Accounting Standards Codification ("FASB ASC") paragraph 305-10-20.

[426] *Id.*

[427] We are also amending the Codification of Financial Reporting Policies to reflect our interpretation under U.S. GAAP, as discussed below. *See infra* section VI.

[428] The federal securities laws provide the Commission with authority to set accounting and reporting standards for public companies and other entities that file financial statements with the Commission. *See, e.g.,* 15 U.S.C. 77g, 77s, 77aa(25) and (26); 15 U.S.C. 78c(b), 78l(b) and 78m(b); section 8, section 30(e), section 31, and section 38(a) of the Investment Company Act.

[429] *See* FASB ASC paragraph 320-10-25-1. This accounting treatment would not apply to entities to which the guidance in FASB ASC Topic 320 does not apply. *See* FASB ASC paragraph 320-10-15-3.

SECTION 300—INTERIM REPORTING

[¶ 38,151] 301. Form 10-Q

[Most publicly owned companies are required to file a quarterly report on Form 10-Q under the Exchange Act. In ASR 286, the Commission revised requirements for interim financial information in quarterly reports and registration statements to make them consistent with the requirements for annual reporting.]*

.01. Adequacy of Disclosure

ASR 286:

Interim financial information is to include disclosure, either on the face of the financial statements or in accompanying footnotes, sufficient so as to make the interim information presented not misleading. The need for and adequacy of additional disclosure is to be determined, except in regard to material contingencies, in the context of a presumption that users of interim financial information have either read or have access to the audited financial statements for the latest fiscal year. Footnote disclosure which would substantially duplicate the disclosure contained in the audited financial statements for the most recent fiscal year, such as a statement of significant accounting policies and practices, details of accounts which have not changed significantly in amount or composition since the end of the most recent fiscal year, and detailed disclosures prescribed by Rule 4-08 of Regulation S-X (note requirements for complete financial statements) may be omitted.

Disclosure is required to be provided, however, where events having a material impact on the registrant have occurred since the end of the most recent fiscal year. Disclosure will encompass, for example, significant changes since the end of the most recent fiscal year in such items as: accounting principles and practices; estimates inherent in the preparation of financial statements; status of long-term contracts; capitalization including significant new borrowings or modification of existing financing arrangements; and the reporting entity resulting from business combinations or dispositions. Where material contingencies exist, disclosure of these contingencies must be included even though a material change in such contingencies may not have occurred since the end of the prior fiscal year.

The Commission believes that even for interim reporting it is important to distinguish between disclosures necessary for fair presentation of financial condition and disclosures which are supplemental in nature. Accordingly, the rule does not allow registrants to provide the disclosures necessary for fair presentation in MD&A.

301.02. Disclosure of Material Contingencies

ASR 286:

The requirement to repeat the disclosure of material contingencies in interim reports was proposed by the Commission because of its understanding of the disclosure requirements already existing under GAAP.** The Commission continues to believe that APBO 28 requires material contingencies to be disclosed in interim reports regardless of whether a material change in the status of the contingencies has occurred. Accordingly, the rules specify that "when material contingencies exist, disclosure of such matters shall be provided even though a significant change since year end may not have occurred."

301.03. Status of Information Disclosed

ASR 286:

Form 10-Q contains Instruction E (Filed Status of Information Presented) which makes explicit whether various information provided in response to the requirements of the form will be deemed filed for the purpose of liability under Section 18 of the Exchange Act. The instruction contains a statement that financial information provided in response to Item 1 and Item 2 of Part I will not be deemed filed, pursuant to Rule 13a-13(d) and Rule 15d-13(d). The instruction goes on to state that this is the case regardless of whether the information is presented directly in the Form 10-Q, is incorporated by reference from an informal report containing the required information, or is in an exhibit to Part I. In addition, the instruction also provides that information provided to satisfy all other requirements of Form 10-Q will deemed filed for the purpose of Section 18 of the Exchange Act.

The Commission adopted an amendment to the safe harbor rule for forward-looking information, Rule 175 under the Securities Act, which makes clear that a projection of the type enumerated by that rule is protected if included or properly reaffirmed in Part I of Form 10-Q. This action codifies the staff position which deems Part I "filed" for purposes of the safe harbor rule even though it is not filed for purposes of Section 18 of the Exchange Act.

301.04. Management's Discussion and Analysis

ASR 286:

* [In Securities Act Releases 6360, 6361 and 6362, an integrated disclosure system for foreign private issuers was proposed. That project will address, among other things, interim reporting for foreign private issuers.]

** Paragraph 22 of APBO 28, "Interim Financial Reporting," states:

Contingencies and other uncertainties that could be expected to affect the fairness of presentation of financial data at an interim date should be disclosed in interim reports in the same manner required for annual reports. Such disclosures should be repeated in interim and annual reports until the contingencies have been removed, resolved, or have become immaterial.

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Requirements governing the scope and content of management's discussion and analysis of interim financial statements are contained in Item 303 of Regulation S-K. These provisions are intended to complement the requirements established for discussions of annual periods by requiring interim period discussions to focus on the same information discussed for annual periods in order to provide an update of the annual discussion. The interim discussion is not required to reiterate all of the information presented in the full year discussion. Rather, only material changes in financial condition and results of operations occurring during the periods covered by the interim financial statements need be discussed.

The discussion of material changes in financial condition must cover the period from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided and must focus on items required for annual discussions such as liquidity and capital resources. A discussion of changes in financial condition from the corresponding interim balance sheet date of the preceding fiscal year is only required if the interim balance sheet as of that date is included in the interim financial statements. Thus, only when the registrant believes the discussion is necessary for an understanding of the impact of seasonal fluctuations on financial condition as of an interim date will that period be required in the discussion of financial condition.

The rules for management's discussion and analysis of interim financial statements also require registrants to discuss any material changes with respect to results of operations for the most recent interim year-to-date period for which an income statement is provided and the corresponding year-to-date period of the preceding fiscal year. If interim financial statements are required or are otherwise provided in a filing for the most recent fiscal quarter,* the registrant must also discuss the material changes in the results of operations with respect to that quarter and the corresponding quarter of the preceding fiscal year. In addition, if a registrant chooses to provide financial statements for a cumulative twelve-month period preceding the date of the most recent interim balance sheet provided, material changes in results of operations must also be discussed with respect to that period and the preceding cumulative twelve-month period. However, if a registrant provides a cumulative twelve-month income statement in a registration statement in place of the interim statements of income otherwise required, as provided for by paragraph (b) of Rule 3-06 of Regulation S-X, the discussion of material changes in results of operations for that period shall be in respect to the preceding fiscal year as opposed to the corresponding preceding period.[1]

The same items required to be addressed in annual discussions of results of operations must, with the exception of the impact of inflation, also be addressed in discussions of interim periods. Although the Commission believes registrants should strive to provide users of interim reports with information regarding the impact of inflation and changing prices, it also believes that it would be premature to require all registrants to address inflation for interim reporting purposes, particularly in light of the experimental nature of this type of disclosure. Once registrants have had the opportunity to experiment with alternative methods of disclosing the impact of changing prices and once improved reporting standards are developed by the accounting profession, the Commission will reconsider disclosure obligations for reporting interim results. In the meantime, the Commission encourages registrants to experiment with this type of disclosure.

The Commission has determined to make the same relief from certain of the MD&A disclosure requirements which is granted to qualified wholly-owned subsidiaries for reporting on Form 10-K[2] also available for quarterly reporting on Form 10-Q.[3] The Commission believes that it is appropriate at this time to grant consistent treatment to these registrants with respect to discussions of capital resources and liquidity for annual and interim periods.[4]

301.05. Incorporation by Reference

ASR 286:

Where an informal report to shareholders contains some or all of the required information, appropriate portions of the report may be incorporated by reference into the Form 10-Q in lieu of repetitive disclosure, just as the annual report to security holders may be used to satisfy some of the requirements of Form 10-K.

The interim financial information and MD&A called for by Part I of the Form could be satisfied, in whole or in part, through incorporation by reference from an informal quarterly report to shareholders containing the required information. The Commission intends to facilitate the practice of sending quarterly reports to shareholders by emphasizing that issuers have the option of incorporating their informal communications into the Form 10-Q. It should be noted that Rule 12b-23(b) already operates to provide that non-financial statement disclosure contained in informal reports to security holders may be incorporated by reference in answer or partial answer to any item of Part II of Form 10-Q.

The Commission believes that it is appropriate at this time to reiterate its support for the recommendation of the Advisory Committee on Corporate Disclosure that companies be encouraged to publish readable, understandable quarterly reports to shareholders which include the information content of a Form 10-Q, and to file these documents with the Commission in satisfaction of Form 10-Q reporting obligations.* The Commission believes that companies can reduce their reporting burden by taking advantage of the option to incorporate by reference to their informal quarterly report in partial or full satisfaction of the requirements of Parts I and II of Form 10-Q. More importantly, use of this option could effect a significant enhancement of the corporate communications system.

301.06. Duplication of Generally Accepted Accounting Principles

ASR 286:

The Commission at this time does not believe that generally accepted accounting principles for interim reporting purposes are as well defined as the principles for annual reporting purposes, especially in regard to financial statements which constitute less than a complete set of financial statements but which are more comprehensive than summarized data of operations. Consequently, the Commission has elected to retain, and in some cases add to, the level of guidance offered applicable to the interim data it requires.

301.07. Use of Form 10-Q in Lieu of Form 8-K

ASR 286:

Item 5 may be used to fulfill any or all of the reporting requirements under Form 8-K. Item 5 permits registrants to reduce reporting burdens by including in a report on Form 10-Q information which would otherwise be required to be reported on Form 8-K. Of course, all Form 8-K timing and substantive disclosure requirements would have to be met by the filing on Form 10-Q in order to avoid the obligation to file a Form 8-K.

301.08. Signature Requirements

ASR 177:

Form 10-Q must be signed by either the chief financial officer or the chief accounting officer of the corporation. This requirement is included in recognition of the fact that the data in the form is primarily financial, and that it is appropriate to emphasize the responsibility of the chief financial or accounting officer for the representations explicit and implicit in the filing. This signature will not relieve other corporate officers of their responsibilities.

[¶ 38,161] 302. Registration Statement Requirements

.01 Age of Financial Statements

ASR 281:

In general, the rules regarding the inclusion of interim financial information in registration statements parallel requirements for interim financial data under Form 10-Q. The rules do not require registrants to provide in registration statements interim financial data any more current than interim data required for most registrants in quarterly reports on Form 10-Q. A discussion of the rules, which specify the interim data to be included both as of the date of filing and as of the expected effective date of the filing, or proposed mailing date in the case of a proxy statement, and a description of the exceptions to the general rule are set forth below.

302.01.a. Filings Within 90 Days of Year-End

[Amended in Release No. 33-8644, effective December 27, 2005, 70 F.R. 76626. See section III.D of the release for compliance date information.]

ASR 281:

The uniform financial statement requirement requires audited balance sheets as of the end of the two most recent fiscal years and audited statements of income and cash flows for each of the most recent three fiscal years. Exceptions to this rule occur when filings, other than on Form 10-K or Form 10, are made within 45 days after the end of the registrant's fiscal year and audited financial statements for the most recent fiscal year are not yet available. In these circumstances, the rules provide that the audited balance sheets may be as of the end of the two preceding fiscal years and audit statements of income and cash flows may be presented for each of the three fiscal years preceding the most recent audited balance sheet presented. Under these circumstances, however, an additional balance sheet (which may be unaudited) is required as of an interim date at least as current as the end of the registrant's third fiscal quarter of the most recently completed fiscal

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* Only Form 10-Q requires income statements for the most recent fiscal quarter and for the corresponding quarter of the preceding fiscal year in addition to comparative statements for year-to-date periods.

[1] Rule 3-06 of Regulation S-X contains instructions to income statement requirements and applies to interim statements in certain registration statements. Paragraph (b) provides that:

If the registrant is engaged primarily (1) in the generation, transmission or distribution of electricity, the manufacture, mixing, transmission or distribution of gas, the supplying or distribution of water, or the furnishing of telephone or telegraph service; or (2) in holding securities of companies engaged in such businesses, it may at its option include statements of income and changes in financial position (which may be unaudited) for the twelve-month period ending on the date of the most recent balance sheet being filed, in lieu of the statements of income and changes in financial position for the interim periods specified.

[2] See General Instruction I to Form 10-K.

[3] Instruction G(2)(a) reflects this conforming change.

[4] It should be noted that, in light of the changed focus of MD&A from the former summary of operations onto the financial statements themselves, the Commission may reconsider this area, both for annual and interim periods, as it gains experience with the new MD&A.

* Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (1977), Committee Print 95-29, 470-5.

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year and unaudited statements of income and cash flows are required on a comparative basis for the interim period between the date of the most recent audited balance sheet presented and the date of the most recent interim balance sheet.

This same provision for filing interim financial data is applicable to filings, other than on Form 10-K or Form 10, made after 45 days but within 60 days of the end of the registrant's fiscal year (75 days for fiscal years ending before December 15, 2006) for large accelerated filers or after 45 days but within 75 days of the end of the registrant's fiscal year for accelerated filers (or after 45 days but within 90 days of the end of the registrant's fiscal year for other registrants) provided the registrant meets certain prescribed conditions.

To this extent, the rules parallel interim reporting requirements under the Exchange Act. A potential investor of securities already registered and traded in the open market, for instance, wishing to make an investment decision on March 1, may only have available to him for a calendar year company the audited financial statements for the two years preceding the fiscal year most recently completed and unaudited interim data on a condensed basis through the end of the third fiscal quarter of the most recent fiscal year (as filed on Form 10-Q). This same level of disclosure will be available to the investor considering an investment in shares being registered on March 1.

However, where a company files a registration statement or plans to become effective with a registration after 45 days but within 60 days (75 days for fiscal years ending before December 15, 2006) of the end of its fiscal year if the registrant is a large accelerated filer (*i.e.*, February 16 to March 1 (or March 15 for fiscal years ending before December 15, 2006) for calendar year companies), after 45 days but within 75 days of the end of its fiscal year if the registrant is an accelerated filer (*i.e.*, February 16 to March 15 for calendar year companies), or after 45 days but within 90 days of the end of its fiscal year for other registrants (*i.e.*, February 16 to March 31 for calendar year companies) and does not meet the conditions prescribed by the rules described below, the Commission requires that audited financial statements for the most recently completed fiscal year be included in the registration statement. To avoid the possibility of having to accelerate the preparation and audit of the financial statements for the most recently completed fiscal year, a company filing in the "45 day window" specified above must: (a) be a registrant who files annual, quarterly and other reports pursuant to section 13 or 15(d) of the Exchange Act; (b) have filed all reports due; (c) reasonably and in good faith expect income, after taxes but before extraordinary items and cumulative effect of a change in accounting principle, for the most recent fiscal year for which audited financial statements are not yet available; and (d) for at least one of the two immediately preceding fiscal years for which audited financial statements are available, have reported income, after taxes but before extraordinary items and cumulative effect of a change in accounting principle.

The Commission recognizes that for some short period of time certain registrants may be prevented from going to the market. However, the Commission has concluded that, when a company is either a new registrant or is a registrant with unprofitable operations and is attempting to raise capital in the marketplace during the 45 days before audited financial statements for the most recent fiscal year would otherwise be required, it is reasonable to delay registration until such financial statements become available. The Commission believes that companies which do not meet the conditions described above will be cognizant of applicable registration requirements and will plan to accelerate the preparation and audit of their financial statements when planning to file or become effective in this 45 day period.

The Commission believes that this exception in the rules is in the best interest of the investing public and will not create any burden on the large majority of registrants. Also, it should be understood that, as in the past, the Commission will offer waivers to the rules where unusual circumstances dictate the need for them.

302.01.b. Filings After 134 Days of Year-End

[Amended in Release No. 33-8644, effective December 27, 2005, 70 F.R. 76626. See section III.D of the release for compliance date information.]

ASR 281:

The rules also provide for interim financial information in registration statements filed after 129 days subsequent to the end of a registrant's fiscal year if the registrant is a large accelerated filer or an accelerated filer (or 134 days subsequent to the end of a registrant's fiscal year for other registrants) —the period after audited financial statements for the most recently completed fiscal year are already required to be filed by most registrants on Form 10-K and on or after the date most registrants are required to have filed interim financial statements for the first fiscal quarter. When a registration statement is filed during this period, an additional balance sheet is required as of an interim date within 130 days of the date of the filing if the registrant is a large accelerated filer or an accelerated filer (or 135 days of the date of the filing for other registrants) but as of a date at least as current as the date of the most recent quarterly data filed with the Commission on Form 10-Q. Also, statements of income and cash flows are required, on a comparative basis, for the interim period between the date of the most recent audited balance sheet and the date of the most recent interim balance sheet being filed. Here again, the rules parallel the requirements for interim information under the Exchange Act but also provide some flexibility for those registrants who may not be required to file quarterly data on Form 10-Q.*

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302.01.c. Age at Effective Date of Filing

[Amended in Release No. 33-8644, effective December 27, 2005, 70 F.R. 76626. See section III.D of the release for compliance date information.]

ASR 281:

Where financial statements in a filing are as of a date 130 days or more, if the registrant is a large accelerated filer or an accelerated filer (or 135 days or more for other registrants) prior to the date the filing is expected to become effective or proposed mailing date in the case of a proxy statement, the rules require the financial statements to be updated with a balance sheet as of an interim date within 130 days, if the registrant is a large accelerated filer or an accelerated filer (or 135 days for other registrants) and with statements of income and cash flows on a comparative basis, for the interim period between the end of the most recent fiscal year and the date of the interim balance sheet provided.

Two exceptions to this rule have been provided. First, where the registrant meets the four conditions described in the previous section and the anticipated effective date or proposed mailing date in the case of a proxy statement falls after 45 days but within 60 days (75 days for fiscal years ending before December 15, 2006) of the end of the fiscal year if the registrant is a large accelerated filer, after 45 days but within 75 days if the registrant is an accelerated filer (or after 45 days but within 90 days of the end of the fiscal year for other registrants), the filing need not be updated with financial statements more current than as of the end of the third fiscal quarter of the most recently completed fiscal year provided audited financial statements for such fiscal year are not available. Second, where the registrant does not meet the prescribed conditions referred to above and the anticipated effective date or proposed mailing date falls after 45 days but within 60 days (75 days for fiscal years ending before December 15, 2006) of the end of the fiscal year if the registrant is a large accelerated filer, after 45 days but within 75 days if the registrant is an accelerated filer (or after 45 days but within 90 days of the end of the fiscal year for other registrants), the filing must include audited financial statements for the most recent fiscal year. Both of these exceptions are consistent with the rules governing financial statements as of the date of filing and have been included for the same reasons described in the previous sections.

In addition, the updating rules include a general provision that, if a filing is made near the end of a fiscal year and the audited financial statements for that fiscal year are not included in the original filing, the filing shall be updated with such audited financial statements if they become available prior to the anticipated effective date, or proposed mailing date in the case of a proxy statement.

302.02. Form and Content

ASR 281:

As an additional step toward attaining consistency between the disclosures required under the Securities Act and those required under the Exchange Act, the Commission adopted amendments which conform the requirements as to form and content of interim financial data under the Securities Act with requirements as to form and content under Form 10-Q under the Exchange Act.

[¶ 38,171] 303. Reporting in Conjunction with Historical Financial Statements

[The Commission originally required disclosure of selected quarterly financial data in notes to annual financial statements of certain registrants as announced in ASR 177. Subsequently, the requirement for such disclosure was moved from Regulation S-X to Item 302.(a) of Regulation S-K thereby permitting such disclosure outside of the financial statements as announced in ASR 280. These disclosures are required in annual reports filed with the Commission and annual reports to security holders furnished pursuant to the proxy rules. A certain level of auditor involvement with this unaudited information is required.]

ASR 177:

The Commission determined that disclosure of selected quarterly financial data (net sales, gross profit, income before extraordinary items and cumulative effect of a change in accounting, per share data based upon such income, and net income for each quarter within the two most recent fiscal years and any subsequent fiscal period for which income statements are required) is appropriate for the protection of investors in the case of large companies whose shares are actively traded. The Commission believes that the greatest investor need for these data exists in the case of such companies whose activities are most closely followed by analysts and investors. Accordingly, registrants whose shares are not actively traded or whose size is below certain limits have been exempted from this rule. In making this judgment, the Commission also recognized that the costs of such disclosure would be relatively a greater bur-

* For instance, a calendar year company not subject to quarterly reporting requirements under the Exchange Act and therefore not required to file a Form 10-Q may, in a filing on May 30, include interim financial statements as of, say, the end of January or February as opposed to the end of the first fiscal quarter (March 31). For some companies not accustomed to reporting as of an interim date, a requirement for data as of the end of the most recent fiscal quarter imposes a significant burden in preparing a registration statement. Data less current than as of the end of the most recent fiscal quarter will be acceptable as long as it is within the prescribed period prior to the date of filing.

den to smaller companies. Nevertheless, the Commission urges registrants who are exempt from the rule to consider the desirability of including such data in their annual reports.

The Commission believes that such disclosure will materially assist investors in understanding the pattern of corporate activities throughout a fiscal period and it feels that such understanding is important if financial statements are to serve their objective of allowing investors to develop reasonable expectations about the future prospects of enterprises in which they are investing or considering investment. Presentation of such quarterly data will supply information about the trend of business operations over segments of time which are sufficiently short to reflect business turning points. Annual periods may obscure such turning points and may reflect a pattern of stability and growth which is not consistent with business reality. In addition, quarterly data will reflect seasonal patterns which are of significance to an investor's understanding of the business operations of a reporting entity.

While the Commission recognizes that random events can materially affect quarterly results, it believes that its rule which requires disclosure of any unusual or infrequently occurring items recognized in any quarter disclosed, will enable investors to ascertain the effect of such items and hence not be misled. It also recognizes that short period estimates are imprecise, and did not propose any change in the traditional accounting practice of making the best estimate practicable at the time the estimate must be made, and then reflecting subsequent adjustments in the estimate in subsequent periods as the need became apparent. Estimates are a necessary part of all financial reporting, and since registrants have had many years experience in making the estimates required in quarterly reporting and investors have had equivalent experience in using the reports encompassing these estimates, the Commission is not prepared to conclude that including quarterly data in an annual report will create an impression of reliability which will mislead investors. In addition, the rule requires the disclosure of the aggregate effect and the nature of year end or other adjustments which are material to the results of each quarter presented. This disclosure will permit investors to determine the nature and effect of substantial changes in estimates.

[¶ 38,175] 304. Involvement of Independent Public Accountants

.01. Review of Interim Data

[In ASR 177, the Commission announced a requirement that auditors review interim financial information filed with annual financial statements.]

ASR 177:

The Commission believes that all registrants would find it useful and prudent to have independent public accountants review quarterly financial data on a timely basis during the year prior to the filing of Form 10-Q and it encourages registrants to have such a review made. While such a review does not represent an audit and cannot be relied upon to detect all errors and omissions that might be discovered in a full audit of quarterly data, it will bring the reporting, accounting and analytical expertise of independent professional accountants to bear on financial reports included in Form 10-Q and, therefore, should increase the quality and the reliability of the data therein in a cost-effective way. The Commission believes that an accountant's report on a limited review may provide significant and useful information to investors and that such reports should be encouraged. However, the Commission does not require such reports in connection with Form 10-Q filings.

The Commission believes that as reviews of quarterly information become a regular part of the audit examination of public companies, auditors will revise the timing of their audit examinations so that they will perform procedures related to the testing of internal controls and the analytical review of internal financial reports on a regular basis throughout the year. In addition, programs encompassing regular analytical review should increase the efficiency of auditors in finding and focusing promptly on potentially troublesome areas in the audit. The Commission believes, therefore, that many of the costs included in the studies reported to the Commission will not prove to be incremental costs but will reduce the cost of the year-end audit examination. In addition, it is the Commission's view that many of the costs will be of a one time rather than a continuing nature since audit programs and corporate control systems will be improved promptly to keep costs at a minimum. The Commission does not suggest that the cost of auditor involvement in quarterly data will be trivial, but it does believe that some of the higher estimates supplied to it will not prove to be correct.

The benefits resulting from such increased costs cannot be quantified, but the Commission is satisfied that they will be substantial. While the rules do not mandate the timely involvement of the independent accountant with quarterly reports, the Commission believes that it is likely that such involvement will occur so that management will be less likely to face the necessity of revising quarterly data at the time year-end statements are published. Either timely or retrospective involvement should increase the care and attention devoted to quarterly reports which will increase the likelihood that management will discover needed adjustments on a timely basis. In addition, management may be able to identify problem areas more promptly so that unusual charges and credits are not made so frequently in the last month of

a fiscal year. Finally, the involvement of independent accountants will add the expertise of professional accountants with wide experience in reporting problems to the quarterly reporting process. This should improve individual company reporting and direct greater professional attention to the general problems of interim reporting.

The Commission has brought a number of enforcement actions involving quarterly reports and it has observed other cases where quarterly reports have required correction. In addition, it has noted the preponderance of Form 8-K filings covering unusual charges and credits to income being made late in the year. While these are not suggested to be evidence of systematic abuse in quarterly reporting, they do indicate that deficiencies exist. Although auditor involvement will not prevent all deficiencies, the Commission does believe that it will enhance the reliability of interim reports and reduce the likelihood of abuse. In the final analysis, however, the benefits of auditor involvement in quarterly data are expected primarily to result from improvement in the quality of interim reporting and the annual auditing process and only secondarily from the prevention of specific abuses currently perceived.

After appraising the costs and benefits, the Commission determined that the benefits of mandatory involvement of independent accountants in quarterly data on the basis set forth in the rules substantially outweigh the costs thereof, and that such involvement is required in the interests of investors.

In exempting certain registrants from these rules, the Commission has noted that the cost of auditor involvement will fall with the greatest relative severity on smaller registrants in which public investor interest is not of great magnitude. In these cases, the Commission believes that it is less clear that the benefits of auditor involvement with interim data outweigh the costs. Accordingly, it has not required such involvement for such registrants at the present time, although it will continue to study the question as it evaluates the experience gained from the rules adopted.

304.02. Preferability Letters

ASR 177:

In connection with accounting changes, a letter from the registrant's independent public accountant is required to be filed in which the accountant states whether or not the change is to an alternative principle which in his judgment is preferable under the circumstances. The Commission believes that professional accounting judgment can be applied to determine whether an alternative accounting principle is preferable in a particular set of circumstances. Since a substantial burden of proof falls upon management to justify a change, the Commission believes that the burden has not been met unless the justification is sufficiently persuasive to convince an independent professional accounting expert that in his judgment the new method represents an improved method of measuring business operations in the particular circumstances involved.

[¶ 38,181] 305. Form 8-K

ASR 306:

Form 8-K plays a critical role in the periodic reporting system, which is intended to provide investors with a continuous stream of corporate information. Reports on Form 8-K are used to provide material information concerning certain specified events that may have occurred since the latest annual report on Form 10-K or quarterly report on Form 10-Q was filed. In addition, registrants may, and in fact are encouraged to, file voluntary reports on Form 8-K pursuant to Item 5 describing any other events that may be of interest to investors. Item 5 makes clear that registrants may file voluntary reports not only to report material events, but also to inform their security holders of other matters that may be of interest. This provision is intended to encourage further voluntary reports on Form 8-K and to remove any reluctance that registrants may have to file voluntary reports pursuant to Item 5 on the basis that they will be deemed to have admitted the materiality of the event reported.

ASR 206:

Registrants are reminded of the obligations of publicly held companies to make full and prompt announcements of material facts regarding the company's financial condition, notwithstanding their compliance with the reporting requirements of the Exchange Act. The failure of companies to make prompt and accurate disclosure of both favorable and unfavorable information to security holders and the investing public may violate the Exchange Act and, in the case of an issuer making a continuous offering of its shares, may also violate the Securities Act if the prospectus is not appropriately updated. Therefore, corporate managements are urged to review their policies with respect to corporate disclosure and endeavor to set up procedures which will insure that prompt disclosure be made of all material corporate developments.*

* See Securities Act Release 5092 (October 15, 1970), 35 FR 16733 (October 29, 1970).

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SECTION 400—SPECIALIZED INDUSTRIES

[¶ 38,191] 401. Banks and Bank Holding Companies

[In ASR 254, the Commission adopted a comprehensive revision of Article 9 of Regulation S-X relating to bank holding companies and banks. In ASR 276, the Commission adopted revisions to certain sections of those rules. In FRR 11, the Commission adopted further revisions to Article 9 to (1) eliminate rules which are duplicative of GAAP, (2) integrate and simplify the rules, (3) reflect current financial reporting practices, and (4) improve financial reporting generally. In addition, certain related amendments to the Guides for Statistical Disclosure by Bank Holding Companies (Industry Guide 3) were adopted in order to incorporate a number of disclosures which were eliminated from the requirements of Article 9. The Commission also amended the proxy rules to require bank holding companies to include in annual reports to shareholders financial statements prepared in accordance with Regulation S- X.] [Amended in FR-11, March 7, 1983.]

.01. Income Statement Format

ASR 254:

The Commission believes that the net interest income format presents valuable information for analysis by investors even when it is not on a tax equivalent basis. The tax equivalency adjustment is not in accordance with generally accepted accounting principles but reflects theoretical income never actually realized by a company. Although such an adjustment may be appropriate for statistical analytical purposes, it is not appropriate for inclusion in financial statements.

401.02. Disclosure of Loans to Nonofficer Directors

ASR 276:

In view of commentator requests and the limitations in the Financial Institutions Regulatory and Interest Rate Control Act of 1978 on when banks can make loans to executive officers, directors and certain stockholders, the Commission considered whether detailed disclosure of loans to nonofficer directors in a schedule to the financial statements was useful in evaluating the financial condition and future prospects of bank holding companies and banks. The Commission believes, that an investor should be aware of the extent, at least in the aggregate, to which a bank makes loans to insiders as against loans to the general public.

FR 11:

A significant number of commentators suggested that the Commission eliminate all requirements for disclosure of related party loans because banks engage in lending transactions in the ordinary course of business. Many of these commentators suggested that no distinction is necessary for loans to related parties since such transactions are highly regulated and subject to certain legal requirements. Other commentators suggested that specific Commission requirements are unnecessary since GAAP adequately addresses this area under the Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 57, "Related Party Disclosures" ("SFAS 57"). The Commission has considered the view of these commentators and continues to believe specific information about loans to related parties is material information for investors and shareholders. Furthermore, analysis of commentator letters indicates some confusion about the applicability of SFAS 57 to bank holding companies, since SFAS 57 contains an exception for certain related party transactions in the ordinary course of business. Therefore, the Commission has determined to retain its specific disclosure requirements to ensure consistent minimum disclosure in this important area.

401.03. Foreign Activities

ASR 254:

The definition of foreign activities recognizes the ability of banks at times to place loans in a foreign or domestic office depending on the availability of funds. Although the definitions and details of items to be reported for foreign activities in Article 9 differ in certain respects from those in the reports of condition and income (call report) of the Federal bank regulatory agencies because of differences in the purposes for which the reports are required, the Commission believes that there is no difference in details and totals of corresponding assets, liabilities, revenue and income which are to be reported. The provisions of Article 9 have also been designed to reflect the application of the general provisions of SFAS 14 to the special nature of banking.

The general requirement for disclosure of foreign activities and the requirement that disclosure be made if income before tax expense or net income exceeds 10 percent of the corresponding amount in the related financial statement are appropriate for bank holding companies and other financial type companies because their leveraged nature creates different relationships between assets, revenue and income as against the relationships existing in commercial and industrial companies.

401.04. Investment Securities

ASR 254:

The Commission believes that disclosure of market value of investment securities on the balance sheet is valuable in the evaluation of this asset specifically and in relation to the balance sheet in its entirety. The significance of market value of investments is such that it should not be completely relegated to a note to the financial statements.

FR 11:

Investment Securities Gains or Losses. The proposed rules called for a change in the income statement format to report gains or losses on investment securities as a separate component of income before income tax expense, rather than as a separate item (less applicable taxes) after the caption entitled "income before securities gains or losses." This proposed elimination of the so-called two-step format of reporting income both before and after investment security transactions was commented on by approximately three-fourths of the respondents. A majority of those commentators opposed the proposed change. Objection to the proposed one-step approach was based primarily on the view that the two-step reporting format is a customary presentation which banks have used for many years, and that the inclusion of the effect of investment securities transactions as a part of income from banking operations is inappropriate and will result in a less useful presentation. A few commentators objected for other reasons, indicating that banks should have the ability to restructure their investment portfolio without penalizing current "operating" income with the related losses, or that the proposed change would increase the potential to manage or smooth reported earnings through the timing and selection of securities transactions.

Although the rule met with considerable opposition, a significant number of commentators strongly endorsed the change. Proponents indicated that a uniform net income approach was long overdue and that conforming the reporting format used by bank holding companies to that used by virtually all other entities would eliminate much of the confusion surrounding a bank holding company's actual earnings. These commentators generally agreed with the Commission that there is no conceptual basis for reporting investment transactions in a manner that implies that the gains or losses thereon represent something other than operating earnings. Further, the present reporting was viewed as being inconsistent in that security losses are excluded from operations, while the interest on the replacement security, which generally exceeds the interest on the previous security, is included in operating income. On this point, it was mentioned that the sale of securities generally has the same objective as the sale of mortgage loans and should be classified similarly.

Careful consideration has been given to the comments of respondents, particularly those of users, and the needs of investors. While the Commission understands that some persons believe that income before securities gains or losses provides a better basis upon which to evaluate trends, the Commission continues to believe that the two-step income format promotes the misconception that securities transactions are not part of normal banking operations, and that this format detracts from the importance of net income, which should be of primary importance to investors. Furthermore, there are many other discretionary items (similar to securities transactions) which are included in income before securities gains and losses.

For these reasons, and because of the potential for inappropriate reporting of certain transactions as security gains or losses, the Commission is adopting the one-step income statement format for bank holding companies as proposed, with one change. In response to commentator suggestions that the proposed presentation of securities gains or losses as a separate caption after other income and other expenses retains some of the complexity of the present two-step format, the final rules call for the presentation of investment securities gains and losses as a separate subcategory of other income.

In response to certain commentator suggestions that the one-step format will somehow influence investment policies regarding the content of the investment portfolio and the restructuring thereof (including the potential for registrants to manage earnings through the timing and selection of securities transactions), the Commission wishes to emphasize its belief that the revised reporting format should not have a bearing on prudent decision making. Furthermore, the Commission's existing disclosure requirements require specific disclosures about the content of the investment securities portfolio and the yields thereon. Such disclosures should provide users with the necessary information to evaluate management's investment policies and strategies.

In response to certain commentator suggestions that the one-step format will increase the potential for registrants to manage earnings, the Commission emphasizes the responsibility of bank holding companies, as well as all other registrants, to clearly identify and explain in the Management's Discussion and Analysis the nature and impact of all special, discretionary, or nonrecurring items (such as investment securities gains or losses) having a material effect on reported financial condition, changes in financial condition and results of operations.

The Commission is aware of certain private-sector initiatives to promote the adoption of the one-step income statement for the entire banking industry. This action would complement the Commission's action, which is only applicable to bank holding companies required to file with the Commission.

In addition, the FASB has a project on its agenda as part of its conceptual framework to

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explore display issues in reporting earnings.[2] This project will deal with, among other things, the purpose of the income statement, the concept of operating performance and how information should be displayed in the income statement (i.e., the reporting of details, subtotals, and which kind of items should be presented separately within the statement). The Commission expects that the outcome of this project (which has been under consideration for some time and is not yet near completion) should result in more useful financial reports for companies in all industries. Thus, the Commission encourages the FASB to aggressively pursue this project and stands ready to reconsider the provisions of Article 9 being adopted today, as well as other provisions of S-X governing the form and content of financial statements, based on its evaluation of the results of the FASB project.

401.05. Reporting of Large Certificates of Deposit and Time Deposits

ASR 276:

Informative disclosure of the aggregate amount of time certificates of deposit (CD) and other time deposits (TD) in denominations of $100,000 or more in both domestic and foreign categories appears necessary to show the increasing significance of large CD's and TD's and in some banks the increasing reliance on large interest bearing deposits in foreign offices. Separate disclosure of large foreign CD's and TD's would not be necessary if the aggregate of such deposits is a majority of total foreign deposit liabilities. In such cases, a note should explain that the aggregate amount of deposits in excess of $100,000 is a majority of total foreign deposits.

401.06. Bankers' Acceptances

FR 11:

In the proposing release, the Commission requested comments on the balance sheet presentation of bankers' acceptance transactions. Although no changes were proposed to the present requirement to disclose on the balance sheet amounts due from customers on acceptances and banks' acceptances outstanding as assets and liabilities, the Commission noted that some have indicated that the current presentation should be reevaluated to determine whether these transactions should be reported as contingent liabilities.

Response to the inquiry was diverse. Some commentators maintained that acceptances are best characterized as contingent liabilities, while others stated their belief that the present practice is appropriate. A significant number of commentators suggested that this issue should be left to the private sector for resolution.

In the absence of a consensus as to the most appropriate accounting in this area, and considering the complexity of the issues, the Commission has determined that it will not take any further action at this time. Rather, the Commission encourages industry and accounting groups to continue to consider this issue, and if deemed necessary, to refer the matter to the Financial Accounting Standards Board for resolution.

401.07. Parent Company Financial Information

FR 11:

In the proposing release, the Commission requested comments on the need for parent company financial information when consolidated financial statements are presented for bank holding companies. The response to this inquiry indicates that many users and preparers of bank holding company financial statements strongly believe that information provided by separate financial statements of the parent company are necessary for informed decisions since inter-company loans, advances and cash dividends by bank subsidiaries are subject to substantial regulatory restrictions. The Commission believes that these views are valid and that the parent company information should be widely available to assist in making informed investment decisions. Accordingly, the final rules provide that the condensed parent only financial information currently provided in Schedule III (modified to prescribe certain separate disclosures about bank and non-bank subsidiaries which was previously required in a schedule)[4] be presented in the notes to the consolidated financial statements. The effect of the change will be to require parent company financial information in the annual reports to shareholders of bank holding companies.

Other. In addition to various editorial revisions, certain other substantive changes have been made in the final rules:

—The instructions in Article 9 concerning disclosure of the valuation of trading account assets have been deleted since GAAP calls for such assets to be carried at market value.

—A provision was added to Rule 9-03(7) allowing the registrant to use different loan categories than those specified if it results in a more meaningful presentation; this provision currently exists in Article 9 but was not included in the proposal.

[2] FASB Exposure Draft, Proposed Statement of Financial Accounting Concepts, "Reporting Income, Cash Flows and Financial Position of Business Enterprises," (November 16, 1981). The comment period on this exposure draft expired May 3, 1982. After reviewing the comments received, the FASB decided that further development of concepts for reporting earnings should be delayed so as to be concurrent with the development of concepts for measurement and recognition criteria.

[4] The requirement to provide information in a schedule about investments in and indebtedness of and to bank subsidiaries, and cash dividends paid by bank subsidiaries was rescinded by Accounting Series Release No. 302 in Securities Act Release No. 6359 (November 6, 1981) [46 FR 56171].

—The requirements of Section V-A of Guide 3 regarding the types of deposits have been amended to provide for disclosures of the average rates paid thereon. Also, an instruction was added to allow the use of captions other than those specified for domestic deposits if appropriate. These changes were made in light of the impact of deregulation on the costs and sources of funds, and should provide additional useful information about these funding sources and provide flexibility to appropriately describe the nature of the deposits.[5]

Sec. 401.08. Risk Elements Involved in Lending Activities

[*Sec. 401.08 added by FRR-13.*]

Sec. 401.08a. Executive Summary

FRR 13:

This release amends the existing Item III.C., "Nonperforming Loans," of the Industry Disclosure Guides for Bank Holding Companies ("Guide 3") to establish a new section—"Risk Elements."[1] The terminology "nonperforming loans" is no longer utilized in Guide 3. This risk elements section calls for four categories of disclosure:

- Nonaccrual, past due and restructured loans
- Potential problem loans
- Foreign outstandings
- Loan concentrations

The above information does not have to be set forth in a single table.

The first of the four risk categories contain three of the four classifications of loans which are designated as nonperforming loans in the current Item III.C. of Guide 3, except that the Commission's existing criterion for determining a restructured loan is being replaced by the criteria of Statement of Financial Accounting Standards No. 15 ("FAS 15")[2] for troubled debt restructurings. A significant change in the amended guidelines for disclosure of nonaccrual, past due and restructured loans is the exclusion of certain instructions present in the current Guide which allowed for the use of different criteria, and permitted exclusion of certain loans. This change has the effect of enhancing comparability of disclosures among registrants. Users of this information, particularly financial analysts, have stressed the importance of comparability in this area.

The second category, potential problem loans, is currently the fourth existing criterion for classification of loans as nonperforming (i.e., "serious doubts" loans). These are loans which are not disclosed as part of the first category described above, but where information known by management indicates that the borrower may not be able to comply with present payment terms.

The third category calls for "foreign outstandings" disclosures. This new category is a codification of the substance of the alternative table disclosures of Staff Accounting Bulletin No. 49 ("SAB 49"), "*Disclosures by Bank Holding Companies about Certain Foreign Loans*" [47 FR 49627, November 2, 1982]. The threshold for disclosure provided in SAB 49, however, has been changed and certain additional disclosures are called for. Certain implementation guidance has also been provided.

The fourth category calls for disclosure of "loan concentrations" which are defined as amounts loaned to a multiple number of borrowers engaged in similar activities which would cause them to be similarly impacted by economic or other conditions. A disclosure threshold of 10% of total loans has been provided.

The Commission believes that these revised guidelines will improve the utility of disclosures by bank holding companies by focusing more broadly on the various risk elements involved in lending activities. Since they require more uniformity in the preparation of the disclosures, the revisions should improve comparability of disclosures among registrants, a factor important to analysts and other users of the data in assessing risk.

As a result of a coordinated effort by the Commission and the Federal banking agencies, the amended guidelines pertaining to "nonaccrual, past due and restructured loans" as well as "foreign outstandings" are consistent with the present and planned disclosure requirements of the Federal banking agencies. Uniformity in the bases for presenting information by bank holding companies in Commission filings and by banks in supplementary disclosures for bank regulatory purposes will reduce compliance burdens and enhance the usefulness of the disclosure reports by investors and the public.

Sec. 401.08b. Risk Elements Disclosure

FRR 13:

The final guidelines contain a revised format for "Risk Element" disclosures which includes four categories: (1) nonaccrual, past due and restructured loans; (2) potential problem loans; (3) foreign outstandings; and (4) loan concentrations.

A majority of the commentators expressed concerns about the perceived requirement for a tabular format. They were concerned that investors

[5] As provided for in General Instruction No. 5 of Industry Guide 3, if information as to average rates paid on domestic deposits or the average balances of the categories of foreign deposits is not reasonably available on an historical basis, a waiver may be granted and thus these disclosures may be provided prospectively.

[1] The Commission solicited public comments on the proposed revision of Guide 3 in Release No. 33-6462 (April 15, 1983) [48 FR 18826, April 26, 1983]. Forty-nine comment letters were received in response to this proposal.

[2] Financial Accounting Standards Board Statement of Financial Accounting Standards No. 15 "Accounting by Debtors and Creditors for Troubled Debt Restructurings" (June 1977).

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might add all of the amounts disclosed in such a presentation and equate the total to the previously reported "nonperforming loan" amount, and conclude that the risk has increased. The Commission did not intend that the proposed disclosures necessarily be presented in a single tabular format. Registrants may present this data in a manner deemed appropriate to their facts and circumstances provided that such presentation is not misleading.

Rather than adopting the proposal that would have required a breakdown of each of the risk element disclosures by type of loan as set forth in Item III.A. of Guide 3 (loan categories), the final guidelines call for separate disclosure of aggregate foreign and domestic loan amounts only. The proposed display was intended to provide information for assessing relative risks based on the classification of the loan and on the nature of the borrower. This change was made in response to commentators' concerns that such detailed disclosure would be burdensome and complex. However, as discussed later under "Foreign Outstandings," the final amendments call for disclosure of foreign outstandings by type of borrower.

The Commission has adopted a provision for disclosure of potential problem loans which are not reported as "nonaccrual, past due or restructured," but where known information causes management to have serious doubts as to the ability of the borrowers to comply with the present loan repayment terms. "Potential problem loan" information is only required to be presented for the latest reported period. Some commentators asserted that this provision was unnecessary because many such loans may already be reported as nonaccrual in accordance with the registrant's policies. While the Commission understands that the amounts of potential problem loans may not be significant for most registrants because they may place such loans on nonaccrual status, it recognizes there may be difficult judgments as to classification of certain loans and believes that potential problem loans represent material information to investors.

The final amendments add the "foreign outstandings" disclosures to the matters encompassed in the risk elements section in the proposing release. The Commission determined that it is appropriate to include foreign outstandings in the risk elements section in order to embody all risk related disclosure guidelines in one section of the Guide and to emphasize the risks present in cross-border lending activities.

In response to commentators' concerns, the final amendments include a disclosure provision, as an instruction to the "foreign outstandings" category, concerning foreign borrowers whose economic and political conditions are expected to have a material impact on the timely payment of interest or principal. The proposal would have required that "any loans to private and public sector borrowers in foreign countries experiencing economic and political conditions which have created liquidity problems which may have a material impact on the timing of interest or principal payments" be included in the "serious doubts" category. The majority of respondents to the proposal expressed concern that including liquidity impaired foreign loans in a category of loans which typically comprises credit-impaired loans may be misleading because of the dissimilarity of respective risks. These respondents asserted that any discussion of foreign loans where borrowers may be adversely affected by liquidity problems are best made in the context of disclosures about foreign lending activities.

Many respondents did not concur with the Commission's characterization of industry loan concentrations as a "risk element" because they believed it was inappropriate to present loan concentrations with nonaccrual, past due and restructured loans and other loans as to which there are serious doubts about the ability of the borrower to comply with loan repayment terms. As noted above, loan concentration data would not necessarily have to be presented together with data called for by the other categories of risk elements. The Commission recognizes that the nature of the risks associated with each of the four categories may vary but believes that this can be effectively communicated in registrant filings.

Sec. 401.08c. Determination of Certain Risk Elements

FRR 13:

The final amendments do not include the substance of certain instructions in the existing Item III.C. which allowed registrants to use different criteria and exclude certain loans in the classification of loans as "nonperforming." The Commission has determined that uniformity in the presentation of this data, and thus comparability among registrants, is important to investors.

Many respondents urged the Commission to retain the substance of the existing Instruction 5 to Item III.C. which provides that "the registrant may use different criteria and may present quantitative information in a different manner than described above if such presentation more effectively identifies and communicates the present risk elements in the loan portfolio."[3] Some respondents urged the Commission to include a similar instruction to provide necessary flexibility in communicating the diversity of lending risks.

Many respondents also urged the Commission to retain the current Instruction 1 to Item III.C. for presentation of past due, nonaccrual and restructured loans. That instruction provided that installment loans to individuals and lease financing amounts may be excluded if the total amount of such loans does not exceed 10% of total loans. These respondents contended that the specific 10% materiality threshold for exclusion should be retained and that data on delinquent consumer loans, if material, should be presented and analyzed separately from data on troubled commercial loans. These persons asserted that consumer delinquencies are not indicative of the same sort of risks as commercial loans because of the nature of the loans and the fact that the accounting convention of automatic charge-off when installment loans reach a certain delinquency mitigates much of the uncertainty, and therefore risk, normally associated with commercial loans.

The Commission is concerned that there has been disparity of practice among registrants in disclosing nonperforming loans thereby impacting the comparability of that data. Users who responded to the proposal indicated that risk elements were important indicators and that comparability among registrants is essential. Because the Commission agrees that consistency will enhance the utility of this information to investors, analysts and other users, the substance of Instruction 5 has not been included in the final amendments, and an instruction has been added to the revised Item III.C.1 to specifically prohibit any exclusions. Varying risk elements associated with the types of loans included in the past due, nonaccrual and restructured loan categories may be described in narrative discussions setting forth the reasons for and impact of such factors.

Sec. 401.08d. Forgone Interest on Certain Loans

FRR 13:

The final guidelines reflect the proposed amendment to include disclosure of interest income that would have been earned under the original loan terms for nonaccrual and restructured loans, and the amounts actually recognized. The proposing release indicated that the amount of interest earned and the amount actually recognized on troubled debt restructurings is an existing financial statement disclosure requirement of FAS 15. The additional disclosure of such amounts related to nonaccrual loans should supplement the disclosures required under generally accepted accounting principles ("GAAP").

Over half of the respondents addressing this point agreed with the proposed disclosures and financial analysts stated that this disclosure was particularly important. Other commentators raised various conceptual objections to any presentation of information representing hypothetical interest that would have been earned by the registrant if the loan had been current. This amendment was adopted because it communicates an element of the cost of carrying certain problem loans, provides supplemental data for nonaccrual loans similar to information already required under GAAP and is an important factor in the estimation of current and potential earning power. Registrants may supplement these disclosures by appropriate textual discussions to the extent they believe necessary to explain the impact of such loans on their operations.

Sec. 401.08e. Foreign Outstandings

FRR 13:

The Commission has codified the substance of SAB 49's alternative table disclosure for foreign outstandings. Information about foreign outstandings is required for a three-year period rather than the proposed five-year period.

A majority of the commentators responding to the proposal to disclose outstandings to foreign countries in excess of 1% of consolidated outstandings urged retention of the alternatives provided by SAB 49. SAB 49 allows either a tabular presentation of foreign outstandings exceeding 1% or identification of outstandings to foreign countries in excess of 1% where economic or political conditions may impact the timely payment of principal or interest. Many commentators believed that it is not appropriate to require disclosure of outstandings in each country where outstandings exceed 1% of total outstandings because the reader of financial statements could inappropriately interpret this total amount as an unusual risk. Although these commentators generally agreed that there is an additional risk that a foreign government may impose restrictions on funds leaving the country or that foreign exchange may not be available to make timely payments of interest or principal, they did not believe that these risks warranted the type of disclosure proposed by the Commission.

The Commission has carefully considered the views of commentators and has concluded that the proposed table disclosure approach is preferable to one that focuses only on certain countries that are currently experiencing liquidity problems. The amendments adopted herein identify the registrant's significant cross-border exposures in foreign countries and allow investors to arrive at their own conclusions as to any potential or actual transfer risks involved.

The final guidelines call for certain additional disclosures when a foreign country is experiencing liquidity problems because of economic or political conditions which *are expected to have* a material impact on timely payment. This standard implies a greater degree of certainty in determining the impact of such conditions than that of the proposal, viz. when such conditions *may have* an impact on timely payment. The adopted standard

[3] The genesis of Instruction 5 to Section III.C. was the initial adoption in 1976 of Guide 3. The intent of this instruction was to provide flexibility in reporting what was the new information about risk elements in the loan portfolio. This instruction was provided since there were varying opinions as to the most appropriate method of determining such elements and the disclosures were in a sense experimental.

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should result in greater consistency of disclosures among registrants.

The revised guidelines utilize a disclosure threshold based on total assets. In response to the Commission's inquiry with respect to the propriety of the proposed disclosure threshold of 1% of outstandings, approximately half the respondents stated that the Commission should retain the "consolidated outstandings" threshold measurement for disclosure; slightly less than half of the respondents felt the measurement should be based on consolidated assets; and the remainder believed that the threshold should be based on a percentage of registrants' equity.

The Commission has determined that the use of a threshold based on 1% of total assets has the merit of simplicity of calculation since the total assets amount is readily obtainable from a registrant's balance sheet. In contrast, outstandings typically can not be computed unless supplemental data is furnished. Also, disclosures using a 1% of total assets threshold will be similar to disclosures made pursuant to SAB 49. Finally, in addition to disclosures about individual countries whose outstandings exceed 1% of total assets, the final guidelines (Instruction 7 to Item III.C.3.) call for aggregate disclosures for countries where outstandings are between .75% and 1% of total assets. This disclosure format is consistent with that proposed in the Federal banking agencies' Country Exposure Report.[4]

The proposed separate disclosure of private and public-sector cross-border outstandings has been revised to call for disclosure of outstandings by the types of borrowers specified in Item III.A., i.e., governments and official institutions, banks and other financial institutions, commercial and industrial, and other. Registrants have presented breakdowns similar to that adopted, and users have commented that this level of disclosure is important in assessing a registrant's exposure in certain countries.

The final amendments call for disclosure of outstandings which are repayable in dollars or other non-local currency: they do not require that gross amounts repayable in *local* currency be disclosed. Many commentators asserted that most loans repayable in local currency are substantially funded by local operations and that any net unfunded amounts normally do not reflect significant transfer risk since they generally are not material. The revised guide provides that any material amounts of local currency outstandings which are not hedged or are not funded by local currency borrowings should be reflected in cross-border outstandings.

An instruction to Item III.C.3. allows any legally enforceable written guarantees of principal or interest by domestic or other non-local third parties to be netted against the amounts of foreign outstandings presented. The Commission agrees with those respondents who asserted that, when the source of repayment of outstandings is assured by third parties, and the registrant is clearly not exposed to transfer risk because of this recourse, presentation of amounts net of such guarantees more appropriately reflects the registrant's exposure to transfer risks. The amendments also allow collateral values to be netted against the cross-border outstandings of a foreign country in certain limited circumstances.

Several commentators queried whether commitments to lend additional dollar amounts, such as through irrevocable letter of credit agreements, should be included in the determination of "outstandings." Under the revised guide, such commitments would not be included in outstandings, but they would be separately disclosed if material.

In the proposing release, the Commission requested specific comment as to whether a loan to a foreign branch of a foreign bank was or should be reflected as a loan to the foreign country in which the parent bank is located. A substantial majority of those commenting stated that such interbank loans should be reflected as a loan of the parent of the foreign branch. Accordingly, the final amendments include an instruction which indicates that loans made to a branch of a foreign bank located outside the foreign bank's home country should be classified based on the parent's geographic location.

Sec. 401.08.e.i. Outstandings to Countries Experiencing Liquidity Problems

[*Sec. 401.08.e.i. added by FR-28.*]

.i.a. Executive Summary

The Commission has authorized amendments ("the amendments") to the Industry Guides for Statistical Disclosure by Bank Holding Companies ("Guide 3"), regarding disclosure of outstandings[1] to borrowers in certain foreign countries experiencing liquidity problems that are expected to have a material impact on timely repayment of principal or interest ("liquidity problems"),[2] and

[4] The Federal banking agencies have announced their intention to provide for increased and more timely disclosures about banks' country exposures. These disclosures would be based on the information called for by the revised Item III.C. of Guide 3 and would be available to the public upon request.

[1] Outstandings to a foreign country (or "cross-border outstandings") are defined by Instruction (1) to Item III.C.3. of Guide 3 to include those loans, accrued interest, acceptances, interest-bearing deposits or investments, and other monetary assets which are denominated in U.S. dollars or other non-local currency, and those which are denominated in local currency if not hedged or funded by local borrowings.

[2] The provisions of Guide 3 distinguish liquidity problems from credit problems in countries that are currently unable to fully service their debts. Unlike credit problems, liquidity problems (i.e., current inability to raise sufficient amounts of the requisite currency to meet principal or interest repayment obligations to U.S. banks, do not necessarily affect the assess-

certain restructurings of outstandings to those countries.

The amendments call for a tabular analysis of changes in aggregate outstandings to each country experiencing liquidity problems, if the aggregate amount exceeds one percent of the registrant's total assets. The analyses are to include amounts of new outstandings, collections of principal and interest, interest income accrued, and other changes. If material amounts of outstandings to such countries are restructured (or if an agreement in principle for restructuring has been reached), the amendments call for tabular presentations of pre- and post-restructuring maturities and interest rates on the restructured amounts, disclosure of commitments arising in connection with the restructurings, and disclosure of amounts removed or expected to be removed from nonaccrual status as a result of the restructurings. The amendments are intended to enable users of bank holding company ("BHC") financial reports ("users") to better assess BHCs' exposures to certain foreign countries, the nature of changes in those exposures, and the impact of significant restructurings of those exposures. The amendments are based largely on views of the Commission staff previously expressed in interpretive letters regarding disclosures of significant foreign debt restructurings.

.i.b. Description of "Other Changes"

The proposed amendments called for descriptions of significant changes in outstandings other than the changes reported as new outstandings, collections, and accruals of interest. Several respondents suggested that specific descriptions of reductions in BHCs' reported exposures to particular countries, resulting from sales, swaps or charge-offs of outstandings, could disadvantage BHC's efforts to collect what is legally due from debtors in those countries.

In consideration of these comments, the final amendments do not include a specific requirement for inclusion of a description of "other changes". However, a description of the components of amounts reported as "other changes" would be required to the extent that such information is material to an understanding of results of operations or financial condition, or is necessary to make information otherwise included in the filing not misleading.

.i.c. Troubled Debt Restructurings

The proposed amendments called for disclosures regarding restructurings of foreign outstandings irrespective of whether they are troubled debt restructurings ("TDRs") as defined in Statement of Financial Accounting Standards No. 15 ("FAS 15").[5] On that basis, it was proposed that restructurings disclosed pursuant to the proposed amendments and which occurred for reasons unrelated to concerns as to ultimate collectibility need not be reported as TDRs pursuant to Item III.C.1.(c) of Guide 3. Item III.C.1. calls for reporting of aggregate amounts of what are commonly referred to as "nonperforming" loans which include, among other categories, loans that are TDRs.

Several respondents requested clarification as to whether the proposed amendments were intended to supercede or modify the accounting and/or disclosure requirements of FAS 15 for purposes of complying with generally accepted accounting principles ("GAAP"). Others suggested that the need to determine whether a foreign debt restructuring is a TDR should not depend on whether the restructuring occurred due to credit problems or liquidity problems.

The proposal was not intended to suggest that FAS 15 should be interpreted as not applicable to foreign debt restructurings that occur due to liquidity problems, nor was it intended to supercede or modify the accounting and/or disclosure requirements of GAAP with respect to TDRs. Thus, BHCs and their auditors would still need to assess whether a foreign debt restructuring is a TDR for purposes of complying with GAAP requirements.

As stated in the proposing release, (a) there may be practical difficulties in determining whether certain foreign debt restructurings are TDRs and what disclosures should be provided if they are deemed TDRs,[6] and (b) the proposed disclosures were intended to enable users to assess for themselves whether restructured foreign outstandings are "nonperforming" loans. On that basis, the separate disclosure regarding foreign restructurings was proposed to avoid the possibility of having particular restructurings of foreign outstandings reported twice within the Guide 3 disclosure (i.e., pursuant to both the new instruction (6)(d) to Item III.C.3. and, if TDRs, Item III.C.1.(c)). The final amendments retain the provision that restructurings disclosed pursuant to

(Footnote Continued)

ment of whether loans will ultimately be uncollectible. The amendments do not affect current guidance regarding disclosure of loans beset by credit problems.

[5] FAS 15, *Accounting by Debtors and Creditors for Troubled Debt Restructurings* (Financial Accounting Standards Board, 1977), states that a TDR occurs if a creditor, for economic or legal reasons related to a debtor's financial difficulties, grants a concession to the debtor that it would not otherwise consider.

[6] For example, it may be difficult to assess whether the post-restructuring interest rate is below market rates for similar loans, because there may be no sources of significant amounts of new loans to the country, other than the lenders participating in the restructuring. FAS 15 calls for disclosures regarding TDRs that are effected through modifications of terms (e.g., interest rates and/or maturities) only if the post-restructuring interest rates are below market rates.

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