

17 CFR Parts 240 and 270

[Release No. 34-38073, IC-22415, File No. S7-32-96]

RIN 3235-AH10

Securities Transactions Exempt From Transaction Fees**AGENCY:** Securities and Exchange Commission.**ACTION:** Final Rule.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is adopting amendments to Rule 31-1 under the Securities Exchange Act of 1934 and an amendment to Rule 24e-2 under the Investment Company Act of 1940. The purpose of these amendments is to conform Rules 31-1 and 24e-2 to recently enacted legislation. Rule 31-1 is being amended to conform the Rule to legislation which extends transaction fees to transactions in OTC securities (other than bonds, debentures, and other evidences of indebtedness) subject to prompt last-sale reporting.

EFFECTIVE DATES: Section 270.24e-2 paragraph (a) is effective December 30, 1996.

Section 240.31-1 Preliminary Notes and paragraph (f) are revised effective January 1, 1997.

Section 240.31-1 is revised effective September 1, 1997.

Section 240.31-1 Preliminary Note is revised effective October 1, 1997.

FOR FURTHER INFORMATION CONTACT:

David Oestreicher, Esq. or James McHale, Esq. regarding the amendments to Rule 31-1 under the Securities Exchange Act of 1934 at 202/942-0173 or 202/942-0190; Office of Market Supervision, Division of Market Regulation, Mail Stop 5-1. For further information regarding the amendment to Rule 24e-2 under the Investment Company Act of 1940, please contact Robin Gross at 202/942-0640; Office of Regulatory Policy, Division of Investment Management, Mail Stop 10-2, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC. 20549.

SUPPLEMENTARY INFORMATION:**I. Introduction**

Pursuant to recently enacted legislation, beginning January 1, 1997, transaction fees will be collected on all Nasdaq securities. Initially, for transactions occurring over-the-counter ("OTC") these fees will be collected pursuant to the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 ("Appropriations Act").¹ Beginning on

September 1, 1997, these fees will be collected under Section 31 of the Exchange Act as amended.

The amendments to Rule 31-1² under the Securities Exchange Act of 1934 ("Exchange Act") will modify, effective January 1, 1997, the existing exemption from transaction fees for Nasdaq securities contained in Rule 31-1 so that transactions in OTC securities occurring on a national securities exchange pursuant to unlisted trading privileges ("UTP") would be subject to transaction fees collected by national securities exchanges. The amendments also would revise the Preliminary Notes to Rule 31-1 in three phases to coincide with legislative changes. The amendments will be effective January 1, 1997, September 1, 1997, and October 1, 1997. Moreover, the Commission also is taking action to eliminate the existing exemption for Nasdaq securities in its entirety. Finally, the amendments clarify that off-exchange transactions in OTC securities subject to UTP will be subject to section 31(d) of the Exchange Act, as amended (rather than section 31(c)).

The Commission also is adopting an amendment to Rule 24e-2 under the Investment Company Act of 1940 ("Investment Company Act"), the rule that governs the payment of fees by certain registered investment companies for additional securities registered on a post-effective amendment to a registration statement.

II. Background

Section 31 of the Exchange Act³ currently requires transaction fees to be paid to the Commission based on sales of securities registered on a national securities exchange. Specifically, section 31 requires every national securities exchange to pay an annual fee to the Commission based on the aggregate dollar amount of the sale of securities (other than bonds, debentures, and other evidences of indebtedness) transacted on that exchange.⁴ In addition, section 31 requires payment of similar fees by broker-dealers for OTC transactions in securities registered on a national securities exchange ("third market trades").⁵ Section 31 also provides the Commission with authority

to exempt any sale of securities or any class of sales of securities from imposition of the transaction fee if the Commission finds that such exemption is consistent with the public interest, the equal regulation of markets and brokers and dealers, and the development of a national market system.⁶

In September 1985, the Commission allowed exchanges to trade OTC securities without listing these securities, on a UTP basis ("OTC/UTP securities").⁷ A collateral effect of this action would have been to subject securities principally traded OTC (*i.e.* Nasdaq securities) to section 31 fees, even though section 31 was not designed to apply to transactions in such securities.⁸ Therefore, pursuant to its exemptive authority, the Commission amended Rule 31-1 to exempt transactions in Nasdaq securities from section 31 by adding paragraph (f).⁹ This exemption was predicated on the Commission's belief that it was preferable to address the application of section 31 fees to the OTC market in a uniform and orderly manner, rather than through the automatic application

⁶ In response to The National Securities Markets Improvement Act of 1996, the Commission plans at a later time to solicit comment on a prior Commission proposal to exempt certain transactions effected after regular trading hours from the imposition of transaction fees. See Securities Exchange Act Release No. 29238 (May 28, 1991), 56 FR 25056 (June 3, 1991).

⁷ The Commission's grant of UTP was conditioned on, among other things, the Commission approving a joint plan to consolidate exchange and OTC quotations and transaction reports in OTC securities upon which UTP are granted. See Securities Exchange Act Release No. 22412 (September 16, 1985), 50 FR 38640 (September 24, 1985); and Securities Exchange Act Release No. 22413 (September 16, 1985), 50 FR 38515 (September 23, 1985).

⁸ As a technical matter, under section 12(f)(6) of the Exchange Act (15 U.S.C. 781(f)(6)), securities trading OTC, which are also admitted to UTP on an exchange are deemed to be "registered." Therefore, if construed literally, section 31 would have required payment of fees by the exchange(s) for transactions in OTC/UTP securities occurring on the exchange, as well as by broker-dealers trading such securities OTC. Similarly, stocks that were listed on a regional exchange and then received concurrent Nasdaq National Market System ("NMS") designation would have been subject to section 31, *i.e.*, both the exchange and OTC trades in such securities would have been subject to section 31 transaction fees.

⁹ See Securities Exchange Act Release No. 23229 (May 13, 1986), 51 FR 18578 (May 21, 1986). The Commission amended the Rule again in June 1987. See Securities Exchange Act Release No. 24635 (June 23, 1987), 52 FR 24149 (June 29, 1987). In May 1988, the Commission extended the effectiveness of Rule 31-1(f) for an additional year. See Securities Exchange Act Release No. 25671 (May 6, 1988), 53 FR 17180 (May 16, 1988). Finally, in May 1989, the Commission extended the effectiveness of Rule 31-1(f) indefinitely. See Securities Exchange Act Release No. 26790 (May 6, 1989), 54 FR 20524 (May 12, 1989).

² 17 CFR 240.31-1.

³ 15 U.S.C. 78ee.

⁴ The fee is equal to 1/300 of one percent of the aggregate dollar value of securities sold.

⁵ For transactions otherwise than on a national securities exchange, the fee is currently paid by the broker-dealer on the sale side of the transaction. If, however, there is no broker-dealer on the sale side of the transaction, then the broker-dealer on the buy side of the transaction is required to pay the fee. Where no broker-dealer is involved in the transaction, no fee is required. See Rule 31-1.

¹ Pub. L. 104-208, 110 Stat. 3009 (1996).

of section 31 as a result of an exchange's decision to trade OTC/UTP securities or the concurrent designation of Nasdaq/NMS securities.¹⁰ In light of recent legislation, however, the exemption afforded to these Nasdaq securities is no longer appropriate.

III. Discussion

On September 30, 1996, the SEC's appropriation for fiscal year 1997 was enacted as part of the Appropriations Act. In addition to funding the agency for fiscal year 1997, the Appropriations Act extends transaction fees to all sales of securities transacted otherwise than on a national securities exchange (other than bonds, debentures and other evidences of indebtedness) subject to prompt last-sale reporting,¹¹ effective January 1, 1997.¹²

On October 11, 1996, The National Securities Markets Improvement Act of 1996 ("Improvement Act"),¹³ was signed into law. The Improvement Act amends section 31 of the Exchange Act to extend transaction fees to transactions in OTC securities subject to prompt last sale reporting, effective September 1, 1997.¹⁴ The Improvement

Act also explicitly amends section 31 of the Exchange Act to provide that, effective October 1, 1997, the transaction fee arising out of the sale of third market trades will be payable by each national securities association.¹⁵ The Improvement Act further amends section 31, effective October 1, 1997, to require payment of section 31 fees to the Commission two times per year, instead of one time per year as section 31 presently requires.¹⁶

Currently, sales of OTC/UTP securities occurring on a national securities exchange are exempted from section 31 fees. This exemption is no longer appropriate in view of Congress' express intention to extend transaction fees to all OTC securities subject to prompt last sale reporting. The Commission believes that the law intends fees on transactions in Nasdaq securities to apply equally, whether such transactions occur on an exchange or OTC. Accordingly, the Commission is eliminating, effective January 1, 1997, the current exemption in Rule 31-1(f) with respect to transactions in those Nasdaq securities occurring on a national securities exchange pursuant to OTC/UTP. As a result, as of January 1, 1997, the same fees will apply to OTC and exchange trades in Nasdaq securities, consistent with the equal regulation of markets, brokers and dealers, and the development of a national market system.

The Commission also is phasing in amendments to the Preliminary Notes to Rule 31-1 on three dates (January 1, 1997, September 1, 1997, and October 1, 1997), to make them consistent with the changes in law. Finally, effective

securities association shall pay to the Commission a fee at a rate equal to 1/300 of one percent of the aggregate dollar amount of sales transacted by or through any member of such association otherwise than on a national securities exchange of securities (other than bonds, debentures, and other evidences of indebtedness) subject to prompt last sale reporting pursuant to the rules of the Commission or a registered national securities association, excluding any sales for which a fee is paid under subsection (c) * * *."

¹⁵ Presently, section 31 requires broker-dealers to remit directly to the Commission transaction fees arising out of third market trades. This procedure will continue until October 1, 1997. See section III, D "Third Market Transactions," *infra*.

¹⁶ Section 31(e) will require payment of all transaction fees on or before March 15, with respect to transactions occurring during the period beginning on the preceding September 1 and ending at the close of the preceding December 31. The fee for transactions occurring during the period beginning on the preceding January 1 and ending at the close of the preceding August 31, will be payable to the Commission on September 30. Pursuant to section 31(g) of the Exchange Act, as amended, the Commission will publish in the Federal Register notices of the fee rates applicable under section 31 for each fiscal year, beginning with fiscal year 1998.

September 1, 1997, the Commission is implementing a technical amendment to Rule 31-1 to clarify that fees arising out of off-exchange transactions in OTC/UTP securities will be collected pursuant to section 31(d) of the Exchange Act, and not section 31(c).¹⁷ In amending the Rule, the Commission has considered the amendments' impact on efficiency, competition, and capital formation.¹⁸

Because the Appropriations Act extends transaction fees to the OTC market effective January 1, 1997, the Commission is issuing this release and amending Rule 31-1 on an emergency basis. A delay in amending the Rule could lead to confusion over the responsibilities of those persons affected by the new legislation.

Although the Administrative Procedure Act ("APA") states that an agency must provide general notice of proposed rulemaking and an opportunity for comment, these requirements do not apply if the agency, for good cause, finds that those procedures are "impracticable, unnecessary, or contrary to the public interest."¹⁹ The Commission finds that good cause exists, and that notice and comment are unnecessary, because the amendments to Rule 31-1 are being adopted to make the Rule consistent with the Appropriations Act and the Improvement Act. In addition, the Commission finds that good cause exists, and that notice and comment are unnecessary for the amendment to Rule 24e-2 under the Investment Company Act (eliminating the \$100 minimum fee), because the Commission has ceased collecting the fee pursuant to the Improvement Act.

Moreover, although the APA generally requires publication of an adopted rule at least thirty days before its effective date,²⁰ this requirement does not apply if the agency determines, for good cause, not to provide pre-effective publication. As mentioned above, a delay in amending Rule 31-1 until after the January 1, 1997 effective date of the Appropriations Act could lead to confusion over the responsibilities of those persons affected by the legislation. Accordingly, the Commission finds good cause not to provide pre-effective publication for the amendments to Rule

¹⁷ The Commission notes that the purpose of this exemption is to carry out the intent of Congress, based on the revenue projections used by Congress at the time of the Appropriations Act and the Improvement Act, that transaction fees for these types of trades be collected pursuant to section 31(d) of the Exchange Act.

¹⁸ 15 U.S.C. 78c(f) and 15 U.S.C. 80a-2(c).

¹⁹ 5 U.S.C. 553(b)(B).

²⁰ 5 U.S.C. 553(d).

¹⁰ Without the exemption, the application of section 31 fees to all transactions in particular OTC securities would have depended entirely on exchange decisions to trade OTC/UTP securities, or on issuer decisions to retain an exchange listing despite the stock being designated an Nasdaq/NMS security.

¹¹ The Commission notes that Congress intended transaction fees to be applied to OTC securities subject to prompt last sale reporting in the same circumstances as section 31 fees currently are applied to transactions in exchange-traded securities. Accordingly, all of the exemptions presently contained in Rule 31-1 (for example, initial public offering transactions) will apply to transactions in securities subject to the Appropriations Act fee, except for the exemption for Nasdaq securities in paragraph "(f)" of Rule 31-1.

¹² Specifically, the Appropriations Act provides that effective January 1, 1997, every national securities association shall pay to the Commission a fee at a rate of 1/300th of one percent of the aggregate dollar amount of sales transacted by or through any member of such association otherwise than on a national securities exchange (of securities) (other than bonds, debentures, and other evidences of indebtedness), subject to prompt last sale reporting pursuant to the rules of the Commission or a registered national securities association, excluding any sales for which (a) fee is paid under section 31 of the Exchange Act. Moreover, the legislation requires every national securities association to pay the fee on or before September 30, 1997, with respect to transactions and sales occurring during the period beginning on January 1, 1997, and ending at the close of August 31, 1997. Beginning September 1, 1997, a similar fee will be required by section 31(d) of the Exchange Act as amended by Title IV of the National Securities Markets Improvement Act of 1996. See section III, C "Off-Exchange Trades of OTC Securities," *infra*.

¹³ Pub. L. No. 104-290, 110 Stat. 3416 (1996).

¹⁴ Specifically, section 31(d)(1) of the Exchange Act will provide, in part, that "(e)ach national

31-1. The Commission also finds that good cause exists not to provide pre-effective publication for the amendment to Rule 24e-2 under the Investment Company Act because the amendment is intended to eliminate a source of confusion for registrants and a delay would only serve to prolong the potential confusion of registrants. Finally, under 5 U.S.C. 804, the revisions to Rules 31-1 and 24e-2 are exempt from the definition of the term "rule" for purposes of Chapter 8, entitled "Congressional Review of Agency Rulemaking," because the revisions are to rules of "agency organization, procedure, or practice * * *" and conform agency practice and procedure to that required by the Appropriations Act and the Improvement Act.

The following sections describe the interim and permanent obligations of each national securities exchange, national securities association and broker-dealer with regard to the payment of transaction fees.

A. Exchange-Registered Securities Transacted on an Exchange

The only substantive change for a national securities exchange remitting transaction fees arising out of the sale of exchange-registered securities²¹ on the exchange is the timing for payment of such fees.²² As noted above, the amendments made to section 31 by the Improvement Act require, among other things, payment of transaction fees two times per year, instead of one time per year. This change, however, does not go into effect until October 1, 1997, and will not affect the fee payment schedule until January 1, 1998. Accordingly, the fee arising out of transactions occurring between January 1, 1996 and December 31, 1996 will be payable on March 15, 1997. Likewise, the fee arising out of transactions occurring between January 1, 1997 and December 31, 1997 will be payable to the Commission on March 15, 1998. Pursuant to section 31(e), however, the section 31 fee arising from transactions that occur between January 1, 1998 and August 31, 1998, will be due to the Commission on or before

September 30, 1998. The fee arising from transactions between September 1, 1998 and December 31, 1998, will be payable to the Commission on or before March 15, 1999. This payment schedule will continue in this manner indefinitely.

B. OTC Securities Transacted on an Exchange Pursuant to OTC/UTP

Effective January 1, 1997, Rule 31-1(f) will be amended to effectively include within the coverage of existing section 31 of the Exchange Act transactions in those Nasdaq securities occurring on a national securities exchange pursuant to OTC/UTP. Therefore, beginning January 1, 1997, every national securities exchange will be responsible for remitting transaction fees to the Commission for exchange transactions in OTC/UTP securities, pursuant to existing section 31 of the Exchange Act. Effective October 1, 1997, every national securities exchange will be responsible for the payment of these fees pursuant to section 31(b) of the Exchange Act, as revised by the Improvement Act.

Once section 31(e) of the Exchange Act becomes effective on October 1, 1997, the transaction fee payable by an exchange arising from the sale of OTC/UTP securities on such exchange will be payable in two installments per year. Accordingly, the payment schedule for fees arising out of transactions in OTC/UTP securities is identical to the payment schedule for fees arising out of transactions in exchange-registered securities effected on an exchange.²³

C. Off-Exchange Trades of OTC Securities

As discussed above, both the Appropriations Act and section 31 as amended by the Improvement Act extend transaction fees to securities (other than bonds, debentures and other evidences of indebtedness) traded otherwise than on a national securities exchange, and subject to prompt last sale reporting pursuant to the rules of the Commission or a registered national securities association. The phrase "securities subject to prompt last sale reporting" as used in the legislation includes securities designated as Nasdaq National Market securities,²⁴ securities designated as Nasdaq SmallCap securities,²⁵ and securities traded on the NASD's Bulletin Board system ("OTCBB").²⁶ Moreover, although the NASD's rules do not

require transaction reporting for certain types of transactions, if the underlying securities are subject to prompt last sale reporting, the NASD is responsible for collecting a transaction fee even if the particular transaction is not subject to last-sale reporting.²⁷

Pursuant to the Appropriations Act, fees arising from off-exchange transactions in OTC securities occurring between January 1, 1997 and August 31, 1997 will be payable to the Commission by a national securities association on or before September 30, 1997.²⁸ Pursuant to sections 31(d) and 31(e) of the Exchange Act as amended by the Improvement Act, transaction fees arising from such trades occurring from September 1, 1997 to December 31, 1997 will be due from a national securities association on March 15, 1998.²⁹ Off-exchange transactions in OTC securities occurring between January 1, 1998 and August 31, 1998 will result in a fee due to the Commission from a national securities association on or before September 30, 1998. Fees due for such transactions occurring between September 1, 1998 and December 31, 1998 will be payable on or before March 15, 1999. This payment schedule will continue in this manner indefinitely.

D. Third Market Transactions

Broker-dealers will continue to remit transaction fees arising out of third

²⁷ Among other trades, NASD Rule 4632(e) excludes from its transaction reporting requirements odd-lot transactions, and purchases or sales of securities effected upon the exercise of an option. The NASD, however, is required to collect fees on both of these types of transactions, unless the underlying security is not subject to prompt last sale reporting. The NASD also is required to collect transaction fees for after-hours trades in securities subject to prompt last sale reporting. The Commission notes, however, that no transaction fee will arise for transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, e.g. to enable the seller to make a gift. See NASD Rules 4632(e)(5), 4642(e)(4), 6420(e)(5), and 6620(e)(3). Finally, the Commission notes that as prompt last sale reporting is extended to additional securities, such securities will become subject to transaction fees.

²⁸ Even though Rule 31-1(f) will continue to exempt these types of transactions from existing Section 31 of the Exchange Act until September 1, 1997, when section 31(d) of the Exchange Act takes effect, these transactions will be covered by the Appropriations Act beginning January 1, 1997.

²⁹ Effective September 1, 1997, fees arising out of off-exchange trades of OTC securities subject to OTC/UTP will be payable pursuant to section 31(d). A clarifying amendment to Rule 31-1(f) will become effective on September 1, 1997, in order to exempt these types of trades from the payment of fees under section 31(c). As a result, fees arising out of these types of transactions will be collected pursuant to Section 31(d). As noted above, this technical amendment is necessary in order to carry out the intent of Congress that all trades in OTC securities be treated equally no matter where those trades occur.

²¹ As used herein, the term "exchange-registered securities" refers to those securities registered on a national securities exchange by an issuer taking an affirmative action (e.g. filing Form 8-A), and not OTC securities deemed "registered" under section 12(f)(6) of the Exchange Act based on OTC/UTP trading. Cf. note 8, *supra*.

²² The Commission also notes that, as a result of the amendments to Rule 31-1 made herein, effective January 1, 1997, every national securities exchange will be responsible for remitting section 31 transaction fees based on sales of OTC/UTP securities transacted on such exchange. See "OTC Securities Transacted on an Exchange pursuant to OTC/UTP," section III, B, *infra*.

²³ See Section III, A, "Exchange-Registered Securities Transacted on an Exchange," *supra*.

²⁴ See National Association of Securities Dealers, Inc. ("NASD") Rule 4632.

²⁵ See NASD Rule 4642.

²⁶ See NASD Rule 6550.

market trades directly to the Commission until October 1, 1997, pursuant to existing section 31 of the Exchange Act. Section 31(c) of the Exchange Act as amended by the Improvement Act, requires fees arising out of third market trades to be paid by each national securities association effective October 1, 1997.³⁰ Specifically, the fee arising from third market transactions occurring between January 1, 1997 and September 30, 1997 will be payable by each broker-dealer on or before March 15, 1998, pursuant to current section 31 of the Exchange Act. Based on the Improvement Act's amendments to section 31, the fee arising from third market transactions occurring between October 1, 1997 and December 31, 1997 also will be due from a national securities association on or before March 15, 1998. The fee arising from third market transactions occurring between January 1, 1998 and August 31, 1998 will be due from a national securities association on or before September 30, 1998. For third market trades occurring between September 1, 1998 and December 31, 1998, the transaction fee is due from a national securities association on or before March 15, 1999. This payment schedule will continue in this manner indefinitely.

E. Options Transactions

With respect to options transactions occurring on a national securities exchange, the options exchanges, or the Options Clearing Corporation ("OCC") on behalf of the exchanges, will continue to be responsible for the payment of section 31 fees on such options transactions.³¹ Moreover, any sale of exchange-registered securities to or by a person exercising an exchange-registered option contract shall require the exchange itself or the OCC on behalf of the exchange to pay a section 31 fee in an amount determined on the basis of the exercise price. In addition, as a result of the Appropriations Act, effective January 1, 1997, any sale of OTC securities (subject to prompt last sale reporting) to or by a person exercising an exchange-registered option contract shall require payment of a transaction fee, in an amount

determined on the basis of the exercise price, by the appropriate national securities association or the OCC on behalf of the association.³² Further, when section 31(d) of the Exchange Act becomes effective on September 1, 1997, any sale of securities covered by section 31(d) to or by a person exercising an exchange-registered option contract will require payment of a section 31 fee, in an amount determined on the basis of the exercise price, by the appropriate national securities association or the OCC on behalf of such association.

With regard to transactions in OTC options, no transaction fee will arise because these securities are not currently subject to prompt last sale reporting.³³ However, broker-dealers will continue to remit section 31 fees directly to the Commission for any sale of exchange-registered securities to or by a person exercising an OTC option, in an amount determined on the basis of the exercise price, until October 1, 1997, when these fees will be collected by the appropriate national securities association.³⁴ Moreover, as a result of the Appropriations Act and the Reform Act, effective January 1, 1997, any sale of OTC securities to or by a person exercising an OTC option also shall require payment of a transaction fee, in an amount determined on the basis of the exercise price, by the appropriate national securities association.³⁵

V. Amendment to Rule 24e-2 Under the Investment Company Act

The Commission is adopting an amendment to Rule 24e-2 under the Investment Company Act of 1940, the rule that governs the payment of fees by certain registered investment companies for additional securities registered on a post-effective amendment to a registration statement filed under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) ("Securities Act"). The amendment eliminates the \$100 minimum fee currently in the Rule. The Rule's \$100 minimum fee was designed to

correspond to the \$100 minimum fee requirement under section 6(b) of the Securities Act (15 U.S.C. 77f(b)), which was eliminated by the Improvement Act. The Commission ceased collecting the fee under Rule 24e-2 on October 11, 1996 and the amendment would eliminate a source of confusion for registrants.

V. Effects on Competition and Regulatory Flexibility Act Considerations

Section 23(a)(2) of the Exchange Act,³⁶ requires the Commission, in adopting rules under the Exchange Act, to consider the competitive effects of such rules, if any, and to balance any impact with the regulatory benefits gained in terms of furthering the purposes of the Exchange Act. As noted above, in amending Rule 31-1 the Commission is merely conforming the Rule to recently enacted legislation. Moreover, adoption of the amendment to Rule 31-1 will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The amendment will promote efficiency and capital formation by equalizing the treatment of exchange-listed and OTC securities.

The Regulatory Flexibility Act³⁷ is not applicable to the revisions to Rule 31-1, nor is it applicable to the amendment to Rule 24e-2 under the Investment Company Act. The Regulatory Flexibility Act's flexibility analysis requirements are limited to rulemaking for which the Commission would be required by the APA to publish general notice of proposed rulemaking.³⁸

The Paperwork Reduction Act does not apply because the proposed amendments do not impose recordkeeping or information collection requirements, or other collections of information which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

VI. Statutory Basis

The amendments to Rule 31-1 under the Exchange Act are being adopted pursuant to 15 U.S.C. 78a *et seq.*, particularly sections 23(a) and 31 of the Exchange Act, and pursuant to Pub. L. No. 104-208. The amendment to Rule 24e-2 under the Investment Company Act is being adopted pursuant to 15

³⁰ Section 31(d) of the Exchange Act as amended by the Improvement Act, excludes any sales for which a fee is paid under section 31(c).

³¹ The Commission notes that this transaction fee arises on the options transaction regardless of whether the underlying security is traded on a national securities exchange, or otherwise than on an exchange. Moreover, the payment schedule for fees arising out of options transactions occurring on a national securities exchange is the same as for exchange-registered equity securities discussed above.

³² The payment schedule for these fees is the same as the payment schedule for off-exchange trades of OTC securities discussed above.

³³ Pursuant to the Appropriations Act and the Improvement Act, should options traded otherwise than on a national securities exchange become subject to prompt last sale reporting in the future, transaction fees also will be applicable to those options transactions. Accordingly, effective October 1, 1997, the Preliminary Notes to Rule 31-1 will provide for the collection of section 31 fees for transactions in OTC options subject to prompt last sale reporting.

³⁴ See section III, D, "Third Market Transactions," *supra*.

³⁵ The Commission notes that the NASD, as the only currently registered national securities association, will be responsible for the collection of these fees effective January 1, 1997.

³⁶ 15 U.S.C. 78w(a)(2).

³⁷ 5 U.S.C. 601-612.

³⁸ 5 U.S.C. 603(a). As noted above, the Commission is not required to solicit public comment due to the nature of the Commission's revisions to Rule 31-1.

U.S.C. 80a-1 *et seq.*, 80a-37, and 80a-39 unless otherwise noted.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

VII. Text of the Amendments

For the reasons set forth above, the Commission amends part 240 of chapter II, title 17 of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78ll(d), 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 and 80b-11, unless otherwise noted.

* * * * *

2. Effective January 1, 1997, § 240.31-1 is amended by revising the Preliminary Notes and paragraph (f) to read as follows:

§ 240.31-1 Securities transactions exempt from transaction fees.

Preliminary Notes

If a sale of a security for which a fee is paid under section 31 of the Act is effected on a national securities exchange, the transaction fee must be paid by that exchange. With regard to sales of securities for which a fee is paid under section 31, effected otherwise than on a national securities exchange, the fee is to be paid by the registered broker or dealer on the sale side of the transaction. When there is no registered broker or dealer on the sale side of the transaction (as, for example, where a third market dealer purchases securities for its own account from a public customer), the fee is to be paid by the registered broker or dealer on the purchase side of the transaction. Where no registered broker or dealer is involved in the transaction, no fee arises.

The fee for options transactions occurring on a national securities exchange is to be paid by the exchange itself, or by the Options Clearing Corporation on behalf of the exchange, and such fee is to be computed on the basis of the option premium (market price) for the sale of the option, and the exercise price of the option in the event of its exercise. In addition, any sale of securities for which a fee is paid under section 31, occurring otherwise than on a national securities exchange, to or by a person exercising an option contract shall require payment of a section 31 fee, in an amount determined on the basis of the exercise price, by the registered broker or dealer selling the securities. If there is no registered broker or dealer on the sale side of such transaction, then the fee is to be paid by the registered broker or dealer on the purchase side of the

transaction. If no registered broker or dealer is involved in the transaction, no fee arises.

* * * * *

(f) Transactions in Nasdaq securities as defined in § 240.11Aa3-1 (Rule 11Aa3-1 under the Act) except for:

(1) Transactions in those Nasdaq securities for which transaction reports are collected, processed, and made available pursuant to the plan originally submitted to the Commission pursuant to § 240.17a-15 (subsequently amended and redesignated as Rule 11Aa3-1) under the Act, which plan was declared effective as of May 17, 1974; and

(2) Transactions in those Nasdaq securities occurring on a national securities exchange pursuant to unlisted trading privileges.

3. Effective September 1, 1997, § 240.31-1 is revised to read as follows:

§ 240.31-1 Securities transactions exempt from transaction fees.

Preliminary Notes

If a sale of a security for which a fee is paid under section 31 of the Act is effected on a national securities exchange, the transaction fee must be paid by that exchange. With regard to sales of securities for which a fee is paid under section 31, effected otherwise than on a national securities exchange (except those securities for which a fee is paid under section 31(d)), the fee is to be paid by the registered broker or dealer on the sale side of the transaction. When there is no registered broker or dealer on the sale side of the transaction (as, for example, where a third market dealer purchases securities for its own account from a public customer), the fee is to be paid by the registered broker or dealer on the purchase side of the transaction. Where no registered broker or dealer is involved in the transaction, no fee arises.

The fee for options transactions occurring on a national securities exchange is to be paid by the exchange itself, or by the Options Clearing Corporation on behalf of the exchange, and such fee is to be computed on the basis of the option premium (market price) for the sale of the option, and the exercise price of the option in the event of its exercise. In addition, any sale of securities for which a fee is paid under section 31 (except those securities for which a fee is paid under section 31(d)), occurring otherwise than on a national securities exchange, to or by a person exercising an option contract, shall require payment of a section 31 fee, in an amount determined on the basis of the exercise price, by the registered broker or dealer selling the securities. If there is no registered broker or dealer on the sale side of such transaction, then the fee is to be paid by the registered broker or dealer on the purchase side of the transaction. If no registered broker or dealer is involved in the transaction, no fee arises. Finally, any sale of securities for which a fee is paid under section 31(d), to or by a person exercising an option contract, shall require payment of a section 31 fee, in an amount

determined on the basis of the exercise price, by the appropriate national securities association or by the Options Clearing Corporation on behalf of the association.

(a) The following shall be exempt from section 31 of the Act:

(1) Transactions in securities offered pursuant to an effective registration statement under the Securities Act of 1933 (except transactions in put or call options issued by the Options Clearing Corporation) or offered in accordance with an exemption from registration afforded by section 3(a) or 3(b) thereof (15 U.S.C. 77c(a) or 77c(b)), or a rule thereunder.

(2) Transactions by an issuer not involving any public offering within the meaning of section 4(2) of the Securities Act of 1933 (15 U.S.C. 77d(2));

(3) The purchase or sale of securities pursuant to and in consummation of a tender or exchange offer;

(4) The purchase or sale of securities upon the exercise of a warrant or right (except a put or call), or upon the conversion of a convertible security; and

(5) Transactions which are executed outside the United States and are not reported, or required to be reported, to a transaction reporting association as defined in § 240.11Aa3-1 (Rule 11Aa3-1 under the Act) and any approved plan filed thereunder;

(b) Over-the-counter ("OTC") transactions in OTC securities which are subject to unlisted trading privileges on a national securities exchange shall be exempt only from section 31(c) of the Act.

4. Effective October 1, 1997, the Preliminary Note to § 240.31-1 is revised to read as follows:

§ 240.31-1 Securities transactions exempt from transaction fees.

Preliminary Note

The section 31 fee for options transactions occurring on a national securities exchange, or transactions in options subject to prompt last sale reporting occurring otherwise than on an exchange, is to be paid by the exchange or the national securities association itself, respectively, or the Options Clearing Corporation on behalf of the exchange or association, and such fee is to be computed on the basis of the option premium (market price) for the sale of the option. In the event of the exercise of an option, whether such option is traded on an exchange or otherwise, a section 31 fee is to be paid by the exchange or the national securities association itself, or the Options Clearing Corporation on behalf of the exchange or association, and such fee is to be computed on the basis of the exercise price of the option.

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**PART 270—RULES AND
REGULATIONS, INVESTMENT
COMPANY ACT OF 1940**

5. The authority citation for part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a-1 *et seq.*, 80a-37, 80a-39 unless otherwise noted;

* * * * *

6. Section 270.24e-2 is amended by revising paragraph (a) to read as follows:

§ 270.24e-2 Computation of fee.

* * * * *

(a) The fee to be paid at the time of filing of such amendment shall be calculated in the manner specified in section 6(b) of the Securities Act of 1933 except that, for the purposes of such calculation, the maximum aggregate price at which the securities are proposed to be offered may be deemed to be the maximum aggregate offering price, as determined by Rule 457(d) (17 CFR 230.457(d)) under the Securities Act of 1933, of:

(1) The amount of securities (number of shares or other units) being registered reduced by;

(2) The amount of securities (number of shares or other units) of the same class redeemed or repurchased by the issuer in its previous fiscal year (which amount of securities must, for purposes of this paragraph (a)(2), be reduced by the amount of any securities used in a reduction made by the issuer with respect to such shares pursuant to paragraph (c) of section 24f-2 of the Act during the current fiscal year) provided that, when more than one such amendment is filed by an issuer in any one fiscal year, the total amount of securities used for such reductions during any fiscal year in which such reductions are made may not exceed the total amount of securities which were redeemed or repurchased by the issuer during its previous fiscal year; and

* * * * *

Dated: December 23, 1996.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96-33056 Filed 12-24-96; 2:38 pm]

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DEPARTMENT OF ENERGY

**Federal Energy Regulatory
Commission**

18 CFR Part 2

[Docket No. RM96-6-000; Order No. 592]

**Inquiry Concerning the Commission's
Merger Policy Under the Federal Power
Act; Policy Statement**

Issued December 18, 1996.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Policy statement.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to update and clarify the Commission's procedures, criteria and policies concerning public utility mergers in light of dramatic and continuing changes in the electric power industry and the regulation of that industry. The purpose of this Policy Statement is to ensure that mergers are consistent with the public interest and to provide greater certainty and expedition in the Commission's analysis of merger applications.

EFFECTIVE DATE: December 18, 1996.

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SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Commission's Public Reference Room, Room 2A, 888 First Street, N.E., Washington, D.C. 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a

modem by dialing (202) 208-1397 if dialing locally or 1-800-856-3920 if dialing long distance. CIPS is also available through the FedWorld System (by Modem or Internet). To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400 or 1200bps full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this final rule will be available on CIPS in ASCII indefinitely and WordPerfect 5.1 format for one year. The complete text on diskette in Wordperfect format may also be purchased from the Commission's copy contractor, LaDorn Systems Corporation, also located in Room 2A, 888 First Street, N.E., Washington, D.C. 20426.

The Commission's bulletin board system also can be accessed through the FedWorld system directly by modem or through the Internet. To access the FedWorld system by modem:

- Dial (703) 321-3339 and logon to the FedWorld system

- After logging on, type: /go FERC

To access the FedWorld system through the Internet, a telnet application must be used either as a stand-alone or linked to a Web browser:

- Telnet to: fedworld.gov
- Select the option: [1] FedWorld
- Logon to the FedWorld system
- Type: /go FERC

or

- Point your Web Browser to: <http://www.fedworld.gov>
- Scroll down the page to select FedWorld Telnet Site
- Select the option: [1] FedWorld
- Logon to the FedWorld system
- Type: /go FERC

**Policy Statement Establishing Factors
the Commission Will Consider in
Evaluating Whether a Proposed Merger
Is Consistent With the Public Interest**

Issued December 18, 1996.

I. Introduction

This Policy Statement updates and clarifies the Federal Energy Regulatory Commission's (Commission) procedures, criteria and policies concerning public utility mergers in light of dramatic and continuing changes in the electric power industry and corresponding changes in the regulation of that industry. The Commission believes it is particularly important to refine and modify its merger policy at this critical juncture for the electric industry. The Commission recognizes that the electric industry now is in the midst of enormous technological, regulatory and economic