DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 93

[Docket No. 00–115–2]

Specifically Approved States Authorized to Receive Mares and Stallions Imported from Regions. Where CEM Exists: Delay of Effective Date

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final Rule; delay of effective date.

SUMMARY: In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled ''Regulatory Review Plan,'' published in the **Federal Register** on January 24, 2001, this action temporarily delays for 60 days the effective date of the rule entitled Specifically Approved States Authorized to Receive Mares and Stallions Imported from Regions Where CEM Exists, published in the **Federal Register** on December 18, 2000, 65 FR 78897. The rule amends the animal importation regulations in 9 CFR part 93 by adding Oregon to the lists of States approved to receive certain mares and stallions imported into the United States from regions affected with contagious equine metritis (CEM). To the extent that 5 U.S.C. section 553 applies to this action, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. section 553(b)(A). Alternatively, the Department's implementation of this rule without opportunity for public comment, effective immediately upon publication today in the **Federal Register**, is based on the good cause exceptions in 5 U.S.C. section 553(b)(B) and 553(d)(3). Seeking public comment is impracticable, unnecessary and contrary to the public interest. The temporary 60-day delay in effective date is necessary to give Department officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President's memorandum of January 20, 2001. Given the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations. The imminence of the effective date is also good cause for making this rule effective immediately upon publication.

DATES: The effective date of the Specifically Approved States Authorized to Receive Mares and Stallions Imported from Regions Where CEM Exists regulation, published in the **Federal Register** on December 18, 2000 at 65 FR 78897, is delayed for 60 days, from February 16, 2001 to a new effective date of April 17, 2001.

FOR FURTHER INFORMATION CONTACT: Dr. Karen James at (301) 734–8364.

Dated: January 29, 2001.

Ann M. Veneman,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–7943; File No. S7–30–98]

RIN 3235–AG83

Integration of Abandoned Offerings

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; solicitation of comment on Paperwork Reduction Act burden estimate.

SUMMARY: The Securities and Exchange Commission is adopting new Rule 155 under the Securities Act to provide safe harbors for a registered offering following an abandoned private offering, or a private offering following an abandoned registered offering, without integrating the registered and private offerings in either case. This new rule is intended to enhance an issuer's ability to switch from a private offering to a registered offering, or vice-versa, in response to changing market conditions.

To facilitate reliance on the public-to-private safe harbor, we are amending Securities Act Rule 477 to provide automatic effectiveness for any application to withdraw an entire registration statement before it becomes effective unless the Commission objects within 15 days after the issuer files that application. We are amending Rules 429 and 457 to move provisions addressing the offset of filing fees to Rule 457. We also amend Rule 457 to permit filing fees to be offset from withdrawn registration statements and to provide other technical changes to the calculation of filing fees. These amendments, along with new Rule 155, are intended to reduce the financial risk of a registered offering that is withdrawn.

EFFECTIVE DATE: March 7, 2001.

FOR FURTHER INFORMATION CONTACT: Anne M. Krauskopf, Special Counsel, Office of Chief Counsel, Division of Corporation Finance, at (202) 942–2900.

SUPPLEMENTARY INFORMATION: We are adopting new Rule 155 [1] and amendments to Rules 429,[2] 457,[3] and 477 [4] under the Securities Act of 1933.[5]

I. Executive Summary

Securities Act registration provides investors with the benefits of full and fair disclosure and civil remedies for false or misleading disclosure and violations of the registration and prospectus delivery requirements. In November 1998, we published for comment proposals to modernize the registration process for offers and sales of securities under the Securities Act (the ''1998 proposals'').[6] The 1998 proposals recognized that the benefits of registration are furthered if the Commission continues to make the registration system flexible enough to accommodate dynamic evolution of the capital markets.

One subject of the 1998 proposals was the integration of private and registered offerings. Because conditions in the securities markets may shift quickly, companies may find that the relative attractiveness of making a registered offering instead of a private offering has changed. For example, a company that files a registration statement for an initial public offering may find that there are too few potential investors to make a registered offering worthwhile. Conversely, a company that starts a private offering may find sufficient investor interest to justify making a registered offering.

The 1998 proposals included proposed amendments to Rule 152 [7] to create new safe harbors that would facilitate changing an offering from private to registered, or vice versa. Commenters who addressed these

[1] 17 CFR 230.155.

[2] 17 CFR 230.429.

[3] 17 CFR 230.457.

[4] 17 CFR 230.477.

[5] 15 U.S.C. 77a *et seq.*

[6] Release No. 33–7606A (Nov. 13, 1998) (63 FR 67174). We extended the comment deadline for the 1998 proposals to June 30, 1999 in Release No. 33–7659 (64 FR 15143). The public comments we received are available in our Public Reference Room at 459 Fifth Street, NW., Washington, DC 20549, in File No. S7–30–98. Public comments submitted by electronic mail are on our website, at *www.sec.gov/rules/s73098.htm.*

[7] 17 CFR 230.152. Rule 152 provides that section 4(2) (15 U.S.C. 77d(2)) is available for a transaction not involving any public offering at the time of the transaction although the issuer later decides to make a public offering and/or files a registration statement.

proposals responded favorably.[8] Noting that these proposals do not depend on the other 1998 proposals, some commenters[9] urged us to adopt them without regard to the other 1998 proposals.[10] We believe that the proposed Rule 152 amendments that we adopt in part today as new Rule 155 are an appropriate step in adapting the registration process to the rapidly changing dynamics of the capital markets.[11] We are concerned particularly about reducing the capital-raising costs of small businesses and believe that adopting Rule 155 will advance that goal significantly.

The new integration safe harbors that we adopt today as new Rule 155 provide clarity and certainty regarding two common situations, and do not otherwise affect traditional integration analyses.[12] Under Rule 155, we provide conditions under which an issuer that begins a private offering but sells no securities will be able to abandon it and begin a registered offering. Any private offering that relies on this integration safe harbor will need to satisfy the conditions of a private offering exemption, so that the private offering is bona fide.[13] In addition, the issuer and any person acting on its behalf will need to terminate all offering activity with respect to the private offering. Any prospectus filed as part of the registration statement will need to include disclosure regarding abandonment of the private offering. The issuer also will need to wait 30 days after abandoning the private offering before filing the registration statement unless securities were offered in the private offering only to persons who were (or who the issuer reasonably believes were) accredited investors[14] or sophisticated.[15]

New Rule 155 also provides an integration safe harbor that will permit an issuer that started a registered offering to withdraw the registration statement before any securities are sold[16] and then begin a private offering. To use the safe harbor, the issuer and any person acting on its behalf will need to wait 30 days after the effective date of withdrawal of the registration statement before commencing the private offering. The issuer must provide each offeree in the private offering with information concerning withdrawal of the registration statement, the fact that the private offering is unregistered and the legal implications of its unregistered status. In addition, any disclosure document used in the private offering must disclose any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering.

Rule 477 sets forth the conditions for withdrawing a Securities Act registration statement. We amend this rule so that an issuer's application to withdraw an entire pre-effective registration statement will become effective automatically upon filing with the Commission unless the Commission objects within 15 days after the issuer files the withdrawal application. This amendment will facilitate reliance on the registered-to-private safe harbor by eliminating potential administrative delay in withdrawing the registration statement.

Under the amendments to Rule 457, fees paid for a withdrawn registration statement will be available to the issuer for use with its future registration statements regardless of whether the class of securities is the same or different. This should benefit issuers by reducing the financial risk of an abandoned registered offering. We also amend Rule 429 to move its fee provisions to Rule 457 and to restate it in plain English.

II. Rule 155

A. The Integration Doctrine

The integration doctrine provides an analytical framework for determining whether multiple securities transactions should be considered part of the same offering. This analysis helps to determine whether registration under Section 5 of the Securities Act is required or an exemption is available for the entire offering. The integration doctrine, which has existed since 1933,[17] prevents an issuer from improperly avoiding registration by artificially dividing a single offering so that Securities Act exemptions appear to apply to the individual parts where none would be available for the whole.[18] Improper reliance on an exemption can harm investors by depriving them of the benefits of full and fair disclosure or of the civil remedies that flow from registration for material misstatements and omissions of fact.

Whether particular securities offerings should be integrated calls for an analysis of the specific facts and circumstances. In the 1960s, we issued two interpretive releases identifying five factors to consider in making this determination.[19] The new rule we adopt today does not modify or rescind the five-factor test set forth in those releases.[20] We also have created safe harbors from integration that provide

[8] *See, e.g.,* Letters of American Bar Association (''ABA''), American Corporate Counsel Association, American Society of Corporate Secretaries, The Association of the Bar of the City of New York (''NY City Bar''), The Business Roundtable, Cleary, Gottlieb, Steen & Hamilton (''Cleary''), Fried, Frank, Harris, Shriver & Jacobson (''Fried Frank''), Intel Corporation, National Association of Real Estate Investment Trusts (''NAREIT''), National Venture Capital Association, and Pennsylvania Securities Commission.

[9] Letters of ABA, Cleary and NY City Bar.

[10] The 1998 proposals also included proposed Rule 159, which we continue to consider as a separate rulemaking project. This proposed rule would permit all offers and sales in a negotiated transaction described in Rule 145 (17 CFR 230.145) to be registered under Section 5 notwithstanding the fact that certain target company shareholders sign agreements with the acquiror to vote in favor of the transaction prior to the filing or effective date of the registration statement. As provided in the 1998 proposals, availability of proposed Rule 159 would be subject to conditions.

[11] The 1998 proposals included other proposed amendments to Rule 152 to codify when a private offering would be deemed completed so that it would not be integrated with a later registered offering, including a registered resale of the same securities. Because we are not adopting those proposed amendments, Rule 152 and related staff interpretations as to when a private offering is deemed ''completed'' are unaffected.

[12] These new safe harbors address only registration requirements under the Securities Act and are not intended to affect antifraud law.

[13] For purposes of the rule, a ''private offering'' is defined as an unregistered offering of securities that is exempt from registration under section 4(2) or 4(6) of the Securities Act (15 U.S.C. 77d(6)) or Rule 506 of Regulation D (17 CFR 230.506). An offering that satisfies the conditions of Rule 506 is deemed not to involve a public offering for purposes of section 4(2).

[14] For this purpose, ''accredited investor'' is defined in Rule 501(a) of Regulation D (17 CFR 230.501(a)).

[15] For this purpose, an investor is sophisticated if the investor, either alone or with his or her representative, has such knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment. *See* Rule 506(b)(2)(ii) of Regulation D.

[16] Under Section 5(a) of the Securities Act (15 U.S.C. 77e(a)), no securities may be sold in a registered offering until the registration statement becomes effective.

[17] *See* Release No. 33–97 (Dec. 28, 1933).

[18] Integration of an offering for which a private offering exemption is claimed with another offering (or offerings) would result in the loss of an exemption for one or more of the offerings unless an exemption is available for the integrated offering.

[19] Release No. 33–4434 (Dec. 6, 1961) [26 FR 11896], and Release No. 33–4552 (Nov. 6, 1962) [27 FR 11316].

[20] The five factors identified as relevant to the question of integration are as follows:

1. Are the offerings part of a single plan of financing?

2. Do the offerings have the same general purpose?

3. Are the offerings of the same class of security?

4. Are the offerings made at or about the same time?

5. Are the securities sold for the same type of consideration?

The five factors also are included in Rule 502(a) of Regulation D [17 CFR 230.502(a)].

certainty in particular circumstances.[21] However, these integration safe harbors do not address a registered offering that follows an abandoned private offering, or a private offering that follows a withdrawn registered offering. New Rule 155 will facilitate the capital-raising process by creating safe harbors designed specifically for these situations.[22]

B. Non-Exclusive Safe Harbors and Schemes to Evade

In the public comments, we were asked to clarify that the proposed integration safe harbor conditions would not be exclusive.[23] We have done so in the Preliminary Note to the rule. Regardless of whether an issuer is relying on Rule 155, the issuer also may look to the traditional five-factor test to determine whether integration is required.

Similarly, like other safe harbors,[24] Rule 155 is not available to any transaction or series of transactions that, although in technical compliance, is part of a plan or scheme to evade the registration requirements of the Securities Act. As adopted, the Preliminary Note to Rule 155 codifies this principle as well.[25]

C. Rule 155(a)—Definition of Private Offering

As adopted, the rule defines ''private offering,'' as proposed, as an unregistered offering of securities that is exempt from registration under section 4(2) or 4(6)[26] of the Securities Act or Rule 506 of Regulation D.[27] This definition applies for purposes of both safe harbors under the new rule. This definition is specific to Rule 155, however, and does not purport to define the term ''private offering'' for other purposes.

Satisfaction of the Rule 155 non-integration conditions will not assure the availability of a private offering exemption. A person who claims an exemption from Section 5 of the Securities Act has the burden of proving that the offering satisfies the conditions of that exemption.[28]

Some commenters[29] suggested that we expand the definition of ''private offering'' to include state exemptions based on the North American Securities Administrators Association, Inc. Model Accredited Investor Exemption.[30] These state exemptions permit general solicitation as long as no sales are made to non-accredited investors. However, we have long construed general solicitation or advertising to impart a public character to an offering. Thus, we do not believe that general solicitation or advertising is permissible in an offering under section 4(2).[31] Similarly, both section 4(6) and Rule 506 expressly forbid general solicitation or advertising.[32] For this reason, we decline to expand the term ''private offering'' in Rule 155 in the manner suggested.

We also decline to extend Rule 155 to offerings exempted by Rule 505 of Regulation D,[33] as some commenters requested.[34] Unlike Rule 506, Rule 505 permits sales to persons who are neither accredited nor financially sophisticated.[35] Because these persons may purchase in Rule 505 offerings, investor protection considerations weigh against including Rule 505 offerings in the new safe harbors.[36]

D. Rule 155(b)—Abandoned Private Offering Followed by a Registered Offering

An issuer that starts a private offering, abandons it before any securities are sold, and then files a registration statement incurs a risk that the registered offering could be integrated with the private offering under the five-factor test. If the offerings were integrated, the Commission or the courts could find a violation of Section 5(c) by virtue of the pre-filing offers.

Recognizing that an issuer may want to take advantage of rapidly changing market conditions to make a registered offering instead of completing a private offering already started, we proposed to amend Rule 152 to add a safe harbor for making this switch.[37] This proposal, which we adopt today with some modifications as Rule 155(b), enables an issuer to abandon a private offering and follow it soon with a registered offering, without integration concerns.

As adopted, the conditions of Rule 155(b) are as follows:

- No securities were sold in the private offering;
- The issuer and any person(s) acting on its behalf terminate all offering activity in the private offering before the issuer files the registration statement;
- Any prospectus filed as part of the registration statement discloses information about the abandoned private offering, including:

[21] For example, Rule 502(a) states that offers and sales made more than six months before the start of, or more than six months after completion of, a Regulation D offering will not be integrated with the Regulation D offering, as long as there are no offers and sales of the same or a similar class of securities (other than through employee benefit plans) during that period.

Other integration safe harbors are Rule 147(b)(2) (17 CFR 230.147(b)(2)) (for exempt intrastate offerings), Rule 251(c) (17 CFR 230.251(c)) (for small offerings by non-reporting issuers under Regulation A), and Rule 701(f) (17 CFR 230.701(f)) (for non-reporting issuers' exempt offerings to employees and consultants under written compensatory benefit plans).

Equity securities issued in exempt rights offerings by foreign private issuers under Rule 801 (17 CFR 230.801) and securities issued in exempt exchange offers and business combinations involving foreign private issuers under Rule 801 [17 CFR 230.802] are not subject to integration with offerings exempt from registration under other provisions of the Securities Act.

Offshore transactions made in compliance with Regulation S are not integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act, even if undertaken contemporaneously. Release No. 33–6862 (Apr. 24, 1990)

[22] Rule 155, like Rule 152, does not address whether two or more private offerings should be integrated with each other. The five-factor test continues to apply to this question, as does Rule 502(a) where one or more of the private offerings relies on Regulation D. Moreover, the amendments adopted today do not address the staff's policy position with respect to concurrent private and registered offerings that was articulated in *Black Box, Inc.* (Jun. 26, 1990) Q. 3 and *Squadron, Ellenoff, Pleasant & Lehrer* (Feb. 28, 1992).

[23] Letters of ABA and New York City Bar.

[24] *See, e.g.,* Preliminary Note 6 to Regulation D, and Preliminary Note 2 to Regulation S.

[25] For example, the Rule 155(b) safe harbor, described in Section II.D below, would not be available if, notwithstanding technical compliance with the rule, the issuer attempts to register on a primary basis a transaction that in fact was completed privately.

[26] Section 4(6) was added to the Securities Act in 1980 by the Small Business Issuers' Simplification Act of 1980, § 602, Pub. L. No. 96–477, 94 Stat. 2294 (codified at 15 U.S.C. 77d(6)). Section 4(6) exempts a transaction that does not exceed $5 million, if offers or sales are made only to accredited investors and other conditions are met.

[27] Rule 155(a).

[28] Release No. 33–4552 (Nov. 6, 1962), and *SEC* v. *Ralston Purina Co.,* 346 U.S. 119, 126 (1953).

[29] Letters of North American Securities Administrators Association (''NASAA'') and Texas State Securities Board.

[30] This model exemption was adopted by NASAA on April 27, 1997. NASAA Rep. (CCH) Para. 361. It has been adopted, in all or substantial part, by 25 states. Blue Sky Reporter (CCH) Para. 6471.

[31] Release No. 33–4552 (Nov. 6, 1962).

[32] Both Section 4(6) and Rule 506 have other conditions in addition to the prohibition of general solicitation and advertising.

[33] 17 CFR 230.505. Rule 505 provides an exemption for offerings up to $5 million within a 12-month period, if certain conditions are met. The Commission created this exemption under section 3(b) of the Securities Act (15 U.S.C. 77c(b)).

[34] Letters of Cleary, Joseph A. Grundfest *et al.,* NAREIT, NY City Bar, New York State Bar Association (''NY State Bar'').

[35] Investors in a Rule 505 offering who are not accredited must be limited to 35, but they need not be sophisticated.

[36] Consistent with current staff interpretations of Rule 152, the Rule 155 safe harbors will be available for a Rule 505 offering that also satisfies the requirements of Rule 506 or Section 4(6). *The Immune Response Corp.* (Nov. 2, 1987).

[37] Proposed Rule 152(b), Release No. 33–7606A.

—The size and nature of the private offering,[38]
—The date on which the issuer terminated all offering activity in the private offering,
—That any offers to buy or indications of interest in the private offering were rejected or otherwise not accepted, and
—That the prospectus delivered in the registered offering supersedes any selling material used in the private offering; and

• The issuer does not file the registration statement until at least 30 calendar days after termination of all offering activity in the private offering unless the issuer and any person acting on its behalf offered securities in the private offering only to persons who were (or who the issuer reasonably believes were) accredited investors or sophisticated.

An issuer that relies on the safe harbor must fully comply with all of its applicable conditions. The conditions are designed to assure that there is a clean break between the private and registered offerings and that persons who were offered securities in the abandoned private offering understand this break as they consider an investment in the registered offering.

For example, this safe harbor will allow an issuer to switch to a registered offering where, based on the response to an offering that the issuer commenced privately, there appears to be sufficient investor interest in a registered offering of the securities.[39] This should provide greater flexibility in matching securities offerings to market conditions, thereby increasing the efficiency of offerings and providing investors with better investment opportunities.

The 1998 proposals included a specific prohibition against general solicitation or advertising in the private offering. However, these practices are not permitted under sections 4(2) and 4(6) and Rule 506, and the safe harbor is available only where the private offering satisfies the conditions of one of these exemptions. Consequently, because the proposed prohibition would be redundant, it is not included in Rule 155(b) as adopted.

The safe harbor will be available only if the issuer and any person acting on its behalf terminate all offering activity regarding the private offering before filing the registration statement. As a further condition, the issuer may not file the registration statement sooner than 30 days after termination of all offering activity in the private offering, unless the issuer and any person acting on its behalf offered the securities privately only to persons who were (or who the issuer reasonably believes were) accredited investors or sophisticated.[40] We believe that this condition provides an additional protection against the possibility of issuers abusing the safe harbor with respect to potential investors for whom a registration statement, which requires full and balanced disclosure, is particularly important.

As originally proposed, the rule would have required the issuer to notify all private offerees that the private offering was abandoned. The 1998 proposals also would have required the issuer to inform all private offerees that the filed prospectus supersedes the prior selling materials and any indications of interest in the private offering are considered rescinded.[41] Noting that only the private offerees who participate in the registered offering need to know this information, commenters objected to notification to all private offerees.[42] We believe that limiting the disclosure provisions to persons who participate in the registered offering fulfills the purpose of the safe harbor. Under the safe harbor as adopted, the issuer will need to disclose prominently the information required by the rule in each prospectus filed as part of the registration statement and each prospectus delivered to investors.[43]

The rule as adopted requires disclosure that the prospectus delivered in the registered offering supersedes any selling materials used in the private offering. The purpose of this provision is to reduce confusion among investors in the registered offering about what information they should rely upon to make their investment decision. Nevertheless, issuers are reminded that they may be liable for any material misstatements or omissions in the private offering under the antifraud provisions of the federal securities laws.[44]

Because we want to prevent misuse of the Rule 155(b) safe harbor, we are directing the staff to monitor its use carefully. For example, we expect that the staff may request supplemental information regarding the termination of all offering activity in the private offering. In acting on requests for acceleration of the effective date of the registration statement, we assume that the staff will consider carefully whether the standards of the safe harbor are met.

E. Rule 155(c)—Abandoned Registered Offering Followed by a Private Offering

As discussed above, the use of general solicitation or advertising to offer a security would defeat a claim to an exemption from registration for that offer under section 4(2) or 4(6) or Rule 506.[45] The public character of a registered offering[46] may raise a question about the validity of a claim to a private offering exemption even if the registered offering is abandoned.[47]

Currently, unless an issuer waits six months following withdrawal of the registration statement before starting a private offering, the five-factor test applies to the question of whether the registered and private offerings should be integrated.[48] An issuer may file a registration statement, discover insufficient investor interest to proceed and still need financing quickly. Recognizing that this presents legal uncertainty, we proposed to amend Rule 152 to add a safe harbor from integration to be available in this circumstance.[49]

[38] This disclosure should describe the amount sought to be raised, the type of securities offered privately, and the general purpose of the abandoned private offering.

[39] The Rule 155(b) safe harbor differs from Rule 254 of Regulation A (17 CFR 230.254), which allows an issuer to publish or otherwise disseminate materials designed to determine whether there is interest in a contemplated public offering exempt under Regulation A. Rule 254 materials must be filed with the Commission on or before the date of first use, and, among other things, must state that no money or other consideration is solicited or will be accepted. In Release No. 33–7188 (Jun. 27, 1995) (60 FR 35648), the Commission proposed a general safe harbor for ''test the waters'' solicitations regarding IPOs. The more comprehensive 1998 proposals superseded that proposal.

[40] The 30-day period is analogous to Rule 254(d), under which an issuer that has a bona fide change of intention may file a registration statement if at least 30 calendar days have elapsed since the last solicitation of interest for the initially proposed Regulation A offering.

[41] As an alternative to this disclosure, the 1998 proposals would have required the issuer to file all selling materials used in the private offering as part of the registration statement. This alternative condition is not adopted because, based on comments received, few issuers would have used it. *See* Letters of Joesph A. Grundfest et al., and New York City Bar.

[42] Letters of ABA, Fried Frank, Joseph A. Grundfest et al., NAREIT, NY City Bar, and NY State Bar.

[43] Thus, the information must be included in both the section 10(a) (15 U.S.C. 77j(a)) final prospectus and any section 10 preliminary ''red herring'' prospectus used in the registered offering.

[44] *See* n.12, above.

[45] *See* Section II.C, above.

[46] *See* Letter of John J. Huber, Director, Division of Corporation Finance to Michael Bradfield, General Counsel, Board of Governors of the Federal Reserve System, regarding Bankers Trust Company (Mar. 16, 1984).

[47] *See* Litigation Release No. 10241 (Dec. 19, 1983) regarding *SEC* v. *Michael A. Traiger, Traiger Energy Investments* (U.S.D.C. C.D. Cal. Civil Action No. 83–2738–LTL Jpx).

[48] *See, e.g.,* Rule 502(a). As an interpretive matter, the staff traditionally looks to the six-month non-integration safe harbor of Regulation D even if the private offering does not rely on Regulation D for an exemption.

[49] Proposed Rule 152(c), Release No. 33–7606A.

We adopt this as Rule 155(c).[50] This safe harbor should assist issuers by reducing the financial risk of an abandoned registered offering.

The rule establishes the following conditions:

- No securities were sold in the registered offering;
- The issuer withdraws the registration statement; [51]
- The issuer and any person acting on its behalf do not commence the private offering earlier than 30 calendar days after the effective date of withdrawal of the registration statement;
- The issuer notifies each offeree in the private offering that:

—The offering is not registered under the Securities Act,
—The securities will be ''restricted securities'' as defined in Rule 144 and cannot be resold without registration unless an exemption is available,
—Purchasers do not have the protection of section 11 [52] of the Securities Act, and
—A registration statement for the abandoned offering was filed and withdrawn, specifying the effective date of the withdrawal; and

- Any disclosure document used in the private offering discloses any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering.

These conditions are designed to assure that the private offering is separate and distinct from the registered offering and that offerees in the private offering are aware that the legal benefits and protections in the private offering differ from those in the registered offering. Under Rule 155(c), the issuer will need to withdraw the registration statement in reliance on amended Rule 477 [53] before the issuer or any person acting on its behalf offers or sells the securities privately. The requirement that no securities were sold in the registered offering will not be satisfied if the issuer, or any person acting on its behalf, received any money or other offering consideration for the securities. Placing funds in escrow will not avoid this prohibition.[54]

To avoid confusion between the offerings, offerees in the private offering will need to know information regarding abandonment of the registered offering and legal consequences related to purchasing in an unregistered offering. These consequences are that the securities are restricted and purchasers do not have the protection of Section 11. As proposed, the issuer would have been required to provide this information and notice that the offering is not registered only to purchasers in the private offering. Upon further consideration, because all of this information is significant to an investment decision, we include in the safe harbor a requirement that the issuer make this disclosure to each offeree in the private offering. We also have added a requirement that any disclosure document used in the private offering discloses any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering. This requirement reduces concerns that private offerees will be influenced by outdated disclosure in the prospectus filed as part of the registration statement.

We believe that ordinarily an issuer would not be inclined to incur the costs of preparing and filing a registration statement with the intention to withdraw it later and commence a private offering. Nevertheless, we wish to assure that issuers do not use this integration safe harbor merely as a mechanism to avoid the private offering prohibition on general solicitation and advertising. At the time the private offering is made, in order to establish the availability of a private offering exemption, the issuer or any person acting on its behalf must be able to demonstrate that the private offering does not involve a general solicitation or advertising. Use of the registered offering to generate publicity for the purpose of soliciting purchasers for the private offering would be considered a plan or scheme to evade the registration requirements of the Securities Act.[55]

The 30-day waiting period is designed to reduce concerns regarding the validity of the issuer's claimed reliance on a private offering exemption. The 30-day waiting period, together with the disclosure applicable to offerees in the private offering, should assure that investors do not confuse the investment decision they are making in the private offering with the decision that they previously considered in the registered offering.

The 1998 proposals included an alternative provision that would have permitted the private offering to start within 30 days after the registration statement was withdrawn. This alternative would have required the issuer and other sellers to agree that liability under Securities Act sections 11 and 12(a)(2) [56] would apply in the private offering.[57] Commenters objected to the conditions of this alternative.[58] Based on public comment and our own analysis, we have decided not to adopt this alternative condition. If the issuer (or any person acting on its behalf) first offers the securities privately within 30 days following withdrawal of the registration statement, the safe harbor will not be available. Instead, traditional integration analyses, including the five-factor test, would determine whether the registered offering and the private offering should be integrated.

III. Rule 477—Registration Statement Withdrawal

Rule 477 permits an issuer to withdraw a registration statement, or any amendment or exhibit to a registration statement, if the Commission finds withdrawal to be consistent with the public interest and the protection of investors and grants its consent.[59] The amendments adopted today will facilitate this process.

[50] The conditions of the new safe harbor will apply if the private offering is commenced within six months of the effective date of withdrawal of the registration statement. If more than six months elapse between these events, the issuer may avoid integration of the offerings in reliance on traditional staff interpretations. *See* n. 48, above. The issuer also may look to the five-factor test.

[51] If the issuer also filed a Form 8–A (17 CFR 249.208a) to register the class of securities under section 12 of the Exchange Act (15 U.S.C. 78(g)) concurrently with Securities Act registration, withdrawal of the Securities Act registration statement under Rule 477 will be deemed also to withdraw the corresponding Form 8–A. In situations where a Securities Act registration statement is not withdrawn but the registered offering is not pursued, the Form 8–A would remain pending under General Instruction A(d)(2) of Form 8–A. If the Form 8–A is filed to register the class of securities under section 12(g), that section provides that registration will become effective automatically 60 days after filing with the Commission. If the Form 8–A is filed to register the class of securities under section 12(b), section 12(d) provides that registration will become effective 30 days after exchange authorities certify to the Commission that the security has been approved by the exchange for listing and registration.

[52] 15 U.S.C. § 77k.

[53] *See* Section III, below, describing amendments to Securities Act Rule 477.

[54] Under section 5(a)(1), it is illegal to enter into a contract of sale for a security before the effective date of the registration statement. The pre-effective receipt of investors' funds, or the segregation of those funds into an escrow account, is presumptive evidence of an illegal pre-effective contract of sale.

[55] *See* Preliminary Note to Rule 155.

[56] 15 U.S.C. 77*l*.

[57] Specifically, the 1998 proposals for sellers' section 11 liability to investors who purchased in the private offering during the 30 days following withdrawal of the registration statement. The 1998 proposals also provided for sellers' section 12(a)(2) liability to private offering investors who purchased after the 30 days had passed, if there were purchasers during the first 30 days.

[58] Letters of ABA, Cleary, Joseph A. Grundfest et al., Morgan Stanley Dean Witter, NY City Bar, and NY State Bar.

[59] Rule 477(a).

Specifically, an application for withdrawal of an entire registration statement made before the registration statement becomes effective will be deemed granted upon filing unless, within 15 calendar days after the issuer files the application, the Commission notifies the issuer that the application will not be granted.[60] This will expedite the use of Rule 155(c) to switch from an abandoned registered offering to a private offering and will provide predictability in most cases. Any application for withdrawal following effectiveness or application for withdrawal of less than an entire registration statement will continue to require affirmative Commission consent.[61]

In all cases, the registrant must sign the application for withdrawal and state fully in it the grounds on which withdrawal is requested. The registrant must include in the application a statement that no securities were sold in the offering. If withdrawal is sought in anticipation of using the registered-to-private safe harbor of Rule 155(c), the registrant also should include in the application a statement that it may undertake a subsequent private offering relying on that safe harbor.[62]

As is the case today, the amended rule also provides that any withdrawn document remains in the Commission's public files, as does the related request for withdrawal.[63] Documents filed on EDGAR will remain posted on the EDGAR website. The Rule 477 amendments adopted today do not affect the Commission's authority to bring an enforcement action against a registrant with respect to the content of a withdrawn registration statement.

IV. The Offset of Filing Fees and Other Technical Changes

In 1995, we expanded Rule 429[64] to provide a mechanism for issuers to offset the payment of a registration statement filing fee with fees that they previously paid for an earlier filed registration statement.[65] The amount available for use as an offset under Rule 429 equals the portion of the filing fee previously paid that is associated with any unsold securities of the same class registered on an earlier registration statement.[66] Once a filing fee has been used as an offset, those unsold securities on the earlier registration statement are deemed deregistered.[67] This practice has benefited many issuers.

Rule 429, however, also provides for the use of a combined prospectus for multiple offerings. Because the pairing of fee offset procedures and combined prospectus procedures in the same rule sometimes results in confusion as to when fee offset is available, we proposed to move the fee offset procedures into Rule 457, which addresses fee computation. We also proposed to allow an issuer to offset filing fees in the same manner when it withdraws a registration statement. We now adopt these proposals.[68]

As adopted, the amendment requires any fee offset to occur within five years of the initial filing date of the earlier registration statement.[69] The amendment also describes how the offset will be computed. Specifically, the aggregate total dollar amount of the filing fee associated with the unsold registered securities may be offset against the total filing fee due for a subsequent registration statement or registration statements. This will be the case whether the original filing fee was computed based on Rule 457(a) or Rule 457(o).

The 1998 proposals also would have required the subsequent registration statement(s) to be filed by the same registrant or its wholly-owned subsidiary. However, as a policy matter we believe that the benefits of filing fee offsets should apply across broader categories of registrants that control, or are controlled by, the original registrant. As adopted, this amendment permits the subsequent registration statement(s) to be filed by the same registrant,[70] its majority-owned subsidiary, or a parent that owns more than 50 percent of the original registrant's outstanding voting securities.[71] The issuer will need to add a note to the ''Calculation of Registration Fee'' table in the subsequent registration statement(s) explaining the fee offset similar to the note currently required by Rule 429.

As proposed, we also amend Rule 457 to codify the following staff interpretations:

- If a filing fee is paid for the registration of an offering and the same registration statement also covers the resale of the securities, no additional filing fee is required to be paid for the resale;[72] and
- Payment of a filing fee is not required for the registration of an indeterminate amount of securities to be offered solely for market-making purposes by an affiliate of the issuer.[73]

Finally, we also amend Rule 457 as proposed to clarify that the registration fee may be calculated on the basis of the maximum aggregate offering price of the securities, without regard to whether the securities are offered by the issuer or selling shareholders.[74]

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[60] Rule 477(b). The 1998 proposals included a proposed amendment to Rule 477(b) providing automatic effectiveness upon filing of any application to withdraw an entire registration statement that had not yet become effective. Upon further consideration, we believe that there are circumstances, such as where the Division of Enforcement has commenced an investigation with respect to the pending registration statement, in which investor protection concerns outweigh the convenience to an issuer of a withdrawal application's immediate effectiveness. The rule as adopted balances these concerns by providing the Commission a limited period of time to notify the issuer that withdrawal of the registration statement will not be granted.

[61] An issuer may withdraw a registration statement under Rule 477 before effectiveness, or after effectiveness before any sale is made. Under section 5(a) of the Securities Act, securities may be sold in a registered offering following effectiveness of the registration statement. Due to the staff's greater need to verify that no securities were sold, amended Rule 477 does not provide for automatic effectiveness of any withdrawal application made after the registration statement became effective. However, the staff will consider these applications promptly.

[62] Rule 477(c). This statement should not include any information regarding the proposed terms of the private offering to avoid the possibility of a general solicitation. Providing this statement under Rule 477(c) is not a condition of the Rule 155(c) safe harbor, although Rule 155(c)(2) requires the issuer to withdraw the registration statement under Rule 477.

[63] Rule 477(d).

[64] 17 CFR. 230.429.

[65] Release No. 33–7168 (May 11, 1995) [60 FR 26604]. The staff also has permitted fee offset between issuers and their wholly-owned subsidiaries with no independent operations.

[66] The staff has permitted an issuer to apply the offset to different classes of securities if the issuer is eligible to file an unallocated shelf registration statement.

[67] When filing fees have been transferred to a new registration statement, a post-effective amendment is necessary to deregister unsold shares on the original registration statement only if the original registration statement was filed on Form S–8. *Ropes & Gray* (Oct. 30, 1997).

[68] The amended fee offset procedures will apply whether the registration statement is withdrawn under Rule 477 before effectiveness, or after effectiveness before any sale is made. If any securities have been sold under the registration statement following effectiveness, the issuer may not withdraw the registration statement. However, the issuer may post-effectively amend the registration statement to deregister the remaining unsold securities. As proposed and adopted, the Rule 457 amendment does not permit fee offset from unsold shares that were deregistered before the new registration statement is filed.

[69] As proposed, a fee offset would have been permitted within five years of the completion or termination of the offering registered in the earlier registration statement. However, because this is not a date that is publicly available and companies sometimes wait a considerable period before withdrawing a registration statement, we concluded that the initial filing date of the earlier registration statement would be a better benchmark.

[70] For this purpose, a successor issuer that satisfies the conditions of Securities Act Rule 405 [17 CFR 230.405] will be considered the same registrant.

[71] Rule 457(p).

[72] Rule 457(f)(5).

[73] Rule 457(q).

[74] Rule 457(o). This amendment does not affect the obligation to disclose outside the calculation of fee table the amount of securities offered for the

V. Transition

Rule 155 and all of the amendments adopted today become effective March 7, 2001. However, to the extent that the Rule 457 amendments codify current staff interpretive positions, those positions continue to be valid before the effective date.

The Rule 155 integration safe harbors will be available to private offerings that are abandoned and registered offerings for which the registration statements are withdrawn on or after the effective date. In addition, an issuer may rely on Rule 155(b) to file a registration statement on or after the effective date for an offering that follows a private offering abandoned before the effective date. Similarly, an issuer may rely on Rule 155(c) on or after the effective date to commence a private offering that follows a registered offering withdrawn before the effective date.

VI. Paperwork Reduction Act Analysis

Certain provisions of Rule 155 and amended Rule 477 contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[75] The Commission will submit the collection of information requirements contained in these rules to the Office of Management and Budget for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.[76] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a valid OMB control number.[77]

Rule 155(b) provides a safe harbor from integration where an abandoned private offering is followed by a registered offering if specified conditions are satisfied. One of these conditions is that the Section 10(a) final prospectus and any Section 10 preliminary prospectus used in the registered offering disclose certain information about the abandoned private offering, so that the registered offering is not confused with the private offering. Preparing and sending the required information in a prospectus is a collection of information. We estimate that including this information in the prospectus will add one burden hour to the total burden hours applicable to the registration statement.

Rule 155(c) provides a safe harbor from integration where an abandoned registered offering is followed by a private offering. The conditions for this safe harbor require, among other things, that the issuer notify each offeree in the private offering that the registration statement for the abandoned offering was withdrawn, specifying the effective date of the withdrawal. The issuer also must notify each offeree in the private offering that the offering is not registered, the securities are ''restricted,'' and purchasers in the private offering do not have the protection of Section 11. These conditions are designed to assure that the private offering is not confused with the registered offering. Preparing and delivering this notification involves a collection of information. We estimate that this will add one burden hour with respect to each private offering that relies on the safe harbor.[78]

To avoid confusion between the offerings, Rule 155(c) also requires any disclosure document used in the private offering to disclose any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering. Unlike the other Rule 155 disclosure requirements described above, which always apply, this requirement will not necessarily apply to all private offerings that rely on Rule 155(c) and may require more disclosure in some cases than others where it does apply. Taking these variables into consideration, we estimate that this requirement will add six burden hours with respect to each private offering that relies on the safe harbor.

If an issuer withdraws a registration statement in anticipation of reliance on Rule 155(c), amended Rule 477 provides for the issuer to include in the withdrawal application a statement that the registrant may undertake a subsequent private offering in reliance on Rule 155(c). This condition will permit the Commission and the public to know when an issuer relies on Rule 155(c). We estimate that the collection of this information will add one burden hour to a withdrawal application.

Of the registration statements filed during the five-year period from January 1, 1995 to December 31, 1999, issuers withdrew 851 Securities Act registration statements. These withdrawals may not necessarily have been followed by private offerings. We expect nevertheless that the number of withdrawals may increase, based on the availability of new Rule 155 and amendments to Rule 477. We do not have comparable information as to the number of private offerings that were abandoned. However, we believe it is reasonable to assume that this number may approximate the number of withdrawn registration statements, and also may increase based on the availability of new Rule 155.

Assuming that on an annual basis issuers rely on Rule 155(b) for 300 abandoned private offerings and rely on Rule 155(c) for 300 abandoned registered offerings, the total associated additional burden will be 2400 hours.[79] Of the 2400 hours, we estimate that 50% (1200 internal burden hours) will be attributable to corporate staff, and 50% (1200 hours) will be attributable to external professionals retained by the issuers. The estimated cost of the external professional help is $210,000 ($1200 \times \$175$).[80]

Also assuming that on an annual basis issuers rely on amended Rule 477 for 300 abandoned registered offerings, the total associated additional burden will be 300 hours. We estimate that all 300 burden hours will be attributable to corporate staff, and no external professional costs will be incurred in connection with this disclosure.

The information collection requirements imposed by Rule 155 and amended Rule 477 is mandatory only for those issuers that choose to rely on the Rule 155 safe harbors from integration. Issuers that decide not to obtain the rule's safe harbor benefits are not required to respond. There is no mandatory retention period for the information disclosed. Responses to the collection of information with respect to Rule 155(b) and Rule 477, which will be

account of each selling security holder, consistent with the requirements of Item 507 of Regulations S–B and S–K (17 CFR 228.507 and 229.507). This amendment also does not change the staff's interpretation that secondary offerings under General Instruction I.B.3 to Form S–3 may not be included among securities registered on an unallocated basis in a Rule 415 offering. Securities offered by selling shareholders may be registered on the same registration statement as an unallocated shelf offering, but a separate section in the fee table must be included for the selling shareholders. That section lists the class(es) of securities registered and allocates a dollar amount to each class. The Item 507 disclosure is included in the prospectus at the time of effectiveness.

[75] 44 U.S.C. 3501–3520.

[76] Titles for the collecitons of information are: ''Securities Act Rule 155''; and ''Securities Act Rule 477''. We have requested OMB control numbers for rules 155 and 477.

[77] 44 U.S.C. 3506(c)(1)(B)(v).

[78] In this regard, we note that a private offerings issuers typically advise offerees of the legal consequences related to purchasing in an unregistered offering.

[79] Three hundred hours are atributable to the new registration statement disclosure, another 300 hours are attributable to the notification requirement in private offerings, and 1800 hours are attributable to disclosure in the private offering documents of changes in the issuer's business or financial condition that are material to the investment decision in the private offering.

[80] We used an estimated hourly rate of $175.00 to determine the estimated cost to the respondent of the disclosure prepared by outside counsel. We arrived at that hourly rate estimate after consulting with several private law firms.

filed with the Commission, will not be kept confidential. Responses to the collection of information with respect to Rule 155(c) will not be filed with the Commission.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the information collected pursuant to new Rule 155 and revised Rule 477 is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of collection on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549 with reference to File No. S7–30–98. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–30–98, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VII. Consideration of Costs and Benefits

As an aid to evaluate the costs and benefits of our proposals, we requested the views of the public and other supporting information. Commenters who addressed costs said that the proposed safe harbors for switching from private to registered offerings and vice versa would reduce costs,[81] noting particularly that companies would be able to consider investor interest before deciding to expend resources to conduct a registered offering.[82] The rules and amendments adopted today are designed to modernize and improve the Commission's regulatory system for offerings under the Securities Act, enhancing the efficiency of the offering process without diminishing investor protection.

The new rule and amendments will increase all issuers' flexibility to raise capital in different ways and will reduce the costs of raising capital because issuers will be able to adapt their financing plans more easily to prevailing market conditions. These benefits are difficult to quantify. Moreover, because the Commission generally does not regulate the private offering of securities, it is particularly difficult to estimate the impact of these rules. Rule 155(b) will allow an issuer that starts a private offering to switch to a registered offering if investor interest is substantial. Rule 155(c) will allow an issuer to abandon a registered offering, for example if investors show little interest, and instead proceed with a private offering. In either case, the issuer may be able to make the change more rapidly and with greater legal certainty than under current regulations and staff interpretations. Rule 155 will enable issuers more easily to avoid incurring the significant expense of filing a registration statement, only to discover later that a registered offering cannot be completed. This flexibility should be particularly beneficial to small business issuers, for whom the costs of a registered offering typically represent a greater proportion of resources and thus greater risk.

Satisfaction of each safe harbor's conditions will require issuers to incur modest additional costs to disclose information about the abandoned offering. For example, under Rule 155(b) there will be the cost of disclosure to include in each prospectus used in the registered offering specified information concerning the private offering and its abandonment. If the issuer seeks to file the registration statement sooner than 30 calendar days after termination of all offering activity in the private offering, further costs may be incurred to establish or obtain legal advice that securities were offered in the private offering only to persons who were (or who the issuer reasonably believes were) ''accredited'' or ''sophisticated.'' Under Rule 155(c), costs will be incurred to withdraw the registration statement before effectiveness and to provide each offeree in the private offering specified information regarding abandonment of the registered offering and legal consequences related to purchasing in an unregistered offering. In some cases, further costs may be incurred to disclose in any disclosure document used in the private offering any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering.

By making withdrawal of a registration statement before effectiveness automatic, the amendments to Rule 477 will facilitate reliance on Rule 155(c) by eliminating administrative delays that can result in increased costs to issuers. Together with the integration safe harbor of Rule 155(c), amended Rule 477 will allow issuers to access private markets more rapidly if an attempted registered offering is abandoned. If reliance on Rule 155(c) is anticipated, amended Rule 477 requires an issuer to incur modest additional costs to state that the issuer may undertake a subsequent private offering in reliance on that rule.

Under the amendments to Rule 457, the filing fee paid for a withdrawn registration statement will be available to the issuer for use with future registration statements for up to five years. This amendment further reduces the financial risk of an abandoned registered offering. Of the registration statements filed during the five-year period from January 1, 1995 to December 31, 1999, issuers withdrew 851 Securities Act registration statements. The aggregate filing fees paid for these 851 registration statements was $19,540,257. The average filing fee paid for each registration statement was $22,962; the median filing fee was $13,646.

The ability to offset filing fees associated with a withdrawn registration statement against filing fees due for a later registration statement on the terms provided by amended Rule 457 could represent substantial cost savings to qualifying issuers. A majority-owned subsidiary of the original registrant or a parent that owns more than 50 percent of the original registrant's voting securities will also be able to offset filing fees paid with respect to unsold securities against filing fees due for a later registration statement, resulting in additional potential cost savings.

Other amendments to Rule 457, codifying that no filing fee is required to register securities offered solely for market-making purposes by an affiliate and no separate filing fee is required to register a resale in tandem with the

[81] Letters of Investment Company Institute, national Venture Capital Association, and TIAA–CREF.

[82] Letter of National Venture Capital Association.

registered offering of securities for which a filing fee was paid, such as a business combination transaction, keep costs low and provide benefits. None of the amendments to Rule 457 will require an issuer to incur any new costs.

VIII. Promotion of Efficiency, Competition and Capital Formation

Section 2(b) of the Securities Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[83]

New Rule 155, as well as the amendments to Rules 429, 457 and 477, will enable issuers to decrease many of the costs of abandoned offerings and accelerate their ability to obtain financing in new offerings. This should promote efficiency and capital formation.

To the extent that the new and amended rules operate to lower the cost of raising capital in the United States, they should enhance the competitiveness of issuers that raise capital in U.S. capital markets. We believe that the new and amended rules, by reducing the financial risk of an abandoned registered offering, will reduce competitive disadvantages borne by small business issuers, for whom the costs of a registered offering typically represent a greater proportion of resources. The new rule and amendments make it easier for issuers to enter private markets after abandoning a registered offering, without sacrificing existing investor protections.

IX. Final Regulatory Flexibility Analysis

We prepared this Final Regulatory Flexibility Analysis under 5 U.S.C. § 604 regarding the new rule and amendments adopted today.

A. Need for Rulemaking

The purpose of Rule 155 and the amendments is to modernize, rationalize, and clarify the Commission's regulatory system for offerings under the Securities Act. In particular, Rule 155 is intended to provide greater certainty regarding the integration of private and registered offerings, and to facilitate changing an offering from private to registered (or vice versa), thereby promoting capital formation without diminishing investor protection.

[83] 15 U.S.C. 77b(b).

B. Significant Issues Raised by Public Comment

We invited written comments on any aspect of the Initial Regulatory Flexibility Analysis, but received no specific comments in response to our request.

C. Small Entities Subject to the Rules

Rule 155 and the amendments will affect small entities that are required to file registration statements under the Securities Act. For purposes of the Regulatory Flexibility Act, the Securities Act defines a ''small business'' issuer, other than an investment company, to be an issuer that, on the last day of its most recent fiscal year, had total assets of $5 million or less.[84]

We estimate that most of the 2,500 reporting companies with assets of $5 million or less are not investment companies. All of these companies would be able to rely on Rule 155 and the amended rules if they switched from a private offering to a registered offering, or vice versa. However, we have no reliable way to determine how many small businesses may switch from one kind of offering to another in the future, or may be affected otherwise by the new rule or the new amendments.

D. Reporting, Recordkeeping, and Other Compliance Requirements

Rule 155 and the amendments modernize and clarify the regulatory system for offerings under the Securities Act. Small businesses will report and file essentially the same information as before. The amendments will increase all issuers' flexibility to raise capital in a number of ways. An issuer will be able to switch to a registered offering if investors show substantial interest in a private offering already commenced, and will be able to withdraw an unsuccessful registered offering more quickly than before, eliminating costly administrative delays.

Issuers will be able to convert more easily and with less regulatory uncertainty between registered and private offerings. In each case, the issuer will need to provide investors disclosure regarding abandonment of the prior offering. When an issuer withdraws a registration statement, the filing fee paid with respect to the unsold securities will be available to offset against the filing fee due for a future registration statement. In most cases, the withdrawal application, which will need to disclose the reason for withdrawing the registration statement, will become effective automatically. These changes should benefit small business issuers.

[84] *See* 17 CFR 230.157. When used regarding an issuer tht is an investment company, the term is defined as an investment company and any related investment company with aggregate netr assets of $50 million or less as of the end o its most recent fiscal year. *See* 17 CFR 270.0–10.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small business issuers. In connection with the amendments, we considered several alternatives, including the following:

- Establishing different compliance and reporting requirements, or timetables that take into account the resources of small businesses;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small businesses;
- Using performance rather than design standards; and
- Exempting small businesses from all or part of the requirements.

Overall, the rule is designed to benefit all capital raising activity, by both small and large entities. The conditions imposed include disclosure designed to protect investors from any confusion in the event an entity changes how it raises money. These disclosure conditions are not resource intensive.

We did not propose or adopt all of the alternatives that we considered. Alternatives that we proposed but did not adopt include:

- In the private-to-registered safe harbor, the issuer filing any selling materials used in the private offering as part of the registration statement; and
- In the registered-to-private safe harbor, the issuer agreeing in writing to liability under the standards of Securities Act Sections 11 and 12(a)(2) for any material misstatements or omissions in the offering documents used in the private offering.

These alternatives were not adopted because commenters stated that they would be costly and burdensome to issuers.

In some instances, the alternatives that we chose not to propose or adopt—for example exempting small issuers from the disclosure requirements—would be inconsistent with our statutory mandate under the Securities Act to require full and fair disclosure of all material information to investors. We believe that the amendments should apply equally to all entities required to disclose information, in order to safeguard protection of all investors.

We also believe that there would be no benefit in providing separate requirements for small business issuers based on the use of performance rather than design standards. The five-factor test,[85] which continues to apply, already provides a performance standard to resolve the question of integration. The design standards adopted in Rule 155 allow an issuer to switch between private and registered offerings more quickly and with greater certainty than under the five-factor test. Moreover, we already have provided a separate Integrated Disclosure System for Small Business Issuers[86] to simplify the registration requirements for small entities. Registered offerings filed under this system will be treated the same as any other registered offering for purposes of Rule 155.

X. Statutory Basis and Text of Amendments

Securities Act Rule 155 and the amendments to Securities Act Rules 152, 429, 459 and 477 are adopted pursuant to the authority set forth in Sections 2(b), 6, 7, 8, 10, 19(a), and 28 of the Securities Act, as amended.

List of Subjects in 17 CFR Part 230

Advertising, Investment companies, Reporting and recordkeeping requirements, Securities.

Text of the Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. By revising the general authority citation for Part 230 to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77sss, 77z–3, 78c, 78d, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. By adding § 230.155 to read as follows:

§ 230.155 Integration of abandoned offerings.

Preliminary Note: Compliance with paragraph (b) or (c) of this section provides a non-exclusive safe harbor from integration of private and registered offerings. Because of the objectives of Rule 155 and the policies underlying the Act, Rule 155 is not available to any issuer for any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Act.

(a) *Definition of terms.* For the purposes of this section only, a *private offering* means an unregistered offering of securities that is exempt from registration under Section 4(2) or 4(6) of the Act (15 U.S.C. 77d(2) and 77d(6)) or Rule 506 of Regulation D (§ 230.506).

(b) *Abandoned private offering followed by a registered offering.* A private offering of securities will not be considered part of an offering for which the issuer later files a registration statement if:

(1) No securities were sold in the private offering;

(2) The issuer and any person(s) acting on its behalf terminate all offering activity in the private offering before the issuer files the registration statement;

(3) The Section 10(a) final prospectus and any Section 10 preliminary prospectus used in the registered offering disclose information about the abandoned private offering, including:

(i) The size and nature of the private offering;

(ii) The date on which the issuer abandoned the private offering;

(iii) That any offers to buy or indications of interest given in the private offering were rejected or otherwise not accepted; and

(iv) That the prospectus delivered in the registered offering supersedes any offering materials used in the private offering; and

(4) The issuer does not file the registration statement until at least 30 calendar days after termination of all offering activity in the private offering, unless the issuer and any person acting on its behalf offered securities in the private offering only to persons who were (or who the issuer reasonably believes were):

(i) Accredited investors (as that term is defined in § 230.501(a)); or

(ii) Persons who satisfy the knowledge and experience standard of § 230.506(b)(2)(ii).

(c) *Abandoned registered offering followed by a private offering.* An offering for which the issuer filed a registration statement will not be considered part of a later commenced private offering if:

(1) No securities were sold in the registered offering;

(2) The issuer withdraws the registration statement under § 230.477;

(3) Neither the issuer nor any person acting on the issuer's behalf commences the private offering earlier than 30 calendar days after the effective date of withdrawal of the registration statement under § 230.477;

(4) The issuer notifies each offeree in the private offering that:

(i) The offering is not registered under the Act;

(ii) The securities will be ''restricted securities'' (as that term is defined in § 230.144(a)(3)) and may not be resold unless they are registered under the Act or an exemption from registration is available;

(iii) Purchasers in the private offering do not have the protection of Section 11 of the Act (15 U.S.C. 77k); and

(iv) A registration statement for the abandoned offering was filed and withdrawn, specifying the effective date of the withdrawal; and

(5) Any disclosure document used in the private offering discloses any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering.

3. By revising § 230.429 to read as follows:

§ 230.429 Prospectus relating to several registration statements.

(a) Where a registrant has filed two or more registration statements, it may file a single prospectus in the latest registration statement in order to satisfy the requirements of the Act and the rules and regulations thereunder for that offering and any other offering(s) registered on the earlier registration statement(s). The combined prospectus in the latest registration statement must include all of the information that currently would be required in a prospectus relating to all offering(s) that it covers. The combined prospectus may be filed as part of the initial filing of the latest registration statement, in a pre-effective amendment to it or in a post-effective amendment to it.

(b) Where a registrant relies on paragraph (a) of this section, the registration statement containing the combined prospectus shall act, upon effectiveness, as a post-effective amendment to any earlier registration statement whose prospectus has been combined in the latest registration statement. The registrant must identify any earlier registration statement to which the combined prospectus relates by setting forth the Commission file number at the bottom of the facing page of the latest registration statement.

4. By amending § 230.457 by adding paragraphs (f)(5), (p) and (q) and revising the first sentence of paragraph (o) to read as follows:

§ 230.457 Computation of fee.

* * * * *

[85] *See* n. 20, above.

[86] Regulation S–B, 17 CFR 228.10, *et seq.*

(f) * * *

(5) If a filing fee is paid under this paragraph for the registration of an offering and the registration statement also covers the resale of such securities, no additional filing fee is required to be paid for the resale transaction.

* * * * *

(o) Where an issuer registers an offering of securities, the registration fee may be calculated on the basis of the maximum aggregate offering price of all the securities listed in the ''Calculation of Registration Fee'' table. * * *

(p) Where all or a portion of the securities offered under a registration statement remain unsold after the offering's completion or termination, or withdrawal of the registration statement, the aggregate total dollar amount of the filing fee associated with those unsold securities (whether computed under § 230.457(a) or (o)) may be offset against the total filing fee due for a subsequent registration statement or registration statements. The subsequent registration statement(s) must be filed within five years of the initial filing date of the earlier registration statement, and must be filed by the same registrant (including a successor within the meaning of § 230.405), a majority-owned subsidiary of that registrant, or a parent that owns more than 50 percent of the registrant's outstanding voting securities. A note should be added to the ''Calculation of Registration Fee'' table in the subsequent registration statement(s) stating the dollar amount of the filing fee previously paid that is offset against the currently due filing fee, the file number of the earlier registration statement from which the filing fee is offset, and the name of the registrant and the initial filing date of that earlier registration statement.

(q) Notwithstanding any other provisions of this section, no filing fee is required for the registration of an indeterminate amount of securities to be offered solely for market-making purposes by an affiliate of the registrant.

5. By amending § 230.477 by adding a sentence at the end of paragraph (b); by revising paragraph (c); and by adding paragraph (d) to read as follows:

§ 230.477 Withdrawal of registration statement or amendment.

* * * * *

(b) * * * Any other application for withdrawal of an entire registration statement made before the effective date of the registration statement will be deemed granted at the time the application is filed with the Commission unless, within 15 calendar days after the registrant files the application, the Commission notifies the registrant that the application for withdrawal will not be granted.

(c) The registrant must sign any application for withdrawal and must state fully in it the grounds on which the registrant makes the application. The fee paid upon the filing of the registration statement will not be refunded to the registrant. The registrant must state in the application that no securities were sold in connection with the offering. If the registrant applies for withdrawal in anticipation of reliance on § 230.155(c), the registrant must, without discussing any terms of the private offering, state in the application that the registrant may undertake a subsequent private offering in reliance on § 230.155(c).

(d) Any withdrawn document will remain in the Commission's public files, as well as the related request for withdrawal.

Dated: January 26, 2001.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–2847 Filed 2–2–01; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 903

[Docket No. FR–4420–F–11]

RIN 2577–AB89

Rule To Deconcentrate Poverty and Promote Integration in Public Housing; Change in Applicability Date of Deconcentration Component of PHA Plan

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule; amendment.

SUMMARY: This final rule amends HUD's December 22, 2000 final rule revising the deconcentration provisions of its Public Housing Agency (PHA) Plan regulations. Specifically, the final rule provides that the December 22, 2000 amendments concerning the deconcentration component of a PHA's admission policy are applicable to PHAs with fiscal years commencing on and after October 1, 2001.

DATES: *Effective Date:* March 7, 2001.

FOR FURTHER INFORMATION CONTACT: Rod Solomon, Deputy Assistant Secretary for Policy, Program and Legislative Initiatives, Department of Housing and Urban Development, Office of Public and Indian Housing, 451 Seventh Street, SW, Room 4116, Washington, DC 20410; telephone (202) 708–0713 (this is not a toll-free telephone number). Persons with hearing or speech disabilities may access this number via TTY by calling the free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On December 22, 2000 (65 FR 81214), HUD published a final rule to amend the deconcentration provisions of its October 21, 1999 Public Housing Agency (PHA) Plan final rule. The December 22, 2000 final rule followed publication of an April 17, 2000 proposed rule.

The December 22, 2000 final rule provides that the first PHA fiscal year that is covered by the new requirements is the PHA fiscal year that begins July 2001 (see § 903.5). Upon further consideration, HUD believes that the July 1, 2001 date may not provide PHAs with sufficient time to bring their practices into compliance with the new deconcentration requirements. Accordingly, this final rule provides that the December 22, 2000 amendments concerning the deconcentration component of a PHA's admission policy are applicable to PHAs with fiscal years commencing on and after October 1, 2001.

II. Justification for Issuance of Rule for Effect

In general, HUD publishes a rule for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking at 24 CFR part 10. Part 10, however, does provide for exceptions from that general rule where HUD finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when the prior public procedure is ''impracticable, unnecessary, or contrary to the public interest'' (24 CFR 10.1). HUD finds that good cause exists to publish this rule for effect without first soliciting public comment, in that prior public procedure is unnecessary. Public procedure is unnecessary because this rule makes a technical change to 24 CFR part 903 regarding the first PHA fiscal year covered by the deconcentration-related amendments of HUD's December 22, 2000 final rule to allow PHAs more time to comply with this requirement. The amendment will benefit PHAs, the residents they serve and the public by assuring that PHAs have sufficient time to become familiar with the requirements of the December 22, 2000 final rule and to bring their practices into compliance with the new deconcentration procedures.