SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 202, 210, 228, 229, 230, 232, 239, 240 and 249

[Release No. 33–7606A; 34–40632A; IC–23519A; International Series Release No. 1167A; File No. S7–30–98]

RIN 3235–AG83

The Regulation of Securities Offerings

AGENCY: Securities and Exchange Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commission is proposing to modernize and clarify the regulatory structure for offerings under the Securities Act of 1933 while maintaining investor protection. The proposals cover five major topics: Registration system reform; communications around the time of an offering; prospectus delivery requirements; integration of private and public offerings; and periodic reporting under the Securities Exchange Act of 1934.

Under the proposals, larger seasoned issuers could offer securities at any time as long as they file a registration statement before sale. Other seasoned issuers could do the same when they make offerings to relatively sophisticated or informed investors. The Commission staff would not review these registration statements before effectiveness. Those issuers and their underwriters would designate the effective dates and have complete control over when they offer and sell in those registered offerings. Their communications to the market and to investors, while governed by antifraud and civil liability provisions, would no longer be limited based on the filing or effectiveness of their registration statements.

The proposals also would provide predictability to medium-sized seasoned issuers that register offerings. The registration statements they file to raise capital would become effective when they designate. Those registration statements would not be subject to pre-effective review by the Commission staff. Seasoned companies of any size would benefit from the proposals as well. We would allow them to incorporate Exchange Act disclosure in registration statements earlier than the current rules permit. To provide greater certainty to small and medium-sized issuers planning a registered offering, we also are proposing new communication rules. One rule would provide that communications made by or for such an issuer more than 30 days before the registration statement is filed would not be treated as offers. Other proposed rules would guide those issuers as to the types of communications that we permit within that 30-day period.

Our proposals also would give issuers of all sizes and their underwriters greater freedom to communicate with investors in writing during the offering process. The proposed exemptive rules would allow use of any document (not just the traditional prospectus) at any time during an offering by a larger seasoned issuer or an offering to sophisticated or informed investors by a smaller seasoned issuer. Those ''free writing'' communications would be subject to antifraud and civil liability provisions. In all other offerings, the proposed exemptions would allow an issuer and underwriter the same flexibility after the issuer has filed a registration statement. The free writing proposals would allow use of documents tailored specifically for the investors reading them. Other proposed revisions would increase investor access to analyst research reports. We would allow their distribution around the time of an offering in more cases than permitted today.

The proposals affecting prospectus delivery in registered offerings would re-focus those requirements for the benefit of investors. Delivery of a prospectus or a term sheet would be required before investors make their investment decisions rather than at the time a sale is confirmed.

The proposals addressing the integration of offerings would provide flexibility for issuers that have difficulty assessing the extent of market interest in a planned offering. Those revisions would enable an issuer to change an unregistered private offering into a registered public offering, or vice versa, after it commences the offering. Small companies that begin a registered public offering would still have the option to make an unregistered, exempt offering to qualified buyers even though they broadly solicited potential investors.

Finally, we are proposing various revisions to expedite and expand some of the disclosure required in periodic reports filed under the Exchange Act. Investors would have more timely access to company disclosure.

DATES: You should send us your comments so that they arrive at the Commission by April 5, 1999.

ADDRESSES: You should send 3 copies of your comments to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Stop 6–9, Washington, D.C., 20549. You also may submit your comments electronically to the following electronic mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7–30–98; this file number should be included in the subject line if you use electronic mail. Comment letters will be available for public inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. We will post electronically submitted comment letters on the Commission's Internet Web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Anita Klein at (202) 942–2980, Julie Hoffman, Joseph Babits, Patricia Miller or Rani Doyle at (202) 942–2900, or, with respect to small business issuer aspects, John Reynolds at (202) 942–2950, Division of Corporation Finance, U.S. Securities and Exchange Commission, Washington, D.C. 20549.[1]

SUPPLEMENTARY INFORMATION:

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[1] The Commission also wishes to recognize the contributions to this release of Jennifer Bethel.

I. Executive Summary

Through the Securities Act registration system, issuers and underwriters reach out to the public and sell securities. The registration system provides investors with the dual benefits of: full and fair disclosure (or effective remedies if there is faulty disclosure), and freely tradeable securities. Registration also benefits the markets at large by providing everyone with access to the most up-to-date information about the company making the offering. This disclosure is significant both to the market, for accuracy in pricing, and to the individual investor, for determining the suitability of the investment. Today's proposals are based on a recognition that investors will receive these benefits of registration only if the Commission continues to make the registration system flexible enough to be a viable alternative in the capital markets of today and the future.

A. Registration System Reforms

Our reforms to the registration system are designed to make registration more attractive to issuers without compromising investor protection. We believe that registration benefits all participants: issuers, by lowering their cost of capital; investors, by enhancing disclosure and providing remedies; and the marketplace, by increasing depth and liquidity.

In 1990, the Commission adopted Rule 144A which permits unregistered sales to and by qualified institutional buyers (''QIBs'').[2] Since then, this institutional market, which exists virtually side-by-side with the public market, has expanded significantly. Recent data illustrates the size of this parallel market: in 1997, Rule 144A offerings comprised 17% of all offerings on a dollar basis, including 21% of all equity and 16% of all debt.[3] In some types of securities, the Rule 144A market has become predominant. In 1997, 76% of the high-yield debt, 72% of the convertible investment grade debt, and 10% of the non-convertible investment grade debt were issued for the Rule 144A market.[4]

Our proposed reforms seek to apply the issuer advantages of offering securities in the private and Rule 144A markets—timing and disclosure flexibility—to the public market. We believe that, as a result, more offerings will be registered.

We propose to create a three-tiered registration system for offerings consisting of: Form A, Form B and Form C. Form A offerings generally would be those made by smaller or unseasoned companies. Form B offerings would be those made by larger, seasoned, well-followed issuers and those made to relatively informed or sophisticated investors. Form C offerings would relate to business combinations or exchange offers. Today the Commission also is publishing a companion release regarding the regulation of takeovers, including tender offers, mergers and other extraordinary transactions. You should read that release for a detailed discussion of the regulation of business combinations and exchange offers registered on Form C.[5]

[2] ''Qualified institutional buyers'' is defined in Securities Act Rule 144A(a)(1), 17 CFR 230.144A(a)(1). Even though some proportion of the Rule 144A securities are eventually registered, the investor benefits of registration are not maximized. It is not uncommon for securities sold in Rule 144A transactions to end up in the public market because they are registered for resale or exchanged for registered securities in ''*Exxon Capital*'' transactions (named after the Commission staff interpretive letter sanctioning the practice).

[3] Securities Data Corp's *New Issues* Database. Virtually all of that market share has moved to the Rule 144A market in the last 5 years. Rule 144A is not available for securities listed on a national securities exchange or quoted on a U.S. automated inter-dealer quotation system.

[4] Non-convertible investment grade debt is eligible for short-form registration under our current system, whereas the other two categories are not.

[5] Exchange Act Release No. 40633 (Nov. 3, 1998).

1. Contents of Prospectuses

Current requirements strictly mandate the content of an offering prospectus. Because we believe that larger seasoned issuers attract a large market following and operate in an efficient market, we are considering providing them with a larger measure of flexibility to craft disclosure about their offerings. We are asking for comment on two alternative proposals for Form B offerings. The first, while requiring all material transactional disclosure, would limit the itemized requirements for such disclosure. The second would continue to require all itemized transactional disclosure. Under both proposals, we would continue to mandate that issuers incorporate by reference the current itemized company information in their periodic reports. Thus, we would maintain the same standards for information about the company while we seek comment on the level of freedom to allow the issuer and the underwriter when crafting information about the offering itself.

Where the issuer or its representative uses disclosure to promote sales in the offering, it would have to file that disclosure, which would be subject to civil liability provisions prohibiting material misstatements and omissions. This ''inclusive prospectus'' approach would reflect the reality that investment decisions in these offerings would be based on more than the information contained in a single disclosure document.

By shifting some itemized disclosure requirements to materiality-based requirements, as one of our proposals would permit, we seek to discourage drafters from just routinely providing the boilerplate transactional disclosure that some have suggested the standardized disclosure items have evoked. This alternative would re-focus drafters on analyzing and including the information particular to that deal that is material to investors. More focused disclosure could result.

On the other hand, under our alternative proposal, all current transactional disclosure requirements specified in Regulation S–K that are in Form S–3 and/or Form F–3 would continue to apply. This alternative would provide investors with more certain core transactional information.

Under either proposal, issuers and third party participants such as underwriters and auditors would continue to ensure the quality of disclosure due to both market pressures and their legal responsibility to do so. We believe that analysts and the financial press, among others, also will

test the accuracy of disclosure by larger, seasoned issuers.[6] By allowing issuers some more freedom to craft their transactional disclosure and communicate with investors in Form B offerings for which there is evidence of an efficient market, we also hope to reduce selective disclosure by allowing access to more information.

We are considering the same alternative approaches to disclosure in offerings limited to sophisticated investors and in offerings to investors with a pre-established relationship with the issuer. Historically, we have given issuers more flexibility in these types of offerings on the theory that these purchasers are able to fend for themselves.

For smaller issuers or unseasoned issuers of any size, we believe that the current strict itemization of transactional information in the prospectus remains important to the dissemination of adequate offering information. Some of those issuers would have little experience with crafting offering disclosure and the same market scrutiny is not present. We would therefore maintain all current itemized offering disclosure requirements in Form A. We would, however, allow more freedom for seasoned smaller issuers to rely on their periodic reports for disclosure about their companies in an offering. In the case of business combinations and exchange offers on Form C, we would maintain the itemized requirements for transactional disclosure.

2. Timing of Registration

Under the revised registration system, issuers would have complete flexibility in timing the registration of Form B offerings. By operation of rule, those registration statements would become effective at the issuer's discretion, either immediately upon filing or at whatever later date and time the issuer chooses. The staff would not review these registration statements before the offering or take action to make the registration statement effective. Form B registration statements would be screened by the Commission staff shortly after receipt by the Commission to determine whether the offering was eligible for registration on Form B and whether the disclosure raises any ''red flags'' concerning the antifraud provisions of the federal securities laws. Therefore, the only timing constraint for Form B offerings would be the statutory requirement that the registration statement must be effective before the first sale. We are not proposing to exempt issuers from that requirement because, among other reasons, filing of a final prospectus would ensure prompt disclosure to the market about the offering.

We would continue to require that issuers registering offerings on Form A file a registration statement before making their first offer. The Commission staff would continue to review all initial public offerings and selectively review repeat offerings by smaller, unseasoned issuers. We would, however, allow seasoned medium-sized issuers to control the timing of registration in their Form A offerings. We also would allow certain other Form A issuers that incorporate recent Exchange Act reports that have been fully reviewed by the Commission staff to control the timing of their offerings. Those filings, like Form B offerings, would be screened (but not reviewed) by the staff shortly after receipt.

We believe that this increased flexibility in the timing of registration will encourage issuers to register more offerings and thus extend the investor protection benefits of registration to more purchasers. Further, although offerings by these issuers that we would not review under the proposed system are currently subject to staff review, these reforms essentially mirror current practice with respect to review of what would be Form B-type filings and recently examined Form A-type filings.

3. Underwriter Guidance

In connection with the proposed registration system, we would add a new provision to the Securities Act rule concerning due diligence. That rule currently lists circumstances to consider in deciding whether a person has met the ''reasonable investigation'' and ''reasonable ground for belief'' standards that apply in defending against liability under Section 11 of the Securities Act. The new provision would cover only certain Form B offerings completed on an expedited basis and would expand upon the existing guidance in the rule to reflect current practices.

4. Small Business Issuers

For purposes of registration and reporting, we are proposing to revise the definition of ''small business issuer'' to increase the number of companies qualifying as small business issuers. We would raise the annual revenues ceiling from $25 to $50 million and remove the public float limitation. We propose to update the definition to reflect significant economic and market changes that have occurred in the six years since we adopted the definition. Also, our successful experience with the small business disclosure system indicates that we could classify companies with higher revenues as small business issuers while at the same time maintaining investor protection. To provide small businesses with greater flexibility in raising capital, we also propose to delay the time at which they must pay registration fees, allow earlier incorporation by reference of their Exchange Act reports and allow increases in the size of their offerings in an expedited fashion.

B. Easing Restrictions on Communications

Our proposals would loosen the strict controls that exist today on communications to investors and the market around the time of an offering. Our intent in proposing the communications reforms is to ensure that investors and the market have greater access to more timely information, which we believe is the foundation of investor protection. We are not proposing any diminution in the remedies that would be available to investors in the event of defective disclosure made by or on behalf of an issuer around the time of an offering.

1. Issuer Communications

The extent to which we would ease communications by the issuer or deal participants depends on the type of offering. For Form B offerings, we would allow oral and written communications in any format at any time regardless of whether the offering is imminent or ongoing. Of course, the antifraud provisions and civil liability provisions of the securities laws would apply to those communications and provide the necessary investor protections.

In Form A offerings on the whole, we have less reason to assume that plentiful, thoroughly scrutinized issuer information is available. A barrage of sales-related communications could affect prospective investors, especially if those communications are the only ones publicly available. The greatest need for investor protection in that case would occur before the investor has access to reliable, balanced prospectus disclosure. Thus, for these offerings, we propose to maintain the prohibition on offers prior to filing a registration statement. Once the issuer's prospectus is on file with

[6] We recognize that analysts, especially so-called ''sell-side'' analysts, have inherent conflicts of interest. There is a risk that impartiality may be compromised when their firms seek to participate in the issuers' distributions. We believe, nevertheless, that analysts in general, and the expanding ''buy side'' analysts in particular, are in a unique position to gather and analyze information about issuers. They represent an undeniably significant method of corporate disclosure and dissemination.

the Commission, however, our proposals would lift existing restrictions on written communications for Form A offerings because an investor would be able to test the sales materials against the registration statement. Moreover, our proposals on prospectus delivery would ensure timely delivery, not just access, to this more balanced information.

For the period before filing the registration statement, we propose to create greater certainty about the timing and scope of remaining restrictions on communications. We are aware that the restrictions on communications before a filing have been criticized as unclear. This is especially true due to the recent increased use of the Internet. Consequently, we are proposing a bright-line rule that would define the 30 days immediately before filing the registration statement as the period during which communications would be limited due to the upcoming offering. In addition, our proposed rules provide that, even during that 30-day limited communications period, issuers could disclose factual business information and regularly released forward-looking information. Our proposals also would permit issuers to announce limited offering information during the 30-day period without indicating whether the offering will be registered or exempt.

2. Safe Harbors for Research Reports

For Form B offerings and many Schedule B offerings by foreign governments, the proposals would allow analysts to publish research reports without any interruption due to the registered offering. For other offerings, we propose expanded safe harbors to make it easier for analysts to report about foreign government issuers and smaller, unseasoned companies. We also are proposing to expand those safe harbors to address the distribution of research reports in connection with Regulation S and Rule 144A offerings.

C. Prospectus Delivery Reforms

To provide investors with the maximum benefit from prospectus disclosure, the proposals re-focus prospectus delivery requirements on when the prospectus is needed most: before investors make an investment decision. Where we would require that offering participants deliver prospectus information earlier, we would allow them to decide whether or not to deliver a final prospectus. Where they do not deliver a final prospectus, we would require that they tell investors where they can obtain it free of charge.

In Form B offerings, we would not require that offering participants deliver a full prospectus. We would, however, require earlier delivery of a ''securities term sheet'' outlining the key features of the securities. Delivery of that securities term sheet would precede the investment decision—when the investor gives its oral or written commitment to purchase. We also are considering, as an alternative for Form B offerings, requiring delivery of a prospectus containing all mandated transactional information listed in Subpart 500 of Regulation S–K that would be contained in a short-form registration statement today.

In Form A offerings by unseasoned issuers (issuers that have registered their initial public offerings within the past year), underwriters and dealers participating in the offering would have to deliver a preliminary prospectus at least 7 days before the date of pricing. In all other Form A offerings, issuers, underwriters and participating dealers would have to deliver a preliminary prospectus at least 3 days before the date of pricing. These requirements would ensure that investors that are offered securities of smaller, unseasoned issuers have more time in which to assess the disclosure. Issuers and other participants in Form A offerings also would have to inform investors no later than 24 hours before pricing about any material change that has occurred since they delivered prospectuses.

D. Public and Private Offering Flexibility

Today's capital markets can change quickly. Companies, especially small businesses, may find that the desirability of making a public offering versus a private offering can change just as quickly. Current rules prevent most companies from changing their minds in a timely fashion once they have started an offering one way. Our proposals would remove most of those impediments. Under the proposed safe harbor, if an issuer started to register a public offering but then decided to abandon it, the issuer could withdraw the registration statement and either wait 30 days to sell privately or sell privately sooner and accept a higher liability standard for written disclosure provided to purchasers.

Similarly, if an issuer started a private offering but then decided to abandon it, the issuer could file a registration statement for a public offering immediately unless it had offered the securities to persons that would not have been eligible to buy in a private offering under Securities Act Section 4(2). In that event, the issuer would have to wait for 30 days after abandoning the private offering to file its registration statement.

This safe harbor would be particularly useful to small issuers. It would allow a small private company to ''test the waters'' for a public offering of its securities through this mechanism. Doing so would not prevent the small issuer from selling privately if it finds too few investors to make it worthwhile to become a public company. Similarly, small issuers that find more investor interest than expected could change from a private offering to a registered public offering.

E. Periodic Reporting

We are proposing several changes to Exchange Act disclosure requirements, some of which the Advisory Committee on Capital Formation and Regulatory Processes recommended. These changes would require issuers to report annual and quarterly financial results sooner, to make and update risk factors disclosure in their Exchange Act reports, to accelerate the due dates for some Form 8–K reports and to expand the events about which Form 8–K requires a report. The changes also would require persons signing Exchange Act filings to indicate that they have reviewed the disclosure and, to their knowledge, the registration statement or report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. These Exchange Act disclosure reforms would provide key investor protections in a further streamlined registration process. Additionally, if the proposed registration system is adopted, the Commission envisions shifting staff resources to the review of Exchange Act filings.

II. History of Registration Under the Securities Act

The Securities Act and the regulations thereunder have long provided the foundation for a capital-raising system of unparalleled integrity, fairness, and liquidity. The regulatory scheme seeks to ensure that investors receive full and fair disclosure with respect to securities offerings by issuers and their affiliates.

The Securities Act was adopted in response to the activities culminating in the 1929 market crash.[7] President

[7] The Securities Act was the first of six securities statutes to be enacted during the 1933–1940 period. The other five acts include: the Securities Exchange Act of 1934, Pub. L. No. 73–291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–78kk (1994, Supplemented 1996)); the Public Utilities Holding Company Act of 1935, Pub. L. No. 74–333, 49 Stat. 803 (1935) (codified as amended at 15 U.S.C. §§ 79–79z–6 (1994, Supplemented 1996)); the Trust Indenture Act of 1939, Pub. L. No. 76–253, 53 Stat. 1149 (1939) (codified as amended at

Franklin D. Roosevelt articulated the underlying philosophy of regulating securities offerings which continues today:

[t]here is * * * an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.[8]

Congress has made relatively few broad-reaching amendments to the Securities Act since its inception. In administering the statute, we strive to be responsive to changing markets and capital-raising practices. Over the years, the Commission has interpreted the statute through rules and regulations to give continuing life to the original statute.

A. Evolution of the Registration System

Modern efforts at reforming registration stem in part from a commentary on Securities Act regulation published in 1966. In his article, ''Truth in Securities,'' Milton H. Cohen theorized that the:

Combined disclosure requirements of these statutes would have been quite different if the 1933 and 1934 Acts * * * had been enacted in opposite order, or had been enacted as a single, integrated statute* * *.[9]

Cohen argued for a coordinated disclosure system having as its basis the continuous disclosure system of the Exchange Act with the Securities Act disclosure requirements built upon it.[10] The Commission soon thereafter instituted a study, chaired by Commissioner Francis M. Wheat, to examine disclosure to investors.[11] The Wheat Report, published in 1969, recommended expanded periodic disclosure under the Exchange Act and the coordination of the disclosure requirements of the Securities Act and the Exchange Act.[12]

The Commission followed up on the Wheat Report by adopting a short-form Securities Act registration statement. That registration statement permitted incorporation by reference of Exchange Act reports by larger issuers and in specified types of offerings.[13] This approach allowed companies to avoid reiterating in their registration statements the company disclosure contained in annual and other periodic reports.

In 1977, the Commission adopted Regulation S–K, which began the effort to establish a single set of disclosure requirements for issuers under both the Securities Act and the Exchange Act.[14] That effort was substantially completed with the adoption of the ''Integrated Disclosure System'' in 1982.[15] The Commission's integrated disclosure system eliminated overlapping and unnecessary disclosure required by the Securities Act and the Exchange Act.

The Commission also adopted the modern-day ''shelf registration'' system in connection with the integrated disclosure system.[16] That permits registration of securities offerings that are conducted on a delayed basis sometime after the effective date.[17] In 1992, the Commission extended short-form and shelf registration to smaller issuers and new offerings, including asset-backed securities offerings.[18] The Commission also permitted registration of shelf offerings without requiring that the amount of securities be allocated upon registration to specific classes of the issuer's securities. This approach permitted issuers to decide as late as the point of sale which of its securities to use.

Another significant change in the registration system occurred with the Commission's adoption in 1990 of Rule 144A.[19] Rule 144A provides a safe harbor from registration for resales of restricted securities to QIBs. By creating certainty about when registration is not required in these transactions, the Commission enhanced the attractiveness of alternatives to registration of securities.[20]

B. Review of the Capital Formation Process

Both within and outside the Commission, debate periodically has centered on the Securities Act and the best way to regulate the securities offering process. Over the years, industry participants, academics and Commission members have voiced opinions that there are strains in the regulatory framework and have called for changes. Their proposed solutions have ranged from minor rule changes to the abolition of the Commission.

There also has been recent discussion about the extent to which the regulatory system requires an overhaul in the face of the ever-changing market and offering practices.[21] Factors identified as causing strain in the current regulatory regime include:

1. Technological developments in the field of electronic communications; [22]

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15 U.S.C. §§ 77aaa–77bbbb (1994, Supplemented 1996)); the Investment Company Act of 1940, Pub. L. No. 76–768, 54 Stat. 789 (1940) (codified as amended at 15 U.S.C. §§ 80a–1–80a–64 (1994, Supplemented 1996)); and the Investment Advisors Act of 1940, Pub. L. No. 76–768, 54 Stat. 847 (1940) (codified as amended at 15 U.S.C. §§ 80b–1–80b–21 (1994, Supplemented 1996)).

[8] H.R. Rep. No. 85, 73d Cong. 1st Sess., at 1–2 (1933).

[9] Cohen, ''*Truth in Securities*'' *Revisited*, 79 Harv. L. Rev. 1340, 1341 (1966).

[10] *Id.* at 1342.

[11] *Disclosure to Investors—A Reappraisal of Administrative Policies Under the 1933 and 1934 Acts*, Report and Recommendations to the SEC from the Disclosure Policy Study (Mar. 27, 1969) [hereinafter ''Wheat Report''].

[12] The securities bar also acted upon the ideas in Cohen's article. The American Law Institute commissioned several industry experts, led by Professor Louis Loss, to combine all six federal statutes into one comprehensive code, American Law Institute, Federal Securities Code (1980) (the ''ALI Code''). *See also* Loss, *The American Law Institute's Federal Securities Code Project*, 25 Bus. Law. 27 (1969). Upon its completion ten years later in 1980, the Commission and many in the securities industry expressed support for the ALI Code. *See* Securities Act Release Nos. 6242 (Sept. 18, 1980) [20 S.E.C. 1483 (1980)] and 6377 (Jan. 21, 1982) [24 S.E.C. Docket 788 (1961)] (releases stating and reaffirming support for the ALI Code). *See also* Coffee, *Re-Engineering Corporate Disclosure: The Coming Debate Over Company Registration*, 52 Wash. & Lee L. Rev. 1143, 1145 (1995). The ALI Code was in turn presented to Congress. Congress, however, took no action with respect to the ALI Code.

[13] Securities Act Release No. 5117 (Dec. 23, 1970) [36 FR 777].

[14] Securities Act Release No. 5893 (Dec. 23, 1977) [42 FR 65554]. As originally adopted, Regulation S–K contained only two items: ''Description of Business'' and ''Description of Property.''

[15] Securities Act Release No. 6383 (Mar. 3, 1982) [47 FR 11380]. In that release, the Commission stated that ''in reliance on the efficient market theory'' Form S–3 would allow for maximum use of incorporation by reference [47 FR at 11382].

[16] Temporary Rule 415 was adopted in March of 1982. Securities Act Release No. 6383 (Mar. 3, 1982). In November of 1983, the Commission announced the adoption of a revised shelf registration rule. Securities Act Release No. 6499 (Nov. 17, 1983) [48 FR 52889].

[17] *See* Securities Act Release No. 6499 (Nov. 17, 1983) and Securities Act Rule 415, 17 CFR 230.415. Short-form registration is used for delayed shelf offerings.

[18] Securities Act Release No. 6964 (Oct. 22, 1992) [57 FR 32461].

[19] Securities Act Release No. 6862 (Apr. 23, 1990) [55 FR 17933].

[20] According to Securities Data Co., the deal value of Rule 144A private placements in 1997 was $254.4 billion, approximately $83 billion of which was raised by foreign issuers. Tibbitts, *Private Placement Volume Explodes as Structured Deals Rule 144A Market*, Investment Dealers' Digest, Feb. 2, 1998. The amount of non-convertible bonds issued in the Rule 144A market in the first quarter of 1998 ($30 billion) is almost equal to the entire amount (equity, preferred and debt) placed in the Rule 144A market from its inception in 1990 to the end of 1992 ($31 billion).

[21] *Compare* Merrill Lynch comment letter (Oct. 31, 1996) (''[W]e believe that what the registration process needs today is a tune up, not an overhaul.'') *with* American Bar Ass'n comment letter (Dec. 11, 1996) (''[T]he time has come to recognize that the current jury-rigged system requires fundamental reforms.''). These letters are available for inspection and copying in the Commission's public reference room. Refer to File No. S7–19–96.

[22] *See, e.g., Report to the Congress: The Impact of Recent Technological Advances on the Securities Markets*, (Sept. 1997). That Report, like all Commission reports issued after 1996, is available on the Commission's Internet web site (http://www.sec.gov).

2. The gradual erosion of traditional distinctions between public and private offerings; [23]

3. Novel financing instruments, methods of capital-raising and risk management initiatives; [24] and

4. Regulatory initiatives that reduce other market risks, such as the T+3 clearance and settlement system.[25]

III. Recent Reform Initiatives

The Commission has been cognizant of the call for change in the regulatory framework governing the capital formation process. For the last several years, the Commission has been actively reevaluating the current registration system. Recent Commission steps in that process have included: the March 1996 Report of the Task Force on Disclosure Simplification (the ''Task Force''); the July 1996 Report of the Commission-impaneled Advisory Committee on the Capital Formation and Regulatory Processes (the ''Advisory Committee''); and the Commission's Securities Act Concept Release in July 1996 (the ''Concept Release'').[26]

A. Task Force Report

The Commission's Task Force was organized in August 1995 to conduct a broad-based review of existing disclosure requirements to identify outdated or unnecessary requirements that clutter the regulatory framework. That review encompassed the forms and rules relating to: capital-raising transactions; periodic reporting pursuant to the Exchange Act; proxy solicitations and tender offers; and beneficial ownership reports under the Williams Act. The goal was to simplify the disclosure process, consistent with investor protection, by eliminating unnecessary requirements.[27] In its March 1996 report, the Task Force recommended that the Commission eliminate or modify a quarter of the rules and half the forms. To this end, the Commission has abolished 45 rules and 6 forms.[28]

B. The Advisory Committee on Capital Formation

The Advisory Committee was established in 1995 by the Commission and chaired by then-Commissioner Steven M.H. Wallman. The Advisory Committee's objective was to evaluate the efficiency and effectiveness of the regulatory process relating to public offerings of securities, secondary market trading, and corporate reporting. After 18 months of study, the Advisory Committee published a report in 1996 calling for reform. Its primary recommendation was that the Commission further its integrated disclosure system by implementing a ''company registration'' concept first envisioned by the ALI's Federal Securities Code. The report advocated refocusing the registration system on registration not of transactions, but of companies, with greater reliance on periodic disclosure than prospectus disclosure. The Advisory Committee suggested that the Commission implement the concept as a pilot program for larger companies.

C. The Commission's Concept Release

In light of diverse developments in the markets and the work of the Advisory Committee and Task Force, the Commission published the Concept Release on offering regulation in July 1996. In the Concept Release, the Commission announced that it was reexamining the application of the Securities Act and the rules thereunder to securities offerings. The Concept Release sought comment on the best methods for eliminating unnecessary obstacles to capital formation while improving the quality and timing of disclosure and, therefore, investor protection. The Commission focused its questions in the Concept Release on broad concepts underlying Securities Act regulation. They included:

- Whether investors are receiving all material information in a timely manner in the offering process;
- Whether limitations on the use of written communications other than the statutory prospectus during the offering process ought to be eased;
- Whether the speed of takedowns of securities under the Commission's shelf registration system results in procedures that do not adequately inform the market;
- Whether the role of independent gatekeepers in the offering process needs to be reconfigured to work in conjunction with issuers' quick access to capital; and
- Whether the periodic disclosure under the Exchange Act needs improvement.

The Commission also asked questions in the Concept Release about the Advisory Committee's company registration idea and suggestions about regulatory reform that had been made by others. The Commission received 55 comment letters in response to its requests.[29]

D. The National Securities Markets Improvement Act

Following the publication of the Concept Release, the National Securities Markets Improvements Act of 1996 (''NSMIA'') was enacted.[30] This legislation was designed to update the securities laws to promote investment, decrease the cost of capital, and encourage competition. To this end, Congress granted the Commission for the first time general exemptive authority under the Securities Act.[31] In order to exercise our new exemptive authority, NSMIA requires us to find that such action is ''necessary or appropriate in the public interest and consistent with the protection of investors.'' [32] That exemptive authority gives the Commission substantial additional flexibility in administering the Securities Act. Congress believed that this additional flexibility would allow the Commission to adopt more easily new approaches to registration and disclosure in order to promote efficiency, competition and capital formation.[33]

After the enactment of NSMIA, the Commission began to study possible reform of the regulatory structure for offerings even more broadly. For the past two years, the Commission staff has researched and studied the existing regulatory system and possible improvements that could be made to it. Some of our proposals rely upon our new exemptive authority.

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[23] *See, e.g.*, Keller, *Securities Act Concepts: The Private/Public Offering Dichotomy and Proposals for Reform*, Mass. Continuing Legal Educ., 15 Ann. Bus. & Sec. L. Conf. (Oct. 31, 1997).

[24] Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation* 93 Mich. L. Rev. 649, 666–72 (1995). *See also* Securities Act Release No. 7386 (Jan. 31, 1997) [62 FR 6044].

[25] *See, e.g.*, Securities Act Release No. 7168 (May 11, 1995) [60 FR 26604].

[26] Securities Act Release No. 7314 (July 31, 1996) [61 FR 40044].

[27] The Task Force met with issuers, investor groups, underwriters, accounting firms, lawyers, and others who participate daily in the capital markets. The Task Force reported that none of the participants suggested wholesale deregulation, and virtually all emphasized the importance of the Commission's basic regulatory goals to preserve orderly markets. *See* Task Force Report at pp. 1–6.

[28] Securities Act Release No. 7300 (May 31, 1996) [61 FR 30397] and Securities Act Release No. 7431 (July 18, 1997) [62 FR 39755]. These releases are available on the Commission's Internet web site (http://www.sec.gov).

[29] Those letters and a summary of them may be read and copied at the Commission's Public Reference Room, 450 Fifth Street N.W., Washington, D.C. 20549. Refer to File No. S7–19–96.

[30] Pub. L. No. 104–290, 104th Cong., 2d. Sess. (1996).

[31] *See* Section 28 of the Securities Act, 15 U.S.C. § 77z–3.

[32] 15 U.S.C. § 77z–3.

[33] H.R. Rep. No. 104–622, 104 Cong. 2d Sess. at (1996).

IV. Scope of the Proposals

The Commission is proposing a variety of revisions to the current regulatory structure for securities offerings.[34] While many revisions address problems identified by offering participants, the overall goal of the proposed reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's capital markets. In the last decade, the Commission has seen the results of a registration structure that has been perceived as having too much rigidity to comport with the realities of modern global markets. Sellers have used to their fullest extent available methods of offering without registration. Increasingly, they have tried to create new ways around registration strictures. They also have stretched the boundary between registered and exempt offerings in seeking to acquire the benefits of both. Where registration has taken place, too many offerings have been accomplished with a divergence between the disclosure about the transaction in the registration statement and the disclosure actually used to convince investors to buy.

A large share of the stress on the registration structure in recent years has stemmed from the issuers' and underwriters' need to raise capital on a schedule that they can control. Our proposals seek to fulfill that need through the registration system where consistent with investor protection. In addition, the speed at which offerings are accomplished today, and the limitations on communications imposed by the statute, have called into question whether investors are being informed in a timely manner. Rather than continuing the statute's ''exclusive prospectus'' approach to disclosure, our proposals take an ''inclusive'' approach to disclosure. We seek to ensure that material information is within the reach of investors when they need it most. We also seek to lessen the gap in offerings done quickly between the disclosure about the offering actually being used to sell the securities and the disclosure that is filed with the Commission in a registration statement. Overall, the revisions should create a more flexible registration system under which public offerings proceed with benefits to both buyers and sellers.

Our proposals are primarily focused on the structure of the regulation of offerings; they are not primarily focused on the contents of disclosure requirements. In the process of considering structural reform, however, the Commission has recognized that it needs to study whether the specific disclosure that is mandated both in Exchange Act periodic reports and Securities Act registration statements should be re-focused to serve the investing public better. As a result, the Commission's reform work is not done. The next step in our ongoing process will be to revisit the quantity and quality of required disclosure.

V. Proposals Altering the Securities Act Registration Process

A principal premise of the existing Securities Act registration system is that a prospectus containing mandated disclosure should be virtually the exclusive written document used to offer the securities. In the years since adoption, especially with the recent explosion of information technology, this exclusivity premise is less a reality than a theory, at least for certain offerings and issuers. We believe that it is time to recognize that a different approach would be better for those offerings.

For larger seasoned issuers, communications made around the time of a typical registered offering, whether or not part of a traditional prospectus, provide the basis for investment decisions in the offering. Those issuers are well followed by the market and the important statements that they make are quickly disseminated and considered by investors even when the issuers are not making an offering. When they are making an offering, any communication those issuers and other offering participants make is of even greater interest to the markets. For those issuers, therefore, we propose a transformation from the ''exclusive'' prospectus approach to the ''inclusive'' prospectus approach as a means of facilitating informed investment decisions. That approach would embrace as part of the registration system all information used by or on behalf of the issuer during the offering period that would be material to an investor in the offering. All investors in the offering would receive or have access to such information as well as the required material company and transactional disclosure. The proposed system would maintain investor protection by subjecting this information to the antifraud and civil liabilities provisions of the Securities Act and the Exchange Act.

For most offerings by smaller or unseasoned issuers, and in business combinations and exchange offers, we would primarily rely on the current mandated prospectus to provide written offering communication to investors, although there too we would allow them more freedom to communicate in any medium by means other than the prospectus.[35]

The proposed system would have three main registration forms: Form A for smaller issuers and larger unseasoned issuers, Form B for larger seasoned issuers and offerings to relatively well-informed or sophisticated investors, and Form C for business combinations and exchange offers. Both domestic and foreign issuers would use each of these Forms.[36] Small business issuers would continue to be permitted to use Form SB–1 and revised Form SB–2 for their offerings and would have to use new Form SB–3 for business combinations and exchange offers.

The new forms reflect our understanding of when investors need more, or less, mandated disclosure and when investors benefit from access to information from more than one source. In addition, the proposed divisions of issuers and offerings would create a system that more accurately reflects when an efficient market exists and when an issuer has a significant market following. The new system also would enhance the use of Exchange Act disclosure to satisfy Securities Act disclosure requirements.

A. Form B Offerings

1. How Form B Works

a. Registration Statement Contents

At the time of effectiveness, a Form B registration statement would consist of:

- A cover page with a calculation of registration fee table;
- A prospectus that contains:

—Offering information;
—The registrant's Exchange Act reports, via incorporation by reference;
—A foreign private issuer's Item 18 reconciliation (or Item 17, as applicable) to U.S. GAAP (if not already in an incorporated report);[37]

[34] The proposals do not purport to affect any rules or regulations imposed by self-regulatory organizations in connection with securities offerings.

[35] *See* Section VII. of this release regarding proposed changes in the regulation of offering communications.

[36] While disclosure for foreign private issuers currently is made through a separate set of registration forms, we believe that it would be simpler to formulate a single set of forms for both foreign and domestic issuers. In doing so, foreign private issuers registering on Form A would be subject to the same disclosure requirements as they are currently. In Form B, foreign private issuers would have at least as much flexibility as domestic issuers. Through designations on the front of the registration forms, it will be possible to track the use by foreign private issuers regardless of whether they register on the same forms as domestic issuers.

[37] *See* Items 17 and 18 of Form 20–F.

—The securities term sheet; [38]
—Undertakings to provide investors upon their request, and free of charge, with information incorporated by reference but not delivered.
- Signatures;
- Selected exhibits: [39]

—Any instrument that defines the rights of the security holders (incorporated by reference if previously filed);
—Consents; [40]
—Statement of eligibility of trustee, where applicable (Form T–1);
—Legal opinions; and
—A representation that underwriters concur with the issuer's designated effective date.[41]

Form B issuers would be required to deliver promptly a prospectus, free of charge, to any investor who requests it. In addition to that obligation, Form B issuers would be required to deliver a securities terms sheet.[42]

i. Company Disclosure

Investors, as always, will obtain company information from a variety of sources such as the Internet, television, newspapers and radio. They also may acquire company information from securities analysts or the company itself. While there are many possible sources of information about Form B issuers that investors can access today,[43] one reliable source is the information that issuers make public through filing their Exchange Act reports with the Commission. Investors can rely on this information because it is subject to the regulatory and antifraud provisions of the federal securities laws as well as subject to review by the staff of the Commission. This structure compels issuers to come forward with information about their businesses that they might not choose to make public otherwise.

The proposed registration system takes account of this source of information by providing that an issuer must incorporate by reference into its effective registration statement on Form B:

1. Its latest annual report [44] filed under the Exchange Act; and [45]

2. Any Exchange Act reports filed since the end of the fiscal year covered by its latest annual report.[46]

Issuers that use Forms S–3 or F–3 currently must incorporate their Exchange Act reports into those Forms. The 12-month reporting requirements under those Forms, however, do not assure that an issuer incorporates an annual report into either of those registration statements because annual reports are not due until three months (or 6 months, for foreign private issuers) after the end of a company's fiscal year. In addition to this information, issuers would be required to disclose in their Form B registration statements updated company information that describes material changes not reflected in any Exchange Act reports incorporated by reference.

ii. Transactional Disclosure

We are seeking comment on two alternatives on Form B transactional disclosure. The first would mandate the inclusion of ''offering information'' that includes some of the traditional items of transactional disclosure. This alternative would allow issuer discretion as to materiality and applicability of other traditional items of transactional disclosure. The second alternative would simply mandate that issuers set forth in Form B the items of transactional disclosure required today. Both alternatives would require that the registrant file any offering information disclosed by or on behalf of the issuer (including by the underwriter or participating dealer) during the offering period.[47] Under the first proposal, the registrant would file offering information as part of the prospectus in the effective registration statement.[48] ''Offering information'' consists of:

- The amount of securities being offered; [49]
- Material changes in the issuer's affairs since the end of the latest fiscal year that are not reflected in incorporated Exchange Act reports;
- The information required by Item 504 of Regulation S–K regarding use of proceeds;
- The information about underwriter's discounts and commissions required by Item 501(b)(3) of Regulation S–K;
- Information about the risks of the offering of the type described in Item 503 of Regulation S–K;
- Information concerning who is selling the securities of the type described in Item 507 of Regulation S–K;
- Material information about the terms of the securities offered as required by Item 202 of Regulation S–K, unless capital stock is to be registered and securities of the same class are registered pursuant to Section 12 of the Exchange Act;
- All information regarding the transaction that is material, which may include where applicable, but is not limited to:

—Information about dilution of the type described in Item 506 of Regulation S–K;
—Information about the determination of the offering price of the type described in Item 505 of Regulation S–K;
—Information about the plan of distribution of the type described in Item 508 of Regulation S–K;
—Ratio of earning to fixed charges, as described in Item 503 of Regulation S–K;

- Any offering information disclosed by or on behalf of the issuer during the offering period,[50] other than information communicated orally; and
- Offering information communicated orally that the issuer chooses to file.

This alternative could provide registrants, and those acting on their

[38] *See* Section VIII.C.4.a. of this release for a discussion of this securities term sheet and delivery requirements relating to it.

[39] *See* proposed revisions to Item 601 of Regulation S–K, 17 CFR 229.601.

[40] *See infra* note 73 for a discussion of consents of auditors in delayed shelf registration statements.

[41] *See* Sections V.A.1.d. and V.B.2.a. of this release for a discussion of this underwriter concurrence.

[42] We discuss prospectus delivery obligations for Form B issuers at Section VIII.C.4.a. of this release.

[43] We also believe our proposal to free communications by Form B registrants, discussed below, would spur diverse public discourse about the merits of the issuer and its offering, all of which would be open to the public investor.

[44] We do not, however, permit incorporation by reference of annual reports on Form 40–F. *See* General Instruction I.B.7. of proposed Form B.

[45] Financial statements included in the Form must be no older than permitted in the age of financial statements requirements of Regulation S–X. *See* Rules 3–12 and 3–19 of Regulation S–X, 17 CFR 210.3–12 and 210.3–19. Foreign issuers using Form B would be required to reconcile to U.S. GAAP any financial statements either incorporated by reference into or set forth in the Form. We would require reconciliation in accordance with Item 17 or Item 18 of Form 20–F under the same standards used today.

[46] The proposed system would not permit Form B registrants to incorporate by reference any Exchange Act report filed after the end of the offering period. For delayed shelf offerings, each takedown would have its own separate offering period.

[47] We would not permit a Form B registrant to file information that had not been disclosed during the offering period. *See* Form B ''Information Required in the Prospectus that is Part of the Effective Registration Statement,'' paragraph 1.(c), and proposed Securities Act Rule 172(e), 17 CFR 230.172(e). Information communicated orally during that period could be reduced to writing and filed as part of the registration statement if the registrant so chooses.

[48] Information communicated orally would not have to be filed and would be subject to section 12(a)(2) liability.

[49] Under Rule 457(a), 17 CFR 230.457(a), a number of securities may be registered. Under Rule 457(o), 17 CFR 230.457(o), a dollar amount may be registered. The registrant may choose between these two alternatives in a typical capital-raising offering.

[50] For purposes of this Form, ''offering period'' means the period beginning 15 days in advance of the first offer made by or on behalf of the issuer in connection with the offering and ending when the offering is completed.

behalf, more flexibility to craft a selling document shaped by their particular offering, the market demands for information, and the requirements to provide material information to investors. We believe the greater freedom may allow issuers to cut some boilerplate disclosure and to omit non-material disclosure from the prospectus. We solicit comment, however, with regard to whether issuers would use that freedom to accomplish those objectives. At the same time, the Form's requirements should ensure investor protection by requiring issuers to disclose all material offering information in the prospectus that is part of the effective Form B. We solicit comment on this point.

We solicit comment on whether traditional transactional line items not included in Form B should be retained. If so, which of the items? Conversely, should we permit Form B issuers to craft their transactional disclosure based on what they believe is material information, and what the market and investors would demand, rather than based on traditional transactional line items? If so, should we limit that flexibility to a narrower class of Form B issuers, such as those with a minimum public float of $750 million or $1 billion?

The second alternative would mandate that issuers disclose in Form B all the information required by the Regulation S–K transactional disclosure items currently required in Form S–3 and/or Form F–3. In addition to the information that would be required by the first alternative, this alternative would require the registrant to provide further information in accordance with Regulation S–K.[51] Should Form B include as mandated itemized information all of the topics listed under that requirement? Should mandated itemized disclosure be a different subset of the Regulation S–K information currently required in Form S–3 and/or Form F–3?

b. Free Writing Materials

For Form B issuers, written information[52] disclosed during the ''offering period'' would be classified as either ''offering information'' or ''free writing'' materials.[53] The ''offering period'' with respect to a Form B offering would be defined as the period beginning 15 days before the first offer made by or on behalf of the issuer and ending at the time of completion of the offering. ''Free writing'' materials would include all written information disclosed by or on behalf of the issuer during the offering period, other than ''offering information,'' factual business communications[54] and limited notices of proposed offerings.[55] Free writing could include, but would not be limited to, sales literature and selling documents that include forward-looking information.[56] A document that contains both offering information and ''free writing'' would be treated as ''free writing,'' if the offering information was filed as part of the issuer's registration statement. If the offering information was not filed as part of the issuer's registration statement, the document, including the ''free writing'' portion, would be treated as offering information and would be required to be filed as part of the registration statement.

The registrant would file, at the same time it files its Form B registration statement, the free writing materials it disseminated before filing its Form B.[57] It would file free writing materials used after the filing of its Form B at the time of first use.[58] The registrant would not file free writing materials as part of the effective registration statement, nor would it have to file information in the effective registration statement as free writing materials.[59]

Given the significance of the offering period, should the Commission require the registrant to state on the front cover page of the registration statement the date of the first offer in connection with the offering being registered? Should the Commission require free writing materials to be filed at the time of their first use since investors might prefer access to them as they make their investment decisions?

c. Time of Filing

A registrant could file a registration statement on Form B at any time before the first sale of the securities.[60] Issuers wishing to file immediately before sale could do so.[61] Because issuers may wish to price Form B offerings before filing and because many offerings are currently priced after hours, we would allow registrants to file Form B registration statements with the Commission after hours via EDGAR or facsimile until 10:00 p.m.[62] Issuers would pay the filing fee under the same procedures used today by issuers filing Rule 462(b) registration statements after hours via facsimile.[63]

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[51] That additional information would be: certain portions of Item 501 of Regulation S–K (forepart of registration statement and outside front cover page of prospectus); Item 502 of Regulation S–K (inside front and outside back cover pages of prospectus); certain portions of Item 503 of Regulation S–K (prospectus summary and address and telephone number); Item 509 of Regulation S–K, where applicable (interests of named experts and counsel) and Item 510 of Regulation S–K, where applicable (disclosure of Commission position on indemnification for Securities Act liabilities).

[52] For these purposes, ''written'' includes all information disseminated otherwise than orally and therefore would include electronic communications and other future uses of changing communications technology.

[53] If a document includes offering information, whether or not it also contains free writing, it would be treated as an offering information document for all purposes unless that offering information is otherwise included in the registration statement.

[54] ''Factual business communications'' would be defined in proposed Securities Act Rule 169, 17 CFR 230.169.

[55] *See* proposed revisions to Securities Act Rule 135, 17 CFR 230.135.

[56] Section 12(a)(2) would apply to free writing materials (and to all oral statements made by or on behalf of the issuer during the offering period).

[57] *See* proposed Securities Act Rule 425(b)(2), 17 CFR 230.425(b)(2). As proposed, Rule 425 would describe the materials that would not have to be filed. They consist of:

1. Any factual business communication (as defined in proposed Rule 169) regardless of when it is made;

2. Any research report used in reliance on Rules 137, 138 or 139;

3. Any information used in connection with an offering under Form S–8;

4. Any information used in connection with an offering on Form B under a dividend or interest reinvestment plan;

5. Any information used in connection with a direct stock purchase plan; or

6. Any information filed or to be filed as part of an effective registration statement.

For purposes of proposed Rule 425, ''direct stock purchase plan'' refers to a registrant-sponsored plan pursuant to which the registrant offers registered common stock for cash to only its existing common stock holders (''plan participants'') and in which there is no underwriter participation. The common stock registered pursuant to the plan may either be newly issued or purchased by the registrant for the account of plan participants at prices not in excess of current market prices at the time of purchase, or at prices not in excess of an amount determined under a pricing formula specified in the plan and based on average or current market prices at the time of purchase.

[58] *See* proposed Securities Act Rule 425(b), 17 CFR 230.425(b).

[59] *See* proposed Securities Act Rule 425, 17 CFR 230.425.

[60] *See* Section VII of this release for a discussion of the restrictions on communications that are being eliminated for Form B offerings.

[61] Because Form B offerings would not have to be filed until the time of first sale, the payment of registration fees would also be delayed until the time of first sale.

[62] *See* proposed revisions to Securities Act Rules 110(d) and 402, 17 CFR 230.110(d) and 230.402. In the usual case, a registrant may file a registration statement in paper format only until 5:30 p.m. It may file on EDGAR between 5:30 p.m. and 10:00 p.m., but those registration statements are treated as if they were filed the following day. Form B registration statements filed after hours via EDGAR would be treated as filed the same day. *See* proposed revisions to Rule 13 of Regulation S–T, 17 CFR 232.13. We also have proposed revisions to Securities Act Rule 111(b), 17 CFR 230.111(b), to allow for special fee payment procedures for Form B filings made after hours.

[63] *See* Securities Act Rule 111, 17 CFR 230.111. That procedure is described in detail in Securities Act Release No. 7168 (May 11, 1995).

d. Becoming Effective

A Form B and any amendment to a Form B would be effective by operation of rule at the issuer's discretion to give issuers maximum flexibility.[64] The issuer would simply select one of three choices on the cover page:

(1) Effective upon filing;

(2) Effective _____ (date and time specified by the issuer); or

(3) effective as specified in a later amendment to the registration statement.[65] The Commission staff would not have to take action for the registration statement to become effective.

In most underwritten offerings under the current registration system, the Commission requires that a request for effectiveness of a registration statement be made by the underwriters in addition to the issuer.[66] Both underwriters and issuers are subject to liability under Section 11 for the disclosure in an effective registration statement. A request for effectiveness is therefore an acknowledgment by each requester that it is aware of its obligations under the Securities Act.[67]

Because the issuer would have complete control over effectiveness by controlling the filing, we would include in Form B a requirement that the issuer obtain and file as an exhibit evidence of the managing underwriters' or principal underwriters' concurrence with the issuer's designation of effectiveness.[68] The issuer would have to obtain that concurrence before it files the Form B registration statement in which it requests either immediate effectiveness or effectiveness at a specified date.

Would the requirement to file the evidence of the underwriters' concurrence as an exhibit to Form B be unnecessarily burdensome? Alternatively, should we require the issuer to represent in the registration statement that it obtained the underwriters' concurrence, but not require it to file the concurrence, and require it to retain the concurrence for 5 years? Should we require that the issuer obtain the concurrence, but not require that the concurrence be evidenced in writing? Would an oral concurrence provide the issuer and the underwriters with sufficient assurance of agreement and protection against misunderstanding?

e. Delayed Shelf Offerings and Form B

Form B would provide much the same flexibility to issuers that delayed shelf registration on Forms S–3 and F–3 has provided,[69] and those benefits would be available to approximately the same issuers.[70] Unlike current shelf registration, however, issuers using Form B would not need to file a base or core prospectus to be able to offer and sell at will. Base prospectuses today, particularly those used for unallocated delayed shelf registration statements, tend to describe in the broadest of terms the many different types of securities and offerings that might be done off the shelf. Thus, in offerings off the shelf, the key offering disclosure is usually filed in the Rule 424 prospectus supplement. Form B would allow an issuer to avoid writing transactional disclosure that covers ''everything but the kitchen sink'' and simply file whatever transactional disclosure it gives to investors at the time of the offering.

There are also other Form B benefits as compared to the current delayed shelf system. First, the Form B registration statement would not be subject to pre-effective staff review. Under the existing delayed shelf system, the Form S–3 or F–3 containing the core prospectus is subject to the staff's selective pre-review. Second, issuers may have less concern about market overhang effects on its stock price under Form B.[71] Under the current system, an issuer wishing to put equity securities on the shelf has to include them in the registration statement even before it intends to offer those securities. Under the proposed system, a registrant need only file a Form B registration statement before sale. The absence of a filing that signals an upcoming offering well before the time it can be completed may be welcomed by issuers, but may be of concern to secondary market participants.[72]

Another advantage for issuers in Form B as compared to existing shelf registration relates to fees. In shelf registration today, an issuer must file the base prospectus and pay the full filing fee at that time, even though it may not take down securities from the shelf until much later. An issuer using Form B other than for delayed offerings would pay upon filing but generally that would not occur until sale. There would be no need to register more than is needed for that offering at that time.

We believe that the way Form B operates would largely eliminate the incentive for a registrant to set up a delayed shelf registration statement. We recognize, however, that some issuers are accustomed to doing shelf takedowns and do so on a frequent basis. As proposed, a registrant wishing to file some preliminary information could still do so on Form B and either become effective then and file the remaining disclosure concerning the offering in a post-effective amendment or delay effectiveness of the Form B until the rest of the information is available. The issuer could designate when those post-effective amendments become effective. The current delayed shelf does not require directors and officers to sign the Rule 424(b) supplements filed for each takedown.[73] Under the proposal, registrants may use a power of attorney to avoid the inconvenience of obtaining multiple signatures upon the filing of a pre-effective or post-effective amendment. We also would provide in delayed shelf offerings that when the persons signing a Form B do not appoint a person to

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[64] *See* proposed Securities Act Rule 462(f)(1) and (f)(2), 17 CFR 230.462(f)(1) and 230.462(f)(2).

[65] The later amendment could amount to no more than a cover page on which the registrant would check the appropriate box to designate immediate effectiveness or a specified effective date.

[66] *See* Securities Act Rule 461(a), 17 CFR 230.461(a). The Rule requires the managing underwriters, or if there are no managing underwriters, the principal underwriters, to join in the issuer's request for acceleration of a registration statement.

[67] *See* Securities Act Rule 461(a), 17 CFR 230.461(a).

[68] *See* proposed Form B ''Exhibits'' section and proposed revisions to Item 601 of Regulation S–K. Evidence of concurrence could be, for example, in a writing from the underwriter to the issuer or an electronic message to that effect.

[69] For convenience, we refer to Rule 415(a)(1)(x), 17 CFR 230.415(a)(1)(x), offerings as delayed shelf offerings or shelf offerings in this release. Other types of Rule 415 shelf offerings, such as continuous offerings, generally are unaffected by the proposed system.

[70] Our research indicates that, of the 379 existing issuers who utilized the equity and unallocated shelf registration system between calendar year 1993 to the third quarter of 1996, only 37 would be ineligible to use new Form B under the public float/ADTV tests (the tests are described at Section V.B.2.a. of this release). Of those, 23 issuers appear to be REITs. The 37 that are eliminated would be able to use Form B for offerings to QIBs and offerings of investment grade securities, among others.

[71] For a discussion of market overhang effects, see Securities Act Release No. 6383, (Mar. 16, 1992) (adopting integrated disclosure system and unallocated shelf registration rules).

[72] *See* Section XVII of this release for a solicitation of comment regarding the effect this proposal would have on the secondary market.

[73] Under the current system, auditors do not provide consents for prospectus supplements. They consent to inclusion of the financial statements in the registration statement and also consent at the time of filing most post-effective amendments. Subsequently filed Forms 10–K that are incorporated by reference include the auditor's consent to inclusion of the financial statements to update the shelf. Under the proposed system, post-effective amendments will be more common because transactional information will be filed in that manner.

The consents of auditors are not required today with respect to the filing of prospectus supplements and certain post-effective amendments to shelf registration statements. The Commission similarly would not require an auditor's consent for post-effective amendments that amount to prospectus supplements and have no bearing on the financial statements.

sign via a power of attorney, a signature on a post-effective amendment by an authorized representative of the registrant shall be deemed to constitute signature by the persons signing the original filing unless otherwise specified in the amendment.[74]

Delayed shelf offerings on Form B would, however, improve upon the Form S–3/F–3 shelf registration system in two ways that would enhance investor protection. First, we would provide clearly in Form B that any transactional disclosure used in connection with a Form B offering is within the effective registration statement. With Form B, transactional information disclosed to investors before the end of the offering period would have to be filed either as part of the effective registration statement or on a post-effective amendment that becomes effective whenever the issuer wishes before the time of sales. That information would be within the scope of Section 11 under the Securities Act. That transactional disclosure would include information filed under Rule 424 as prospectus supplements to shelf registration statements today. We also would provide clearly in Form B that historical and forward-incorporated Exchange Act reports would be part of the effective registration statement. That information also would be within the scope of Section 11. We recognize that certain commentators have questioned whether Section 11 applies to Rule 424 information [75] and forward-incorporated Exchange Act reports.[76] While we believe that under existing law such Section 11 liability applies, and do not accept the views of those commentators on these issues, we recognize that an explicit statement in the proposed Form would serve to eliminate any uncertainty practitioners may believe exists.

The other change to the way delayed shelf would operate relates to the time of filing with the Commission information about the offering off the shelf. Today, that information may be filed pursuant to Rule 424 up to two business days after the earlier of pricing of the securities or first use of the prospectus supplement. Under the proposed registration system, we would require that Form B issuers file this information as part of the effective registration statement by the time of sale.[77] We believe that both investors and the market are better served by having this disclosure filed promptly. Moreover, because the transactional information that may be filed as part of the Form B registration statement includes only information about which investors have been informed before committing to purchase the securities, there is less reason to contemplate a filing after the sale takes place. In addition, the Commission is aware that some investors trading in shelf registrants' securities after a takedown and before the filing have been troubled by the absence of disclosure during that period. We have concerns that some investors are aware of the shelf takedowns while others become aware days later when notice is filed with the Commission. Although a two-business-day wait may not have been considered a material delay at the outset of modern shelf registration, it appears to be one in today's market framework. Eliminating this delay would support our goal of reducing the risks of selective disclosure.

We solicit comment on whether there is a continued need for a delayed shelf concept under Form B. Do registrants see advantages to delayed registration on Form B over and above what would be allowed on Form B without that concept? Does the delayed shelf concept needlessly complicate the system? Is there a reason to retain the two-year limitation on the amount registered? Would concerns about market overhang keep issuers from taking advantage of any extension? Should we limit the extension to 3 or 4 years? Would issuers benefit more if we remove completely any restrictions on the amount of securities that issuers could register for a delayed shelf? What if we extended the possible life of a shelf registration statement to 6, 7 or 10 years? Would issuers register securities to be offered over those periods of time?

2. Offerings Eligible for Registration on Form B

An issuer may register on Form B only offerings that fit in one of the following categories.

a. Offerings by Larger Seasoned Issuers

Given the envisioned disclosure and delivery aspects of Form B, we believe that only those issuers with a demonstrated market following should be eligible to use Form B to register primary and secondary offerings of any type to the general public. The current threshold for short-form registration (Forms S–3 and F–3) is a public float of $75 million. Based on our research, we believe that the most accurate measurement to attain the goal of choosing issuers for which there is an efficient market is a combination of public float of the issuer's common equity securities [78] and average daily trading volume (''ADTV'') of the issuer's equity securities.[79] We propose that an issuer able to use Form B should *either* have:

- A public float of $75 million or more *and* an ADTV of $1 million or more; [80] *or*
- A public float of $250 million or more.[81]

Thus, if an issuer has a public float of less than $250 million then it must have an ADTV of at least $1 million in addition to a public float of $75 million.

In determining these thresholds, we considered, among other things, the level of analysts coverage that would result at different public float and ADTV thresholds. Our research indicates that companies that meet the proposed combined public float/ADTV test would have an average of 14 analysts following them.

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[74] *See* Signatures section of Form B and proposed revisions to Securities Act Rule 471, 17 CFR 230.471. *See* also Section XI.C. of this release, the discussion of the proposal to require management to certify that to management's knowledge, the filings they sign contain no material misstatement or omission.

[75] For example, the Advisory Committee expressed the belief that Section 11 may not apply and recommended that the Commission address this potential lapse in application of Securities Act protections. *See* Advisory Committee Report at p. 28.

[76] *See, e.g.*, Johnson and McLaughlin, Corporate Finance and the Federal Securities Laws 2d ed. 508–09 (1997). *But see* proposed revisions to Item 512 of Regulation S–K, 17 CFR 229.512.

[77] *See* proposed revisions to Rule 424(b)(2), 17 CFR 230.424(b)(2).

[78] Public float is the aggregate market value of the issuer's outstanding voting and non-voting common equity held by non-affiliates of the issuer. 17 CFR 228.10(a)(1). We used market capitalization information as a proxy for public float figures. Public float information is less readily available and would require a determination of the equity interests of affiliates of a company in order to derive it from market capitalization data.

[79] Our research showed that a public company's market capitalization, public float and ADTV are closely and positively associated with the number of analysts that follow firms. Combination tests of ADTV and either market capitalization or public float are more closely associated with the speed of price discovery than any of those tests alone. The proposed tests would preclude lesser followed companies from Form B registration eligibility. We use a similar combination in Regulation M. *See* Exchange Act Rules 100–105, 17 CFR 242.100–242.105.

[80] Our research indicates that, just taking into account ADTV levels, 4% of the companies with an ADTV of $1 million or more would have fewer than 3 analysts covering them. Our research also indicates that, just taking into account market capitalization, 14% of the companies with market capitalizations of $75 million or more would have fewer than 3 analysts covering them.

[81] Our research indicates that 5% of the companies that have market capitalizations of $250 million or more have fewer than 3 analysts covering them. On average, companies of this size have 15 analysts covering them.

We looked at analyst coverage not because we believe that analysts create market following or because we believe that analysts statements are wholly accurate and unbiased or because we believe that all investors would have access to or rely upon analysts reports. Instead, we looked to analyst coverage because we believe that the number of analysts that cover companies that fit a certain profile is indicative of the level of investor interest in companies within the profile. Like news organizations, analysts tend to cover companies that are of interest to their customers.[82]

For purposes of Form B, issuers would be required to measure their ADTV during the three full calendar months (or any 90 consecutive calendar days ending within 10 calendar days) immediately preceding the filing of the registration statement. They would measure their public float as of the end of their last fiscal quarter. While the alternative stand-alone public float test of $250 million may be used by both domestic and foreign issuers to qualify for Form B eligibility, we propose it primarily for the benefit of large foreign issuers whose shares trade principally on foreign markets.[83] In comparison to current Form S–3 and F–3 public float levels, 1,175 fewer companies would be eligible to register on Form B due to size.[84] Those companies, and even smaller ones, would, however, be eligible to register on Form B under other criteria discussed below, such as when offering only to QIBs or offering investment grade securities.

In addition to the public float/ADTV criteria, Form B would be available only to issuers that have a history of reporting under the Exchange Act. The reporting history would ensure that issuers have been reporting long enough so that adequate information about them is publicly available. It also gives issuers enough time to adjust to the disclosure requirements applicable to reporting companies. We propose a one-year reporting history requirement coupled with the requirement that the issuer have filed at least one annual report. Because annual reports are due months after the end of a fiscal year, simply requiring that Form B issuers have a one-year reporting history would not necessarily ensure that all issuers using the Form had prepared and filed at least one annual report.[85] We believe the annual report requirement would provide benefits to investors, due to the fact that they would have more Exchange Act information to use in evaluating the issuer and also because the issuer would have more reporting experience. In addition, an issuer would not qualify to use Form B unless it had filed all Exchange Act reports due and had filed all of its reports on a timely basis in the 12 months immediately before the filing.[86]

We request your comment on this proposal. Should the $75 million threshold used in conjunction with the ADTV threshold be higher (*e.g.*, $100 million, $150 million, $200 million or $250 million)?[87] Should the ADTV test used with the public float test be higher (*e.g.*, $1.5 million or $2 million)?[88] Should the ADTV test be lower (*e.g.*, $750,000)?[89] Should we raise the proposed stand-alone public float test of $250 million (*e.g.*, to $300 million, $350 million, $400 million or $450 million)? Should we lower the stand-alone public float test (*e.g.*, to $200 million)?[90] Should we raise the one-year and one annual report reporting requirement to two years?[91] Is there any reason why the ADTV/public float test thresholds should be consistent with the thresholds used for the actively-traded security exception in Rule 101(c)(1) of Regulation M? Instead of worldwide volume, which is used in Regulation M, would U.S. market volume, as proposed, be a better indicator of market following by U.S. investors? Unlike Regulation M and the proposals, should ADTV be calculated solely on the basis of trading conducted on the NYSE, AMEX or Nasdaq-NMS so as to exclude microcap companies?[92]

b. Offerings to QIBs

As the Commission determined in adopting Rule 144A, larger institutional investors, or QIBs as denominated in the rule, are presumed to be sophisticated securities investors.[93] Their investing experience and size purportedly puts them in a position to insist upon as much information as would be provided by registration.[94] Also, their size, which may be viewed as signifying buying and bargaining power, should allow them to demand from issuers protective covenants and restrictions. In other words, their sophistication enables them to fend for themselves.[95] Rule 144A applies both with respect to securities of

[82] Both issuers and investors suggest that multiple analysts are necessary to provide the public with broad, relatively unbiased information about a company. We obtained information concerning analyst coverage from Nelson Publications, publisher of Nelson's Directory of Investment Research (1996). The research that we conducted considered the number of analyst firms that follow a company rather than the number of individual analysts. In proposing thresholds, we have considered that not all analysts contained in that listing would be actively following the issuer at all times. Thus, we have chosen thresholds that provide a significant number of analysts following the issuer. Where an issuer has significant analyst following and the market operates efficiently with respect to price discovery, we believe it is fair to assume some level of investor awareness of company information. It is also fair to assume that investors would have access to multiple sources of information about a company, making short-form registration and elimination of communications restrictions appropriate.

[83] ADTV is measured for purposes of Form B on U.S. trading markets only. We believe that provides a better measure of U.S. market following than world-wide ADTV for these purposes. To avoid creating a test that would disproportionately exclude well followed foreign issuers with little or no U.S. trading market, we provide the alternative $250 million float test without an ADTV component.

[84] Of these companies, only 13 have taken advantage of unallocated shelf registration. This eligibility criteria includes 801 more issuers than were eligible to register securities on Form S–3 when the Commission lowered the public float requirements from $150 million to $75 million in 1992. *See* Securities Act Release No. 6943 (July 16, 1992) [57 FR 32461].

[85] Form S–3 currently requires simply a one-year reporting history. Form F–3 requires a one-year reporting history and also imposes a requirement that the registrant previously filed an annual report on Form 20–F.

[86] Issuers also would be required to be in compliance with our EDGAR rules. These timeliness and EDGAR requirements currently apply to offerings registered on short-form registration statements on Forms S–3 and F–3.

[87] At the $100 million market capitalization level, our research indicates that 5% of the companies have fewer than 3 analysts covering them. At $150 million, 5% have fewer than 3 analysts; at $200 million, 5% have fewer than 3 analysts; and at $250 million, 5% have fewer than 3. At the $100 million threshold, an average of 14 analysts follow the company. At $150 million, the average increases to 15, at $200 million the average increases is 15, and at $250 million the average is 16.

[88] Our research indicates that companies with an ADTV between $1 million and $2.5 million have an average of 8 analysts following them.

[89] Our research shows that 33% of companies with an ADTV of less than $1 million have no analyst following.

[90] Companies with a market capitalization of at least $200 million have an average of 14.5 analysts following them.

[91] We studied the impact of extending the reporting history by additional years and found no resulting statistically significant improvement in price discovery or analyst following.

[92] *See* Section V.A.2.g. of this release for a discussion relating to microcap companies.

[93] Securities Act Release No. 6862 (Apr. 23, 1990). Rule 144A provides a safe harbor from the registration requirements of the Securities Act for resales of restricted securities to QIBs as defined in Securities Act Rule 144A(a)(1), 17 CFR 230.144A(a)(1).

[94] In many instances, issuers prepare materials that are almost identical in presentation and substance to registration statements. *See, e.g.*, McGeehan, *Money Raised in Private Placement of Issues Doubles as Companies Take Advantage of SEC's Rule 144A''* Wall St. J., Jan. 2, 1998, at 38, col. 1.

[95] *See* Securities Act Release No. 6808 (Oct. 25, 1988) [53 FR 50038] Section IV.A.1. (institutional investors possess sufficient knowledge and experience in financial and business matters, and so are capable of evaluating the risks of an investment and are less in need of the protections of registration); *see also* Securities Act Release No. 6839 (July 11, 1989) [54 FR 30076], Section II.B.

reporting companies and non-reporting companies.[96]

If QIBs can fend for themselves in unregistered transactions involving securities of both reporting and non-reporting companies, they certainly should be able to fend for themselves at least as easily in connection with an offering by a public company registered on Form B. Moreover, when QIBs fend for themselves in Form B offerings, they will share the benefit of the disclosure they acquire with the rest of the investing public through the filing of that disclosure. To encourage registration of offerings that otherwise would be made in reliance on Rule 144A, we propose to extend Form B for registration of offerings made solely to QIBs, as defined in Rule 144A, where the QIBs are purchasing for their own accounts or for the accounts of other QIBs.[97] Those offerings could be made where the issuer has been a reporting company for at least one year, has filed at least one annual report under Section 13(a) of the Exchange Act and is current and timely in fulfilling its reporting requirements.

i. Advantages of Registered Offerings

Domestic issuers and foreign issuers that are already reporting would have the same key advantage under Form B registration that they find today in making Rule 144A offerings: they would find it just as easy to time their offerings because the issuer would control when its registration statement becomes effective and it need only file before the first sale. We believe issuers and investors would realize two significant benefits from registration of securities that otherwise would be sold only in reliance on Rule 144A:

1. Unlike Rule 144A, securities fungible with those that are listed on exchanges or quoted on NASDAQ could be offered and sold under Form B registration.

2. Unlike Rule 144A securities, the securities generally would be freely resalable because they would be covered by a registration statement. Because the securities would not be restricted, some QIBs that otherwise would be subject to limitations on the amount of restricted securities they may hold would be permitted to purchase these registered securities freely.[98]

ii. Limitations on QIB Purchases

Because the securities registered on Form B would not be restricted securities, there is some chance that investors and issuers would arrange to use the Form where the offering is not truly a QIB-only offering but instead is a distribution to the public using a QIB as a conduit.[99] We therefore would provide that certain QIBs would be ineligible to purchase under a Form B QIB-only offering. Dealers and investment advisers would be excluded from those offerings. Those purchasers do not generally purchase securities for their own investment. Dealers are in the business of selling securities. Moreover, the size threshold in Rule 144A for dealers is significantly lower than the thresholds for other QIBs. Given those factors, we believe the risk of indirect distribution by QIBs in those categories is sufficient to warrant precluding their participation. Should other QIB groups be excluded? If so, which ones?

Furthermore, issuers and QIBs that attempt to effect an indirect public distribution of securities through a QIB-only offering on Form B would violate Section 5 absent an applicable exemption. The transaction that the issuer would register under this provision of Form B would be its sale of securities to QIBs, not a sale to the public. If the securities do not come to rest with the QIBs and the QIBs are mere conduits for sales to the public, the offering would be ineligible for registration on Form B.[100] If a QIB purchases and effects a distribution, it will be acting as an underwriter as defined in Section 2(a)(11) of the Securities Act. Its transaction would not be registered and likely would not be exempt and therefore would be illegal.

iii. QIB Definition

The current general QIB test, which was established with the adoption of Rule 144A, is whether the institution, acting for its own account or for that of other QIBs, in the aggregate owns and invests on a discretionary basis at least $100 million of securities of non-affiliates.[101] The QIB threshold differs for dealers and banks, savings associations and equivalent institutions. We solicit comment on whether the thresholds for defining ''qualified institutional buyer'' for purposes of Form B and Rule 144A should be revised upward in light of the length of time since Rule 144A was adopted and the changes that have occurred in the markets since then.[102]

Taking into account only inflation since 1990, use of the $100 million threshold today would have been the same as if the Commission in 1990 had approved a 144A threshold of $81 million dollars.[103] Taking into account only market changes since 1990, our use of the $100 million QIB threshold today is equivalent to us adopting in 1990 a threshold of only $29.2 million.[104] Thus, taking into account market changes, the $100 million 1990 threshold would translate to approximately $240 million today. Even with some adjustments, therefore, we believe more entities would qualify as QIBs today than could have qualified at the time we adopted Rule 144A in 1990.

We solicit comment on whether one should have to own and invest on a discretionary basis at least $125, $150 or $200 million in securities of non-affiliated issuers to qualify as a QIB. We also solicit comment on whether we

[96] When the issuer of the securities to be resold under Rule 144A is neither a reporting company nor exempt from reporting under Exchange Act Rule 12g3–2(b), availability of the Rule is conditioned on the right of the current or prospective holder of the issuer's securities to obtain specific information from the issuer. *See* Rule 144A(d)(4), 17 CFR 230.144A(d)(4).

[97] An issuer that wishes to register an offering on Form B made solely to QIBs may offer or sell only to persons it reasonably believes are QIBs. The Division of Corporation Finance has interpreted the filing of a registration statement as a general solicitation. The filing of a Form B registration statement could, in and of itself, be viewed as a general solicitation and therefore as making offers to non-QIBs. Therefore, under the proposals, the Division would reconsider the issue regarding filing as a general solicitation for the purposes of QIB-only Form B offerings.

[98] The fact that Rule 144A, 17 CFR 230.144A, offerings are frequently conditioned on the issuer's promise to register the offering with the Commission within three to six months evidences the attraction of holding registered securities even for QIBs.

[99] This kind of indirect distribution would deprive the ultimate public purchasers of the liability protections of Securities Act registration.

[100] Securities Act Rule 401(g), 17 CFR 230.401(g), states that any registration statement or amendment is deemed to be filed on the proper form unless the Commission objects to the form before the effective date. The rule thus requires the Commission and the registrant to resolve disputes about form eligibility before effectiveness. We recently have proposed to amend Rule 401(g) to exclude from its scope all registration statements and post-effective amendments that become effective automatically upon filing. *See* Securities Act Release No. 7506 (Feb. 17, 1998) (63 FR 9648). In this release we propose to expand that exclusion to cover all registration statements in which the registrant could designate the effective date. *See* proposed revisions to Rule 401(g), 17 CFR 230.401(g). This change would eliminate the presumption existing today that an effective Securities Act registration statement is on the appropriate form and therefore aid the Commission staff in asserting that securities are offered and sold in violation of Section 5 if anyone attempts to use QIBs as conduits in connection with a QIB-only Form B offering.

[101] *See* Securities Act Rule 144A(a)(1), 17 CFR 230.144A(a)(1). *See also* Securities Act Release No. 6862 (Apr. 23, 1990); Securities Act Release No. 6806 (Oct. 25, 1988) [53 FR 44016].

[102] In 1997, companies raised approximately $254 billion through 144A offerings. This figure represents a 94% increase from 1996 and a 250% increase from 1995. McGeehan, *supra*, n. 94, at 38, col. 1.

[103] This figure is based on changes in the consumer price index between January 1, 1990 and January 1, 1998.

[104] This figure is based on increases in the S&P 500 between January 1, 1990 and January 1, 1998.

should increase the $10 million eligibility requirement for dealers acting for their own accounts or for the accounts of other QIBs. Should it be raised to $15, $20 or $25 million? Should we increase the net worth test for banks, savings associations and equivalent institutions? If so, should it be raised from $25 to $30, $35 or $50 million in order for them to qualify as QIBs? [105] Should a net worth test be applied to those institutions at all?

Are upward revisions necessary to provide continued assurance that QIBs are sophisticated investors with some ability to require appropriate disclosure from the sellers? If so, should they be based on inflation only or should we revise them in accordance with market-related measures?

We also request your comment on whether we should expand the eligibility standards for Rule 144A QIB status. If so, what categories of entities should we make eligible as QIBs? For example, should we permit certain state pension funds to qualify as QIBs if they meet the current thresholds in Rule 144A?

iv. Other Reporting and Non-Reporting Issuers

In light of the sophistication of QIB purchasers, we solicit comment about whether we should extend Form B to issuers subject to the Exchange Act reporting requirements that do not satisfy a one-year and one annual report reporting history. If we were to extend Form B in that way, an issuer could choose to register not long after registering for the first time another offering under the Securities Act or a class of securities under the Exchange Act. Even in that event, however, the issuer would have filed virtually the same company information in its prior registration statement that it otherwise would file in its periodic reports. That information, like periodic reports, could be incorporated into its Form B registration statement. In the case of offerings made only to QIBs, is a year of seasoning as a reporting company going to provide significant investor protections that the QIBs themselves could not attain? Alternatively, should we increase the reporting requirement to two years for offerings to QIBs on Form B by issuers that do not meet the public float/ADTV threshold?

Non-reporting foreign issuers that currently make Rule 144A offerings would not be eligible for Form B even for QIB-only offerings. We solicit comment concerning whether the largest non-reporting foreign issuers (*e.g.*, those with a public float over $500 or $750 million) should be permitted to use Form B to register offerings to QIBs of investment grade securities. These issuers would be required to reconcile their financial statements to conform to U.S. GAAP. This alternative would allow large foreign issuers to enter the U.S. markets in a registered context rather than through Rule 144A, and would give the initial investors freely tradeable securities.[106]

By registering, those companies would become reporting issuers. We would require reconciliation of their financial statements in the Form B registration statement. Also, because these issuers would not have Exchange Act reports to incorporate by reference, we would require that they disclose in the Form B registration statement the company information set forth in Regulation S–K. Under those circumstances, would allowing foreign issuers the opportunity to register investment grade securities on an expedited basis encourage them to enter the U.S. registration and reporting system? Would they be unlikely to register even on that basis due to the reporting and disclosure requirements, or for other reasons? Should we preclude non-reporting foreign issuers from registering even investment grade QIB-only offerings on Form B absent staff review?

c. Offerings to Certain Existing Security Holders

We propose to extend Form B to smaller issuers that do not meet the Form's public float and ADTV threshold eligibility requirements for registration of offerings to certain existing shareholders. Under the proposed registration system, those issuers, which otherwise would be required to use Form A, may use Form B to register: rights offerings; offerings of securities pursuant to a dividend or interest reinvestment plan; offerings of common stock to existing common stock holders, such as under a direct stock purchase plan; offerings of securities upon exercise of either outstanding transferable options or outstanding transferable warrants; and offerings of securities upon conversion of outstanding convertible securities.

Current short-form registration statements, Forms S–3 and F–3, may be used in some, but not all, of these cases.[107] The Commission extended Forms S–3 and F–3 for registration of these kinds of offerings based on the premise that, despite the issuers' inability to meet the eligibility requirements and the possibility they may not be well known or widely followed by the market, these offerings would be directed to specific investors that previously invested in the issuer's securities and could therefore be expected to follow the issuer or to receive information from the issuer. Similarly, we propose to allow issuers that do not meet proposed Form B's public float and ADTV tests to register these and similar offerings on Form B as long as they meet the reporting requirements of the proposed Form and the transactional requirements described below.

i. Dividend or Interest Reinvestment Plans

As early as 1977, we began relaxing registration requirements for dividend or interest reinvestment plans (''DRIPs'').[108] We currently allow all issuers to use short-form registration for securities offered pursuant to their DRIPs even if they do not meet the Forms' public float tests.[109] These registration statements become effective automatically upon filing without staff review.[110]

Under the proposed registration system, we seek both to maintain the relaxed regulatory approach to registration of DRIP offerings and to prevent abuses of the registration system's investor protections.[111] We therefore would extend Form B for DRIP offerings of seasoned issuers that do not otherwise meet the Form's eligibility requirements if:

1. The issuer has not discontinued or suspended dividend payments on the securities held by DRIP participants;

2. The DRIP securities registered on Form B are offered only to existing security holders that have held the issuer's securities for at least 2 months;

[105] *See* Securities Act Rule 144A(a)(ii) and (a)(vi), 17 CFR 230.144A(a)(ii) and (a)(vi).

[106] Through 1992, foreign issuers accounted for about 30% of the 144A market. *See, e.g.*, Bostwick, *The SEC Response to Internationalization and Institutionalization: Rule 144A Merit Regulation of Investors*, 27 Law and Policy in Int'l. Bus. 423 (Winter 1996); Devere, *144A Deal Volume Surges in Dynamic Second Quarter*, 62 Investment Dealer's Digest 13 (July 22, 1996).

[107] *See* Instruction I.B.4. to Forms S–3 and F–3.

[108] *See* Securities Act Release No. 5923 (Apr. 11, 1978) [43 FR 16677].

[109] Most DRIPs are registered on Form S–3. For purposes of this discussion, we will refer to Form S–3 rather than Forms S–3 and F–3.

[110] Securities Act Release No. 6964 (Oct. 22, 1992).

[111] Some issuers have been known to register DRIP offerings on Form S–3 as a pretext for making what are basically primary offerings to the public. Some issuers otherwise ineligible to use Form S–3 have registered DRIPs on the Form to raise amounts of capital that, in the worst cases, exceed the issuer's public float at the commencement of the offering.

3. The dollar amount of the DRIP securities registered on Form B represents no more than 15% of the issuer's public float when aggregated with the dollar amount of securities previously registered by the issuer on Form B pursuant to any offering directed solely to common security holders, including a DRIP, within the 12 months before the start of, and during, the current offering; and

4. The shareholder purchases in any 12-month period no more than the smaller of 100% of the value of the issuer's securities owned by the shareholder at the start of the 12-month period, or 5% of the total offering amount, except that any shareholder may purchase up to $10,000 of securities in any 12-month period.

We would preclude issuers from using DRIPs to sell securities directly to participants at a time when the issuer has discontinued or suspended dividend payments on the DRIP securities. A purchase is not merely a dividend reinvestment when the company is not paying dividends. This is consistent with the Division's current interpretation.[112]

We also would set a limit on the amount of DRIP securities an issuer may register on Form B equal to an aggregate of 15% of the issuer's public float within the 12 months before the start of and during the offering.[113] Under this proposal, issuers could make several DRIP offerings on Form B over the course of a 12-month period as long as the total amount registered within that period did not exceed 15%.[114] While Form B would cover the offering of securities by a smaller issuer to its existing shareholders, if such an issuer uses its shareholders merely as conduits to distribute the securities to the public, the offering would not be eligible for Form B. If a shareholder purchases to effect a public distribution, it would be considered an underwriter and its sale would not be considered registered. To avoid the potential use of Form B in these conduit situations, we propose to restrict the amount of securities that may be purchased by any one shareholder and its affiliates. This provision, in addition to the 15% limitation, would protect against an unregistered distribution to the public.

Our proposal would limit the amount that an existing shareholder may purchase in any 12-month period. It could purchase the smaller of: 100% of the value of the issuer's securities it owns at the start of the 12-month period; or 5% of the total offering amount. A shareholder would have to aggregate its securities purchases and ownership with those of its affiliates. The shareholder also would have to count its purchases in all Form B offerings to existing security holders within the 12-month period. Any one shareholder and its affiliates would be able to purchase at least $10,000 of the issuer's securities in any 12-month period in Form B offerings to existing security holders, despite the percentage tests. For example, where a shareholder owned $5,000 of the issuer's securities at the start of a 12-month period, it would be able to purchase $10,000 of securities in the subsequent 12-month period in all Form B registered offerings to existing security holders.

Finally, the Commission notes that investor eligibility to participate in a DRIP is often based on ownership of a certain amount of the issuer's securities. In many cases, ownership of just one share or even a partial share worth as little as $25 qualifies a person for participation in a DRIP. The Commission is concerned that where there may be little public information about an issuer and the investor does not have a significant ownership interest in the securities of an issuer, the investor may not have access to adequate issuer information or have the inclination to follow the issuer and its business.[115] To help ensure that investors have a chance to learn about the issuer before deciding whether to participate in its DRIP, the Commission proposes to provide that small issuers may not use Form B to register their DRIPs unless the DRIP is limited to investors who have held securities of the issuer for at least two months.

Should the proposed 15% threshold be lowered to 5% or 10%, or raised to 20%? Would the shareholder purchase limitations adequately protect against unregistered distributions to the public? Should the percentage limitations be lower (*e.g.*, 75% of the securities owned at the start or 2% of the total offering) or higher (*e.g.*, 150% of the securities owned at the start or 10% of the total offering)? Should the $10,000 minimum purchase amount during any 12-month period be lower (*e.g.*, $5,000) or higher (*e.g.*, $20,000)? Should we lengthen the 12-month measurement period to two years? Should the two-month ownership period before participation be longer (*e.g.*, 3, 4, 5 or 6 months) or should it be shorter (*e.g.*, one month) or eliminated completely? Finally, would the holding period requirement make it overly burdensome for issuers to determine who is eligible to participate in the DRIP?

ii. Offerings to Existing Common Stock Holders

For the same reasons we would permit small issuers to register on Form B securities issued pursuant to DRIPs, rights offerings, or in connection with convertible securities and exercise of transferable warrants, we would permit smaller issuers to use Form B to register offerings of common stock to existing common stock holders, without regard to whether the offering was pursuant to an ongoing plan. This proposal represents an extension of our current approach to offerings to existing security holders and reflects, in part, our recognition that more and more companies offer securities to existing security holders through direct stock purchase plans (''DSPPs'').

To register on Form B, these offerings would have to meet the following conditions:

1. The securities registered on Form B are offered only to existing common stock holders that have held the issuer's common stock for at least two months;

2. The dollar amount of the securities registered on Form B represents no more than 15% of the issuer's public float when aggregated with the dollar amount of securities previously registered by the issuer on Form B pursuant to any offering directed solely to common security holders, including under DRIPs, within the 12 months before the start of, and during, the current offering; and

3. The shareholder purchases in any 12-month period no more than the smaller of 100% of the value of the issuer's common stock owned by the shareholder at the start of the 12-month period, or 5% of the total offering amount, except that any shareholder may purchase up to $10,000 of common stock in any 12-month period.

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[112] *See* The Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 1997), available on our web site (http://www.sec.gov).

[113] Based on our research of DRIP offerings made during the last year, the 15% limit should not affect the amount of securities that the vast majority of issuers register for offerings pursuant to DRIPs. We specify this threshold in the instructions to proposed Form B.

[114] The issuer would refer to its most recently filed Form 10–K to determine its public float for calculating how much it may register on Form B. This limitation also may allow issuers to avoid market overhang problems that may be associated with registering at one time a large amount of securities to be offered over a long period.

[115] Securities Act Rule 405, 17 CFR 230.405, defines the term dividend or interest reinvestment plan and states that such plans may allow participants to contribute additional cash amounts for the purchase of securities offered under the DRIP. Accordingly, once an issuer registers a DRIP, it may offer securities to participants in addition to or even in lieu of those purchased by the reinvestment of dividends or interest.

We propose the first two conditions for the same reasons we propose them in connection with DRIPs. Just as with DRIPs, we seek to prevent small companies otherwise ineligible to use Form B from being overly-aggressive in labeling a sale to the public as a sale to existing shareholders. Therefore, we impose these conditions. The first condition requires issuers to aggregate all their offerings of common stock to existing security holders, including those under DRIPs, to determine how much common stock they may register on the Form B for offerings to existing common stock holders. We believe the condition is appropriate because it would inhibit smaller issuers from circumventing the 15% public float mechanism designed to prevent smaller issuers from using DRIPs to raise excessive amounts of capital through a short-form registration statement that they would otherwise be ineligible to use.[116] These common stock offerings raise concerns similar to offerings under DRIPs. We therefore propose to add the same kind of common stock shareholder purchase limitation as proposed for DRIP offerings registered on Form B.

The Commission believes this proposal will make it easier for smaller issuers to publicly offer securities to its existing shareholders. The proposal also may benefit investors because extending Form B for offerings pursuant to DSPPs may encourage issuers to register them.

We solicit your comment on this proposal. Should we narrow or expand the offering thresholds? Would the shareholder purchase limitations adequately protect against unregistered distributions to the public? Should the purchase limitations be the same as used in DRIP offerings or should they be lower or higher? Is two months a sufficient amount of time to ensure that investors would have time to familiarize themselves with the issuer? Is it a sufficient period of time to ensure the offering is truly one to existing shareholders and not simply an offering to the public at large? Should we have a minimum ownership requirement to ensure that investors have reason to keep informed about the company? If so, how much? Would a $1,000, $2,000, $5,000 or $10,000 threshold be appropriate? Should we apply a minimum ownership requirement to DRIPs as well? If so, should the threshold be the same as for offerings of common stock to common stock holders?

We are proposing to make Form B available for offerings to existing common stock holders of smaller issuers, in part, because we assume that those investors are following those issuers. Therefore, those investors would not need delivery of company information. Is our assumption correct that an existing common stock holder is likely to follow the issuer? Would it be more appropriate to move such offerings to Form A but permit small issuers to designate the effective date of their Form A registration statement? What additional costs, if any, would issuers incur as a result of requiring them to use Form A for these offerings, with the ability to designate their effective dates, instead of Form B?

iii. Convertible Securities, Transferable Warrants and Rights Offerings

In 1972, we adopted amendments to our short-form registration statement to provide that seasoned issuers could use Form B to register securities to be offered upon the conversion of outstanding convertible securities and upon the exercise of outstanding transferable warrants.[117] In 1978, we adopted, in the ''nature of an experiment,'' short-form registration to register rights offerings to existing shareholders.[118] We determined not to require that issuers of rights offerings, or of the other kinds of offerings to existing shareholders, meet the newly adopted eligibility standards applied to primary offerings by large, seasoned companies.[119] When we adopted Form S–3, we explained that offerees in offerings to existing shareholders pursuant to rights offerings, exercises of convertible securities, exercises of transferable warrants and dividend or interest reinvestment plans did ''not need the additional assurances of wide information dissemination provided by the test for primary offerings'' because they already owned securities of the issuer and could be presumed to follow the issuer through corporate communications and Exchange Act reports.[120]

We believe that reasons that have historically supported a streamlined and relaxed approach to offerings by smaller seasoned issuers to existing shareholders would support extending the availability of proposed Form B to smaller reporting issuers that make offerings of securities pursuant to: rights offerings,[121] conversion of outstanding convertible securities and exercise of transferrable warrants.[122] Those issuers would continue to realize the benefits of short-form registration for offerings to existing shareholders that had already made a decision to invest in the issuer. At the same time, the reporting requirement of Form B would ensure the public availability of at least 12 months of public information about the issuer.

We seek your comment on this proposal. Do any of these three types of offerings present risks that should result in exclusion from Form B? Is there any reason to preclude such issuers from using Form B? Should we restrict availability of Form B to smaller issuers that have sent at least a glossy annual report to their shareholders [123] within the twelve months before making their offering to existing shareholders? Is that requirement useful in light of the fact that the warrants or convertible securities are transferable, and therefore the shareholders to whom the issuer

[116] Many issuers offer securities to existing security holders through DSPPs to qualify those holders to participate in their DRIPs. Depending on the circumstances, the two plans could work in the same ways and provide holders with the same benefits. Accordingly, at this time, we believe it is appropriate to limit the amount of securities a small issuer can register under either offering when registering them on Form B—no matter how the offering is characterized.

[117] *See* Securities Act Release No. 5265 (June 27, 1972) [37 FR 15989].

[118] Securities Act Release No. 5879 (Nov. 2, 1977) [42 FR 58677].

[119] Securities Act Release No. 5923 (Apr. 11, 1978) [43 FR 16672]; Securities Act Release No. 5931 (May 15, 1978) [43 FR 21661].

[120] Securities Act Release No. 6331 (Aug. 6, 1981) [46 FR 41902].

[121] In situations where securities underlying rights may be acquired by new investors because, for instance, the rights are transferable, an issuer may not use short-form registration unless it meets the eligibility requirements for a primary offering on the form. *See, e.g.*, Securities Act Release No. 6943 (July 16, 1992). Our proposals would not alter this position. Accordingly, smaller issuers would be ineligible to use Form B to register securities underlying rights that may be acquired by new investors. We also would preclude smaller issuers from using Form B to register securities underlying rights that were not taken up by existing shareholders and that would be offered on a ''standby'' basis to new investors.

[122] Form B would not be available for the issuance of securities pursuant to a conversion of a convertible security or the exercise of a transferable warrant if the issuance of such securities could occur within one year of the company's issuance of the convertible security or transferable warrant. If the underlying security is issuable within one year of the company's issuance of the convertible security or transferable warrant, the underlying security would be part of the offering of the convertible security or transferable warrant. Consequently, the underlying securities must be registered with the convertible security or transferable warrant. In that case, unless the issuer is eligible to use Form B to register the convertible security or transferable warrant, it would not be eligible to register the underlying security on Form B. *See* The Division of Corporation Finance Manual of Publicly Available Telephone Interpretations, Section A.9. (July 1997).

[123] Throughout this release, all references to ''annual report'' or ''Exchange Act annual report'' refer to the annual report filed under Section 13(a) of the Exchange Act, generally on a Form 10–K or 20–F. All references to the ''glossy annual report to security holders'' or ''the annual report to security holders'' refer to the annual report filed under Rule 14a–3, 17 CFR 240.14a–3.

would send that information may not be the same persons who exercise or convert? Are we correct in continuing to believe that existing investors would follow the issuer and keep informed of its business? Or, to ensure investor follow-up, should we limit Form B for offerings to existing security holders that hold a minimum amount or value of the issuer's securities (*e.g.*, $2,000)?

Under current requirements, an issuer may not use Form S–3 to register securities pursuant to DRIPs, upon exercise of outstanding rights or transferable warrants, or upon conversion of outstanding convertible securities unless it has sent an annual report[124] within the 12 months preceding the filing of the Form S–3 to all record holders of those outstanding or DRIP securities.[125] Foreign private issuers registering such offerings on Form F–3 are not subject to any prior information delivery requirement.[126] We have not included a prior delivery requirement in the proposed system. These issuers would be ineligible to use Form B unless they had already filed with the Commission at least one annual report.[127]

We solicit comment on whether to impose any information delivery requirement on smaller issuers that would use Form B to register securities issuable in connection with these kinds of securities offerings. Is it fair to assume that security holders would have adequate information about an issuer they already invested in if the issuer were not required to deliver annual report information to security holders? Should we require them to provide existing security holders with more information than would be required under current rules (*e.g.*, information in an annual report on Form 10–K or 20–F)?

In connection with this proposal, are there any reasons to continue to distinguish domestic issuers from foreign private issuers? Should we require foreign private issuers making these kinds of offerings to deliver information to their existing security holders? If so, should they be required to deliver the same kind of information required by Form 20–F, or should we allow them to deliver the level of information required by Rule 14a–3?

iv. Exercise of Outstanding Transferable Options

We propose to allow smaller seasoned issuers to use Form B to register offerings to existing security holders of securities issuable upon exercise of outstanding transferable options. Issuer options are like warrants in that they entitle the holder to buy or sell securities at a fixed price, during a specified period in the future. In deciding whether to buy the option, an investor speculates about the future value of the security underlying the option. An option holder then either trades the option on the basis of the premium price, exercises it or lets it lapse.

If an option holder has already made one investment decision about the underlying securities before exercising the option, we believe it is fair to presume that the holder has access to information about the issuer. (In the case of employee options, the employee may have simply received a grant of options.) To at least the same extent as existing shareholders, we believe that such investors may be expected to follow the issuer closely through corporate communications or Exchange Act reports. Therefore, we propose to extend Form B to smaller seasoned issuers for registration of securities issuable upon exercise of options.

As in the case of conversions of convertible securities and exercises of transferable warrants, if the underlying security is issuable within one year of the company's issuance of the option, the underlying security would be part of the offering of the option. Consequently, the underlying securities must be registered with the option. In that case, unless the issuer is eligible to use Form B to register the option, it would not be eligible to register the underlying security on Form B.[128]

We seek comment on this proposal. Would allowing Form B registration for option exercises by smaller companies otherwise ineligible for Form B result in indirect distributions of common stock to the public? Does their ineligibility to use Form B for this purpose if exercisable within a year avoid that possibility? Should we preclude Form B registration for exercises of options by dealers to avoid the possibility of issuers entering into options with underwriters as a means to effect a delayed distribution by issuers that would be ineligible for delayed shelf registration?

For domestic issuers that would use Form B for offerings to existing shareholders, should we, following Form S–3's current requirements, extend the Form only if within the 12 months preceding the filing on Form B the issuer sent out material company and financial information to all its existing shareholders to whom it would extend the Form B offering?[129] If so, would investors need more or less information than what Form S–3 currently calls for in order to make an informed investment decision?[130] Would 6 months be more appropriate because it would be more timely? What information, if any, should foreign companies using the Form be required to have provided? Would this registration option render Form S–8 unnecessary for exercises of employee stock options? Should we continue to require issuers to register employee stock option exercises on Form S–8 in light of the fact that employees may not have made an investment decision when acquiring the options?

d. Non-Convertible Investment Grade Securities

Today, companies that do not meet the public float requirement of Form S–3 may nevertheless register an offering of non-convertible investment grade securities on that Form. When the Commission adopted Form S–3 in 1982, we indicated that Form S–3 was appropriate for the registration of investment grade securities because investors purchase those securities on the basis of their interest rate and credit rating.[131] The Commission continues to believe that investors rely on a security's credit rating, although investors may well seek more than just

[124] Form S–3 states that the material that issuers must deliver to existing security holders must include the information required by Rule 14a–3(b), 17 CFR 240.14a–3(b). The information required under that Rule is most frequently included in companies' glossy annual reports, and is less detailed than the information required in an annual report filed under cover of Form 10–K. Form S–3 also states that management-related information need only be delivered to existing security holders who may be issued common stock in connection with their exercises or conversions of securities or participation in a DRIP.

[125] *See* General Instruction I.B.4. of Form S–3.

[126] *See* General Instruction 1.B.4. of Form F–3. Foreign private issuers, however, are not permitted to use Form F–3 for these kinds of offerings if any of the securities are to be offered or sold in a standby or similar underwriting arrangement.

[127] Smaller issuers of securities under these kinds of offerings, whether domestic or foreign, would not be eligible to use Form B unless they: were seasoned (subject for at least 12 months to the reporting requirements of Section 12 or 15(d)); were timely in meeting their reporting obligations; and had filed at least one annual report under the Exchange Act. *See* General Instruction I.B. of proposed Form B.

[128] *See* The Division of Corporation Finance Manual of Publicly Available Telephone Interpretations, Section A.9. (July 1997).

[129] Prior delivery of specific information to existing shareholders is not currently required on Form F–3.

[130] *See* General Instruction I.B.4. of Form S–3, citing to Rule 14a–3(b) of the Exchange Act, 17 CFR 249.13a–3(b), and Items 401, 402 and 403 of Regulation S–K, 17 CFR 229.401–229.403.

[131] Securities Act Release No. 6383 (Mar. 3, 1982).

rating information in order to evaluate the investment.

Given the historical precedent of using investment grade rating as an eligibility criterion for Form S–3 registration, we are proposing to allow non-convertible investment grade securities offerings to be registered on Form B by issuers that have been reporting under the Exchange Act for at least a year, have filed at least one annual report and are current and timely in filing those reports. We solicit comment, however, regarding whether we should continue to have a registration system in which Form eligibility turns solely on a credit rating, particularly in the case of Form B. A credit rating is one organization's judgment about the likelihood of default. That judgment is not a guarantee of no risk. Rather than allowing use of Form B on the sole basis of an investment grade rating for the securities being offered, should we provide for registration of those securities on Form A with its mandated transactional disclosure but allow for effectiveness of those Form A filings upon demand?

e. Market Making Transactions by Affiliated Broker-Dealers

When a broker-dealer that is an affiliate of an issuer [132] engages in market making transactions in that issuer's securities, registration under the Securities Act is required.[133] The registration requirement arises under the statute due to either of two reasons. First, in the definition of ''underwriter'' under the Securities Act, the term ''issuer'' includes any person affiliated with the issuer.[134] Because of the affiliation between the broker-dealer and the issuer, the broker-dealer itself is considered an issuer. Thus, the exemption from Securities Act registration for persons other than ''issuers, underwriters and dealers'' would not be available.[135]

The second reason registration is required flows from the definition of ''dealer'' under the Securities Act. The Securities Act exempts from registration most securities transactions by dealers.[136] ''Dealer,'' as defined under the Securities Act, means any person that engages in transactions in ''securities issued by another person.'' [137] If an issuer and its broker-dealer are affiliated, the broker-dealer would be considered to be an issuer. Hence, if it engages in a transaction in the issuer's securities, its transaction would not be in securities ''issued by another person.'' Thus, the affiliated broker-dealer is not a ''dealer'' under the Securities Act and the dealer's exemption is not available. Absent an exemption, registration under the Securities Act is required by Section 5.

In accordance with Section 5, therefore, the broker-dealer must prepare and deliver ''market making prospectuses'' in market making transactions in securities of its affiliates. This prospectus discloses the affiliation between the issuer and broker-dealer, explains the use of the prospectus in offers and sales by the affiliated broker-dealer in market making activities, and provides information about the issuer.

We have recognized that prospectus delivery in market making transactions imposes a burden on affiliated broker-dealers.[138] We seek to reduce that burden while maintaining investor protection. By allowing registration of these transactions on Form B, we would preserve the benefits for investors of registration, but alleviate much of the burden.[139]

Certain other transactions are proposed to be allowed on Form B because of the nature of the purchasers, such as their financial sophistication or their pre-existing knowledge of the issuer. Because of their nature, these purchasers appear to have less need for prospectus delivery. Purchasers in market making transactions, on the other hand, may not have prior issuer knowledge or financial sophistication. Despite this difference, however, purchasers in market making transactions should not be adversely affected by registration on Form B. Buyers in this situation, like most buyers in the secondary markets, are likely to have made their investment decisions before contact with the market maker.

We propose to permit registration of ordinary market making transactions by affiliated broker-dealers on Form B only if the issuer is a reporting company under the Exchange Act.[140] That criterion would assure that information about the registrant is publicly available. We also would include two requirements to be sure that the transactions by affiliated broker-dealers are bona fide market making transactions. First, the broker-dealer must engage in the transactions only in its ordinary capacity as a market maker.[141] Second, the securities must be outstanding securities that the broker-dealer did not acquire directly from the issuer or an affiliate of the issuer or indirectly by arrangement with those parties. Market making transactions that do not meet these requirements could not be registered on Form B.

We request your views on this aspect of Form B eligibility. Should market making transactions by affiliated broker-dealers be permitted on Form B? If not, why should they be excluded? Are there reasons prospectus delivery should be retained for all market making transactions? Are the registrant requirements appropriate and adequate? Are there additional restrictions that would further ensure that only bona fide market making transactions are registered on Form B? Should the Commission consider extending Form B for this purpose to non-reporting foreign private issuers whose securities are traded in designated offshore markets and who claim the exemption from registration under Rule 12g3–2(b)? Should we more specifically define the

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[132] A broker-dealer is considered an affiliate of the issuer when the broker-dealer controls, or is controlled by, the issuer or when the broker-dealer and the issuer are under common control. *See* Rule 405 of Regulation C, 17 CFR 230.405. The determination of control is based on the facts and circumstances of the particular situation.

[133] Market-making transactions are principal transactions. A principal transaction is a transaction in which the broker-dealer purchases or sells for its own account, rather than the account of another party.

[134] Section 2(a)(11) of the Securities Act defines the term ''underwriter'' to mean ''any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, * * * or participates or has a participation in the direct or indirect underwriting of any such undertaking. * * * As used in this paragraph the term ''issuer'' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.'' 15 U.S.C. § 77b(a)(11).

[135] *See* Section 4(1) of the Securities Act, 15 U.S.C. § 77d(1).

[136] *See* Section 4(3) of the Securities Act, 15 U.S.C. § 77d(3).

[137] Section 2(a)(12) of the Securities Act defines the term ''dealer'' to mean ''any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.'' 15 U.S.C. § 77b(a)(12).

[138] The Task Force recommended elimination of the affiliated broker-dealer's prospectus delivery obligation in ''regular way'' market making transactions in outstanding securities of a Section 12 reporting company. Task Force Report at p. 42.

[139] *See* Sections VIII.C.3. and VIII.C.4.a. of this release for a discussion of when prospectus information must be delivered in Form B offerings.

[140] The same disqualifications that would apply to other types of offerings on Form B also would apply for registration of market making transactions. *See* Section V.A.2.g. of this release.

[141] Section 3(a)(38) of the Exchange Act defines the term ''market maker'' to mean ''any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.'' 15 U.S.C. § 78c(a)(38).

types of market making transactions permitted? Should the Commission exempt all market making transactions from prospectus delivery requirements, or exempt certain market making transactions from the registration requirements entirely?

f. Small Business Issuers

Most small business issuers that file Exchange Act reports provide disclosure based upon Regulation S–B. These issuers would be allowed to register certain offerings on Form B. If they meet the seasoned reporting requirements of Form B, they would be able to register on Form B offerings to certain existing security holders, offerings of non-convertible investment grade securities, offerings solely to QIBs and market making transactions.

A small number of reporting small business issuers provide non-financial statement disclosure based on Form 1–A, instead of Regulation S–B.[142] The Form 1–A disclosure requirements are generally less extensive than those of Regulation S–B. These issuers are called ''transitional small business issuers.'' [143] These companies continue to provide non-financial statement disclosure based on Form 1–A in their Exchange Act reports.

Proposed Form B would not be available for transitional small business issuers.[144] We believe that these issuers should be excluded from using the Form for several reasons. First, the disclosure in their Exchange Act reports would be less detailed than disclosure provided by other Exchange Act reporting companies. Second, these issuers are likely to have less experience in preparing disclosure documents. Third, we believe that the disclosure document should be subject to possible staff review. Consequently, automatic effectiveness should be unavailable for these offerings.

We request your comments on our treatment of small business issuers under proposed Form B. Should Form B be available for small business issuers? If not, why not? Should we expand the Form to permit offerings by transitional small business issuers? If so, what types of offerings should they be allowed to conduct under the Form?

g. Form B Disqualifications

Given the freedom and flexibility provided to issuers that would register their offerings on Form B, we do not believe that all issuers that would meet the Form's reporting and other eligibility requirements would necessarily be suited to use the Form. We believe certain events and circumstances justify disqualification of otherwise eligible offerings from registration on Form B, no matter under which category of Form B offerings it would be eligible. For those offerings, investors need the additional protections that come with registration on other forms: mandated transactional disclosure standards; stricter prospectus delivery requirements; possible staff review; and greater Commission control over effectiveness.

Under our proposal, the disqualifications generally would fall into four categories. The first category would include issuers whose offerings have been identified as potential vehicles for fraudulent and manipulative schemes that harm investors.[145] Blank check companies [146] and companies offering penny stock [147] would fall into this category. The second category would include issuers that appear more likely to face potentially significant liquidity problems, such as issuers that recently defaulted on material indebtedness. An issuer that is the subject of a ''going concern'' opinion from its independent auditor also would fall into this category, as would an issuer that recently was involved in a bankruptcy or insolvency proceeding.

We also believe that an issuer should be disqualified from the privilege of using Form B if it abuses the registration system or other federal securities laws. The third category of Form B ineligible issuers would therefore include those issuers that within five years before the date of filing a Form B were found to have violated provisions of the federal securities laws or that were convicted of securities fraud or business-related fraud or perjury.[148] It also would include issuers with executive officers, directors, general partners or nominees to such positions, or issuers using underwriters, that have done the same.

The issuers in these three categories have historically been viewed as unsuited to short-form registration or ineligible for certain disclosure-related relief. For instance, the Commission has repeatedly stated its belief that penny stock and blank check offerings give rise to disclosure abuses.[149] In addition, Congress determined not to extend the safe harbors for forward-looking statements to: issuers of blank check and penny stock securities offerings; issuers previously convicted of certain felonies and misdemeanors; and, issuers that are subject to a decree or order involving a violation of the securities laws.[150] Accordingly, we believe it is appropriate to preclude such issuers from registering their offerings on Form B.

The fourth category of issuers that we would disqualify from use of Form B would include issuers that fail to cooperate in good faith with the Commission's selective review system for Exchange Act reports. If the issuer has failed to resolve the Commission's staff's comments on an Exchange Act report that the issuer would be incorporating by reference into its Form B, we would not permit that issuer to use Form B.

We seek comment on these proposals. Should other categories of issuers also be precluded from using Form B? For example, is there any reason we should disqualify certain entities from using Form B, such as partnerships, limited liability companies or direct participation investment programs? On the other hand, should any of the issuers noted in the four categories be permitted to use Form B? Should any of them be permitted to use Form B, but not be permitted to designate the effective time? Should we extend the look-back periods used to disqualify issuers in any other category to coincide

[142] Form 1–A is the Form used to qualify securities under Regulation A, an exemption from registration under the Securities Act. Form 1–A contains two offering circular models, Model A and B, plus other parts. These offering circular models and Part F/S of Form 1–A provide the disclosure requirements for offering circulars used in Regulation A offerings.

[143] Transitional small business issuers are companies that either initially registered a securities offering on Form SB–1 under the Securities Act or initially registered on Form 10-KSB under the Exchange Act and provided certain Form 10-KSB disclosure based on the Form 1–A non-financial statement disclosure requirements.

[144] This approach is consistent with our approach under the proposed changes to Form SB–2 and proposed new Form SB–3. Proposed Form SB–2 and SB–3 would not permit incorporation by reference by transitional small business issuers.

[145] *See, e.g.,* Securities Act Release No. 7006 (July 2, 1993) [58 FR 37445].

[146] Securities Act Rule 419(a)(2), 17 CFR 230.419(a)(2), defines blank check company.

[147] Exchange Act Rule 3a51–1, 17 CFR 240.3a51–1, defines penny stock.

[148] *See* General Instruction I.B.6.(g) and (h) of Proposed Form B, 17 CFR 239.5.

[149] *See, e.g.,* Securities Act Release No. 7024 (Oct. 25, 1993) [58 FR 58099] (the Commission stated that Congress found blank check companies to be common vehicles for fraud and manipulation in the penny stock market, and concluded that the Commission's disclosure-based regulation and review of such offerings protects investors); Securities Act Release No. 7393 (Feb. 20, 1997) [62 FR 9276] (blank check and penny stock issuers would be ineligible to use proposed rule providing for delayed pricing because of ''prior substantial abuses'').

[150] Section 27A of the Securities Act, 15 U.S.C. § 77z-2, and Section 21E of the Exchange Act, 15 U.S.C. § 78u-5.

with the five-year look-back for issuers which have violated the law?

More recently the Commission has identified offering abuses associated with very small capitalization issuers.[151] We solicit comment on whether issuers more likely to be identified with microcap fraud should be disqualified from using Form B even though they do not fall into the blank check/penny stock category or the prior violations category. If we were to disqualify issuers more likely to engage in microcap offering fraud, how would we define such a category? What issuer or offering characteristics would be inclusive enough to meet our goal of preventing abuse but exclusive enough to avoid improperly stigmatizing smaller issuers that are not involved in fraud?

Would disqualification from Form B use on the basis of a ''going concern'' opinion from the issuer's independent auditor cause undue pressure to be placed on auditors not to issue those opinions? Should the Commission replace that disqualification with one dependent on whether the issuer had: (1) net losses or negative cash flows from operations for two or more of the past three annual fiscal periods; or (2) a deficit in net worth at the date of the most recent balance sheet?

h. Secondary Offerings

As proposed, registrants would not be able to register an offering on Form B without meeting other eligibility criterion simply because it is a secondary offering. Whether an equity offering is a primary or secondary one, the investment is in the securities of the issuer and it is the issuer's disclosure that is relevant to investors. In either offering, the issuer prepares the disclosure. The primary difference is that the issuer does not receive the proceeds in the secondary offering. Considered only from an investor's viewpoint, the same disclosure would be needed regardless of whether the issuer or an affiliate is selling the securities.

For some time, however, we have made a distinction in eligibility for short-form registration between primary and secondary offerings.[152] To register secondary offerings, issuers do not need to meet the Form S–3 or F–3 public float test. By allowing short-form registration for secondary offerings, we have inadvertently provided an incentive for issuers not to register primary sales and to distribute to the public indirectly through third parties. Some registrants have been particularly aggressive about casting what are actually primary distributions as secondary offerings by selling shareholders in order to use current short-form registration. This practice threatens the integrity of the registration process by permitting registrants to do indirectly what they would be precluded from doing directly. Given the attractions of Form B, we would expect that practice to continue if we were to allow secondary offering registration on Form B. We would avoid that abuse by not allowing registration of secondary offerings on Form B unless other offering eligibility criteria were met.

In 1981, we proposed to apply the same public float test for both primary and secondary offerings in Form S–3. Commenters were concerned that applying the additional float requirement to secondary offerings would adversely affect venture capital companies and their investors. In light of that concern, we chose to distinguish the two types of offerings in Form S–3. The proposed registration system, however, has several advantages over the existing system that could ease any concerns regarding venture capitalists. For example, under the eligibility requirements for use of Form B, a company may register its initial offering of common stock to the venture capitalists on Form B that are existing common stockholders of the company. We also would make Form B available for any offering to venture capitalists who are QIBs. Form B offerings could be completed as quickly as today's private offerings, because Form B would not be subject to staff pre-review and could be effective upon filing if the issuer chooses. Because Form B would permit companies to register their initial offerings to venture capitalists, as opposed to first completing a private placement and then registering those securities for a secondary offering, special treatment of secondary offerings for the sake of venture capitalists would no longer be needed.[153]

Registrants would register secondary offerings not eligible for Form B under the proposed system on Form A which is described in detail below. Form A, unlike Form S–1 today, would permit companies to incorporate their Exchange Act filings by reference. Consequently, it should take a company less time to prepare its registration statement on Form A as compared to Form S–1 today. Additionally, the Commission is proposing to provide some Form A companies with the ability to designate the effective dates of their registration statements.[154] Where applicable, the company's registration statement, therefore, would be effective significantly sooner than under the current system.[155]

We are proposing to treat primary and secondary offerings the same on Form B. Thus, secondary offerings by affiliates[156] would need to qualify under the same public float/ADTV, QIB-only, existing shareholders, or investment grade eligibility criteria. Affiliates stand in the shoes of the issuer and should get no different or better treatment. Because issuers and others have relied upon the historical distinction between secondary and primary offerings, however, we solicit comment regarding whether the secondary nature of offerings by non-affiliates should be added as a separate eligibility criterion on new Form B.

Similarly, we are proposing to revise Form S–8 treatment of secondary offerings.[157] Currently, affiliates and others may register on Form S–8 resales of control or restricted securities acquired pursuant to an employee benefit plan. The resale prospectus on Form S–8 must meet the requirements of Part I of Form S–3 or Form F–3. For the same reasons that we are not proposing special eligibility for secondary offerings on Form B, we propose to eliminate special eligibility for secondary (i.e., resale) offerings on Form S–8. Whether an offering is primary or secondary is of little importance to most investors. Investors tend to base their investment decision on an issuer's disclosures. Accordingly, we believe amending Form S–8 would further investor protection.

Comment is solicited with respect to elimination of S–3 level registration of

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[151] *See, e.g.*, Securities Act Release No. 7505 (Feb. 17, 1998) [63 FR 9632] (adopting amendments to Regulation S (17 CFR 230.901–905)); Exchange Act Release No. 39670 (Feb. 17, 1998)[63 FR 9661] (proposing amendments to Exchange Act Rule 15c2–11 (17 CFR 240.15c2–11)).

[152] *See* Securities Act Release No. 5265 (June 27, 1972).

[153] Under this proposal, unlike in a registered secondary offering, venture capitalists would generally not be subject to the prospectus delivery requirements.

[154] *See* proposed revisions to Securities Act Rule 462, 17 CFR 230.462.

[155] The holding period of Rule 144(d), 17 CFR 230.144(d), also is much shorter today than it was in 1981, thus making private placements more attractive as an alternative to registration than they were in 1981. We recently proposed to narrow the definition of ''affiliate.'' Consequently, Rule 144 would be available to most venture capitalists. Securities Act Release No. 7391 (Feb. 20, 1997) [62 FR 9246].

[156] For purposes of this discussion, we assume that the narrower definition of ''affiliate'' proposed by the Commission in 1997 would apply. We have not proposed that narrower definition in this release because we already have proposed it.

[157] Form S–8 would be largely unaffected by the proposed registration system. For example, no additional filing or delivery requirements would be added for Form S–8.

secondary offerings on Form S–8. Are there compelling reasons to retain that treatment in an employee benefit context that would not apply in other secondary offerings?

B. Form A Offerings

Form A would be the basic form for registration under the Securities Act.[158] It would be available for any offering for which no other Form is authorized or prescribed. Initial public offerings and smaller reporting issuers' offerings ineligible for another form would be registered on Form A. Many of the offerings that issuers would register today on Form S–1, F–1, S–2 and F–2 would be registered under the proposed system on Form A. Just as in the case of Forms B and C, both domestic and foreign filers would use Form A.[159]

1. Structure of Form A

In keeping with current Securities Act registration forms, there are two parts to Form A: information included in the prospectus (Part I) and information not included in the prospectus (Part II).

a. Part I—Information Required in the Prospectus

Part I of Form A requires the following three categories of information: (1) standard disclosure on the cover and back pages of the prospectus and registration statement; (2) transactional information; and (3) company information. All issuers registering on Form A would set forth the first two types of information directly in the prospectus. Some Form A issuers would incorporate by reference their company information, while others would set forth that information directly in the prospectus.

i. Cover Pages

All issuers using Form A must comply with Items 501, 502 and 503 of Regulation S–K relating to information on the front cover page of the registration statement, the cover pages of the prospectus and in the summary and risk factors sections, among others. This is the same requirement as in current Forms S–1, F–1, S–2 and F–2.

ii. Transactional Information

All issuers using Form A also must provide information regarding:

- Summary risk factors and ratio of earnings to fixed charges;
- Use of proceeds;
- Determination of offering price;
- Dilution;
- Selling security holders;
- Plan of distribution;
- Description of securities;
- Interests of named experts and counsel; and
- The Commission's position on indemnification for Securities Act liabilities.

Again, this is the same information that is required in current Forms S–1, F–1, S–2 and F–2.

iii. Company Information

Depending on whether the issuer is ''seasoned'' or not, it must present company-related disclosure either in full in the prospectus or incorporate it by reference into the prospectus that is part of the effective registration statement.

(A) ''Seasoned'' Form A Issuers

For purposes of Form A, ''seasoned'' issuers would be:

- Issuers that have been reporting under the Exchange Act for at least 24 months, if they have a public float of $75 million or more; and
- Issuers that have been reporting under the Exchange Act for at least 24 months and have filed at least two annual reports.

Issuers that are ''seasoned'' would be eligible to incorporate their previously filed Exchange Act reports by reference unless they meet any of the disqualifications contained in General Instruction II.B. of the Form.[160]

A Form A registrant would incorporate by reference into the prospectus and deliver, along with the prospectus, its latest annual report filed pursuant to Section 13(a) or 15(d) of the Exchange Act and either deliver or include in the prospectus the information in Part I of Form 10–Q or 10–QSB for the most recent fiscal quarter. The registrant must deliver the information required by this option with the first prospectus it sends. It need not deliver that information with any subsequent prospectus it sends to the same person.

Issuers relying on this option would not have to reiterate company information in the prospectus, although they would have to deliver those incorporated reports with the preliminary prospectus.[161] The Form A eligibility requirements for incorporation by reference would reduce the length of time a registrant must be reporting. Under current Forms S–2 and F–2, a registrant must have a thirty-six month reporting history before it may incorporate by reference.[162] We solicit comment on whether the seasoning test for incorporation by reference on Form A should be shortened (*e.g.*, to where the issuer has been reporting under the Exchange Act for 12 months and has filed at least one annual report).

If a company incorporates by reference, investors would be required to review more than one document to obtain all the material information. We solicit comment as to whether this increases the analytical burden on investors. Additionally, does incorporation by reference of documents containing historical disclosure tend to obscure recent material information about the company? Would it be better for investors if incorporation by reference was limited to the most recent annual report with all subsequent information included in the prospectus? Today, some small issuers that are not well known to investors may include, for marketing purposes, information in their prospectuses that also is contained in the documents they have incorporated by reference. Is incorporation by reference useful for such small companies? Is incorporation by reference necessary in light of technological advances in financial printing? Does incorporation by reference reduce an issuer's cost of registration if the incorporated documents are required to be delivered to investors? If so, by how much are costs reduced?

Current Forms S–2 and F–2 give a registrant two options for complying with the disclosure requirements of the Form when incorporating by reference. If the registrant elects to deliver the prospectus together with its Exchange Act reports incorporated by reference in the registration statement, it must provide in the prospectus updating financial information and describe any material changes in its affairs not previously disclosed in an incorporated and delivered Exchange Act report. If the registrant does not elect to deliver its incorporated Exchange Act reports together with the prospectus, it must

[158] Form A also may be used to register concurrently under Section 12(b) or 12(g) of the Exchange Act. *See* Section VI. of this release for a discussion of concurrent Exchange Act registration.

[159] U.S. registrants must provide all information required by the Items of the Form except where the Item expressly identifies the requirement as applying only to foreign registrants. Similarly, foreign registrants must provide all information required by the Items of this Form except where the Item expressly identifies the requirement as applying only to U.S. registrants.

[160] Section 11 would apply to all documents incorporated by reference in Form A.

[161] For a discussion of Form A prospectus delivery obligations, see Sections VIII.C.3. and VIII.C.4.b. and e. of this release.

[162] Those forms are available for smaller seasoned issuers, but are rarely used. In 1996, only 102 Forms S–2 were filed and only three Forms F–2 were filed.

provide abbreviated company information in the prospectus itself.[163] Proposed Form A would permit only the first option of providing company information when incorporating—a registrant may incorporate company information into its prospectus and deliver its Exchange Act reports together with the prospectus.[164] Otherwise, it could not incorporate and must set forth the full company disclosure required in a Form A, just like an unseasoned Form A company.

Current Form S–2 permits issuers to choose to incorporate and deliver their glossy annual and quarterly reports to security holders in lieu of incorporating and delivering their Exchange Act annual and quarterly reports. Proposed Form A would require issuers to incorporate and deliver their latest Forms 10–K and 10–Q, because those reports must contain more extensive disclosure about the company.[165] We solicit comment on whether Form A seasoned issuers should be given the option to incorporate and deliver their glossy annual and quarterly reports to shareholders in lieu of their reports on Forms 10–K and 10–Q, with the additional provisions that those glossy annual and quarterly reports are incorporated by reference in their entirety (and are therefore subject to Section 11 liability under the Securities Act) and are filed with the Commission before their use in the Form A.

In certain circumstances, current Forms S–2 and F–2 permit registrants that are majority-owned subsidiaries but do not meet the Form eligibility requirements to register on those Forms instead of Form S–1 or F–1 if their parent satisfies certain requirements. This provision allows both the parent and the majority-owned subsidiary to register the offering on one form and incorporate by reference. Proposed Form A would not provide a similar option to those majority-owned subsidiaries. Given that Form A encompasses both seasoned and non-seasoned issuers and that incorporation by reference on Form A would be available after 24 months, as opposed to the current 36-month requirement, we believe there would be little reason to extend the ability to incorporate by reference to majority-owned subsidiaries any sooner.

(B) ''Unseasoned'' Issuers

In initial public offerings and offerings by all other issuers that are not ''seasoned,'' we would require that the registrant provide company information in the prospectus. The content of the company information in the registration statement would remain the same as it is in current Forms S–1 and F–1. We would not permit these issuers to incorporate by reference any Exchange Act reports.

b. Part II—Information Not in the Prospectus

Just as in Forms S–1, F–1, S–2 and F–2, Part II of proposed Form A would require the following information in the registration statement but not in the prospectus that is delivered to investors: expenses of issuance and distribution, indemnification of directors and officers, recent sales of unregistered securities, exhibits and undertakings.

2. Timing of Form A Offerings

a. Seasoned Issuers

Many commenters on the Concept Release noted that issuers would benefit from greater certainty of the time schedule of staff review. For example, a fixed offering schedule would promote efficiency in marketing efforts and the management of deal flow. We believe that we can achieve greater certainty in the timing of staff review without compromising investor protection. Proposed revisions to Securities Act Rule 462[166] would provide for effectiveness of registration statements and post-effective amendments of seasoned issuers on Form A whenever they request if:

1. The registrant's public float is or exceeds $75 million; or

2. The Exchange Act annual report incorporated into the Form A recently has been reviewed fully by the Commission staff and has been amended in accordance with the staff's comments, if so requested.[167]

In addition to the reporting history requirement, issuers in all cases must be subject to the Exchange Act reporting requirements, current in filing their Exchange Act reporting requirements and timely in filing their Exchange Act reports during the last 12 months in order to be seasoned. A seasoned issuer that meets one of these criteria may choose when it wants its registration statement on Form A to be effective.[168] The front cover of the Form would include three boxes, one of which the issuer would check to designate the date and time of effectiveness of the Form. Like Form B issuers, these seasoned Form A issuers may elect that the filing become effective: immediately upon filing, at the date and time specified on the front cover, or as specified in a later amendment. Even if an issuer met either of those criteria, the proposal would preclude it from designating the effectiveness of its Form A if the issuer fits the profile of any issuer disqualified in Form A from the provisions in the Form for incorporation by reference and automatic effectiveness.[169]

The basis of the public float test is to provide medium-sized seasoned issuers with certainty about the timing of their registered offerings. We believe that issuers would be more inclined to register their offerings if they knew they could take advantage of market windows or realize a need for quick capital by relying on Form A's provisions for automatic effectiveness.

The $75 million public float criteria is the same float level required in our current short-form registration statements (Forms S–3 and F–3). Our research indicates that approximately 1175 companies that are currently eligible to use those short-form registration statements would be ineligible to use Form B, at least with respect to offerings requiring the issuer to satisfy the public float/ADTV threshold. Those 1175 companies generally would be able to avail themselves of Form A's provisions for automatic effectiveness if they had reported under the Exchange Act for at least 24 months. We propose the $75 million float requirement to ensure that the only registration statements on Form A that could become automatically

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[163] This disclosure is less comprehensive than what would be required on Form S–1 or F–1 today. It includes information regarding: the registrant's business, the registrant's common equity securities, management's discussion and analysis, changes in and disagreements with accountants on accounting and financial disclosure and market risk. Financial statements and other financial information, including selected financial data and supplementary financial information are also required to be presented in the prospectus.

[164] The disclosure required by seasoned Form A registrants includes a description of any material change in the registrant's affairs that is not already described in a filing with the Commission, incorporated by reference into Form A and delivered to investors.

[165] A small business issuer may choose to register an offering on Form A rather than on Form SB–2 and incorporate and deliver its reports on Forms 10–KSB and 10–QSB. A small business issuer that registers an offering under Form A but that does not incorporate its Exchange Act reports must provide the company disclosure called for by Form A based on either Regulation S–K or Form 20–F (if a Canadian small business issuer).

[166] 17 CFR 230.462.

[167] Form A would not permit incorporation by reference of any Exchange Act report or other filing if the staff reviewed the filing and any comments remain unresolved.

[168] While these registration statements will not be reviewed by the staff, any request for confidential treatment regarding information required to be included in the registration statement may be received by the staff. Therefore, any request for confidential treatment should be submitted a reasonable period before the registration statement's designated effective date.

[169] *See* General Instruction II.B of proposed Form A and Section V.B.1.a.4. of this release.

effective are those filed by issuers with some market following resulting from their size and at least 24 months experience filing Exchange Act reports.

The basis of the recently reviewed test is that the staff will have reviewed the bulk of the issuer's disclosure. Pursuant to this test, any seasoned Form A issuer may designate effectiveness where it incorporates by reference into its Form A an annual report filed under Section 13(a) or 15(d) for its most recently completed fiscal year [170] that has been reviewed fully by the Commission staff and the issuer has responded satisfactorily to the staff's comments.[171] As discussed in greater detail below, the staff of the Division of Corporation Finance would consider requests that the staff review their Exchange Act reports.[172] Because issuers may request that the staff review their Exchange Act annual reports before registering on Form A, this mechanism would allow an issuer further flexibility in controlling the timing of its registered offering.

We solicit your comment on this proposal. Should we permit these registration statements on Form A to become effective per the issuer's discretion? Is the $75 million float too high? Should it be lowered to $60 million? Or should it be raised to $100 million or $200 million? Would the proposal to allow a Form A issuer incorporating a fully reviewed annual report provide particular flexibility in light of the proposal that the staff would review Exchange Act reports upon request to the extent it is able? Should the power to designate effectiveness when the staff has reviewed the issuer's annual report be limited to offerings of a class of securities the issuer has registered previously? Should there be any time frame within which the staff would have to review the report, for example, within three or six months before the offering? Should we exclude offerings of certain securities from that treatment? If so, what types of securities?

Because the proposed rules provide these issuers with complete control over effectiveness of their filings, we would require that the issuer obtain evidence of the managing underwriters' or principal underwriters' concurrence with its designation of effectiveness.[173] The issuer would have to file the evidence of concurrence as an exhibit to Form A.

Would a requirement to file the concurrence be unnecessarily burdensome? Alternatively, should we require the issuer to obtain the underwriters' concurrence, but not require that the concurrence be evidenced in writing? Would an oral concurrence provide the issuer and the underwriters with sufficient assurance of agreement and protection against misunderstanding? Should we require that the issuer represent in the registration statement that it obtained the concurrence, not require filing, and require that the issuer retain the written concurrence for five years?

b. Unseasoned Issuers

The timetable for effectiveness of registration statements filed by issuers making their initial public offerings or by issuers who do not meet the ''seasoned'' eligibility requirements of General Instruction II. of Form A would be similar to the filings on Forms S–1 and F–1 today. All registration statements would be reviewed on a similar time table as current Forms S–1 and F–1 and the registration statement would become effective pursuant to a request for acceleration after the issuer addresses staff comments.

3. Solicitation of Comments on Definition of Form A Seasoned Issuer

We use the same definition of seasoned issuer under Form A for purposes of permitting incorporation by reference of Exchange Act reports and timing of registration statement effectiveness, with one exception discussed below. We distinguish between issuers with a public float of $75 million or more and issuers with a public float of less than $75 million. Issuers with public floats of $75 million or more must have reported under the Exchange Act for 24 months or more. Issuers with smaller public floats must have reported for 24 months or more and filed at least two annual reports. For purposes of determining effectiveness (but not incorporation by reference), issuers with smaller public floats also must incorporate an Exchange Act annual report that was reviewed fully by Commission staff and amended for any staff comments. An issuer also must meet other conditions to be seasoned for purposes of incorporation by reference and timing of effectiveness.

We solicit comment regarding the reporting history of companies with a public float of $75 million or more. Is 24 months the proper reporting history to permit companies with that amount of public float to determine the timing of their effectiveness? Would a 12-month reporting history be sufficient in this regard? Similarly, is 24 months the proper reporting history to permit these companies to incorporate by reference Exchange Act periodic reports? Would a 12-month reporting history be sufficient in this regard? For each of these purposes (*i.e.*, timing of effectiveness and incorporation by reference), should we add an annual report filing requirement to the 24- or 12-month reporting periods? Finally, for each of these purposes, we have proposed that the company be timely in filing its Exchange Act reports for the most recent 12 months. Is this sufficient evidence of providing timely information to the market? Would a longer period, such as 24 months, be more appropriate?

We also solicit comment regarding the reporting history of companies with a public float of less than $75 million. Is 24 months of Exchange Act reporting and the filing of at least two annual reports the proper reporting history to permit companies with that amount of public float to determine the timing of their effectiveness? Would 12 months of Exchange Act reporting and the filing of at least one annual report be sufficient in this regard? Similarly, is 24 months of Exchange Act reporting and the filing of at least two annual reports the proper reporting history to permit these companies to incorporate by reference Exchange Act periodic reports? Would 12 months of Exchange Act reporting and the filing of at least one annual report be sufficient in this regard? For each of these purposes, should we simply require either a 24- or 12-month reporting history, without regard to how many annual reports had been filed by the registrant? Finally, for each of these purposes, we have proposed that the company be timely in filing its Exchange Act reports for the most recent 12 months. Is this sufficient evidence of providing timely information to the market? Would a longer period, such as 24 months, be more appropriate? For purposes of timing of effectiveness, should we require that the Exchange Act annual report incorporated by reference be reviewed fully by Commission staff and satisfactorily amended for any staff comments?

4. Disqualification for Seasoned Form A Companies

As noted, Form A would permit smaller, reporting issuers to incorporate

[170] *See* proposed revisions to Securities Act Rule 468(f)(1)(iv), 17 CFR 230.468(f)(1)(iv).

[171] Because Form A would not permit issuers to incorporate any Exchange Act report if any Commission staff comments on it are unresolved, issuers could only take advantage of this provision if the review of their annual report was completed.

[172] *See* Section XII.B. of this release.

[173] *See* proposed Form A, Item 21 and proposed revisions to Item 601 of Regulation S–K, 17 CFR 229.601.

by reference their Exchange Act reports and to have greater control over their effectiveness time schedule. We do not believe that all issuers that would meet proposed Form A's reporting and other eligibility requirements would necessarily be suited to incorporate by reference their company information or have expedited effectiveness. We believe certain events and circumstances justify disqualification of otherwise eligible issuers from taking advantage of those benefits on Form A. We propose to use the same factors that disqualify otherwise eligible issuers from using Form B.[174] As we do with Form B issuers, we solicit comment on whether we should lengthen the ''look-back'' periods we propose to use to disqualify Form A issuers from designating the effective date of their registration statements or incorporating by reference. If so, should the periods be independent of or match those in Form B?

5. Real Estate Companies

Real estate entities that formerly registered on Form S–11 would now register on Form A, unless they meet the eligibility requirements of another form. Disclosure specifically required by Form S–11 instead has been added to Regulation S–K.[175] Real estate entities that formerly provided such disclosure on Forms S–11 or S–4 would continue to be required to provide such disclosure on Forms A and C, respectively.

These proposed disclosure requirements of Regulation S–K have been drafted in plain English and would codify certain staff practices regarding disclosure by real estate entities. These practices include disclosing:

1. When finite life entities intend to sell their properties;

2. The securities rating assigned by a nationally recognized statistical rating organization (''NRSRO'') to any securities in which the registrant has invested;

3. Any cross default or cross collateralization provisions in mortgages; and

4. Information about subsidiaries, such as operating partnerships.

Additionally, to provide uniformity on how registrants calculate occupancy rates, the Commission is proposing to require real estate entities to disclose occupancy rates as a percentage of rentable square footage or units.[176] Finally, the new disclosure requirements of Regulation S–K would omit disclosure currently required by Item 35 of Form S–11, as it appears no longer applicable to most real estate companies.

We also propose to amend Forms 10 and Form 10–K to codify the staff's practice of requiring real estate entities to disclose:

- Operating and financing activities;[177]
- Real estate and other investment activities;[178] and
- A description of real estate and operating data.[179]

We also are proposing in certain offerings by real estate entities to eliminate the Guide 5 recommendation that a registrant supplementally provide the Commission staff, before use, sales materials it intends to furnish to investors.[180] The Commission staff would no longer pre-review the sales materials in cases where an issuer has the power to designate the effective date of its registration statement or when the Commission staff has notified the issuer that it will not be reviewing its registration statement. The benefits provided by the ability to designate effectiveness would be significantly diminished if the issuer nevertheless had to delay its offering until the Commission staff had pre-reviewed its sales materials. Similarly, there would be little benefit to investors from Commission staff pre-review of sales materials where the staff would not also review the issuer's registration statement. Proposed Rule 425 generally would require issuers and offering participants to file sales materials used in an offering. We request comment as to whether the Guide 5 recommendation to provide the Commission staff with sales materials supplementally should be eliminated for all offerings because sales materials generally would be filed under proposed Rule 425.

C. Applicability of Civil Liability Provisions to Offerings Registered on Proposed Forms A and B

The proposals provide a liability structure that depends on the content of materials, as well as the manner and time in which materials are used. The following discussion describes this liability structure.

1. Form A Offerings

A Form A offering either may involve, or must involve, the following materials used in connection with the offer or sale of securities:

- The Form A registration statement, including the prospectus;
- If the issuer is seasoned, the Exchange Act reports that it incorporates by reference into its registration statement;
- Free-writing materials, but only after the issuer files the Form A registration statement;
- A prospectus contained in a post-effective amendment to the Form A registration statement; and
- Prospectus supplements that the issuer uses after effectiveness of the Form A registration statement for shelf offerings.

The liability that applies to each of these types of materials is as follows.

Section 11 liability would attach to the effective Form A registration statement, including the prospectus in it.[181]

A Form A registrant relying on incorporation by reference would have to incorporate into the registration statement its last annual report filed under Section 13(a), and all Exchange Act reports that it files under Section 13(a) thereafter up to the date of effectiveness. Section 11 liability would attach to all information in those incorporated reports. [182] Section 11 also would attach to any Exchange Act report filed after the effective date that the issuer incorporates by reference through filing a post-effective amendment.[183]

A Form A registrant using free writing materials after it files its registration statement would file those materials in accordance with Rule 425. Section 12(a)(2) liability would attach to all free writing materials the registrant uses, whether or not they are filed under Rule 425 as required.

A Form A registrant could make additions or revisions to the prospectus by filing a post-effective amendment to the registration statement. The

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[174] *See* General Instruction II.B. of proposed Form A, 17 CFR 239.4. For a discussion of the nature of and reasons behind the disqualifications, *see* Section V.A.2.g. of this release.

[175] *See* proposed Items 1101—1113 of Regulation S–K, 17 CFR 229.1101—229.1113.

[176] *See* proposed Item 1107 of Regulation S–K, 17 CFR 229.1107.

[177] *See* proposed Item 1105 of Regulation S–K, 17 CFR 229.1105.

[178] See proposed Item 1106 of Regulation S–K, 17 CFR 229.1106.

[179] *See* proposed Item 1107 of Regulation S–K, 17 CFR 229.1107.

[180] *See* proposed revisions to Guide 5, referenced in 17 CFR 229.801(e).

[181] Section 12(a)(2) liability also would attach to any information in the registration statement that is part of a prospectus. Section 12(a)(2) also would attach to any oral communication used to offer or sell the securities.

[182] The filed Exchange Act reports would also be subject to Section 18 liability. *See* Section XI.A.3 of this release for a discussion of Section 18 of the Exchange Act.

[183] A Form A issuer may not incorporate Exchange Act reports filed after the effective date except through a post-effective amendment. Forward incorporation is not available on Form A.

prospectus in a post-effective amendment becomes the prospectus in the registration statement. [184] Accordingly, Section 11 would attach to any prospectus (and any other information) included in a post-effective amendment to Form A.

As proposed, Form A registrants would not be permitted to undertake delayed shelf offerings of securities under Rule 415. Those registrants could, however, undertake other shelf offerings, such as continuous offerings. In those offerings, the registrant could use prospectus supplements to change the prospectus in the registration statement after effectiveness. Because prospectus supplements are not set forth in post-effective amendments, it has been argued that Section 11 liability does not attach to them. It is our view that these supplements are part of that prospectus and Section 11 liability applies to the information in them.

All of the materials described above would be subject not only to the civil liability provisions of the Securities Act, but also to the antifraud provisions of the Securities Act and the Exchange Act. The proposals would have no effect on the applicability of those provisions.[185]

Rule 167 defines any communication made more than 30 days before filing in a Form A-registered offering as not being an offer to sell or offer to buy securities for purposes of Section 5(c) of the Securities Act. Because of this definition, neither Section 11 nor Section 12(a)(2) of the Securities Act would attach to these communications. However, these definitions do not affect the application of the anti-fraud provisions of the Exchange Act or the Securities Act. For example, any communication ''in connection with the purchase or sale'' of a security would be subject to Exchange Act Section 10(b), regardless of Rule 167. Similarly, any ''offer or sale of any security'' would be subject to Securities Act Section 17(a).

2. Form B Offerings

In a Form B-registered offering, the liability provisions would apply to written disclosures as follows:

- Section 11 would apply to all information in the registration statement, including: [186]
- The term sheet,
- Offering information used during the offering period,[187]
- The Exchange Act reports incorporated by reference into the registration statement,
- Material updates to the disclosure in the incorporated Exchange Act reports, and
- All other information included in the registration statement, including exhibits;
- Section 12(a)(2) liability would always apply to ''free-writing'' materials that are used during the offering period, including regularly released forward-looking information;
- Section 12(a)(2) liability may apply to factual business communications during the offering period;
- Section 17(a) liability would apply to any communication that constitutes an offer of a security, regardless of whether that offer was made during the offering period; and
- Exchange Act Section 10(b) liability would apply to any communication in connection with the purchase or sale of a security, regardless of whether that communication was during the offering period.

a. Section 11

Section 11 liability would attach to all information in the Form B registration statement. Offering information that is used during the offering period must be filed as part of the registration statement. Offering information used in the period beginning 15 days before the first offer and ending with the filing of the registration statement must be filed with that registration statement. Because the offering period runs through the completion of the offering, all offering information—including pricing information—used after filing of the registration statement would have to be filed as an amendment to the Form B registration statement.

A Form B registrant must incorporate by reference into the registration statement its last annual report filed under Section 13(a), and all Exchange Act reports that it files thereafter up to the date of effectiveness of the registration statement. A Form B registrant also must incorporate by reference into the registration statement all Exchange Act reports it files between effectiveness of the Form B registration statement and the completion of the offering.

A Form B registrant must inform potential investors of material updates to its Exchange Act reports. The registrant would accomplish this through the use of offering information that is filed as part of the effective Form B registration statement.

b. Section 12(a)(2)

Section 12(a)(2) liability would always apply to free writing materials that are used during the offering period. Among other communications, regularly released forward-looking information would be included in this category of information.[188]

Free writing materials used during the offering period would have to be filed in accordance with Rule 425. Free writing materials used in the period beginning 15 days before the first offer and ending with the filing of the registration statement must be filed under Rule 425. Because the offering period runs through the completion of the offering, free writing materials used after filing of the registration statement also must be filed under Rule 425. Section 12(a)(2) liability would attach to all free writing materials the registrant uses, whether or not they are filed under Rule 425 as required.

While factual business communications are not ''free writing'' materials,[189] Section 12(a)(2) may still apply to those communications during the offering period if they are made to offer securities.

c. Section 17(a) and Exchange Act Section 10(b)

Section 17(a) liability would apply to any communication in the offer or sale of a security, regardless of whether that communication was made during the offering period. Exchange Act Section 10(b) liability would apply to any communication in connection with the purchase or sale of a security, regardless

[184] *See* Securities Act Section 11(a), 15 U.S.C. § 77k(a), and Item 512(a)(2) of Regulation S–K, 17 CFR 229.512(a)(2).

[185] *See* Exchange Act Section 10(b), 15 U.S.C. § 78j(b), Exchange Act Rule 10b–5, 17 CFR 240.10b–5 and Securities Act Section 17(a), 15 U.S.C. § 77q(a).

[186] Section 12(a)(2) liability also would attach to any information in the registration statement that is part of a prospectus and to any oral communication used to offer or sell the securities.

[187] The offering period would begin 15 days before the first offer is made and end at the completion of the offering.

[188] Proposed Securities Act Rule 168, 17 CFR 230.168, would define ''regularly released forward-looking information'' and exempt it from the prohibition on pre-filing offers in Section 5(c). This exemption would be more significant for Form A-registered offerings, because all pre-filing offers in connection with offerings registered on Form B would be exempt from Section 5(c) under proposed Securities Act Rule 166, 17 CFR 230.166. Regularly released forward-looking information must be filed under proposed Securities Act Rule 425, 17 CFR 230.425.

[189] Proposed Securities Act Rule 169, 17 CFR 230.169, would define ''factual business communications'' and exempt them from the prohibition on pre-filing offers in Section 5(c). This exemption would be more significant for Form A-registered offerings, because all pre-filing offers in connection with offerings registered on Form B are exempt from Section 5(c) under proposed Securities Act Rule 166, 17 CFR 230.166. Proposed Securities Act Rule 425, 17 CFR 230.425, would state that registrants need not file ''factual business communications,'' regardless of when they are made.

of whether that communication was during the offering period.

Rule 167 defines any communication made more than 30 days before filing in a Form A-registered offering as not being an offer to sell or an offer to buy the securities being offered under the registration statement. Rule 167 has a similar treatment for communications made before the offering period in a Form B-registered offering. Because of this rule, neither Section 11 nor Section 12(a)(2) would attach to these communications. Rule 167 does not, however, affect the application of Section 17(a) or Exchange Act Section 10(b) to these communications.

D. Form C Offerings

1. Use of Form C

Under the proposed system, business combinations and exchange offers would be registered exclusively on proposed Form C.[190] Proposed Form C would permit all offerings that were available on Forms S–4 and F–4. One form would be available for both domestic and foreign issuers.[191] A registrant must use Form C, or SB–3 if a small business issuer, to register an offering under the Securities Act that is:

1. A business combination transaction of the type specified in Rule 145(a);

2. A merger in which the applicable law would not require the solicitation of the votes or consents of all of the security holders of the company being acquired;

3. An exchange offer for securities of the issuer or another entity;

4. A public reoffering or resale of any securities acquired pursuant to this registration statement; or

5. More than one of the kinds of transactions listed in paragraphs 1. through 4. registered on one registration statement.

[190] Small business issuers, however, would register business combinations and exchange offers on proposed Form SB–3. For an explanation of Form SB–3, *see* Section V.E.4. of this release. A small business issuer's disclosure requirements would not differ substantially from Form S–4 today. Form C would thus provide no additional benefits to small business issuers than Form SB–3 and, for tracking purposes, small business issuers would be barred from using Form C. A small business issuer may, of course, provide more information on Form SB–3 than required by the small business disclosure regime.

[191] U.S. registrants must provide all information required by the Items of the Form except where the Item expressly identifies the requirement as applying only to foreign registrants. Similarly, foreign registrants must provide all information required by the Items of this Form except where the Item expressly identifies the requirement as applying only to U.S. registrants.

2. Relationship with Exchange Act Rules

Like Forms S–4 and F–4, the proposed Form C prospectus may serve as the proxy or information statement used in connection with the proposed transaction. Form C would be deemed to meet the informational and filing requirements of the proxy or information statement rules under Section 14 of the Exchange Act and Regulations 14A and 14C.

In a companion release, the Commission is also proposing changes to the Exchange Act and Williams Act regulatory scheme applicable to extraordinary transactions, including the rules under Sections 13(e), 14(a), 14(c), 14(d) and 14(e).[192] For a more complete discussion of the rationale behind the extraordinary transactions proposals, you also should read that Release.

3. Timing of Form C

As proposed, a Form C registration statement would be subject to Commission staff review and would become effective in the same manner that Forms S–4 and F–4 become effective today. Although some Form C registration statements would be filed by large seasoned issuers acquiring large seasoned companies, we have not proposed automatic effectiveness for Form C under the theory that the market is not informed at the time of filing about the pro forma effects of the transaction. We solicit comment, however, regarding whether all registration statements filed on Form C (except Rule 13e–3 and roll-up transactions) should become effective automatically upon filing or on an expedited schedule (*e.g.*, 20 days after filing). Should Form C registration statements filed by Form B-eligible companies become effective automatically upon filing, similar to the Form B registration statement? Should Form C registration statements become effective automatically or on an expedited schedule if the company to be acquired would meet the Form B public float/ADTV test? What if both the registrant and the company being acquired would meet that test? Should Form A registrants eligible to determine the timing of effectiveness of a Form A registration statement also be able to control timing of their Form C registration statements? Are there any categories of offerings on Form C that should be granted automatic or expedited effectiveness, such as exchange offers?

[192] *See* Exchange Act Release No. 40633 (Nov. 3, 1998).

4. Structure of Form C

In keeping with other Securities Act registration forms, there are two parts to Form C: information included in the prospectus (Part I) and information not included in the prospectus (Part II).

a. Part I—Information Required in the Prospectus

Like current Forms S–4 and F–4, Part I is divided into four sections: information about the transaction, information about the registrant, information about the company being acquired, and voting and management information.

i. Information About the Transaction

The first section requires the disclosure of information about the proposed transaction. In addition to other information, this section requires a prospectus summary, a summary of the material features of the proposed transaction and a presentation of pro forma financial information.[193] This section is designed to elicit material information about a transaction that should be presented in a prospectus subject to Securities Act liabilities which is delivered to investors. We solicit comment on whether Form B-eligible registrants should be required to comply with the mandated disclosure requirements for transactional information as described in this section or whether these registrants should be permitted somewhat more freedom to develop their own transactional disclosure, much as they would on Form B.

ii. Information About the Registrant

The second section mandates the disclosure regarding the information required about the registrant and prescribes different levels of information required to be presented in the prospectus incorporated by reference, depending on which Securities Act form the registrant could use in making a primary offering of its securities. Current Forms S–4 and F–4 apply different levels of registrant disclosure based on the registrant's

[193] Other information required by this section include: a description of material contacts between the registrant and the company being acquired; information required for reofferings by persons deemed to be underwriters; disclosure regarding the interests of named experts and counsel; and disclosure of the Commission's position on indemnification for Securities Act liabilities.

Real estate entities would be required to provide additional information specific to that industry. That information includes disclosure regarding: risk factors; the organization; tax treatment; certain relationships and related transactions; selection, management and custody of investments; conflict of interest policy and limitations of liability.

eligibility for Forms S–1, S–2, S–3, F–1, F–2 and F–3. Proposed Form C continues this approach and reflects the proposed re-tiering of the registration forms.

(A) Form B Eligible Registrants

If the registrant meets the registrant eligibility requirements of General Instruction I.B. and the public float/ADTV test of Form B, it may elect to satisfy company disclosure requirements through incorporation by reference. The registrant would provide substantially the same information that a Form S–3 or F–3 eligible issuer currently provides on Forms S–4 and F–4:

1. A description of any material change in the affairs of the registrant that is not already described in a filing with the Commission which is incorporated by reference into the Form C;

2. Incorporation by reference of its latest annual report filed in accordance with Section 13(a) or 15(d) of the Exchange Act and any other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year; and

3. Under certain circumstances, incorporation by reference of the description of capital stock contained in an Exchange Act registration statement.[194]

(B) Seasoned Form A Registrants

If the registrant meets the eligibility requirements for incorporation by reference in Form A, it may elect to comply with the incorporation by reference option in Form C.[195] A registrant choosing this option must incorporate by reference into the prospectus and deliver with the prospectus its latest annual report filed pursuant to Section 13(a) or 15(d) of the Exchange Act and either deliver or include in the prospectus the information in Part I of Form 10–Q or 10–QSB for the most recent fiscal quarter. The registrant must deliver the information required by this option with the first prospectus it sends. As with Form A, it need not deliver that information with any subsequent prospectus it sends to the same person.

The disclosure required from seasoned Form A registrants would also include a description of any material change in the registrant's affairs that is not already described in a filing with the Commission and incorporated by reference into Form C.

Unlike current Form S–4, Form C would not permit delivery of a company's glossy annual or glossy quarterly report to security holders in lieu of delivery of a Form 10–K or Form 10–Q report. Just as we are soliciting comment on whether to provide the option to incorporate and deliver a company's glossy annual and quarterly report in lieu of a company's Form 10–K and Form 10–Q for ''seasoned'' companies filing on Form A, we solicit comment on whether we should provide this option for seasoned Form A companies filing on Form C.

(C) All Other Registrants

All registrants ineligible for Form C's two incorporation by reference options would disclose in the registration statement the same information as current Forms S–4 and F–4 require of Forms S–1 and F–1 registrants. In addition, real estate entities would disclose the information required by the following proposed items of Regulation S–K: Item 1105, Operating and financing activities; Item 1106, Real estate and other investment activities; and Item 1107, Description of real estate and operating data.

iii. Information About the Company Being Acquired

Similar to current Forms S–4 and F–4, proposed Form C would require presentation of disclosure about the company being acquired in the registration statement. Presentation of disclosure could be made under the same options that would be available to the registrant. Thus, a company to be acquired would refer to the ''Information About the Registrant'' section to determine whether and how it could incorporate by reference.

Forms S–4 and F–4 give non-reporting companies to be acquired a choice about the amount of disclosure that they provide. They may either provide the full company information required by reporting companies[196] or provide abbreviated company information which only non-reporting companies are permitted to provide.[197] Form C proposes different disclosure requirements than on current Forms S–4 and F–4. Form C would require a non-reporting company to provide the same non-financial disclosure as a reporting company[198] but would not require the company to provide the full financial statement disclosure that a reporting company would have to provide.[199] We solicit comment on what non-financial disclosure should be required by non-reporting companies. Would the requirement to provide the same information as reporting companies be unduly burdensome on these companies? If so, what information should be required by non-reporting companies?

iv. Voting and Management Information

Form C would require issuers to present much the same information in the Form C prospectus as they would be required to present in Forms S–4 and F–4 today. If either the registrant or the company to be acquired is soliciting proxies, consents or authorizations, Form C would require information about: the meeting, the vote required for approval, revocability of proxy, dissenters' rights, persons making the solicitation, persons with substantial interest in the matter and voting securities of principal holders.

Whether or not proxies, consents or authorizations are being solicited, and in the case of exchange offers, Form C would require information concerning voting securities and the principal holders of such shares with respect to all directors and executive officers of both entities. Form C would require information about directors and executive officers of the surviving or acquiring company, certain relationships and related transactions and executive compensation. If eligible to incorporate by reference, the registrant or the company to be acquired could incorporate this information into the prospectus in lieu of presenting the information in the prospectus.

[194] The description of capital stock must be incorporated only if capital stock is being registered and securities of the same class are registered under Section 12 of the Exchange Act, and such stock is either listed for trading or admitted to unlisted trading privileges on a national securities exchange or bid and offer quotations for such stock are reported in an automated quotations system operated by a national securities association.

[195] See Sections V.B.1.a.iii.(A) and V.B.4. of this release regarding Form A issuers eligible to incorporate by reference. Section 11 would apply to all documents incorporated by reference in Form C.

[196] *See* Item 17(a) of Form S–4 and Item 17(a) of Form F–4.

[197] *See* Item 17(b) of Form S–4 and Item 17(b) of Form F–4.

[198] Form S–4 does not require non-reporting companies to be acquired to provide the information required by Item 102 of Regulation S–K (description of property), Item 103 of Regulation S–K (legal proceedings) or Item 304(a) of Regulation S–K (changes in and disagreements with accountants on accounting and financial disclosure). Form C would require both reporting and non-reporting companies to provide this information. Similarly, Form F–4 does not require non-reporting companies to be acquired to provide the information required by Item 2 of Form 20–F (description of property), Item 3 of Form 20–F (legal proceedings), Item 6 of Form 20–F (exchange controls) and Item 7 of Form 20–F (taxation). Form C would require both reporting and non-reporting companies to provide this information.

[199] *See* Items 18(c) and 21(b) of proposed Form C, 17 CFR 239.6. For a more complete discussion of this proposal, *see* Exchange Act Release No. 40633 (Nov. 3, 1998).

b. Part II—Information Not Required in the Prospectus

Just as in Form S–4 and F–4, Part II of proposed Form C would require, in the registration statement but not in the prospectus that is delivered to shareholders, information about indemnification of directors and officers, exhibits and undertakings.

5. General Instruction G. of Form S–4

Proposed Form C would not include any instruction to parallel General Instruction G. of Form S–4 regarding the formation of bank or savings and loan holding companies. This General Instruction is part of Form S–4, but is no longer needed in the business combination form because Congress has amended the Securities Act.[200] Section 3(a)(12) exempts from registration the vast majority of those transactions eligible for General Instruction G.[201] In those limited situations in which an offering regarding the formation of a bank or saving and loan holding company falls outside of the Section 3(a)(12) exemption, the registrant may still register the transaction on any form appropriate to the registrant and transaction. In addition, Staff Accounting Bulletin 50, which permits abbreviated financial statements, would still be available in this transaction.

6. Small Business—Business Combinations

Small business issuers would not be permitted to register an offering involving a business combination on Form C. Instead, we are proposing a new form, Form SB–3, which is a small business combination form.[202] Due to the necessary different requirements of larger domestic and foreign issuers and those issuers in the small business reporting regime, the use of two forms is necessary for business combinations to provide clarity for the registrant as to the requirements of the particular offering.

In the event that a registrant filing on Form C is registering an acquisition of a company that is reporting pursuant to the small business issuer regime, the small business issuer need only provide the information in the registration statement that it would be required to provide if the offering was registered on Form SB–3.

E. Small Business Issuers

1. Small Business Issuers' System

In 1992 and 1993, we adopted special registration forms under the Securities Act for smaller issuers: Forms SB–1 and SB–2.[203] We also adopted special forms for these issuers to use in registering and reporting under the Exchange Act.[204] The disclosure requirements of those forms are less extensive than the ones that apply to larger issuers.

The small business issuer registration and reporting systems were designed to facilitate capital-raising by small businesses and reduce their costs in complying with the federal securities laws. A small business issuer generally is any issuer with less than $25 million in revenues and a public float of less than $25 million.[205]

2. Re-defining ''Small Business Issuer''

Since the Commission adopted the ''small business issuer'' definition in 1992, economic and market changes have occurred. While annual inflation rates have remained low, the nation's economy has experienced significant growth. Revenue levels of most public companies increased substantially, and their market capitalizations rose even more dramatically. This growth in revenues and market capitalization levels has effectively reduced the percentage and number of public companies qualifying as small business issuers.[206] Many companies that would have met the definition of small business issuer in 1992 now do not qualify as small business issuers even though they remain relatively small. These companies must satisfy the more extensive disclosure requirements of Regulation S–K and S–X in preparing their registration statements and periodic reports.

We have had six years of successful experience with the small business issuer disclosure system. Our experience indicates that small business issuers have incurred less cost, time and burden in preparing disclosure documents based on the streamlined disclosure requirements. The system has improved their access to capital and increased their competitiveness against larger companies without reducing investor protection. For these reasons, we are proposing to redefine ''small business issuer'' by revising the criteria in the definitions.[207]

We are proposing to raise the revenues test to $50 million and eliminate the public float test. As a result, 1100 more public companies would meet that revenues test than satisfy the current $25 million revenues test today.[208] The $50 million revenues test also would reinstate the percentage of public companies that met the revenues test in 1992.[209] While the percentages remain constant, 500 more public companies would meet the $50 million revenues test than met the $25 million revenues test in 1992.

Our proposal would aid non-reporting companies with revenues between $25 and $50 million that plan to register initial public offerings under the Securities Act or propose to register a class of securities under the Exchange Act. Also, reporting companies that are small business issuers would be able to remain in the small business disclosure system until their revenues grow to $50 million.[210]

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[200] Riegle Community Development and Regulatory Improvement Act, Pub. L. No. 103–325, Title III, § 320, 108 Stat. 2225 (1994) amending § 3(a) of the Securities Act (15 U.S.C. § 77c(a)).

[201] Transactions in which the rights and interests of security holders in the holding company are not ''substantially the same'' as those in the bank or savings and loan association before the transaction are not exempted from registration by Section 3(a)(12) but would have satisfied General Instruction G. of Form S–4.

[202] *See* Section V.E.4. of this release for a discussion of proposed Form SB–3.

[203] Securities Act Release No. 6949 (July 30, 1992) [57 FR 36442] (adopting Form SB–2) and Securities Act Release No. 6996 (Apr. 28, 1993) [58 FR 26509] (adopting Form SB–1).

[204] These Exchange Act forms are: Form 10–SB (the form used to register a class of securities under the Exchange Act); Form 10–KSB (the annual report form); and Form 10–QSB (the quarterly report form). We also revised the requirements for annual reports to security holders and proxy and information statements of small business issuers. *See* 17 CFR 240.14a–3(b), Note to Small Business Issuers; 17 CFR 240.14c–3(a)(2), Note to Small Business Issuers; and 17 CFR 240.14a–101, Note G—Special Note for Small Business Issuers.

[205] 17 CFR 230.405. Other conditions also must be met. The issuer must be either a U.S. or Canadian issuer and must not be an investment company under the Investment Company Act of 1940. In addition, if the issuer is a majority-owned subsidiary of another company, the parent also must be a small business issuer.

[206] In 1992, we indicated that 42% of public companies had revenues of less than $25 million and 63% had market capitalizations under $25 million. Securities Act Release No. 6924 (Mar. 20, 1992) [57 FR 9768]. Today, these percentages have fallen to 31% and 24%, respectively. (This data is derived from a Compustat database for 9,698 public reporting companies as of June 24, 1998.) While about 3,600 public companies met the $25 million revenues test in 1992, only about 3,000 public companies meet that test today. Our analysis necessarily excludes private companies as information for them is not generally available.

[207] *See* proposed revisions to Securities Act Rule 405, 17 CFR 230.405; Exchange Act Rule 12b–2, 17 CFR 240.12b–2; and Item 10 of Regulation S–B, 17 CFR 228.10.

[208] Currently, almost 4,100 public companies have revenues below $50 million.

[209] Approximately 42% of public companies met the $25 million revenues test in 1992. The same percentage would meet the $50 million test today.

[210] Currently, reporting companies that are not in the small business disclosure system are able to use that system only if they meet the revenues and public float tests for two consecutive years. *See* 17 CFR 228.10(a)(2)(iv). We would alter that treatment for purposes of the transition from the $25 million thresholds to the $50 million threshold. Under our proposals, we would allow a reporting company to switch to the small business issuer disclosure system immediately in the first year after the proposals become effective if it had revenues of less

We would eliminate the public float test from the small business issuer definition. The small business system is designed to simplify and reduce the cost of raising capital for start-up, developing and small businesses. We believe that the size of a company's revenues may be a more indicative measure of whether a company needs the benefits of the small business system than a combined revenues and public float test. While the public float test for small businesses may be correlated with the size of a company's operations, it can, at times, penalize those small businesses that the market believes to have promising prospects. The elimination of the public float test also would simplify the regulatory scheme. Accordingly, we propose that a company that has less than $50 million in revenues would qualify as a small business issuer regardless of the size of its public float.

We request your comments on the proposed revised definition of small business issuer.[211] Should the proposed revenues level be higher (such as $60 or $70 million) or lower (such as $45 or $40 million)? Why? Should the public float test be retained? If retained, should it also be set at $50 million or should it be retained at $25 million or increased to $60 or 70 million? Should another measure, such as assets level or market capitalization, be used to define small business issuers? If another measure is used, what dollar level would be appropriate and why?

We are not proposing to change the time period over which revenues would be considered. Under the current definition, a non-reporting company would look at the amount of its revenues during its last fiscal year (and public float as of a date within 60 days before filing its registration statement). A reporting company would look at its revenues (and public float) as the end of its last two consecutive fiscal years. We would continue to apply this approach. Thus, a private company filing either an initial public offering under the Securities Act or registering a class of securities under the Exchange Act would look to its revenues during the its last fiscal year. A public reporting company that is in the small business disclosure system would be required to leave the system if it had revenues over $50 million in each of its last two consecutive fiscal years. A public reporting company which is not in the small business disclosure system would have to earn less than $50 million revenues in each of its last two consecutive fiscal years before it would be permitted to switch to the small business system. We solicit your comments as to whether a revenues test based on a longer time period, such as three years, or an average annual revenues test based on a three-year period, would be better.

3. Proposed Changes to Form SB–2

We propose changes to Form SB–2 to permit seasoned small business issuers to incorporate their previously filed Exchange Act reports by reference.[212] In most cases, the Exchange Act disclosure would satisfy the company disclosure requirements of Form SB–2. By delivering previously prepared documents, the small business issuer would avoid the expense, time and effort required in recreating this disclosure. Those issuers would continue to include the same information about the offering, such as use of proceeds and plan of distribution disclosure, in the prospectus.[213] We believe there is no compelling reason to preclude the small business issuer from incorporating by reference to the same extent as a Form A issuer. If we extend this option to small business issuers, they will not need to leave the less extensive small business disclosure system in order to enjoy the benefits of incorporation by reference.[214]

a. Conditions for Using Incorporation by Reference

The conditions for using incorporation by reference in Form SB–2 would be the same as those in Form A. By using the same criteria, we would treat equally all seasoned Exchange Act reporting companies that are not using Form B, regardless of their size. To use incorporation by reference, the small business issuer would have to have been subject to the Exchange Act reporting requirements for at least a twenty-four-month period and have filed all required reports on a timely basis during the twelve months just before filing the Form SB–2.[215] Likewise, the issuer also must have filed at least two Exchange Act annual reports.

Small business issuers would be subject to the same disqualifications applicable to Form A and Form B issuers relating to the issuer's financial condition, past violation of laws or status as a blank check or penny stock company.[216] In addition, a small business issuer that used the less extensive Regulation A narrative disclosure requirements in its latest annual report on Form 10–KSB would not be allowed to incorporate its Exchange Act reports by reference. We solicit comment on whether we should extend any of Form SB–2's disqualification provisions' ''look-back'' periods.[217]

Similarly, we are not proposing to permit transitional small business issuers registering on Form SB–1 to use incorporation by reference.[218] We believe it is important that issuers experience at least one cycle of reporting under a comprehensive (as opposed to a significantly streamlined) disclosure regime before graduating to a short-form approach.

We solicit your views regarding whether incorporation by reference should be available to small business issuers. Should their smaller size preclude them from using incorporation by reference? Should we impose additional conditions on small business issuers regardless of what form they use given their smaller size? Should we shorten the reporting history requirement (*e.g.*, to twelve months or twelve months and the filing of one annual report)? Does it take a longer period for those issuers to adjust to the reporting requirements and produce the expected Exchange Act disclosure? Should there be additional disqualifications? For example, should a Form SB–2 issuer not be able to incorporate by reference if a material retroactive restatement of its financial statements or a material disposition of assets is not reflected in its latest

than $50 million for its last two fiscal years. That transition would be allowed even if the issuer's revenues for those years exceeded the current $25 million threshold or the issuer exceeded the current public float test in those years.

[211] *See* proposed Item 10(a)(1) of Regulation S–B, 17 CFR 228.10(a)(1).

[212] Section 11 would apply to all documents incorporated by reference in Form SB–2.

[213] The offering disclosure requirements are contained in proposed Form SB–2, Items 1–10 and 14.

[214] Form S–2 currently permits incorporation by reference for small business issuers that meet certain requirements. *See* General Instruction II.C. of Form S–2. The proposed changes to Form SB–2 would preserve this option for these issuers. While small business issuers would be eligible to use Form A, use of that Form would involve compliance with Regulation S–K rather than reliance on the small business issuer disclosure system.

[215] *See* proposed Form SB–2, General Instruction D.

[216] *See* Sections V.A.2.g., V.B.1.a.iii.(A) and V.B.4. of this release which discuss the disqualification provisions for Form A and Form B issuers. The disqualification provisions for those Forms are the same as we propose under Form SB–2.

[217] *See* General Instruction E.2. of proposed Form SB–2, 17 CFR 239.10.

[218] Form SB–1 is available for certain small business issuers that register no more than $10 million of securities during any continuous twelve-month period. Form SB–1 permits these issuers to provide the non-financial statement disclosure required under Regulation A, 17 CFR 230.251–263. These narrative disclosure requirements are less extensive than those of Regulation S–B, which governs the disclosure in Form SB–2.

Exchange Act annual report, even if that information is set forth in the prospectus?

b. How to Incorporate by Reference

Under the proposals, a small business issuer choosing to incorporate by reference must incorporate its latest Exchange Act annual report and all Exchange Act reports filed after the end of the fiscal year covered by that form.[219] It would not be permitted to incorporate Exchange Act forms filed after the effective date of the registration statement.

The issuer must list in the prospectus that is part of the effective registration statement all of the reports that are incorporated by reference.[220] As part of the effective registration statement, all incorporated portions of these reports would be subject to Section 11. If an issuer wanted to incorporate an Exchange Act report filed after effectiveness of the Form SB–2, it would have to file a post-effective amendment to incorporate it into that prospectus.

A small business issuer would have to state in the SB–2 prospectus that it will provide to investors any report that it is incorporating by reference but not providing with the prospectus.[221] It also must identify the reports that it files with or submits to the Commission and describe how investors may obtain those reports.[222]

Small business issuers would have to update the company information in the prospectus if material changes occur after the end of the fiscal year covered by the annual report and are not reported in the Form 10–QSB delivered with the prospectus.[223] In addition, the small business issuer would have to include financial statements of businesses acquired or to be acquired or real estate operations acquired or to be acquired, and pro forma financial information, if that information is required by Regulation S–B[224] and was not in the latest annual report.[225]

Comment is requested on the manner of incorporation of Exchange Act reports. Should issuers be permitted to incorporate reports filed after effectiveness of the Form SB–2 provided that they are deemed incorporated into the prospectus that is part of the effective registration statement?

c. Delivery of Exchange Act Reports

A small business issuer would have to provide copies of its recent Exchange Act reports with the delivered prospectus when it incorporates by reference in the Form SB–2. It must deliver to investors a copy of its latest Exchange Act annual report and state in the prospectus that it is accompanied by that annual report.[226] It also would have to deliver its Form 10–QSB for its most recent fiscal quarter[227] or include that information in the prospectus. Those that choose to deliver the Form 10–QSB would have to state in the prospectus that it is accompanied by that Form.

The issuer would have to deliver the Exchange Act annual report and the Form 10–QSB with the prospectus delivered to investors under proposed Securities Act Rule 172. If the issuer delivers another prospectus to the same investor later on in the offering, it would not have to re-deliver the Exchange Act reports.[228]

Our proposals require delivery of the small business issuer's full Exchange Act annual report rather than an abbreviated glossy annual report to security holders. We believe that most small business issuers are not generally followed by the investment community and the information that they report is not widely disseminated. Because a typical annual report to security holders provides less information to investors than an annual report, we believe the latter would aid investors more.[229] For example, an annual report to security holders does not include complete information about management, executive compensation, security ownership and transactions with related parties. We would require that the issuer deliver this disclosure, which is included in the Exchange Act annual report, with the prospectus.[230]

We solicit comment on these delivery requirements. Should we expand the delivery requirements to require delivery not just of the annual report and most recent Form 10–QSB but also any other Form 10–QSB or Form 8–K filed since the end of the fiscal year covered by the annual report? Should we narrow the delivery requirements? For example, should we allow small business issuers to deliver their annual reports to security holders instead of their Exchange Act annual report disclosure?

d. Other Changes to the Forms

In addition to amending Form SB–2 to permit incorporation by reference, we are rearranging that Form in order to accommodate the new provisions. Also, we are proposing correcting and technical changes to Form SB–2.[231]

4. Form SB–3

a. Use and Timing of Form SB–3

Small business issuers would register business combinations and exchange offers on proposed Form SB–3, rather than Form C. Under the present system, small business issuers must use Form S–4 for these transactions. A General Instruction to the Form lists the Items of Form S–4 with which small business filers are not required to comply. It also lists those Items of other forms that the

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[219] *See* proposed Form SB–2, Items 11 and 12. A small business issuer that was in the small business disclosure system during its last fiscal year would incorporate its annual report on Form 10–KSB. A reporting company that entered the small business disclosure system after the close of its latest fiscal year would be allowed to incorporate its annual report on Form 10–K or 20–F for its latest fiscal year.

Small business issuers, like larger registrants, have the option of satisfying certain Exchange Act annual report requirements by incorporating portions of their glossy annual reports to security holders under Rule 14a–3 or 14c–3, 17 CFR 240.14a–3 or 240.14c–3, or definitive proxy or information statements filed under Regulations 14A or 14C. *See*, for example, Form 10–KSB, General Instruction E. If a registrant's Exchange Act annual report incorporates from those documents, the incorporated portions also will become part of the Form SB–2 through incorporation of the Exchange Act annual report.

[220] *See* proposed Form SB–2, Item 12(a).

[221] *See* proposed Form SB–2, Item 12(b). The issuer would have to:

(i) Disclose that the information will be provided without cost upon oral or written request; and

(ii) Name the contact person who should receive the request.

[222] *See* proposed Form SB–2, Item 12(c).

[223] *See* proposed Form SB–2, Item 11(e).

[224] 17 CFR 228.310(c)–(e). Item 310(c) requires the financial statements of certain businesses acquired or to be acquired. If those financial statements are required, pro forma financial information also must be provided under Item 310(d). Item 310(e) requires financial information about certain real estate operations acquired or to be acquired.

[225] *See* proposed Form SB–2, Item 11(d).

[226] *See* proposed Form SB–2, Item 11(a). An issuer that incorporates sections of its glossy annual report to security holders or definitive proxy or information statement into its Form 10–KSB also would have to deliver those portions together with the prospectus.

[227] *See* proposed Form SB–2, Item 11(c). If, however, the report for the most recent fiscal quarter is not due before the effective date of the Form SB–2, the issuer would deliver the quarterly report for the fiscal quarter immediately before that one. It could also elect to deliver the later Form 10–QSB even though it is not yet due to be filed under Exchange Act rules.

[228] *See* proposed revisions to Form SB–2, Note to Item 12.

[229] The annual report to security holders of small business issuers must contain the information required by Rule 14a–3(b), 17 CFR 240.14a–3(b). This includes financial statements, changes in and disagreements with accountants, management's discussion and analysis or a plan of operations, a brief description of business, basic management information and market prices for the issuer's common equity and related information. 17 CFR 240.14a–3(b) and 17 CFR 240.14c–3(b).

[230] For similar reasons, we do not propose that small business issuers deliver a quarterly report to security holders instead of the most recently filed Form 10–QSB.

[231] General Instruction A.3. would be revised because it repeats General Instruction A.2. General Instruction B.1. would be amended to remove the reference to Form SR, which was eliminated in September 1997. *See* Securities Act Release No. 7431 (July 18, 1997).

registrant must comply with in lieu of the Form S–4 Items. We are proposing a separate form for small business issuers to simplify and streamline their disclosure requirements when they register a business combination or exchange offer transaction.

Only registrants that are small business issuers under Rule 405 would be allowed to use proposed Form SB–3. Form SB–3 would be available for the same types of transactions as proposed Form C and current Form S–4.[232] Form SB–3 may serve as the proxy or information statement used in the proposed transaction, like Form C. A Form SB–3 would be subject to Commission staff review and would become effective in the same manner as Form S–4 today.

b. Structure of Form SB–3

In keeping with other Securities Act registration forms, there are two parts to Form SB–3: information included in the prospectus (Part I) and information not included in the prospectus (Part II).

i. Part I—Information Required in the Prospectus

The Part I information of Form SB–3 would be the same as the Part I information required by Form C. It would consist of four sections: information about the transaction, information about the registrant, information about the company being acquired, and voting and management information.

(A) Information About the Transaction

The registrant would have to provide the same information about the transaction as a registrant on Form C would.

(B) Information About the Registrant

This section details the disclosure requirements that apply to the registrant. It includes three different disclosure formats, based upon the level of disclosure that the small business issuer would have to provide in a primary offering. We are proposing this approach with the larger issuers on Form C as well.

(1) Transitional Small Business Issuers

Certain small business issuers provide non-financial statement disclosure in their Exchange Act reports based on Form 1–A.[233] Those disclosure requirements are less detailed than the Regulation S–B requirements, which apply to all other small business issuers. Form S–4 now permits these registrants to provide the same non-financial statement disclosures as they would on Form 1–A, so long as the registrants provided the information required by Form 1–A in their most recent Form 10–KSB. Proposed Form SB–3 would preserve this option. This alternative would be available only if the registrant would be eligible to use Form SB–1. Form SB–3 requires the registrant to supplement the Form 1–A non-financial information with disclosure required by certain items of Regulation S–B. Also, the registrant would have to provide the financial statements called for by Item 310 of Regulation S–B.

(2) Seasoned Small Business Issuers

A registrant that would be able to incorporate by reference from its Exchange Act reports under the proposed changes to Form SB–2 also would be able to incorporate by reference its Exchange Act reports under proposed Form SB–3. Just like seasoned Form A issuers on Form C, if the registrant chooses this option, it must incorporate by reference into the prospectus, and deliver with the prospectus, its latest Exchange Act annual and quarterly reports. Like proposed Form C, Form SB–3 would not permit delivery of a company's glossy annual report to security holders or a quarterly report to security holders.

(3) All Other Small Business Issuers

Registrants that are not transitional small business issuers or seasoned small business issuers would have to provide the same registrant information they are required to by Form S–4 today. A transitional small business issuer or a seasoned small business issuer also may elect to comply with this disclosure format.

(C) Information About the Company Being Acquired

Proposed Form SB–3 would require the same information required by current Form S–4 and that would be required by proposed Form C. If the company being acquired is a small business issuer, information for that company would be provided under the same three options available to the registrant on Form SB–3. If the company being acquired is not a small business issuer, information for that company would be the same as if it were the registrant on Form C.

(D) Voting and Management Information

This section of proposed Form SB–3 would mandate disclosure the same as that required by Form S–4 and proposed Form C. If the registrant or company being acquired is eligible to incorporate by reference, this information also may be incorporated.

ii. Part II—Information Not Required in the Prospectus

Proposed Form SB–3 would require information about indemnification of directors and officers, exhibits and undertakings to be provided in Part II of the registration statement, as required by Form S–4 and proposed Form C.

C. Request for Comments

We request your comments on proposed Form SB–3. Do you believe that a separate form for small business issuers registering a business combination or exchange offer is necessary? Would it be better to include small business issuers on proposed Form C? We propose to allow a small business issuer's acquisition of a company that is not a small business issuer on Form SB–3. Is this appropriate or should those transactions be filed on Form C?

5. Small Business Issuers that Become Reporting Companies

Another way in which we would ease capital formation for small business issuers is to solve a dilemma that arises at times when they seek to register an offering for the first time. Generally, small business issuers have made exempt offerings of securities before they first register an offering. Sometimes those offerings are made under Rule 504 of Regulation D under the Securities Act.[234] Rule 504 states that an issuer subject to the reporting requirements of Section 13 or 15(d) may not rely on the Rule.

That prohibition on reliance by reporting companies has raised registration concerns for companies that issue convertible securities or warrants in compliance with Rule 504 and afterwards become reporting companies.[235] If their convertible securities or warrants remain

[232] *See* Section V.D.1. of this release for a discussion of the transactions required to be registered on Form C.

[233] Non-reporting companies use Form 1–A to qualify securities offered under Regulation A, an exemption from registration under Section 3(b) of the Securities Act.

[234] 17 CFR 230.504. That Rule provides an exemption from registration for securities offerings not exceeding $1,000,000 within a 12-month period.

[235] An issuer may become an Exchange Act reporting company in a number of ways. Usually, companies become subject to the reporting requirements either because they register an offering of securities under the Securities Act, they register a class of securities under the Exchange Act before listing or quotation, or they exceed the number of holders and assets tests in Exchange Act Section 12(g).

outstanding at the time they become reporting companies, the ongoing offer and sale of the underlying securities would no longer be covered by Rule 504. Sometimes a reporting issuer can rely on another exemption with respect to the continuing offer and the sale of the underlying securities.[236] If not, the reporting issuer can face the difficult situation of having no exemption and being unable to register the offering of the underlying securities because it has offered the securities before filing a registration statement.[237]

We are concerned that an issuer would lose the Rule 504 exemption for the underlying securities in these circumstances solely because the issuer has become a reporting company. In fact, holders of convertible securities or warrants may benefit from that transition. They may have access to more information about the issuer if it is a reporting company. Greater access to information always assists investors that have to make investment decisions.

Accordingly, we propose to revise Rule 504 to provide that the status of the issuer as a reporting company does not prevent it from relying on the Rule for the issuance of securities underlying convertible securities and warrants that it previously offered in compliance with the Rule when it was not a reporting company.[238] If the issuer becomes unable to rely on Rule 504 for any reason other than the fact that it became a reporting company, Rule 504 would not be available.

Under this proposal, a reporting company would be able to rely on Rule 504 only for the conversion or exercise of securities if they were offered pursuant to Rule 504. Thus, before the issuer became subject to the reporting requirements, the convertible securities or warrants would have to have been:

1. Immediately convertible or exercisable; or

2. Convertible or exercisable within a year.

We solicit comment on this change to Rule 504. We seek comment about whether we should permit a reporting company to rely on Rule 504 for the offer and sale of securities underlying convertible securities or warrants regardless of when they become convertible or exercisable. For example, should Rule 504 apply to the offer and sale of underlying securities if the issuer becomes a reporting company one year after issuing warrants under Rule 504 that were not exercisable for three years?

Are there reasons to limit reliance on the Rule to a certain period of time after the issuer becomes a reporting company? Should we not allow an issuer to rely on the Rule for the exercise or conversion if the issuer sold the warrants or convertible securities when it could have foreseen that it was about to become a reporting company? For example, should we extend Rule 504 to securities underlying warrants and convertible securities only if the issuer sold them more than six months (or three months) before becoming a reporting company?

6. Small Business Issuer Registration Fees

We also seek to ease the registration process for small business issuers in recognition of unique difficulties they may face due to their size. We are proposing rule revisions that would permit small business issuers filing on small business registration statement forms to delay payment of the Commission registration statement filing fee until shortly before effectiveness.[239] These issuers often face substantial liquidity problems due to their smaller size. The cost of preparing and filing a registration statement is a relatively expensive endeavor for many small business issuers. Those costs may deplete the issuer's liquid resources. By delaying fee payment, these issuers will have extra time, at least for this portion of the offering expenses, to generate funds to pay the fees. This should help ease registration for these issuers.[240]

The amount of securities that a small business issuer is able to sell in a registered offering may not be determined until well after the public offering begins and the issuer can assess investor interest. It is not uncommon that small business issuers have to scale back the amount of its offering. If the issuer were not required to pay the fee until shortly before effectiveness, it would more likely be able to pay only the fee on the amount of securities that will be sold in the offering.

Under the proposals, a small business issuer that wishes to delay fee payment would have to include a Rule 473(a) delaying amendment in its registration statement. It also would have to include an undertaking in the registration statement to pay the fee no later than the day on which it submits a request for acceleration of effectiveness of the registration statement. If a small business issuer files a pre-effective amendment stating that the registration statement shall thereafter become effective under Section 8(a) of the Securities Act (deleted the delaying amendment), it would have to pay the fee no later than the date the amendment is filed. If no fee is paid at that time, the pre-effective amendment would not be considered filed. Where a small business issuer makes an initial filing of a registration statement without the Rule 473(a) delaying amendment, it must pay the registration fee in order for the registration statement to be considered filed. If no fee is paid at that time, the registration statement would not be deemed filed.

We request your comments on this proposed rule change. Should fee payments by small business issuers be delayed until shortly before effectiveness? If not, why not? Should this alternative be available to all small business issuers or only some category of those issuers, such as non-reporting small business issuers? Should this option be allowed for registration statements filed by blank check companies, blind pool companies, or other issuers? Should this option be allowed for all issuers that file on a registration form that is not effective at the issuer's discretion, whether or not the issuer is a small business issuer?[241] Would the Commission staff be inundated with filings by persons who were not necessarily sincere about going forward with offerings? If so, should we require a good faith down payment of the filing fee?

F. MJDS Issuers

In 1991, the Commission adopted rules and forms to create a multijurisdictional disclosure system (''MJDS'') with Canada. The

[236] Under many circumstances, the Section 3(a)(9) exemption would be available for the issuance of securities pursuant to a conversion. Section 3(a)(9) does not generally apply, however, to the exercise of warrants because the exemption is for exchanges by the issuer of securities with its existing security holders and is not available where a commission or remuneration is paid or given directly or indirectly for soliciting the exchange.

[237] Offers of the underlying securities occur upon issuance of the convertible security or warrant where convertible or exercisable within one year. Also, offers of the underlying securities continue until the conversion or exercise has occurred or the conversion or exercise period has ended.

[238] See proposed revisions to Securities Act Rule 504(a), 17 CFR 230.504(a).

[239] *See* proposed revisions to Securities Act Rule 456, 17 CFR 230.456.

[240] Until recently, the Commission has had little flexibility to change the timing of registration fee payments under the Securities Act. Section 6(b)(2) of the Securities Act, 15 U.S.C. § 77f(b)(2), provides that registration fees must be paid when a registration statement is filed. That section also says that a registration statement will not be deemed filed unless the fee has been paid. 15 U.S.C. § 77f(c). NSMIA revised Section 4(e) of the Exchange Act, 15 U.S.C. § 78d(e), to allow the Commission flexibility to specify the time that fee payments are due relative to filings with the Commission.

[241] For example, Schedule B and the following Forms would not always become effective at the issuer's discretion: A, C, F–8, F–9, F–10 and F–80.

Commission's purpose was to facilitate cross-border securities offerings and periodic reporting by eligible Canadian issuers.[242] The MJDS allows eligible Canadian issuers to satisfy registration and reporting requirements under the Securities Act and the Exchange Act by providing the Commission with disclosure documents prepared under Canadian securities law. At the time the Commission adopted the MJDS, Canada's securities administrators adopted a parallel multijurisdictional disclosure system for U.S. issuers. Together, the systems provide that issuers in the United States and Canada are principally subject to the specific disclosure requirements of only their home country when making securities offerings in the other country.

The MJDS may be used only for certain kinds of transactions,[243] and only by issuers that meet the issuer eligibility requirements related to those transactions. Issuer eligibility requirements under the MJDS vary depending on the transaction being registered. One requirement is that an issuer have a minimum public float. To register an exchange offer or business combination under the MJDS, an issuer must have a public float of (CN) $75 million (Canadian dollars).[244] To use the MJDS to register an offering of investment grade securities or to register any securities offering by a larger issuer, the issuer must have a public float of at least (US) $75 million.[245] Registration under the Exchange Act also may be accomplished under the MJDS by a Canadian issuer if it has a public float of at least (US) $75 million. The minimum float requirements were designed so that the MJDS would be used by issuers that were well-known and widely followed by the market.[246] Those issuers are the same type we would allow to use proposed Form B for any offering. We are therefore proposing to replace the public float tests under the MJDS with the same public float/ADTV thresholds proposed for Form B.[247]

A Canadian foreign private issuer that meets the other issuer eligibility criteria under the MJDS therefore would be eligible to use it if:

1. Its public float is (US) $75 million or more and the ADTV of its equity securities is $1 million or more; or

2. The issuer's public float is (US) $250 million or more.

With the combined public float/ADTV test, some issuers may find that the proposed thresholds are more difficult to satisfy than the current MJDS public float test. The proposed thresholds also would have an effect on issuers seeking to register an exchange offer or a business combination because the float would be measured in U.S. dollars instead of Canadian dollars. Because the other public float requirements under the MJDS are measured in U.S. dollars, the proposal would have less of an impact on those transactions.

Despite the possibility that the new eligibility thresholds may preclude some Canadian issuers from using the MJDS, we believe that the reasons that support the proposed thresholds for Form B issuers, as explained above, also support the proposed thresholds for MJDS issuers. Accordingly, we propose to revise the public float tests in Forms F–8, F–9, F–10, F–80, and 40–F to conform to the proposed public float/ADTV thresholds for Form B.

We solicit your comment on this proposal. Should we continue to express the proposed public float/ADTV requirements for business combinations and exchange offers in Canadian dollars rather than in U.S. dollars? Would the higher proposed thresholds allow too few Canadian companies to use the MJDS system? Should the proposed revisions apply to some but not all of the MJDS forms? If so, which ones?

The proposals in this release also would affect MJDS issuers in another way. Form B requires that the issuer previously have filed at least one annual report on Form 10–K or Form 20–F and have registered an offering of securities under the Securities Act using a form other than those, such as the MJDS Securities Act forms, that become effective automatically upon filing. As a result of these requirements, Canadian issuers who file annual reports on Form 40–F or whose previous offerings have been registered under the Securities Act on MJDS forms will not be eligible to use Form B. If we permitted a Canadian issuer to use filings under MJDS as the basis for Form B eligibility, the issuer could access our markets both initially and on a continuing basis without the Commission staff ever reviewing any of its disclosure documents. Thus, we propose to exclude MJDS forms in determining eligibility. Consequently, Canadian issuers would need to plan in advance which registration or reporting forms to use under the Securities Act and the Exchange Act, because they would not be able move back and forth between the MJDS and non-MJDS systems as easily as is currently possible. We solicit comment on this aspect of Form B. In addition, in view of the fact that Form B will provide some of the same benefits as the MJDS, in terms of ease of access to the market, should some or all of the MJDS forms be eliminated in favor of the system proposed in this release? If only some MJDS forms should be eliminated, which ones?

G. Foreign Government Issuers

Proposed Rule 462 would permit certain seasoned foreign government issuers that file registration statements on Schedule B to designate the date and time of the effectiveness of their registration statements by checking a box on the cover page of their Schedules.[248] The issuer could designate that the registration statement be effective automatically upon filing, upon any date and time it specifies, or as designated in a later amendment. Registration statements filed in reliance on the Rule would not be subject to Commission review.

Rule 462 would only be available to foreign government issuers that were registering on Schedule B an offering of at least $250 million that also was underwritten on a firm commitment basis.[249] These issuers also would be required to have a history of registering under the Securities Act. To use Rule 462, a foreign government issuer would have to have registered an offering under the Securities Act within the three most recent years.

The prior registration requirements would guarantee that some public information would be available before a foreign government issuer could rely on the Rule. It also would give the issuer an opportunity to become comfortable with the registration process and disclosure standards of the federal securities laws.

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[242] Securities Act Release No. 6902 (June 21, 1991) [56 FR 30036].

[243] Generally, the transactions permitted under the MJDS include: issuance of securities upon exercise of rights offered to existing shareholders; issuance of securities pursuant to an exchange offer or business combination requiring shareholder vote; issuance of investment grade debt or preferred securities; and securities offerings by larger issuers.

[244] Issuer exchange offers do not require a minimum public float.

[245] That float test is not applicable for offerings of non-convertible investment grade securities.

[246] When the Commission last revised the public float thresholds in the MJDS, we specifically noted that the MJDS public float test was meant to parallel the Form S–3 public float test. Securities Act Release No. 7025 (Nov. 3, 1993) [58 FR 62028].

[247] The proposed revisions would not add a public float requirement for any transaction registered under the MJDS that does not currently require one.

[248] *See* proposed Securities Act Rule 462(f)(1) and (f)(2), 17 CFR 230.462(f)(1) and 230.462(f)(2).

[249] For a delayed shelf offering, the $250 million would be measured based on what is registered at the outset, not what is offered in any single takedown.

The basis for extending automatic effectiveness to these issuers rests on the concept that offerings by seasoned, well-known issuers attract market, analyst and investor attention and recognition. We believe that most investors and analysts would have familiarity with these foreign governments due to their nature and size. The firm commitment underwritten $250 million offering criteria should ensure that their offering also attract significant market, analyst and investor attention. We believe the prior filing requirement would ensure that these issuers had some experience with registration under the Securities Act. These factors would result, we believe, in the generation and dissemination of current public information about the foreign government issuers and their offerings. In this respect, they would be similar to the classes of issuers to which we would extend Form B. We are therefore proposing that, like Form B issuers, these Schedule B issuers may designate the effectiveness of their registration statements.

We seek comment on this proposal. Should we raise the proposed effectiveness rule's offering threshold to something around $500 million or lower it to something around $150 million? Should we require that a foreign government issuer have registered an offering under the Securities Act within 5 years rather than within three years? Should we allow any filing by a foreign sovereign government issuer, other than its initial registered offering, to be effective immediately upon filing? Should other non-financial factors affect the foreign government issuer's ability to designate the effectiveness of its registration statement?

H. Exxon Capital Transactions

If the Commission decides to adopt these proposals, the staff of the Division of Corporation Finance would repeal the line of interpretive letters concerning *Exxon Capital* exchange offers.[250] These interpretive letters allow issuers to sell certain securities in a private offering and shortly thereafter register an offering of substantially identical securities in exchange for those securities privately placed. Issuers use this procedure, in part, because it allows them to avoid the delay associated with registration. Since July 1, 1998, more than one-third of all initial public offerings have been *Exxon Capital* exchanges.

Under these interpretive letters, investors that participate in the exchange may resell their new securities without complying with registration or prospectus delivery requirements of the Securities Act. Prior to these letters, privately placed securities could be registered only for resale, which provides investors with the protection of prospectus delivery requirements and subjects the sellers to the liability provisions of Sections 12(a)(2) and 17(a) of the Securities Act and, if deemed underwriters, Section 11 of the Securities Act.[251]

These proposals would create a registration system that captures the speed and flexibility associated with private offerings while retaining the benefits of registration for investors. Private placements would no longer be an issuer's main choice when needing to complete an offering quickly. Delays commonly associated with registration would no longer exist for Form B issuers and for medium size Form A issuers. Their registration statements would not be subject to prior staff review. Moreover, if such an issuer chooses, its registration statement could be effective upon filing.

The proposed registration system does not exclude the small issuer from these benefits. Small issuers that do not meet the public float requirement of Form B or the float level on Form A to allow control over effectiveness would be able to use Form B to register an offering if they sell only to QIBs. Given the nature of the purchasers contemplated in the *Exxon Capital* line of letters, allowing small issuers to register sales to QIBs on Form B would allow those issuers much of the same flexibility the *Exxon Capital* structure gives them today.

Elimination of this line of interpretive letters would eliminate the ability of these smaller issuers to rely on the *Exxon Capital* line of interpretive letters for sales to non-QIBs. This limitation seems appropriate, as it aligns with our views regarding registered offerings by these issuers to QIBs and the need for additional protections for non-QIBs in offerings by these smaller issuers. Accordingly, we concur with the belief of the Division of Corporation Finance that the *Exxon Capital* line of interpretive letters should be repealed upon adoption of reforms to the registration system. Comment is solicited with regard to whether the *Exxon Capital* line of letters should be repealed sooner or regardless of whether any reform to the registration statement is adopted.

I. The Offset of Filing Fees and Other Technical Changes to the Calculation of Filing Fees

In 1995, the Commission expanded Rule 429[252] to provide a mechanism for issuers to offset the payment of a registration statement filing fee with fees that were previously paid.[253] 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 registered on an earlier registration statement. Once a filing fee has been used as an offset, those unsold securities on the earlier registration statement are deemed deregistered. This change has proved to be beneficial to issuers.

Rule 429, however, also provides for the use of a combined prospectus for multiple offerings. At times, the combination of fee offset procedures and combined prospectus procedures in the same rule has resulted in confusion as to whether an issuer is offsetting fees or is combining prospectuses. To avoid that confusion, we propose to move the fee offset procedures into Rule 457, which currently deals with fee payment.[254]

We also propose revisions to the fee offset procedures to allow issuers to offset filing fees on more occasions. Currently, fee offset is not possible if the issuer withdraws the earlier registration statement. Under the proposals, we would allow issuers to offset a registration statement filing fee in the same manner regardless of whether it withdraws the registration statement. To assist the Commission in tracking the payment of filing fees and allow for more accurate estimates of future filing fee payments, the proposals would provide that any offset must occur within five years of the completion or termination of the initial registration statement.

We also are proposing to amend Rule 457 to codify certain staff interpretations as follows:

(i) No additional filing fee would be required to be paid for a resale offering of securities, where such securities were received and a filing fee was paid, in connection with a registered offering involving an exchange, reclassification or recapitalization;[255]

[250] *See, e.g., Exxon Capital Holdings Corp.* (May 13, 1988); *Morgan Stanley & Co. Inc.* (Mar. 27, 1991); *Mary Kay Cosmetics, Inc.* (June 5, 1991); *Shearman & Sterling* (July 2, 1993); *Brown & Wood LLP* (Feb. 5, 1997).

[251] The basic premise underlying the *Exxon Capital* line of interpretive letters is that the securities exchanged in reliance on those letters would remain in the institutional investor secondary market.

[252] 17 CFR 230.429.

[253] Securities Act Release No. 7168 (May 11, 1995).

[254] *See* proposed Rule 457(p), 17 CFR 230.457(p).

[255] *See* proposed Rule 457(f)(5), 17 CFR 230.457(f)(5).

(ii) We would not require payment of a filing fee for the registration of an indeterminate amount of securities to be offered solely for market making purposes by an affiliate of the issuer;[256] and

(iii) In offerings by selling security holders, the issuer may calculate the filing fee using the total aggregate dollar amount to be offered, rather than setting forth the number of securities and information based on that just as in offerings where issuers are selling.[257]

J. Solicitation of Comments Regarding Offerings of Asset-Backed Securities Offerings

Currently, issuers (*i.e.*, trusts or other limited purpose entities) and registrants (*i.e.*, sponsors, servicers or depositors) may register an offering of investment grade asset-backed securities on Form S–3 whether or not they are subject to the Exchange Act's reporting requirements. Form S–3 does not require an issuer or registrant of investment grade asset-backed securities to have been reporting under the Exchange Act because asset-backed securities are valued primarily on the pool of assets chosen, not on an issuer or registrant's limited operations.[258] Moreover, historical Exchange Act reports filed by the issuer or registrant of asset-backed securities generally are viewed as of little assistance to investors since such reports would reflect the results of a different pool of assets than those backing the securities being offered. Investors of asset-backed securities often look to a nationally recognized statistical rating organization's (NRSRO) ratings when making their investment decisions.

As proposed, neither Form B nor Form A is designated for use in registering offerings of asset-backed securities.[259] The Commission staff is engaged in an ongoing project to consider development of disclosure and registration requirements specifically related to asset-backed securities. The Commission staff intends to develop proposals with respect to asset-backed securities offerings in connection with that project. To gather more information, we solicit comment about the treatment of these types of offerings in relation to the proposals in this release.

Overall, should treatment of asset-backed securities offerings be the same as or similar to treatment of Form A offerings or Form B offerings? Should we continue to distinguish asset-backed securities on the basis of whether or not they are investment grade securities? Should offerings of investment grade asset-backed securities be treated more like Form B offerings and other asset-backed securities offerings be treated more like Form A offerings? Should we require that one or more NRSROs have rated the securities?

Should the Commission give registrants in some asset-backed offerings greater freedom to craft disclosure about the offering without binding them to all of the itemized disclosure in Regulation S–K? If so, how should the mandated items differ from the ones mandated in Form B? Should the Commission craft a separate regulation setting forth mandated asset-backed offering disclosure items? Should communications restrictions applicable before filing a registration statement and during the registration process be more akin to those applicable to offerings on Form A, Form B or neither?

Should the Commission preserve staff review for all asset-backed offerings or are there categories of such offerings that the Commission need not review for the purpose of investor protection? Should the Commission allow the registrant to control effectiveness in any category of asset-backed offerings? Should delivery requirements with respect to asset-backed offerings resemble delivery obligations of Form A offerings, Form B offerings or neither?

VI. Concurrent Exchange Act Registration

We are proposing to permit an issuer to register concurrently both an offering under the Securities Act and a class of securities under the Exchange Act on Form A, Form B, Form C, Form SB–1, Form SB–2, Form SB–3 and Schedule B.[260] A reporting company can register a class of securities under the Exchange Act on a short-form registration statement: Form 8–A.[261] Form 8–A requires a description of the registrant's securities and the filing as exhibits of documents defining the rights of security holders.[262] Current rules require companies that are registering both an offering of securities under the Securities Act and a class of securities under the Exchange Act to file two forms: the Securities Act registration statement and the Form 8–A. Because the proposed Securities Act forms should contain all of the necessary information, we propose to eliminate the Form 8–A filing requirement when the registrant files one of those Securities Act registration statements at that time.[263]

To allow concurrent registration, those registration Forms would have boxes on the facing page for registrants to check to indicate that Exchange Act registration should be concurrent. The registrant would include the title of the class of securities to be registered and the exchange or market on which the securities are to be listed or traded. We also are proposing a new rule to permit foreign governments and their political subdivisions that register securities offerings on Schedule B to register concurrently under the Exchange Act.[264] If these issuers seek concurrent Exchange Act registration, they must include the same paragraph and table on the facing page of their Schedule B registration statements that appear on the Securities Act registration statements for which we will have adopted forms.

We request comment on these concurrent registration proposals. Are there offerings for which concurrent registration should not be available because the securities description in the Securities Act registration statement would not be adequate?[265]

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[256] *See* proposed Rule 457(q), 17 CFR 230.457(q).

[257] *See* proposed Rule 457(o), 17 CFR 230.457(o).

[258] *See* Securities Act Release 6964 (October 22, 1992) [57 FR 56248].

[259] Form S–3 has permitted the registration of investment grade asset-backed securities since 1992. *See* Securities Act Release No. 6964 (Oct. 22, 1992).

[260] The Commission's Task Force recommended concurrent registration in its Report. Task Force Report at p. 86. We first proposed concurrent registration in May 1996 as part of the Phase Two proposals to implement certain recommendations contained in the Report. Exchange Act Release No. 37263 (May 31, 1996) [61 FR 30405]. When we adopted several of the Phase Two proposals in July 1997, we indicated that we would continue to consider the matter in our efforts to streamline the registration process. Exchange Act Release No. 38850 (July 18, 1997) [62 FR 39755]. That release adopted a companion proposal which revised Rule 12d1–2, 17 CFR 240.12d1–2, to permit automatic effectiveness of the Form 8–A as of the effective time of the Securities Act registration statement relating to the same class of securities. We continue to believe that concurrent registration would be beneficial for registrants and are now reproposing it. *See* proposed Exchange Act Rule 12d1–2, 17 CFR 240.12d1–2.

[261] We also permit an issuer registering an initial public offering to use Form 8–A even though it is not a reporting company until after effectiveness of the Securities Act registration statement.

[262] The securities description must provide the information called for by either Item 202 of Regulation S–K or Regulation S–B, as applicable, 17 CFR 229.202 and 17 CFR 228.202. An issuer can incorporate by reference into Form 8–A information that is contained in other filings made with the Commission.

[263] We also propose a revision to clarify that Form 8–A is available for reporting companies only if they are current in their reporting. *See* proposed revisions to General Instruction A of Form 8–A.

[264] *See* proposed Securities Act Rule 499, 17 CFR 230.499.

[265] In the 1996 proposing release, we did not propose to allow concurrent registration for

Continued

VII. Communications During the Offering Process

The Securities Act restricts the types of offering communications that a registrant may use during the time it is engaged in a registered public offering of its securities.[266] The level of restrictions depends on the period during which the communications occur. The Securities Act creates three distinct periods in the registered offering process. The first period occurs before a registrant files a registration statement with the Commission and is commonly called the ''pre-filing period.'' The second period starts with the filing of the registration statement and ends with the effectiveness of that registration statement and is commonly called the ''waiting period.'' The third period follows the effective date of the registration statement. That period is commonly called the ''post-effective period.''

During the pre-filing period, the Securities Act prohibits the registrant from making any interstate offers or sales of the securities.[267] During the waiting period, the registrant may make certain types of offers (but not sales). Offers made in writing, by radio or by television must conform to the information requirements of Section 10 of the Securities Act. Thus, the Securities Act prohibits the use of supplemental sales literature (''free writing'') during the waiting period. Generally, issuers and underwriters make written offers during the waiting period by means of a preliminary prospectus which must be filed with the Commission. Person-to-person oral offers also are allowed during this period and, unlike widely disseminated communications such as radio or television broadcasts, do not have to satisfy the informational requirements of Section 10. During the post-effective period, the registrant may use any materials to offer the securities [268] but only if it delivers the final prospectus before or with those materials.[269] It also may sell the securities.

Congress designed these limitations so that the prospectus would be the primary means for investors to obtain information during the waiting period regarding an offering of securities. Congress' goal was to prevent high pressure sales practices and to provide investors with an opportunity to become familiar with the investment being offered.[270] In fact, the Securities Act originally prohibited both oral and written offers during the waiting period.[271] While that prohibition succeeded in limiting high pressure sales practices, it also limited the time in which investors could become familiar with the investment so as to make an unhurried decision regarding the merits of the securities.[272] That limitation ultimately was revised by Congress in 1954 in favor of permitting certain offers during the waiting period.[273]

The statutory regulation of communications during the pre-filing and waiting periods has not changed since those 1954 amendments. Our capital markets, however, have changed significantly. For example, there have been major advancements in technology and communication media since 1954. There have been many more offerings of increasingly complex and synthetic or hybrid securities. The trends towards globalization of securities markets and multinationalization of issuers and offerings have continued. Among others, these changes have increasingly created conflicts between communications mechanisms to which markets have become accustomed and the restrictions placed by the Securities Act on communications around the time of a registered offering.

The Commission continues to believe that the Securities Act goals of preventing high pressure sales practices and providing investors with the time and opportunity to familiarize themselves with investment opportunities continue to be important today. We believe, however, that the means by which to effectuate those goals can be shaped to facilitate capital formation better and to provide more information on a more timely basis to investors. We do not believe it is appropriate to unnecessarily hinder communications when allowing them would provide benefits to investors and issuers as well as reflect current practices and realities.

A. Issuer Communications Relating to a Registered Offering

1. The Pre-Filing Period

a. Form B Registrants

Today, the largest public companies are followed by numerous analysts that actively seek new information on a continual basis.[274] Unlike smaller and less mature companies, large public companies tend to have a regular dialogue with investors and market participants through the press and other media. Companies in which there is a wide interest are called upon to release *more* information about their activities more often than is expected of lesser-known companies. The markets also absorb information disclosed about these companies at a rapid rate.[275]

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securities to be offered and sold on a delayed basis under Rule 415(a)(1)(x), 17 CFR 230.415(a)(1)(x), because of concerns about whether an adequate description of the securities would be contained in the Exchange Act registration statement.

[266] Those acting on behalf of the registrant (such as an underwriter) are subject to the same restrictions as the registrant.

[267] Securities Act Rule 135, 17 CFR 230.135, allows an issuer to notify the public of a proposed offering as long as the contents of the notice do not exceed the limited items specified in the rule.

[268] These materials are still subject, of course, to the antifraud and civil liability provisions of the statute.

[269] Final prospectuses must satisfy the informational requirements of Section 10(a) of the Securities Act.

[270] H.R. Rep. No. 85, 73rd Cong., 1st Sess. 3 (1933).

[271] Section 2(a)(3) of the Securities Act originally made no distinction between offers and sales. The term sale was defined to include any: ''offer to sell,'' ''offer for sale,'' ''attempt or offer to dispose of, or solicitation of an offer to buy.'' Consequently, Section 5(a) of the Securities Act prohibited at that time both interstate offers and sales of securities before a registration statement became effective. *See also* S. Report No. 1036, 83rd Cong. 2d Sess. 4 (1954).

[272] *Hearings on S. 2846 Before the Subcomm. of the Senate Comm. on Banking and Currency*, 83rd Cong., 2d Sess. 23 (1954) (statement of Ralph H. Demmler, Chairman of the Securities and Exchange Commission). The regulators soon realized the importance of providing investors with information during the waiting period. The Federal Trade Commission (which administered the Securities Act before the creation of the Commission in 1934) published its view in 1933 that it was permissible for issuers and underwriters to disseminate circulars during the waiting period if they described a security in the same manner a Section 10 prospectus would. *See* Securities Act Release No. 70 (Nov. 6, 1933) [11 FR 10948]; Securities Act Release No. 464 (Aug. 19, 1935) [11 FR 10953]. In 1946, the Commission adopted Rule 131, 17 CFR 230.131, which expressly permitted the use of a preliminary prospectus or ''red herring.'' *See* Securities Act Release No. 3177 (Dec. 6, 1946) [11 FR 14260]. *See also* Securities Act Rules 430 and 430A, 17 CFR 230.430 and 230.430A.

[273] The 1954 amendments were intended to codify practices with regard to communications during the waiting period and finally resolve concerns that dissemination of preliminary information during the waiting period would breach the prohibition against offers. *See Hearings Before the H.R. Comm. on Interstate and Foreign Commerce*, 83rd Cong., 1st Sess. 66 (1953) (statement of Richard B. McEntire, Commissioner of the Securities and Exchange Commission). *See also* H.R. Rep. No. 1542, 83rd Cong., 2d Sess. 7 (1954).

[274] For example, companies with a $250 million or higher market capitalization have, on average, 15 research analyst firms following them.

[275] A staff study on the market's absorption of information found that the speed of price discovery is positively associated with companies' market capitalizations, public floats and ADTVs. The staff found that combination tests of ADTV and either public float or market capitalization are more closely associated with the speed of price discovery than tests of only public float, only market capitalization or only ADTV. *See* Eligibility Requirements for Firms Receiving Preferred Registration Status in the Registration and Disclosure Reform Proposal (April 30, 1997).

Technological innovations that permit instantaneous communications are a driving force behind this decade's securities market.

Given the abundance of readily accessible information about large, seasoned public companies, any communications made by them while in the process of registering an offering are less likely to have a significant impact by conditioning the market or stimulating interest in a proposed offering.[276] Accordingly, we are proposing to remove the restrictions on offering communications by those companies during the pre-filing period.[277] We are proposing an exemption to provide that offers may be made in the pre-filing period.[278]

For a large, seasoned company to rely on the proposed exemption for any offering, it must have filed all of its periodic reports under the Exchange Act for at least one year on a timely basis and have filed at least one annual report. It also must have either:

1. A public float with a market value of at least $250 million; or

2. A public float with a market value of at least $75 million and the average daily trading volume for its equity shares of at least $1 million.

These mirror the eligibility criteria for Form B registration by large well-followed issuers discussed earlier.

The proposed registration system also contemplates use of Form B for offerings by smaller issuers that do not meet Form B's public float and ADTV eligibility tests. Those offerings would be limited to: offerings solely to QIBs;[279] offerings to certain existing shareholders;[280] offerings of investment grade securities; offerings of certain investment grade asset-backed securities; and offerings in connection with market making transactions. We propose to treat these Form B issuers in the same manner as we would treat large seasoned issuers that would register their offerings on Form B. Accordingly, their ability to offer registered securities also would not be contingent on the prior filing of the registration statement for the offering.[281]

These offerings would be directed mainly to existing shareholders of the issuer, such as under a DRIP, or to investors that, because of their status, have unique access to information about the issuer, such as a QIB. Offerees that have an existing connection with, or a prior investment in, the issuer could be presumed to follow the issuer in order to monitor their investment. [282]

In the case of DRIPs, the participant already has made an investment decision about the issuer—to participate in the DRIP—thus, the investor would be likely to obtain information about the issuer both on its own and from the issuer. We believe the investors in these Form B offerings, due to their experience or nature, would be less susceptible than other investors to pre-filing hype about a new offering by the issuer.[283] Thus, the investor protection concerns that are associated with the prohibition against offers before the registration statement is filed are lessened.

Similarly, investors that are able to obtain information because they are able to influence the issuer to provide them with it, such as QIBs, may not need the protections that would flow from a prohibition of pre-filing communications. If an issuer makes statements about an upcoming offering before it files its Form B for the offering, the QIB is more likely than other investors to be in a position to insist that the issuer explain any information the issuer disseminated before filing. It also would be sophisticated enough to recognize the value of waiting until it has a prospectus before making an investment decision.

Moreover, the free communications proposal would not extend to any issuer that had not previously registered with the Commission. We also would require that the issuer be reporting in a timely manner for at least the one year before filing an offering on Form B. The reporting requirements would serve the purpose of ensuring that material information about the issuer would be publicly available. An investor could use that, and whatever other information it may gather, to gauge any communications by the issuer before the registration statement filing.

We solicit comment on the proposal to allow Form B registrants to communicate freely before filing a registration statement. Is Form B the proper standard or should the treatment be limited only to some subset of Form B offerings, such as those meeting the public float/ADTV tests? For these purposes, should a minimum average daily trading volume also be required for companies with a public float of at least $250 million? Should companies be subject to the reporting requirements for a longer period of time, such as two years?

Does the likelihood of market conditioning based on pre-filing communications depend upon the security being issued or the transaction being registered? Does the likelihood of market conditioning depend on the trading market for the securities? If so, should the issuer's trading market be an element of the test for when pre-filing communications restrictions are lifted? Should the nature of the securities offered affect whether pre-filing communications should be restricted in any manner? If offering materials are used before filing a registration statement, should certain information be required to be disclosed therein?

While Section 5 of the Securities Act prohibits both offers to sell and solicitations of offers to buy a security before a registration statement is filed, Section 2(a)(3) of the Act exempts preliminary negotiations or agreements between the issuer and any underwriter, and among underwriters. During that period, negotiation of the financing may proceed, but steps may not be taken to form a selling group. Dealers may not make offers to buy the securities and underwriters and issuers may not offer to sell them to dealers during that period. Congress created this limitation in part to limit the pressure it believed could be brought to bear on dealers to rush their orders.[284] Congress also expressed its concern that market participants would overstimulate the demand for a company's securities and then pressure that company to issue

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[276] The Commission has long interpreted ''offer to sell'' broadly to encompass pre-filing publicity efforts that may not be phrased expressly in terms of an offer but condition the market or stimulate interest in the offering. *See* In the Matter of Loeb, Rhodes & Co., 38 SEC 843 (1959) and In the Matter of First Maine Corp., 38 SEC 882 (1959).

[277] Rules 101 and 102 of Regulation M, 17 CFR 242.101 and 242.102, would continue to prohibit inducements to purchase securities that are the subject of a distribution during any applicable restricted period.

[278] *See* proposed Securities Act Rule 166, 17 CFR 230.166. Prospectuses used in reliance on this Rule during the period beginning 15 days before the first offer and ending with the offering completion would be filed under proposed Rule 425, 17 CFR 230.425.

[279] *See* Securities Act Rule 144A(a)(1), 17 CFR 230.144A(a)(1).

[280] We propose that Form B allow registration of five kinds of offerings to existing shareholders, including: offerings of securities upon exercise of rights or conversion of convertible securities; offerings pursuant to dividend or interest reinvestment plans; offerings to existing common stock holders; and offerings of securities issuable upon exercise of transferable warrants or options. These offerings, and why we propose they be registered on Form B, are discussed in more detail in Section V.A.2.c. of this release.

[281] *See* proposed Securities Act Rule 166(a), 17 CFR 230.166(a).

[282] *See* General Instruction I.B.4. of Form S–3.

[283] Under the proposed Form B, generally, a small issuer would not be permitted to make offerings to an existing security holder unless the investor held securities of the issuer for at least a two-month period. We set this requirement to ensure that the investor would have adequate time to assess its investment and determine whether to sell, hold or buy the issuer's securities.

[284] *See* H.R. Rep. No. 85, 73rd Cong., 1st Sess. 3 (1933).

such securities.[285] Consequently, Section 5 also prevents all pre-filing marketing of public offerings by underwriters and dealers.

Under our proposal, before the filing of a Form B, dealers could make offers to buy, and issuers and underwriters could make offers to sell to dealers. Underwriters and dealers could market the securities before the filing of the Form B. Comment is requested on these aspects of the communications proposals. In today's markets, could issuers and underwriters unduly pressure dealers to accept an allotment of securities without the opportunity to scrutinize the registration statement? Similarly, could underwriters and dealers unduly pressure corporations to issue securities by marketing a company's securities before the issuer wished it to happen? If so, what other safeguards would protect against undue pressure?

b. Foreign Governments

We also propose to allow a seasoned foreign government issuer to communicate freely before filing a registration statement for an offering of securities that exceeds $250 million and that is underwritten on a firm commitment basis.[286] We would deem a foreign government issuer to be seasoned if one year has passed since the date of effectiveness of its initial public offering.[287] We believe that, generally, there is abundant public information, investor awareness and market following relating to seasoned foreign government issuers that make large public offerings. At and around the time of such an offering, sufficient market coverage appears virtually assured. Therefore, we propose to allow large and seasoned foreign government issuers to freely communicate during the pre-filing period.

Smaller offerings by unseasoned foreign government issuers may not attract significant market attention. Such an issuer should limit its pre-filing communications to avoid situations where the only public information available about the issuer or its offering before it files its registration statement is the information that the issuer disseminated for purposes of the offering. When the catalysts for public dissemination of information from sources like analysts or other securities experts are missing, we believe the best way for us to protect investors is to limit the communications of unseasoned foreign government issuers that make smaller offerings in the same way we would limit the communications of Form A issuers. If a foreign government issuer is registering its initial public offering or is registering an offering of securities that is less than $250 million or that is not being underwritten on a firm commitment basis, the issuer would be subject to the same 30-day limited communications period applicable to Form A registrants.[288] Smaller unseasoned foreign government issuers may rely on safe harbors to make announcements during that period, such as factual business information[289] or Rule 135 offering notices.[290]

c. All Other Registrants

Under existing regulations, not all public communications by an issuer are prohibited before and during a registered offering. The line between communications that are permissible and those that are not, however, is not always easy to perceive. Over the years, the Commission has attempted to address this issue in several releases.

In 1969, the Commission stated that, while a company is ''in registration'': disclosure of a material event would ordinarily not be subject to restrictions under Section 5 of the Securities Act if it is purely factual and does not include predictions or opinions.[291]

The release qualified that guidance, however, by stating that ''[a]lthough the matters discussed herein reflect the policies and practices which the staff of the Commission will follow, they do not represent rules of the Commission. Accordingly, these interpretations are subject to change based on experience in their application. * * *''

Two years later, the Commission published another release on communications.[292] That release stated, in the context of companies refusing to answer legitimate inquiries, that ''the practice of non-disclosure of factual information by a publicly held company on the grounds that it has securities in registration'' [293] is not justified by securities laws or Commission policy. In the same release, however, the Commission indicated that neither a company in registration nor persons acting on its behalf ''should instigate publicity for the purpose of facilitating the sale of securities'' in the offering. The Commission also noted that:

[t]he determination of whether an item of information or publicity could be deemed to constitute an offer—a step in the selling effort—in violation of Section 5 must be made by the issuer in the light of all the facts and circumstances surrounding each case.[294]

Given the generality of the statements made by the Commission through the years, and the difficulty of applying a ''facts and circumstances'' test that will be viewed by others in hindsight, cautious legal counsel today often judge it wiser to advise clients to apply significant restrictions on communications. In practice, they appear reluctant to rely on the Commission's general statement of 30 years ago allowing disclosure of material factual information during the course of a registered offering.[295] In the absence of Commission rules, the Commission's (or the staff's) statements have been viewed as providing only vague, general guidance. Securities law practitioners generally see applying that guidance as a practical problem. Many companies appear to be following the practice of shutting off communications of all types for the sake of eliminating the risk of being questioned about possible illegal offers and experiencing a delay in their offering. Those companies that wish to continue communications face the cost of seeking legal advice and review of virtually any communication during the period.[296]

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[285] *See* H.R. Rep. No. 85, 73rd Cong., 1st Sess. 2 (1933).

[286] We propose the $250 million offering threshold as a proxy for size. The firm commitment underwriting requirement would provide greater assurance that the offering would proceed in an orderly fashion. And underwriting participation in the offering signals greater market interest in the offering and the presence of other investor protections due to the underwriters' gatekeeping function. As with Form B issuers, we believe the seasoning requirement would ensure a certain level of publicly available information.

[287] *See* proposed Securities Act Rule 166(a), 17 CFR 230.166(a).

[288] Proposed Securities Act Rule 167, 17 CFR 230.167, would provide that communications before the beginning of the 30-day period would not, for registration purposes, be deemed to be either an offer to sell or an offer to buy as long as the issuer takes reasonable steps to prevent further public dissemination of the information during the 30-day limited communications period. The rule would apply equally to unseasoned foreign sovereigns and all foreign political subdivisions that must observe the 30-day limited communications period.

[289] *See* proposed Securities Act Rule 169, 17 CFR 230.169.

[290] *See* proposed revisions to Securities Act Rule 135, 17 CFR 230.135.

[291] Securities Act Release No. 5009 (Oct. 7, 1969) [34 FR 16870].

[292] Securities Act Release No. 5180 (Aug. 6, 1971) [36 FR 16506].

[293] The term ''in registration'' was used to mean the time starting before the filing of the registration statement and ending with the date the issuer ''reaches an understanding with a broker-dealer that is to act as managing underwriter until the end of the aftermarket prospectus delivery period applicable to dealers.'' *Id.*

[294] *Id.*

[295] Among other results, issuers sometimes refrain from distributing routine reports to shareholders concerning the company during the quiet period. *See Quiet, Please,* Investor Relations, Dec. 1997, at 49.

[296] For example, the Commission understands that legal counsel have advised issuers that all press

This difficulty of discerning the breadth and length of the limitations on communications is why we are proposing safe harbor rules for registrants other than Form B and Schedule B issuers we discussed above. The safe harbors should help to encourage open communication. Our proposed solution is two-fold.

i. Bright-Line Communications Safe Harbor

The Commission seeks first to address uncertainty about whether communications made long before the filing of a registration statement will be viewed in hindsight as illegal offers. We believe that uncertainty has led to a chilling of issuer communications for a longer period before filing than is necessary for investor protection. The uncertainty also unnecessarily complicates the task of those planning the capital-raising process. We see little benefit to continuing it. We believe the purpose of prohibiting offers before a registration statement is filed, which we discussed above, can be fulfilled without the attendant uncertainty costs.

Accordingly, we propose a safe harbor for all communications made by or on behalf of any issuer that take place during a specified period before it files a registration statement.[297] In offerings registered on Form B, an issuer, and those acting on behalf of the issuer, may freely communicate before the offering period begins (*i.e.*, 15 days in advance of the first offer). For business combinations registered on Forms C, SB–3, F–8, F–80 or F–10 (when F–10 is used in connection with a business combination transaction), the offerors may freely communicate before the first communication related to the offering (except for communications, among the participants in the offering).[298] For all other offerings, an issuer, and those acting on the issuer's behalf, may freely communicate at any time before the 30-day period before the date of filing the registration statement. Under the safe harbor, the issuer, underwriter and participating dealer must take all reasonable steps within their control to prevent further distribution or re-publication of the communication during those periods in which free communication is not permitted. We recognize that once a person makes information public it is no longer in full control over whether others will use that information at a later point in time. For example, an issuer may issue a press release on the 40th day before filing a registration statement on Form A and a monthly magazine that is published on the 29th day before filing may see fit to make reference to it. We would not view it as outside this safe harbor if the magazine published that information on the 29th day through no efforts of, or arrangement with, the issuer. If, however, the CEO or some other representative of the issuer gave an interview on the 40th day before filing without getting assurance that the interview article would not be published during the 30-day period, that communication would be outside the safe harbor.

In addition, if an issuer places information on its Internet web site during a period in which it may freely communicate, we would view it as outside the safe harbor if it fails to remove information from its web site during the limited communications period, if the communication is not covered by one of the other proposed safe harbors discussed below (*e.g.*, for factual business information or regularly released forward-looking information). An issuer may not circumvent the bright-line communications safe harbor by arranging for a third party to disseminate information on its behalf during the limited communications period. For example, if an agent or third party acting on behalf of the issuer posts information on a web site that does not fall within a safe harbor, we would view the posting as outside the bright-line communications safe harbor.[299]

We recognize that there is a risk in creating a bright-line test. Some issuers and underwriters could decide to make all of their selling efforts before the bright-line period when a prospectus is not available. We propose to mitigate that risk through the prospectus delivery requirement (discussed below) that, regardless of when the selling efforts occur, investors will have time to review the balanced, accurate disclosure about the investment.[300] We also mitigate that risk in offerings not registered on Form B and not involving business combinations through the use of a 30-day limited communications period. The 30 days will operate as a ''cooling off'' period with respect to any communications made to investors. We solicit comment, however, regarding whether a longer period, such as 90 days or 60 days or 45 days, would mitigate the risk further while still providing a useful dividing line between communications likely to be undertaken as part of the sales effort and those that serve other purposes. Conversely, would a shorter period of time, such as 20 days, adequately serve that function? Are there other risks or benefits of creating a bright-line test?

Would the condition that all reasonable steps be taken within the 30 days by the issuer, underwriter or dealer to prevent further distribution or re-publication be adequate to ensure that there is a ''cooling off'' period? Should we build in an automatic longer prospectus delivery period before pricing when issuers or others participating in the offering fall outside a safe harbor by communicating during the 30-day period? The proposed safe harbor would cover communications of any sort. Should we provide that the safe harbor does not apply to communications discussing the offering itself? Should we require that offering materials used more than 30 days in advance of filing a registration statement be filed with the Commission in the same way as free writing materials?[301] If so, should we require filing of such information if disseminated within 40, 50 or 60 days before the issuer files its registration statement?

ii. Communications Safe Harbor

While defining the pre-filing period during which these issuers must be concerned about the nature of their communications should help lessen uncertainty, we believe further proposals would do so even more. As the Commission stated almost three decades ago, ''[the] flow of normal corporate news, unrelated to a selling effort for an issue of securities, is natural, desirable and entirely consistent with the objectives of disclosure to the public which underlies

releases, speeches to groups, product advertisements, announcements of developments, responses to inquiries by those who report to the public, changes in advertising policy, and public statements first be cleared by legal counsel during this period.

[297] *See* proposed Securities Act Rule 167, 17 CFR 230.167. The bright line safe harbor would apply only to registered offerings. Accordingly, the safe harbor would not permit issuers to avoid the prohibition on general solicitation when conducting a private offering or avoid the Section 4(2) requirement that the ''transaction not involve any public offering.'' *See* 15 U.S.C. § 77d(2).

[298] For a discussion of other ''free communication'' provisions applicable to business combinations, *see* Exchange Act Release No. 40633 (Nov. 3, 1998).

[299] This position parallels advice we gave regarding third party web site postings in the context of offshore Internet offerings. *See* Securities Act Release No. 7516 (Mar. 23, 1998) [63 FR 14806], Sections III.D. and IV.D.

[300] An issuer could not use the Section 10 prospectus at a point more than 30 days before filing and then fail to file it as part of the registration statement because it is not ''an offer.'' The registration statement would be materially deficient absent the prospectus.

[301] *See* proposed Securities Act Rule 425, 17 CFR 230.425.

the federal securities laws.'' [302] We are proposing therefore to exempt factual business communications from communications restrictions.[303] In addition, in offerings by reporting companies, we propose an exemption from communications restrictions for regularly released forward-looking information.[304] We solicit comment on whether we should extend the limited communications period. Should it be 45, 50, 60 or 90 days in length?

(A) Factual Business Communications

For purposes of these proposals, ''factual business communications'' would include:

—factual information about the issuer or some aspect of its business;
—advertisement of the issuer's products or services;
—factual business or financial developments with respect to the issuer;
—dividend notices;
—factual information required to be set forth in any Exchange Act report the issuer is required to file; and
—factual information communicated in response to unsolicited inquiries from stockholders, analysts, the press and others with a legitimate interest in the issuer's affairs.

Factual business communications would not include information about the registered offering itself or forward-looking information. Information about the offering would continue to be limited to that which is permitted to be published under Securities Act Rule 135.[305]

(B) Regularly Released Forward-Looking Information

We also propose a safe harbor for reporting companies that are accustomed to releasing forward-looking information to the markets so that those communications are not discouraged during the limited communications period 30 days before a registration statement is filed.[306] The safe harbor would exempt the dissemination of that information from the Section 5 restrictions on offers in the pre-filing period if the issuer is subject to the reporting requirements of Section 13(a) of the Exchange Act. In order to come within the safe harbor, the issuer must have customarily released this type of information in its ordinary course of business for the last two fiscal years (and any portion of a fiscal year) immediately before the communication. The time, manner and form in which the information is released must be consistent with past practice.[307] The categories of forward-looking information that would be covered by the safe harbor are:

1. Projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;
2. Statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;
3. Statements about the issuer's future economic performance of the type contemplated by the management's discussion and analysis of financial condition and results of operation described in Item 303 of Regulation S–K or Item 9 of Form 20–F; and
4. Assumptions underlying or relating to any of the information described in paragraphs (1), (2) and (3).[308]

We recognize that projections have historically been viewed as the type of communication that would be particularly troublesome in the period before a registration statement is filed.[309] For that reason, we propose to exclude these statements from the proposed safe harbor for factual business communications. We also, however, wish to encourage, where consistent with investor protection, the voluntary disclosure of forward-looking information. Given its value to investors, analysts, investment advisers and other securities professionals, the release of forward-looking information should not be constrained in circumstances that do not require constraint. Thus, where that information is regularly released by the issuer, we would presume that it is not being released around the time of the offering solely as a method of hyping the securities. Accordingly, we propose the safe harbor.

We solicit comment on the safe harbor for this forward-looking information. Are there other categories of forward-looking information that should be added to the list of exempted communications? Should any of the categories proposed in the exemption be deleted?

(C) Notice of Proposed Offerings

As part of lifting communications restrictions, we propose to merge current Securities Act Rules 135 and 135c.[310] The resulting rule, Rule 135, would provide issuers with a communications safe harbor for limited notice of their proposed offerings or business transactions. We propose to remove the reference found in current Rule 135 that specifically states that issuers may not name the underwriters of its proposed offering in any notice published in reliance on the Rule. The proposed rule clearly pronounces that these notices may not include information beyond the subjects enumerated in the rule. Because the proposed rule does not include a provision that would allow issuers to name their underwriters, their Rule 135 notices may not name their underwriters. We solicit comment as to whether there are reasons to retain the specific prohibitions in the rule.

New Rule 135 would not require issuers to announce whether the offering would be public or private. Consequently, an issuer would not have to commit early on whether it is planning a registered or exempt offering. Thus an issuer may find more flexibility in assessing market demand through publication of the Rule 135 notice. Proposed Rule 135 also would provide specifically that an issuer may issue a statement to correct inaccurate accounts or misstatements about its offering. An issuer's correction may not, however, include more information than would be needed to remedy the inaccuracy.

2. Communications During the Waiting Period

Restrictions on communications during the waiting period differ according to the form the communication takes. During the waiting period, oral offers may be made without content restrictions other than due to liability concerns. Written offers, however, must have Section 10 contents or they cannot be used. This distinction

[302] Securities Act Release No. 5009 (Oct. 7, 1969).

[303] *See* proposed Securities Act Rule 169, 17 CFR 230.169.

[304] *See* proposed Securities Act Rule 168, 17 CFR 230.168.

[305] We propose to revise Rule 135, 17 CFR 230.135, to permit issuers to use it whether they plan to make a registered or private offering. *See* Section VII.A.1.c.ii.(C) of this release for a discussion of the proposed revisions to Rule 135.

[306] *See* proposed Securities Act Rule 168, 17 CFR 230.168.

[307] This information generally would have to be filed with the Commission under proposed Securities Act Rule 425, 17 CFR 230.425.

[308] These are essentially the same categories of statements that are defined as forward looking statements under Securities Act Section 27A(i)(1). In light of the offering context, we omitted the category of ''statements by an underwriter or participating dealer assessing any of the itemized information.''

[309] Until the 1970s, the Commission prohibited disclosure of forward-looking information. In 1979, the Commission adopted a safe harbor for release of forward-looking information. *See* Securities Act Release No. 5362 (Feb. 2, 1973) [38 FR 7220]; Securities Act Release No. 6084 (June 25, 1979) [44 FR 38810]; *see also* Wheat Report, *supra* note 11, at 94; Securities Act Release No. 5180 (Aug. 16, 1971).

[310] *See* proposed revisions to Securities Act Rule 135, 17 CFR 230.135.

appears to do little to enhance investor protection or facilitate the capital formation process. One can argue that it creates an incentive for issuers and underwriters to omit information or to provide it in a manner that is not readily available to investors for later reference. For instance, sellers may choose to omit matters that are not easily understood orally, or they may present that information orally anyway despite the risk that investors will have a less than perfect understanding of it. Issuers and their agents are known to deliberately provide some information during the waiting period only orally, and also limit the audience to avoid those communications being considered broadcasted. Perhaps the best example of how this current regulatory structure negatively affect investors is the ''road show'' structure. It is common for issuers and underwriters to conduct ''road show'' presentations during the waiting period for selected broker-dealers and large institutional investors. While these road shows are valuable to some investors because they provide a forum for investors' questions, their value is curtailed because of the limited audience invited to attend and the fact that issuers and underwriters do not allow participants to retain materials used during the presentation (other than the preliminary prospectus). These restrictions raise concerns regarding selective disclosure of material information. They also raise concerns about whether investors have been informed as well as they might have been absent those restrictions.[311]

We believe that the waiting period should be a time of open dialogue between the registrant and its potential investors, provided that the registrant is accountable for the accuracy and completeness of its communications. The medium in which disclosure is made should not be dictated by the regulatory structure but, rather, by the needs of investors.

Under the proposal, we would allow companies to make offers and disseminate offering information during the waiting period in any form without each communication having to meet the informational requirements of Section 10.[312] This would permit issuers to prepare presentations and disclose information in a variety of formats, available to all investors. [313] Through these changes, the Commission seeks to have sellers augment the information available to investors and thereby enhance investors' knowledge of the company and its securities.[314]

Our communications proposals logically contemplate that larger seasoned issuers, including issuers eligible to use Form B and larger, seasoned foreign government issuers, that would have no pre-filing communications restrictions would also be able to freely communicate after filing a registration statement.[315] While generally there may be very limited post-filing marketing periods for these issuers because no registration statement need be filed until the time of sale, some may choose to file earlier. Proposed Rule 165 therefore would permit those issuers to engage in post-filing free writing if they:

1. Comply with the preliminary prospectus delivery requirements in proposed Rule 172;

2. File free writing materials under proposed Rule 425; and

3. File a final prospectus meeting the requirements of Section 10(a) before the first sale.

Smaller issuers that would be likely to market the securities during the waiting period may also engage in post-filing free writing under the same proposed conditions. All free writing materials and term sheets, whether used by large or small issuers, would have to include a prominent legend advising investors to read the other disclosure documents filed with the Commission before making an investment decision. The legend also would describe how the investor could get copies of this information for free from the Commission's web site and explain which documents an investor could get for free from the issuer.[316] Although free writing material would be required to be filed, it would not be required to be delivered. We believe that the filing requirement enhances investor protection by reducing selective disclosure. For example, road show materials not generally available to individual investors today would be available to the broader market on a real-time basis after the registration statement is filed.[317] We solicit comment as to whether investors would have an increased analytical burden in collecting and evaluating various free writing materials.

In light of the free writing that would be granted by the proposed rules, we propose to revise Securities Act Rule 134 to narrow its application to investment companies. The Rule 134 safe harbor would not be needed by other issuers. The proposed Rule 134 amendments would not make substantive changes to the content of the Rule.[318] We are, however, revising the Rule to make it more understandable. For example, the legends informing investors how to obtain more complete information about a fund would be simplified and combined into one legend. The amendments also would clarify that an investment company may identify its secretary, treasurer and any vice-president, in addition to its president, in a Rule 134 advertisement.[319] Finally, to reflect changes made by NSMIA, legend text referring to state registration of securities would be deleted.[320]

We request comment regarding whether a legend substantially similar to that required to appear in Rule 482 advertisements used with a profile should be required for Rule 134 advertisements that are used with a

[311] *See, e.g.*, Pratt, *The IPO Information Gap; Retail Investors are Always the Last to Know as Institutions Get Key Data Despite SEC Ban*, Investment Dealers' Digest, May 18, 1992, at 14. *See also* Seely, *In I.P.O.'s, the More Data the Better*, N.Y. Times, April 26, 1992, § 3, at 13, col. 2.

[312] *See* proposed Securities Act Rule 165, 17 CFR 230.165. Any prospectus disseminated in reliance on this Rule would be subject to Section 12(a)(2) of the Securities Act and would be filed under proposed Securities Act Rule 425, 17 CFR 230.425.

[313] For example, the Division of Corporation Finance has issued a line of no-action letters that permitted issuers and underwriters to conduct road show presentations over the Internet and through other electronic media. Access to these road shows presentations, however, has been restricted by the sponsor to institutional investors, investment advisers, broker-dealers, security analysts and others that customarily would attend the live presentation. *See* Staff no-action letters *Private Financial Network* (Mar. 12, 1997); *Net Roadshow, Inc.* (July 23, 1997); and *Bloomberg L.P.* (Oct. 22, 1997). We request comment on whether video road shows should be deemed free writing and therefore would be required to be filed under these proposals.

[314] The proposals also include modifications to various rules as a result of the restrictions on offering communications being lifted. Securities Act Rule 431, 17 CFR 230.431, permits an issuer that has been subject to the reporting requirements of the Exchange Act for more than 36 months to distribute a summary prospectus after it has filed the related registration statement. Our proposal to permit the use of ''free writing'' materials during the waiting period for all issuers would allow issuers to create and use summary prospectuses without complying with the strictures of Rule 431. Accordingly, we are proposing to eliminate Rule 431.

[315] *See* proposed Securities Act Rule 165, 17 CFR 230.165.

[316] *See* proposed revisions to Securities Act Rule 421, 17 CFR 230.421.

[317] For Form B offerings, road show materials used before the registration statement is filed would not be required to be filed until the registration statement is.

[318] We noted in our release adopting amendments to Form N–1A that we intend to re-evaluate fund advertising rules in the future. *See* Investment Company Act Release No. 23064 (Mar. 23, 1998) [68 FR 13916, 13936].

[319] *See* paragraph (a)(3)(ii) and (a)(3)(x) of the proposed amendments to Securities Act Rule 134, 17 CFR 230.134.

[320] NSMIA, Section 102(a) (exempting certain securities offerings from state regulation).

profile.[321] Are funds likely to use Rule 134 advertisements with a profile? Should such disclosure be permissive or mandatory?

B. Filing Under EDGAR

Communications filed under Rule 425 would be filed electronically, via the EDGAR system, to the same extent that the registration statements to which the communications relate are required to be filed under EDGAR.[322] In some cases, issuers may wish to communicate with investors through multimedia prospectuses. These multimedia prospectuses may be presented in the form of videos, CD–ROMs, streamed video or audio files that can be played over the Internet. Currently, EDGAR is not able to accept multimedia prospectuses. Instead, companies using multimedia prospectuses file a transcript of the material on EDGAR.[323]

We have awarded a contract to modernize EDGAR, which will enable filers to enhance the appearance of their documents by using graphics and different fonts. The system, however, may not be able to accommodate multimedia materials. We are considering whether some of these media could be included in the new system. Some of the factors we are considering include: security; development and maintenance costs of a system that will accept these media; costs of database storage; how these materials should be disseminated to the public; whether investors would have as ready access to these materials as to the current electronic filings; how to meet the archival requirements for storage of electronic documents; wide divergence in industry standards for most multi-media formats; how to assure that filed documents continue to be readable in the future, since applications that can present these media may change or even disappear over time.

If at adoption EDGAR is unable to accept multimedia prospectuses, we would require that a transcript of the presentation be filed.[324] Additionally, we would require that the issuer file five copies of the multimedia prospectus in the form used, so that we may make it available through our public reference rooms. We solicit comment on this approach and alternative approaches to the dissemination of multimedia prospectuses. For example, rather than have the issuer file five copies of the multimedia prospectus, should we require that the issuer include an address in the transcript where the multimedia prospectus can be obtained in its original form? Should we require that a summary of the multimedia prospectus be filed through EDGAR instead of a transcript?

C. Technology Implications of the Communications Proposals

The proposed communications rules would enable issuers and market participants to take significantly greater advantage of the Internet and other electronic media to communicate and deliver information to investors.[325] Most notably, the proposals would permit all issuers, underwriters and their representatives to communicate during the waiting period with potential investors without having to conform their communications to the informational requirements of Section 10 of the Securities Act.[326] Accordingly, after filing a registration statement, any issuer or underwriter could take full advantage of innovative media technology in stylizing its free writing materials. In that period, issuers and underwriters could use the Internet and other electronic media to, among other things:

- Conduct electronic roadshows to institutional and retail investors without the use of password protection;
- Use electronic mail to answer investors questions about the company and its offering; and
- Conduct ''chat room'' discussions or post messages on bulletin boards about its offering with potential investors.[327]

For offerings registered by well-followed, large issuers on Form B, the issuers and underwriters could use the Internet and other media for those purposes both before and after filing a registration statement.[328] The ability to communicate before filing would allow issuers to use the Internet and other electronic media to determine investors' interest in a proposed public offering well before committing significant resources to its completion.

The 30-day bright-line test would help smaller companies that have been concerned about when in relation to an offering they should monitor or limit their Internet use. They would know they have freedom to disseminate information on it at any time except during the 30 days just before filing their registration statements.[329]

The proposed safe harbor for factual business communications made within the 30 days before filing a registration statement would provide smaller issuers with more certainty when determining what information may be posted on their Internet Web sites during those 30 days.[330]

Proposed Form B also would provide issuers with more flexibility in crafting transactional disclosure in their prospectuses. This additional flexibility also should allow issuers to take greater advantage of innovations in media technology.

The Commission also is proposing to require issuers to identify their web site addresses and provide an e-mail contact on the cover page of every registration statement under the Securities Act. This requirement would make this information more accessible to investors, as well as ease investors' electronic communications with companies.

D. Research Reports [331]

Investors acquire useful information regarding companies from sources other than Commission-mandated disclosure. One such source is analysts' research reports. As the Commission has long acknowledged and the Supreme Court recognized in *Dirks* v. *SEC*,[332] analysts

[321] Rule 482(a)(3)(ii), 17 CFR 230.482(a)(3)(ii), requires Rule 482 advertisements that are used with a profile under Rule 498 (''Profile'') to include a conspicuous statement that indicates that information is available in the Profile about the investment company, the procedures for investing in the investment company and the availability of the investment company's prospectus.

[322] Foreign private issuers are not required to file on EDGAR.

[323] *See* Rule 304 of Regulation S–T, 17 CFR 232.304.

[324] Like today, issuers also would have to include a fair and accurate description of any graphical information presented that otherwise is not disclosed in the transcript.

[325] In October 1995, the Commission published its first interpretive release regarding the use of electronic media. At that time, the Commission noted its belief that the use of electronic media ''enhances the efficiency of the securities markets by allowing for the rapid dissemination of information to investors and financial markets.'' Securities Act Release No. 7233 (Oct. 5, 1995) [60 FR 53458]. The procedural requirements discussed in that release regarding notice, access and evidence of delivery would continue to be applicable under the proposed system. *See also* Securities Act Release No. 7288 (May 9, 1996) [61 FR 24644]. More recently, the Commission has provided additional guidance with regard to the use of Internet web sites in the offering of securities offshore. *See* Securities Act Release No. 7516 (Mar. 23, 1998).

[326] *See* proposed Rule 165, 17 CFR 230.165.

[327] In the near future, the Commission intends to address specific technological issues that arise in the offering process. These issues exist under the current offering framework as well as the framework proposed in this release. Further guidance on these activities may be provided in that release.

[328] *See* proposed Rule 166, 17 CFR 230.166.

[329] *See* proposed Rule 167, 17 CFR 230.167.

[330] *See* proposed Rule 169, 17 CFR 230.169.

[331] For convenience, we use the terms ''research reports'' and ''reports'' in this section to cover not only formal reports published by analysts but also the broad range of analyst communications about issuers, whether or not formalized in a report. Rules 137, 138 and 139, 17 CFR 230.137, 230.138 and 230.139, refer to publication of ''information, opinions or recommendations.'' For purposes of this release we use the term ''research'' generically to cover all of those.

[332] 463 U.S. 646, 658–59 (1983).

fulfill an important function by keeping investors informed. They digest information from Exchange Act reports and other sources, actively pursue new company information, put all of it into context, and act as conduits in the flow of information by publishing reports explaining the effect of this information to investors.[333] They also express opinions and recommendations about investment in issuers' securities. Unlike small investors, analysts can arrange to interact with key company insiders and ask them pertinent questions. Where analysts are acting independently and objectively, investors gain from the publication of their insights.

Analyst reports, however, also potentially can be misused to hype a company's securities. Because they could do so under the guise of providing objective, independent analysis, they could unduly influence investors. Often, firms that employ analysts and publish their research reports also act, or may act, as underwriters in connection with the offerings of companies that are the subject of the reports. Research by a broker or dealer about an issuer that proposes to register a public offering, or has registered an offering, may constitute an offer of those securities.[334] This is particularly true when the broker-dealer is to participate in the distribution as an underwriter or selling group member.

The Commission recognized both possible uses of analyst research reports—for hyping as well as for enhancing the free flow of information—when it adopted Rules 137, 138 and 139 under the Securities Act. Those safe harbor rules describe circumstances in which a broker-dealer may publish research in and around the time of a registered offering without concerns about violating Section 5 through making an illegal offer or using a non-conforming prospectus. In those rules, the Commission struck a balance between its concern about hyping and its concern for current information by restricting the situations in which the three safe harbors would apply.[335]

Commenters on the Concept Release asked the Commission to minimize the scope of restrictions on research in order to reflect rapid advances in communications technology and globalization of the markets, among other developments.[336]

1. Proposals in Connection With Registered Offerings

When a company is making a registered offering, investors particularly seek current information about the issuer and its securities. In general, we propose to allow investors to receive as much current information as possible with respect to companies that are in registration, where consistent with investor protection. This is true especially where the largest companies are involved. The narrowness of the current rules regarding research causes some analysts' research to be barred at a point at which investors may seek current research reports the most. The result is that investors may rely on research that does not reflect material changes or current data.

In addition, the narrower rules put U.S. investors at a relative disadvantage because analyst firms may determine that current law would not allow them to give investors the current research that is distributed to investors outside the United States. While larger U.S. investors find out about research distributed offshore and arrange to receive it, the same cannot be said with assurance about smaller U.S. investors. Because of the benefits of analyst research, the proposals overall would create broader exemptions to allow publication of research in more instances around the time of an offering. This approach would allow investors to judge for themselves the value of the analysts' opinions set forth in those reports.

a. Rule 137

When a broker or dealer is not otherwise participating in a distribution of securities, and does not propose to participate in a distribution, it is guided by Rule 137.[337] That rule provides that research may be published by the broker or dealer in the regular course of its business where it is not receiving consideration of any kind from persons with an interest in the securities being registered. Rule 137 protects the broker or dealer from being considered an ''underwriter'' by virtue of its publication.[338] It provides a safe harbor only with respect to reporting companies.

The release proposing Rule 137 in 1969 explained that ''[t]he need for such a rule is primarily evidenced in connection with actively traded securities of issuers concerning which adequate information is available to the public.'' [339] While the need for a safe harbor in 1969 may have been confined to reporting companies, it no longer appears to us that the need is so confined. Not all actively traded securities are issued by reporting companies, particularly in light of the market interest in securities of foreign issuers.

We propose to expand Rule 137 to cover non-reporting companies.[340] We also propose to delete the condition in Rule 137 that the broker or dealer publish the report in the regular course of its business. As expanded, Rule 137 would provide a safe harbor with respect to registrants, such as foreign government issuers, that are less likely to be reporting under the Exchange Act. The new rule also would allow a broker or dealer to commence research coverage on private companies planning to make registered offerings, even where it had never before published a research report concerning that company. Where a broker or dealer is not connected to the registrant's distribution, we perceive limited risk that it will use its research about the registrant or its securities to hype the market for the securities being distributed. While the broker or dealer may seek to cover the registrant for purposes of attracting underwriting business from the registrant in the future, that motive for coverage is universal and is not limited to the distribution period. Investors should factor in that incentive when analyzing any research report. We do not believe the risk of analysts creating reports that are positively skewed to attract future business outweighs the benefits to

[333] Investors benefit from being informed on an ongoing basis via analysts about particular securities and issuers. For instance, issuers' forward-looking information is disseminated indirectly through analyst reports. Analysts communicate with issuer representatives and then reflect their understanding about likely future results in the reports or updates they publish. The market's expectations of an issuer's future earnings can be gradually altered by issuers leading analysts away from incorrect predictions; less volatility in stock price would result.

[334] *See* Sections 2(a)(3) and 5 of the Securities Act, 15 U.S.C. §§ 77b(a)(3), 77e.

[335] These releases are discussed in Chiappinelli, *Gun Jumping: The Problem of Extraneous Offers of Securities*, 50 U. Pitt. L. Rev. 457, 505–07 (1989).

[336] *See, e.g.*, comment letters, in File No. S7–19–96, from the American Bar Ass'n (Dec. 11, 1996), Merrill Lynch (Oct. 31, 1996), Morgan Stanley (Dec. 9, 1996), PSA The Bond Market Ass'n (Nov. 8, 1996), Shearman & Sterling (Dec. 13, 1996) and the Securities Industry Ass'n (Nov. 13, 1996).

[337] Even if the distribution of research constitutes an offer, a dealer may rely on Section 4(3) of the Securities Act which provides an exemption from registration for dealers that are not acting as underwriters. Section 4(3) is not available, however, during certain defined periods shortly after the commencement of an initial offering of a security or the effective date of a registration statement. It is during those periods that reliance on Rule 137, 17 CFR 230.137, may matter most.

[338] Rule 137, 17 CFR 230.137, provides that a broker or dealer satisfying the rule will not be ''participating'' in the offering for purposes of the definition of ''underwriter'' in Securities Act Section 2(11).

[339] Securities Act Release No. 5010 (Oct. 7, 1969) [34 FR 18130].

[340] *See* proposed revisions to Securities Act Rule 137, 17 CFR 230.137. The proposed rule would not cover blank check companies, shell companies and companies making offerings of penny stock.

investors from having persons independent of the issuer and the underwriter publish their views about the investment opportunity at a time when investors would especially look for information. We solicit comment on the relative risks and benefits of this approach.

We also solicit comment regarding our proposal to remove the ''regular course of business'' condition in Rule 137. To avoid concerns that research preparation, absent that condition, would be an unusual activity for that broker or dealer, should it be replaced with a narrower requirement that the person who prepares the research must be employed by the broker or dealer to prepare research in the normal course of his or her duties? Would those concerns be lessened if we required that the person who prepares the research must be a registered person? Should other restrictions be imposed on who prepares the research? Should we mandate the manner in which the broker-dealer discloses the identity and affiliation of those who prepare research?

b. Rule 138

Rule 138 permits a broker or dealer participating in a distribution of one type of an issuer's securities to publish research confined to another type of the issuer's securities if it publishes or distributes the research in the ordinary course of its business. For example, a dealer distributing non-convertible debt may publish under Rule 138 research solely relating to the common stock of that issuer. A dealer distributing convertible debt could publish research limited to the issuer's non-convertible, non-participating preferred securities under Rule 138. When we proposed Rule 138 in 1969, we noted that the markets for non-convertible senior securities and common stock differ significantly. There is less opportunity to condition the market when a broker or dealer is underwriting one and reporting on the other.[341] In addition, the investment conditions with respect to common stock and senior securities are significantly different.[342]

Rule 138 is not available, however, for offerings by any type of issuer. The offering must relate to securities of an issuer that: has been reporting for 3 years (Form S–2 or F–2 issuers); has been reporting for one year and has a public float of $75 million (S–3 or F–3 issuers); or is a foreign private issuer that has a public float of $75 million and a one-year trading history on a designated offshore securities market. In addition, the research must be published by the broker or dealer in the regular course of its business.

Unlike Rule 137, which focuses on whether the broker or dealer becomes an underwriter by publishing research, the Rule 138 safe harbor relates specifically to those who are acting as underwriters. The Rule was designed to address the concern that the publication would violate Section 5. A broker or dealers' research could be viewed as an unlawful offer if it occurs before the filing of a registration statement. The publication could also be a non-conforming prospectus [343] because the contents will not have the disclosure required by Section 10 of the Securities Act. Rule 138 therefore provides that publication of research under the Rule will not be considered:

—An offer during the pre-filing period, which would violate Securities Act Section 5(c); or

—a distribution of a ''prospectus'' that does not conform to the requirements of Section 10, which would violate Securities Act Section 5(b)(1).[344]

Under the proposed registration system, offers may be made during the pre-filing period with respect to Form B offerings.[345] In addition, prospectuses used in connection with Form B offerings need not conform to the requirements of Section 10.[346] Thus, a broker or dealer would not need the relief that Rule 138 provides in connection with Form B offerings.[347]

Further, in registered business combinations, any communications before the first communication related to the offering, other than communications among participants, would not constitute an offer for the purposes of Section 5(c), provided that the parties take reasonable steps to prevent distribution of such communication after the announcement but before filing a registration statement. Thus, a broker or dealer would not need the relief that Rule 138 provides in connection with registered business combination transactions.

Brokers and dealers would only rely on Rule 138 to a limited extent with respect to other registered offerings. In other offerings, a proposed rule would provide that communications made more than 30 days before the registration statement is filed would not constitute offers.[348] Research materials distributed during that period would not constitute prospectuses.[349] Thus, even in the absence of the Rule 138 safe harbor, underwriters and participating dealers would have no Section 5 concerns about publishing research reports during that period. Similarly, after a registration statement is filed, offers may be made and a proposed rule would provide that prospectuses do not have to conform to Section 10 disclosure standards.[350] Thus, underwriters and participating dealers would have no Section 5 concerns about publishing research reports during that period. Thus, an underwriter or participating dealer's Section 5 concerns about research reports would be limited to the 30-day period before filing a registration statement.

We propose to expand Rule 138 to cover research reports relating to securities of virtually all companies subject to the Exchange Act reporting requirements, rather than just larger foreign and domestic issuers with a one-year reporting history and other issuers with a 3-year reporting history.[351] Where Exchange Act reports are available, investors will have another source for information against which to compare the analyst's report. The only reporting issuers' securities that we would not cover are those that have historically posed certain risks of abuse. They include: blank check companies,

[341] Securities Act Release No. 5010 (Oct. 7, 1969). The release noted specifically that the market for senior securities is largely institutional and that ''the investment conditions with respect to common stock and the senior securities of established corporations are significantly different.'' See also Securities Act Release No. 6492 (Oct. 6, 1983) [48 FR 46801].

[342] *See* Securities Act Release No. 5010 (Oct. 7, 1969).

[343] A ''prospectus'' is defined in Section 2(a)(10) of the Securities Act to include any notice, circular, advertisement, letter or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security.

[344] Rule 138, 17 CFR 230.138, exempts the research covered by its terms from constituting an ''offer to sell'' for purposes of Securities Act Section 5 or an ''offer for sale'' for purposes of Securities Act Section 2(a)(10).

[345] *See* proposed Securities Act Rule 166, 17 CFR 230.166.

[346] *See* proposed Securities Act Rule 165(a), 17 CFR 230.165(a).

[347] Rule 138, 17 CFR 230.138, currently contains an instruction that the Rule's safe harbor is available when an issuer plans to file, files or has an effective shelf registration statement that includes both non-convertible securities and equity securities. See Securities Act Release No. 7132 (Feb. 1, 1995) [60 FR 6965]. Under the proposed registration system this instruction would not be needed because these shelf offerings would be Form B offerings.

[348] *See* proposed Securities Act Rule 167, 17 CFR 230.167.

[349] In order for a communication to be a ''prospectus'' as defined in Section 2(a)(10) of the Securities Act, the communication must either offer a security or confirm the sale of a security. Research reports do not confirm the sale of a security and proposed Rule 167, 17 CFR 230.167, would provide that they are not prohibited offers.

[350] *See* proposed Securities Act Rule 165(b), 17 CFR 230.165(b).

[351] *See* proposed revision to Securities Act Rule 138, 17 CFR 230.138.

shell companies and companies making offerings of penny stock.

We are not proposing that the Rule be limited to companies that have been reporting for a specific period of time. Companies generally become subject to the Exchange Act reporting requirements through registering under either the Securities Act or the Exchange Act and provide current disclosure in connection with that event. We solicit comment, however, regarding whether companies covered by Rule 138 should have to have a specified reporting history (*e.g.*, 6 months or a year).

We are not currently proposing that Rule 138 be expanded to cover non-reporting companies other than foreign private issuers that would satisfy the public float/ADTV thresholds of Form B measured on a worldwide basis and whose equity securities trade on a designated offshore securities market.[352] As the Commission explained in 1994 when it proposed to expand Rule 138 to cover certain non-reporting foreign private issuers with an offshore trading history, there is a stream of corporate information available in the marketplace about those foreign private issuers due to their nature, even though they are not filing reports with the Commission.[353] The same stream of information is not available about other non-reporting companies.

Comment is solicited with regard to the application of the proposed Rule 138 safe harbor to research reports regarding non-reporting issuers. Should we require the non-reporting foreign private issuers to have a specified trading history on a designated offshore securities market, as Rule 138 does today? If so, should that trading history be set at one year as in current Rule 138, or some shorter period (*e.g.*, 6 months)? Should we expand the safe harbor to cover cases where the issuer has issued debt in a public offering, but then terminated its status as a reporting company, if the broker or dealer is publishing research reports with respect to those debt securities? Are there reporting companies with respect to which Rule 138 should not apply?

c. Rule 139

Rule 139 permits a broker or dealer participating in a distribution of securities by a larger, seasoned issuer or a larger foreign private issuer publicly traded abroad to publish research concerning the issuer or any class of its securities, if that research is in a publication distributed with reasonable regularity in the normal course of its business. Rule 139 also provides a safe harbor in those situations for distributions by smaller seasoned issuers, if the broker or dealer complies with additional restrictions on the nature of the publication and the opinion or recommendation expressed in it.

Like Rule 138, Rule 139 was developed to create a safe harbor from Section 5 for a person acting as an underwriter for the issuer. It ensures that the research does not constitute an offer during the period before filing, or constitute a non-conforming prospectus.[354] Unlike Rule 138, this Rule covers the situation where the broker or dealer's report covers the same securities that it is selling on the issuer's behalf in the registered offering.

The greatest potential for blurring the objective analyst role and the underwriting role occurs when the analyst firm is publishing research directly about the security it is underwriting. The Commission has recognized that risk in the past by attaching more restrictions to the publication of research reports under the circumstances in Rule 139.

i. Form B and Schedule B Offerings

In the case of Form B offerings, we believe that the fact that many analysts would be covering the issuer, and that the investors would be relatively informed already, justifies allowing research to be published around the time of an offering without applying Section 5 restrictions. Thus, the proposed communications rules allow research reports to be a part of the mix of information that investors may see around the time of a Form B registered offering regardless of who publishes those reports.[355] Accordingly, the Rule 139 safe harbor would not be needed in those cases.

We would provide the same freedom for a research report published around the time of an offering by a seasoned foreign government issuer that is registering an offering of securities that exceeds $250 million and that is underwritten on a firm commitment basis.[356] Because the proposed communications rules would provide that offers may be made before filing of such a registration statement, an underwriter or participating dealer would not have to be concerned about research during that period.[357] Similarly, because prospectuses relating to offerings by those foreign government issuers would not have to satisfy the requirements of Section 10, underwriters and participating dealers would not have to be concerned about publishing research once a Schedule B registration statement is filed.[358] The same would be true in a registered business combination in the period prior to the first communication about the transaction (other than among offering participants).

ii. All Other Offerings

As discussed in connection with Rule 138, in all other offerings, underwriters and participating dealers would have no Section 5 concerns about publishing research more than 30 days before the filing of a registration statement or after a registration statement is filed.[359] Thus, an underwriter or participating dealer would rely on Rule 139 to address its Section 5 concerns about research reports only during the 30-day period before the filing of a registration statement.

In offerings by these issuers, we have some concern that, absent restrictions, research reports published before the filing of a registration statement might evolve into selling documents distributed at a time when no prospectus is available. With appropriate restrictions, we generally believe that research should be able to continue during that time period. The proposed delivery rules would ensure that investors will have time to consider the prospectus disclosure before making a final investment decision.

iii. Focused Reports

Proposed Rule 139 would continue to provide for two categories of reports, broad industry-related reports and reports more focused on the issuer and its securities.[360] The companies about which brokers may prepare those two

[352] ''Designated offshore securities market'' is defined in Rule 902(b) of Regulation S, 17 CFR 230.902(b).

[353] *See* Securities Act Release No. 7120 (Dec. 13, 1994) [59 FR 31038].

[354] Rule 139, 17 CFR 230.139, exempts the research from constituting an ''offer to sell'' for purposes of Securities Act Section 5 or an ''offer for sale'' for purposes of Securities Act Section 2(a)(10).

[355] *See* proposed Securities Act Rule 166, 17 CFR 230.166, and proposed Securities Act Rule 165(a), 17 CFR 230.165(a). As in the case of Rule 138, 17 CFR 230.138, brokers and dealers would not have a need to rely on Rule 139, 17 CFR 230.139, in connection with Form B offerings.

[356] By ''seasoned'' we mean that the foreign government issuer's offering takes place one year or more after the effective date of its initial public offering.

[357] *See* proposed Securities Act Rule 166, 17 CFR 230.166.

[358] *See* proposed Securities Act Rule 165(a), 17 CFR 230.165(a).

[359] *See* proposed Securities Act Rule 167, 17 CFR 230.167, and proposed Securities Act Rule 165(b), 17 CFR 230.165(b).

[360] *See* proposed Securities Act Rule 139, 17 CFR 230.139.

categories of reports, however, would change. Where reporting issuers are making the offering, we would not continue to limit the focused issuer reports under the Rule to issuers that meet the Form S–3 or F–3 minimum float/investment grade and reporting history. Instead, the proposed Rule would allow those reports in offerings of any type of securities by any size issuer that has a one-year reporting history.[361]

In addition, the proposed Rule would allow for focused reports relating to offerings by foreign government issuers that are registering on Schedule B for the first time as long as the issuer is registering on Schedule B an offering of more than $250 million on a firm commitment underwritten basis. We recognize that because of the nature of foreign government issuers, significant amounts of information likely would be available about them even though they may not have registered before in this country. We solicit comment regarding our extension of the focused reports safe harbor to these foreign government offerings. Should we do so only if the foreign government issuer has previously issued securities in a public offering or if the broker or dealer was reporting on the issuer regularly before the filing?

One of the conditions that currently applies to focused research reports under Rule 139 is that the reports are distributed with reasonable regularity in the normal course of business. We propose to eliminate the ''reasonable regularity'' part of that condition but retain a requirement that the report be distributed in the broker or dealer's ordinary course of business. Where the issuer has been reporting under the Exchange Act for more than a year, investors will have public disclosure to refer to in weighing the contents of a focused research report. The same would be true of a large, well-followed foreign issuer even if it is not reporting in the United States. The condition that the broker or dealer be distributing the report as part of its ordinary course of business (*i.e.*, it has a history of distributing similar focused reports on other issuers or securities) should allay concern about hyping as well. We solicit comment about the elimination of the reasonable regularity condition. Are there any reasons we should retain the condition? Should we instead substitute a bright-line test that indicates more clearly just how long a broker or dealer must have been reporting about the issuer or its securities and with what frequency? If so, how long and how often?

iv. Consideration to Expand Rule 139 to IPOs and Offerings by Unseasoned Issuers

We also solicit comment on whether to expand the focused reports aspect of Rule 139 to initial registered offerings and repeat offerings by large unseasoned issuers where research reports are published by brokers or dealers that have been following the issuers in the ordinary course of their business.[362] Large issuers, even those that have not been reporting for a full year, may generate significant market and analyst attention. In some cases, the same would be true in initial registered offerings.

In cases involving repeat offerings by large unseasoned reporting companies, we believe it is possible that investors may benefit if research reports concerning these large companies were available around the time of their offerings. On the other hand, we see merit in limiting dissemination of research reports about unseasoned companies. A limitation helps ensure that the market is not mislead by subjective reports that are not balanced by regulated public disclosure made over a period of time. Given the risk of use of research reports as sales materials in the case of initial registered offerings and other offerings within a year of effectiveness, we would envision a safe harbor applying only if the research reports were required to be filed with the Commission in connection with the offering.

What limitations should we consider if we were to extend the Rule 139 focused reports safe harbor to IPOs? Should we limit extension to companies initially offering more than a certain dollar amount of securities? If so, at what level should we set the minimum offering amount: $250 million; $500 million; $600 million? Should we set other conditions? If so, what kinds?

Do these same considerations apply to unseasoned reporting companies? Does the proposed Form B public float/ADTV criteria provide a good model for qualifying companies that should be able to rely on this aspect of Rule 139? Should we differentiate unseasoned reporting companies listed on a national securities exchange from ones that are not listed?

Should we condition any extension of Rule 139 to cover focused reports about these companies on the broker or dealer having a specified history of following the company (*e.g.*, two years)? Should we extend it only if the report was prepared by a broker or dealer that had issued research reports about the company before the time it announced its registered offering?

Should we require that issuers file any research report prepared in reliance on any further extension of Rule 139 as part of their registration statements or as prospectus supplements? A filing requirement would assure that all investors would have equal access to the report, in furtherance of our goals to reduce selective disclosure whenever possible. If such reports are not filed, should issuers and underwriters be required to inform investors of the reports' availability and undertake to provide the reports upon request?

v. Industry-Related Reports

We also would extend the industry-related report safe harbor. Instead of applying only to offerings of issuers that meet the Form S–3 or F–3 minimum float/investment grade and reporting history, we would extend it to all issuers, regardless of size or reporting history. Where the report is not truly focused on the issuer of the securities, which the existing conditions ensure, there appears to be little risk of a report that is distributed regularly being distributed for the purpose of hyping the security. Even if the purpose of the broker-dealer's distribution was hyping, that type of report is unlikely to have that effect, regardless of whether the issuer is reporting or not. We solicit comment, however, concerning whether the contents of such a report under the proposed safe harbor should be further limited with respect to non-reporting companies.

We also propose to alter one of the conditions of the existing industry-related report safe harbor. We would eliminate the requirement that the report not contain a more favorable recommendation than the one made in the last publication by the broker or dealer about the issuer or its securities. That condition controls the recommendation being made by the analyst, not just the format in which it is made. While we recognize the risk involved in lifting that constraint, we believe it is possible to address the hyping concern by disclosure rather than by prohibiting a broker or dealer from stating what may be a legitimate change in its opinion. Our proposed Rule would provide simply that, when a broker or dealer wishes to make a more favorable recommendation than it made in the past, it also must disclose

[361] We would continue to allow research concerning large foreign exchange-traded issuers that are not reporting if the Form B public float/ADTV threshold is satisfied.

[362] For purposes of this discussion, a large company would be one that would meet the public float/ADTV tests in Form B.

in the report the last two opinions or recommendations it published while not participating in a distribution by the issuer.[363] Because the broker or dealer also must disclose its role in the distribution, investors will be aware of the potential conflict of interest and can judge the current recommendation accordingly.

As revised, Rule 139 also would require that the broker or dealer reporting on unseasoned or non-reporting issuers have distributed such reports with ''reasonable regularity.'' We solicit comment regarding the need to retain the reasonable regularity requirement for unseasoned or non-reporting issuers. We also solicit comment as to whether it is necessary that projections for unseasoned or non-reporting issuers have been published with reasonable regularity.

vi. Section 17(b)

Section 17(b) of the Securities Act requires disclosure of any compensation received or expected to be received, directly or indirectly, form an issuer, underwriter or dealer for the publication or communication of information that describes a security.[364] Brokers and dealers are reminded that compensation received from an issuer that could be attributed to the preparation of a research report should be prominently disclosed.

2. Proposals and Interpretation in Connection With Regulation S and Rule 144A Offerings

Where an issuer is offering securities outside the United States in reliance on Regulation S, it and those acting on its behalf are required to refrain from making ''directed selling efforts'' in the United States and must ensure that the transaction is an ''offshore transaction.'' ''Directed selling efforts'' is defined to encompass activities that are done for the purpose of, or could reasonably be expected to have the effect of, conditioning the market in the United States for the securities being offered under the Regulation. To satisfy the offshore transaction condition, no offer may be made to a person in the United States.

A broker or dealer acting as an underwriter on behalf of an issuer in connection with a Regulation S offering may wish, around the same time, to publish or distribute in the United States its regular analysts' research reports that cover the issuer, its securities or its industry. In that event, questions arise regarding whether those actions would conflict with the prohibition against directed selling efforts or the offshore transaction condition.[365] The concern stems from the analysis that those actions could be viewed as conditioning the market, which would constitute directed selling efforts, or offering the securities in the United States, which is prohibited under the ''offshore transaction'' requirement.

Similarly, when a broker or dealer is selling securities in reliance on Rule 144A, it is subject to the condition that it may not make offers to persons other than those it reasonably believes are QIBs. Where it distributes research about the issuer around the time of the Rule 144A transaction, it may be viewed as making offers to persons that receive it, including those who are not QIBs.

We are concerned that these blanket restrictions have resulted in brokers and dealers withholding regularly published research that they have not prepared with a view towards promoting the offering to investors. We therefore have proposed amendments to Regulation S and Rule 144A. They provide that research may be published or distributed under new terms set forth in Rules 138 and 139 notwithstanding the Regulation S prohibition against directed selling efforts and offshore transaction requirements or the requirement that Rule 144A offers be limited to QIBs.

In Rule 139, we would add an exemption in connection with these unregistered offerings. It would be limited to issuers about whom a broker or dealer may prepare focused reports (that is, seasoned issuers, larger foreign issuers and foreign government issuers).[366] We are not proposing to create a Rule 139 exemption for reports on small or unseasoned issuers making Regulation S or Rule 144A offerings. We solicit comment, however, concerning whether the proposed Rule 139 exemption for industry-type reports in registered offerings should be extended on equivalent terms to Regulation S or Rule 144A offerings.

With one exception, we propose to apply the same conditions in the Rule 138 and 139 exemptions for Regulation S and Rule 144A transactions that we would apply in connection with registered offerings. The additional condition would be that research could be published only in a publication that the broker or dealer distributes with reasonable regularity. We believe that restriction is appropriate given that our goal in these unregistered offerings is to allow for the continuation of research that the broker or dealer has regularly published, not the commencement of research. We solicit comment with regard to whether the research safe harbors for Regulation S and Rule 144A offerings should contain additional safeguards. Conversely, should only Rule 139 contain the reasonable regularity requirement for these offerings? We also solicit comment on whether a bright-line test should replace the ''reasonable regularity'' requirement. If so, what publication intervals should the safe harbor substitute for the reasonable regularity requirement (*e.g.*, annual or quarterly publication)? Would a bright-line test provide sufficient flexibility to cover differing practices among brokers and dealers?

In its 1990 release adopting Regulation S, we stated that research reports of the nature described in Rule 139(b) would not be deemed to constitute directed selling efforts in offerings by reporting companies.[367] Those reports are limited to ones that are not focused solely on the issuer or its securities but are more akin to industry reports. In addition, those reports are limited in how much prominence they can give to the issuer and whether they can provide a more favorable recommendation than last issued. In the same release, we warned brokers and dealers involved in Regulation S offerings by non-reporting companies to exercise greater caution in publication of research. As a result, it generally has been viewed as not appropriate for participating brokers or dealers to publish research of the nature described in Rule 138 and Rule 139(a) while an issuer is conducting an offering under Regulation S.

The Commission believes that this interpretation currently limits the distribution of regularly published research reports by brokers and dealers. The Commission, therefore, is expressing the view today that brokers and dealers may publish and distribute research reports as described in current Rule 138 or Rule 139 without such

[363] If the broker or dealer has not made recommendations on two such occasions in the past, it may so state and provide its last recommendation.

[364] In adopting Section 17(b), Congress intended to address the ''evils of the 'tipster sheet' as well as articles in newspaper[s] or periodicals that purport to give an unbiased opinion but which opinions in reality [were] bought and paid for.'' H.R. Rep. No. 85, 73rd Cong., 1st Sess. 24 (1933).

[365] *See, e.g.*, Braverman, *U.S. Legal Considerations Affecting Global Offerings of Shares in Foreign Companies*, 17 J. of Int'l. L. & Bus. 30, 79 (1996).

[366] *See* proposed revisions to Securities Act Rules 138(b), 17 CFR 230.138(b); 139(b), 17 CFR 230.139(b); 144A(d)(1)(i), 17 CFR 230.144A(d)(1)(i); and Rule 902 (c)(3)(viii) and (h)(4) of Regulation S, 17 CFR 230.902 (c)(3)(viii) and (h)(4).

[367] Securities Act Release No. 6863 (Apr. 24, 1990) [55 FR 18306, 18311–12].

reports being deemed to constitute directed selling efforts.

3. Research and Proxy Solicitation

We also are proposing to codify a Commission staff position [368] that the publication or distribution of research under the conditions set forth in Rules 138 and 139 is permitted in connection with a registered securities offering that is subject to the proxy rules under the Exchange Act.[369] The new rule would provide that distribution of research in accordance with Rule 138 or 139 would be an exempt solicitation for purposes of the proxy rules.[370]

Recently adopted Exchange Act Regulation M also contemplated dissemination of research by distribution participants and their affiliates during the pendency of a distribution of securities if the conditions of Exchange Act Rule 138 or 139 are met.[371] Codification of the staff's position would further harmonize the treatment of research under the Securities Act and Exchange Act rules. We solicit comment on whether the proposed revisions would change analysts' approach to publishing research reports on ongoing business combinations.

VIII. Prospectus Delivery

A. Congressional History

Congress intended that the prospectus provide investors with ''the means of understanding the intricacies of the transaction. * * *'' [372] From the outset of the Securities Act, therefore, Section 5 has required an issuer to send the investor a final prospectus no later than the time of sale. [373] When Congress recognized that the final prospectus would not always be available to investors at the time they make their investment decisions,[374] it amended the Securities Act in 1954 to allow for the use of the preliminary prospectus. As the House Committee on Interstate and Foreign Commerce explained:

[h]ow the investor might have accurate information at the time it is useful to him is a problem that long has been recognized. The proposed amendment offers an approach to its solution in that it provides for the use of a processed document, or preliminary prospectus, prior to the effective date of the registration statement.[375]

While Congress permitted the use of preliminary prospectuses, it did not lift its mandate that final prospectuses be delivered. Thus, while the issuer has the option to deliver prospectus information to the investor before it makes its investment decision, the Act only requires that a final prospectus be delivered to investors prior to or with the confirmation. Because the confirmation arrives at the end of the offering process, investors' investment decisions generally have been made before the time of final prospectus delivery.

B. Commission History

In the face of Congress' decision to treat the two kinds of prospectuses in that manner, the Commission's approach to preliminary prospectus delivery has been measured. Immediately after the adoption of the 1954 amendments, the Commission adopted Securities Act Rule 460.[376] Rule 460 states that the Commission may consider whether preliminary prospectuses have been adequately distributed before accelerating the effectiveness of a registration statement.[377]

In 1969, the Commission expressed its concern that investors were not receiving the necessary disclosure to make informed investment decisions in offerings by first time issuers.[378] The Commission emphasized that ''the investing public should be aware that many such offerings of securities are of a highly speculative character and that the prospectus should be carefully examined before an investment decision is reached.'' [379] Accordingly, the Commission stated that, before accelerating the effectiveness of a registration statement for a first time issuer, it would consider whether the issuer had taken reasonable steps to send to investors a preliminary prospectus at least 48 hours before the mailing of confirmations.

The Commission formalized that 48-hour requirement in offerings by new issuers in 1982 when it amended Exchange Act Rule 15c2–8.[380] Rule 15c2–8 requires a broker or dealer, in connection with offerings by first time issuers, to deliver a copy of the preliminary prospectus to anyone expected to purchase in the offering. They must deliver the prospectus at least 48 hours before sending a confirmation. Rule 15c2–8 also requires that a broker or dealer take reasonable steps to comply promptly with any written request for a preliminary or final prospectus. Additionally, under the rule, brokers and dealers must make copies of the preliminary and final prospectus available to their sales associates that are expected to solicit orders for such securities.[381]

C. Prospectus Delivery Proposals

The Commission continues to believe that delivery of information to investors plays an integral role in their protection. In recognition of the importance of the prospectus to investors, we recently adopted rules that require the use of plain English in the prospectus.[382] Among other benefits, the use of plain English eliminates arcane, unnecessarily complex and incomprehensible language from key sections of the prospectus. We adopted these rules in order to allow investors to understand the intricacies and risks of an offering better when making their investment decisions. If the plain English prospectus reaches investors only after they have made their investment decisions, the full benefit is not realized.

1. Adequacy of Current Rules

Under current market practices, the Commission is concerned that Rule 460 and Rule 15c2–8 do not provide adequate assurance that all investors who need it will have sufficient time to consider the prospectus disclosure before making their investment decisions. Our concern about the adequacy of current rules is multifold.

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[368] *See* Staff no-action letter *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (Oct. 24, 1997).

[369] *See* proposed Exchange Act Rule 14a–1(l)(2)(v), 17 CFR 240.14a–1(l)(2)(v).

[370] *See* Exchange Act Rule 14a–2(a)(7), 17 CFR 240.14a–2(a)(7).

[371] Exchange Act Rule 101(b)(1), 17 CFR 242.101(b)(1).

[372] H.R. Rep. No. 85, 73rd Cong., 1st Sess. 8 (1933).

[373] A final prospectus is a prospectus that conforms to Section 10(a) of the Securities Act, 15 U.S.C. § 77(j)(a).

[374] H.R. Report No. 1542, 83rd Cong., 2d Sess., 12 (1954).

[375] *Id.*

[376] 17 CFR 230.460; Securities Act Release No. 3519 (Oct. 11, 1954) [19 FR 6727].

[377] Under Section 8(a) of the Securities Act, the Commission must give ''due regard to the adequacy of the information respecting the issuer theretofore available to the public * * *'' before accelerating the effectiveness of a registration statement. 15 U.S.C. § 77(h)(a).

[378] Securities Act Release No. 4968 (Apr. 24, 1969) [34 FR 7235].

[379] Securities Act Release No. 4968, 34 FR at 7235.

[380] 17 CFR 240.15c2–8; Securities Act Release No. 6383 (Mar. 3, 1982) [47 FR 11380]. In the 1980 Rule 15c2–8 proposing release, the Commission noted that a preliminary prospectus delivery requirement may be appropriate for all issuers and solicited comment on extending it to every offering. Securities Act Release No. 6276 (Dec. 23, 1980) [46 FR 78]. Commenters expressed concern that such an extension would create an artificial waiting period that would impose an undue burden on an issuer's ability to tap favorable securities markets. *See* Securities Act Release No. 6338 (Aug. 6, 1981) [46 FR 42042].

[381] In the 1969 release proposing Rule 15c2–8, the Commission expressed its concern that salespersons were offering newly issued securities without seeing a copy of the preliminary prospectus. Exchange Act Release No. 8710 (Oct. 7, 1969) [34 FR 17034].

[382] Securities Act Release No. 7497 (Jan. 28, 1998) [63 FR 6370].

First, Rule 460 does not mandate delivery of preliminary prospectus information. Second, delivery of the preliminary prospectus information under Rule 15c2–8 covers only initial public offerings. While preliminary prospectus disclosure is essential in those offerings, investors' need for that disclosure before making investment decisions is not confined to those offerings.

Third, because Rule 15c2–8 measures the timing of delivery from the date of confirmation and uses only a 48-hour period, we are concerned that the Rule does not ensure a sufficient amount of time for investors to consider fully the intricacies of an offering. For example, in the typical marketed underwritten offering today, investors appear to make their investment decisions on or before the ''circle date.'' This is the point at which investors are asked to ''firm up'' their orders in anticipation of pricing. On the circle date, an investor is asked to represent orally whether it will or will not purchase in the offering. The underwriter ''circles'' those indications of interest in its book that represent an affirmative response. The underwriters rely on these commitments in reaching final price and volume terms with the issuer. As a matter of practice, the investing public treats itself as committed at this point in time.[383] The circle date or dates in an offering can occur days before pricing. Confirmations are sent to investors after pricing occurs. While issuers and underwriters can always choose to deliver preliminary prospectuses earlier than required, and sometimes do under current practices, the 48-hour delivery period in the Rule may not effectively guarantee that investors receive prospectuses when they need them most.[384]

A fourth reason for concern that existing rules may not be sufficient relates to the fact that the Rule only applies to brokers and dealers. As the use of electronic media to make offerings becomes more prevalent, issuers may increasingly choose to offer their stock directly to the public.[385] Issuers are not subject to Rule 15c2–8's delivery obligation.[386] In current offerings not involving a broker or dealer, Rule 15c2–8 has no effect on prospectus delivery.

2. Prospectus Delivery and Developments in Communications

Investors' need for adequate time to review the preliminary prospectus may be particularly enhanced in marketed deals under the proposed system. Under today's proposals, we would permit the distribution of sales materials in addition to the preliminary prospectus. This may result in investors receiving much more sales literature in marketed offerings. In turn, investors may require more time with a preliminary prospectus in hand to evaluate all the materials they have. Providing investors with preliminary prospectuses sufficiently before their investment decisions would allow them to consider both the supplemental sales literature and the disclosure contained in the preliminary prospectus.

In the 29 years since the Commission first formulated the 48-hour delivery period, advances in technology, changes in practices and regulatory developments have profoundly altered the transmission of prospectus information. Today, in a matter of minutes, issuers can disseminate documents across the country and to the far corners of the world. Many issuers have Internet web sites that provide investors with instantaneous access to their financial reports and other company information. Electronic delivery of prospectuses is becoming more common, as companies and investors become more familiar with that medium.[387] Broker-dealers already make trade settlement information in connection with securities offerings available electronically on a real-time basis to institutional customers.[388] Print media also has seen its share of technological advancements. In those 29 years, we have moved from typewriters and typesetting to everyday use of computers. Today, a prospectus can be printed in a fraction of the time it took when the 48-hour period was formulated. In addition, regulatory changes such as shelf registration, unallocated shelf registration and, as proposed today, Form B registration have allowed and would allow issuers and underwriters to take advantage of any favorable changes in the securities markets quickly.

3. Final Prospectus Delivery Exemption

We believe that requiring delivery of only a final prospectus at the time of sale does not completely fulfill the Securities Act goal of protecting investors through disclosure in all offerings. In firm commitment underwritten offerings, the final prospectus invariably arrives after the investor has made its investment decision. While delivery of final prospectuses in those offerings may be useful to investors who are considering litigation or resale, it does little to fulfill the prophylactic goals of the Securities Act. As Professor Louis Loss noted, ''[a] prospectus that comes with the security does not tell the investor whether or not he should buy. It tells him whether he has acquired a security or a lawsuit.'' [389]

In addition, because the Securities Act requires delivery of a final prospectus before or at the same time the confirmation is sent, the successful completion of the clearance and settlement process is contingent on prompt completion and delivery of the final prospectus. Broker-dealers sometimes experience practical difficulties in trying to comply with the current T+3 settlement cycle. In some cases, Exchange Act 10b–10 confirmations have had to be delayed in order to await completion of the final prospectus.[390] Any future shortening of the settlement cycle would simply exacerbate those difficulties.

The cost of delivery of a final prospectus, where it is otherwise readily available to the public,[391] may exceed

[383] According to offering participants with whom the staff spoke, the ''law of the Street'' operates to require an investor either to purchase the securities it orally committed to buy on the circle date or harm its reputation by breaking its commitment. To break the commitment made on the circle date also is to risk exclusion from future offerings.

[384] Arguments have been made to the staff that providing for delivery in these marketed deals at such a late point in the offering process would still be effective because underwriters will allow their favored customers, even then, to back out of the trade without repercussions. We are concerned that reliance on that practice would disadvantage smaller investors and not reflect current offering practices.

[385] *See* Grant, *Small Firms Take Direct Route to Stock Offerings,* USA TODAY, Apr. 29, 1979, at 4b; Kollar, *Do-it-Yourself Public Offerings; The Internet Gives a New Dimension to an Old Financing Vehicle,* Investment Dealers' Digest, Mar. 24, 1997 at 4; Barlas, *Floating Stock on the Web; The Next Wave?,* Investor's Daily, Feb. 5, 1998, at A9.

[386] Rule 15c2–8, 17 CFR 240.15c2–8, would apply if the issuer itself is a broker or dealer.

[387] *See* Bagley & Tomkinson, *Internet Is Seeing Its Share of Securities Offerings,* The Nat'l L.J., Feb. 2, 1998, at C3; Weisul, *The New Plumbing on Wall Street; Forget the Hype: The Internet is Now Being Used by Securities Firms to Solve Workaday Problems,* Investment Dealers' Digest, Jun. 23, 1997, at 10.

[388] *See, e.g.,* Depository Trust Company's Institutional Delivery System User Manual at 1 (1994). Electronic messages containing the key information about the trade made in the offering are often sent earlier so that the clearance and settlement process may begin. Paper confirmations are then mailed later.

[389] Loss, Fundamentals of Securities Regulation 93 (1988).

[390] *See* the comment letters, in File No. S7–19–96, from the American Bar Association (Dec. 11, 1996), Merrill Lynch (Oct. 31, 1996), Morgan Stanley (Dec. 9, 1996), PSA The Bond Market Association (Nov. 8, 1996) and the Securities Industry Association (Nov. 13, 1996).

[391] Domestic issuers file final prospectuses with the Commission electronically via EDGAR. The filings are available on a real-time basis through

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any marginal benefit to investors. To provide investors with the maximum benefit from the prospectus, our proposals would re-focus prospectus delivery requirements on a point in time before investors have made their investment decisions. Accordingly, the Commission is proposing to create a new exemption from the Securities Act requirement to deliver a final prospectus.[392] The Commission is not proposing to change the final prospectus delivery requirement in Exchange Act Rule 15c2–8(d).[393] That rule requires all brokers or dealers that participate in a distribution of securities registered under the Securities Act to take reasonable steps to comply promptly with the written request of any person for a copy of the final prospectus. The broker or dealer must comply with such request until the expiration of the applicable 40-day or 90-day period under Section 4(3) of the Securities Act. We solicit comment on whether, as a condition to the exemption, issuers, like brokers and dealers,[394] should be required to provide to a purchaser upon request, and free of charge, a copy of the final prospectus.

a. Conditions to the Exemption

As a condition to the exemption, we would require that issuers, brokers and dealers tell investors, by the time investors receive their confirmations of sale, where they can acquire the information that constitutes the final prospectus free of charge.[395] We also would require as a condition the delivery of preliminary prospectus information in accordance with the Commission's new rule.[396]

Comment is solicited with respect to the notification condition. Given the availability of the final prospectus in all cases via the Commission's Internet web site or the Commission's Public Reference Room, is there a need to tell investors where to find it? Should the notification instead state that the registrant will provide promptly a copy of the final prospectus upon request? Would the proposals shift too heavy a burden to investors by requiring them to take action to obtain a final prospectus rather than to receive it automatically? Is the burden on investors enough that, despite EDGAR, we should continue to require final prospectus delivery?

b. Business Combinations and Exchange Offers

We are not planning to exempt offerings registered on the Securities Act forms for business combinations and exchange offers from the final prospectus delivery requirement.[397] These offerings differ from the other offerings registered under the Securities Act because the proxy rules and tender offer rules in conjunction with state law impose informational and delivery requirements in those transactions. The information contained in the final prospectus therefore would be delivered regardless of Securities Act requirements. In order to ensure consistency among the various rules and regulations applicable to these business combinations and exchange offers, the final prospectus delivery requirement would remain intact.

In addition to the Section 5(b)(2) requirement for final prospectus delivery, Forms S–4 and F–4 require the registrant, if it or the company to be acquired incorporates any documents into the prospectus, to deliver a prospectus no later than 20 business days before the date of the meeting or, if no meeting is held and proxies are solicited, 20 days before the corporate action or transaction is effected. This time period was established by the Commission in 1984 to address investors' need for sufficient time to acquire the documents incorporated by reference and, presumably, consider them.[398] Since 1984, we have witnessed the advent of EDGAR, the Internet and other sources of filed information. The Commission no longer believes that a 20-day time period is needed for that purpose. All of the documents that would be incorporated into proposed Form C would be available through the Commission's Internet web site, as well as other sources, before the time the registration statement becomes effective. We propose to eliminate the 20-day period. We solicit comment, however, on whether we should retain a set period and, if so, how long that period should be. Would delivery under the requirements applicable to these offerings not ensure sufficient time to obtain and consider the disclosure without one?

c. Rule 434 Final Prospectus Delivery Method

In 1995, the Commission adopted Rule 434[399] to ease the burden of prospectus delivery within the new T+3 settlement cycle.[400] At that time, four investment firms and the Securities Industry Association (SIA) had expressed concern that there would be insufficient time to mass print and mail final Section 10(a) prospectuses in a T+3 settlement cycle. Rule 434 provides that delivery of a final prospectus may be made in multiple documents at different intervals in the offering process.

Rule 434 allows issuers and other offering participants to meet their prospectus delivery requirement by delivering a preliminary prospectus and a term sheet or abbreviated term sheet before or at the time of sale. The information contained in the preliminary prospectus, confirmation and term sheet or abbreviated term sheet must in aggregate meet the informational requirements of Section 10(a). Therefore, only the Section 10(a) information not previously delivered to investors would have to appear in the term sheet or abbreviated term sheet. Consequently the term sheet or abbreviated term sheet could be printed and mass mailed quicker than the final integrated prospectus.[401]

As discussed earlier, the Commission is proposing to re-focus the prospectus delivery requirements on a point in time before investors have made their investment decision. If the proposed registration system is adopted, issuers and offering participants largely will be exempt from the requirement to deliver a final prospectus at the time of sale. Therefore, the printing and mailing of a final prospectus in time to meet the T+3 settlement cycle would not be required. Accordingly, the Commission is proposing to repeal Rule 434 for issuers other than investment companies as its purpose and usefulness to issuers and offering participants under the proposed registration system would be limited. The proposals do not exempt investment companies from the requirement to deliver a final prospectus at the time of sale. The

various services and after a 24-hour delay at the Commission's web site (http://www.sec.gov).

[392] *See* proposed Securities Act Rule 173, 17 CFR 230.173. This Rule would not apply in the case of offerings on Forms C, SB–3, F–8, F–80 or F–10 (when that Form is used in a business combination transaction) or offerings of investment company securities.

[393] 17 CFR 240.15c2–8(d).

[394] *See* 17 CFR 240.15c2–8(a).

[395] *See* proposed Securities Act Rule 173(c), 17 CFR 230.173(c). In the case of Form B offerings, investors will be notified through the term sheet of where they can acquire this information.

[396] *See* proposed Securities Act Rule 172, 17 CFR 230.172.

[397] These Forms would include Forms C, SB–3, F–8, F–80 and F–10 (when that Form is used in a business combination transaction).

[398] Securities Act Release No. 6578 (Apr. 23, 1985) [50 FR 18990].

[399] 17 CFR 230.434.

[400] Securities Act Release No. 7168 (May 11, 1995).

[401] It appears, however, that most issuers and participants continued to deliver the integrated final Section 10(a) prospectus at the time of sale. Since September of 1996, only four (non-investment company) issuers have filed term sheets or abbreviated term sheets.

Commission therefore is proposing to retain Rule 434 for closed-end funds and unit investment trusts, which are currently covered by the Rule. We request comment on whether Rule 434 should be retained for these categories of investment companies.

4. Delivery of Preliminary Prospectus Information

Under the proposed registration system, we seek to ensure that high quality disclosure is delivered to investors when they need it most—before they make their investment decisions.[402] The proposed prospectus delivery requirements, like the current prospectus delivery requirements, do not contemplate that an issuer demonstrate that the investors actually received the prospectus. The issuer would have to take steps to ensure that the means it chooses to deliver the prospectus would reasonably result in delivery to the issuer by a certain date. As with other reforms, what prospectus information is required to be delivered, and when, will depend upon the nature of the issuer and offering.[403]

a. Form B Offerings

In all offerings of securities on Form B, we propose to mandate the delivery of transactional information before the investment decision.[404] We seek comment on two alternative proposals. Under the first proposal, we would mandate delivery of a securities term sheet. The securities term sheet would: (1) itemize the material terms of the securities in summary format; (2) identify a contact person to whom questions and requests for final documents may be directed; (3) name any person other than the issuer that is selling the securities and briefly identify any material relationship between such person and the issuer within the past three years; and (4) include a legend advising investors to read, before making an investment decision, the documents the issuer files with the Commission. We would require that the securities term sheet be delivered to investors before they make their investment decisions and be on file with the Commission before the first sale. Delivery of other information would not be mandated in proposed Rule 172 for Form B offerings.

Under the second proposal, we would require delivery of a prospectus containing all transactional disclosure currently required in Form S–3/F–3. That prospectus would have to be on file before first sale. Just like the first proposal, delivery of other information would not be mandated in proposed Rule 172.

We ask for comment on what kind of information should be mandated in the term sheet or prospectus. For example, should the term sheet include all ''offering information'' [405] filed in Form B offerings? Should the term sheet be more like a profile prospectus? Should mandated term sheet disclosure be a different subset of offering information? If so, should the term sheet include only categories of transactional information that must be disclosed in every Form B registration statement (*e.g.*, use of proceeds, changes in the registrant's affairs, etc.)? Should the term sheet include any of the categories of disclosure that must be included in the Form B filing if applicable (*e.g.*, transactional risk factors, dilution, etc.)? Should we require that the term sheet be written in plain English? Should we require in the prospectus fewer items of mandated disclosure? If so, which items should be excluded?

Similarly, should material changes in the issuer's affairs not previously reported be required on either the term sheet or the prospectus? Would there already be sufficient information available to investors and the market regarding certain securities such that delivery of a securities term sheet or prospectus would be unlikely to enhance investor protection significantly? Should we require delivery of a securities term sheet or prospectus in any Form B offering, regardless of whether or not the class of securities was previously registered?

b. Offerings by Small or Unseasoned Issuers

Delivery of information contained in the prospectus is especially important when the registrant is a new or relatively new public company. In those cases, there is comparatively little information available about the company. Due to the general lack of familiarity by investors with companies that are smaller or unseasoned, it is important that prospectus information be delivered early enough for investors to have sufficient time to assess the disclosure and, if necessary, seek further information in light of it. In these situations, we would not limit the requirement to deliver a preliminary prospectus to non-reporting companies, as Rule 15c2–8 does today. We are proposing to require the delivery of a Section 10 prospectus for all filings of small or unseasoned offerings.[406] The timing aspect of the delivery requirement would be dependent upon whether the offering was the registrant's initial public offering (or registered within a year of the registrant's initial public offering). If so, we propose to require that a Section 10 prospectus be delivered in a manner reasonably designed to be received by each investor no later than 7 calendar days before the date of pricing in a firm commitment underwritten offering. In a best efforts offering, or direct public offering, we would mandate delivery in a manner reasonably designed to be received by each investor no later than 7 calendar days before the investor signs a subscription agreement or other document in which it commits to purchase securities. For more seasoned issuers,[407] we would require that the prospectus (and any incorporated reports) be delivered so as to arrive at least 3 calendar days before the date of pricing, or the date the investor signs a subscription agreement or other document in which it commits to purchase the securities, as applicable.

We solicit comment on whether we should require earlier prospectus delivery. Should we mandate delivery, for example, at 10 or 15 days (rather than 7 days) and 5 or 10 days (rather than 3 days) before the date of pricing or commitment to purchase? We solicit comment on whether the proposed 7 and 3 day delivery dates are shorter or longer than the dates by which issuers typically deliver red herring prospectuses under the current system. Would the proposal alter current delivery practices in offerings of the type that would be made on Form A or

[402] *See* proposed Securities Act Rule 172, 17 CFR 230.172, and proposed revisions to Exchange Act Rule 15c2–8, 17 CFR 240.15c2–8.

[403] If it chooses to, the issuer, underwriting or participating broker or dealer may deliver a final prospectus in lieu of the preliminary prospectus, so long as the delivery of the final prospectus satisfies the required time frame.

[404] A preliminary prospectus could be used to satisfy this obligation if an issuer so chooses. If a preliminary prospectus is delivered, delivery of a securities term sheet would not be required. Absent consent by the investor to electronic delivery, the issuer or underwriter would be required to send a paper copy of the securities term sheet.

[405] *See* Section V.A.1.a.ii. of this release for a discussion of what constitutes ''offering information.''

[406] This requirement would encompass all filings on Forms A, SB–1, SB–2, F–7, F–9, F–10 (not involving a business combination) and certain Schedule B offerings. These proposals do not contemplate that issuers must satisfy their prospectus delivery requirements by using any specific method of delivery. Whether issuers satisfy delivery requirements electronically or in more traditional ways, they would be required to deliver the prospectus in a manner reasonably designed to result in delivery by the applicable date.

[407] For purposes of this delivery requirement, seasoned issuers are those whose initial public offerings took place one year or more before the effective date of the registration statement for the current offering of securities.

the small business issuer system? If so, how?

Because information would be delivered to the investor before the transaction is declared effective and sold, material changes to the transaction or the company information may arise that were not disclosed in the preliminary prospectus delivered to investors. If investors are not otherwise informed about those changes, the information must be set forth in a document sent in a manner reasonably designed to be delivered to each investor at least 24 hours before the pricing of securities or the date the investor signs a subscription agreement or otherwise commits to purchase the securities.[408] Should we instead require delivery of material change information in 36 or 48 hours?

c. Foreign Government Issuers

We propose to exempt foreign government issuers[409] from the final prospectus delivery requirements and require them to deliver prospectus information under Rule 172 for the same reason we propose that treatment for other issuers: to provide more timely and efficient dissemination of information to investors.

Foreign government issuers are exempt from the reporting requirements under the Exchange Act unless they list their securities on a U.S. exchange.[410] Therefore, the proposed prospectus delivery requirements would serve a significant function in ensuring that investors have the information about foreign governments they need, at the time they need it, to make an informed investment decision. As in the case of corporate issuers, however, delivery may be needed more or less depending on the issuer and the offering. We believe that investors would need less time to review the prospectus information for a new offering by a seasoned issuer than it would that of an unseasoned one.

When a foreign government issuer makes an initial registered offering in the United States, it files a Schedule B with the Commission. The Schedule is publicly available, and in many cases contains much more information than is mandated.[411] Investors can access this information through the Commission at any time after the registration statement becomes publicly available. Depending on the nature of the offering and the issuer, analysts may cover the issuer and disseminate information about it and its offerings. For purposes of prospectus delivery, therefore, we would define ''seasoned'' foreign government issuers as those that already have registered a public offering on Schedule B. In the absence of a reporting history, we believe that is the best measure of seasoning.

Under proposed Rule 172, foreign government issuers would be divided into two categories: (1) larger seasoned issuers; and (2) smaller/unseasoned issuers. Larger seasoned issuers would consist of those that:

- Had registered an initial public offering with the Commission that was declared effective more than one year before the registration of its current offering on Schedule B; and
- Are registering an offering of securities in excess of $250 million that is being underwritten on a firm commitment basis.

All other foreign government issuers would be within the smaller/unseasoned category.

Large seasoned foreign government issuers that registered their offerings on Schedule B would be treated like Form B registrants for purposes of prospectus information delivery requirements. We would mandate the delivery of a term sheet describing the material terms of the security being offered. We also would require that the term sheet be on file with the Commission before the first sale.[412] These foreign government issuers would have to send the term sheet by means that would reasonably result in delivery to the investor before it makes a binding investment decision.

Foreign government issuers in the smaller/unseasoned category would be treated like Form A registrants. A foreign government issuer, regardless of size, registering its initial public offering on Schedule B (or registering within 1 year of it) would be included in the smaller/unseasoned category. That issuer would be treated like an issuer registering its initial public offering on Form A. Thus, we would require it to send a prospectus that satisfies the requirements of Section 10 of the Securities Act, by means reasonably designed so that the investor receives the prospectus at least 7 days before:

- The date of pricing the securities (for offerings underwritten on a firm commitment basis); or
- The date the investor signs a document that commits it to purchase the securities or otherwise commits to purchase (for offerings underwritten on a best efforts basis and non-underwritten offerings).

A seasoned foreign government issuer registering an offering of less than $250 million or registering an offering that is not underwritten on a firm commitment basis would be treated the same as a seasoned small issuer on Form A. It would have to deliver a prospectus 3 days before the date of pricing or the date an investor commits to purchase, as applicable.

We solicit comment on the prospectus delivery proposals as they relate to foreign government issuers. For unseasoned foreign governments, should we mandate prospectus delivery earlier than 7 days? Would 10 or 15 days be a better measure of time needed to digest the information and do any follow up inquiries. For other foreign government issuers in the smaller/unseasoned category, should we mandate prospectus delivery earlier than 3 days? Would 5 or 10 days be a better measure? For seasoned Schedule B issuers making smaller offerings or offerings not done on a firm commitment underwritten basis, should we mandate prospectus delivery earlier than 3 days? Would 5 or 10 days be a better measure? Should our definitions of ''seasoned'' for offerings by foreign government issuers require that the issuer have made its initial public offering more than 1 year earlier? Would two years earlier be a better test? Should we raise the offering threshold (*e.g.*, to $400 or $500 million) or lower it (*e.g.*, to $100 or $150 million)?

As we do regarding the term sheet required for Form B offerings, we solicit comment on whether the term sheet for Schedule B offerings should include information in addition to the material terms of the securities.

d. Canadian MJDS Issuers

We also would require earlier delivery with respect to offerings on Forms F–7, F–8, F–9, F–10 and F–80—the registration statements used in connection with the MJDS. Under the proposed registration system, issuers

[408] For example, an issuer could choose to have the brokers tell investors orally about the changes when they call to determine if investors will commit to purchase.

[409] Securities Act Rule 405, 17 CFR 230.405, defines ''foreign government'' to mean the government of any foreign country or the government of any political subdivision of a foreign country.

[410] Section 15(d) of the Exchange Act expressly states that it does not apply to foreign government issuers. Section 12(g) of the Exchange Act applies only to issuers of equity securities, and foreign government issuers never issue equity. Accordingly, Section 12(b) is the only section under the Exchange Act that imposes a reporting requirement on foreign government issuers.

[411] Typically, the registration statements will include information about the issuer's country, form of government, economy, monetary system, public finance and national debt. Foreign government issuers disclose this additional information for marketing purposes and due to concern about the antifraud provisions of the federal securities laws. *See* Greene & Adee, *The Securities of Foreign Governments, Political Subdivisions and Multinational Organizations*, 10 N.C.J. of Int'l L. and Com. Reg. 1 (Winter 1985).

[412] *See* proposed Securities Act Rule 230.493A, 17 CFR 230.493A.

that register offerings under the MJDS, other than business combinations and exchange offers, also would be required to comply with proposed Rule 172.[413] We believe this requirement would be especially useful to U.S. investors who may need more time to familiarize themselves with the disclosure that Canadian companies prepare pursuant to the requirements of Canadian securities regulation, which would likely differ somewhat from disclosure generally prepared under U.S. federal securities laws.

Issuers that register on MJDS Forms F–7, F–9 or F–10 (when that form does not involve a business combination) would be required to deliver a Section 10 prospectus under the proposed Rule. The delivery periods would mirror those applicable to Form A offerings. Seasoned issuers making offerings underwritten on a firm commitment basis would be required to deliver the prospectus to investors at least 3 days before the pricing date. For offerings underwritten on a best efforts basis, seasoned issuers would be required to deliver the prospectus to investors at least 3 days before the investor commits to purchase the securities. Unseasoned issuers would be required to deliver the Section 10 prospectus at least 7 days before the date of pricing or the date an investor commits to purchase, depending on the type of underwriting. Because there would be less public information available for unseasoned issuers, the proposed Rule calls for them to give investors more time to read the prospectus.

Comment is solicited with regard to these delivery obligations. Would the 7-day or 3-day delivery requirement provide investors with sufficient time to consider the issuer's disclosure? Should MJDS issuers be required to deliver sooner than proposed? Would 10 or 15 days (instead of 7) or 5 or 10 days (instead of 3) be better measures? Should we provide that MJDS issuers eligible to register on Form B be treated for purposes of delivery the same as Form B issuers, even though they rely on Canadian disclosure requirements? Is there any reason to differentiate the business combinations and exchange offers on MJDS forms from those on Form C or Form SB–3 with respect to the delivery requirements?

[413] Business combinations and exchange offers on Form F–8, F–80, and F–10 (when that Form is used in a business combination transaction) like business combinations on Forms C and SB–3, would not be subject to proposed Rule 172, 17 CFR 230.172, preliminary prospectus delivery. Instead, due to the nature of the transactions, they would continue to be subject to the final prospectus delivery obligations of Section 5. The timing of that delivery would be dependent on state law.

e. Effectiveness and Prospectus Delivery

In determining whether to accelerate effectiveness of registration statements, Section 8(a) of the Securities Act provides that the Commission consider whether there has been available adequate and understandable public information about an issuer and its offering. If not, the Commission may determine that it is not in the public interest to accelerate effectiveness of the registration statement. Under the proposed registration system, we would consider whether an issuer complied with its prospectus delivery obligations in evaluating any request for acceleration. We propose to amend Securities Act Rule 461 to reflect the consideration of compliance with delivery obligations under proposed Rule 172.[414]

f. Secondary Offerings

The proposed prospectus delivery requirements also would apply to registered secondary offerings made by selling security holders. We believe this is appropriate because most registered secondary offerings would be made in a manner that is similar to registered primary offerings. We solicit comment regarding whether it is appropriate to apply the same delivery requirements to all secondary offerings made by selling security holders that we apply to primary offerings made by the issuer. If not, why not, and how should they differ?

Are certain types of registered secondary offerings conducted in a sufficiently different manner from registered primary offerings that the delivery requirements are either not necessary or not appropriate? In particular, should the same delivery requirements apply to non-underwritten secondary sales into an existing trading market?

5. Aftermarket Prospectus Delivery

For a specified period of time after a registration statement becomes effective, the Securities Act requires dealers to deliver a final prospectus to persons who buy those securities. This aftermarket delivery obligation applies to all dealers, whether or not they participated in the offering itself.[415] The obligation arises because Section 5 applies to the dealer's transactions. The exemption generally relied upon by dealers, Section 4(3) of the Securities Act, is not available during a 40-day or 90-day period after the later of the effective date of a registration statement or the first bona fide offer of the security.[416] Thus, the aftermarket delivery period is defined primarily by the length of time Section 4(3) is unavailable.[417]

[414] *See* proposed Securities Act Rule 461(b)(2)(i), 17 CFR 230.461(b)(2)(i).

[415] The obligation is in addition to the obligation of dealers to deliver a prospectus when acting as underwriters and with respect to their unsold allotments.

a. Background of Aftermarket Prospectus Delivery

An exemption from registration for dealers is not available during those periods because Congress determined to mandate that information be delivered to investors by all dealers while the securities are ''in the stream of distribution.'' [418] Congress deemed protection of investors in the aftermarket important because: those investors are likely to be less sophisticated than the ones able to purchase in the initial sale, they frequently purchase at a higher price than the price of the initial offering, and they are solicited or influenced by the same selling efforts as the initial purchasers.[419] The Section 4(3) period was created to distinguish between transactions during distributions and ordinary trading transactions.[420]

Initially, Congress provided for a one-year aftermarket prospectus delivery period during which all dealers were obligated to deliver a prospectus. In 1954, Congress shortened the period to 40 days because it determined that distributions were completed well before the one-year period. [421] In 1964, Congress extended the 40-day period to 90 days for those transactions where no securities of an issuer had previously

[416] The 90-day delivery period in Section 4(3) applies for securities of issuers that have not previously registered under the Securities Act. The 40-day delivery period in Section 4(3) applies to securities of issuers that previously registered under the Securities Act.

[417] As discussed below, Securities Act Rule 174, 17 CFR 230.174, modifies the statutory delivery obligation.

[418] *See* S. Rep. No. 1036, 83rd Cong., 2d Sess. 7 (1954) (statement of Dr. Edward T. McCormick, former Commissioner of the Securities and Exchange Commission and then-current president of the American Stock Exchange).

[419] *See* S. Rep. 379, 88th Cong., 1st Sess. 28 (1963).

[420] The primary purpose of Section 4(3) was to exempt from the scope of Section 5 ''transactions by a dealer in securities not connected by time and circumstances with [the] distribution of a new offering.'' H.R. Rep. No. 85, 73rd Cong., 1st Sess. 6 (1933). The bright-line test Congress adopted was considered less ambiguous and less subject to ''easy evasion'' than any attempt to establish criteria distinguishing dealer activities which are distributive from those which are merely incidental to ordinary trading. Throop and Lane, *Some Problems of Exemption Under the Securities Act of 1933,* 4 L. & Contemp. Problems 89, 120 (1937).

[421] 1954 Amendments to the Securities Act of 1933, Pub. L. No. 83–577, 68 Stat. 683 (1954).

been sold pursuant to an earlier effective registration statement.[422] At the same time, Congress gave the Commission the power to shorten the 40-day and 90-day delivery period by rule, regulation or order.

In response to the 1964 legislative action, the Commission promptly shortened the aftermarket delivery period for some offerings via the adoption of Rule 174.[423] Since 1964, the Commission has amended aftermarket delivery obligations in Rule 174 four times.[424]

Current Rule 174 exempts from aftermarket prospectus delivery any transaction relating to securities of a reporting company.[425] If the transaction relates to securities of a non-reporting company that will be listed on a national securities exchange or quoted on an electronic inter-dealer quotation system, current Rule 174 sets an aftermarket delivery period of 25 days.[426] For offerings by blank check companies, Rule 174 sets an aftermarket prospectus delivery period of 90 days after the funds are released from the escrow or trust account.[427] Where a registration statement relates to offerings to be made from time to time, Rule 174 provides that there is no aftermarket delivery requirement once the initial periodexpires.[428]

[422] Securities Act Amendments of 1964, Pub. L. No. 88–467, 78 Stat. 580 (1964). Congress extended the period for two reasons. First, it viewed 90 days as a ''more realistic appraisal of the time during which the distribution process continues in the case of many new issuers.'' *See* S. Rep. No. 379, 88th Cong., 1st Sess. 28 (1963). Second, it wished to protect investors from the ''hot issue'' allure characterized by a ''seemingly insatiable appetite'' for new issues with ''rapid rises in the prices of such securities to premiums over the initial offering.'' *Id*.

[423] Securities Act Release No. 4749 (Dec. 23, 1964) [29 FR 19099].

[424] Securities Act Release No. 4886 (Nov. 29, 1967) [32 FR 17933] (exempting securities registered on new Form S–7 from the prospectus delivery requirements of Section 4(3)); Securities Act Release No. 5101 (Nov. 19, 1970) [35 FR 18130] (eliminating the aftermarket delivery requirement for securities of reporting issuers); Securities Act Release No. 6763 (Apr. 4, 1988) [53 FR 11841] (reducing the aftermarket delivery requirement for securities issued in initial public offerings that are exchange-listed or quoted on an automated inter-dealer quotation system) and Securities Act Release No. 6932 (April 4, 1992) [57 FR 18037] (adopting a longer delivery requirement for securities of blank check companies).

[425] 17 CFR 230.174(b).

[426] 17 CFR 230.174(d). In establishing the 25-day period, the Commission considered how long it took for the market to be stabilized and to disseminate information. The Commission also studied the daily trading volume and relative prices changes in the aftermarket. Securities Act Release No. 6763 (Apr. 4, 1988).

[427] 17 CFR 230.174(g).

[428] 17 CFR 230.174(c).

b. Aftermarket Underwriter Activities

In practice, aftermarket activities by underwriters occur in connection with offerings both by reporting and non-reporting companies. For example, the Commission's Office of Economic Analysis surveyed aftermarket underwriter short covering in 236 offerings completed between May and July 1997.[429] Short covering occurs when the underwriter creates a short position in the offering that it covers by exercising the over-allotment option, by purchases in the aftermarket or by a combination of the two.

In its survey, the Commission examined the frequency of short covering. Of the 236 offerings, underwriters in 54% of the initial public offerings and 73% of the non-initial public offerings covered short positions in the aftermarket.[430] Of those initial public offerings, 42% had underwriters still covering short positions 10 days after the offering. That percentage dropped to 13% at 25 days after the offering. Of the non-initial public offerings in which short position were taken, 28% had underwriters who were still covering short positions 10 days after the offering. That percentage dropped to 10% at 25 days after the offering.[431]

c. Recent Case Law Relating to Aftermarket Delivery Obligations

Since the *Gustafson* v. *Alloyd Co.*[432] decision by the Supreme Court, several federal district courts have concluded that the end of the prospectus delivery obligation also marks the end of the distribution for purposes of civil liability provisions under the Securities Act. Those decisions tie together the obligation to deliver a prospectus in the aftermarket with the existence of investor remedies in the aftermarket.

In *Gustafson*, the Supreme Court stated that ''the liability imposed by Section 12[(a)](2) * * * cannot attach unless there is an obligation to distribute the prospectus in the first place (or unless there is an exemption).'' [433] District courts have interpreted this dicta to mean that Section 12(a)(2) protections apply only where there is an obligation under Section 5 (read in conjunction with Section 4(3) and Rule 174) to deliver a prospectus.[434] Some courts have extended that reasoning by analogy to Section 11 as well.[435]

Under the current delivery requirements, that interpretation could result, and in some cases has resulted, in findings that Section 11 and Section 12(a)(2) protections do not extend to the entire distribution because Rule 174 creates an exemption from the prospectus delivery aspect of Section 5. We believe such an outcome is inconsistent with the investor protection provisions of the Securities Act and therefore seek to eliminate any potential confusion that could arise from Commission rules relating to prospectus delivery obligations.

d. Aftermarket Prospectus Delivery Proposals

We propose to continue the principle of applying a prospectus delivery obligation to transactions in the aftermarket. The concerns about aftermarket purchasers that caused Congress to apply Section 5's investor protections arguably remain just as valid today. We want to ensure that investors are suitably informed and protected in the aftermarket. When we adopted Rule 174, we intended simply to express when prospectus delivery was needed.[436] We did not intend to delineate when the remedies provisions

[429] Of the 236 offerings studied, 114 were initial public offerings and 122 were primary, non-initial public offerings.

[430] As a result of the findings of this research, the Commission also reviewed the frequency of short covering based on differing criteria, such as average daily trading volume, market capitalization, and proceeds of the offering, to determine if there were other factors indicative of aftermarket activity. The Commission found no statistically significant deviations resulting from the various objective criteria selected. *Frequency of Aftermarket Price Stabilization*, Memorandum of the Commission's Office of Economic Analysis (July 24, 1998).

[431] *Id*.

[432] 513 U.S. 561 (1995).

[433] *Id*. at 564.

[434] *Stack* v. *Lobo*, 903 F. Supp. 1361 (N.D. Cal. 1995)(characterizing *Gustafson* as imposing ''prospectus liability only when the issuer is required to distribute a prospectus'' and applying the civil liability provisions based on the 25-day period created by Rule 174 for IPOs); *Agryropoulous* v. *Mednet*, 1997 U.S. Dist. LEXIS 10497 (C.D. Cal. 1997) (citing *Gustafson* for the holding that ''[S]ection 12(a)(2) imposes prospectus liability only when the issuer is required to distribute a prospectus'') and *Gannon* v. *Continental Ins. Co.*, 920 F. Supp. 566 (D.N.J. 1996) (interpreting *Gustafson* to preclude liability under Section 12(a)(2) ''for anything other than a stock purchase on an initial offering''). *See also Levitin* v. *A Pea in the Pod*, 1997 U.S. Dist. LEXIS 4985 (N.D. Tex. 1997) (reasoning ''[a]ny redistribution of * * * stock within the statutory [mandatory prospectus delivery] period...takes on the characteristics of a new offering'' and thus liability attaches).

[435] *See, e.g., In Re WRT Energy Securities Lit.*, 1997 U.S. Dist. LEXIS 14009 at *21 (S.D.N.Y. 1997); *Gould* v. *Harris*, 929 F. Supp. 353 (C.D. Cal. 1996); *Murphy* v. *Hollywood Enter. Corp.*, 1996 WL 393662 at *3 (D. Or. 1996); *Gannon* v. *Continental Ins. Co.*, 920 F. Supp. 566 (D.N.J. 1996) and *Stack*, 903 F. Supp. at 1361.

[436] Securities Act Release No. 4749 (Dec. 23, 1964).

in the Securities Act would or would not apply.

While we believe it is appropriate overall to continue to apply a prospectus delivery obligation in the aftermarket, we also recognize that the world of accessible investment information has changed in many respects since Congress last amended that obligation in 1964. We believe it is time to reassess how this particular delivery obligation may be satisfied. While the *Gustafson* Court stated that a prospectus delivery obligation must exist in order to apply Section 12(a)(2), Section 12(a)(2) does not speak to the method by which that obligation could be satisfied. Physical delivery of a prospectus would not necessarily be required for purposes of the section.

Today, prospectuses are readily available during the aftermarket period through our Internet web site as well as other electronic sources. The Commission realizes that some investors are technologically sophisticated and are just as able as dealers to download the final prospectus from the Internet. We also recognize, however, that there are still many investors who do not have the capacity to obtain information in that manner. Given that the final prospectus delivery obligation in the aftermarket truly protects investors primarily after they have made their initial investment decisions, we believe that obligation could be satisfied through a means other than physical delivery.

We propose to revise Rule 174 so that the prospectus delivery obligation would be satisfied if a final prospectus[437] is on file with the Commission and the dealer notifies each investor, before or at the same time it receives a confirmation, where it may promptly acquire, free of charge from the issuer, final prospectus information. For example, the dealer could notify investors that they can download a final prospectus in electronic form from our web site and request it in paper format by calling the dealer at the listed number. The notice may be in the form of a legend on the confirmation sent by the dealer under Exchange Act Rule 10b–10.

The proposed Rule would maintain the twin goals of the aftermarket prospectus delivery that Congress created: informing investors and preserving investor remedies throughout the stream of distribution of securities. By directing investors to a web site where they are able to view and print the final prospectus, and by allowing investors to request physical delivery of a final prospectus, the Commission would ensure investor awareness of the availability of information in the aftermarket. At the same time, the burden on dealers would be minimized to only those cases where investors seek a paper prospectus.

We propose to apply the Section 5 prospectus delivery obligation for transactions by all dealers for a period of 25 calendar days after the later of: the effective date of the registration statement, or the first date on which the security was bona fide offered to the public.[438] The aftermarket delivery obligation would apply regardless of whether the offering is an initial public offering or a repeat offering. The frequency and nature of the underwriter trading behavior demonstrates that aftermarket distributive activities are clearly not confined to offerings that are initial public offerings.[439]

The intent of Section 4(3) and Rule 174 was to provide Securities Act protection during the entire stream of distribution. Given our research and understanding of practices, we believe it is possible to set an appropriate delivery obligation period at 25 days for both initial public offerings and repeat offerings. The single period for all offerings would simplify compliance for dealers and provide a bright-line by which investors could set their expectations. Thus, the market should benefit from the clear definition of aftermarket transactions. While distributive activities continue in some offerings beyond that period, we believe the vast majority do not. We solicit comment, however, regarding whether the period should be shorter (*e.g.*, 20 days) or longer (*e.g.*, 30 days) or vary according to some other aspect of the offering.

We also solicit comment on whether dealers that were not members of the underwriting syndicate for an offering of a reporting company should have a prospectus delivery requirement. Would the cost of compliance by notification under proposed Rule 174 for those dealers be greater than the benefit of an informed aftermarket?

6. Proposed Repeal of Rule 153

Under the proposed prospectus delivery regime, Securities Act Rule 153 would not be necessary.[440] Rule 153 addresses delivery of final prospectuses in transactions between brokers taking place over a national securities exchange. The Rule states that the Section 5 delivery obligation of a final prospectus before or with a security will be satisfied if the issuer or underwriter delivers the final prospectus to the exchange. The Rule contemplates that these prospectuses will then be taken or copied by the members of the exchange that are on the buy side of the transaction and delivered to the beneficial purchaser.[441] The Rule is limited in that it applies only to transactions between members of a national securities exchange and only where the transaction was effected on that exchange.[442] The Rule is not applicable for transactions on an automated quotation system.

Based on our staff's discussions with exchanges and market participants, it appears that Rule 153 is not relied on (or rarely relied on) to accomplish prospectus delivery. There are two explanations for this. First, Rule 153 is narrow in scope and therefore does not apply to many transactions. Second, from a procedural standpoint, an underwriter finds it easier to mail prospectuses to all purchasers rather than differentiating among them.

Under the proposed aftermarket prospectus delivery system, Rule 153 would not be necessary. As we propose to revise Rule 174, dealers would have a prospectus delivery requirement for transactions relating to a registered security for a period of twenty-five calendar days after the later of: the effective date of the registration statement, or the first date on which the security was bona fide offered to the public. That delivery obligation would be deemed satisfied, however, if a final prospectus is on file with the

[437] We would provide that the prospectus on file may omit price-related information in reliance on Securities Act Rule 430A, 17 CFR 230.430A, which deems that information to be part of the effective registration statement upon filing.

[438] Proposed revisions to Rule 174, 17 CFR 230.174, would retain some of the provisions of current Rule 174: (1) we would continue to apply a 90-day prospectus delivery obligation to securities of blank check companies; (2) we would retain the provision that Rule 174 does not shorten the prospectus delivery obligation with respect to securities covered by any registration statement that was the subject of a stop order under Section 8(a) of the Act; and (3) we would retain the provision expressing the our authority to set a different aftermarket delivery obligation in a particular case, as appropriate.

[439] We have considered but rejected an outright exemption of dealers' transactions from the aftermarket prospectus delivery obligation. Among the reasons for doing so is the risk that it could have the unintended effect of limiting remedies for purchasers in aftermarket transactions. We believe that result would frustrate the legislative and Commission intent to protect investors who buy throughout the distribution period, including the aftermarket part of it.

[440] 17 CFR 230.153.

[441] Some commentators have questioned whether in practice the re-delivery to the purchaser would occur. *See, e.g.*, Johnson & McLaughlin, *supra* note 76, at 548–49.

[442] *See In the Matter of Hazel Bishop Inc.*, Securities Act Release No. 4371 (June 7, 1961) [40 S.E.C. Docket 718 (1961)].

Commission and each investor is notified where it can obtain the final prospectus information that satisfies Section 10(a). Thus, in the limited situations under the proposed system in which Rule 153 might apply, delivery is satisfied through another mechanism. We therefore propose to repeal Rule 153.

7. Record Keeping of Prospectus Delivery

We solicit comment on whether the Commission should, by rule, specifically require broker-dealers to keep records of their distribution of information relating to an offering of securities under the Securities Act.[443] For example, should the Commission require a broker-dealer to keep records on each offering regarding where and how prospectuses, term sheets and free writing material were disseminated? Should the Commission limit such a rule only to managing or principal underwriters or should the rule apply to every broker-dealer? Should records be required concerning prospectuses only, or should the records reflect all information distributed? Should this requirement be limited to the ''offering period'' only or should it extend through the aftermarket delivery time period required by the proposed amendment to Rule 174? Should this requirement be limited only to those offerings that become effectively automatically?[444] How long should these records be required to be kept? Is two years a long enough period? Is six years too long?

To enable easier tracking of compliance, should we require issuers that make offerings (other than Form B offerings) that are underwritten on a firm commitment basis disclose the pricing date? Should it be disclosed in the first quarterly report they would be required to file after the offering or in another Exchange Act report (*e.g.*, a Form 8–K)?

[443] The Commission would promulgate such a rule under Section 17 of the Exchange Act.

[444] The Act requires the Commission, in ruling upon requests for acceleration of the effective date of a registration statement, to consider whether adequate information is available to the public. *See* Securities Act Section 8(a). The Commission gives guidance as to what constitutes adequate information in Rule 460, 17 CFR 230.460. Many issuers provide the Commission with a description of their effort to satisfy the guidance set forth in Rule 460 in their requests for acceleration of the registration statement. Requests for acceleration are submitted pursuant to Securities Act Rule 461, 17 CFR 230.461. Under the proposals, in Form B offerings and certain offerings on Form A, underwriters and issuers would no longer submit to the Commission a request for acceleration.

IX. The Role of Underwriters

A. Legislative Shaping of the Underwriters' Role

In passing the Securities Act in 1933, Congress was acting on its concern that misleading disclosure and high pressure sales tactics had overstimulated investors' demand for securities.[445] Congress' remedy was to require that investors get complete and truthful information regarding the offered securities. To help ensure that result, Congress deliberately placed underwriters within the scope of the liability provisions.[446] Congress recognized that underwriters occupied a unique position that enabled them to discover and compel disclosure of essential facts about the offering. [447] Congress believed that subjecting underwriters to the liability provisions would provide the necessary incentive to ensure their careful investigation of the offering.[448]

Congress' goal was not to have underwriters act as insurers of an issuer's securities.[449] Accordingly, Congress provided underwriters and others with a ''due diligence'' defense. An underwriter is not liable under Section 11 for the non-expertised portions of the registration statement if, after reasonable investigation, it had reasonable grounds to believe (and did believe) that the statements in the registration statement ''were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.* * *'' [450]

B. Case Law Interpretation of the Underwriters' Role

In the past, the courts also have recognized the important role underwriters play in the offering process. As the U.S. Court of Appeals for the Second Circuit noted, ''[n]o greater reliance in our self-regulatory system is placed on any single participant in the issuance of securities than upon the underwriter.* * *'' [451] Accordingly, courts have found that underwriters must conduct an investigation ''reasonably calculated to reveal all of those facts [that] would be of interest to a reasonably prudent investor.'' [452] As the courts have noted, it is impossible to have a rigid rule defining what is a reasonable investigation or how far an underwriter must go in order to verify an issuer's statements.[453]

C. Commission Interpretation of the Underwriters' Role

We, too, have provided guidance with regard to underwriter due diligence. In 1982, as part of a comprehensive program to integrate the disclosure requirements of the Securities Act and the Exchange Act, we adopted Rule 176.[454] Rule 176 identifies circumstances relevant in determining whether a person's conduct satisfies the due diligence standard in Section 11.[455] They are:

1. The type of issuer;
2. The type of security;
3. The type of person;
4. The office held when the person is an officer;
5. The presence or absence of another relationship to the issuer when the person is a director or proposed director;
6. Reasonable reliance on officers, employees and others whose duties should have given them knowledge of the particular facts;
7. For underwriters, the type of underwriting arrangement, the role as

[445] During the 1920s, $25,000,000,000 in securities (half of all those issued) proved to be worthless. H.R. Rep. No. 85, 73rd Cong., 1st Sess. 2 (1933) (hereinafter H.R. Rep. No. 85).

[446] Congress placed some of the responsibility for investors' losses on the securities industry. The House of Representatives' Committee on Interstate and Foreign Commerce noted that ''the flotation of such a mass of essentially fraudulent securities was made possible because of the complete abandonment by many underwriters and dealers in securities of those standards of fair, honest and prudent dealing that should be basic to the encouragement of investment. * * *'' H.R. Rep. No. 85 at 2.

[447] *ABA Committee on Federal Regulation of Securities, Report of Task Force on Sellers' Due Diligence and Similar Defenses Under the Federal Securities Laws*, 48 Bus. Law. 1185, 1191 (May 1993).

[448] H.R. Rep. No. 85 at 5.

[449] H.R. Rep. No. 152, 73rd Cong., 1st Sess. 26 (1933). In order to remove any uncertainty with regard to the standard of reasonableness Section 11(c) of the Securities Act was amended in 1934 to replace the term ''fiduciary'' with the common law definition of the duty of a fiduciary. H.R. Rep. No. 1383, 73rd Cong., 2d Sess. (1934). *See also Escott, et al* v. *Barchris Construction Corp.*, 283 F. Supp. 643, 697 (S.D.N.Y. 1968) (''In order to make the underwriters' participation in this enterprise of any value to the investors, the underwriters must make some reasonable attempt to verify the data submitted to them.'').

[450] 15 U.S.C. § 77(k)(b)(3). For expertised portions of the registration statement, an underwriter need only show that it had no reasonable ground to believe, and did not believe, that the statements in the registration statement were untrue or omitted to state a material fact. *Id.*

[451] *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 370 (2d Cir. 1983).

[452] *See, e.g., Feit* v. *Leasco Data Processing Equipment*, 332 F. Supp. 544, 582 (E.D.N.Y. 1971).

[453] *Barchris*, 283 F. Supp. at 643.

[454] 17 CFR 230.176.

[455] The rule applies to persons other than the issuer. In the adopting release for Rule 176, the Commission acknowledged that there are other circumstances beyond those enumerated in the rule which may bear upon the reasonableness of an underwriter's investigation. *See* Securities Act Release No. 6383 (Mar. 3, 1982).

underwriter, and the availability of information with respect to the registration; and

8. Where a fact or document is incorporated by reference, whether the person had any responsibility for the fact or document when filed.

We wrote this list in a general way to apply to virtually any kind of offering and to apply to any person that could claim a due diligence defense.

We adopted Rule 176 to provide guidance to courts assessing the reasonableness of an investigation under the integrated disclosure system. [456] At that time, we expressly rejected the consideration of competitive timing and pressures when evaluating the reasonableness of an underwriter's investigation.[457]

In proposing Rule 176, we also discussed techniques available to underwriters that would allow them to expedite their due diligence investigations.[458] We stated that an underwriter could develop a ''reservoir of knowledge,'' before an offering, by carefully reviewing a company's Exchange Act filings, analysts' reports, and by attending the company's meetings with analysts and brokers. This ''reservoir of knowledge'' would enable the underwriter to complete its due diligence investigations more quickly, because it would already be familiar with the company.

D. Proposed Guidance on Underwriter Due Diligence

The registration system we are proposing, among other things, would allow more reporting issuers to register capital faster and more efficiently. Consequently, underwriters may experience marginal additional timing pressures in conducting their due diligence investigations. Under those circumstances, underwriters must take care not to allow competitive pressures and issuers' demands for speed to lessen their due diligence investigations. We have been advised that firms currently underwriting expedited offerings by reporting issuers perform a reasonable investigation despite the very short period between when they are named the underwriter and when the offering is commenced. They reportedly use a combination of real-time and anticipatory due diligence practices. Those practices should work as well in connection with expedited offerings under the proposed registration system.

We believe that a court would, of its own accord, take into account all of the facts and circumstances that affect the ability of the underwriter to conduct a reasonable investigation or develop reasonable grounds for belief. Nevertheless, a rule that provides guidance with respect to expedited offerings by reporting companies could help those involved in the due diligence process and those assessing its adequacy. We believe we can identify several due diligence practices for those offerings that, if present, may be indicative of a ''reasonable investigation'' under Section 11 and ''reasonable care'' under Section 12(a)(2).

Accordingly, we are proposing to expand Rule 176.[459] First, we are proposing that Rule 176 address the reasonable care standard of Section 12(a)(2) as well as the reasonable investigation standard of Section 11. While Section 11 requires a more diligent investigation than Section 12(a)(2), any practices or factors that would be considered favorably under Section 11 also should be considered as favorably under the reasonable care standard of Section 12(a)(2).[460]

We also are proposing to add subsection (i) to the Rule. It would identify six due diligence practices that the Commission believes would enhance an underwriter's due diligence investigation when conducting an expedited offering. The Commission believes the courts should view these practices as positive factors when evaluating an underwriter's due diligence defense, though these practices in no way constitute an exclusive list or serve as a substitute for a court's analysis of all relevant circumstances. The absence of one or more of these practices, apart from the underwriter's review of the registration statement and inquiry into facts or circumstances that raise concerns about the adequacy or accuracy of the disclosure, should not be considered definitive in reaching a conclusion about the adequacy of the underwriter's investigation.

Subsection (i) would apply only to offerings of equity and non-investment grade debt securities that were marketed and completed in fewer than five days. Additionally, the proposed guidance would require that the issuer have registered the offering on Form B. These expedited offerings require the underwriter to perform the bulk of its due diligence on a compressed time schedule. For offerings conducted on a longer time schedule, the Commission believes that no additional guidance is required. For every offering, including expedited offerings, the courts would examine all the relevant circumstances. The six practices that the courts should consider as positive factors in expedited offerings are:

1. Whether the underwriter reviewed the registration statement and conducted a reasonable inquiry into any fact or circumstance that would cause a reasonable person to question whether the registration statement contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading;

2. Whether the underwriter discussed the information contained in the registration statement with the relevant executive officer(s) of the registrant (including, at a minimum, the chief financial officer (''CFO'') or chief accounting officer (''CAO'') or his or her designee) and the CFO or CAO (or his or her designee) certified that he or she has examined the registration statement and that to the best of his or her knowledge, it does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading;

3. Whether the underwriter received a Statement on Auditing Standards (''SAS'') No. 72 comfort letter from the issuer's auditors;

4. Whether the underwriter received a favorable opinion from issuer's counsel opining that nothing has come to its attention that has caused it to believe that the registration statement contains an unfair or untrue statement or omits to state a material fact;

5. Whether the underwriter employed counsel that, after reviewing the issuer's registration statement, Exchange Act filings and other information, opined that nothing came to its attention that would lead it to believe that the registration statement contains an untrue statement or omits to state a material fact; and

6. Whether the underwriter employed and consulted a research analyst that:

(i) Has followed the issuer or the issuer's industry on an ongoing basis for at least the 6 months immediately before the commencement of the offering; and

[456] The integrated disclosure system (and later shelf registration) allowed issuers to complete registered offerings faster than previously possible. Underwriters expressed concern that those accelerated time schedules would increase pressure on them to expedite their due diligence investigations. *See* Securities Act Release No. 6335 (Aug. 6, 1981) [46 FR 42015]. *See also Feit,* 332 F. Supp. at 582. The Commission stated that the integrated disclosure system was not designed to modify the responsibility of underwriters and others to make a reasonable investigation. *See also* Securities Act Release No. 6499 (Nov. 17, 1983).

[457] Securities Act Release No. 6335 (Aug. 6, 1981).

[458] Securities Act Release No. 6335 (Aug. 6, 1981). These techniques were not codified as part of the rule but ''were presented to help facilitate the development of procedures compatible with integrated approach to registration.'' *See* Securities Act Release No. 6383 (Mar. 3, 1982).

[459] See proposed revisions to Securities Act Rule 176, 17 CFR 230.176.

[460] If our proposed expansion of Securities Act Rule 176, 17 CFR 230.176, is adopted as proposed, we envision providing additional guidance in the adopting release as to the difference between the reasonable care standard of Section 12(a)(2) and the reasonable investigation standard of Section 11.

(ii) Has issued a report on the issuer or its industry within the 12 months immediately before commencement of the offering.

The Advisory Committee on Capital Formation also recommended expanding the factors listed in Rule 176.[461] We solicit comment on whether one of those factors, a management report to the audit committee of the board regarding procedures established to assure accurate and complete Exchange Act disclosure, be included in Rule 176 as a basis for underwriter due diligence.[462]

1. Proposed Practices Reflect Current Practice

Various underwriters and issuers have identified to the Commission staff potential elements of current due diligence investigations for expedited offerings. All of the six practices identified in the proposal reportedly are being used to some degree by most underwriters for those offerings. For example, even in the speediest of offerings, an underwriter interested in establishing that it had done a reasonable investigation would: read the disclosure, talk about it with management of the issuer, document management's conclusion about its adequacy, and follow up on matters of concern that arise in connection with its inquiry. An underwriter doing a due diligence investigation in an expedited offering may seek assurance from third parties involved in the offering that they have not discovered inadequacies in the disclosure. Thus, they may arrange for opinions from both the issuer's counsel and their own. Additionally, underwriters may arrange for a SAS 72 comfort letter from the issuer's auditor. Though we believe that underwriters' reliance on representations by third parties may, depending on the circumstances, be a factor in considering an underwriter defense in expedited offerings, in every instance we believe it is appropriate for underwriters to review the registration statement and make reasonable inquires about any suspicious statements or omissions. For that reason, we have indicated that a court could consider dispositive an underwriter's failure to do so. We request comment on whether reliance on third party representations alone could satisfy an underwriter's obligation.

2. The Role of Analysts

An underwriter will sometimes employ its research analysts to help it conduct its due diligence investigation. We believe it is appropriate to recognize that research analysts working for an underwriter can play an important role in facilitating the due diligence process in expedited offerings. A research analyst that follows an issuer's industry would likely be aware of the risks and prospects of an issuer's business. An analyst is employed to search out and analyze not only the Commission filings but also any other information that is available about the issuer and its industry. While an analyst may not have the same degree of access to issuer information as an underwriter performing long-term due diligence, he or she generally has regular contact with the issuer or companies in the issuer's industry. As a result, the analyst would have acquired the necessary ''reservoir of information'' about the issuer that helps fulfill due diligence requirements in expedited offerings.

Firms acting as underwriters in expedited offerings generally do so when they are already conducting a form of ''due diligence'' year round via their in-house analysts. Because of their analysts' prior work, these underwriters have less to do immediately before the offering.[463] While some brokerage firms may have ''walled off'' analysts from the underwriting side of their businesses, that no longer appears to be uniformly the case at the time where an analyst's knowledge can be instrumental in expediting the due diligence process.[464]

In this respect, we recognize that, in limited and controlled circumstances, cooperation between analysts and underwriters can be useful. The proposed system perceives the utility of a ''one-way'' wall between analysts and underwriters of the same firm, whereby information from the analysts who have a ''reservoir of information'' is available to the underwriters for purposes of Rule 176. We still would expect brokerage firms to maintain a wall between analysts and underwriters to prevent any flow of information from the underwriter to the analyst that would result in selective disclosure.

3. Other Due Diligence Practices

The Commission also wishes to solicit comment on a number of other due diligence practices that are currently being conducted or discussed by underwriters.

a. Disclosure Review by an Issuer's Independent Accountants

The role of the accountant in a due diligence investigation cannot be overlooked. Accountants are often the people most familiar with an issuer's financial standing and prospects. They play a vital role in the protection of investors. As noted earlier, underwriters also rely on accountants in performing their due diligence investigation. Underwriters often will request a SAS 72 comfort letter from an issuer's independent auditors as part of their due diligence investigation. Additionally, some issuers have their accountants conduct a SAS 71 review of their quarterly financial statements. We believe that this additional review of an issuer's quarterly financial statements augments compliance with our rules and regulations. Consequently, we request comment as to whether we should add to the proposed practices the fact that an independent accountant performed a timely review under SAS 71 of an issuer's quarterly financial information.

Recently, the American Institute of Certified Public Accountants (''AICPA'') issued a Statement on Standards for Attestation Engagements No. 8 (''SSAE 8''). The SSAE 8 contemplates that an accountant may perform either an examination or a review of an issuer's management's and discussion and analysis (''MD&A'') disclosure. The examination is intended to result in the accountant's expression of an opinion as to whether:

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[461] *See* Advisory Committee Report at 65–70. That Committee primarily suggested that compliance with both mandatory and voluntary ''disclosure enhancements'' recommended in its Report be added as factors for underwriters. In addition to the management report to the audit committee, those included:

—Senior management certification to the Commission regarding disclosure in Exchange Act reports;

—Reviews by outside professionals including:

—SAS 71 review by company's auditors

—SAS 72 comfort letter

—SAS 37 subsequent events procedures

—Rule 10b–5 opinion letter

—Existence of a disclosure review committee of the board of directors;

—The extent of access to analysts; and

—The size of the offering.

[462] *See* Section XI.A.4. of this release regarding Exchange Act disclosure.

[463] While the rule contemplates that the analyst has been following the issuer or its industry as part of its employment responsibilities for a period of time, the rule does not require that the analyst be employed by the underwriter for that entire period. The fact that an analyst moves from one analyst position to another should not be relevant where the analyst's coverage of the issuer continues.

[464] While we recognize the varying practices with respect to maintaining a wall between the analyst and underwriting sides of the brokerage firm, we do not suggest that brokerage firms should remove or lower those walls. Although we recognize the helpful role analysts perform in facilitating due diligence, we also recognize the wisdom of maintaining legitimate walls between analysts and underwriters that work for the same brokerage firm and share an interest in the same issuers. *See, e.g.*, *AutoZone Holders Sold Stock in June After Goldman, Analysts Talked Up Issue*, Wall St. J., Jan. 15, 1997 at C1.

1. The issuer MD&A disclosure contains the required elements of Item 303 or Regulation S–K or Item 303 of Regulation S–B;

2. The historical financial information included in the MD&A is accurately derived from the issuer's financial statements; and

3. The issuer's underlying information, determinations, estimates and assumptions provide a reasonable basis for the disclosures contained in the MD&A.[465]

We believe that a SSAE opinion may further our disclosure goals and help obtain greater compliance with our rules. Therefore, we also solicit comment as to whether a SSAE 8 review should be added to the proposed practices.

b. Disclosure Review by an Independent Qualified Professional

We also request comment as to whether to include as one of the proposed practices an underwriter's review of a favorable report issued by a qualified independent professional to the issuer after the professional conducted a year-end disclosure review. The purpose of the qualified independent professional's review would be for the professional to assess the disclosure in the annual report the issuer is drafting before the issuer files it under the Exchange Act.[466] Although this practice is not common today, we believe it could enhance the quality of Exchange Act disclosure that is typically incorporated by reference into registration statements in connection with expedited and other offerings. In the event that a qualified independent professional completed such a review, a reasonable underwriter should be allowed to factor that in when figuring out what steps it needs to take in its due diligence.

We anticipate that such a disclosure review generally would occur independent of the offering process during the period after the end of the issuer's fiscal year but before it has filed its annual report. In the course of the review, the professional would read all of the issuer's Exchange Act reports for the year, as well as last year's annual report, to assist it in evaluating the quality of the Exchange Act annual report not yet filed by the issuer for the year just ended. The qualified independent professional also would perform a reasonable investigation.[467] It would have to issue its report before the commencement of the offering in order for the underwriters to place reasonable reliance on the report.

To issue a favorable report, the professional would have to state that, after reading those reports and doing a reasonable investigation, it believes that the disclosure in the non-expertised portions of the annual report to be filed is true and there were no omissions of material facts. As to the expertised portions (including the audited financial statements), the professional would have to state that it does not believe that the disclosure is untrue or there was an omission to state a material fact.

We also request comment as to whether certain qualifications should be required of the independent professional. While we anticipate that different professions could perform the disclosure review, should such a review be limited to only certain professions such as the legal or accounting profession? Would we need to provide guidance as to what would constitute an adequate disclosure review? Would there be a sufficient number of qualified professionals willing to undertake such a review? Since these professionals would be subject to liability, would this prevent a market for such services from developing? Would issuers be willing to pay for such a review?

Besides this proposed practice and the liability provisions of the Acts, are there more direct or better ways to enhance the underwriters' due diligence role with respect to an issuer's Exchange Act reports? If so, what are they?

E. Interpretation of the Guidance

While we believe that the due diligence practices we propose to add to Rule 176 would enhance an underwriter's investigation, these practices should not be viewed as mandatory. We also are not suggesting that some or all of these practices are the exclusive way to establish adequate due diligence, even in an expedited offering. The absence of any one or more of the practices in a particular case, except for the underwriter's review of the registration statement and inquiry into facts or circumstances that raise concerns about the adequacy or accuracy of the disclosure, should not be considered definitive in reaching a conclusion about the adequacy of due diligence efforts.[468] Each offering is unique, and therefore the underwriter must evaluate the surrounding circumstances and then choose the appropriate due diligence practices.

F. Investment Grade Debt Offerings

The proposed guidance would not apply to offerings of investment grade debt. Issuers that offer investment grade debt under a medium term note program may conduct frequent offerings. Consequently, underwriters' due diligence is usually performed periodically rather than with each offering of investment grade debt. Periodic due diligence normally would not be completed under the same time pressures associated with an expedited offering of equity or non-investment grade debt securities. We solicit comment, however, as to whether investment grade debt offerings should be included in the proposed amendments to Rule 176. If so, are there certain due diligence practices that would not be applicable to investment grade debt? Are there specific due diligence practices that are performed only with regard to investment grade debt offerings? Should these practices be added to Rule 176? Would these practices allow for due diligence to be performed on an offering-by-offering basis? Would additional guidance regarding investment grade debt offerings be useful to the courts?

G. Requests for Comment on the Proposed Guidance

The Commission requests comment on the proposed amendment to Rule 176. Because the courts already consider the surrounding circumstances of the offering when determining whether an underwriter's investigation was reasonable, would adding these practices to Rule 176 materially assist courts in evaluating due diligence efforts? Would adding them assist underwriters in crafting their due diligence practices? Would any of the proposed practices cause some underwriters, such as those that do not employ analysts, to suffer unfair competitive disadvantages?

Are there other due diligence practices that should be included in the proposed amendment? Are any of the practices not relevant to consider in assessing an underwriter's due diligence? Should the extent to which an underwriter has very recently underwritten another offering for the same issuer be explicitly identified as a relevant circumstance?

[465] Statement on Standards for Attestation Engagement No. 8, American Institute of Certified Public Accountants.

[466] This annual report would be incorporated into the registration statement prepared for the offering.

[467] We envision this investigation as akin to the type of reasonable investigation an underwriter would undertake if the disclosure were contained in a Securities Act registration statement.

[468] We have reflected this position in proposed revisions to Rule 176, 17 CFR 230.176.

Should the proposed 5-day marketing period be shortened (*e.g.*, to two or three days) or lengthened (*e.g.*, to five business days)? Should the proposed guidance be limited to offerings that are underwritten on a firm commitment basis? Should the proposed guidance be expanded to cover offerings that are registered on Form A, particularly those for which the underwriter designates effectiveness? Will the proposed changes provide an incentive for underwriters and issuers to complete their offerings earlier than today? Do we need to define when an offering is considered first marketed? In general, we solicit comment on whether the proposed practices, separately or as a package, provide underwriters with sufficient guidance to enable them to perform adequate due diligence investigations. Are the proposals too lenient to serve that purpose? Should we add other practices to proposed Rule 176(i) to direct underwriters who participate in these offerings better? On the other hand, are the proposals overly burdensome?

H. Liability Safe Harbor

Several commenters on the Concept Release suggested that reform is needed to ensure that an underwriter's exposure to liability under Section 11 mirrors its ability to affect disclosure.[469] In expedited offerings, they argued, there is little time to conduct due diligence immediately before commencement. As a result, some commenters suggested that underwriters be protected from liability through a safe harbor in those offerings.[470] We are not proposing such a safe harbor from potential liability. To grant one to underwriters would be to lessen significantly their incentive to test the quality of the issuer's disclosure in such offerings. We recognize the value that underwriters add to the disclosure process. In our view, investors require that protection. In addition, like the courts and past Commissions, we do not believe that it would be possible to craft a single, finite list of steps that will, without fail, constitute a reasonable investigation in every set of circumstances in many different offerings. We believe our proposal to include specific guidance in Rule 176 about expedited offerings will aid underwriters considering how to conduct due diligence in those circumstances and assist in the event a court needs to assess those steps.

X. Integration of Registered and Unregistered Offerings

A. The Integration Doctrine

The integration doctrine reaches all the way back to 1933.[471] Put simply, integration is the process of combining separate transactions in securities as part of the same offering for purposes of analyzing whether the registration provisions of the Securities Act apply. It is what prevents an issuer from evading registration by artificially splitting what is in reality a single offering to make it appear that an exemption applies when no exemption for that offering was ever intended. When separate transactions are integrated into one offering, that offering must have an exemption from registration. If no exemption is available, then the transaction, if not registered, would be in violation of Section 5 of the Securities Act. Thus, integration is a concept that upholds the policies underlying both the registration system and the exemption system in the Securities Act.

The integration doctrine is not always easy for securities law practitioners to apply to offerings. The analysis generally is dependent on considering all the particular facts and circumstances for each offering. Over the years, however, the Commission has given guidance. In 1962, the Commission issued a release that established a framework for analyzing whether offerings should be integrated.[472] The five-factor test established in that release continues to apply today.[473] In addition, the Commission has created a number of safe harbors from integration in order to simplify the analysis in particular cases.[474] The application of the integration doctrine also has been the subject of staff interpretive letters.[475]

B. Rule 152

In 1935, the Commission adopted Rule 152.[476] It provides a safe harbor from integration when an issuer makes a private offering pursuant to Securities Act Section 4(2) and then decides to make a public offering and/or file a registration statement. The rule states that Section 4(2) shall be deemed to apply to transactions that did not involve any public offering at the time even though the issuer decides subsequently to make a public offering and/or file a registration statement.

Rule 152 has not been considered a model of clarity. Over the years, the scope of Rule 152 has been a matter of some uncertainty and the subject of Commission staff no-action letters. For example, questions have been raised about: whether the safe harbor is available to both completed private offerings and abandoned private offerings, whether the safe harbor is available when the registered offering was contemplated at the time of the private offering, and under what circumstances an offering is considered completed for purposes of the safe harbor.[477]

C. Proposed Safe Harbors for Completed and Abandoned Offerings; Related Rule Proposals

The integration doctrine and Rule 152 have received a great deal of attention in recent years from securities law practitioners. Their interest has reflected their clients' demand for speed in the offering process. One area in which frequent questions arise with respect to integration is the combination of private and public offerings.[478]

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[469] *See, e.g.*, comment letters, in File No. S7–19–96, from Merrill Lynch (Oct. 31, 1996), Morgan Stanley (Dec. 9, 1996) and the Securities Industry Ass'n (Nov. 13, 1996).

[470] *See, e.g.*, comment letters, in File Number S7–19–96, from Cleary, Gottlieb, Steen & Hamilton (Dec. 27, 1996) and Merrill Lynch (Oct. 31, 1996).

[471] *See* Securities Act Release No. 97 (Dec. 28, 1933).

[472] *See* Securities Act Release No. 4552 (Nov. 6, 1962) [27 FR 11316].

[473] The five factors are:

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 securities?

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

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

These factors also are noted in Rule 502 of Regulation D, 17 CFR 230.502. The Commission has stated that any of the factors can be determinative. Securities Act Release No. 4552 (Nov. 6, 1962).

[474] For example, Rule 502(a), 17 CFR 230.502(a), provides that offers and sales made more than 6 months before the start of an offering under Regulation D or more than 6 months after the completion of an offering under Regulation D will not be integrated with the Regulation D offering if there were no non-Regulation D offers and sales of that class of securities (other than through employee benefit plans) during that period. *See also* Rule 147(b)(2), 17 CFR 230.147(b)(2), which provides a similar safe harbor for exempt intrastate offerings; Rule 251(c), 17 CFR 230.251(c), which provides a similar safe harbor under Regulation A for small offerings by non-reporting issuers; Rule 701(b)(6), 17 CFR 230.701(b)(6), which contains a non-integration provision in connection with exempt offerings to employees and consultants under compensation plans.

[475] *See, e.g.*, Staff interpretive letters *Squadron, Ellenoff, Pleasant and Lehrer* (Feb. 28, 1992) and *Black Box Inc.* (June 26, 1990).

[476] *See* Securities Act Release No. 305 (Mar. 2, 1935). *See also* Securities Act Release No. 4761 (Feb. 5, 1965) [30 FR 2022].

[477] *See, e.g.*, Staff interpretive letters *Quad City Holdings, Inc.* (Apr. 8, 1993); *Vulture Petroleum Corp.* (Feb. 2, 1987); *Verticom Inc.* (Feb. 12, 1986).

[478] Integration issues may relate to two or more private offerings, as well. Neither current nor proposed revisions to Rule 152, 17 CFR 230.152, addresses these issues.

We propose to revise Rule 152 to clarify and expand the integration safe harbor.[479] First, the rule would address the circumstances under which a completed unregistered private offering would not be integrated with a subsequent registered offering. Second, the rule would set conditions under which an unregistered private offering that has been abandoned may be followed by a registered offering. Third, the rule would provide a safe harbor for issuers that wish to abandon a registered offering and follow it with an unregistered private offering. Fourth, the rule would codify some of the staff positions taken with respect to integration and registration of resales. Finally, the exempt offerings covered by the rule would be expanded to include other types of unregistered private offerings in addition to Section 4(2) offerings.

We also are proposing related rule changes. Proposed Rule 159 would codify a current staff position concerning lock-up agreements before business combinations.[480] Rule 477 would be revised to facilitate withdrawals of registration statements.[481]

1. Completed Offerings

a. Issuer Transactions

Through revising Rule 152, we hope to avoid persistent interpretive questions concerning whether Section 5 problems arise if a private offering was completed within 6 months before the filing of a registration statement.[482] As proposed, if the private offering is completed before the registration statement is filed, the private offering would not be integrated with the registered offering regardless of the length of time between the two offerings.

The proposed rule would define the circumstances under which an offering would be considered completed for purposes of the safe harbor. An offering would be completed where all purchasers have fully paid the purchase price for the securities in the private offering. If certain conditions are met, an offering will be considered completed even if the purchase price for the securities has not been fully paid. For this exception to apply, the transaction may not be subsequently re-negotiated. These conditions require that the purchaser be unconditionally obligated to pay for the securities. We would qualify that requirement to permit conditional obligations to purchase the securities as long as the obligation depends on a condition that is not within the direct or indirect control of any purchaser. Also, the purchase price in the private offering must be fixed and not contingent upon market prices around the time of the registered offering. This ensures that the purchaser assumes the market risk.

A private offering may involve the offer and sale of convertible securities or warrants. These securities are generally convertible or exercisable into a class of underlying securities (*e.g.*, common stock) over a period of time. While these securities are convertible or exercisable, the issuer, in effect, is conducting an offering of the underlying securities. During this time period, the issuer may file a registration statement under the Securities Act. The offering of the underlying securities concurrently with the registered offering has generated uncertainty about whether the offerings should be integrated. To address these concerns, we propose to expand the Rule 152 safe harbor to protect the offering of the underlying securities from integration with the registered offering. As proposed, the offering of the underlying securities would be considered completed when the offering of the convertible securities or warrants is completed.

A special approach would apply to a private offering made before an initial public offering where the private offering does not raise capital for the issuer but is conducted only to modify the issuer's capital structure. For this approach to apply, the private offering must not be a roll-up transaction under Rule 901(c) of Regulation S–K. When these conditions are satisfied, the private offering would not be integrated with the later registered offering.

We request your comments on our proposed safe harbor for completed offerings. Is our definition of completed offerings clear, especially those offerings where payment for the securities has not been made? Should other conditions be added for these offerings?

b. Resale Transactions

We would clarify in Rule 152 that it is permissible for an issuer to register the resale of securities that were originally sold by the issuer in a completed bona fide private offering. The private offering would be considered completed if the proposed conditions discussed above are met. An offering would be considered completed even though payment for the securities has not been made, or the securities have not been issued, when the registration statement for the resales is filed. Under this approach, payment for the securities may be made following filing or effectiveness of the registration statement for the resales. Also, the payment obligation may be conditioned upon effectiveness of the registration statement, assuming the purchasers have no control over that condition.

We would exclude from the safe harbor resales by affiliates of the issuer or a broker-dealer that has purchased directly from the issuer or an affiliate. In these transactions, there are questions as to whether the offering is a true resale transaction or a primary offering by the issuer. This determination may be made only after examining the facts and circumstances of each individual situation. Because of this uncertainty, we do not propose to extend the safe harbor for these resale offerings.

For purposes of this provision, the definition of ''affiliate'' would have the same meaning as that term has under Rule 144.[483] We have proposed to change the definition of affiliate under Rule 144.[484] If the Rule 144 definition is changed, the new definition also would apply to Rule 152.

We request your views on the safe harbor for resale offerings. Should the safe harbor cover resale offerings by affiliates? If it should, what conditions should be imposed to assure that the resales are bona fide secondary transactions and not part of a primary distribution? Should the Rule 144 definition of affiliate be used or would some subset of the persons that fall within that definition be more appropriate? If so, what?

c. Lock-up Agreements

The use of lock-up agreements in business combinations has become common. As part of the negotiations for these combinations, the acquiring party usually requires that management and principal security holders of the company to be acquired commit to vote for the acquisition. These so-called ''lock-up'' agreements are made when the acquisition agreement is finalized, before any action by the public security holders. These agreements could be

[479] *See* proposed revisions to Securities Act Rule 152, 17 CFR 230.152.

[480] *See* proposed Securities Act Rule 159, 17 CFR 230.159.

[481] *See* proposed revisions to Securities Act Rule 477, 17 CFR 230.477.

[482] The 6-month time period is found in Rule 502(a) of Regulation D, 17 CFR 230.502(a). Offers and sales within 6 months of the start or end of a Regulation D offering must be analyzed under the five-factor test to determine whether those offers and sales should be considered part of the Regulation D offering.

[483] Rule 144(a)(1), 17 CFR 230.144(a)(1), defines an affiliate of an issuer as a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.

[484] See Securities Act Release No. 7391 (Feb. 28, 1997) [62 FR 9246].

considered investment decisions under the Securities Act. If they are, the offers and sales of securities were made to persons who entered into those agreements before the business combination is presented to the non-affiliated security holders for their vote. Under this reasoning, those offers and sales could not be included in the registration statement for the offering to the persons not entering into lock-up agreements.

In recognition of the legitimate business reasons underlying the practice, the staff has permitted the registration of offers and sales under certain circumstances where lock-up agreements have been signed. We propose a rule that codifies this position.[485] Our proposed rule would allow registration of those offers and sales when:

(i) The lock-up agreements involve only executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the voting equity securities of the company being acquired;

(ii) The persons signing the agreements own less than 100% of the voting equity securities of the company being acquired; and

(iii) Votes will be solicited from shareholders of the company being acquired who have not signed the agreements and who would be ineligible to purchase in an offering under Section 4(2) or 4(6) of the Securities Act or Rule 506 of Regulation D.

The first condition would assure that the only persons who signed the agreements were insiders with access to corporate information who arguably would not need the protections of registration and prospectus disclosure. The last two conditions would make certain that registration under the Securities Act is required to accomplish the business combination. Where no vote is required or 100% of the shares are locked up, no investment decision would be made by non-affiliated shareholders and the transaction would have been completed via the lock-up agreement. If the non-affiliated shareholders were able to purchase under one of the private offering exemptions from registration, the entire transaction would be more akin to a private placement and registration of only resales would follow from that characterization.

We request your comments on proposed Rule 159. Should registration be permitted for securities under lock-up agreements? If no, why not? Are the proposed conditions sufficient or are different or additional conditions needed? Should some specified percentage lower than 100% (*e.g.*, 75%) be used? Would it matter what percentage had been locked up if a significant number of shareholders had not been? Should the proposed rule, which applies to lock-ups in connection with mergers and similar transactions, also apply to lock-ups in connection with tender offers? If so, would different conditions be appropriate?

2. Abandoned Offerings

An ongoing private offering may be abandoned by an issuer for any of a number of reasons. After commencement of a private offering, the issuer may discover that interest in the securities is soft and it is unable to sell the amount of securities it needs to sell. On the other hand, the issuer may encounter substantial interest from investors and wish to increase the size or scope of the offering. In the latter situation, the issuer may decide to switch the offering from a private one to a registered one.

Likewise, a registered offering may be abandoned for various reasons. For example, the issuer and its underwriter may discover after filing the registration statement that there is less investor interest than required to complete the registered offering successfully. The issuer may encounter delays in getting the registration statement effective and need funding on a more expedited basis. Changes in the market may make a registered offering less attractive.

a. Private to Public

Under Section 5 of the Securities Act, offers may not be made in registered offerings before filing a registration statement. Thus, an issuer generally is unable to begin a private offering by making offers and then decide to make the offering a registered one.

Under the proposed registration system, Form B issuers would have no difficulty beginning an offering as a private one and completing it as a registered public offering. Because the issuer would not be required to file a Form B until the time of sale, and offers could be made before filing, the transition from a unregistered offering to a registered offering would not have the same regulatory consequences as it does today.

Form A and other issuers, however, would not have the same freedom to proceed with offers in the absence of a filed disclosure document. [486] Thus, the same issues that exist today under the registration system would need to be addressed for those issuers. We propose to expand Rule 152 to permit Form A issuers to abandon an ongoing private offering and then conduct a public offering under the following conditions:

1. The issuer notifies all offerees in the private offering that the private offering is abandoned;

2. No securities were sold in the private offering;

3. Neither the issuer nor any person acting on its behalf offered the securities in the private offering by any form of general solicitation or general advertising; [487]

4. The issuer does not file the registration statement until at least 30 days after it notifies all offerees of abandonment if securities had been offered in the private offering to any person ineligible to purchase in an offering in accordance with Section 4(2), Section 4(6) or Rule 506; and

5. The issuer either files any selling materials used in the private offering as part of the registration statement or it informs all private offerees that the filed prospectus replaces the prior selling materials and any indications of interest are rescinded.

These conditions would assure that persons offered the securities in the private offering are treated the same as offerees and purchasers in the registered offering. The prohibition against sales would make sure that all purchasers have the protections of Section 11 liability. The prohibition on any public offers in the private offering and the 30-day waiting period (if applicable) would protect against issuers who had no intention of making a private offering abusing the safe harbor by making public offers before filing the registration statement containing the full and balanced disclosure. Because only Form B issuers are granted that freedom under the proposed communications rules, we would not want that distinction eroded by persons through the integration safe harbor. The 30-day waiting period also would be consistent with our communications proposals in that 30 days measures the limited communications period before a public offering.

The notification condition in the safe harbor would assure that all private offerees are aware of the abandonment of the private offering. Offerees in the private offering would receive the benefit of Section 11 liability on any selling materials used in the private offering where the issuer files those materials as part of the registration

[485] *See* proposed Securities Act Rule 159, 17 CFR 230.159.

[486] Issuers registering offerings on the small business issuer forms (*i.e.*, Forms SB–1, SB–2 and SB–3) would face the same issues as issuers registering on Form A. They would receive the same treatment for this purpose.

[487] These terms would have the same meanings as used in Rule 502(c) of Regulation D, 17 CFR 230.502(c).

statement. If the issuer chooses not to do that, those offerees would be informed that they should rely on the prospectus for the registered offering instead of the earlier selling materials.

Assuming the 30-day waiting period does not apply, if all of these conditions are met, the issuer need not wait before filing the registration statement. We request your comments on this safe harbor. Are the conditions adequate to assure full protection of investors? Are different or additional conditions needed? Is the 30-day waiting period sufficiently long to provide a disincentive to abuse of the safe harbor or should it be longer (*e.g.*, 45 or 60 days)? Would a company be able to condition the public market for its securities through beginning a private offering under this mechanism despite the 30-day waiting period? Should the offering materials used in the private offering always have to be filed either under proposed Rule 425 or as part of the effective registration statement?

b. Public to Private

The filing of a registration statement for a specific securities offering constitutes a general solicitation for that offering.[488] Thus, when an issuer wishes to convert an offering begun as a registered public offering into a private offering, or follow it soon after abandonment with a private offering, it is doubtful that a private offering exemption would be available. In addition, public offers under the registration statement may have been made to persons who would be ineligible to buy in the private offering. Issuers currently in this situation must wait a full six months to be certain that the public offering under the registration statement would not be integrated with the private offering. We are proposing a safe harbor that would shorten or eliminate that wait.

An issuer, especially a private company or a small business issuer, may not know whether investors will be interested in its securities. Expecting that investors will be interested, these issuers may undergo the time and expense of preparing and filing a registration statement under the Securities Act. During the public offering period, they may discover only limited investor interest. Faced with soft investor interest, these issuers may have to abandon the registered offering, but they still may need funding. Our proposal would eliminate integration concerns and permit these issuers to offer and sell securities in the private offering to persons eligible to buy under the private offering exemption even if they expressed interest as a result of public offers in the registered offering.[489] Thus, issuers faced with a soft market will receive at least some benefits from the time and expense incurred while pursuing registration.

We propose a safe harbor that would permit switching from a public offering (started either by the filing of a registration statement or begun under Form B before filing a registration statement) to an unregistered private offering if the following conditions are met:

1. If a registration statement has been filed, the issuer withdraws it under Rule 477;
2. If no registration statement has been filed (*i.e.*, Form B), the issuer notifies all offerees in a public offering that it is abandoning the public offering;
3. No securities were sold in the public offering;
4. Where the issuer first offers the securities in the private offering more than 30 days after abandonment or withdrawal, the issuer notifies each purchaser in the private offering that the offering is not registered, the securities are restricted, and that investors do not have the protections of Section 11 of the Securities Act; and
5. Where the issuer first offers the securities in the private offering 30 or fewer days after abandonment or withdrawal of the public offering, the issuer and any underwriter agree to accept liability for material misstatements or omissions in the offering documents used in the private offering under the standards of Section 11 and Section 12(a)(2) of the Securities Act.

The notification requirement for public offerings begun under Form B would assure that offerees are made aware of the termination of the public offering. If a registration statement has been filed, it must be withdrawn in order to end the public offering. Because the withdrawal of the registration statement is public information, it would signal to offerees that the public offering has been terminated.

If the private offering is begun more than 30 days after abandonment or withdrawal of the public offering, the intervening time period should reduce concerns that offerees in the private offering would be influenced by the public offering. Offerees in the private offering likely will discount any offering materials they may have received in the public offering due to this passage of time. Instead, they are more likely to rely on the private offering documents. We would require that the issuer notify purchasers in the private offering that the offering is not registered, the securities would be restricted securities and that they do not have the benefits of Section 11 liability. This disclosure requirement plus the intervening time period would assure that investors do not confuse the securities they are buying in the private offering with those offered in the public offering.

An issuer may need funding immediately and may not be able to wait more than 30 days. We would provide an option for companies that need to raise capital within the 30-day period. The reduced time period between the public offering and the private offering raises more investor protections concerns, however, about the lingering effects of the public offering. Offerees in the private offering may still be influenced by the public offering. In addition, we do not want issuers to use the integration safe harbor merely as a mechanism to avoid the prohibition on general solicitation and general advertising. Allowing an immediate switch from registered to private would encourage that abuse, absent some disincentives.

We propose as a condition that an issuer and any underwriter involved in the private offering enter into a binding agreement to apply Section 11 liability standards for any material misstatements or material omissions in the private offering materials with respect to any investor who purchases in the private offering within 30 days following the end of the public offering. These investors, who are likely to have been influenced by the public offering, should have the protections of Section 11 liability. We also would provide that investors who purchase in the private offering more than 30 days after the public offering ends would have the benefit of Section 12(a)(2) standards for liability for any material misstatements or material omission in the private offering materials.

Are the proposed conditions adequate to assure that investors in the private offering are fully protected? Should different or additional conditions be required? Is a 30-day time period adequate or should the time period be longer (*e.g.*, 45 or 60 days)? Should we permit private offerings to start within the 30-day period at all?

3. Definition of Private Offering

Rule 152 currently provides a safe harbor only for transactions under Section 4(2) of the Securities Act. There are other exemptions under the Securities Act which prohibit public

[488] *See* Division of Corporation Finance, Current Issues and Rulemaking Outline available on the Commission's web site (http://www.sec.gov).

[489] While the proposed revisions would provide for no integration, the subsequent private offering must satisfy all of the conditions of the relevant exemption to proceed on that basis.

offers. Section 4(6) [490] prohibits advertising or public solicitation in any transaction under that section. Rule 506, [491] which was adopted under Section 4(2), prohibits offers or sales by any form of general solicitation or advertising. These exemptions also have other requirements, in addition to the ban on public offers.

We propose to expand the private offerings covered by Rule 152 to include offerings under the Section 4(6) exemption and to specify in the Rule that it applies to the Rule 506 exemption. This would provide consistent treatment for Securities Act exemptions for private offerings. We request your views on the expansion of Rule 152 to these additional private offering exemptions. Are there reasons to continue to exclude either of these two exemptions?

Rule 505 of Regulation D,[492] unlike Rule 506, permits sales to persons who are neither accredited nor financially sophisticated.[493] Because these persons may purchase in Rule 505 offerings, we have not included those offerings in Rule 152. We solicit comment, however, as to whether sufficient protections exist under the proposed safe harbor to justify inclusion of Rule 505 offerings.

D. Proposed Changes to Rule 477

Rule 477 of Regulation C [494] contains the procedures to be followed by a registrant in order to withdraw a registration statement or an amendment filed under the Securities Act. The Commission must find that the withdrawal is consistent with the public interest and investor protection and affirmatively act to consent to the withdrawal. This finding requirement involves staff review of the withdrawal request and the time necessary for that review. The time needed for that review can vary. For a limited number of registration statements, the withdrawal request is deemed granted upon filing where the registration statement has not become effective.[495]

We propose to revise the rule to facilitate withdrawal of registration statements, particularly in light of the effect of withdrawals under proposed Rule 152. We would allow registration statements to be withdrawn automatically upon filing the request. The proposed changes would permit quick withdrawals for registration statements. These changes would expedite the use of proposed Rule 152 in switching from a registered public offering to a private offering and provide predictability in other cases.

We request your comments on the proposed change to Rule 477. Should we permit fewer types of registration statements to be withdrawn automatically upon filing? Should the rule be changed only to permit automatic withdrawal of any Form B registration statement, or any Form A registration statement where the registrant is eligible to incorporate by reference and become effective on an expedited basis? Should it be changed so that for all other registration statements, an application for withdrawal would become effective automatically ten days after filing, unless we grant the withdrawal earlier or notify the registrant during the ten-day period that the application will be reviewed? Are there reasons to limit the classes of registration statements that may be withdrawn automatically?

XI. Proposals Relating to Exchange Act Disclosure

To improve Exchange Act disclosure, we propose revisions to enhance the quality and timeliness of information in the periodic reports filed by domestic reporting companies.[496] Investors trading in the secondary markets look to Exchange Act reports for information. Moreover, seasoned issuers that file registration statements under the Securities Act incorporate information from their Exchange Act reports into their Securities Act filings. Investors buying in public offerings therefore also rely on Exchange Act disclosure. As we provide for further reliance on Exchange Act disclosure, we are particularly cognizant of the need to evaluate whether and how it can better serve investors.

Under our proposals, we would extend risk factor disclosure to Exchange Act reports, expand the items of disclosure required to be reported on Form 8–K and add a provision for voluntary reporting of information on Form 6–K. We also would require top management that sign Exchange Act registration statements and reports to certify that they have reviewed the disclosure in them and that they know of no untrue statement of a material fact or omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. In addition, we would require issuers to identify their web site addresses, if any, and an e-mail address, if any, on the cover page of all registration statements and Exchange Act reports. This requirement would make this information more accessible to investors, as well as ease investors' electronic communications with public companies.

Companies frequently issue press releases as a means of disseminating corporate information. In the case of quarterly and annual financial results, we are concerned that this manner of disclosure provides uneven results: some investors may learn of the information, others may not; some investors may have quicker access to the information than others. One of the purposes of the Commission's reporting system is to provide a single source where all investors can expect to find material company disclosure. To even the flow of disclosure to investors, we believe that companies should file material financial information that they may currently be making public only by press release.

We also note reports that corporate managers make conference calls after issuing press releases in order to ''clarify'' the information.[497] We are concerned that these conference calls exacerbate the problem of uneven disclosure, especially in the short-

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[490] 15 U.S.C. § 77d(6). Section 4(6) exempts a transaction that does not exceed $5 million, if offers or sales are made to only accredited investors and other conditions are met. Accredited investor is defined in Rule 501(a) of Regulation D, 17 CFR 230.501(a).

[491] 17 CFR 230.506. The Commission adopted Rule 506 to provide a safe harbor as to what type of offering would not be considered a public offering for purposes of Section 4(2). An issuer complying with Rule 506 is certain that it is conducting a valid Section 4(2) offering.

[492] 17 CFR 230.505. Rule 505 provides an exemption for offerings up to $5 million within a twelve-month period, if certain conditions are met. This exemption was created by the Commission under Section 3(b) of Securities Act, 15 U.S.C. § 77c(b).

[493] Generally speaking, these investors must be limited to 35.

[494] 17 CFR 230.477.

[495] Rule 477(b), 17 CFR 230.477(b), currently permits this procedure for registration statements on Form F–2, relating to a dividend or interest reinvestment plan, or on Form S–4 complying with General Instruction G. of that Form.

[496] Some of these proposed revisions were suggested in substance by the Advisory Committee. While the Advisory Committee envisioned them as operating only where a company was part of a company registration pilot system, we believe implementing these improvements makes sense for all issuers regardless of whether they are concurrently registering an offering. The proposals relating to Exchange Act disclosure do not precisely follow the suggestions of the Advisory Committee. However, they emphasize the significance of Exchange Act reporting and would provide investors with a more current and fuller stream of information. That end corresponds with the Advisory Committee's goals.

[497] See, e.g., Frankel, et al., An Empirical Examination of Conference Calls as a Voluntary Disclosure Medium (Dec. 1996) (unpublished manuscript) (U. of Mich. Bus. Sch.) [hereinafter Conference Call Study]. This study noted that companies typically hold conference calls with analysts because of the declining relevance of historical financial data.

term.[498] This practice widens the information gap between large and small investors. Large investors, particularly institutional ones, may be on the conference call, or they frequently hire analysts that participate in conference calls and often obtain more detailed information about a company's earnings before the information is widely disseminated. While we believe analysts perform a valuable public function in filtering and passing on company information, we believe the small investors are the last to realize the benefits of this function. We think this is especially true when companies do not file with the Commission material information they issue in press releases or communicate by conference calls to analysts.[499]

When there is a significant time lag between the occurrence of a material event and the reporting of that event, or the determination of the quarterly or annual results and the reporting of them, there is a greater chance that selected investors will learn about the information before others.[500] We seek to minimize the gap of information between all investors. One way to do that is to require the quicker filing of material company information with the Commission. Although this will not eliminate entirely the information gap, it will decrease the amount of time during which there is a trading advantage. By requiring companies to speed their reporting of material information such as earnings announcements and other financial data, we hope to decrease the information gap between the ''have'' and ''have-not'' investors. Accordingly, we propose to shorten the due dates for material event reports and to accelerate the reporting of annual and quarterly selected financial data.

A. Annual and Quarterly Reports

1. Risk Factor Disclosure

Most Securities Act registration statements currently require an analysis of the risks associated with an investment in a company's securities.[501] Item 503 of Regulation S–K[502] describes that required disclosure as a ''discussion of the most significant factors that make the offering speculative or risky.'' The Commission promulgated this requirement because it assists investors in comprehending more fully whether the securities present an appropriate level of risk for them as an investment.

We propose to extend risk factor disclosure to Exchange Act registration statements[503] and periodic reports[504] of all issuers. The proposal would require issuers to articulate concisely the most significant risk factors relating to the company's future financial performance. This disclosure would be equally valuable whether investors are purchasing securities in a registered offering or trading in the secondary markets. Through the proposal, the Commission would ensure that timely disclosure about these types of risks does not depend on whether a public company decides to register an offering.

The annual disclosure specifically would consist of an itemization of the most significant factors with respect to the public company's business, operations, industry or financial position that may have a negative impact on its future financial performance. A foreign government issuer would set forth the most significant risk factors with respect to its financial position and the most significant country risks that are unlikely to be known or anticipated by investors.[505] The proposal would require that the issuer briefly explain how each risk affects it.

For public companies filing quarterly reports, we also are proposing that material changes in risk factor disclosure be reported quarterly. The company would disclose in the quarterly report only material risk factors that either:

1. Were not included in the later of the registrant's most recent Securities Act registration statement or Exchange Act periodic report; or
2. Had changed since the date of that registration statement or periodic report.

Foreign private issuers are not required to file reports on a quarterly basis under the Exchange Act; therefore, those companies would update their risk factors disclosure on an annual basis unless they choose to do so more frequently.[506]

A reporting company may incorporate risk factor disclosure into its Securities Act registration statement from its Exchange Act periodic reports. This Exchange Act disclosure may satisfy in whole or in part the risk factor disclosure required in the Securities Act registration statement. Where that is true, a registrant need not reiterate that risk factor disclosure in its Securities Act registration statement.[507]

Securities Act Rule 421(d) requires issuers to write and design their risk factor disclosure in registration statements using plain English principles. Where risk factor disclosure in Exchange Act reports currently is incorporated by reference into Securities Act registration statements, the Commission staff has advised issuers that the Exchange Act risk factor disclosure must comply with Rule 421(d). Under the proposals, registrants may more frequently incorporate Exchange Act risk factor disclosure into their Securities Act registration statements. In light of that, we are proposing an Exchange Act rule parallel to Rule 421(d) that would clarify that plain English requirements apply to Exchange Act risk factor disclosure.[508]

We seek comment on the proposals relating to risk factor disclosures for quarterly and annual reports. Should we require risk factor disclosure about specific matters that are in addition to those referred to in Item 503 of Regulation S–K? If so, what are they?

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[498] See Remarks by Arthur Levitt, Chairman of the Securities and Exchange Commission, A Question of Integrity: Promoting Investor Confidence by Fighting Insider Trading (Feb. 27, 1998), available on the Commission's web site (http://www.sec.gov).

[499] The Conference Call Study states that company managers often provide ''detailed segment data'' during the course of a conference call that is not available in the press release. They also make more forward-looking statements than in the press release. Conference Call Study supra note 497, at 9.

[500] See, e.g., Trading Picks Up During Conference Calls, Evidently leaving Small Investors on Hold, Wall St. J., Mar. 6, 1998, at C2; Small Investors Angered by Growth of After-Hours Profits Reports, Wall St. J., Jan. 21, 1997, at C1; The Price of Great Expectations, Wash. Post, Jan. 23, 1997, at E1.

[501] See, e.g., Forms F–1, F–2, F–3, F–4, S–1, S–2, S–3, S–4 and S–11. To provide uniformity, we also would mandate risk factor disclosure in Securities Act registration statements of foreign governments and their political subdivisions. Those are virtually the only Securities Act registration statements that do not currently mandate this disclosure. Because those investments are not free from risk, investors should benefit from a risk analysis by those issuers as well.

[502] 17 CFR 229.503.

[503] The Exchange Act registration forms affected are: Forms 10, 10–SB and 18. Form 20–F registration statements already require risk factor disclosure. See Item 1(b) of Form 20–F.

[504] The Exchange Act periodic reports affected are: Forms 20–F, 10–Q, 10–QSB, 10–K, 10–KSB and 18–K. The Advisory Committee suggested the use of risk factor disclosure in Form 10–K, with updates in Form 10–Q for any material change in the risk disclosure. Advisory Committee Report at Appendix B, p. 57.

[505] The forms used by foreign governments and their political subdivisions are Schedule B under the Securities Act and Forms 18 and 18–K under the Exchange Act.

[506] We are proposing to amend Form 6–K to create an Item by which foreign private issuers would identify information they are filing under that Form at their option that is not based on foreign requirements.

[507] In a Securities Act registration statement, the risk factors disclosure sometimes focuses on aspects of the particular security or the particular transaction that is the subject of the registration statement, in addition to company risk factors. The risk factor disclosure that issuers would include in Exchange Act reports would relate only to the risks that could affect the company's future financial performance. Thus, given the somewhat differing focus, the risk factor disclosure may vary.

[508] See proposed Exchange Act Rule 12b–24, 17 CFR 240.12b–24.

2. Due Dates for Annual Reports of Foreign Private Issuers

Reporting companies that are foreign private issuers are required to file annual reports on Form 20–F.[509] These reports are due within six months after the end of fiscal year.[510] Like domestic issuers, foreign private issuers issue press releases containing their annual results before the due dates of their annual reports filed with the Commission. In fact, given the longer due date, they may do this far more frequently than domestic issuers.[511]

For the same reasons we propose to accelerate the reporting of annual results for domestic issuers through adding a Form 8–K filing, we also propose to accelerate the due date for annual reports of foreign private issuers. We propose that a foreign private issuer be required to file its annual report on Form 20–F within 5 months after its fiscal year end. Although that due date would remain significantly longer than the due date for annual reports of domestic companies, it would shorten the gap between the two. In light of the variety of foreign law requirements for annual reports, a gradual decrease in due dates for annual reports appears preferable. We believe foreign reporting companies should be able to prepare annual reports within 5 months or less without an undue increase in cost. We also propose to change the filing period for the transition report that must be filed after a foreign private issuer changes its fiscal year. We would reduce the time period for filing this report from six to five months.[512] We would not change the present three-month filing period where the transition period does not exceed six months and the issuer elects to file the abbreviated transition report.[513]

We seek comment on this proposal. Should we accelerate the due date to 4 months? How would the 4-month or 5-month due date compare to foreign requirements to report annual results?

3. Treating Quarterly Information as ''Filed''

Under current Exchange Act rules,[514] the financial information required by Part I of Form 10–Q and Form 10–QSB is deemed not to be ''filed.'' [515] Part I information is therefore not subject to liability under Section 18 of the Exchange Act.[516] Those rules originated in 1955 when the Commission proposed to require semi-annual reporting of certain financial information for the first time.[517] At that time, the Commission determined that semi-annual reports should be deemed not to be filed for purposes of Section 18 because interim earnings figures included in those reports would often be based on ''reasonable estimates * * * or certain assumptions.'' [518]

Since 1955, the Commission has taken a few steps to expand periodic financial reporting. In 1970, we required that public companies file quarterly financial information on Form 10–Q.[519] In 1981, we expanded the information required by Form 10–Q to include disclosure of management's discussion and analysis of the registrant's financial condition and results of operations (''MD&A'').[520] Most recently, we amended Form 10–Q in 1997 to require registrants to disclose qualitative and quantitative information about market risks.[521]

Both the existing registration system and the proposed registration system rely on Exchange Act disclosure. The rationale behind the rules granting relief from Section 18 seems out of place more than 40 years later in a market which now routinely relies on such reasonable estimates and assumptions. Furthermore, registrants have had 28 years of experience preparing quarterly financial statements and 17 years of preparing MD&A disclosures.

Accordingly, we propose to revise rules to treat the financial statements and MD&A disclosure in Forms 10–Q and 10–QSB as filed.[522] We would not extend the same treatment to market risk disclosure. Given the recent adoption of the rules requiring that disclosure, as well as the complex nature of that disclosure, we believe it would be appropriate to continue to treat that part of Form 10–Q disclosure as not ''filed'' for purposes of Section 18.

We solicit comment on whether applying Section 18 remedies to financial statements and MD&A disclosure would cause registrants to alter disclosure in quarterly reports that they make today. If so, what kinds of disclosure would change and how? Is there any reason to treat MD&A disclosure as ''filed'' but not the financial statements, or vice versa? How does the treatment of these parts as not ''filed'' affect investors? Should we also apply Section 18 remedies to quarterly market risk disclosures?

4. Request for Comment on Management Report to Audit Committee

We solicit comment on the Advisory Committee's recommendation to require the filing of a management report to the audit committee of the board of directors.[523] The report would disclose the procedures, if any, established to assure the accuracy and adequacy of Exchange Act reports. As the Advisory Committee envisioned it, the report would not specify a particular set of procedures to follow, nor would it require an assessment of the adequacy of the procedures. The report would be filed as an exhibit to the Form 10–K and would be refiled only when there was a material change in procedures. Would such a report enhance the quality of disclosure provided in Exchange Act reports?

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[509] ''Foreign private issuer'' is defined in Exchange Act Rule 3b–4(c), 17 CFR 240.3b–4(c).

[510] See General Instruction A.(b) of Form 20–F.

[511] Using electronic search databases, we found that foreign private issuers use Business Wire and PR Newswire and other services to issue press releases about their annual results, including detailed financial information. For comparative purposes, these companies disclose information about their most recent year end along with the same information for the prior year. While it appears that a minority of foreign companies issue these press releases as soon as two months after their fiscal year ends, others issue them within three or four months after the fiscal year end.

[512] *See* proposed Exchange Act Rule 13a–10(g)(3), 17 CFR 240.13a–10(g)(3) and proposed Exchange Act Rule 15d–10(g)(3), 17 CFR 240.15d–19(g)(3).

[513] *See* Exchange Act Rule 13a–10(g)(4), 17 CFR 240.13a–10(g)(4) and Exchange Act Rule 15d–10(g)(4), 17 CFR 240.15d–10(g)(4).

[514] Exchange Act Rule 13a–13(d), 17 CFR 240.13a–13(d), and Exchange Act Rule 15d–13(d), 17 CFR 240.15d–13(d).

[515] Part I of Form 10–Q consists of: the financial statements; the Management's Discussion and Analysis of Financial Condition and Results of Operations; and the Quantitative and Qualitative Disclosures About Market Risk. Part I of Form 10–QSB contains only the first two of those three categories.

[516] Section 18 provides a remedy for those relying on false or misleading statements made in any application, report, document or registration statement filed with the Commission under the Exchange Act.

[517] Exchange Act Release No. 5129 (Jan. 27, 1955) [20 FR 771].

[518] *Id.* See also Exchange Act Release No. 5189 (June 23, 1955) [20 FR 4816] (adopting the semi-annual reports as proposed).

[519] Exchange Act Release No. 9004 (Oct. 28, 1970) [35 FR 17537].

[520] Exchange Act Release No. 17524 (Feb. 17, 1981) [46 FR 12480].

[521] *See* Exchange Act Release No. 38223 (Jan. 31, 1997) [46 FR 6044].

[522] *See* proposed revisions to Exchange Act Rules 13a–13d and 15d–13(d), 17 CFR 240.13a–13(d) and 240.15d–13(d). Along with these proposed revisions to Rule 15d–13, we are correcting that Rule by removing paragraph (e), which is duplicative and was intended to be removed in a prior amendment to the Rule. *See* Exchange Act Release No. 13477 (Apr. 28, 1977) [42 FR 24062] and Exchange Act Release No. 13156 (Jan. 13, 1977) [42 FR 4424].

[523] *See* Advisory Committee Report at Appendix B, pp. 52–54. *See also* Section IX.D. of this release regarding whether the report should be considered as a factor in evaluating an underwriter's due diligence obligation.

B. Interim Reports on Form 8–K

1. Timely Disclosure of Annual and Quarterly Results of Domestic Companies

a. Form 8–K Requirement for Item 301 Information

A domestic reporting company must file an annual report on Form 10–K or Form 10–KSB within 90 days after the end of its fiscal year.[524] A domestic reporting company must file a quarterly report on Form 10–Q or 10–QSB within 45 days of the end of its quarter.[525]

Hundreds of public companies issue press releases to announce annual and quarterly results well before they file their annual and quarterly reports with the Commission.[526] We are cognizant that significant technological developments over at least the last three decades have simplified the process of preparing financial data and periodic reports. It appears that companies and their auditors have developed efficiencies over the years that allow them to generate basic financial data quickly.

The timing and frequency with which companies issue press releases about their annual and quarterly results indicates that companies complete the preparation of at least their core financial data well before the due dates of their periodic reports. That practice also reflects the importance of that financial information and investors' demand for it at the earliest time it is available.

While we applaud companies' practice of issuing press releases to keep investors informed, there are disadvantages to dissemination of information in this way. Not all investors subscribe to the publications that carry press release information. Not all publications report on every company's release or include all the information in the release.[527] The unevenness of press release disclosure raises concerns that not all investors are informed of a company's financial results at the same time. Moreover, presentation of annual and quarterly information in press releases differs from company to company. Sometimes this variance appears to arise because a company wants to focus on the positive aspects of the financial information.[528]

To ensure uniform and even disclosure by public companies, we propose to require domestic reporting companies to report selected financial data on Form 8–K. That report would be due on the earlier of the date they issue a press release containing earnings information or either the date that is 30 days after the end of each of the first three quarters of their fiscal year or 60 days after the end of their fiscal year.

The Form 8–K would include the selected financial data required by Item 301 of Regulation S–K for both the most recently completed fiscal quarter and interim period or year. For comparative purposes, we also would require companies to disclose Item 301 financial data for the same periods of the prior year. For example, if a company issued an early press release announcing earnings results for its second quarter, its Form 8–K would include Item 301 information for the three months comprising the second quarter as well as for the six months ending the second quarter. The Form also would include Item 301 information for the corresponding periods of the prior year so investors could compare current results with last year's results.

We believe the press releases of most companies include at least this level of basic material information. Accordingly, we do not believe the requirement would impose a significant burden on domestic reporting companies, particularly those that consistently issue press releases. As for companies that do not follow the press release practice, we believe that they nevertheless would be able to prepare Item 301 information by the 30th day after the end of their quarters or the 60th day after the end of their fiscal years.

Regulation S–B does not contain a disclosure requirement comparable to Item 301 of Regulation S–K. Thus, small business issuers now are not required to provide Regulation S–K, Item 301 information in their disclosure documents. Also, transitional small business issuers are not required to provide this information. We propose to require all small business issuers, including transitional small business issuers, to provide Regulation S–K, Item 301 information in Form 8–K reports filed in advance of their quarterly or annual reports. We request your comments on whether small business issuers should be required to provide Regulation S–K, Item 301 information in these current reports. Should small business issuers providing disclosure based on Regulation S–B be subject to this requirement? Should transitional small business issuers be subject to this requirement? Would it be more difficult for small business issuers to comply with this requirement? Would the additional time and cost of this disclosure requirement outweigh the increase in investor protection?

We believe that all investors and the market would benefit from being able to review selected financial data earlier than they can today. Would these benefits justify the cost associated with an additional filing? Should we require more or less than Item 301 information? If more, what kinds of additional information should we require? Should we require companies to discuss factors that may affect the comparability of current results with last year's results? If less, what should we omit? Would current interim financial data be meaningful absent presentation of historical comparative information? Given the limited nature of the information required by Item 301, should we require companies to file the Form 8–K even earlier than proposed (*e.g.*, 20 or 25 days after the end of the quarter and 45 or 50 days after the end of the year)?

b. Solicitation of Comment on Whether to Accelerate Due Dates

Since 1970, annual reports have been due 90 days after a reporting company's fiscal year end.[529] Quarterly reports, since they were first required in 1946, have always been due within 45 days after the end of a quarter.[530] Many companies file, or ostensibly could file, their periodic reports before they are due.

In this age of computers, instantaneous communications and

[524] *See* General Instructions A of Forms 10–K and 10–KSB. Foreign companies that do not satisfy the foreign private issuer definition in Exchange Act Rule 3b–4(c), 17 CFR 240.3b–4(c), also must report on Forms 10–K or 10–KSB.

[525] *See* General Instruction A of Forms 10–Q and 10–QSB. Foreign private issuers, as defined in Exchange Act Rule 3b–4(c) have no quarterly reporting obligation. *See* Exchange Act Rule 13a–13(b)(2), 17 CFR 240.13a–13(b)(2). Other non-governmental foreign issuers must file quarterly reports.

[526] Companies frequently issue press releases through Business Wire, PR Newswire and other publications. Through narrow searches of electronic databases, it is possible to find the press releases of hundreds of companies that relate to early annual and quarterly results or earnings information. Most companies seem to have included in their press releases the basic information that would be prepared for inclusion in a periodic report. Some companies also use press releases to announce the early filing of periodic reports with the Commission and to publish the same financial information that they include in their filings with the Commission.

[527] Some services apparently publish verbatim almost any company press release (*e.g.*, Business Wire or PR Newswire). Not all investors have access or know about these services.

[528] *See, e.g.*, Antilla, *Quarterly Reports Often Mask Companies' Ugly Truths*, The Dallas Morning News, Apr. 12, 1998 at 13A.

[529] *See* Exchange Act Release Nos. 9000 (Oct. 21, 1970) [35 FR 16919] and 9004 (Oct. 28, 1970) [35 FR 17537]. Before 1970, the due date for filing annual reports was 120 days after a company's fiscal year end.

[530] *See* Exchange Act Release No. 3803 (Mar. 28, 1946) [11 FR 10988].

electronic filing, we believe it is possible for reporting companies to file their annual and quarterly Exchange Act reports sooner than they are currently due. Public companies, as a group, have had decades of experience in preparing Exchange Act periodic reports within 90 and 45 days.[531]

As the proposed registration system makes clear, the securities markets move faster than they did before. Commentators have long remarked that because the due dates for quarterly reports are so lengthy, the information required by Form 10–Q or 10–QSB is stale by the time the reports are available.[532] Annual information—when provided 90 days after a fiscal year end—is also viewed as stale. We believe investors and the market would realize immediate and ongoing benefits if domestic reporting companies filed their annual and quarterly reports earlier than currently due. We also believe earlier due dates would provide investors with more timely disclosure as well as shorten the period during which periodic results would be available to only certain investors.

For these reasons, as an alternative to the proposal to add a financial reporting requirement to Form 8–K discussed above, we request comment on whether we should accelerate the due dates for annual and quarterly reports. Should we require companies to file quarterly reports on Forms 10–Q or 10–QSB within 30 days after their first three fiscal quarters? Should we require them to file annual reports within 60 days after their fiscal year end? Would companies find it feasible to prepare their periodic reports within those periods? If we adopt this alternative, should the periods be lengthened (*e.g.*, to 35 or 40 days after the end of a quarter and 70 or 75 days after the end of a fiscal year)? Should small business issuers, because they may have fewer resources, be given more time to prepare periodic reports than larger issuers? Should larger issuers, because their accounting issues may be more complex, be given the same amount or more time than small business issuers to prepare their periodic reports? If we were to reduce the time period for filing annual and quarterly reports, should we also shorten the filing period for the transition report that must be filed after an issuer changes its fiscal year?

We solicit comment on whether accelerated periodic reporting requirements would exacerbate the problems of selective disclosure by issuers to certain analysts or shareholders. Are there steps other than, or in addition to, accelerating the due dates of periodic and current reports that the Commission should take to address selective disclosure to institutional investors through conference calls, advance press releases or other methods?

2. Other Reporting Events

We propose to expand the items of disclosure that reporting companies must report on Form 8–K to include: material modifications to the rights of security holders; departure of a CEO or CFO; material defaults on senior securities; certain auditor notifications; and company name changes. Some of the proposed items currently have to be disclosed only on a quarterly basis. Other proposed items may be reported if the company chooses to do so or feels compelled to do so because of concerns about antifraud provisions. We believe that prompt reporting by issuers of each of these events would enhance investor protection. We solicit comment on whether other disclosure should be required on Form 8–K. If so, what types of information? If companies disclose less information to the market when experiencing difficulties, is there a need for more frequent reports or updates when events such as those we propose to add take place?

We also propose to accelerate the due date of reports that must be filed on Form 8–K. The longer the period of time between the occurrence of a material event and the public reporting of the event, the greater the likelihood that over the course of that period security holders will be selectively informed of that material information. The unfair trading advantage that may result can be significantly lessened if information about material events is reported earlier on Form 8–K.

a. Material Modifications to the Rights of Security Holders

The Commission believes, as did the Advisory Committee, that reporting companies should promptly and publicly notify their security holders about material modifications in their rights.[533] The Commission proposes to add an item to Form 8–K that would accelerate the disclosure of developments that materially modify the rights of security holders, favorably or unfavorably, to within five calendar days of the development or event causing the modification.

Under current requirements, a reporting company must disclose the general effects of those modifications in the report on Form 10–Q or Form 10–QSB for the quarter in which the modifications occur.[534] That requirement allows reporting companies to delay filing this information for up to four and a half months after changes to security holder rights have occurred. That timing is unnecessarily long given the significance of these matters to security holders and the possibility that modifications to their rights could have a dramatic effect on the value of the securities they own.

Under our proposal, reporting companies would be required to promptly disclose on Form 8–K any modification of the instruments that define security holder rights, modifications to security holder rights resulting from the issuance of another class of securities, and modifications resulting because of restrictions on working capital or payment of dividends.

We solicit comment on this proposal. Should it encompass other specific events that could materially affect security holder rights, such as reincorporation from one state to another, elimination of preemptive rights, or adoption of an anti-takeover plan.

b. Departure of CEO, CFO, COO or President

The departure of a reporting company's chief executive officer, chief financial officer, chief operating officer, president, or any person serving equivalent functions, is a material event that often can cause changes in the

[531] Since 1970, we have expanded the information required by Form 10–Q only twice to any notable extent. In 1981, we added the requirement for MD&A information. Exchange Act Release No. 17524 (Feb. 17, 1981); *see* Item 2 of Part 2 of Form 10–Q. Last year we added a disclosure requirement relating to market risk. Exchange Act Release No. 38223 (Jan. 31, 1997); *see* Item 3 of Part 2 of Form 10–Q.

[532] ''In a slower, paper-based world, quarterly reporting frames were deemed adequate for purposes of the 1934 Act's continuous disclosure system * * * [b]ut in an era of electronic reporting, it is possible to advocate a much more rapid reporting obligation.'' Coffee, *Brave New World? The Impact(s) of the Internet on Modern Securities Regulation*, 52 Bus. Law 1195, 1199 (Aug. 1997). In 1969, former Commission Chairman Manuel Cohen said: ''because companies need not file the [quarterly] report until 45 days after the end of the quarter, the information is often stale.'' *See* Brown, *Corporate Communications and the Federal Securities Laws*, 53 Geo. Wash. L. Rev. 741, (1985).

[533] The Advisory Committee recommended that the Commission expand Form 8–K to require disclosure about developments that would result in material modifications to the rights of security holders. *See* Advisory Committee Report at p. 27 and Appendix B at p. 55.

[534] Item 2 of Part II of Form 10–Q and 10–QSB. Foreign private issuers are not required to file quarterly reports and therefore are not subject to this disclosure requirement.

market price of the company's securities as well as changes to the company's business or goals. Today, reporting companies are not required to disclose these events on either a quarterly or current basis, although many do report them on a timely basis because the departure of a CEO, CFO, COO or president is usually viewed as a material event.[535]

The Advisory Committee recognized that general principles of materiality often cause reporting companies to promptly disclose the termination of their CEOs, CFOs, COOs or president; nonetheless, it recommended that the Commission expand Form 8–K to accelerate and mandate disclosure of the resignation or removal of a public company's top five executive officers.[536]

We believe it is important to investors and the market that public companies promptly report news of the departure of a CEO, CFO, COO, president or any person serving in those capacities. Whether the departure is the result of resignation or termination or another reason also would be of interest to investors. Accordingly, the Commission proposes to add an item to Form 8–K to require disclosure of that departure information. Given the significance of this information, we solicit comment on whether it should be reported within one business day of the departure.

We also seek comment on whether the proposal should be extended to include more than just a company's CEO, CFO, COO and president. Should we require a company to disclose on Form 8–K the departure of any of its five most highly compensated executive officers? Are other positions, whether or not based on compensation, significant enough to justify mandating Form 8–K disclosure when they are vacated? For example, should Form 8–K require disclosure of the departure of key personnel who make significant contributions to the company, such as a chief technology officer or head of information systems, a scientist, researcher, or head of marketing or production?

c. Material Defaults on Senior Securities

Any material default by a reporting company on payments of principal or interest or any other scheduled payment on its securities could have severe consequences to the reporting company, its business and its security holders. The default is especially significant when senior securities are involved, because a default on those securities may signal that the company faces imminent, serious financial difficulty.

Under current reporting requirements, disclosure of material defaults on senior securities need be made only on a quarterly basis.[537] The Commission believes quarterly reporting of such events is insufficient, as did the Advisory Committee.[538] Reporting companies should be required to provide current public notice of all material defaults on senior securities so that investors have time to consider the possible effects of any default, including whether to sell or hold their securities. Further, the Commission and the Advisory Committee share concerns that, under current reporting standards, default information may become stale before it reaches all the security holders of a reporting company.

For these reasons, we propose to revise 8–K to require current disclosure of material defaults under a company's governing instruments and material delinquencies in a company's payments of interest or a dividend preference due on its senior securities. Also, given the potentially grave consequences of a material default on senior securities, the Commission does not believe it would be appropriate to allow reporting companies to wait as much as five days to report the event. Instead, we believe that reporting companies should disclose this information as soon as possible, but certainly no later than the day following the material default. Accordingly, we propose to set the due date at one business day after the day the default occurred. Where the default occurred on a Saturday, Sunday or a federal holiday, we propose that the disclosure be due within two business days after the day the default occurred.

As with other proposed changes to Form 8–K, we solicit your comment. Do reporting companies need as much as five days before they are prepared to file material default reports? Should we limit the due date to one business day, instead of two business days, for reporting of material defaults that occur on a Saturday, Sunday or federal holiday?

d. Reliance on Prior Audit

Form 8–K already requires a reporting company to disclose promptly when its independent accountant resigns, declines to stand for reelection or is dismissed, as well as when it engages a new auditor.[539] To supplement these items, the Commission is proposing that a reporting company promptly report when:

(i) its independent auditor notifies it that it may no longer rely on the audit report included; and

(ii) the independent auditor notifies it that the auditor will not consent to the use of its prior audit report or the company or one of its significant subsidiaries.

The Commission believes that such announcements would be of interest and importance to investors and the market because they could signal a discrepancy in the company's audited financial reports.[540] Further, announcements or dissemination of information about such auditor notices, as with announcements and information about the other events proposed to be added to Form 8–K, could have an immediate and significant impact on the market price of a company's securities. We are concerned about the potential for unfair trading on the basis of selective information. The Advisory Committee stated these same concerns, and also posited that timely disclosure about matters relating to certifying would reinforce the auditor's role as a gatekeeper.[541]

Accordingly, we propose to add these events to those that relate to a

[535] Item 6 of Form 8–K currently requires prompt disclosure of a director's resignation or declination to stand for re-election. The Item does not require similar disclosure with respect to CEOs, CFOs, COOs or president.

[536] *See* Advisory Committee Report at p. 27 and Appendix B at p. 55. The Committee did not limit its recommendation to disclosures regarding the CEO, CFO, COO and president. It extended its recommendation to the ''top five'' or ''five most senior'' executive officers.

[537] Item 3 of Part II of Form 10–Q and Item 3 of Part II of Form 10–QSB. Both Items require disclosure of defaults whether under the terms of a company's governing instruments or with respect to arrearages in the payment of a dividend or other delinquencies. Neither Item, however, requires disclosure of defaults or arrearages with respect to any class of securities held entirely by or for the account of the registrant or its wholly owned subsidiaries. *See* Instruction to Item 3 of Part II of Form 10–Q and Instruction to Item 3 of Part II of Form 10–QSB. Our proposal includes these same reporting exceptions.

[538] The Advisory Committee also recommended that the Commission accelerate disclosure of material defaults on senior securities. The Committee believed that prompt public disclosure would reduce the possibility of unfair trading based on selective disclosure and would improve market efficiency. *See* Advisory Committee Report at p. 27 and Appendix B at pp. 55–56.

[539] Item 4 of Form 8–K.

[540] The Advisory Committee suggested that this kind of disclosure should be required on Form 8–K. *See* Advisory Committee Report at p. 27 and Appendix B at pp. 55–56. As noted, the Commission's proposals do not precisely follow the Committee's suggestions. The Committee did not expressly suggest expanding Form 8–K to require disclosure of an accountant or auditor's refusal to consent to use of its prior audit report.

[541] *See* Advisory Committee Report, Appendix B at pp. 27–28 and 55–56. The Committee explained that an auditor could provide a gatekeeping function when asked to furnish or update a consent to the use of its report. If the auditor does not satisfy itself that the report does not require any adjustments, it may withhold or refuse to consent to use of the report. By requiring companies to report when its auditor refuses to consent to use of its report, we elicit disclosure that may signal problems with the company's financials.

company's accountants and auditors and that are already in Form 8–K.[542] We would require companies to report these events within one business day of their occurrence.

We solicit comment about whether other events concerning an auditor's report should be included in the Form 8–K. For example, should companies report when they seek to have another auditor reaudit a prior audited period? The Committee did suggest we require disclosure of engagement of a new auditor to reaudit a prior audited period. We seek comment on this subject.

With respect to the information about auditors already required by Item 4 of Form 8–K, we propose to accelerate the due date for reporting that information to one business day after the reporting event occurs. We believe the significance of that information warrants near immediate disclosure.

e. Name Changes

We propose to add to Form 8–K a requirement that a reporting company report any change in its name. This disclosure is not specifically required in current periodic reports, although companies may report name changes because general principles of materiality may call for it. Under our proposal, companies would report their former and current names within five calendar days after the change. Prompt reporting of a change in a reporting company's name is important to keep investors informed of the status of the company. Also, for investors that are not otherwise aware, a change in a company's name often signals the occurrence of some significant event concerning the company about which they should educate themselves. Timely public notice of a name change also would allow investors to continue to follow or research the reporting company and avoid concern about its fate when its familiar name is replaced by an unfamiliar one.

We solicit comment on this proposal. If the name change results from a business combination that was already publicly announced, should we nonetheless require name change reporting?

f. Due Dates for Reporting Events

Currently, most reports filed on Form 8–K are due within 15 calendar days after the occurrence of the event triggering the reporting requirement.[543] Some reports are due within 5 business days after the occurrence of the event.[544]

The Commission believes that, given the explosive growth of the secondary trading market and the importance of Exchange Act reporting to it, reporting companies should be required to disclose more information about material events and developments that concern them and their security holders sooner than they are required currently.

The Advisory Committee suggested that the due date for mandated reports on Form 8–K be accelerated from 15 calendar days to 5 business days.[545] The Commission believes it is appropriate to go further, however, and proposes to accelerate the general Form 8–K due date to 5 calendar days after occurrence of the events required to be reported on the Form.[546] For disclosures of material defaults and notices that a company's independent accountant has resigned, declined to stand for reelection or been replaced,[547] as discussed above, we generally would require companies to report within one business day after the date of the reportable event. We also propose to accelerate the reporting of resignations of any of the registrant's directors to within one business day of the reportable event.[548]

The Commission recognizes that acceleration of the due date may create some burdens for reporting companies; however, we believe that any burdens are outweighed by investors' and the market's need for current information. With respect to each proposed addition to or acceleration of reporting under Form 8–K, the Commission believes that security holders and the market have a need for prompt disclosure particularly because the events could impact the market price of the reporting company's securities. We also believe that the faster that material information is publicly disclosed, the less the potential for unfair trading on the basis of selective disclosure.

We ask for your comment on this proposal. Does the proposed 5-day reporting period provide reporting companies with enough time to file their reports? If not, should the due dates be extended, as the Committee suggested, to 5 business days? Should material defaults be reported faster than other events required to be reported on Form 8–K? Should the due date of other required reports similarly be set at one business day?

C. Signatures

1. Exchange Act Reports and Registration Statements

The Commission is proposing to revise the signatures section of all registration statements and periodic reports filed under the Exchange Act to mandate that the persons who are required to sign those reports must certify that they have read the registration statement or report and that they know of no untrue statement of a material fact or omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.[549] The proposal also would expand the number of persons required to sign Forms 8–A, 10, 10–SB, 20–F, 40–F, 10–Q and 10–QSB, to include the principal executive officers of the registrant and a majority of the board of directors of the registrant.[550] Although we are not proposing to require that a majority of board members sign current reports filed under cover of Form 8–K and 6–K, we would require the signatory for the registrant to certify that he or she provided a copy of those reports to the registrant's board of directors. That certification should encourage board participation in the disclosures required to be made on those Forms.[551]

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[542] *See* proposed revisions to Item 304 of Regulation S–B, 17 CFR 228.304, and proposed revisions to Item 304 of Regulation S–K, 17 CFR 229.304.

[543] Events concerning changes in control of a registrant, acquisition or disposition by a registrant of a significant amount of assets, and a registrant's bankruptcy or receivership, as well as other events, must be reported within 15 calendar days of the occurrence of the event. *See* General Instruction B. of Form 8–K.

[544] Registrants must file reports on Form 8–K within 5 business days of both changes in the registrant's certifying accountant and the resignation of any of the registrant's directors. *See* General Instruction B. of Form 8–K.

[545] Advisory Committee Report at p. 27.

[546] As discussed above, this due date would not apply to the reporting of annual and quarterly financial results on Form 8–K.

[547] This information is currently required to be disclosed under Item 4 of Form 8–K, within 5 business days of the event.

[548] This information is currently required under Item 6 of Form 8–K and is due today within 5 business days of the event.

[549] The proposal relates to Exchange Act Forms 8–A, 10, 10–SB, 20–-F, 40–F, 6–K, 8–K, 10–Q, 10–QSB, 10–K and 10–KSB. The Commission is not currently proposing to change the language in these Forms that direct the registrant to file a specified number of copies with the Commission. Of course, reporting entities that file the Forms electronically pursuant to Regulation S–T need not submit multiple copies electronically.

[550] Forms 10–K and 10–KSB already require those persons to sign those Forms. *See* Instruction D.(2)(a) of Form 10K and Instruction C.2. of Form 10–KSB. Forms 8–K and 6–K only require the signature of the officer signing on behalf of the registrant and in his or her capacity as an officer of the registrant. *See* Form 6–K and Form 8–K. We do not propose to revise either Form 6–K or 8–K to require more signatures.

[551] Although board members may not review the disclosures in those Forms before receiving them from the registrant, we believe that the delivery requirement would increase director awareness of

We believe that persons signing the report will be less likely to adopt the practice of simply signing blank signature pages without having even seen the report if they must affirmatively state that they have read the report and that they know of no untrue statement of a material fact or omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.[552] Requiring a signatory of current reports to provide a copy of those reports to the registrant's board of directors would, at a minimum, help ensure that the board is quickly informed about material current developments or events that concern the registrant.

This proposal is based in part on the Advisory Committee's finding that the disclosures made in Exchange Act reports tends to be of a lesser quality than the disclosures made in Securities Act filings. The Committee believed that, generally, one way to improve Exchange Act disclosures would be to require senior management to review the Exchange Act reports filed on behalf of the company they managed.[553]

The Commission concurs with the Committee's goal that management take a more active role in the disclosure the registrant makes in its Exchange Act reports as well as acknowledge more responsibility for the disclosure in their reports.[554] We also note, as the Committee did, that revisions to enhance the disclosures in Form 8–K may improve disclosure for Securities Act purposes, because almost all seasoned issuers incorporate their Exchange Act reports into their Securities Act registration statements.

We recognize that companies may find it inconvenient to obtain the additional signatures that would be necessary to file the report. However, we believe the instructions to the Forms, current or proposed, that provide for conformed signatures would significantly ease any logistical burdens associated with obtaining the signatures.

2. Securities Act Filings

We also propose to revise the signature sections of certain registration statements under the Securities Act to mandate that any person signing the registration statements certify that he or she has read the registration statement and, to his or her knowledge, it does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading.[555] Unlike the Exchange Act proposals, we would not expand the number of persons required to sign the registration statements.[556]

We hope that the certification requirement would cause the signatories, who typically also manage and control the issuer, to read the disclosure and perhaps even participate more in the preparation of the filing. We seek your comment on this proposal. Would the proposed certification have any effect on the extent to which the signatories participate in overseeing the disclosure? Would it change the extent to which management of the companies are given draft disclosure or given time to read the disclosure before filing? Given that signatories are already responsible for the disclosure under the liability provisions of the Securities Act,[557] would certification have any effect?

D. Form 6–K Submissions

Form 6–K is a critical part of the Exchange Act disclosure system for foreign private issuers. Form 6–K requires a foreign private issuer to furnish the Commission with all the material information that the foreign issuer:

1. Discloses or is required to disclose under the laws of its domicile or place of incorporation;

2. Files or is required to file with stock exchanges that list its securities; and

3. Distributes or is required to distribute to its security holders.[558]

Unlike Form 8–K,[559] Form 6–K does not explicitly encourage current voluntary disclosure that is not dependent upon foreign requirements. The Commission believes foreign issuers should be encouraged to keep their security holders and the market up-to-date, particularly because they may report less frequently than domestic issuers do under the Exchange Act system. Accordingly, the Commission proposes to add an instruction to Form 6–K to encourage foreign issuers to submit voluntarily current information that the issuer deems of importance to its security holders. Because the submission would be voluntary, we are not proposing a filing deadline, but we would recommend that foreign issuers promptly submit the Form 6–K after becoming aware of the information. We would deem information submitted voluntarily not to be filed for purposes of Section 18, just as we do all information under cover of Form 6–K.[560]

We solicit comment on the proposed instruction. Rather than encourage more disclosure by foreign private issuers, should we mandate particular disclosures not required under applicable foreign requirements? If so, what disclosures should be mandatory? For example, should we require issuers to report risk factor information similar to what would be required in Form 10–Q? Should we encourage reporting of other information about the issuer by enumerating in the proposed instruction areas of possible interest to investors?

The Commission is also proposing to revise Form 6–K to include four new

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the disclosure in the reports, and therefore possibly increase their participation. Moreover, the Commission has noted that certain companies may have no internal system by which to provide directors with significant corporate information. The Commission has indicated before that directors must assume some responsibility with respect to disclosures made by the companies on whose boards they sit. *See, e.g.,* Exchange Act Release No. 17114 (Sept. 2, 1980) [45 FR 63630].

[552] The Advisory Committee noted in its Report that it was advised that senior management of reporting companies routinely execute the signature pages for Exchange Act reports without having or reviewing the report itself. *See* Advisory Committee Report, Appendix B at p. 50. The Advisory Committee learned in various meetings and through research that board members devote less attention to Exchange Act reports than they devote to reviewing Securities Act filings. *See* Advisory Committee Report, Appendix A at pp. 49–53.

[553] The Committee also suggested that, the Commission require senior management to address and submit a report to the audit committee of the board of directors describing the procedures employed to ensure compliance with disclosure and accounting standards and requirements. *See* Advisory Committee Report, Appendix B at pp. 50–54.

[554] In 1980, the Commission amended Form 10–K to require that the Form be signed on behalf of the registrant by the registrant's principal executive officer(s), its principal financial officer, its controller or principal accounting officer and by at least a majority of the board of directors. Exchange Act Release No. 17114 (Sept. 2, 1980). The Commission noted that, while commentators either did not address or object to the proposal to require executive officers to sign the Form 10–K, they did object to the proposal that board members be required to sign. The Commission adopted the proposal over the commentators' objections because it concluded that the requirement would help shift the focus to Exchange Act reporting. By shifting the focus, the Commission expected that officers and directors would pay more attention to the disclosures made in Forms 10–K and to participate more in their preparation. It believed then, as we do now, that the signature requirement would impose an added measure of discipline that would provide benefits that outweighed the potential impact, if any, of the signature on legal liability.

[555] We would revise existing Securities Act Forms SB–1 and SB–2. Proposed Securities Act Forms A, B, C and SB–3 would include the same certification.

[556] Forms S–1, S–2, F–1, F–2, S–3, F–3, S–4, F–4 and S–11 currently require the signatures of the same persons we would require to sign proposed Forms A, B and C.

[557] *See* Securities Act Section 11(a), 15 U.S.C. § 77(k)(a).

[558] *See* General Instruction B to Form 6–K.

[559] *See* Item 5 of Form 8–K.

[560] For internal tracking purposes, we propose to add a box to the cover of Form 6–K for issuers to check if they are voluntarily submitting the Form 6–K pursuant to the proposed instruction.

items in the list of examples of what issuers would disclose on Form 6–K if the information is disclosed under applicable foreign requirements. Those items are: (i) changes in the issuer's name; (ii) material modifications to the rights of security holders; (iii) any material defaults on indebtedness, material arrearages in dividends and other material delinquencies; and (iv) departure of the issuer's chief executive officer, chief financial officer, chief operating officer or president (or anyone serving those functions). The existing list on Form 6–K mirrors the events that domestic issuers must report on Form 8–K. Because we are proposing to include these items on Form 8–K, we are proposing corresponding changes to the Form 6–K list. Each of the four relates to material events that all reporting issuers, foreign or domestic, should disclose to their security holders and the market of on a timely basis.

We seek comment on this revision. Are there reasons to omit any of the four from the instruction? Should we consider adding other, more specific, informational items?

E. Solicitation of Comment Regarding Plain English in Exchange Act Reports

The Commission recently adopted the requirement that Securities Act prospectuses be drafted in plain English. In the Securities Act registration system we propose today, investors would look increasingly to Exchange Act reports for information regarding the registrant. These proposals also would expand the documents that would be used in connection with an offering. The concerns that led to the plain English revisions included the need to read and understand easily the information that is the basis for the investment decision. Given today's proposals, these concerns would also seem to apply to Exchange Act documents that are incorporated by reference into the Securities Act prospectus. One proposal to require risk factor disclosure in Exchange Act registration statements and periodic reports also requires that disclosure be written using plain English principles. We solicit comment on whether we should extend the plain English requirement to all materials that are a part of the prospectus, including other parts of Exchange Act reports that are incorporated by reference into that document. Would it be more appropriate to extend the plain English requirements to all Exchange Act periodic reports, regardless of whether they are incorporated by reference into a Securities Act registration statement? Should we extend the plain English requirements only to certain parts of Exchange Act periodic reports, such as the description of the company's business or the MD&A section?

XII. Staff Review Policy

The Commission staff would continue to review all IPO registration statements for sufficiency of disclosure. The staff would review Form A registration statements by certain repeat issuers and Form C registration statements if they are selected in accordance with its review criteria.

Form B registration statements would not be reviewed by the staff before effectiveness. Although the Commission will continue to review their periodic reports on a regular basis, we see less need for regulatory supervision at the time of their offerings. We solicit comment, however, on whether the staff review should apply to Form B offerings of novel securities. If so, how should ''novel'' be defined so as to provide certainty as to the possibility of review? If the Commission staff reviews ''novel'' securities offerings, would those offerings tend to gravitate to the unregistered market?

Form B registration statements would be screened by the staff promptly after being filed with the Commission. The staff will determine whether the offering was eligible to be registered on Form B[561] and whether the disclosure raises any ''red flags'' concerning compliance with the antifraud provisions of the federal securities laws. If the offering filed on Form B is not eligible for registration on Form B, the issuer would have violated Section 5 of the Act and would be referred to the Division of Enforcement for appropriate action. If the disclosure raises ''red flags,'' the staff will conduct an immediate review of the registration statement and take further action as appropriate.

Filings on Form A would be divided into two categories: those subject to review and those not subject to review. Filings by smaller and unseasoned issuers would be reviewed by the staff in the same way they are today. However, medium-sized seasoned issuers may designate the time and date that their registration statements on Form A would become effective; these filings obviously would not be subject to staff review prior to effectiveness. Some commenters on the Concept Release suggested that the Division disclose its review criteria to provide more predictability in the offering process.[562] They noted that, other than in the case of initial public offerings which are always reviewed by the staff, the Commission has not chosen to tell issuers planning an offering what criteria the staff will use to make its decision about reviewing their registration statements.

We intend to resolve this uncertainty in the case of Form B offerings by announcing that the staff will not review those offerings. These registration statements either would be effective upon filing or would become effective when the issuer chooses. The same would be true of Form A offerings either made by issuers with a public float greater than $75 million or made by seasoned issuers incorporating an annual report on Form 10–K or Form 20–F that has been reviewed previously by the Commission staff. In addition, we propose not to review certain offerings by large seasoned foreign government issuers registering on Schedule B. In all other repeat offerings, we believe that the positive effects on registration statement disclosure that result from the possibility of staff review outweigh the cost of uncertainty. As a result, the Division will not make its review criteria for other offerings public.

In order to increase efficiency and certainty for issuers, however, we propose several changes to the staff review process with respect to Exchange Act filings.

A. Notification of Selection for Review

If the proposals are adopted, the Division staff will begin to notify the issuer as soon as its Exchange Act reports are selected for review. This practice would eliminate the concerns expressed by issuers that they are taken by surprise when they receive a comment letter from the staff on their Exchange Act filings. The staff also will indicate in those notification telephone calls approximately when comments, if any, can be expected to be communicated to the issuer by the staff.

B. Voluntary Pre-Review of Filings

If the proposals are adopted, the Division staff will begin to consider requests by issuers for the staff to review their Exchange Act disclosure because the issuer is planning an offering in the near future. The Commission also reminds issuers that, as always, the Division is willing to discuss with issuers potential accounting problems that may arise either in due course or in connection with unusual transactions.

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[561] The issuer and the offering must meet the eligibility requirements set forth in General Instruction I. of Form B.

[562] *See, e.g.*, comment letters, in File No. S7–19–96, from PSA The Bond Market Trade Ass'n (Nov. 8, 1996); Cleary, Gottlieb, Steen & Hamilton (Dec. 27, 1996); and the N.Y. State Bar Ass'n (Oct. 25, 1996).

Resolution of those issues before filing benefits all interested parties. [563]

This voluntary review option would be available to reporting issuers that are concerned about receiving a staff comment letter requesting an amendment to an Exchange Act report that is being incorporated into a registration statement or that will serve as the basis for company disclosure in a registration statement. Subject to obvious limitations on staff resources, the staff will make every effort to accommodate an issuer's request when made a reasonable period before an offering. If the staff is unable to accommodate a request, the issuer will be so advised promptly after the request is made. If the staff informs the issuer that it is unable to review the issuer's Exchange Act reports at that time, the staff would not select those reports for a routine review during the 30 days thereafter. At any time more than 30 days thereafter, the staff could choose to perform a routine review of that issuer's reports. At all times, the Commission staff would reserve the right to review those reports for cause.

XIII. Request for Comments About Investment Company Issuers and Market Value Adjustment Contracts

A. Investment Company Issuers

Interested persons are asked to submit written comments on how any aspect of the proposals affects investment companies and on how the proposals should be modified to reflect the circumstances of investment companies. For example should the safe harbors for communications contained in proposed rules 167, 168 and 169 apply to investment companies or should investment companies be expressly excluded from these safe harbors? Do the proposals, which generally are tied to the form on which securities are registered, adequately address delivery obligations with respect to investment company securities, particularly the securities of closed-end investment companies?

B. Market Value Adjustment Contracts

Life insurance companies sometimes issue so-called ''market value adjustment'' contracts, either alone or in combination with a variable annuity contract. Under a market value adjustment contract, an insurer promises a contractowner a fixed interest rate, subject to an adjustment based on prevailing interest rates in the event of early surrender of the contract. Market value adjustment contracts have been registered on Form S–1, S–2 or S–3. Under today's proposals, they would be registered on Form A or B.

We solicit comment on how the proposals affect market value adjustment contracts and on how the proposals should be modified for these contracts. For example, what criteria should be used to determine whether a market value adjustment contract is registered on Form A or Form B? Is one of these forms more appropriate for all market value adjustment contracts? Should registration statements on Form B for market value adjustment contracts be subject to the same rules for time of filing and time of effectiveness as other Form B registration statements, or should they be treated similarly to investment company registration statements? Should the exemption permitting offers to be made in the pre-filing period apply to market value adjustment contracts registered on Form B? Should the same delivery requirements apply to market value adjustment contracts registered on Forms A and B as apply to other Form A and B offerings, or should market value adjustment contracts be treated similarly to investment company securities?

XIV. Cost-Benefit Analysis

The proposed new rules and amendments should modernize and improve the Commission's regulatory system for offerings under the Securities Act. We believe our proposals would enhance communications between public companies and investors, and promote investor protection. In this section we examine the benefits and costs of the proposed revisions of the Securities Act and Exchange Act, focusing on the groups that might be affected. We request that commentators provide views and supporting information as to the benefits and costs associated with the proposals.

A. Impact on Investors

We anticipate that the proposed rules and amendments would enhance investor protection by requiring issuers to deliver information to investors before they commit to purchasing securities.[564] Specifically, the proposed rules and amendments would require issuers registering securities on Form A to deliver preliminary prospectuses to potential buyers 7 days before pricing for initial public offerings and 3 days before pricing for repeat offerings. Issuers would have to notify offerees of material changes at least 24 hours before pricing. For Form B offerings, issuers would be required to deliver term sheets outlining the key features of the securities before accepting purchases from customers. In contrast to the proposed rules, the final prospectus currently is required to be sent to investors before, or at the same time as, the securities purchased.[565] Thus investors typically receive prospectuses after securities sales, rather than when they are considering the merits of investments. The proposed rules and amendments would accelerate the delivery of information to investors in some circumstances, thereby ensuring they receive written information before investing.

The proposed rules and amendments would also enhance the timeliness, uniformity, and quality of disclosure in Exchange Act reports by:

- Requiring registrants to file summary financial information on Form 8–K before they file Forms 10–K and 10–Q;
- Shortening the period during which foreign private registrants may file Form 20–F;
- Reducing the 15-day filing period for Form 8–K to 5 days, and reducing the 5-day filing period for disclosing independent accountant and director resignations, material defaults, dividend arrearages, and delinquencies filed on Form 8–K to 1 day;
- Requiring registrants to report additional events on Form 8–K, including:

—Material modifications to rights of security holders;
—Departures of CEO, CFO, COO or president (or persons in equivalent positions);
—Material defaults on senior securities (must be disclosed no later than one day following default);
—notices that reliance on prior audit is no longer permissible, or that auditor will not consent to use of its report in a Securities Act filing; [566] and
—change in company name.

- Altering Form 6–K to:

—Encourage registrants to voluntarily and promptly report current important information;
—Suggest that registrants report the same events that are reported pursuant to Form 8–K; and
—Include a signature requirement.

- Treating the information in Part I of Forms 10–Q and 10–QSB as ''filed'' for purposes of Section 18 under the Exchange Act; [567] and

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[563] We would exclude from this policy Exchange Act reports filed in accordance with requirements of foreign law, such as Forms 40–F and 6–K.

[564] *See* proposed Securities Act Rule 172, 17 CFR 230.172.

[565] In initial public offerings, issuers are required to deliver preliminary prospectuses to investors at least 48 hours before sending confirmations.

[566] *See* 17 CFR 228.304 and 17 CFR 229.304.

[567] *See* proposed revisions to Exchange Act Rules 13a–13(d) and 15d–13(d), 17 CFR 240.13a–13(d) and 17 CFR 240.15d–13(d).

- Requiring risk factors disclosure in Forms 10–K and 10–KSB with quarterly updating in Forms 10–Q and 10–QSB.[568]

Reducing filing periods and requiring firms to file summary financial information with the Commission before filing Forms 10–K and 10–Q would unify and in some instances accelerate the release of information to investors. The other requirements would enhance the uniformity and quality of information disseminated to the market and investors.

The Commission is proposing to require that all persons who sign a firm's registration statements filed under the Securities Act and reports filed under the Exchange Act certify they have read the filing and do not know of any material misstatement or omissions of information in the filing.[569] The proposals would expand the number of persons required to sign forms to include the registrant, the registrant's principal executive officer, principal financial officer, principal accounting officer, and at least a majority of the registrant's board.[570] These revisions would help ensure that information is adequately reviewed both internally by a registrant's senior management (and by its board), thereby enhancing investors' confidence in the quality of the information.

The proposed rules and amendments would also improve investors' access to information by allowing issuers to use ''free writing'' sales materials before the effectiveness of their registration statement.[571] Current limitations on communications originally were intended to focus investors' attention on prospectuses, whose contents were specified by the Commission. We believe that by allowing issuers the additional flexibility to communicate with investors before the effectiveness of a registration statement, investors may become better informed before making their investment decisions. These additional communications made during the offering period would be subject to the provisions of Section 12(a)(2) under the Securities Act and the antifraud provisions of the Securities and the Exchange Acts.[572] Additionally, investors would continue to have access to issuers' registration statements through the Commission's Internet web site and several non-governmental web sites. The Commission recognizes, however, that deregulating communications may impose an analytical burden on investors. For example, in some offerings, an investor may need to assemble and assimilate various free writing documents and Exchange Act materials in order to get the whole investment picture. We seek comment on whether investors would benefit overall from issuers communicating with investors during the waiting period.

The proposed rules and amendments would improve investors' access to information by allowing issuers that register offerings on Form B to communicate with investors before they file a registration statement. [573] The proposed rules and amendments would apply to:

- Large, seasoned companies;
- Offerings sold only to QIBs;
- Offerings to certain existing shareholders;
- Offerings of certain non-convertible investment securities; and
- Certain market making transactions by affiliated brokers/dealers.

In these instances, the Commission anticipates investors would benefit from receiving information from issuers during the pre-filing period, and believes that doing so would not create an investor protection concern, given the information is subject to the provisions of Section 12(a)(2) under the Securities Act and the antifraud provisions of the Securities and the Exchange Acts. [574] Moreover, given the abundance of readily accessible information about large, seasoned public companies, any communications made by them while in the process of registering an offering are less likely to have a significant impact by conditioning the market or stimulating interest in a proposed offering. The Commission, however, recognizes that deregulating communications may lead to issuers ''hyping'' securities more than today. We seek comment on whether such activities would interfere with investors' ability to evaluate offerings objectively.

Offerings to QIBs and existing shareholders also may be registered on Form B. We believe that these investors, due to their experience or nature, would be less susceptible than other investors to pre-filing hype about a new offering. For example, under the proposed rules, issuers may register on Form B an offering of securities to QIBs. Because of their sophistication, we believe QIBs are more likely than other investors to be in a position to insist that issuers explain any information disseminated before the filing of a registration statement. Similarly, we believe that certain existing shareholders would benefit from issuers communicating more freely. These investors are likely to be knowledgeable about the investments in which they would be eligible to receive additional issuer disclosures during the pre-offering period. And finally, we believe purchasers of non-convertible investment grade debt are unlikely to need the additional protections offered by Form A registration. We understand these securities' investors buy largely based on ratings and maturities. We request comment on the accuracy of these views.

The proposed new rules and amendments are designed to increase the amount of information provided to investors. For example, the proposals would allow analysts to distribute research reports around the time of offerings as long as they disclosed potential conflicts of interest.[575] Facilitating communication between analysts and investors would enhance investors' ability to evaluate offerings and should increase the speed at which the market discovers prices.

The proposed revisions also would reduce the effects of selected disclosure by requiring issuers to file all ''free writing'' materials with the Commission. These materials would then be available to all investors through our web site. In offerings today, many issuers and their representatives exclude some investors from roadshows and other issuer communications. The proposed rules and amendments should put investors with Internet access on a more equal footing with respect to receiving written information about the issuer, although issuers might continue or increase their selective disclosure of oral information. We request comment

[568] The proposed revisions would also require issuers to disclose risk factors in Forms 10, 10–SB, 18, 20–F, and 18–K.

[569] The proposed revisions would affect Forms A, B, C, SB–1, SB–2, and SB–3 under the Securities Act and Forms 10–K, 10–KSB, 10–Q, 10–QSB, 10, 8–A, 10–SB, 20–F, 40–F, 18, 8–K, and 6–K under the Exchange Act.

[570] Foreign private issuers also would need to have an authorized representative in the United States sign. The proposed revisions would affect Forms A, B, C, SB–1, SB–2, and SB–3 under the Securities Act and Forms 10–K, 10–KSB, 10–Q, 10–QSB, 10, 8–A, 10–SB, 20–F, 40–F, and 18 under the Exchange Act. For Forms 8–K and 6–K, we would require either the registrant's principal executive officer, principal financial officer, or principal accounting officer to sign a particular Exchange Act report and certify he or she provided a copy to board members.

[571] *See* proposed Securities Act Rule 165, 17 CFR 230.165, and Rule 166, 17 CFR 230.166.

[572] Under the proposals, Form B offering information would be subject to liability under Section 11 of the Securities Act.

[573] *See* proposed Securities Act Rule 166, 17 CFR 230.166.

[574] Under the proposals, Form B offering information would be subject to liability under Section 11 of the Securities Act.

[575] *See* proposed revisions to Securities Act Rules 137, 138, and 139, 17 CFR 230.137, 230.138, and 230.139.

on whether investors without access to the Internet may be disadvantaged.

The proposed new rules and amendments would likely expand the registered investment opportunities available to investors. The proposed revisions would lower the cost of registering public offerings which in turn may motivate issuers to shift at least some securities' sales from the private to the public market. Investors that are eligible to purchase securities in private placements today would be able to purchase securities that would be similar to those before, but would be freely resalable. The information would be subject to the higher liability standards of Section 11 under the Securities Act. Investors currently ineligible to purchase securities in private placements may have new investment opportunities. Shifting securities offerings from the private to the public market also would likely increase the liquidity of the public market.

Although it is difficult to estimate the number of offerings or aggregate amount of securities that might become available to the public market, we anticipate that larger seasoned issuers would register some offerings on Form B that otherwise would have been privately placed, resulting in more offerings becoming available to non-QIB investors. Smaller, less seasoned issuers would likely register at least some offerings on Form B that they offer exclusively to QIBs and to certain existing shareholders, or that are investment grade non-convertible securities, rather than privately place them, resulting in more offerings being traded in the public market.[576] The Commission recognizes that some smaller, less seasoned issuers, however, would choose today to register their securities on Form B as an offering exclusively to QIBs. In these instances, non-QIB investors under the proposals would not be able to participate in the initial distribution of securities. We request comment on the extent to which the proposed rules would integrate the private and public markets and bifurcate QIB versus non-QIB investment opportunities.

One cost to investors of the proposed revisions is that they might increase investors' analytical burden. The proposed new rules and amendments would allow Form A issuers with two years of reporting history to incorporate Exchange Act reports into prospectuses as long as they deliver the reports with prospectuses to investors. Investors in these offerings would have to physically compile the delivered integrated information. The Commission notes that investors have not complained they are unduly burdened when investing in offerings where company information is incorporated by reference from the issuer's Exchange Act reports. The Commission seeks comment from investors as to whether, as a practical matter, compiling delivered materials that are incorporated by reference into prospectuses is burdensome to investors. The Commission seeks comment from investors as to whether, in their experience, issuers or mutual fund companies have promptly delivered periodic reports incorporated by reference or, in the mutual fund context, the Statement of Additional Information, when such materials were requested. And we seek comment from companies on how often they receive requests from investors.

The proposed new rules and amendments could also increase investors' analytical burden if they receive transactional information in Form B registration statements that is not uniform. In addition, investors would have the burden of identifying omitted information that today may be mandated. In general, however, we expect few problems. We anticipate that issuers and underwriters would use the opportunity to craft disclosure based on investors' demand and the requirement to provide material information to investors. The proposed rules do not change issuers' or underwriters' liability, thus we expect they would have incentives to present complete and correct transactional information. The Commission also is proposing to continue mandating the same company information as today, as well as certain transactional disclosure items. We request your comments on the accuracy of this view.

The Commission recognizes that some fraction of the cost savings to issuers and underwriters reflects a shifting of costs from issuers to investors, including investment advisers, investment companies, and retail investors. These costs may include quantifiable costs (such as printing) and less quantifiable costs (such as time, effort, and inconvenience). Some portion of the printing costs that Form B companies would save by not printing and delivering final prospectuses might be shifted to investors. Under the proposals, prospectuses would be available to investors through the Commission's web site or issuers' toll-free telephone numbers. Investors could either rely on prospectuses' continued availability on the Internet (and not acquire hard copies), call issuers for free copies or download and print them.

The Commission seeks comment on the assumptions and quantitative data that should go into estimating the costs to investors of acquiring prospectuses in Form B offerings. For example, would investors be less likely to read and use prospectuses if prospectuses are not delivered and investors have to take extra steps to receive them? What percentage of investors would contact issuers for free copies of prospectuses? What percentage of investors would obtain prospectuses through the Internet? How much does it cost investors in terms of paper, Internet connection costs, and telephone connection time to download information and print prospectuses? How likely is it that investors would read prospectuses ''on-line,'' and if they did so, how much in additional connection charges would they pay? What are the costs to issuers and underwriters of printing and delivering prospectuses? What are the costs of bulk printing of prospectuses through commercial printers relative to the cost of ''retail printing'' of prospectuses by individual investors? We request comment on the number of prospectuses that issuers and underwriters would no longer need to print and deliver to investors and the size of the resulting cost savings.

The proposed new rules and amendments would allow companies that currently are ineligible to register offerings on Forms SB–1 and SB–2 to use these forms, and to register business combinations on new Form SB–3.[577] One issue that could arise is the quality of the newly eligible firms' disclosures might be lower than today, because the small issuer disclosure system, of which

[576] In a study of non-convertible debt, we found that at least 49% of the non-convertible debt issued in the 144A market in the first half of 1998 would have likely migrated to the public market under the proposed rules. The evidence indicates yields on privately placed investment grade securities and securities with registration rights are essentially the same as yields on registered securities with similar characteristics. The insignificant yield differential suggests that investors perceive few differences between these privately placed and publicly registered securities. Yet issuers pay as much as 100 basis points in extra issuance costs for privately placed investment grade securities and securities with registration rights. Presumably, issuers believe the additional expense is more than justified by the issuance and timing flexibility provided by the private market. Under the proposed rules, issuers would have much of the same flexibility when they register offerings on Form B that they currently have in the private market. We therefore anticipate that issuers would sell these securities in the public rather than private market. *See Effects of Streamlined Registration,* Memorandum by the Commission's Office of Economic Analysis (Sept. 18, 1998).

[577] *See* proposed revisions to Securities Act Rule 405, 17 CFR 230.405.

Forms SB–1 and SB–2 are part, allows companies to register offerings with less extensive disclosure requirements than those required by Forms S–1 and S–2. We do not anticipate, however, that classifying companies with revenues up to $50 million as small business issuers would harm investors. The information that we have suggests allowing more firms to file on Forms SB–1 and SB–2 would not cause or allow firms that otherwise would register on Forms A or B to misrepresent or omit material information to investors. We request your comments on the accuracy of this view.

A final concern is that eliminating staff review of offerings registered on Form B would diminish issuers' incentives to fully and accurately disclose information in prospectuses. Although the Commission's staff currently reviews relatively few offerings that would be registered on Form B under the proposals,[578] the possibility of review likely enhances the quality of disclosure. The Commission agrees that prospectus review is valuable, but believes the resources currently dedicated to prospectus review might better serve investors' interests if applied to reviews of Exchange Act reports. As discussed in the Advisory Committee report, the equity trading markets are approximately 35 times larger (approximately $5.5 trillion dollars in 1995) than the primary markets (approximately $155 billion dollars in 1995).[579] Given that larger seasoned issuers are followed by analysts and other providers of information, we believe that focusing on Exchange Act report reviews would benefit investors. We request your comments on the accuracy of this view.

B. Impact on Issuers

The proposed rules and amendments would change the registration forms on which issuers register offerings and business combinations. Issuers would use Forms A, B, and C rather than Forms S–1, F–1, S–2, F–2, S–3, F–3, S–4, and F–4. Form A would be available to all issuers: It would roughly parallel current Forms S–1, F–1, S–2, and F–2. Issuers that would have been reporting companies for at least two years and that used Form A would be able to incorporate Exchange Act reports by reference. Form B would be available to larger seasoned issuers; that is, issuers with either public floats of at least $75 million *and* ADTVs of $1 million *or* public floats of at least $250 million.[580] Alternatively, issuers could use Form B if they sell securities exclusively to QIBs and certain existing shareholders, or sell non-convertible investment grade securities. Issuers would use Form C to register business combinations. The Commission also is proposing to revise the definition of small business issuer to increase the revenue test from $25 to $50 million and remove the public float test.[581] Firms that meet this test would be eligible to register offerings on Forms SB–1 and SB–2, and business combinations on new Form SB–3.

In the table below, we estimate the impact of the proposed eligibility requirements on companies' form eligibility based on data from 1997. We apply the proposed Form A and Form B public float, ADTV, and reporting history form requirements to the companies that were publicly traded on the NYSE, AMEX, and NASDAQ market in 1997.[582] Of the 8,825 companies that were traded on these exchanges and market in 1997, 5,428 would have been required to register offerings on Form A under the proposals, unless they sold securities solely to QIBs and certain existing shareholders, or sold non-convertible investment grade securities.[583] Of those 5,428 companies, 1,075 of the companies would not have been allowed to incorporate Exchange Act reports by reference on Form A under the proposals, whereas 4,353 would have been permitted to incorporate Exchange Act reports by reference. Of the 4,353 companies that would have been permitted to incorporate Exchange Act reports by reference on Form A under the proposals, 2,526 were required to register offerings on Forms S–1 and F–1 in 1997, 400 were required to register offerings on Forms S–2 and F–2, and 1,427 were required to register offerings on Forms S–3 and F–3. Under the proposed rules and amendments, 3,397 registrants would have been eligible to register offering on Form B based on their public floats and ADTVs. Not shown in the table are the 4,087 companies, 1,050 more than today, that would have been eligible in 1997 to register offerings on Forms SB–1, SB–2, and SB–3 under the proposed rules.[584] The impact of these changes on issuers is discussed below.

TABLE: IMPACT OF PROPOSED FORM REQUIREMENTS ON REGISTRANTS

	Form A, no incorporation by reference	Form A, incorporation by reference	Form B	Total
Form S–1/F–1	1,075	2,526	0	3,601
Form S–2/F–2	0	400	0	400
Form S–3/F–3	0	1,427	3,397	4,824
Total	1,075	4,353	3,397	8,825

We anticipate that the proposed rules and amendments would lower the cost of raising capital in the public market for many issuers. For the purposes of the Paperwork Reduction Act, the table in Section XV summarizes our preliminary estimates of the internal burden hours that parties would spend to comply with the proposals. We base these estimates on current burden hour estimates and the staff's experience with these filings. The estimates in the table

[578] *See* Advisory Committee Report at Appendix A, p. 9, Table 2. The Commission reviewed approximately 15% of prospectuses of underwritten common equity registered in calendar years 1994 and 1995 on Form S–3, which roughly parallels Form B.

[579] *See* Advisory Committee Report at p. 2 and at Addendum to Appendix A, Fig. 2.

[580] Public float is the aggregate market value of the issuer's outstanding voting and non-voting common equity held by non-affiliates of the issuer. *See* 17 CFR 230.405.

[581] *See* proposed revisions to Securities Act Rule 405, 17 CFR 230.405.

[582] Market capitalization was used as a proxy for public float. We use data from the Center for Research in Security Prices. We also are proposing to change the requirements for Canadian foreign private issuers to be eligible for MJDS to roughly conform with the requirements for Form B. These changes affect Forms F–7, F–8, F–9, F–10, F–80 and 40–F. We request comment on the impact of the revisions on these issuers.

[583] The proposed rules would allow certain Form A issuers with at least $75 million in public float to go effective whenever they request. We estimate approximately 1,960 issuers would be eligible under the proposals.

[584] *See* 17 CFR 228.10.

indicate that public companies would expend approximately 9,106,343 internal burden hours/year complying with the proposals. If we assume 70% of these burden hours would be expended by persons that cost the affected parties $85/hour and 30% of these burden hours would be expended by persons that cost $10/hour, then the proposals would cost approximately $573,699,609/year in internal staff time.[585] For the purposes of the Paperwork Reduction Act, we also estimate that parties would spend approximately $4,754,863,050/year on outside professional help to comply with the proposals. Thus we estimate that affected parties would spend approximately $5,328,562,659/year to comply with the proposals. Applying the same cost estimates to the burden imposed by the current rules, we estimate that issuers would spend approximately $5,581,739,205/year.[586] Note that these estimates do not attempt to quantify the proposals' intangible benefits, such as the benefits to issuers and investors of enhanced communications and the greater likelihood that issuers would shift capital raising from the private to the public market, nor its intangible costs, such as the cost to security holders of identifying misleading or incomplete pre-filing information. We request comment on the reasonableness of our estimates.

The proposed rules would allow issuers that otherwise would not be eligible to register securities on Form B to use Form B if they sold securities exclusively to QIBs and certain existing shareholders, or sold non-convertible investment grade securities. Consequently, they would be able to incorporate Exchange Act reports by reference without delivering them to investors, and would be able to craft transactional disclosure, subject to Section 11 liability standards, with fewer constraints than under the current regime. These changes would lower issuers' expenses to publicly raise capital. Although we cannot estimate the number of offerings or aggregate amount of securities that these issuers might register on Form B rather than on Form A, we anticipate that they would register at least some offerings on Form B. If they used Form B, they would also be allowed to communicate with investors during the pre-offering period. We request your comments, including any supporting empirical information, on the benefits and costs to smaller, less seasoned issuers of registering securities on Form B under the proposed rules.

The proposed rules would simplify larger seasoned issuers' preparation of Form B by lifting restrictions on communications,[587] enhancing these issuers' control over the timing of public offerings,[588] and not requiring physical delivery of a prospectus.[589] Under the proposed rules, we would require issuers in Form B offerings to deliver only a term sheet of the securities' most important features, instead of a full prospectus. We request comment on the number of Form B offerings in which issuers would not have to deliver prospectuses, the number of offerees in these deals, and the percentage of investors that would not request prospectuses. To the extent investors do not request the prospectus or information incorporated by reference, or obtain such information on the Internet, issuers would save mailings costs. Specifically, how does the difference in costs between the bulk mailing of prospectuses, under current law, and the on-request mailing of prospectuses as proposed, affect the potential cost to Form B issuers? How much would it cost Form B issuers to establish toll-free telephone numbers? How much would it cost Form B issuers to deliver term sheets? In Form A offerings, issuers would no longer have to deliver final prospectuses, but would have to deliver preliminary prospectuses. How many prospectuses would Form A issuers have to send to offerees? How does this number compare to the number of investors in these offerings? Would it cost more or less to send preliminary prospectuses relative to sending final prospectuses today? We request comment on the benefits and costs of these revisions to issuers.

The proposed rules and amendments would increase all issuers' flexibility to raise capital in a number of ways. The proposals would allow issuers to ''test the waters'' to gauge investor interest in offerings, allowing them to withdraw unpopular offerings more quickly than under the current regime. Issuers would be able to convert more easily and with less regulatory uncertainty between public and private offerings,[590] and would no longer be required to announce public or private status in ''limited content notices.'' [591] The Commission would also credit issuers' registration fees if they withdraw registration statements, and would allow small business issuers to increase the amount of securities they register on a statement by 50%, up from 20% today. The Commission is proposing to permit issuers in the small business issuer system to delay paying registration statement filing fees until shortly before they sell securities.[592] This provision is designed to help ease these issuers' liquidity concerns. We anticipate these changes would benefit issuers. We request comment on the reasonableness of this view.

These proposed new rules and amendments could slow issuers' access to the public market in quick offerings because issuers would be required to deliver preliminary prospectuses in some offerings and term sheets in others. The proposed rules and amendments would require issuers registering securities on Form A to deliver preliminary prospectuses to buyers 7 days before pricing for initial public offerings and 3 days before pricing for repeat offerings. In addition, issuers would have to notify offerees of material changes at least 24 hours in advance of pricing. For Form B offerings, issuers would be required to deliver term sheets outlining the key features of securities being offered.[593]

To assess the burden of the proposed Form A delivery requirements on issuers whose public floats, ADTVs, and reporting histories would otherwise require them to register offerings on Form A, we examine whether these issuers' offerings in 1996 would have been slowed by the proposed restrictions. In the case of non-shelf offerings, very few deals would have been affected.[594] In the case of shelf

[585] These hourly rates translate to annual salaries of $170,000/year and $20,000/year.

[586] For the purposes of the Paperwork Reduction Act, we estimate in the table of Section XV the burden hours imposed on parties to comply with the current rules. Assuming (as we did for the proposed rules) that 25% of the hours required to comply with the rules are provided by corporate staff at a cost of $63/hour (70% of the expended corporate staff time cost $85/hour, whereas 30% of the expended corporate staff time cost $10/hour), and 75% of the hours required to comply with the rules are provided by external professional help at a cost of $175/hour, we estimate that affected parties spend approximately 37,971,015 burden hours/year * $147/hour = $5,581,739,205/year.

[587] *See* proposed Securities Act Rules 165 and 166, 17 CFR 230.165 and 230.166.

[588] Offering materials would not be subject to staff review, and issuers could designate offerings' effective dates. Certain Schedule B filers also could designate the timing of their offerings' effectiveness.

[589] *See* proposed Securities Act Rules 172 and 173, 17 CFR 230.172 and 230.173.

[590] *See* proposed revisions to Securities Act Rule 152, 17 CFR 230.152.

[591] *See* proposed revisions to Securities Act Rules 135c and 135, 17 CFR 230.135c and 230.135.

[592] *See* 17 CFR 228.512.

[593] *See* proposed Securities Act Rule 172, 17 CFR 230.172, and proposed revisions to Exchange Act Rule 15c2–8, 17 CFR 240.15c2–8.

[594] We found that 14 non-shelf offerings by 13 issuers would have been slowed by the proposed Form A delivery requirements. In all but one case, the requirement to deliver notice of material changes at least 24 hours in advance of pricing

Continued

offerings, more deals, especially medium-term-note offerings, would have been slowed by the Form A prospectus delivery requirements.[595] In general, however, these offerings are sold to institutional buyers, and issuers would be eligible to register offerings on Form B if securities were sold solely to QIBs and certain existing shareholders, or were non-convertible investment grade securities. Registration on Form B would eliminate regulatory uncertainty and Form B issuers would be required to deliver only a securities term sheet to investors.

Under the proposals, we would require issuers to file post-effective amendments for delayed shelf takedowns by the time of first sale. This requirement would accelerate issuers' filing obligation with respect to transactional disclosure in prospectus supplements relative to today. We do not, however, anticipate a substantial increase in burden on issuers. We ask comment on the reasonableness of this view.

C. Impact on Other Parties

We anticipate that the proposed rules and amendments would on balance benefit underwriters. The proposed changes would clarify and expand the current safe harbors for research reports. Analysts would be allowed to distribute research reports around the time of an offering as long as potential conflicts of interest were disclosed.[596] Thus analysts would be able to continue servicing their clients, even during offerings.

The proposed rules and amendments would also remove much of the burden on issuers and underwriters of delivering final prospectuses.[597] We anticipate these parties would experience tremendous cost savings from this change. The proposed rules would also facilitate the Commission moving towards quicker clearing and settling cycles in the future, reducing clearance and settlement risk to clearing corporations, their members, and public investors. The proposed rules and amendments would lift the obligation on dealers to deliver final prospectuses to investors in sales after initial distributions if final prospectuses are on file with the Commission and dealers notify investors where they may acquire them.[598]

The proposed rules, however, could increase the pressure on underwriters to rapidly review offerings because more offerings would be eligible to come to market quickly. Although underwriters' techniques to review offerings have improved since the introduction of shelf registration in 1982, several commentators on the Concept Release noted that further deregulation of the registration process could undermine their ability to influence the contents of issuer disclosure, leaving them liable for prospectus content. The Commission is proposing to revise Rule 176 to provide courts better guidance as to whether a due diligence investigation meets a ''reasonable investigation'' and ''reasonable ground for belief'' standard in a defense against liability under Sections 11 and 12(a)(2) in a quick offering.[599] We also are proposing to extend Rule 176 to cover liability under Section 12(a)(2) as well as Section 11. We believe the revisions would provide guidance to underwriters and the courts while preserving underwriters' as ''gatekeepers.''

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[600] a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Commenters should provide empirical data on (a) the annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any effect on competition, investment or innovation. We note that for purposes of the Paperwork Reduction Act, we estimate the proposals would create an annual information collection paperwork preparation savings to issuers of more than $100 million. We request your comments on the reasonableness of this estimate.

In adopting rules under the Exchange Act, Section 23(a) requires the Commission to consider the impact that rules would have on competition and to not adopt any rule that would impose a burden on competition not necessary or appropriate in the public interest. Section 3(f) of the Exchange Act requires the Commission, when engaged in rulemaking and required to consider or determine whether the action is necessary or appropriate in the public interest, to also consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.[601]

We believe the proposals would lower companies' cost of capital raising relative to today which would enhance their efficiency and facilitate capital formation. We anticipate the proposals would promote investor protection and enhance communications between public companies and investors, thereby increasing investors' confidence in the integrity of the securities markets.

To the extent that the proposals would lower the cost of raising capital in the United States, they could enhance the competitiveness of issuers that raise capital in the U.S. public capital markets. We anticipate the proposals also could reduce some of the competitive disadvantage of small issuers that today register offerings on Forms S–1, SB–1, and SB–2 relative to larger firms. Given that the proposals would (1) allow small issuers to raise capital from QIBs and certain existing shareholders, or sell non-convertible investment grade securities using Form B; (2) allow small businesses to incorporate Exchange Act reports by reference into registration statements as long as they deliver the reports with prospectuses to investors; and (3) allow certain Form A issuers' registration statements to go effective immediately if they are reporting companies for at least two years and have public floats of at least $75 million, we believe small companies' competitiveness could be enhanced relative to today.

The proposals to revise Rule 176 to provide courts better guidance as to whether a due diligence investigation meets a ''reasonable investigation'' and ''reasonable ground for belief'' standard

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would have caused the delay. Of course, the current registration regime encourages issuers to delay filing registration statement amendments, thus it is unclear as to whether these issuers could have filed their amendments earlier without incurring additional cost.

[595] In some cases, as discussed above, firms that currently use Forms S–3 and F–3 to issue securities from shelves would not have sufficient public float and ADTV to qualify to use Form B. These firms would have to meet the preliminary prospectus delivery requirements for Form A. Here we examine these firms' use in 1996 of unallocated shelf to see if the proposed prospectus delivery requirements would have slowed their offerings. In 1996, 187 firms that were eligible to use Forms S–3 and F–3, but which would not have been eligible to use Form B took securities off unallocated shelves. Not all of these offerings, however, would have been slowed. In roughly ⅔ of equity deals and ⅓ of non medium-term-note (MTN) debt deals, firms file preliminary takedown prospectuses (red herrings) with the Commission because they market the deals. Marketing, not regulatory requirements slow these deals. Such marketing is rare, however, for takedowns in MTN programs.

[596] *See* proposed revisions to Securities Act Rules 137, 138, and 139, 17 CFR 230.137, 230.138, and 230.139.

[597] *See* proposed Securities Act Rule 173, 17 CFR 230.173.

[598] *See* proposed revisions to Securities Act Rule 174, 17 CFR 230.174.

[599] *See* proposed revisions to Securities Act Rule 176, 17 CFR 230.176.

[600] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996).

[601] 15 U.S.C. § 78c(f).

in a defense against liability under Sections 11 and 12(a)(2) in a quick offering could, however, put underwriters that do not have in-house analysts at a competitive disadvantage relative to other underwriters. The revision would allow underwriters to cite the employment and consultation of research analysts that are actively involved in an issuer's industry as a positive factor for the courts to consider when deciding whether underwriters' investigations are reasonable. Underwriters that cannot rely on this factor may be somewhat at a competitive disadvantage in underwriting quick offerings. We request comment on the significance of this disadvantage.

As discussed above, the Commission anticipates that the proposed rules and amendments would reduce the cost of raising capital in the public market, promoting efficiency, competition, and capital formation. The Commission requests comment on these preliminary views and encourages commentators to provide empirical data and other facts to support their views. We request data and analysis on the effect of the proposed changes on efficiency and capital formation. The Commission also requests comments on the competitive effects that may impact market participants under the proposed amendments.

XV. Initial Regulatory Flexibility Analysis

We prepared this Initial Regulatory Flexibility Analysis under 5 U.S.C. § 603 concerning the new rules, forms, and amendments proposed today. We will consider your written comments in the preparation of the final analysis.

A. Reasons and Objectives for Proposed Action

The purpose of the proposed new rules, forms, and amendments is to modernize, rationalize, and clarify the Commission's regulatory system for offerings under the Securities Act of 1933, enhance communications between public companies and investors, and promote investor protection.

B. Objectives and Legal Basis

We propose the new rules, forms, and amendments to the Commission's existing rules and forms pursuant to Sections 2(b), 6, 7, 8, 10, 19(a), and 28 of the Securities Act, as amended and Sections 3, 4, 10, 12, 15, 23, and 36 of the Exchange Act.

C. Small Entities Subject to the Rules

The proposed rules and amendments would affect small entities that are required to file registration statements and reports under the Securities Act, Exchange Act, and the Investment Company Act. For the purposes of the Regulatory Flexibility Act, the Securities Act and Exchange Act define 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.[602] When used with respect to an issuer that is an investment company, the term is defined as an investment company and any related investment company with aggregate net assets of $50 million or less as of the end of its most recent fiscal year.[603]

We currently are aware of approximately 1,100 reporting companies that are not investment companies with assets of $5 million or less. There are approximately 400 investment companies that satisfy the ''small entity'' definition. All of these companies would be subject to the proposed rules, forms, and amended rules. We have no reliable way, however, to determine how many businesses may become subject to Commission reporting obligations in the future, or may otherwise be impacted by the changes.

D. Reporting, Recordkeeping, and Other Compliance Requirements

For the most part, the proposals are deregulatory in nature, modernizing, rationalizing, and clarifying the Commission's regulatory system for offerings under the Securities Act and enhancing communications between public companies and investors. Under the proposed rules, small businesses would report and file essentially the same information as today, although more small companies would be eligible for the small business disclosure system's streamlined reporting. The Commission also is proposing a new small business combination form, Form SB–3. One exception to this generalization is the Commission would require issuers, both large and small, to file written communication used during the waiting period in a securities offering. The proposed rules and amendments also could change small issuers' recordkeeping of prospectus delivery to investors. Our preliminary view is that any additional recordkeeping burden resulting from our proposals for prospectus delivery would be minimal. To the extent that underwriters and issuers collect information to contact potential investors and collect information to send prospectuses and confirmations under the existing rules, we do not anticipate the proposals would impose a significant additional burden on underwriters and issuers. We request comment, however, on the accuracy of this view.

E. Significant Alternatives

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

- 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 rule for small businesses;
- Using performance rather than design standards; and
- Exempting small businesses from all or part of the requirements.

In a number of instances, the proposed rules, forms, and amendments would reduce the burden of complying with the Securities Act and Exchange Act to both large and small businesses. We propose to allow issuers to simultaneously register offerings under the Securities Act and classes of securities under the Exchange Act by checking a box on their Securities Act registration statements.[604] The revision would reduce the number of issuer filings. And the proposed rules and amendments would reduce uncertainty regarding staff review of Exchange Act reports through notification of review and pre-review. The proposed rules would allow issuers, both large and small, to raise capital from QIBs and certain existing shareholders, or sell non-convertible investment grade securities using Form B. These issuers would be able to incorporate Exchange Act reports by reference without necessarily delivering them to investors, and would be able to craft transactional disclosure, subject to Section 11 liability standards, with fewer constraints than under the current regime. These changes should lower issuers' expenses to publicly raise capital.

The proposed rules and amendments would increase all issuers' flexibility to raise capital in a number of ways. The

[602] *See* 17 CFR 230.157 and 17 CFR 240.0–10.

[603] *See* 17 CFR 240.0–10.

[604] *See* proposed Securities Act Rule 499, 17 CFR 230.499, for Schedule B filers and proposed revisions to Exchange Act Rule 12d1–2, 17 CFR 240.12d1–2.

proposals would allow issuers to ''test the waters'' to gauge investor interest in offerings, allowing them to withdraw unpopular offerings more quickly than under the current regime. Issuers would be able to convert more easily and with less regulatory uncertainty between public and private offerings,[605] and would no longer be required to announce public or private status in ''limited content notices.'' [606] The Commission would credit issuers' registration fees if they withdraw registration statements. We anticipate these changes would benefit small issuers.

The proposals would also relax many of the restrictions on communications between issuers and investors and clarify any remaining limitations. Issuers would be able to more freely promote and sell securities to investors, subject to the provisions of Section 12(a)(2) under the Securities Act and the antifraud provisions of Rule 10b-5 under the Exchange Act.[607] Specifically, the proposed rules and amendments would allow all issuers to communicate freely with investors after registration statements are filed.[608] During the pre-filing period, issuers of offerings registered on Forms A, SB–1, and SB–2 and unregistered offerings would be somewhat limited in their ability to communicate with investors, but the proposed rules would clearly define the length of the period and would delineate the types of communications permitted and prohibited.[609] These changes would enhance small businesses' communications with investors and reduce regulatory uncertainty.

The proposed rules and amendments explicitly would reduce the impact on small businesses complying with the provisions of the Securities Act by allowing seasoned small businesses to incorporate Exchange Act reports by reference into the small business registration forms as long as they deliver the reports with prospectuses to investors. This provision should save issuers time and money. For example, we estimate issuers would spend approximately 533, or 343 fewer, burden hours preparing Form SB–2 registration statements under the proposed rules than today.[610] The Commission is proposing to allow more issuers to qualify for the small business disclosure system and to allow small business issuers to register business combinations and exchange offers on a new form, Form SB–3. Form SB–3 is designed to simplify and streamline the information that small businesses must disclose when they combine with other firms. As discussed in detail in Section XV, we estimate small business issuers would expend approximately 1,095 burden hours to file business combinations on Form SB–3,[611] or $163,155/filing in labor costs. Relative to filing on Forms S–4 or F–4 today, we estimate these issuers would save approximately 149 burden hours/filing or $22,201/filing in labor costs. The Commission also is proposing to permit issuers in the small business issuer system to delay paying registration statement filing fees until shortly before they sell securities.[612] This provision is designed to help ease these issuers' liquidity concerns. Small business issuers also would gain approximately $166/filing in interest because they would be able to defer paying registration fees.[613] Finally, the Commission would allow small business issuers to increase the amount of securities they register on a statement by 50%, up from 20% today.

The proposed rules and amendments could impose additional analytical burdens on investors that qualify as small entities, such as some investment companies and investment advisors. As discussed in Section XV, the proposed rules and amendments would allow issuers to communicate, including using written sales materials, with investors, both large and small, after registering offerings with the Commission. We seek comment on whether small investors would benefit overall from issuers communicating with investors during the waiting period. The proposed new rules and amendments also would allow Form A issuers with two years of reporting history to incorporate Exchange Act reports into prospectuses as long as they deliver the reports with prospectuses to investors. Investors in these offerings would have to physically compile the delivered integrated information. The Commission seeks comment from investors as to whether, as a practical matter, compiling delivered materials that are incorporated by reference into prospectuses would be burdensome to small investors. Finally, the proposals could also increase small investors' analytical burden if they receive transactional information in Form B registration statements that is not uniform in presentation from offering to offering. We request your comments on whether some issuer flexibility in crafting Form B transactional disclosure would unduly burden small investors.

As discussed in Section XV, the Commission recognizes that some portion of the printing costs that Form B companies would save by not printing and delivering final prospectuses might be shifted to small investors. Under the proposals, prospectuses would be available to investors through the Commission's web site or through issuers' toll-free telephone numbers. Small investors could either rely on prospectuses' continued availability on the Internet (and not acquire hard copies), call issuers for free copies or download and print them. The Commission seeks comment on whether the proposed revisions would unduly burden small investors.

We did not propose all of the alternatives that we considered. In some instances, the alternatives we chose not to propose would be inconsistent with our statutory mandate to require prospectuses to disclose fully and fairly all material information to investors. In other instances, the alternatives would significantly reduce the quality and timeliness of Exchange Act report information, depriving shareholders of an important means to evaluate investments. We believe that except in the specific instances, such as in the case of the small business disclosure system and Form B disclosure requirements, the proposed rules, forms, and amendments should apply equally to all entities required to disclose information to enhance protection of all investors. For these reasons, we also believe there would be no benefit in providing separate requirements for small issuers based on the use of

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[605] *See* proposed revisions to Securities Act Rule 152, 17 CFR 230.152.

[606] *See* proposed revisions to Securities Act Rules 135c and 135, 17 CFR 230.135c and 230.135.

[607] Under the proposals, Form B offering information would be subject to liability under Section 11 of the Securities Act.

[608] *See* proposed Securities Act Rule 425, 17 CFR 230.425.

[609] *See* proposed Securities Act Rules 167, 168, and 169, 17 CFR 230.167, 230.168, and 230.169.

[610] *See* the detailed discussion in Section XV of this release.

[611] We base this estimate on the number of burden hours required to file Form SB–2 under the proposals relative to the number of burden hours required to file Form A. We then reduce the number of burden hours required today to file Form C by this ratio. Specifically, we estimate the number of hours required to file Form SB–3 under the proposed rules would be [(533 burden hours/SB–2 filing under the proposals / 606 burden hours/Form A filing under the proposals) * 1,244 burden hours/Form C filing under the proposals = 1,095 burden hours/SB–3 filing.

[612] *See* 17 CFR 228.512.

[613] In fiscal year 1998, small business issuers filed registration statements an average of 103 days before effectiveness. On average, these issuers raised $13,068,000/filing. At an interest rate of 15%/year, which the staff believes small firms could be required to pay, and Commission filing fees of 0.03% per dollar of capital raised, these issuers would have saved $166/filing on average in interest if they had been able to postpone paying their registration fee.

performance rather than design standards.

F. Overlapping or Conflicting Federal Rules

We do not believe any current federal rules duplicate, overlap or conflict with the rules, schedules, and amendments that we propose to amend.

We request your written comments on any aspect of this Initial Regulatory Flexibility Analysis. We particularly seek comment on:

- The number of small entities that would be affected by the proposed rules, forms, and amendments;
- The expected impact of the proposals as discussed above; and
- How to quantify the number of small entities that would be affected by, and how to quantify the impact of, the proposed rules, forms, and amendments.

We ask commentators to describe the nature of any impact and provide empirical data supporting the extent of the impact.

XVI. Paperwork Reduction Act

The proposed rules and amendments affect several regulations and forms that contain ''collection of information requirements'' within the meaning of the Paperwork Reduction Act of 1995.[614] The Commission has submitted proposed revisions to those rules and Forms to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. § 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The proposed new rules, forms, and amendments would modernize, rationalize, and clarify the Commission's regulatory system for offerings under the Securities Act of 1933, enhance communications between public companies and investors, and promote investor protection. The proposed forms and regulations set forth the disclosures that the Commission would require issuers to make about themselves and their securities offerings to the public. The requirements of the forms would largely be the same as today, except for a few changes that are discussed in detail below and in Section XIII. The information is needed so that prospective investors may make informed investment decisions both in registered offerings and in secondary transactions of registered securities. The information collection requirements imposed by the forms and regulations would be mandatory to the extent that companies are publicly owned and offer securities to the public. There would be no mandatory retention period for the information disclosed, and the information gathered would be made publicly available.

Form S–1 under the Securities Act (OMB Control Number 3235–0065) is used by issuers that are not eligible to use other forms to register offerings of securities.[615] The form sets forth the transactional and company information required by the Commission in securities offerings. Form S–2 under the Securities Act (OMB Control Number 3235–0072) is used by issuers that have reported under the Exchange Act for a minimum of three years and have timely filed all required reports during the 12 calendar months and any portion of the month immediately preceding the filing of the registration statement to register offerings of securities. The form sets forth the transactional and company information required by the Commission in securities offerings. It permits incorporation by reference of Exchange Act reports. Delivery of these incorporated documents as well as the prospectus to investors may be required. Form S–3 under the Securities Act (OMB Control Number 3235–0073) is used by issuers that have reported under the Exchange Act for a minimum of twelve months and have met the timely filing requirements set forth under Form S–3 (also, the offering and issuer must meet the eligibility tests prescribed by the form) to register offerings of securities. The form sets forth the transactional and company information required by the Commission in securities offerings. It permits incorporation by reference of Exchange Act reports. Form F–1 under the Securities Act (OMB Control Number 3235–0258) is used by foreign private issuers that are not eligible to use other forms to register offerings of securities. The form sets forth the transactional and company information required by the Commission in securities offerings. Form F–2 under the Securities Act (OMB Control Number 3235–0257) is used by foreign private issuers that have reported under the Exchange Act for a minimum of three years or have an equity float of at least $75 million worldwide or are registering non-convertible investment grade securities to register offerings of securities. The form is somewhat shorter than Form F–1 because it uses delivery of filings made by the issuer under the Exchange Act, particularly Form 20–F. Form F–3 under the Securities Act (OMB Control Number 3235–0256) is used by foreign private issuers that have reported under the Exchange Act for a minimum of twelve months and that have a worldwide public market float of more than $75 million (the form also may be used by eligible foreign private issuers to register offerings of non-convertible investment grade securities, securities to be sold by selling security holders, or securities to be issued to certain existing security holders) to register offerings of securities. The form allows issuers to incorporate Exchange Act reports by reference. Form SB–1 under the Securities Act (OMB Control Number 3235–0423) is used by small business issuers, as defined in Rule 405 of the Securities Act, to register offerings of up to $10 million of securities in a continuous 12-month period. The form sets forth the transactional and company information required by the Commission in securities offerings. It requires less detailed information about the issuer's business than Form S–1. Form SB–2 under the Securities Act (OMB Control Number 3235–0418) is used by small business issuers, as defined in Rule 405 of the Securities Act, to register securities offerings. The form sets forth the transactional and company information required by the Commission in securities offerings. It requires less detailed information about the issuer's business than Form S–1. Form S–4 under the Securities Act (OMB Control Number 3235–0324) is used by issuers to register securities offerings in connection with business combinations and exchange offers. The form sets forth the transactional and company information required by the Commission in securities offerings. Form F–4 under the Securities Act (OMB Control Number 3235–0325) is used by issuers to register securities offerings in connection with business combinations and exchange offers involving foreign private issuers. The form sets forth the transactional and company information required by the Commission in securities offerings. Form F–7 under the Securities Act (OMB Control Number 3235–0383) is used by publicly traded Canadian foreign private issuers to register rights offers extended to their U.S. holders. To be registered on Form F–7, the rights must be granted to U.S. shareholders on terms no less favorable than those extended to other shareholders. Form F–8 under the Securities Act (OMB

[614] 44 U.S.C. § 3501 *et seq.*

[615] Regulations S–K and S–B do not impose reporting burdens directly on public companies. For administrative convenience, each of these regulations is currently assigned one burden hour. The burden hours imposed by the disclosure regulations are currently included in the estimates for the forms that refer to the regulations.

Control Number 3235–0378) is used by large publicly traded Canadian foreign private issuers to register securities offerings in connection with business combinations and exchange offers. To be registered on Form F–8, the securities must be offered to U.S. shareholders on terms no less favorable than those extended to other holders. Form F–9 under the Securities Act (OMB Control Number 3235–0377) is used by large publicly traded Canadian foreign private issuers to register non-convertible investment grade securities. Form F–10 under the Securities Act (OMB Control Number 3235–0380) is used by large publicly traded Canadian foreign private issuers to register any securities offerings, except certain derivative securities. Unlike Forms F–7, F–8, F–9, and F–80, however, Form F–10 requires the Canadian issuer to reconcile its financial statements to U.S. GAAP. Form F–80 under the Securities Act (OMB Control Number 3235–0404) is used by large publicly traded Canadian foreign private issuers to register securities offerings in connection with business combinations and exchange offers. To be registered on Form F–80, the securities must be offered to U.S. holders on terms no less favorable than those extended to other holders. Schedule B under the Securities Act is used by Foreign governments or political subdivisions thereof to register securities offerings. Generally, it contains a description of the country and its government, the terms of the offering, and the uses of proceeds. Form S–8 under the Securities Act (OMB Control Number 3235–0066) is used by issuers to register securities for offer and sale to employees in a compensatory or incentive context. Form A under the Securities Act (OMB Control Number to be determined) would be used by issuers that are not eligible to use other forms to register offerings of securities. The form would set forth the transactional and company information required by the Commission in securities offerings. Form B under the Securities Act (OMB Control Number to be determined) would be used by issuers that have reported under the Exchange Act for a minimum of twelve months and that have public floats of at least $75 million and ADTVs of $1 million or public floats of at least $250 million (alternatively, issuers could use Form B if they sell securities exclusively to QIBs and certain existing shareholders or register non-convertible investment grade securities) to register offerings of securities. These issuers would be able to incorporate Exchange Act reports by reference without necessarily delivering them to investors, and would be able to craft transactional disclosure, subject to Section 11 liability standards and some itemized requirements, with fewer constraints than under the current Form S–3. Form C under the Securities Act (OMB Control Number to be determined) would be used by issuers to register securities offerings in connection with business combinations and exchange offers. The form would set forth the transactional and company information required by the Commission in securities offerings. Form SB–3 under the Securities Act (OMB Control Number to be determined) would be used by small business issuers, as defined in Rule 405 of the Securities Act, to register securities offerings in connection with business combinations and exchange offers. The form would set forth the transactional and company information required by the Commission in securities offerings. It would require less detailed information about the issuer's business than Form A.

Form 10 under the Exchange Act (OMB Control Number 3235–0064) is used by registrants to file classes of securities. It requires certain business and financial information about the issuer. Form 8–A under the Exchange Act (OMB Control Number 3235–0056) is an optional short form used by issuers to file classes of securities. Form 10–SB under the Exchange Act (OMB Control Number 3235–0419) is used by small business issuers, as defined in Rule 12b–2 of the Exchange Act, to file classes of securities. This form requires slightly less detailed information about the issuer's business than Form 10 requires. Form 20-F under the Exchange Act (OMB Control Number 3235–0288) is used by foreign private issuers to register securities or file annual reports. Form 40-F under the Exchange Act (OMB Control Number 3235–0381) is used by Canadian foreign private issuers to register securities or file annual reports. Form 18 under the Exchange Act (OMB Control Number 3235–0121) is used by foreign governments or political subdivisions thereof to register securities on a national securities exchange. Form 10–K under the Exchange Act (OMB Control Number 3235–0063) is used by registrants to file annual reports. It provides a comprehensive overview of the registrant's business. Form 10–KSB under the Exchange Act (OMB Control Number 3235–0420) is used by small business registrants, as defined in Rule 12b–2 of the Exchange Act, to file annual reports. It provides a comprehensive overview of the registrant's business, although its requirements call for slightly less detailed information than required by Form 10–K. Form 18–K under the Exchange Act (OMB Control Number 3235–0120) is used by foreign governments or political subdivisions thereof to file annual reports. Form 10–Q under the Exchange Act (OMB Control Number 3235–0070) is used by registrants to file quarterly reports. It includes unaudited financial statements and provides a continuing view of the registrant's financial position during the year. The report must be filed for each of the first three fiscal quarters of the registrant's fiscal year. Form 10–QSB under the Exchange Act (OMB Control Number 3235–0416) is used by small business registrants, as defined in Rule 12b–2 of the Exchange Act, to file quarterly reports. It includes unaudited financial statements and provides a continuing view of the registrant's financial position during the year. The report must be filed for each of the first three fiscal quarters of the registrant's fiscal year. Form 8–K under the Exchange Act (OMB Control Number 3235–0060) is used by registrants to report the occurrence of material events or corporate changes. Form 6–K under the Exchange Act (OMB Control Number 3235–0116) is used by foreign private issuers to report information: (i) Required to be made public in the country of its domicile; (ii) filed with and made public by a foreign stock exchange on which its securities are traded; or (iii) distributed to security holders. The report must be furnished promptly after such material is made public. Issuers would also file under Rule 425 of the Securities Act (OMB Control Number to be determined) written communications (other than required registration statements) about pending offerings.

In addition to affecting these collections of information, the proposed rules and amendments also could change issuers' recordkeeping of prospectus delivery to investors and impose a new burden of tracking their ''first offers'' in Form B offerings. Our preliminary view is that any additional recordkeeping burden resulting from our proposals for prospectus delivery would be minimal. To the extent that underwriters and issuers collect information to contact potential investors and collect information to send prospectuses and confirmations under the existing rules, we do not anticipate the proposals would impose a significant additional burden on underwriters and issuers. We request comment, however, on the accuracy of

this view. We also do not anticipate that requiring issuers to keep information provided to investors fifteen days before the first offer and any information used throughout the offering period would impose a significant burden on issuers. Issuers would only have to keep the information until they file it with us. Thus issuers might not have to keep it longer than the date of their first offer because they can file their registration statement with us at that time. The longest issuers would have to keep the information would be the length of the offering period, plus 15 days, since the latest they can file the registration statement is at first sale. We request comment and any supporting data on the burden that these requirements would impose on issuers and underwriters.

We anticipate that the proposed rules and amendments would lower the cost of raising capital in the public market for many issuers. For the purposes of the Paperwork Reduction Act, the table below summarizes our preliminary estimates of the burden hours that parties would spend to comply with the proposals. We base these estimates on current burden hour estimates and the staff's experience with these filings. The estimates in the table indicate that parties would expend approximately 9,106,343 burden hours/year to comply with the proposals. In addition, as discussed in more detail below, we estimate that parties would spend approximately $4,754,863,050/year on outside professional help to comply with the proposals. Note that these estimates do not attempt to quantify the proposals' intangible benefits, such as the benefits to issuers and investors of enhanced communications and the greater likelihood that issuers would shift capital raising from the private to the public market, nor its intangible costs, such as the cost to security holders of identifying misleading or incomplete pre-filing information. We request comment on the reasonableness of our estimates.

TABLE: BURDEN HOUR ESTIMATES

Form	Estimated burden hours/filing		Estimated filings/year		Estimated burden hours/year	
	Before revisions (A)	After revisions (B)	Before revisions (C)	After revisions (D)	Before revisions (E) = A*C	After revisions (F) = B*D
S–1	1,267	0	1,136	0	1,439,312	0
S–2	470	0	152	0	71,440	0
S–3	398	0	3,890	0	1,548,220	0
F–1	1,868	0	139	0	259,652	0
F–2	559	0	1	0	559	0
F–3	166	0	172	0	28,552	0
SB–1	710	178	8	8	5,680	1,424
SB–2	876	138	414	559	362,664	77,142
S–4	1,233	0	3,701	0	4,563,333	0
F–4	1,308	0	677	0	885,516	0
F–7	2	1	1	1	2	1
F–8	2	1	16	16	32	16
F–9	420	105	12	12	5,040	1,260
F–10	420	105	45	45	18,900	4,725
F–80	2	1	2	2	4	2
Schedule B	0	0	33	33	0	0
S–8	46	12	5,597	5,261	257,462	63,132
A	0	152	0	2,616	0	397,632
B	0	75	0	3,067	0	230,025
C	0	311	0	3,984	0	1,239,024
SB–3	0	280	0	394	0	110,320
10	95	24	124	124	11,780	2,976
8–A	7	7	2,293	0	15,363	0
10–SB	90	23	162	162	14,580	3,726
20–F	1,991	498	908	908	1,807,828	452,184
20–FR	95	24	99	99	9,405	2,376
40–F	1,991	498	121	121	240,911	60,258
40–FR	95	24	15	15	1,425	360
18	8	2	0	0	0	0
10–K	1,723	431	10,392	9,342	17,905,416	4,026,402
10–KSB	1,179	295	2,591	3,641	3,054,789	1,074,095
18–K	8	2	38	38	304	76
10–Q	144	36	29,551	26,401	4,255,344	950,436
10–QSB	131	33	7,521	10,671	985,251	352,143
8–K	5	5	27,519	69,087	137,595	345,435
6–K	8	8	10,582	11,000	84,656	88,000
Filings under Rule 425	0	0.25	0	10,628	0	2,657
Total					37,971,015	9,106,343

The Commission's experience indicates that allowing small companies to register offerings on Forms SB–1 and SB–2 reduces issuers' disclosure burden hours and cost. The proposed rules and amendments would therefore save time and money for 1,050 companies—companies that would become newly eligible to register offerings on Forms SB–1, SB–2, and SB–3 under the proposed rules and amendments.[616] Among those affected would be (1) non-

[616] *See* proposed revisions to Securities Act Rule 405.

reporting companies with revenues between $25 and $50 million that plan to register initial public offerings under the Securities Act or propose to register under the Exchange Act, (2) non-reporting companies with revenues under $25 million but public float over $25 million, because the public float test would be eliminated, and (3) reporting companies that would remain in the small business disclosure system longer than under the current system.

In fiscal year 1998, issuers registered eight offerings on Form SB–1. Given the limited use of this form, we do not expect any additional filings on this form under the proposed rules and amendments. Under the proposed rules, we estimate issuers would require 710 hours to file Form SB–1, the same as today.[617] Of the 710 hours, we estimate that 25% (178 internal burden hours) would be provided by corporate staff, and 75% (532 hours) by external professional help. In addition, we anticipate filers would spend, at an estimated $175/hour, approximately $93,100/filing in professional labor costs to file Form SB–1.[618] We request your comments and supporting empirical information on the reasonableness of these estimates.

In fiscal year 1998, issuers registered 414 offerings on Form SB–2. In addition to these filings, we expect an additional 143 filings/year, for a total of 559 filings/year, on Form SB–2 because more firms would be eligible to use Form SB–2 under the proposed rules and amendments.[619] Under the current rules, issuers expend approximately 876 hours to register securities on Form SB–2, which does not allow issuers to incorporate Exchange Act reports by reference. The proposed rules and amendments would allow seasoned issuers to incorporate Exchange Act reports by reference into Form SB–2 registration statements as long as they deliver the reports with prospectuses to investors. We anticipate this provision would save issuers time and money. We anticipate approximately 330 (59%) of the 559 filings/year would incorporate Exchange Act reports by reference under the proposed rules, whereas 229 (41%) would not.[620] Under the proposed rules, we estimate issuers would require 876 hours to file Form SB–2 if they cannot incorporate Exchange Act reports by reference under the proposals, and approximately 324 hours if they can.[621] On average, we estimate small business issuers would spend approximately 550 hours preparing Form SB–2 registration statements under the proposed rules than today. [622] Of the 550 hours, we estimate that 25% (138 internal burden hours) would be provided by corporate staff, and 75% (412 hours) by external professional help. We anticipate filers would spend, at an estimated $175/hour, approximately $72,100/filing in professional labor costs to file Form SB–2.[623] We request your comments and supporting empirical information on the reasonableness of these estimates.

The proposed rules would simplify larger seasoned issuers' preparation of Form B by allowing them greater flexibility to craft their transactional disclosure. In fiscal year 1998, approximately 4,824 issuers registered 4,062 offerings on Forms S–3 and F–3.[624] Based on the proposed rule's public float and ADTV tests, approximately 3,397 or 70% of these issuers would be eligible to register offerings on Form B under the proposed rules.[625] The remaining 1,427 or 30% of issuers would be required to register offerings on Form A. Based on relative representation, and the total offerings registered on Forms S–3 and F–3 in fiscal year 1998, we estimate issuers would register approximately 2,843 offerings on Form B and 1,219 offerings on Form A.[626] (We anticipate, however, that many Form A issuers would register at least some offerings on Form B by selling their securities exclusively to QIBs and certain existing shareholders, or selling non-convertible investment grade securities, and thus would achieve the savings associated with filing on Form B.) We estimate 224 additional secondary offerings would be filed on Form B under the proposals that currently are filed on Form S–8.[627] Thus, we anticipate 3,067 offerings would be filed on Form B under the proposals. We anticipate that these issuers would save burden hours and money from the simplification of Form B. We estimate that issuers would require 300 hours to register securities on Form B. Of the 300 hours, we estimate that 25% (75 internal burden

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[617] The numbers in Column B of the Table differ significantly from those in Column A of Table 2 because the estimated burden hours in Column A include the estimated corporate burden hours and outside labor hours that parties would require to file information statement. In Column B, we estimate only the corporate burden hours needed to file information statements (we estimate separately the expense, in dollar terms, of outside labor).

[618] We estimate filers would spend $93,100/filing in professional labor costs. We base this estimate on 532 hours of professional labor/Form SB–1 *$175/hour. In aggregate, we estimate that filers would spend $744,800/year to file 8 Form SB–1s/year.

[619] We base this estimate on the number of firms that would be eligible to register offerings on Form SB–2 under the proposals relative to the number of firms that are eligible to register offerings on Form SB–2 today, and on the number of SB–2 filings in fiscal year 1998. Specifically, we estimate the number of SB–2 filings under the proposals would be (4,087 firms eligible to register on Form SB–2 under the proposals/3,037 firms eligible to register on Form SB–2 today) *414 SB–2 filings/year today=559 SB–2 filings/year.

[620] We base this estimate on the number of repeat offerings registered on Form SB–2 today relative to the number of offerings registered on Form SB–2 today, and on the number of offerings we expect would be registered on Form SB–2 under the proposals. Specifically, we estimate the number of SB–2 filings/year that would incorporate Exchange Act reports by reference under the proposals would be (246 repeat offerings registered on Form SB–2 today/414 offerings registered on Form SB–2 today) *559 SB–2 filings/year under the proposals=330 SB–2 filings/year. We expect the remaining 229 offerings (559 SB–2 filings/year under the proposals −330 SB–2 filings/year that would incorporate Exchange Act reports by reference under the proposals) not to incorporate Exchange Act reports by reference.

[621] We base this estimate on the number of burden hours required today to file Form S–2 (which allows issuers to incorporate Exchange Act reports by reference, but requires them to deliver the reports to investors) relative to the number of burden hours required today to file Form S–1. We then reduce the number of burden hours we estimate issuers would require under the proposed rules to file Form SB–2 if they cannot incorporate Exchange Act information by reference by this ratio. Specifically, we estimate the number of hours required to file Form SB–2 under the proposed rules if an issuer cannot incorporate Exchange Act reports by reference would be (470 burden hours/S–2 filing today/1,267 burden hours/S–1 filing today) *876 burden hours/SB–2 filing under the proposals with no incorporation by reference=324 burden hours/SB–2 filing with incorporation by reference.

[622] We base this estimate on [(876 hours/SB–2 filing under the proposals with no incorporation by reference *229 SB–2 filings under the proposals with no incorporation by reference)+(324 hours/SB–2 filing under the proposals with incorporation by reference *330 SB–2 filings under the proposals with no incorporation by reference)]/559 SB–2 filings under the proposals=550 hours/SB–2 filing on average under the proposed rules. Today, SB–2 filings require 876 hours/filing or 326 more hours than under the proposed rules.

[623] We estimate filers would spend $72,100/filing in professional labor costs. We base this estimate on 412 hours of professional labor/Form SB–2 *$175/hour. In aggregate, we estimate that filers would spend $40,303,900/year to file 559 Form SB–2s/year.

[624] In fiscal year 1998, issuers registered 3,890 offerings on Form S–3 and 172 offerings on Form F–3.

[625] We estimate the percentage of firms that currently are eligible to use Forms S–3 and F–3 that would be eligible under the proposals to register offerings on Form B based on their public floats and ADTVs would be (3,397 firms that would be required to register offerings on Form B under the proposals/4,824 firms that would be eligible to register offerings on Forms S–3 and F–3 today)=70%.

[626] Specifically, 70% *4,062 offerings/year=2,843 offerings/year on Form B under the proposals and 30% *4,062 offerings/year=1,219 offerings/year on Form A.

[627] In a random sample of 50 offerings filed in 1996 and 1997 on Form S–8, we found 6% would no longer be eligible to file on Form S–8 under the proposals. Under the proposed rules and based on our sample, we would require 4% (224) of the 5,597 offerings filed on Form S–8 in fiscal year 1998 to file on Form B, 1% (56) to file on Form A with automatic effectiveness and incorporation by reference, and 1% (56) to file on Form A with no automatic effectiveness.

hours) would be provided by corporate staff, and 75% (225 hours) by external professional help. We anticipate filers would spend, at an estimated $175/hour, approximately $39,375/filing in professional labor costs to file Form B.cv[628] We request your comments and supporting empirical information on the reasonableness of these estimates.

The proposed rules and amendments also would simplify issuers' preparation of Form A prospectuses and reduce regulatory uncertainty. The proposals would allow certain Form A issuers' registration statements to go effective immediately if they are reporting companies for at least two years and have public floats of at least $75 million. We estimate approximately 1,960 Form A issuers would meet these criteria. The proposals would also allow Form A issuers to incorporate Exchange Act disclosure by reference in registration statements two years after becoming reporting issuers rather than after three years, as currently required. As discussed above, 2,526 companies that currently are required to register offerings on Forms S–1 and F–1 would become newly eligible to incorporate Exchange Act reports by reference. These firms would save burden hours and prospectus preparation costs when offering securities. Based on the number of offerings filed on Forms S–1, S–2, F–1, and F–2 in fiscal year 1998,[629] the proposed availability of Forms SB–1 and SB–2 to certain of these issuers,[630] the number of offerings by issuers that today would file on Forms S–3 and F–3 that would not be eligible for Form B, [631] and the number of offerings currently filed on Form S–8 that would be filed on Form A under the proposals,[632] we estimate issuers would file approximately 2,616 offerings/year on Form A.[633] We expect the 1,219 offerings/year that issuers registered in fiscal year 1998 on Forms S–3 and F–3 to incorporate Exchange Act reports by reference on Form A under the proposals. In addition, we expect approximately 978 of the 1,397 remaining filings on Form A to incorporate Exchange Act reports by reference each year.[634] Thus we expect issuers would incorporate Exchange Act reports by reference into 2,197 Form A offerings/year under the proposed rules. The remaining 419 offerings on Form A would not be eligible to incorporate Exchange Act reports by reference. We estimate issuers filing on Form A under the proposed rules and amendments would expend approximately 1,333 burden hours/filing if they cannot incorporate Exchange Act reports by reference,[635] and 471 burden hours if they can.[636] On average, we anticipate issuers would spend about 609 hours preparing Form A registration statements.[637] Of the 609 hours, we estimate that 25% (152 internal burden hours) would be provided by corporate staff, and 75% (457 hours) by external professional help. We anticipate filers would spend, at an estimated $175/hour, approximately $79,975/filing in professional labor costs to file Form B.[638] We request your comments and supporting empirical information on the reasonableness of these estimates.

The proposed rules and amendments would also create new Form C for business combinations and new Form SB–3 for small business issuer combinations. In fiscal year 1998, issuers registered 4,378 business combinations on Forms S–4 and F–4. Of these, we estimate issuers would register approximately 3,984 on Form C and 394 on Form SB–3 under the proposed rules.[639] We estimate issuers

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[628] We estimate filers would spend $39,375/filing in professional labor costs. We base this estimate on 225 hours of professional labor/Form B* $175/hour. In aggregate, we estimate that filers would spend $120,763,125/year to file 3,067 Form Bs/year.

[629] Issuers registered 1,136 offerings on Form S–1, 152 offerings on Form S–2, 139 offerings on Form F–1, and one offering on Form F–2, for a total of 1,428 offerings in fiscal year 1998.

[630] Under the proposed rules, issuers would register these offerings on Form A, except for the 143 offerings we anticipate issuers would register on Form SB–2.

[631] We estimate 30% of the firms currently eligible to use Forms S–3 and F–3 would be required to register offerings on Form A based on their public floats and ADTVs. Specifically, the percentage would be (1,427 firms that would be required to register offerings on Form A under the proposals/4,824 firms that would be eligible to register offerings on Forms S–3 and F–3 today) = 30%. If we adjust the 4,062 offerings issuers registered on Forms S–3 and F–3 in fiscal year 1998 by this percentage, we estimate issuers would register approximately 1,219 of these offerings/year on Form A under the proposals.

[632] In a random sample of 50 offerings filed in 1996 and 1997 on Form S–8, we found 6% would no longer be eligible to file on Form S–8 under the proposals. Under the proposed rules and based on our sample, we would require 4% (224) of the 5,597 offerings filed on Form S–8 in fiscal year 1998 to file on Form B, 1% (56) to file on Form A with automatic effectiveness and incorporation by reference, and 1% (56) to file on Form A with no automatic effectiveness.

[633] Specifically, issuers would register on Form A under the proposed rules 1,428 offerings/year currently registered on Forms S–1, S–2, F–1, and F–2–143 offerings/year registered on Form SB–2 + 1,219 offerings/year currently registered on Form S–3 + 112 offerings/year currently registered on Form S–8 = 2,616 offerings/year.

[634] We base this conclusion on the number of firms that currently are required to register offerings on Forms S–1 and F–1 that would become newly eligible to incorporate Exchange Act reports by reference under the proposals relative to the number of firms that currently are required to register offerings on Forms S–1 and F–1. Specifically, the number of filings on Form A that would incorporate Exchange Act reports by reference each year would be (2,526 firms that would be eligible to incorporate Exchange Act reports by reference on Form A under the proposals/3,601 firms that currently are eligible to register offerings on Forms S–1 and F–1) *(2,616 offerings/year on Form A − 1,219 offerings/year on Form A that would incorporate Exchange Act reports by reference that are eligible to be registered on Form S–3 today) = 978 offerings/year (in addition to the 1,219 offerings/year on Form A that would incorporate Exchange Act reports by reference that are eligible to be registered on Form S–3 today).

[635] Both domestic and foreign issuers would be able to register offerings on Form A. Domestic issuers currently require 1,267 hours to complete Form S–1 (which does not allow issuers to incorporate Exchange Act reports by reference), whereas foreign issuers require 1,868 hours to complete Form F–1 (which also does not allow issuers to incorporate Exchange Act reports by reference). In fiscal year 1998, issuers registered 1,136 offerings on Form S–1 and 139 offerings on Form F–1. We estimate the number of hours that issuers would require to file Form A if they cannot incorporate Exchange Act reports by reference would be [(1,136 domestic Form A filings that previously would have been filed on Form S–1 *1,267 hours/domestic Form A filing that previously would have been filed on Form S–1) + (139 foreign Form A filings that previously would have been filed on Form F–1 *1,868 hours/foreign Form A filing that previously would have been filed on Form F–1)]/1,275 filings on Form A = 1,333 hours/filing.

[636] Both domestic and foreign issuers would be able to register offerings on Form A. Domestic issuers currently require 470 hours to complete Form S–2 (which allows issuers to incorporate Exchange Act reports by reference), whereas foreign issuers require 559 hours to complete Form F–2 (which allows issuers to incorporate Exchange Act reports by reference). In fiscal year 1998, issuers registered 152 offerings on Form S–2 and one offering on Form F–2. We therefore estimate the number of hours that issuers would require to file Form A if they can incorporate Exchange Act reports by reference would be 471 hours/filing.

[637] As discussed above, we anticipate issuers would register 419 offerings/year on Form A where Exchange Act reports would not be incorporated by reference and 2,197 offerings/year on Form A where Exchange Act reports would be incorporated by reference. The average hours to file Form A would be approximately 1,333 hours if they cannot incorporate Exchange Act reports by reference and 471 hours if they can incorporate Exchange Act reports by reference. On average we expect the number of hours issuers would expend to file Form A would be [(419 offerings/year on Form A where Exchange Act reports would not be incorporated by reference * 1,333 hours if they cannot incorporate Exchange Act reports by reference) + (2,197 offerings/year on Form A where Exchange Act reports would be incorporated by reference * 471 hours if they can incorporate Exchange Act reports by reference)]/2,616 offerings/year on Form A = 609 hours/filing.

[638] We estimate filers would spend $79,975/filing in professional labor costs. We base this estimate on 457 hours of professional labor/Form A * $175/hour. In aggregate, we estimate that filers would spend $209,214,600/year to file 2,616 Form As/year.

[639] Issuers registered 3,701 offerings on Form S–4 in fiscal year 1998 and 677 offerings on Form F–4, for a total of 4,378 business combinations. Based on the number of offerings we expect issuers would register on Forms SB–1 and SB–2 under the proposals relative to the number of offerings registered on Forms SB–1, SB–2, A, and B, and the number of business combinations in fiscal year 1998, we estimate the number of SB–3 filings

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would expend approximately 1,245 hours to complete Form C under the proposed rules and amendments.[640] Of the 1,245 hours, we estimate that 25% (311 internal burden hours) would be provided by corporate staff, and 75% (934 hours) by external professional help. We anticipate filers would spend, at an estimated $175/hour, approximately $163,450/filing in professional labor costs to file Form C.[641] We estimate small business issuers would expend approximately 1,121 hours to file business combinations on Form SB–3.[642] Of the 1,121 hours, we estimate that 25% (280 internal burden hours) would be provided by corporate staff, and 75% (841 hours) by external professional help. We anticipate filers would spend, at an estimated $175/hour, approximately $147,175/filing in professional labor costs to file Form B.[643] We request your comments and supporting empirical information on the reasonableness of these estimates.

The proposals also would relax many of the restrictions on communications between issuers and investors and clarify any remaining limitations. Issuers would be able to more freely promote securities to investors, subject to the provisions of Section 12(a)(2) under the Securities Act and the antifraud provisions of the Securities and the Exchange Acts.[644] Specifically, the proposed rules and amendments would allow all issuers to communicate freely with investors after a registration statement was filed.[645] During the pre-filing period, issuers of offerings registered on Forms A, SB–1, and SB–2 and unregistered offerings would be somewhat limited in their ability to communicate with investors, but the proposed rules would clearly define the length of the period and would delineate the types of communications permitted and prohibited.[646] The Commission would permit larger seasoned issuers and other issuers making particular kinds of offerings on Form B to communicate with investors both before and after registration statements are filed.[647] Proposed Rule 425 would require issuers to file written communications (in addition to required registration statements) about pending offerings. The rule, which would have few specific information requirements, would require issuers to attach their written communications and include a prominent legend advising investors to read the registration statement. The Commission recognizes that companies would incur costs from filing sales literature used in public offerings. We estimate that a firm's corporate staff would expend approximately 15 burden minutes (0.25 internal burden hours) to file a written communication under the proposed rule.[648] Not all issuers would use sales literature in offerings, especially those that occur quickly. In other offerings, however, issuers might communicate with investors using sales literature. Preliminarily, we estimate issuers would file, on average, one written communication (besides the required registration) for each offering. Thus, we anticipate issuers would register approximately 10,628 offerings on Forms A, B, C, SB–1, SB–2, and SB–3 per year. We estimate issuers would expend approximately 2,657 burden hours to file written communications under Rule 425. We request your comments and supporting empirical information on the reasonableness of these estimates.

We anticipate that the proposed rules and amendments would streamline and simplify issuers' filing of Exchange Act reports in two ways. First, the Commission would allow issuers to simultaneously register an offering under the Securities Act and a class of securities under the Exchange Act by checking a box on their Securities Act registration statements.[649] This change would not result in any loss of information to investors because the Securities Act registration forms would include any Exchange Act registration information currently not required by the Securities Act registration requirements. The revision, however, would reduce the number of issuer filings. As indicated in the Table, we anticipate that issuers would no longer need to file approximately 2,293 Form 8–As/year, saving approximately 7 burden hours/filing. Second, the proposed rules and amendments would reduce uncertainty regarding staff review of Exchange Act reports through notification of review and pre-review.

These proposed new rules and amendments, however, would enhance and expedite some of the disclosure required in Exchange Act reports filed by reporting companies. These revisions could increase issuers' cost of disclosure. To help assess the costs, we asked representatives of the American Society of Corporate Secretaries (ASCS), two issuers, one accounting firm, and two law firms to assess the impact of the proposed rule changes. These parties did not anticipate substantial increases in registrant costs if the Commission required reporting companies to file summary financial information on Form 8–K within 30 days after quarter-end and 45 days after fiscal year-end.[650] They reported that most firms release earnings information before quarter end and hence the requirement would codify and unify financial reporting

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issuers would file under the proposals would be (567 offerings registered on Forms SB–1 and SB–2 under the proposals / 6,250 offerings registered in fiscal year 1998) * 4,378 filings/year under the proposals = 394 SB–3 filings/year. The remaining 3,984 business combinations (4,378 filings/year—394 SB–3 filings/year) would be filed on Form C.

[640] Both domestic and foreign issuers would be required to register business combinations on Form C. Domestic issuers currently require 1,233 hours to complete Form S–4, whereas foreign issuers require 1,308 hours to complete Form F–4. In fiscal year 1998, issuers registered 3,701 business combinations on Form S–4 and 677 business combinations on Form F–4. We estimate the number of burden hours that issuers would require to file Form C would be [(3,701 Form C filings that previously would have been filed on Form S–4 * 1,233 hours/Form C filing that previously would have been filed on Form S–4) + (677 Form C filings that previously would have been filed on Form F–4 * 1,308 hours/Form C filing that previously would have been filed on Form F–4)]/4,378 filings on Form C = 1,245 hours/filing on Form C.

[641] We estimate filers would spend $163,450/filing in professional labor costs. We base this estimate on 934 hours of professional labor/Form C * $175/hour. In aggregate, we estimate that filers would spend $651,184,800/year to file 3,984 Form Cs/year.

[642] We base this estimate on the number of hours required to file Form SB–2 under the proposals relative to the number of hours required to file Form A. We then reduce the number of hours required today to file Form C by this ratio. Specifically, we estimate the number of hours required to file Form SB–3 under the proposed rules would be [(550 hours/SB–2 filing under the proposals / 609 hours/Form A filing under the proposals) * 1,245 hours/Form C filing under the proposals = 1,121 hours/SB–3 filing.

[643] We estimate filers would spend $147,175/filing in professional labor costs. We base this estimate on 841 hours of professional labor/Form A* $175/hour. In aggregate, we estimate that filers would spend $57,986,950/year to file 394 Form As/year.

[644] Under the proposals, Form B offering information would be subject to liability under Section 11 of the Securities Act.

[645] *See* proposed Securities Act Rule 165, 17 CFR 230.165.

[646] *See* proposed Securities Act Rules 167, 168, and 169, 17 CFR 230.167, 230.168, and 230.169.

[647] *See* proposed Securities Act Rule 166, 17 CFR 230.166.

[648] We base this estimate on the burden imposed by a similar filing requirement under Item 901(c) of Regulation S–K for roll-up transactions.

[649] *See* proposed Securities Act Rule 499, 17 CFR 230.499, for Schedule B filers and proposed revisions to Exchange Act Rule 12d1–2, 17 CFR 240.12d1–2.

[650] In a 1998 survey of its members, the ASCS found that although only 10% of respondents file Form 8–K with quarterly financial information, over 99% issue quarterly press releases. Of those, approximately 90% issue a press release within 30 days after quarter-end. The results of the survey indicate that 38% of respondents issue a summary or complete balance sheet, 46% issue a summary or complete income statement, 24% issue a summary or complete cash flow statement, 69% issue information on revenues or sales (including those that issued an income statement), 80% issue earnings (including those that issued an income statement), and 12% issue segment financial information.

practice. We estimate registrants would file 4 additional Form 8–Ks/year. If each Form 8–K filing requires a registrant to expend 5 burden hours, companies would expend approximately 20 additional burden hours/year.[651] We request comment on the reasonableness of this estimate.

The proposed rules and amendments would also reduce the Form 8–K filing period from 15 to 5 days, affecting only announcements of:

- Changes in control;
- Acquisitions or dispositions of assets;
- Bankruptcies or receiverships; and
- Changes of fiscal year.

The parties we contacted did not anticipate reducing the Form 8–K filing period for these events would substantially increase registrants' costs. They indicated that registrants typically issue press releases when these events occur, and thus would be able to file announcements on Form 8–K within 5 days at little additional cost. We request comment on the feasibility and cost of accelerating the filing deadline of Form 8–K for these events.

The proposed rules and amendments would also reduce the Form 8–K filing period from 5 to 1 days for announcements of:

- Independent accountant resignations;
- Director resignations; and
- Material defaults, dividend arrearages, and delinquencies.

The Commission does not anticipate that reducing the Form 8–K filing period for these events would substantially increase registrants' costs, and believes the benefits to investors would outweigh the costs to registrants. We request comment, however, on the validity of this view.

The proposed rules and amendments would require additional events required to be reported on Form 8–K, including:

- Material modifications to rights of security holders;
- Departures of CEO, CFO, COO or president (or persons in equivalent positions);
- Material default on senior securities (must be disclosed no later than one day following default);
- Notice that reliance on prior audit is no longer permissible, or that auditor will not consent to use of its report in a Securities Act filing;[652] and
- Change in company name.

As with the reduction in the Form 8–K filing period, the Commission anticipates the cost of these revisions to be low. After (or, in some cases, before) these events occur, registrants are likely to issue press releases and file a Form 8–K based on their more general obligation to release information about material events.[653] And most of these events are likely to be expected and thus issuers should be able to anticipate the need to file. We request your comments, including any supporting empirical information, on the costs that would be incurred by companies under the proposed revisions. We also view the proposed changes to Form 6–K as imposing little additional burden on foreign private issuers. In many instances, the firms that the Commission would ask to file a Form 6–K already are required to file similar information in their home countries. The proposed filings would also be voluntary, rather than required. We request comment on the burden of these revisions, along with the signature requirement, on foreign private issuers.

We propose to treat the information in Part I of Forms 10–Q and 10–QSB as ''filed'' for purposes of Section 18 under the Exchange Act. Although the revision would increase the liability associated with the financial information in Forms 10–Q and 10–QSB, we do not believe it would significantly increase registrants' costs. The reporting systems that generate this financial information also generate the financial information contained in Forms 10–K and 10–KSB, which currently is subject to liability under Section 18. We therefore do not anticipate that registrants would need to undertake substantial investments to generate information in quarterly reports that can withstand the heightened standard of liability. We request comment on this view.

Another proposed rule would require registrants to disclose risk factors in Forms 10–K and 10–KSB and to update them quarterly in Forms 10–Q and 10–QSB.[654] Again the Commission does not anticipate that the rule would impose a substantial burden on reporting companies. The Commission already requires issuers to disclose risk factors in most Securities Act registration statements. Thus the proposed revisions would require firms that recently have raised capital just to update previously disclosed risk factors. In a 1998 ASCS survey of its members, only 20% of respondents indicated that the costs of disclosing risk factors would be significant, 54% estimated modest cost increases, and 26% estimated no cost increase. Of those respondents estimating costs to be significant, 19% believed the impact would be short term, rather than on-going. To reflect this cost, we added one hour to the estimates for Forms 10–K, 10–KSB, 10–Q, and 10–QSB.[655] On average, we anticipate issuers would spend about 1,724 hours preparing Form 10–K.[656] Of the 1,724 hours, we estimate that 25% (431 internal burden hours) would be provided by corporate staff, and 75% (1,293 hours) by external professional help. We anticipate filers would spend, at an estimated $175/hour, approximately $226,275/filing in professional labor costs to file Form 10–K.[657] We request your comments and supporting empirical information on the reasonableness of these estimates. Finally, the Commission is proposing to require that all persons who sign a firm's registration statements filed under the Securities Act and reports filed under the Exchange Act certify they have read the filing and do not know of any material misstatement or omissions of information in the filings.[658] The proposals would also

[651] The parties consulted generally indicated that Form 8–K filings are prepared by corporate counsel.

[652] *See* 17 CFR 228.304 and 17 CFR 229.304.

[653] *See, e.g.*, the comment letter on the Concept Release, File No. S7–19–96, submitted by the American Bar Ass'n. (Dec. 11, 1996).

[654] The proposed revisions would also require issuers to disclose risk factors in Forms 10, 10–SB, 18, 20–F, and 18–K.

[655] We also added a burden hour to our estimates for Forms 10, 10–SB, 18, 20–F, and 18–K.

[656] As discussed above, we anticipate issuers would register 419 offerings/year on Form A where Exchange Act reports would not be incorporated by reference and 2,197 offerings/year on Form A where Exchange Act reports would be incorporated by reference. The average hours to file Form A would be approximately 1,333 hours if they cannot incorporate Exchange Act reports by reference and 471 hours if they can incorporate Exchange Act reports by reference. On average we expect the number of hours issuers would expend to file Form A would be [(419 offerings/year on Form A where Exchange Act reports would not be incorporated by reference * 1,333 hours if they cannot incorporate Exchange Act reports by reference) + (2,197 offerings/year on Form A where Exchange Act reports would be incorporated by reference * 471 hours if they can incorporate Exchange Act reports by reference)]/2,616 offerings/year on Form A = 609 hours/filing.

[657] We estimate filers would spend $226,275/filing in professional labor costs. We base this estimate on 1,293 hours of professional labor/Form 10–K* $175/hour. In aggregate, we estimate that filers would spend $2,113,861,050/year to file 9,342 Form 10–Ks/year. In fiscal year 1998, registrants filed 10,392 Form 10–Ks and 2,591 Form 10–KSBs. Under the proposals 1,050 companies that currently file their annual report on Form 10–K would be eligible to file on Form 10–KSB. Thus we anticipate registrants would file 9,342 Form 10–Ks and 3,641 Form 10–KSBs. In fiscal year 1998, registrants filed 29,551 Form 10–Qs and 7,521 Form 10–QSBs. Under the proposals 1,050 companies that currently file their quarterly reports on Form 10–Q would be eligible to file on Form 10–QSB. Thus we anticipate registrants would file 26,401 Form 10–Qs [29,551 Form 10–Qs today—(3 quarterly reports on Form 10–QSB/year * 1,050 companies)], and 10,671 Form 10–QSBs [7,521 Form 10–QSBs today + (3 quarterly reports on Form 10–QSB/year * 1,050 companies)].

[658] The proposed revisions would affect Forms A, B, C, SB–1, SB–2, and SB–3 under the Securities

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expand the number of persons required to sign forms to include the registrant, the registrant's principal executive officer, principal financial officer, principal accounting officer, and at least a majority of the registrant's board.[659] The cost to registrants of these proposals would be the cost associated with having managers and board members spend additional time reading documents so that they can affirm having read them. Given the involvement of most firms' senior managers in the reporting process, we do not anticipate significant additional cost to registrants from these proposals. We request comment, however, on this view.

In accordance with 44 U.S.C. § 3506c(2)(B), we solicit comment on the following:

- Whether the proposed changes in each collection of information are necessary for the proper performance of the function of the agency;
- The accuracy of our estimate of the burden of the proposed changes to each collection of information;
- The quality, utility, and clarity of the information to be collected; and
- Whether there are ways to minimize the burden of any of the collections of information on those who are required to respond, including through the use of automated collection techniques or other forms of information technology.

Anyone desiring to submit comments on any or all of 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. The Office of Management and Budget is required to make a decision concerning the collection 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.

XVII. General Request for Comments

Given the scope and significance of this proposal, the Commission is particularly eager to receive your comments. We solicit comment, both specific and general, upon each component of the proposal. We believe your comments will be very important in determining the course these proposals will take. The Commission therefore intends to review with great care all comments received.

We also solicit comment on whether issuers would take advantage of some of the flexibility in registration or communication provided in the proposal to engage in fraudulent activities. If so, what elements of the proposal could be open to such abuse? How can we avoid abuse and continue to ensure investor protection, for example, in the proposals for automatic effectiveness and free communications, while at the same time provide issuers with timing certainty and allow market participants to take fuller advantage of today's technology?

We believe our proposals would provide additional benefits for smaller companies (*e.g.*, simpler and more flexible registration process, elimination of restrictions on post-filing communications and relaxed integration rules). We also believe that our proposals balance these benefits with enhanced protection for investors (*e.g.*, earlier prospectus delivery, filing of free writing prospectuses). We solicit comment on the impact that our proposals may have on microcap companies and microcap fraud. Should we exclude microcap companies from some of our proposals as a precautionary measure against microcap fraud? If so, which proposals? By excluding microcap companies from certain proposals would we be providing a competitive advantage to their non-microcap competitors? Rather than excluding microcap companies, should we provide for enhanced monitoring of microcap companies?

We encourage your comments on whether and how our proposal would affect the secondary trading markets for securities. How would our proposal affect public investors, broker-dealers and the companies whose securities are traded in the secondary markets? Our proposed changes to the Exchange Act disclosure system would enhance and speed corporate information to the marketplace, would add Commission resources to oversight of the secondary markets and should provide valuable benefits to investors. Besides the proposed Exchange Act reporting changes, our proposal relates primarily to the securities offering process, rather than secondary trading. Would these proposed changes adversely affect participants in secondary trading? Would investor protection in secondary market transactions be affected by our proposed changes? If so, how?

Any interested person wishing to submit written comments on any aspect of the proposals, as well as on other matters that might have an impact on the proposals, is requested to do so. In addition, the Commission requests comment on whether any further changes to the Commission's rules and forms are necessary or appropriate to implement the objectives of the proposals. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549 and should refer to file number S7–30–98.

XVIII. Statutory Bases

The proposed new rules, forms and amendments to the Commission existing rules and forms are being proposed pursuant to Sections 2(b), 6, 7, 8, 10, 19(a) and 28 of the Securities Act of 1933 as amended and Sections 3, 4, 10, 12, 15, 23 and 36 of the Securities Exchange Act of 1934.

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegation (Government agencies).

17 CFR Part 202

Administrative practice and procedure, Securities.

17 CFR Part 210

Accountants, Accounting.

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small business.

17 CFR Parts 229, 239 and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 230

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

17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

Act and Forms 10–K, 10–KSB, 10–Q, 10–QSB, 10, 8–A, 10–SB, 20–F, 40–F, 18, 8–K, and 6–K under the Exchange Act. We also are proposing to require registrants to disclose their email address and web site on all registration statements and Exchange Act reports. We do not anticipate any additional burden from these requirements.

[659] Foreign private issuers also would need to have an authorized representative in the United States sign. The proposed revisions would affect Forms A, B, C, SB–1, SB–2, and SB–3 under the Securities Act and Forms 10–K, 10–KSB, 10–Q, 10–QSB, 10, 8–A, 10–SB, 20–F, 40–F, and 18 under the Exchange Act. For Forms 8–K and 6–K, we would require either the registrant's principal executive officer, principal financial officer or principal accounting officer to sign a particular Exchange Act report and certify he or she provided a copy to board members.

Text of Proposed Amendments

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

The authority citation for part 200 continues to read in part as follows:

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

* * * * *

§ 200.30–1 [Amended]

2. By removing paragraph (a)(4) in § 200.30–1 and by redesignating paragraphs (a)(5), (a)(6), (a)(7) and (a)(8) as paragraphs (a)(4), (a)(5), (a)(6) and (a)(7).

PART 202—INFORMAL AND OTHER PROCEDURES

3. The authority citation for part 202 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 77t, 78d–1, 78u, 78w, 78*ll*(d), 79r, 79t, 77sss, 77uuu, 80a–37, 80a–41, 80b–9, and 80b–11, unless otherwise noted.

* * * * *

4. By revising the seventh sentence of the introductory text of § 202.3a to read as follows:

§ 202.3a Instructions for filing fees.

* * * Filing fees paid pursuant to Section 6(b) of the Securities Act of 1933 (15 U.S.C. 77a *et. seq*.) or pursuant to Section 307(b) of the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et. seq*.) should be designated as ''restricted,'' except that filing fees paid with respect to registration statements filed in accordance with Form SB–1, SB–2 and SB–3 (§§ 239.9, 239.10 and 239.11 of this chapter) or pursuant to §§ 230.462(b), 230.462(e) and 230.462(f) of this chapter should be designated as ''unrestricted.'' * * *

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PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

5. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77aa(25), 77aa(26), 78j–1, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–37(a), unless otherwise noted.

§ 210.3–14 [Amended]

6. By amending the Note following paragraph (a)(1) of § 210.3–14 by removing the words ''Item 15 of Form S–11'' and adding, in their place the words ''Item 1107(b) of Regulation S–K (§ 229.1107(b) of this chapter)''.

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

7. The authority citation for part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

8. By amending § 228.10 by removing paragraph (b)(4); and revising paragraph (a) to read as follows:

§ 228.10 (Item 10) General.

(a) *Application of Regulation S–B.* Regulation S–B is the source of disclosure requirements for ''small business issuer'' filings under the Securities Act of 1933 (the ''Securities Act'') and the Securities Exchange Act of 1934 (the ''Exchange Act'').

(1) *Definition of small business issuer.* A small business issuer is defined as a company that meets all of the following criteria:

(i) Has revenues (including revenues of any consolidated subsidiaries) of less than $50,000,000;

(ii) Is a U.S. or Canadian issuer;

(iii) Is not an investment company;

(iv) If a majority-owned subsidiary, the parent corporation is also a small business issuer; and

(v) Each majority-owned subsidiary of the company, if any, meets the criteria of paragraphs (a)(1)(ii) and (a)(1)(iii) of this section.

(2) *Entering and exiting the small business disclosure system.* (i) A company that meets the definition of small business issuer may use Form SB–1, SB–2 or SB–3 (§§ 239.9, 239.10 and 239.11 of this chapter), whichever is appropriate, for registration of its securities under the Securities Act; Form 10–SB (§ 249.210b of this chapter) for registration of its securities under the Exchange Act; and Forms 10–KSB and 10–QSB (§§ 249.310b and 249.308b of this chapter) for its annual and quarterly reports.

(ii) For a non-reporting company entering the disclosure system for the first time either by filing a registration statement under the Securities Act or a registration statement under the Exchange Act, the determination as to whether the company is a small business issuer is made with reference to its revenues during its last fiscal year.

(iii) Once a small business issuer becomes a reporting company, it will remain a small business issuer until it exceeds the revenue limit at the end of two consecutive years (or until it fails to meet one of the other criteria in the small business issuer definition).

(iv) A reporting company that is not a small business issuer must meet the definition of a small business issuer at the end of two consecutive fiscal years before it will be considered a small business issuer.

(v) The determination as to the reporting category (small business issuer or other issuer) made for a non-reporting company at the time it enters the disclosure system governs all Exchange Act reports relating to the remainder of that fiscal year. The determination made for a reporting company at the end of its fiscal year governs all Exchange Act reports relating to the next fiscal year. An issuer may not change from one category to another with respect to reports under the Exchange Act for a single fiscal year. A small business issuer may, however, choose not to use Form SB–1 or SB–2 (§ 239.9 or § 239.10 of this chapter) for registration under the Securities Act.

(vi) Notwithstanding paragraph (a)(2)(v) of this section, a company that is a reporting company as of _____ [insert effective date of the final rule] may determine at any time between _____ [insert effective date of the final rule] and _____ [insert date one year after effective date of the final rule] to begin reporting under the Exchange Act on the forms available only to small business issuers if it satisfies the small business issuer definition through having revenues of less than $50 million in each of its last two fiscal years and satisfying the other criteria in paragraph (a)(1) of this section.

* * * * *

9. By amending § 228.304 by revising the introductory text of paragraph (a)(1), paragraphs (a)(1)(i), (a)(1)(iii), (a)(1)(iv)(A), (a)(1)(iv)(B) introductory text, (a)(1)(iv)(B)(*2*), (a)(1)(iv)(B)(*3*), (a)(1)(iv)(D) and (a)(1)(iv)(E); and by adding a sentence at the end of paragraph (a)(3) to read as follows:

§ 228.304 (Item 304) Changes in and disagreements with accountants on accounting and financial disclosure.

(a)(1) The disclosure described below is required if the small business issuer, during its two most recent fiscal years or any subsequent interim period, dismissed its principal independent accountant or a significant subsidiary dismissed its independent accountant on whom the small business issuer's principal accountant expressed reliance in its report. The disclosure also is required if, during that time, any of those accountants: resigned; declined to stand for re-election after the current audit; notified the registrant or a significant subsidiary that reliance on the accountant's prior audit report is no longer permissible; or notified the registrant or a significant subsidiary that it will not consent to the use of the accountant's prior audit report in a filing with the Commission. State:

(i) Which of the actions described in paragraph (a)(1) of this section occurred and when;

* * * * *

(iii) If a change in accountants resulted, whether the decision to change accountants was recommended or approved by the board of directors or a committee thereof; and

(iv)(A) Whether, during the small business issuer's two fiscal years and any subsequent interim period immediately preceding the date of the action described in paragraph (a)(1) of this section, there were disagreements with the accountant, whether or not resolved to the accountant's satisfaction, on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure;

(B) The following information, if applicable. Indicate whether the accountant advised the small business issuer that:

* * * * *

(*2*) Information has come to the attention of the accountant that made the accountant unwilling to rely on management's representations, or unwilling to be associated with the financial statements prepared by management; or

(*3*) The scope of its audit should be expanded significantly, or that information has come to the accountant's attention that the accountant has concluded will, or if further investigated might, materially impact the fairness or reliability of a previously issued audit report or the underlying financial statements, or the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent audited financial statements (including information that might preclude the issuance of an unqualified audit report); and

* * * * *

(D) Whether the board of directors or any committee thereof discussed the subject matter of each such disagreement with the accountant;

(E) If a change in accountants resulted, whether the small business issuer has authorized the former accountant to respond fully to the inquiries of the successor accountant concerning the subject matter of each such disagreement. If not, describe the nature of any limitation on responses and the reason for that limitation.

* * * * *

(3) * * * If the former accountant declines to furnish the registrant with a letter addressed to the Commission stating whether the accountant agrees with the statements made by the registrant in response to this Item 304(a), so state.

* * * * *

10. By amending § 228.512 by removing the words ''Form S–3 or S–8 (§§ 239.13 or 239.16b of this chapter)'' from the Note to paragraph (a)(1) and adding in their place the words ''Form B or S–8 (§§ 239.5 or 239.16b of this chapter)''; and by adding paragraphs (g), (h) and (i) to read as follows:

§ 228.512 (Item 512) Undertakings.

* * * * *

(g) *Registration on Form SB–3 of securities offered for resale.* Include the following if the securities are being registered on Form SB–3 (§ 239.11 of this chapter) in connection with a transaction specified in paragraph (a) of § 230.145 of this chapter:

(1) Before a public reoffering of securities registered on this Form by any person who is considered an underwriter within the meaning of § 230.145(c) of this chapter through use of a prospectus that is a part of this registration statement, [Name of registrant] will ensure that the reoffering prospectus contains all the information called for by the Form concerning the reoffering by the underwriter(s) (in addition to the information required by other items of the Form).

(2) [Name of registrant] will file as part of an amendment to the registration statement any prospectus that is filed under paragraph (g)(1) of this Item or purports to meet the requirements of Section 10(a)(3) of the Securities Act (15 U.S.C. 77j(a)(3)) and is used in connection with an offering of securities subject to § 230.415 of this chapter. We will not use such prospectus until the amendment containing the prospectus is effective. For purposes of determining any liability under the Securities Act of 1933 (15 U.S.C. 77a *et. seq.*), we acknowledge that each amendment will be considered a new registration statement relating to the securities being offered, and the offering of those securities at that time will be considered the initial bona fide offering of those securities.

(h) *Delayed payment of registration fee.* A small business issuer relying on § 230.456 of this chapter to delay paying the registration fee, must include the following undertaking:

[Name of registrant] will pay the required registration fee no later than the earlier of:

(1) The date on which we request that the Commission grant effectiveness of this registration statement under Section 8(a) of the Act (15 U.S.C. 77h(a)); or

(2) The date on which we file an amendment to the registration statement that contains the statement set forth in § 230.473(b).

(i) *Registration on Form SB–1, SB–2 or SB–3.* If the securities are being registered on Form SB–1 (§ 239.9 of this chapter), Form SB–2 (§ 239.10 of this chapter) or on Form SB–3 (§ 239.11 of this chapter) include the following:

The registrant will file with the Commission, on or before the date of first use, all free writing materials used in connection with the securities registered on this registration statement after effectiveness and before the offering is completed.

11. By amending § 228.601 by removing from paragraph (b)(1) the words ''Form S–3 (§ 239.13)'' and adding, in their place, the words ''Form B (§ 239.5)''; by removing from paragraph (b)(10)(ii)(B)(*5*) the words '', or registering debt or non-voting preferred stock on Form S–2 (§ 239.12)''; by removing from Note 2 to paragraph (c)(1)(ii) the words ''Form S–3 (§ 239.13 of this chapter)'' and adding, in their place, the words ''Form B (§ 239.5 of this chapter)''; by removing from Note 1 to paragraph (c)(1) the words ''Form S–2 (§ 239.12 of this chapter), Form S–3 (§ 239.13 of this chapter)'' and adding, in their place, the words ''Items 11 and 12 of Form SB–2 (§ 239.10 of this chapter), Form B (§ 239.5 of this chapter)''; by removing from the introductory text of paragraph (c)(3) the words ''Form S–1 (§ 239.11 of this chapter)'' and adding, in their place, the words ''Form A (§ 239.4 of this chapter)''; and by revising the exhibit table to read as follows:

§ 228.601 (Item 601) Exhibits.

* * * * *

EXHIBIT TABLE

	Securities Act forms				Exchange Act forms			
	B	SB–2	SB–3	S–8	10–SB	8–K	10–QSB	10–KSB
(1) Underwriting agreement	X	X	X	.....	.....	X	.....	.....
(2) Plan of acquisition, reorganization, arrangement, liquidation or succession	X	X	X	.....	X	X	X	X
(3) (i) Articles of Incorporation	.....	X	X	.....	X	.....	X	X
(ii) By-Laws	.....	X	X	.....	X	.....	X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X
(5) Opinion re legality	X	X	X	X	.....	.....	.....	.....
(6) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) [Removed and reserved]	.....	.....	.....	.....	.....	.....	.....	.....
(8) Opinion re tax matters	X	X	X	.....	.....	.....	.....	.....
(9) Voting trust agreement	.....	X	X	.....	X	.....	.....	X
(10) Material contracts	.....	X	X	.....	X	.....	X	X
(11) Statement re computation of per share earnings	.....	X	X	.....	X	.....	X	X
(12) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(13) Annual or quarterly reports, Form 10–Q [1]	.....	X	X	.....	.....	.....	.....	X
(14) [Removed and reserved]	.....	.....	.....	.....	.....	.....	.....	.....
(15) Letter re unaudited interim financial information	X	X	X	X	.....	.....	X	.....
(16) Letter re change in certifying accountant [3]	.....	X	X	.....	X	X	.....	X
(17) Letter re director resignation	.....	.....	.....	.....	.....	X	.....	.....
(18) Letter re change in accounting principles	.....	.....	.....	.....	.....	.....	X	X
(19) Report furnished to security holders	.....	.....	.....	.....	.....	.....	X	.....
(20) Other documents or statements to security holders	.....	.....	.....	.....	.....	X	.....	.....
(21) Subsidiaries of the registrant	.....	X	X	.....	X	.....	.....	X
(22) Published report regarding matters submitted to vote of security holders	.....	.....	.....	.....	.....	.....	X	X
(23) Consents of experts and counsel	X	X	X	X	.....	[2] X	[2] X	[2] X
(24) Power of attorney	X	X	X	X	X	X	X	X
(25) Statement of eligibility of trustee	X	X	X	.....	.....	.....	.....	.....
(26) Invitation for competitive bids	X	X	X	.....	.....	.....	.....	.....
(27) Financial Data Schedule [4]	X	X	X	.....	X	X	X	X
(28) [Removed and reserved]	.....	.....	.....	.....	.....	.....	.....	.....
(29) Underwriter Concurrence with Effective Date	X	.....	.....	.....	.....	.....	.....	.....
[Reserved (30) through (98)]	.....	.....	.....	.....	.....	.....	.....	.....
(99) Additional Exhibits	X	X	X	X	X	X	X	X

[1] Only if incorporated by reference into a prospectus and delivered to holders along with the prospectus as permitted by the registration statement; or in the case of a Form 10–KSB, where the annual report is incorporated by reference into the text of the Form 10–KSB.
[2] Where the opinion of the expert counsel has been incorporated by reference into a previously filed Securities Act registration statement.
[3] If required under Item 304 of Regulation S–K.
[4] Financial Data Schedules must be filed by electronic filers only. Such Schedule must be filed only when a filing includes annual and/or interim financial statement that have not been previously included in a filing with the Commission. See Item 601(c) of Regulation S–B.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

12. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

§ 229.10 [Amended]

13. By amending § 229.10 by removing in paragraph (c)(1)(iii) the words ''Form S–3 (§ 239.13 of this chapter)'' and adding, in their place, the words ''Form B (§ 239.5 of this chapter)''.

§ 229.101 [Amended]

14. By amending § 229.101 by removing in paragraph (a)(2)(i) the words ''Form S–1 (§ 239.11 of this chapter)'' and adding, in their place, the words ''Form A (§ 239.4 of this chapter)'', and by removing in paragraph (a)(2)(iii)(B)(1) the words ''Form S–1'' and adding, in their place, the words ''Form A''.

§ 229.102 [Amended]

15. By amending § 229.102 by removing the words ''Office of Engineering'' in Instruction 4. to Instructions to Item 102 and adding, in their place, ''Office of Natural Resources''.

§ 229.201 [Amended]

16. By amending § 229.201 by removing in paragraph (a)(2) the words ''Form S–1 (§ 239.11 of this chapter)'' and adding, in their place, the words ''Form A (§ 239.4 of this chapter)''.

17. By amending § 229.304 by revising the introductory text of paragraph (a)(1), paragraph (a)(1)(i), the introductory text of paragraph (a)(1)(iii), paragraph (a)(1)(iv), the first sentence of the introductory text of paragraph (a)(1)(v), paragraph (a)(1)(v)(C)(*2*), paragraph (a)(1)(v)(D)(*2*); and by adding a sentence at the end of paragraph (a)(3) to read as follows:

§ 229.304 (Item 304) Changes in and disagreements with accountants on accounting and financial disclosure.

(a)(1) The disclosure described below is required if the registrant, during its two most recent fiscal years or any subsequent interim period, dismissed its

principal independent accountant or a significant subsidiary dismissed its independent accountant on whom the registrant's principal accountant expressed reliance in its report. The disclosure also is required if, during that time, any of those accountants: resigned; declined to stand for re-election after the current audit; notified the registrant or a significant subsidiary that reliance on the accountant's prior audit report is no longer permissible; or notified the registrant or a significant subsidiary that it will not consent to the use of the accountant's prior audit report in a filing with the Commission.

(i) State which of the actions described in paragraph (a)(1) of this section occurred and when;

* * * * *

(iii) If a change in accountants resulted, state whether the decision to change accountants was recommended or approved by:

* * * * *

(iv) State whether, during the registrant's two fiscal years and any subsequent interim period immediately preceding the date of the action described in paragraph (a)(1) of this section, there were disagreements with the accountant on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure. In addition:

(A) Describe each such disagreement;

(B) State whether the board of directors or any committee thereof discussed the subject matter of each such disagreement with the accountant; and

(C) If a change in accountants resulted, state whether the registrant has authorized the former accountant to respond fully to the inquiries of the successor accountant concerning the subject matter of each such disagreement. If not, describe the nature of any limitation on responses and the reason for that limitation.

Instructions to Item 304(a)(1)(iv).

1. The registrant need only disclose information in response to this Item if the disagreement(s), if not resolved to the satisfaction of the accountant, would have caused it to make reference to the subject matter of the disagreement(s) in connection with its report.

2. The disagreements required to be reported in response to this Item include both those resolved to the accountant's satisfaction and those not resolved to the accountant's satisfaction.

3. Disagreements contemplated by this Item are those that occur at the decision-making level, *i.e.*, between personnel of the registrant responsible for the presentation of its financial statements and personnel of the accounting firm responsible for rendering its report.

(v) If, during the registrant's two fiscal years and any subsequent interim period immediately preceding the date of the action described in paragraph (a)(1) of this Item, any of the events listed in paragraphs (a)(1)(v)(A) through (a)(1)(v)(D) of this Item occurred, provide the information required by paragraph (a)(1)(iv) of this Item for each event (even if the registrant and the accountant did not express a difference of opinion regarding the event). * * *

* * * * *

(C) * * *

(*2*) Due to the action described in paragraph (a)(1) of this Item, or for any other reason, the accountant did not so expand the scope of its audit or conduct such further investigation; or

(D) * * *

(*2*) Due to the action described in paragraph (a)(1) of this Item, or for any other reason, the issue has not been resolved to the accountant's satisfaction prior to such action.

* * * * *

(3) * * * If the former accountant declines to furnish the registrant with a letter addressed to the Commission stating whether the accountant agrees with the statements made by the registrant in response to this Item 304(a), so state.

* * * * *

18. By amending § 229.305 by revising Instruction 2.D. to General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e), to read as follows:

§ 229.305 (Item 305) Quantitative and qualitative disclosures about market risk.

* * * * *

General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e):

* * * * *

2. * * *

D. For purposes of Instruction 1. of the General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e), market capitalization is the aggregate market value of common equity. The term ''common equity'' is as defined in Securities Act Rule 405 (§ 230.405 of this chapter). The aggregate market value of the registrant's outstanding voting and non-voting common equity shall include the common equity held by affiliates and shall be computed by use of the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity as of January 28, 1997.

19. By amending § 229.404 by removing in the introductory text of paragraph (d) the words ''Form S–1 under the Securities Act (§ 239.11 of this chapter)'' and adding, in their place, the words ''Form A under the Securities Act (§ 239.4 of this chapter)''.

20. By amending § 229.501 by revising the section heading to read as follows:

§ 229.501 (Item 501) Front cover page of the registration statement and outside front cover page of the prospectus.

* * * * *

21. By amending § 229.512 by removing in paragraph (a)(1)(iii) the words ''on Form S–3 (§ 239.13 of this chapter)'' and adding in their place the words ''on Form B (§ 239.5 of this chapter)''; in paragraph (a)(4), by removing in the third sentence the words ''on Form F–3 (§ 239.33 of this chapter)'' and adding, in their place, the words ''on Form B (§ 239.5 of this chapter)'', and removing the words ''in the Form F–3.'' and adding in their place ''in the Form B.''; by revising paragraph (b) and the introductory text of paragraph (g); and by adding paragraph (k) to read as follows:

§ 229.512 (Item 512) Undertakings.

* * * * *

(b) *Filings incorporating by reference subsequent Exchange Act documents.* Include the following if the registration statement incorporates by reference any Exchange Act document filed subsequent to the initial effective date of the registration statement:

The undersigned registrant hereby undertakes that, for determining liability under the Securities Act of 1933, each of the registrant's reports pursuant to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

* * * * *

(g) *Registration on Form C or Form SB–3 of securities offered for resale.* Include the following if the registrant is registering an offering on Form C or Form SB–3 (§§ 239.6 or 239.11 of this chapter) in connection with a transaction specified in paragraph (a) of Rule 145 (§ 230.145 of this chapter).

* * * * *

(k) *Registration on Form A, Form B or Form C.* If the securities are being registered on Form A (§ 239.4 of this chapter), Form B (§ 239.5 of this chapter) or on Form C (§ 239.6 of this chapter) include the following:

The registrant will file with the Commission, on or before the date of first use, all free writing materials used in connection with the securities registered on

this registration statement after effectiveness and before the offering is completed.

22. By amending § 229.601 by removing from paragraph (b)(10)(iii)(B)(*6*) the words ''or registering debt instruments or preferred stock which are not voting securities on Form S–2''; and by removing from Note 1 to Paragraph (c)(1) the words ''Form S–2 (§ 239.12 of this chapter), Form S–3 (239.13 of this chapter)'' and adding, in their place, the words ''Form B (239.13 of this chapter), General Instruction VIII of Form A (§ 239.4 of this chapter)''; by revising the Exhibit Table, paragraph (b)(4)(ii) and paragraph (b)(8); and by adding paragraph (b)(28) to read as follows:

§ 229.601 (Item 601) Exhibits.

* * * * *

(b) * * *

(4) *Instruments defining the rights of security holders, including indentures*

(i) * * *

(ii) Except as set forth in paragraph (b)(4)(iii) of this Item, for filings on Forms A and C under the Securities Act (§§ 239.4 and 239.6 of this chapter) and Forms 10 and 10–K (§§ 249.210 and 249.310 of this chapter) under the Exchange Act all instruments defining the rights of holders of long-term debt of the registrant and its consolidated subsidiaries and for any of its unconsolidated subsidiaries for which financial statements are required to be filed.

* * * * *

(8) *Opinion re tax matters.* (i) *Real estate entity registrants and roll-up transactions.* The registrant must file an opinion of counsel, an opinion of an independent public or certified public accountant or a revenue ruling from the Internal Revenue Service supporting the tax matters and consequences to the investors it describes in its filing in the following circumstances:

(A) The registrant is required to provide the information required by Item 1108 of Regulation S–K (Tax treatment) in its registration statement on Form A (§ 239.4 of this chapter);

(B) Securities Act Industry Guide 5 applies to the offering; or

(C) The transaction being registered is a roll-up as defined in Item 901 of Regulation S–K (§ 229.901).

(ii) *All other registrants.* All other registrants must include this exhibit only when the tax consequences are material to an investor and the registrant includes a discussion of tax consequences in the filing. If a tax opinion is set forth in full in the filing, the exhibit may so state instead of repeating the full opinion. Any conditions or qualifications on the opinion must be adequately described in the filing.

* * * * *

(28) *Underwriter concurrence with effective date.* A registrant filing a registration statement listed in § 230.462(f)(1) of this chapter must file the written concurrence with the effective date, signed and dated by the managing underwriter(s), or if there are no managing underwriter(s), of the principal underwriter(s) of its offering. If the filed concurrence is not manually signed, a registrant must retain the manually signed underwriters' concurrence for a period of five years. Upon request, the registrant must provide a copy of that concurrence to the Commission or its staff.

* * * * *

EXHIBIT TABLE

	Securities Act forms			
	A	*B*	*C*[3]	S–8
(1) Underwriting agreement	X	.....	X	.....
(2) Plan of acquisition, reorganization, arrangement, liquidation or succession	X	.....	X	.....
(3) Articles of Incorporation	X	.....	X	.....
(ii) By-Laws	X	.....	X	.....
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X
(5) Opinion re legality	X	X	X	X
(6) [Removed and reserved]	.....	.....	.....	.....
(7) [Removed and reserved]	.....	.....	.....	.....
(8) Opinion re tax matters	X	X	X	.....
(9) Voting trust agreement	X	.....	X	.....
(10) Materials contracts	X	.....	X	.....
(11) Statement re computation of per share earnings	X	.....	X	.....
(12) Statements re computation of ratios	X	.....	X	.....
(13) Annual report to security holders, Form 10–Q or quarterly report to security holders[1]	X	.....	X	.....
(14) [Removed and reserved]	.....	.....	.....	.....
(15) Letter re unaudited interim financial information	X	.....	X	X
(16) Letter re change in certifying accountant	X[4]	.....	X[4]	.....
(17) Letter re director resignation	.....	.....	.....	.....
(18) Letter re change in accounting principles	.....	.....	.....	.....
(19) Report furnished to security holders	.....	.....	.....	.....
(20) Other documents or statements to security holders	.....	.....	.....	.....
(21) Subsidiaries of the registrant	X	.....	X	.....
(22) Published matters regarding matters submitted to vote of security holders	.....	.....	.....	.....
(23) Consents of experts and counsel[2]	X	X	X	X
(24) Power of attorney	X	.....	X	X
925) Statement of eligibility of trustee	X	X	X	.....
(26) Invitation for competitive bids	X	.....	X	.....
(27) Financial Data Schedule[5]	X	.....	X	.....
(28) [Removed and Reserved]	.....	.....	.....	.....
(29) Underwriter Concurrence with Effective Date	X	X	.....	.....
[Reserved (30) through (98)]	.....	.....	.....	.....
(99) Additional Exhibits	.....	.....	X	X

[1] Where incorporated by reference into the text of the prospectus and delivered to security holders along with the prospectus as permitted by the registration statement; or, in the case of the Form 10–K, where the annual report to security holders is incorporated by reference into the text of the Form 10–K.

[2] Where the opinion of the expert or counsel has been incorporate by reference into a previously filed Securities Act registration statement
[3] An exhibit need not be provided about a company if
(a) the company meets the requirements of General Instruction I.A., I.B., I.C.1 of Form B; and
(b) The Exhibit would not have been required to be filed if the Company was registering a primary offering on Form B.
[4] If required pursuant to item 304 of Regulation S–K.
[5] Financial Data Schedules shall be filed by electronic filers only. Such schedule shall be filed only when a filing includes annual and/or interim financial statements that have not been previously included in a filing with the Commission. *See* Item 601 of Regulation S–K.

23. By amending Securities Act Industry Guide 5 (referenced in § 229.801(e)) by removing from paragraph 16 the words ''Form S–1 or S–11'' and adding, in their place, the words ''Form A (§ 239.4 of this chapter)'' and by revising paragraph 19.D. to read as follows:

Note: The text of Securities Act Industry Guide 5 does not and this amendment will not appear in the Code of Federal Regulations.

* * * * *

Guide 5

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19. Summary of promotional and sales material

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D.(1) The registrant or any offering participant must, before its use, provide the Commission staff supplementally any written sales material that it intends to furnish investors. This includes all materials described in paragraph B. The registrant or the offering participant need not, however, supplementally provide the staff with sales material if:

(i) the offering is registered on Form A and the registrant meets the requirements of General Instruction VIII. of that Form;

(ii) the offering is registered on Form B;

(iii) the staff has notified the registrant that its registration statement will not be reviewed; or

(iv) the sales material is used only internally.

(2) For purposes of this paragraph, sales material includes all marketing memoranda that are sent by the General Partner or its affiliates to broker/dealers or other sales personnel and may include material labeled ''for broker/dealers use only.'' Staff comments, if any, will be promptly communicated to the registrant. The registrant should contact the staff before using any sales material that has been submitted to the staff.

Note to paragraph 19.D.: You should read Securities Act Rule 425. Sales materials may be required to be filed under that Rule.

24. By amending part 229 to add subpart 229.1100 to read as follows:

Subpart 229.1100—Real Estate Interests

Subpart 229.1100—Real Estate Interests

§ 229.1101 (Item 1101) Definitions

For purposes of this subpart 229.1100 of Regulation S-K:

(a) You are a *real estate entity* if you:

(1) Are a real estate investment trust under Section 856 of the Internal Revenue Code (26 U.S.C. 856(a)); or (2) Invest in real estate, interests in real estate, or securities of other real estate investors as your primary business.

Instruction to Item 1101(a)

''Real estate entity'' does not include any issuer that is an investment company registered or required to register under the Investment Company Act of 1940.

(b) *Affiliated person* means:

(1) Your directors and officers;

(2) Any person directly or indirectly controlling or under direct or indirect common control with you;

(3) Any record owner who owns, or anyone you know who beneficially owns, 10 percent or more of any class of your equity securities;

(4) Any promoter directly or indirectly connected with you in any capacity;

(5) Principal underwriters of securities being registered;

(6) People performing management or advisory services; and (7) Any associate of any of these people.

§ 229.1102 (Item 1102) Limitations on transfer.

Disclose on the cover page of the prospectus any limitations on the transfer of the securities you are offering. If no market exists for the securities, so state on the cover page. If a market does exist, disclose in the prospectus the nature of the market and the market price as of the latest practicable date before the filing of the registration statement or an amendment to the registration statement.

§ 229.1103 (Item 1103) Summary risk factor information.

In a series of concise bullets or paragraphs, present a summary of the risk factors of the offering. Address the following, if appropriate:

(a) A comparison of the percentage of securities being offered to the public and those issued or to be issued to affiliated person;

(b) The extent to which security holders can be liable for your acts or obligations;

(c) The allocation of cash distributions between investors who are affiliated persons and those investors who are not affiliated persons; and

(d) The compensation and benefits affiliated persons will receive, directly or indirectly. With respect to underwriters, include a comparison of the aggregate compensation and benefits to be received by them with the aggregate net proceeds from the sale of the securities being registered.

§ 229.1104 (Item 1104) Organization.

(a) Provide the following information:

(1) Your name and form of organization;

(2) The State or other jurisdiction whose laws govern your organization;

(3) The date your governing instruments became operative; and

(4) The date on which your governing instruments will expire, if any and, if you may be finite life as defined in Item 901 of Regulation S–K, your planned time period for holding your assets.

(b) Outline any provisions of your governing instruments that provide that your duration or planned investment holding period may be shortened or extended.

(c) Summarize the provisions of your governing instruments, or any policy or proposed policy, relating to the holding of annual or other meetings of investors.

(d) If you were organized within the last five years, name all promoters. Indicate whether each promoter holds any position or intends to hold any position with you.

§ 229.1105 (Item 1105) Operating and financing activities.

For each of the following activities, describe your and your subsidiaries' policy or proposed policy, indicate if you may change each policy without a vote of investors, and indicate the extent to which you have engaged in each activity.

(a) Issue securities senior to the securities you are offering;

(b) Borrow money;

(c) Make loans. Purchasing a portion of publicly distributed bonds, debentures or other securities, in the original distribution, or otherwise, is not making a loan;

(d) Invest in another issuer's securities in order to exercise control;

(e) Underwrite other issuer's securities;

(f) Purchase, sell or trade investments;

(g) Offer securities in exchange for property;

(h) Repurchase or otherwise reacquire your securities; and

(i) Provide annual or other reports to investors. Indicate what the reports will cover and whether they will include audited financial statements.

Instruction to Item 1105.

Include a separate description of your policy for each activity. If you will not engage in a particular activity, specifically state that you will not.

§ 229.1106 (Item 1106) Real estate and other investment activities.

(a) Describe the types of real estate investments you intend to make and indicate whether you can change this plan without a vote of investors.

(b) Describe the principles and procedures you and your subsidiaries will use in investing in the assets.

(c) Disclose the percentage of your and your subsidiaries' assets you may invest in any one type of investment.

(d) You should include the information below if you or your subsidiaries might invest in the following types of assets:

(1) *Investments in real estate or real estate interests.* (i) Identify the geographic areas where you intend to invest;

(ii) Describe the types of real estate in which you may invest, such as office buildings, apartment buildings, shopping centers, industrial and commercial properties, special purpose buildings or undeveloped land;

(iii) Describe how you intend to operate and finance your real estate. Disclose any limit on the number or amount of mortgages you may place on any one piece of property;

(iv) Specifically state whether your policy is to acquire assets primarily for income or capital gain; and

(v) Disclose your policy as to the amount or percentages of your assets you may invest in any one property;

(2) *Investments in real estate mortgages and mortgage-backed securities.* (i) Describe the types of mortgages you may invest in, such as first or second mortgages. Disclose whether the mortgages are guaranteed, and if so, by whom;

(ii) Describe your policy as to the amount or percentage of assets you may invest in any single mortgage;

(iii) Describe each type of mortgage activity in which you intend to engage, such as originating or servicing mortgages;

(iv) Describe how long you anticipate holding these investments;

(v) Indicate the types of properties subject to mortgages in which you intend to invest, such as, single family homes, apartment buildings, office buildings, bowling alleys, commercial properties or undeveloped land; and

(vi) Identify the geographic areas where the property underlying the mortgages is located.

(3) *Securities of or interests in other real estate investors.* (i) Describe the types of securities or other interests in persons engaged in real estate activities in which you may invest, such as common stock, limited partnership interests, interests in real estate investment trusts, mortgage-backed securities and joint venture interests;

(ii) Disclose your policy as to the amount or percentage of your assets you may invest in each type of security or interest and the amount or percentage of your assets you may invest in any one issuer;

(iii) Describe the investment policies and primary activities of persons in which you will invest, such as mortgage sales, investment in office buildings or investment in undeveloped land; and

(iv) State your criteria for the purchase of these securities or interests, such as securities listed on a national securities exchange, minimum net income requirements, period of operation of issuer or rating of security.

(e) Indicate the type of other securities (*e.g.*, bonds, preferred stocks, common stocks) and the industry groups in which you may invest and the percentage of your assets which you may invest in each type or industry group. Describe how you will acquire these assets.

§ 229.1107 (Item 1107) Description of real estate and operating data.

Provide the following information separately for each material real estate interest. For all other real estate interests, provide the following information by classes or groups of properties that reasonably convey the required disclosure:

(a) For real estate interests in which you or your subsidiaries now invest or intend to invest:

(1) State the location and describe the general character;

(2) Identify the present and proposed use and discuss whether the real estate interests are suitable and adequate for the present or proposed use;

(3) Describe your title to or interest in the real estate;

(4) For each material mortgage, lien or other encumbrance:

(i) Disclose the principal amount;

(ii) Describe the interest and amortization provisions;

(iii) Describe the prepayment provisions;

(iv) Discuss any cross collateralization or cross default provisions;

(v) Identify the maturity date; and

(vi) Quantify the balance due at maturity assuming no prepayment of principal;

(5) Disclose principal lease terms;

(6) Outline the terms of any option or contract to purchase or sell the real estate interests;

(7) Briefly discuss proposed renovation, development or improvement programs. Quantify the cost of these programs. If you do not have any plans, state that you have no plan and indicate why you are investing or will invest in the real estate;

(8) Describe the general competitive conditions in the markets in which the real estate interests or the underlying properties are operated; and

(9) State whether management believes that the real estate interest or the underlying properties are adequately covered by insurance.

(b) For each improved material real estate interest in which you or your subsidiaries now invest or intend to invest:

(1) Occupancy rate, as a percentage of rentable square footage or units, for each of the past five years;

(2) Average annual effective rent paid per square foot or per unit for each of the past five years;

(3) The following schedule of lease expirations in each of the next ten years:

Year	(A) Total number of tenants with leases expiring	(B) Area covered by expiring leases (sq. feet)	(C) Annual rental of expiring leases ($)	(D) Percentage of gross annual rental for expiring leases
Year in which filing is made.				
Second Year.				
***.				
***.				
***.				
Tenth Year.				

(4) The number of tenants that occupy ten percent or more of the rentable square footage, the main business of those tenants and the principal provisions of their lease including, but not limited to, annual rent, the expiration date and any renewal option;

(5) The principal businesses, occupations or professions conducted at the property underlying the real estate interest;

(6) The Federal tax basis, rate, depreciation method and life claimed for each real estate interest or component for which you charge depreciation; and

(7) The realty tax rate, annual realty taxes and estimated taxes on any proposed improvement.

Instructions to Item 1107.

1. You need not provide detailed legal and physical descriptions of your real estate interest. Rather, you should disclose all information necessary for an investor to evaluate and understand your real estate interests. We encourage tabular presentation.

2. A material real estate interest is one that:

(a) Has a book value representing ten percent or more of your total assets, including assets of your consolidated subsidiaries; or

(b) Produced gross revenue in the last fiscal year that was ten percent or more of your total revenues for the last fiscal year, including revenues of your consolidated subsidiaries.

§ 229.1108 (Item 1108) Tax treatment of you and your investors.

Describe material Federal income tax consequences for you, your subsidiaries and your investors including a discussion of:

(a) Your and your subsidiaries' treatment under Federal income tax laws;

(b) The treatment of distributions to investors under Federal income tax laws, including gains from the sale of securities or real estate interests in excess of annual net income; and

(c) The tax treatment of any exchange of securities for real estate interests or other securities.

§ 229.1109 (Item 1109) Certain relationships and related transactions.

Disclose the aggregate depreciation claimed by the seller for Federal income tax purposes if:

(a) You provide any information required by Instruction 5 to Item 404(a) of Regulation S–K; and

(b) The assets had been acquired by the seller within five years prior to the Item 404 of Regulation S–K transaction.

§ 229.1110 (Item 1110) Selection, management and custody of investments.

(a) Describe any arrangements you or your subsidiaries have made or propose to make with respect to the following. If any of the persons performing these services is a corporation or other organization, include the name and principal occupations during the last five years of each principal executive officer of such corporation or other organization:

(1) Management of your real estate interests, including arranging for purchases, sales, leases, maintenance and insurance;

(2) The purchase, sale and servicing of your mortgages; and

(3) Investment advisory services.

(b) If any of these services in paragraph (a) of this Item will be performed by any affiliated person, other than an officer or director performing the services in that capacity with no additional compensation, furnish the following information about each person:

(1) Name and address;

(2) Nature of principal business;

(3) Principal occupations during the last five years;

(4) Nature of all existing direct or indirect material interests in or business connections with you or any of your affiliated person;

(5) Nature of all services rendered to you; and

(6) Compensation received from you and your subsidiaries, directly or indirectly, during your last fiscal year and the capacities in which this remuneration was received.

§ 229.1111 (Item 1111) Conflict of interest policies.

Outline your policies and provisions of your governing instruments which limit any person from any of the following:

(a) Having any financial interest in any investment you or any of your subsidiaries will acquire or dispose of or in any transaction to which you or any of your subsidiaries are a party or have an interest; and

(b) Engaging for their own account in business activities of the types you and your subsidiaries conduct or will conduct.

§ 229.1112 (Item 1112) Limitations of liability.

Outline the principal provisions of your governing instruments or of any contract or arrangement to which you or a subsidiary are a party that limit the liability of affiliated person or any of their directors, officers or employees. Indicate the effect of Section 14 of the Act (15 U.S.C. 77n) upon any provision broad enough to cover liability arising under the Act.

§ 229.1113 (Item 1113) Sales to special parties.

Name each person or specify each class of persons (other than underwriters or dealers, acting in that capacity) to whom you or your subsidiaries have sold securities within the past six months or are going to sell securities at a different price than you are offering the same class of securities pursuant to this registration statement. Also provide this information with respect to any selling security holder registering securities pursuant to this registration statement. State the consideration given or to be given by each of these persons or class.

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

By revising the general authority citation for part 230 to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77sss, 77z–3, 78c, 78d,

78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

26. By revising paragraph (d) of § 230.110 to read as follows:

§ 230.110 Business hours of the Commission.

* * * * *

(d) *Filings by facsimile.* Registration statements, post-effective amendments and prospectuses, filed pursuant to §§ 230.425(c), 230.462(a), (b), (e) or (f) may be filed by facsimile transmission with the Commission any day (except Saturdays, Sundays and federal holidays) from 5:30 p.m. to 10 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect.

By revising the introductory text of paragraph (b) of § 230.111 to read as follows:

§ 230.111 Payment of fees.

* * * * *

(b) Notwithstanding paragraph (a) of this section, payment of filing fees for registration statements filed pursuant to §§ 230.462(b), (e), or (f) between the hours of 5:30 p.m. and 10 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect may be made by:

* * * * *

By amending § 230.134 by revising the section heading and the introductory text, the introductory text of paragraph (a) and paragraphs (a)(3), (a)(13), (a)(14)(i), (b)(1), and (e) to read as follows:

§ 230.134 Registered investment company communications not deemed a prospectus.

The term prospectus as defined in Section 2(10) of the Act (15 U.S.C. 77b(10)) does not include a notice, circular, advertisement, letter, or other communication published or transmitted to any person after a registration statement has been filed by an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1—80(a)–64) (''fund'') if the communication contains only the statements required or permitted by this section.

(a) The communication may include any one or more of the following items of information, in any order:

* * * * *

(3)(i) The fund's classification and subclassification under the Investment Company Act of 1940, the type or category of fund and whether in the selection of investments emphasis is placed upon income or growth characteristics, and a general description of an investment company including its general attributes, methods of operation and services offered provided that such description is not inconsistent with the operation of the particular fund for which more specific information is being given, identification of the fund's investment adviser, any logo, corporate symbol or trademark of the fund or its investment adviser and any graphic design or device or an attention-getting headline, not involving performance figures, designed to direct the reader's attention to textual material included in the communication pursuant to other provisions of this section; and, with respect to a fund issuing redeemable securities:

(A) A description of the fund's investment objectives and policies, services, and method of operation;

(B) Identification of the fund's principal officers;

(C) The year of incorporation or organization or period of existence of the fund, its investment adviser, or both;

(D) The fund's aggregate net asset value as of the most recent practicable date;

(E) The aggregate net asset value as of the most recent practicable date of all funds under the management of the fund's investment adviser;

(F) Any pictorial illustration that is appropriate for inclusion in the fund's prospectus and not involving performance figures;

(G) Descriptive material relating to economic conditions, or to retirement plans or other goals to which an investment in the fund could be directed, but not directly or indirectly relating to past performance or implying achievement of investment objectives; and

(H) Written notice of the terms of an offer made solely to all registered holders of the securities, or of a particular class or series of securities, issued by the fund proportionate to their holdings, offering to sell additional shares to such holders of securities at prices reflecting a reduction in, or elimination of, the regular sales load charged: *Provided that,* if any printed material permitted by paragraphs (a)(3)(i) (A) through (H) of this section is included, or if any material permitted by paragraphs (a)(3)(i) (A) through (G) of this section is used in a radio or television advertisement, the communication shall also contain the following legend given emphasis no less than that used in the major portion of the advertisement:

For more complete information about [Name of Fund] including charges and expenses [get] [obtain] [send for] a prospectus [from (Name and Address)] [by sending this coupon]. Read it carefully before you invest or [pay] [forward funds] [send money].

(ii) For purposes of paragraph (a)(3)(i)(B) of this section, principal officers means the president, secretary, treasurer, any vice-president in charge of a principal business function and any other person who performs similar policy making functions for the fund on a regular basis.

(iii) In the case of two or more funds having the same investment adviser or principal underwriter, the same information described in paragraph (a)(3)(i) may be included as to each such fund in a joint communication on the same basis as it is permitted in communications dealing with individual funds under paragraph (a)(3)(i).

* * * * *

(13) Offers, descriptions and explanations of any products and services not constituting securities subject to registration under the Act, and descriptions of corporations. The offers, descriptions and explanations may not relate directly to the desirability of owning or purchasing a security issued by a fund and all direct references to a security issued by a fund may contain only the statements required or permitted to be included by the other provisions of this section and must be placed in a separate and enclosed area in the communication.

(14)(i) With respect to any class of debt securities, any class of convertible debt securities or any class of preferred stock, the security rating or ratings assigned to the class of securities by any nationally recognized statistical rating organization and the name or names of the nationally recognized statistical rating organization(s) that assigned such rating(s).

* * * * *

(b) * * *

(1) If the registration statement has not yet become effective, the following statement:

A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective. This [communication] shall not constitute an offer to sell or the solicitation of an offer to buy.

* * * * *

(e) In the case of a fund that holds itself out as a ''money market fund,'' a communication used under this section shall contain the disclosure required by § 230.482(a)(7).

By revising § 230.135 to read as follows:

§ 230.135 Notice of proposed offerings.

(a) *All Offerings.* For purposes of Section 5 of the Act (15 U.S.C. 77e) only, an issuer or a selling security holder (and any person acting on behalf of either of them) that publishes through any medium a notice of a proposed offering will not be deemed to offer its securities for sale through that notice if:

(1) *Legend.* The notice includes a statement to the effect that it does not constitute an offer of any securities for sale; and

(2) *Limited notice content.* The notice otherwise includes no more than the following information:

(i) The name of the issuer;

(ii) The title, amount and basic terms of the securities offered;

(iii) The amount of the offering, if any, to be made by selling security holders;

(iv) The anticipated timing of the offering;

(v) A brief statement of the manner and the purpose of the offering;

(vi) Whether the issuer is directing its offering to only a particular class of purchasers;

(vii) Any statements or legends required by the laws of any state or foreign country or administrative authority; and

(viii) In the following offerings, the notice may contain additional information, as follows:

(A) In a rights offering to existing security holders:

(*1*) The class of security holders eligible to subscribe;

(*2*) The subscription ratio and expected subscription price;

(*3*) The proposed record date;

(*4*) The anticipated issuance date of the rights; and

(*5*) The subscription period or expiration date of the rights offering.

(B) In an offering to employees of the issuer or an affiliated company:

(*1*) The name of the employer;

(*2*) The class of employees being offered the securities;

(*3*) The offering price; and

(*4*) The duration of the offering period.

(C) In an exchange offer:

(*1*) The basic terms of the exchange offer;

(*2*) The name of the subject company; and

(*3*) The subject class of securities.

(b) *Corrections of misstatements about the offering.* A person that publishes a notice in reliance on this section may issue a notice that contains no more information than is necessary to correct inaccuracies published about the proposed offering.

(c) *Rule 145(a) offerings.* For purposes of Section 5 of the Act (15 U.S.C. 77e) only, an issuer or a selling security holder (and any person acting on behalf of either of them) that publishes through any medium a notice of a transaction described in paragraph (a) of § 230.145 will not be deemed to offer its securities for sale through that notice if:

(1) *Legend.* The notice includes a statement to the effect that it does not constitute an offer of any securities for sale;

(2) *Limited notice content.* The notice otherwise includes no more than the following information:

(i) The name of the issuer;

(ii) The name of the person whose assets are to be sold in exchange for the securities to be offered;

(iii) The names of any other parties to the transaction;

(iv) A brief description of the business of the parties to the transaction;

(v) The date, time and place of the meeting of security holders to vote on or consent to the transaction;

(vi) A brief description of the transaction and the basis upon which the transaction will be made; and

(vii) Any statements or legends required by the laws of any state or foreign country or administrative authority.

§ 230.135c [Removed and Reserved]

30. By removing and reserving § 230.135c.

31. By amending § 230.135e by revising paragraph (b)(1) to read as follows:

§ 230.135e Offshore press conferences, meetings with issuer representatives conducted offshore, and press-related materials released offshore.

* * * * *

(b) * * *

(1) State that:

(i) The written press-related materials are not an offer of securities for sale in the United States;

(ii) The securities may not be offered or sold in the United States absent registration or an exemption from registration; and

(iii) Any registered public offering to be made in the United States will involve a registration statement that will contain information about the company and management, as well as financial statements.

* * * * *

32. By revising § 230.137 to read as follows:

§ 230.137 Publications by brokers or dealers that are not participating in a registrant's distribution of securities.

Under the following conditions, a broker or dealer shall not be considered an *underwriter* as defined in Section 2(a)(11) of the Act (15 U.S.C. 77b(a)(11)) solely because it publishes or distributes information, an opinion or a recommendation with respect to the securities of a registrant that proposes to file, has filed, or has an effective registration statement under the Act:

(a) The broker or dealer is not participating, and does not propose to participate, in the distribution of the registered securities;

(b) The issuer is not:

(1) A development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified entity or entities;

(2) A shell entity having few or no assets, earnings or operations; or

(3) Registering an offering of penny stock as defined in § 240.3a51–1 of this chapter; and

(c) In connection with its publication or distribution, the broker or dealer is not receiving consideration directly or indirectly from, or acting under any direct or indirect arrangement or understanding with:

(1) The registrant;

(2) A selling security holder;

(3) Any participant in the distribution; or

(4) Any other person with an interest in the securities that are the subject of the registration statement.

Instruction to paragraph (c):

This provision does not preclude payment of the regular subscription or purchase price of the document or other communication in which the broker or dealer's information, opinion or recommendation appears.

33. By revising § 230.138 to read as follows:

§ 230.138 Publications by a broker or dealer about securities other than those it is distributing or selling.

(a) *Registered offerings.* Under the following conditions, a broker's or dealer's publication or distribution of information, an opinion or a recommendation shall be exempt from Section 5(b)(1) and Section 5(c) of the Act (15 U.S.C. 77e(b)(1) and (c)) even if the broker or dealer is participating or will participate in the distribution of the issuer's securities to which the registration statement relates:

(1) The issuer is:

(i) Subject to the requirements of Section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*l* or 78o(d)); or

(ii) A foreign private issuer that satisfies the public float threshold in General Instruction I.C.1. of Form B (§ 239.5 of this chapter) or the public

float/average daily trading volume threshold in General Instruction I.C.1. of Form B (except measured on world-wide markets rather than only U.S. markets), and has equity securities trading on a designated offshore securities market as defined in § 230.902(b);

(2) The issuer is not:

(i) A development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified entity or entities;

(ii) A shell entity having few or no assets, earnings or operations; or

(iii) Registering an offering of penny stock as defined in § 240.3a51–1 of this chapter;

(3) The broker or dealer publishes or distributes the information, opinion or recommendation in the ordinary course of its business;

(4) The publication prominently describes the capacity in which the broker or dealer is participating in the distribution; and

(5) The information, opinion or recommendation relates to:

(i)(A) An issuer's common stock, or debt or preferred stock convertible into common stock; and

(B) The issuer proposes to file a registration statement, has filed a registration statement, or has an effective registration statement relating to non-convertible debt securities or non-convertible, nonparticipating preferred stock; or

(ii)(A) An issuer's non-convertible debt securities or non-convertible, nonparticipating preferred stock; and

(B) The issuer proposes to file a registration statement, has filed a registration statement, or has an effective registration statement relating solely to common stock or debt or preferred stock convertible into common stock.

(b) *Certain unregistered offerings.* (1) If the conditions set forth in paragraph (a)(1), (a)(2), (a)(3), (a)(4), (b)(2) and (b)(3) of this section are satisfied, a broker's or dealer's publication or distribution of information, an opinion or a recommendation:

(i) Shall not constitute directed selling efforts as defined in § 230.902(c);

(ii) Shall not be inconsistent with an offshore transaction as defined in § 230.902(h); and

(iii) Shall be an exception to the prohibition against offers to persons other than qualified institutional buyers in § 230.144A(d)(1)(i).

(2) The broker or dealer publishes or distributes the information, opinion or recommendation in a publication that is distributed with reasonable regularity in the ordinary course of business.

(3) The information, opinion or recommendation relates to:

(i)(A) An issuer's common stock, or debt or preferred stock convertible into common stock; and

(B) The issuer proposes to offer or is offering solely non-convertible debt securities or non-convertible, nonparticipating preferred stock; or

(ii)(A) An issuer's non-convertible debt securities or non-convertible, nonparticipating preferred stock; and

(B) The issuer proposes to offer or is offering solely common stock or debt or preferred stock convertible into common stock.

34. By revising § 230.139 to read as follows:

§ 230.139 Publications by brokers or dealers distributing securities.

(a) *Registered offerings.* Under the following conditions, a broker's or dealer's publication or distribution of information, an opinion or a recommendation shall be exempt from Section 5(b)(1) and Section 5(c) of the Act (15 U.S.C. 77e(b)(1) and (c)) even if the broker or dealer is participating or will participate in the distribution of the issuer's securities to which a registration statement relates:

(1) *Seasoned issuers; larger foreign issuers; foreign government issuers.* (i) The issuer:

(A) Has been subject to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*l* or 78o(d)) for at least one year and has filed all reports it was required to file pursuant to Section 13, 14 or 15(d) of such Act (15 U.S.C. 78m, 78n or 78o(d)) during the last year;

(B) Is a foreign private issuer that:

(*1*) Is not subject to the requirements of Section 13 or 15(d) of the Exchange Act;

(*2*) Satisfies the public float threshold in General Instruction I.C.1. of Form B (§ 239.5 of this chapter) or the public float/average daily trading volume threshold in General Instruction I.C.1. of Form B (except measured on markets worldwide rather than only U.S. markets); and

(*3*) Has had equity securities trading on a designated offshore securities market (as defined in § 230.902(b)) for at least one year;

(C) Is a foreign government issuer eligible to register on Schedule B (15 U.S.C. 77aa), if the offering is a firm commitment underwritten offering in excess of $250 million in securities;

(ii) The issuer is not:

(A) A development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified entity or entities;

(B) A shell entity having few or no assets, earnings or operations; or

(C) Registering an offering of ''penny stock'' as defined in § 240.3a51–1 of this chapter;

(iii) The publication prominently describes the capacity in which the broker or dealer is participating in the distribution; and

(iv) The information, opinion or recommendation is contained in a publication that is distributed in the ordinary course of business.

(2) *All other reporting and non-reporting issuers.* (i) The conditions set forth in paragraphs (a)(1)(ii), (a)(1)(iii) and (a)(1)(iv) of this section are satisfied;

(ii) The information, opinion or recommendation is contained in a publication that is distributed with reasonable regularity in the ordinary course of business;

(iii) The information, opinion or recommendation is contained in a publication that includes similar information, opinions or recommendations with respect to a substantial number of issuers in the issuer's industry or sub-industry, or contains a comprehensive list of securities currently recommended by such broker or dealer;

(iv) The information, opinion or recommendation is given no materially greater space or prominence in the publication than that given to other securities or registrants; and

(v) If the publication contains an opinion or recommendation more favorable as to the issuer or any class of its securities than that last published by the broker or dealer prior to the commencement of participation in the distribution, the publication sets forth the last two opinions or recommendations published by the broker or dealer with respect to the issuer or its securities while not participating in a distribution by the issuer.

(b) *Certain unregistered offerings.* If the conditions set forth in paragraph (a)(1) of this section are satisfied, a broker's or dealer's publication or distribution of information, an opinion or a recommendation, if contained in a publication that is distributed with reasonable regularity in the ordinary course of business:

(1) Shall not constitute directed selling efforts as defined in § 230.902(c);

(2) Shall not be inconsistent with an offshore transaction as defined in § 230.902(h); and

(3) Shall be an exception to the prohibition against offers to persons other than qualified institutional buyers in § 230.144A(d)(1)(i).

Instructions to § 230.139.

1. For purposes of paragraph (a)(2) of this section, a research report has not been distributed with ''reasonable regularity'' if it contains information, an opinion or a recommendation concerning a company with respect to which a broker or dealer currently is not publishing research.

2. Projections constitute opinions within the meaning of this section.

3. For purposes of paragraph (a)(2)(ii) of this section, where projections of an issuer's sales or earnings are included in a publication, the broker or dealer must have published the projections previously on a regular basis in order for the publication to have been distributed with reasonable regularity in the ordinary course of business.

4. For purposes of paragraph (a)(2)(iii), the broker or dealer must have included projections with respect to either a substantial number of companies in the issuer's industry or sub-industry, or all companies represented in the comprehensive list of securities contained in the publication. Also, those projections may not cover significantly different periods with respect to the issuer as compared to the other companies.

35. By amending § 230.144A by redesignating paragraphs (d)(1)(i), (d)(1)(ii), (d)(1)(iii) and (d)(1)(iv) as paragraphs (d)(1)(ii)(A), (d)(1)(ii)(B), (d)(1)(ii)(C) and (d)(1)(ii)(D); and by adding new paragraphs (d)(1)(i) and (d)(1)(ii) introductory text to read as follows:

§ 230.144A Private resales of securities to institutions.

* * * * *

(d) * * *

(1)(i) The securities are offered or sold only to a qualified institutional buyer or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer, except that if the seller is a broker or dealer, it may distribute information, an opinion or a recommendation in accordance with § 230.138(b) or § 230.139(b) while relying on this section.

(ii) In determining whether a prospective purchaser is a qualified institutional buyer, the seller and any person acting on its behalf shall be entitled to rely upon the following non-exclusive methods of establishing the prospective purchaser's ownership and discretionary investments of securities:

* * * * *

36. By amending § 230.145 by revising the last sentence of the first paragraph of the Preliminary Note and paragraph (b) to read as follows:

§ 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.

Preliminary Note: * * * Issuers must register transactions described in paragraph (a) of Rule 145 on Form C (§ 239.6 of this chapter), Form SB–3 (§ 239.11 of this chapter) or Form N–14 (§ 239.23 of this chapter).

* * * * *

(b) *Communications.* Communications in connection with a registered transaction described in paragraph (a) of this section may be made in accordance with §§ 230.135, 230.165, 230.166, 230.167, 230.168 or 230.169.

* * * * *

37. By revising § 230.152 to read as follows:

§ 230.152 Integration of private and public offerings.

(a) *Completed private offerings; resales.* (1) A completed bona fide private offering will not be considered part of an offering registered under the Act as long as the registration statement is filed after the completion of the private offering. At any time following the completion of a bona fide private offering, a registrant may register the securities sold in the private offering for purpose of resale by persons other than an affiliate or a dealer who has purchased directly from the issuer or an affiliate of the issuer.

(2) For purposes of paragraph (a)(1) of this section, a private offering will be considered completed:

(i) As of the date all purchasers in the private offering have paid the purchase price; or

(ii) As of the date the following are true, provided that the transaction is not subsequently renegotiated:

(A) All purchasers are unconditionally obligated to pay the purchase price, except that the purchase obligation may be contingent on a condition that is not within the direct or indirect control of any purchaser; and

(B) The purchase price is fixed and is not contingent on the market price of the securities at or around the time of the registered offering.

(3) For purposes of paragraph (a)(1) of this section, an offering of securities underlying convertible securities or warrants will be considered completed if the offering of the convertible securities or warrants to which it relates is completed. This is true regardless of when the convertible securities or warrants become convertible or exercisable.

(4) For purposes of paragraph (a)(1) of this section, an offering of securities prior to the issuer's initial offering registered under Section 5 of the Act (15 U.S.C. 77e) will be considered completed if:

(i) It does not raise capital for the issuer;

(ii) It is undertaken for the sole purpose of modifying the capital structure of the issuer; and

(iii) It does not involve a roll-up transaction as defined in § 228.901(c) of this chapter.

(b) *Abandoned private offerings followed by offerings registered other than on Form B.* A bona fide private offering of securities will not be considered part of an offering subsequently registered under Section 5 of the Act on a form other than Form B (§ 239.5 of this chapter) if:

(1) The registrant notifies all offerees in the private offering of its abandonment of that offering;

(2) The registrant does not file the registration statement for the registered offering until at least 30 days after it notified the offerees of abandonment, where the registrant (or any person acting on its behalf) offered securities in the private offering to any person ineligible to purchase in an offering in accordance with Section 4(2) or 4(6) of the Act (15 U.S.C. 77d(2) or 77d(6)) or § 230.506;

(3) Neither the issuer nor any person acting on its behalf offered the securities in the private offering by any form of general solicitation or general advertising (as those terms are used in § 230.502(c));

(4) No securities were sold in the private offering; and

(5) One of the following conditions is met:

(i) The registrant files any selling materials used in the private offering as part of the effective registration statement; or

(ii) The registrant informs offerees in the private offering that:

(A) The prospectus delivered in the registered offering supersedes any selling materials used in the private offering; and

(B) Any indications of willingness to purchase offerees gave during the private offering are considered rescinded.

(c) *Abandoned public offerings followed by private offerings.* An offering of securities for which a registration statement under the Act was filed or that would have been eligible to be registered on Form B (collectively, a ''public offering'') will not be considered part of a subsequent bona fide private offering if:

(1) The issuer notifies all offerees in the public offering of its abandonment of that offering or, if the issuer filed a

registration statement for that offering, the issuer withdraws it under § 230.477;

(2) No securities were sold in the public offering; and

(3) One of the following conditions is satisfied:

(i) If the issuer (or any person acting on its behalf) first offers the securities in the private offering more than 30 days after notification of abandonment or withdrawal of the public offering, it notifies each purchaser in the private offering that:

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

(B) The securities are restricted and cannot be resold unless they are registered under the Securities Act or unless an exemption from registration is available; and

(C) Investors do not have the protection of Section 11 of the Act (15 U.S.C. 77k).

(ii) If the issuer (or any person acting on its behalf) first offers the securities in the private offering 30 or fewer days after notification of abandonment or withdrawal of the public offering, the issuer and any underwriter:

(A) Agree in writing, in a manner enforceable by each investor committing to purchase in the 30-day period following abandonment or withdrawal of the public offering, that they will be liable for any material misstatements or omissions in the offering documents used in the private offering under the standards set by Section 11 of the Act; and

(B) Agree in writing, in a manner enforceable by each investor committing to purchase after the 30-day period following abandonment or withdrawal of the public offering, that they will be liable for any material misstatements or omissions in the offering documents used in the private offering under the standards set by Section 12(a)(2) of the Act (15 U.S.C. 77*l*(a)(2)).

(d) *Definition of terms.* For the purposes of this section only, a *private offering* means an unregistered offering of securities that is exempt from registration pursuant to Section 4(2) or 4(6) of the Act or § 230.506 of Regulation D.

§ 230.153 [Removed and Reserved]

38. By removing and reserving § 230.153.

39. By adding § 230.159 to read as follows:

§ 230.159 Lock-up agreements.

All offers and sales in a negotiated transaction described in § 230.145(a) may be registered under Section 5 of the Act (15 U.S.C. 77e) notwithstanding the fact that certain shareholders of the company to be acquired sign agreements with the acquiror to vote in favor of the transaction prior to the filing or the effective date of the registration statement, if:

(a) The agreements are limited to executive officers, affiliates and directors of the company to be acquired, the founder(s) of that company and their family members, and holders of 5% or more of the voting equity securities of that company;

(b) The persons signing the agreements own less than 100% of the voting equity securities of the company being acquired; and

(c) Votes will be solicited from shareholders of the company to be acquired who:

(1) Have not signed the agreements; and

(2) Would be ineligible to purchase under an exemption from registration pursuant to Section 4(2) or 4(6) of the Act (15 U.S.C. 77d(2) or 77d(6)) or § 230.506 of Regulation D.

40. By adding § 230.165 to read as follows:

§ 230.165 Post-filing free writing.

Notwithstanding Section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), any prospectus used in connection with an offering after the filing of a registration statement need not satisfy the requirements of Section 10 (15 U.S.C. 77j) of the Act if:

(a) Prospectus information is delivered in accordance with § 230.172, as applicable;

(b) The registrant files with the Commission any prospectus used in reliance on this section when so required by § 230.425; and

(c) The registrant files with the Commission the information necessary to satisfy the requirements of Section 10(a) of the Act prior to the first sale in the offering.

41. By adding § 230.166 to read as follows:

§ 230.166 Offers made before filing a registration statement.

(a) *Form B and seasoned Schedule B offerings.* Notwithstanding Section 5(c) of the Act (15 U.S.C. 77e(c)), an issuer, underwriter or participating dealer may make an offer to sell or solicit an offer to buy securities prior to the filing of a registration statement with respect to those securities if:

(1) At the time of the offer, the registrant and the offering satisfy the Eligibility Requirements of Schedule B or General Instruction I of Form B (§ 239.5 of this chapter);

(2) Either:

(i) The offering is later registered on Form B; or

(ii) The offering:

(A) Is later registered on Schedule B (15 U.S.C. 77aa);

(B) Is a firm commitment underwritten offering in excess of $250 million in securities; and

(C) Is registered 1 year or more after the effective date of the registrant's initial registered offering; and

(3) The registrant files any prospectus used in reliance on this section in the period beginning 15 days before the first offer and ending with the filing of the registration statement when so required by § 230.425.

(b) *Form C/SB–3 transactions.* Notwithstanding Section 5(c) of the Act, the offeror of securities in a transaction to be registered on Form C, SB–3, F–8, F–80 or F–10 (§§ 239.6, 239.11, 239.38, 239.41 or 239.40 of this chapter) (when that form is used in a business combination transaction) may make an offer to sell or solicit an offer to buy securities before the filing of a registration statement with respect to those securities if:

(1) Any prospectus relating to the transaction used in the period beginning with the first public announcement, and ending with the filing of the registration statement is filed in accordance with § 230.425; and

(2) In an exchange offer, the offers are made in accordance with the tender offer rules; and, in a transaction involving the vote of security holders, the offers are made in accordance with the proxy rules.

42. By adding § 230.167 to read as follows:

§ 230.167 Exemption from Section 5(c) for certain communications.

(a) In offerings registered on Form B (§ 239.5 of this chapter), any communication made before the offering period shall not constitute an offer to sell or an offer to buy the securities being offered under the registration statement for purposes of Section 5(c) of the Act (15 U.S.C. 77e(c)). ''Offering period'' is defined in Form B.

(b) In offerings registered on Forms C (§ 239.6 of this chapter), SB–3 (§ 239.11 of this chapter), F–8 (§ 239.38 of this chapter), F–80 (§ 239.41 of this chapter) or F–10 (§ 239.40 of this chapter) (when Form F–10 is used in connection with a business combination transaction), any communication before the first communication related to the offering (except for communications among the participants in the offering) shall not constitute an offer to sell or an offer to buy the securities being offered under the registration statement for purposes of Section 5(c) of the Act, provided that the parties to the transaction take all

reasonable steps within their control to prevent further distribution or publication of such communication during the period between that first communication and the date of filing the registration statement.

(c) In all offerings other than those described in paragraph (a) or (b) of this section or those registered on Form S–8 (§ 239.16b of this chapter), any communication made by an issuer, underwriter or participating dealer more than 30 days before the date of filing of the registration statement shall not constitute an offer to sell or offer to buy the securities being offered under the registration statement for purposes of Section 5(c) of the Act, provided that the issuer, underwriter(s) or participating dealer(s) take all reasonable steps within their control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement.

43. By adding § 230.168 to read as follows:

§ 230.168 Regularly released forward-looking information.

(a) Except in connection with offerings registered on Form S–8, C, SB–3, F–8, F–80 or F–10 (when that form is used in a business combination transaction), (§ 239.16b, 239.6, 239.11, 239.38, 239.41 or 239.40 of this chapter) in a registered offering by an issuer that is subject to the requirements of Section 12 or 15(d) of the Exchange Act (15 U.S.C. 78l or 78o(d)), the dissemination of regularly released forward-looking information by an issuer, underwriter or participating dealer in the 30-day period immediately preceding the filing of a registration statement shall be exempt from the prohibitions on offers to sell or offers to buy set forth in Section 5(c) of the Act (15 U.S.C. 77e(c)), if the registrant files any prospectus used in reliance on this section when so required by § 230.425.

(b) In an offering registered on Form S–8, C, SB–3, F–8, F–80 or F–10 (when that form is used in a business combination transaction) by an issuer that is subject to the requirements of Section 12 or 15(d) of the Exchange Act, the dissemination of regularly released forward-looking information by an issuer, underwriter or participating dealer in the period after the public announcement of the offering and prior to the filing of the registration statement shall be exempt from the prohibitions on offers to sell or offers to buy in Section 5(c) of the Act, if the registrant files any prospectus used in reliance on this section when so required by § 230.425.

(c) For purposes of this section, ''regularly released forward-looking information'' includes the information listed in paragraphs (c)(1) through (c)(4) of this section, if the issuer customarily releases information of this type in the ordinary course of business on a regular basis, it has done so in the two fiscal years (and any portion of a fiscal year) immediately prior to the communication, and the time, manner and form in which it is released is consistent with past practice:

(1) Projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

(2) Statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;

(3) Statements about the issuer's future economic performance of the type contemplated by the management's discussion and analysis of financial condition and results of operation described in § 229.303 of this chapter or Item 9 of Form 20–F (§ 249.220f of this chapter); and

(4) Assumptions underlying or relating to any of the information described in paragraphs (c)(1), (c)(2) and (c)(3) of this section.

By adding § 230.169 to read as follows:

§ 230.169 Factual business communications.

(a) Except in connection with offerings registered on Form S–8, C, SB–3, F–8, F–80 or F–10 (when that form is used in a business combination transaction), (§§ 239.16b, 239.6, 239.11, 239.38, 239.41 or 239.40 of this chapter), factual business communications made by an issuer, underwriter or participating dealer in the 30-day period immediately preceding the filing of a registration statement with respect to a registered offering shall be exempt from the prohibitions on offers to sell and offers to buy in Section 5(c) of the Act (15 U.S.C. 77e(c)).

(b) In an offering registered on Form S–8, C, SB–3, F–8, F–80 or F–10 (when that form is used in a business combination transaction), factual business communications made by an issuer, underwriter or participating dealer after the public announcement of the offering and prior to the filing of the registration statement shall be exempt from the prohibition on offers to sell and offers to buy in Section 5(c) of the Act.

(c) For purposes of this section, *factual business communications* include:

(1) Factual information about the issuer or some aspect of its business;

(2) Advertisement of the issuer's products or services;

(3) Factual business or financial developments with respect to the issuer;

(4) Dividend notices;

(5) Factual information set forth in any Exchange Act report the issuer is required to file; and

(6) Factual information communicated in response to unsolicited inquiries by persons that are not affiliates of the issuer, underwriter or participating dealer.

(d) For purposes of this section, *factual business communications* do not include:

(1) Information about the registered offering; or

(2) Forward-looking information.

45. By adding § 230.172 to read as follows:

§ 230.172 Delivery of prospectus information.

The issuer, selling security holders, any underwriter, any participating broker or dealer, and any person acting on behalf of any of them, must deliver prospectus information to each person offered securities in connection with an offering registered under the Act as follows:

(a) *Form B and Schedule B seasoned registrants.* If the registrant is offering securities as described in paragraph (a)(1) of this section, then delivery under paragraph (a)(2) of this section must be made.

(1) Securities in an offering registered on:

(i) Form B (§ 239.5 of this chapter), other than pursuant to General Instruction I.C.6. of Form B; or

(ii) Schedule B (15 U.S.C. 77aa), where it is a firm commitment underwritten offering in excess of $250 million in securities that is registered more than one year after the effective date of the registrant's initial registered offering;

(2) A term sheet prospectus that contains the following information must be sent in a manner reasonably designed to arrive before the date an investor makes a binding investment decision:

(i) An itemization of the material terms of the securities in summary format;

(ii) The name of any person, other than the issuer, for whose account securities are offered and a brief identification of any material

relationship such person has (or had within the past three years) with the issuer or any affiliate of the issuer;

(iii) The identity and location of a contact person to whom questions may be directed; and

(iv) The identity and location of a person who, upon request, will send promptly the documents that define the terms of the securities.

(b) *Other registrants—firm commitment underwritten offerings.* If an offering is registered on Form A, Form SB–1, Form SB–2, Form F–7, Form F–9, Form F–10 (other than in a business combination transaction), (§§ 239.4, 239.9, 239.10, 239.37, 239.39, 230.40 of this chapter) or on Schedule B (other than as described in paragraph (a) of this section), is underwritten on a firm commitment basis and the offering:

(1) Is the registrant's initial offering registered in accordance with Section 5 of the Act (15 U.S.C. § 77e) or is an offering registered within one year of the effective date of the registrant's initial registered offering, then a prospectus satisfying Section 10 of the Act (15 U.S.C. § 77j) must be sent to each investor in a manner reasonably designed to arrive at least 7 calendar days before the pricing of the securities.

(2) Takes place more than one year after the effective date of the registrant's initial offering registered in accordance with Section 5 of the Act, then a prospectus satisfying Section 10 of the Act must be sent to each investor in a manner reasonably designed to arrive at least 3 calendar days before the pricing of the securities.

(c) *Other registrants—non-firm commitment underwritten offerings.* If an offering is registered on Form A, Form SB–1, Form SB–2, Form F–7, Form F–9, Form F–10 (other than in a business combination), or on Schedule B (other than as described in paragraph (a) of this section), is *not* underwritten on a firm commitment basis and the offering:

(1) Is the registrant's initial offering in accordance with Section 5 of the Act or is an offering taking place within one year of the effective date of the registrant's initial registered offering, then a prospectus satisfying Section 10 of the Act must be sent to each investor in a manner reasonably designed to arrive at least 7 calendar days before the investor signs a subscription agreement or otherwise commits to purchase securities.

(2) Takes place more than one year after the effective date of the registrant's initial registered offering in accordance with Section 5 of the Act, then a prospectus satisfying Section 10 of the Act must be sent to each investor in a manner reasonably designed to arrive at least 3 days before the investor signs a subscription agreement or otherwise commits to purchase the securities.

Note to paragraphs (b) and (c).

The issuer, underwriter or participating broker or dealer may choose to deliver a prospectus meeting the requirements of Section 10(a), instead of a prospectus meeting the requirements of Section 10, if it does so in accordance with the terms of paragraphs (b) and (c) of this section.

(d) *Roll-ups.* Notwithstanding paragraphs (a) through (c) of this section, if a registrant is registering a roll-up transaction as defined in § 229.901(c) of this chapter, a prospectus that satisfies the requirements of Section 10 of the Act must be sent to each investor no later than the earlier of:

(1) 60 calendar days before the meeting at which the roll-up transaction will be submitted to a vote or 60 calendar days before the earliest date on which partnership action could be taken by consent; and

(2) The date calculated by applying the maximum number of days permitted for giving notice under applicable state law.

(e) *Material changes.* If not previously disclosed by any other means to investors, material changes to the information reflected in the prospectus delivered must be set forth in a document sent to each investor in a manner reasonably designed to arrive at least 24 hours before:

(1) The securities are priced, if the offering is subject to paragraph (b) of this section;

(2) The investor signs a subscription agreement or otherwise commits to purchase securities, if the offering is subject to paragraph (c) of this section; or

(3) The date of the meeting at which the transaction will be submitted to a vote or on which partnership action could be taken by consent, if the offering is subject to paragraph (d) of this section.

(f) *Rule 462 registration statements.* Notwithstanding paragraphs (a) through (d) of this section, if an offering is registered in part through a registration statement filed under § 230.462(b) or § 230.462(e), a prospectus delivered with respect to the earlier registration statement to an investor in compliance with this § 230.172 will be deemed to satisfy the delivery requirements with respect to that investor under this § 230.172 with respect to the § 230.462(b) or § 230.462(e) registration statement for the offering, provided that the issuer, underwriter or participating dealer otherwise informs investors purchasing in the offering of the change in the size of the offering.

46. By adding § 230.173 to read as follows:

§ 230.173 Delivery of final prospectuses.

Notwithstanding Section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)), a prospectus that meets the requirements of Section 10(a) of the Act (15 U.S.C. 77j(a)) need not precede or accompany the carrying or delivery of any security by any person in an offering registered other than on Form S–8, Form C, Form SB–3, Form F–8, Form F–80 or F–10 (when that form is used in a business combination transaction) (§§ 239.16b, 239.6, 239.11, 239.38, 239.41 or 239.40 of this chapter) provided that:

(a) Prospectus information that satisfies the requirements of Section 10(a) of the Act other than the price-related information that may be omitted pursuant to § 230.430A is filed with the Commission prior to the transmission of any confirmation in connection with the offering;

(b) Delivery of prospectus information in accordance with § 230.172 or § 230.174, as applicable, has been made;

(c) At or before the time they receive any confirmation of sale, investors are informed where they can acquire promptly the prospectus information that meets the requirements of Section 10(a) of the Act, free of charge; and

(d) The security being carried or delivered is not issued by an investment company.

47. By revising § 230.174 to read as follows:

§ 230.174 Aftermarket delivery of prospectuses by dealers.

(a) For transactions that take place prior to the expiration of the 40-day or 90-day period specified in Section 4(3) of the Act (15 U.S.C. 77d(3)) in which a dealer is obliged to deliver a Section 10(a) (15 U.S.C. 77j(a)) prospectus, the dealer need only satisfy that obligation in transactions occurring during a period of twenty-five calendar days after the later of:

(1) The effective date of the registration statement; or

(2) The first date on which the security was bona fide offered to the public.

(b) For purposes of paragraph (a) of this section, the required prospectus is delivered if:

(1) A prospectus satisfying the requirements of Section 10(a) (other than omitting price-related information pursuant to § 230.430A) is on file with the Commission; and

(2) Prior to or at the same time each investor receives a confirmation the

dealer notifies it as to where it may obtain promptly that prospectus, free of charge.

(c) Paragraph (a) of this section shall not apply to any transaction relating to a *blank check company* (as defined in § 230.419). In such transactions, all dealers must deliver a prospectus satisfying the requirements of Section 10(a) for ninety calendar days after the date the funds and securities are released from the escrow or trust account under § 230.419.

(d) If a registration statement relates to offerings made on a continuous basis, a dealer's prospectus delivery obligation expires after the initial prospectus delivery period specified in this section.

(e) This section shall not apply to any transaction in which:

(1) The registration statement is the subject of a stop order issued under Section 8 of the Act (15 U.S.C. 77h); or

(2) The Commission provides, upon application or on its own motion, another aftermarket delivery obligation.

(f) Nothing in this section shall affect any obligation to deliver a prospectus pursuant to the provisions of Section 5 of the Act (15 U.S.C. 77e) by a dealer who:

(1) Is acting as an underwriter with respect to the securities involved; or

(2) Is engaged in a transaction as to securities constituting the whole or a part of an unsold allotment to, or subscription by, that dealer as a participant in the distribution of the securities by the issuer or by or through an underwriter.

(g) No prospectus need be delivered in the 40-day or 90-day period specified in Section 4(3) of the Act (15 U.S.C. 77d(3)) if the registration statement is on Form F–6 (§ 239.36 of this chapter).

48. By amending § 230.176 by revising the section heading and the introductory text; by removing the word ''and'' at the end of paragraph (g); revising ''incorporated.'' at the end of paragraph (h) to read ''incorporated; and''; and by adding paragraph (i) to read as follows:

§ 230.176 Reasonable investigation and reasonable grounds for belief under Section 11 of the Act and reasonable care under Section 12(a)(2) of the Act.

In determining whether or not the conduct of a person, other than the issuer, constitutes a reasonable investigation or a reasonable ground for belief meeting the standard set forth in Section 11(c) of the Act (15 U.S.C. 77k(c)) or the exercise of reasonable care meeting the standard set forth in Section 12(a)(2) of the Act (15 U.S.C. 77*l*(a)(2)), relevant circumstances to include:

* * * * *

(i)(1) The circumstances listed in paragraph (i)(3) of this section if:

(i) The person is an underwriter;

(ii) Investment grade debt securities are not being offered;

(iii) The offering is marketed and priced in fewer than five days;

(iv) The issuer meets the requirements of General Instruction I.B.2. of Form B (§ 239.5 of this chapter); and

(v) The offering is registered on Form B (§ 239.5 of this chapter) pursuant to either General Instruction I.C.1. or I.C.2.

(2) The absence of any one or more of the circumstances listed in paragraph (i)(3) of this section, except for paragraph (i)(3)(i) of this section, should not be considered definitive in reaching a conclusion regarding whether the conduct of the underwriter met the standards set forth in Section 11(c) or 12(a)(2) of the Act.

(3)(i) Whether the underwriter:

(A) Reviewed the registration statement (which, for purposes of this section, includes all amendments and supplements to it and all documents incorporated by reference into it); and

(B) Conducted a reasonable inquiry into any fact or circumstance that would have caused a reasonable person to question whether the registration statement contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading;

(ii) Whether the underwriter discussed the information contained in the registration statement with the relevant executive officer(s) of the issuer (including, at a minimum, its chief financial officer or chief accounting officer or that person's designee (or person performing those functions)) and the issuer's chief financial officer or chief accounting officer or that person's designee (or person performing those functions) certified to the underwriter that:

(A) He or she has read the registration statement; and

(B) To the best of his or her knowledge after reasonable investigation, the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading;

(iii) Whether the underwriter received from the independent accountants responsible for the audited financial statements included in the registration statement a letter contemplated by Statement on Auditing Standards No. 72 of the American Institute of Certified Public Accountants;

(iv) Whether the underwriter received an opinion from the issuer's legal counsel substantially to the effect that:

(A) Counsel is of the opinion that the registration statement and prospectus (except for financial statements, financial data and schedules included therein as to which counsel need not express any opinion) comply as to form in all material respects with the Act and the rules and regulations of the Commission thereunder; and

(B) Counsel has participated in the drafting and preparation of the registration statement and prospectus and nothing that has come to the attention of counsel that has caused it to believe that the registration statement (except for financial statements, financial data and schedules as to which counsel need not express any belief), contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading;

(v)(A) Whether the underwriter employed legal counsel that reviewed:

(*1*) The issuer's registration statement and all periodic reports filed by the issuer with the Commission for the last full fiscal year ended prior to the offering and any portion of a fiscal year thereafter; and

(*2*) The issuer's charter, by-laws, corporate minutes for the last full fiscal year ended prior to the offering and any portion of a fiscal year thereafter, and all material contracts entered into by the issuer in the last five years prior to effectiveness of the registration statement;

(B) Whether underwriter's counsel opined substantially to the effect that nothing has come to its attention that would lead it to believe that the registration statement contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading;

(vi) Whether the underwriter employs a research analyst that:

(A) For at least the 6 months immediately prior to the commencement of the offering, has followed the issuer or the issuer's industry on an ongoing basis;

(B) Has issued a report on the issuer or the issuer's industry within the 12 months immediately prior to the commencement of the offering; and

(C) Has been consulted by the underwriter in connection with the disclosure used in the offering.

49. By amending § 230.401 by revising paragraph (g) to read as follows:

§ 230.401 Requirements as to proper form.

* * * * *

(g) Except for registration statements and post-effective amendments that become effective automatically pursuant to § 230.462, § 230.464 and 230.485(b) (including registration statements that become effective automatically at the time designated by the issuer in accordance with § 230.462(f)(2)), a registration statement or any amendment thereto is deemed filed on the proper form unless the Commission objects to the form before the effective date.

50. By revising paragraph (d) of § 230.402 to read as follows:

§ 230.402 Number of copies; binding; signatures.

* * * * *

(d) Notwithstanding any other provision of this section, if a registrant files a registration statement pursuant to § 230.462(b), § 230.462(e) or § 230.462(f) by facsimile pursuant to § 230.110(d), the registrant need only file one complete copy of the registration statement with the Commission. That copy must include all exhibits and other documents that are a part of it. That copy need not be bound. It may include facsimile versions of signatures in accordance with paragraph (e) of this section.

* * * * *

51. By amending § 230.405 by revising the definition of ''small business issuer'' to read as follows:

§ 230.405 Definitions of terms.

* * * * *

Small Business Issuer. The term ''small business issuer'' means an entity that meets the following criteria:

(1) Has revenues (including revenues of any consolidated subsidiaries) of less than $50,000,000;

(2) Is a U.S. or Canadian issuer;

(3) Is not an investment company;

(4) If a majority-owned subsidiary, the parent corporation is also a small business issuer; and (5) Each majority owned subsidiary of the entity, if any, meets the criteria in paragraphs (2) and (3) of this definition.

* * * * *

§ 230.406 [Amended]

52. By amending § 230.406 by removing in paragraph (a) the words ''Form S–3, F–2, F–3 (§ 239.13, 239.32 or 239.33 of this chapter) relating to a dividend or interest reinvestment plan, or on Form S–4 (§ 239.25 of this chapter) complying with General Instruction G of that Form'' and adding, in their place, the words ''Form B (§ 239.5 of this chapter), or on Form A (§ 239.4 of this chapter) complying with General Instruction VIII. of that Form where the issuer plans to have the registration statement become effective upon filing or fewer than 20 days thereafter''.

§ 230.415 [Amended]

53. By amending paragraph (a)(1)(x) of § 230.415 by removing the words ''Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter)'' and adding, in their place, the words ''Form B (§ 239.5 of this chapter)''.

54. By amending § 230.418 by revising the first sentence of the introductory text of paragraph to read as follows:

§ 230.418 Supplemental information.

(a) The Commission or its staff may, where it deems appropriate, request supplemental information not otherwise filed with the Commission concerning the registrant, the registration statement, the distribution of the securities, market activities and underwriters' activities.

* * *

* * * * *

55. By removing in § 230.418(a)(3) the words ''eligible to use Form S–2 or Form S–3 (§§ 239.12 or 239.13 of this chapter)'' and adding, in their place, the words ''that meets the requirements of General Instructions II.A. and II.B of Form A (§ 239.4 of this chapter) or is eligible to use Form B (239.5 of this chapter)''.

56. By amending § 230.421 by adding paragraph (e) to read as follows:

§ 230.421 Presentation of Information in Prospectuses.

* * * * *

(e) If a prospectus is not subject to the informational requirements of Section 10 of the Act, it must contain a prominent legend that urges investors to read filed documents because they contain important information. The legend must identify the other types of filings available about the offering, for example: free writing, term sheet, Exchange Act reports, and prospectus (registration statement). The legend must also explain that investors can get the document(s) for free at the SEC's web site and explain which documents are free from the issuer. You may adapt the following legend or write your own in plain English:

Example: Before you invest, you should read the other document(s) that we have filed with the SEC. These documents [describe or name the documents] contain important information that you need to consider before making an investment decision. You may get these documents for free by visiting EDGAR on the SEC web site at www.sec.gov. We will send you [describe or name the documents] for free if you call us at 1 800 xxx–xxxx.

57. By amending § 230.424 by revising the section heading and paragraph (b)(2); revising Instruction 1 and redesignating it as ''Instruction to § 230.424''; and by removing paragraph (b)(7) and Instruction 2 to read as follows:

§ 230.424 Filing of Section 10 prospectuses; number of copies.

* * * * *

(b) * * *

(2) A prospectus used in connection with a primary offering of securities made on a delayed basis pursuant to §§ 230.415(a)(1)(vii) or 230.415(a)(1)(viii) that discloses the public offering price, description of securities, specific method of distribution or similar matters shall be filed with the Commission no later than the second business day following the earlier of:

(i) The date the offering price is determined; and

(ii) The date the prospectus is first used after effectiveness in connection with a public offering or sale.

* * * * *

Instruction to § 230.424. Notwithstanding §§ 230.424(b)(2) and 230.424(b)(5), a form of prospectus or prospectus supplement relating to an offering of mortgage-related securities on a delayed basis under § 230.415(a)(1)(vii) that is required to be filed pursuant to paragraph (b) of this section shall be filed with the Commission no later than the second business day it is first used after effectiveness in connection with a public offering or sale.

* * * * *

58. By adding § 230.425 to read as follows:

§ 230.425 Filing of ''free writing'' and other prospectuses.

(a) A registrant must file under this section the information described in paragraph (b) of this section except that it need not file:

(1) Any factual business communication, as defined in § 230.169, regardless of when it is made;

(2) Any research report used in reliance on § 230.137, § 230.138, § 230.139, § 230.165 or § 230.166;

(3) Any information used in connection with an offering under Form S–8 (§ 239.16b of this chapter);

(4) Any information used in connection with an offering on Form B (§ 239.5 of this chapter) under a dividend or interest reinvestment plan;

(5) Any information used in connection with a direct stock purchase plan;

(6) Any information filed or to be filed as part of an effective registration statement (except in a business combination transaction registered on

Form C, SB–3, F–8, F–10 or F–80 (§§ 239.6, 239.11, 239.38, 239.40 or 239.41)); or

(7) Any confirmation described in § 240.10b–10 of this chapter;

(b)(1) Five copies of any prospectus used in reliance on § 230.165 shall be filed with the Commission on or before the date of first use.

(2) Five copies of any prospectus used prior to the filing of a registration statement in reliance on § 230.166(*a*) shall be filed with the Commission at the time the related registration statement is filed.

(3) Five copies of any prospectus used before the filing of a registration statement in reliance on § 230.166(b) shall be filed with the Commission on or before the date of first use. Each copy of a prospectus filed under this section must identify the filer and the company that is the subject of the offering in the upper right corner of the cover page in addition to the information required by paragraph (c) of this section.

(4) Five copies of any prospectus used in reliance on § 230.168 shall be filed with the Commission at the time the related registration statement is filed.

(c) Each copy of a prospectus filed under this section shall contain, in the upper right corner of the cover page, the Commission file number for the related registration statement or, if that file number is unknown, a description sufficient to identify the related registration statement.

§ 230.428 [Amended]

59. By removing in § 230.428(b)(2)(iii) the words ''or F–1 (§ 239.31 of this chapter)'' and adding, in their place, the words ''or Form A (§ 239.4 of this chapter)''.

60. 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 one 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 would currently be required in a prospectus relating to all offering(s) 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 those registration statements whose offerings have been combined into the new or amended registration statement. The registrant must identify the earlier registration statement(s) to which the combined prospectus relates by setting forth the Commission file number(s) at the bottom of the facing page of the latest registration statement.

61. By amending § 230.430A by removing the word ''fifteen'' and adding, in each place it appears, the word ''five'' in paragraph (a)(3) and by revising the last sentence of Instruction to Paragraph (a) to read as follows:

§ 230.430A Prospectus in a registration statement at the time of effectiveness.

* * * * *

Instruction to Paragraph (a). * * * Notwithstanding the foregoing, any increase or decrease in volume (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the price range may be reflected in the form of prospectus filed with Commission pursuant to § 230.424(b)(1) or § 230.497(h) if, in the aggregate, the changes in volume and price result in no more than a 20% change in the amount of net proceeds disclosed in a prospectus that was delivered to investors in accordance with § 230.172(b) or, if no prospectus was required to be delivered, in the prospectus that was part of the effective registration statement.

* * * * *

§ 230.431 [Removed and Reserved]

62. By removing and reserving § 230.431.

63. By revising § 230.434 to read as follows:

§ 230.434 Prospectus delivery requirements in firm commitment underwritten offerings by registered investment companies.

(a) Where an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) registers an offering of securities on Form N–2 (§ 274.11a–1 of this chapter) or Form S–6 (§ 239.16 of this chapter) and the conditions described in paragraph (b) are satisfied, then:

(1) The prospectus subject to completion and the term sheet described in paragraph (b)(4), taken together, shall constitute a prospectus that meets the requirements of Section 10(a) of the Act (15 U.S.C. 77j(a)) for purposes of Section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) and Section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)); and

(2) The Section 10(a) prospectus described in paragraph (a)(1) shall have:

(i) Been sent or given prior to or at the same time that a confirmation is sent or given for purposes of Section 2(a)(10) of the Act; and

(ii) Accompanied or preceded the transmission of the securities for purpose of sale or for delivery after sale for purposes of Section 5(b)(2) of the Act.

(b) Conditions:

(1) The securities are offered for cash in a firm commitment underwritten offering;

(2) A prospectus subject to completion and any term sheet described in paragraph (b)(iv), together or separately, are sent or given prior to or at the same time with the confirmation;

(3) The prospectus subject to completion and term sheet, together, are not materially different from the prospectus in the registration statement at the time of its effectiveness or an effective post-effective amendment thereto (including, in both instances, information deemed to be a part of the registration statement at the time of effectiveness pursuant to Rule 430A(b) (§ 230.430A(b)); and

(4) The term sheet under this paragraph (b) sets forth all information material to investors with respect to the offering that is not disclosed in the prospectus subject to completion or the confirmation.

(c) The information contained in any term sheet described in this section shall be deemed to be a part of the registration statement as of the time such registration statement was declared effective.

Instruction: Any form of prospectus or term sheet used in reliance on this section shall be filed in accordance with § 230.497(h).

(d) Any term sheet described under this section shall state, at the top center of its cover page, that the term sheet is a supplement to a prospectus and identify that prospectus by issuer name and date; clearly identify the document as a term sheet used in reliance on Rule 434; set forth the approximate date of the term sheet's first use; and clearly identify the documents that, when taken together, constitute the Section 10(a) prospectus.

(e) For purposes of this section, prospectus subject to completion shall mean any prospectus that is either a preliminary prospectus used in reliance on Rule 430 (§ 230.430) or a prospectus omitting information in reliance on Rule 430A (§ 230.430A).

64. By revising § 230.455 to read as follows:

§ 230.455 Place of filing.

All registration statements and other papers filed with the Commission under the Act in paper format shall be filed at its principal office, except for registration statements and post-effective amendments thereto filed via facsimile pursuant to § 230.110(d). Materials not filed electronically or via facsimile may be filed by delivery to the Commission through the mails or otherwise.

65. By amending § 230.456 by revising the section heading; designating the current text as paragraph (a); and adding paragraph (b) to read as follows:

§ 230.456 Date of filing, timing for fee payment by small business issuers.

* * * * *

(b)(1) Notwithstanding Section 6 of the Act (15 U.S.C. 77f) and paragraph (a) of this section, a small business issuer filing a registration statement on Form SB–1, SB–2 or SB–3 (§§ 239.9, 239.10 or 239.11 of this chapter) that contains the delaying amendment described in § 230.473(a) may defer payment of the registration fee required by Section 6, provided that it pays the fee no later than the first date to occur of the following:

(i) The date on which the small business issuer requests that the Commission grant effectiveness of the registration statement under Section 8(a) of the Act (15 U.S.C. 77h(a)); or

(ii) The date on which the small business issuer files an amendment to the registration statement that states that the registration statement shall thereafter become effective in accordance with the provisions of Section 8(a) of the Act, as described in § 230.473(b).

(2) Notwithstanding Section 6(c) of the Act, where the small business issuer defers payment of the registration fee in accordance with paragraph (b)(1) of this section, the registration statement (and any amendment thereto) will be considered filed when it is received by the Commission (assuming all requirements of the Act and the rules that apply to such filing have been complied with, other than payment of the registration fee).

66. 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.

* * * * *

(f) * * *

(5) If a filing fee is paid pursuant to 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 with respect to the resale.

* * * * *

(o) Where an issuer is registering 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, the dollar amount of the filing fee paid that is associated with the unsold securities may be used as an offset against the total filing fee due to be paid for a subsequent registration statement or registration statements. The subsequent registration statement(s) must be filed by the same registrant or a wholly-owned subsidiary of that registrant within five years of the completion or termination of the initial 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 issuer.

67. By revising paragraph (b)(2) of § 230.461 to read as follows:

§ 230.461 Acceleration of effective date.

* * * * *

(b) * * *

(2)(i) Where delivery of prospectus information to investors required by § 230.172 is not accomplished, until the registrant, any underwriter and any participating dealer give the Commission adequate assurance that they have complied with § 230.172; and

(ii) Where the prospectus information delivered to investors is found to be inaccurate or inadequate in any material respect, until the registrant, any underwriter and any participating dealer give the Commission adequate assurance that they have informed investors that will purchase in the offering of the appropriate correcting information.

* * * * *

68. By amending § 230.462 by revising the section heading, paragraphs (a), (b)(2) and (c); and by adding paragraphs (e), (f) and (g) to read as follows:

§ 230.462 Effectiveness of certain registration statements and post-effective amendments.

(a) A registration statement filed in accordance with Form S–8 (§ 239.16b of this chapter) shall become effective upon filing with the Commission.

(b) * * *

(2) The registration statement is filed before the date confirmations are sent or given or, in an offering described in § 230.145(a), before the meeting date at which security holders approved the transaction or, if no meeting was held, the date the transaction was approved by security holders' authorization or consent; and

* * * * *

(c) A post-effective amendment shall become effective upon filing with the Commission if:

(1) Other than price-related information previously omitted in reliance upon § 230.430A, it contains no substantive changes from or additions to the prospectus previously filed:

(i) As part of the effective registration statement; or

(ii) As part of a post-effective amendment to that registration statement; and

(2) The post-effective amendment is filed:

(i) Prior to the time confirmations are sent or given; and

(ii) No more than 30 days after the effectiveness of the registration statement or another post-effective amendment thereto that contains a prospectus.

* * * * *

(e) A registration statement and any post-effective amendment thereto shall become effective upon filing with the Commission if:

(1) The registration statement is filed on Form SB–1 (§ 239.9 of this chapter), Form SB–2 (§ 239.10 of this chapter) or Form SB–3 (§ 239.11 of this chapter) and is registering additional securities of the same class(es) as were included in an earlier effective registration statement filed on Form SB–1, Form SB–2 or Form SB–3 for the same offering;

(2) The registration statement is filed before the date confirmations are sent or given or, in an offering described in § 230.145(a), before the meeting date at which security holders approved the transaction or, if no meeting was held, the date the transaction was approved by security holders' authorization or consent; and

(3) The new registration statement registers additional securities in an amount and at a price that together represent no more than 50% of the maximum aggregate offering price set forth for each class of securities in the ''Calculation of Registration Fee'' table contained in the earlier registration statement.

(f)(1) The following registration statements shall become effective in accordance with paragraph (e)(2) of this section:

(i) A registration statement filed in accordance with Form B (§ 239.5 of this chapter);

(ii) A registration statement filed in accordance with Schedule B (15 U.S.C. 77aa) by a foreign government issuer that:

(A) Registered an offering under the Act within the 3 years before the filing date of the current offering; and

(B) Is registering an offering of at least $250 million in securities that is underwritten on a firm commitment basis; and

(iii) A registration statement filed in accordance with Form A (§ 239.4 of this chapter) by an issuer that:

(A) Satisfies the requirements of General Instruction II.A. or II.C. of Form A and is not disqualified as specified in General Instruction II.B. of Form A.; and

(B) Has a public float of $75 million or more as of the filing date; or

(C) Incorporates into the Form A its annual report filed under Section 13(a) or 15(d) of the Securities Exchange Act (15 U.S.C. 78m or 78o(d)) for the end of its most recently completed fiscal year and that annual report was reviewed fully by the staff of the Commission and was amended in accordance with the staff's comments (if so requested).

(2) The registrant shall designate the effective date of the registration statement listed in paragraph (f)(1) of this section. It must indicate on the front page of the Form or Schedule that the registration statement will become effective either:

(i) Upon filing with the Commission;

(ii) At the date and time set forth on the front page of the Form or Schedule; or

(iii) As specified in a later amendment to the Form or Schedule.

(g) An issuer may file only one registration statement pursuant to either paragraph (b) or (e) of this section for any offering.

69. By revising § 230.464 to read as follows:

§ 230.464 Effective date of a post-effective amendment filed on Form A, Form B or Form S–8.

(a) If at the time a registrant files a post-effective amendment on Form A, it meets the requirements set forth in General Instruction VIII. to Form A (§ 239.4 of this chapter):

(1) Its post-effective amendment filed on Form A shall become effective in accordance with the registrant's designation on the front page of Form A either:

(i) Upon filing with the Commission;

(ii) On the date set forth on the front page of Form A; or

(iii) As specified in a later post-effective amendment to the Form; and

(2) The effective date of the registration statement shall be deemed to be the effective date of the post-effective amendment.

(b) If at the time a registrant files a post-effective amendment on Form B (§ 239.5 of this chapter), it meets the eligibility requirements to file that post-effective amendment on Form B:

(1) Its post-effective amendment filed on Form B shall become effective in accordance with the registrant's designation on the front page of Form B either:

(i) Upon filing with the Commission;

(ii) On the date set forth on the front page of Form B; or

(iii) As specified in a later post-effective amendment to the Form; and

(2) The effective date of the registration statement shall be deemed to be the effective date of the post-effective amendment.

(c) If a registrant meets the eligibility requirement of Form S–8 (§ 239.16b of this chapter), its post-effective amendment filed on Form S–8:

(1) Shall become effective upon filing with the Commission; and

(2) The effective date of the registration statement shall be deemed to be the filing date of the post-effective amendment.

70. By revising the first sentence of paragraph (a) of § 230.471 and adding paragraph (c) to read as follows:

§ 230.471 Signatures to amendments.

(a) Except as provided in paragraph (c) of this section or § 230.478, every amendment to a registration statement shall be signed by the persons specified in Section 6(a) of the Act (15 U.S.C. 77f(a)). * * *

* * * * *

(c)(1) All persons who sign a registration statement on Form B (§ 239.5 of this chapter) will be deemed to have signed a post-effective amendment to that registration statement where an authorized representative of the registrant signs that amendment if all the following are true:

(i) The registration statement relates to an offering under § 230.415(a)(1)(x);

(ii) The person did not grant a power of attorney for another person to sign a post-effective amendment; and

(iii) The post-effective amendment does not expressly state to the contrary.

(2) Despite paragraph (c)(2) of this section, if any person who signed the registration statement no longer acts in the capacity in which such person signed the registration statement, the registrant must provide the signature of the person who currently acts in that capacity in the post-effective amendment.

71. By revising paragraph (e) of § 230.472 to read as follows:

§ 230.472 Filing of amendments; number of copies.

* * * * *

(e) Notwithstanding any other provision of this section, if a registrant files a post-effective amendment pursuant to § 230.462(b), § 230.462(e) or § 230.462(f) by facsimile pursuant to § 230.110(d), the registrant need file only one complete copy of the registration statement with the Commission. That copy must include all exhibits and other documents that are a part of it. That copy need not be bound. It may include facsimile versions of signatures in accordance with § 230.402(e).

§ 230.473 [Amended]

72. By amending § 230.473 by removing in paragraph (d) the words ''Form S–3, F–2 or F–3 (§ 239.13, § 239.32 or § 239.33 of this chapter) relating to a dividend or interest reinvestment plan; or on Form S–4 (§ 239.25 of this chapter) complying with General Instruction G of that Form'' and adding, in their place, the words ''Form B (§ 239.5 of this chapter) or on Form A (§ 239.4 of this chapter) complying with General Instruction VIII. of that Form''.

§ 230.475a [Removed]

73. By removing § 230.475a.

74. By amending § 230.477 by revising paragraphs (b) and (c); and by adding paragraph (d) to read as follows:

§ 230.477 Withdrawal of registration statement or amendment.

* * * * *

(b) Any application for withdrawal of an entire registration statement will be deemed granted upon filing of the application with the Commission if made prior to the effective date.

(c) The registrant must sign any application for withdrawal and must state fully in it the grounds on which it is making the application. If the application for withdrawal is being made in anticipation of reliance on § 230.152(c), the registrant must state in the application that no securities were sold in connection with the offering and that it may undertake a subsequent private offering in reliance on § 230.152.

(d) Any withdrawn document will remain in the Commission's files, but an indication of the date of withdrawal will be included in the file for the withdrawn document along with a notation that it was withdrawn upon the request of the registrant with the consent of the Commission.

75. To add § 230.493A to read as follows:

§ 230.493A Filing of securities term sheet in certain offerings registered on Schedule B.

Foreign government issuers must file with the Commission any securities term sheet they deliver pursuant to § 230.172(a) as part of the prospectus in the related effective registration statement on Schedule B (15 U.S.C. 77aa). They must file the securities term sheet no later than the date of the first sale in the offering.

76. By adding § 230.499 to read as follows:

§ 230.499 Concurrent registration under the Exchange Act on Schedule B.

(a) Any issuer filing a registration statement pursuant to Schedule B (15 U.S.C. 77aa) also may use that Schedule to register concurrently under Section 12(b) or 12(g) of the Exchange Act (15 U.S.C. 78l(b) or (g)). The issuer may register any class of securities that is the subject of the offering it is registering under the Securities Act. To register, the issuer must check the appropriate box(es) and identify the class(es) of securities it is registering under Section 12(b) or 12(g) and the exchange or market for those securities. The issuer also must include the following paragraph and table on the facing page of the Schedule B registration statement:

The issuer is using Schedule B to register concurrently under Section 12(b) or 12(g) of the Exchange Act one or more classes of securities that are the subject of the offering being registered under the Securities Act. The issuer has checked the appropriate box(es) and identified the class(es) of securities it is registering under Section 12(b) or 12(g) on the table below:

☐Securities being registered pursuant to Exchange Act Section 12(b):

Title of each class:

_____

_____

Name of exchange on which listed:

_____

_____

☐Securities being registered pursuant to Exchange Act Section 12(g):

Title of each class:

_____

_____

Name of market on which quoted:

_____

_____

(b) Registration on Schedule B of a class of securities under Exchange Act Section 12(b) shall become effective upon the later of:

(1) Receipt by the Commission of certification from the national securities exchange listed on the cover of the Schedule B that the securities have been approved for listing; or (2) Effectiveness of the Schedule B under the Securities Act.

(c) Registration on this Schedule B of a class of securities under Exchange Act Section 12(g) shall become effective automatically upon the earlier of:

(1) 60 days after the initial filing of this Schedule B; or

(2) The effectiveness of this Schedule B.

(d) The issuer must file at least one complete, signed copy of the registration statement on Schedule B with each exchange or market identified on the cover of the Schedule B.

77. By amending § 230.502 by removing in paragraph (b)(2)(ii)(B) the words ''Form S–1 (§ 239.11 of this chapter)'' and adding, in their place, the words ''Form A (§ 239.4 of this chapter)'', by removing ''SB–2 (§ 239.10 of this chapter) or S–11 (§ 239.18 of this chapter)'' and adding, in their place, the words ''or SB–2 (§ 239.10 of this chapter)'', by removing in paragraph (b)(2)(ii)(D) the words ''Form F–1 (§ 239.31 of this chapter)'' and adding, in their place, the words ''Form A (§ 239.4 of this chapter)'' by removing in paragraph (c)(2) the words ''with § 230.135c'' and adding, in their place, the words ''with § 230.135''; revising the Note heading following paragraph (a) and adding a sentence at the end of that Note to read as follows:

§ 230.502 General conditions to be met.

* * * * *

(a) *Integration.* * * *

Note to Paragraph (a). * * * *See also* § 230.152 which provides safe harbors from integration of public offerings and private offerings made around the same time, including offerings under § 230.506.

* * * * *

78. By revising paragraph (a) of § 230.504 to read as follows:

§ 230.504 Exemption for limited offerings and sales of securities not exceeding $1,000,000.

(a) *Exemption.* Offers and sales of securities that satisfy the conditions in paragraph (b) of this section shall be exempt from the provisions of Section 5 of the Act (15 U.S.C. 77e) under Section 3(b) of the Act (15 U.S.C. 77c(b)) if the issuer is not:

(1) An investment company;

(2) A development stage company that either:

(i) Has no specific business plan or purpose; or

(ii) Has indicated that its business plan is to engage in a merger or acquisition with an unidentified entity or entities; or

(3) Subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), except that an issuer may be subject to those requirements in connection with the offer and sale of securities underlying convertible securities or warrants if:

(i) The issuer offered and sold the convertible securities or warrants in compliance with this section while it was not subject to those requirements; and

(ii) The issuer offered the securities underlying the convertible securities or warrants in compliance with this section prior to becoming subject to those requirements.

* * * * *

79. By amending § 230.902 by removing the word ''and'' at the end of paragraph (c)(3)(v)(B); by revising paragraph (c)(3)(vi); by removing the period at the end of paragraph (c)(3)(vii) and adding in its place ''; and''; and by adding paragraphs (c)(3)(viii) and (h)(4) to read as follows:

§ 230.902 Definitions.

* * * * *

(c) *Directed selling efforts.* * * *

(3) * * *

(vi) Publication by an issuer of a notice in accordance with § 230.135;

* * * * *

(viii) Publication or distribution of information, an opinion or a recommendation by a broker or dealer in accordance with § 230.138 or § 230.139.

* * * * *

(h) *Offshore transaction.* * * *

(4) Notwithstanding paragraph (h)(1) of this section, publication or distribution of information, an opinion or a recommendation in accordance with § 230.138 or § 230.139 by a broker or dealer at or around the time of an offering in reliance on Regulation S (§§ 230.901 through 230.904) will not cause the transaction to fail to be an offshore transaction as defined in this section.

* * * * *

PART 232—REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILERS

80. By revising the authority citation for part 232 to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 77z-3, 78c(b), 78d, 78l, 78m, 78n, 78o(d), 78w(a), 78ll(d), 78mm, 79t(a), 80a-8, 80a-29, 80a-30 and 80a-37.

81. By amending § 232.13 by revising paragraphs (a)(1)(ii), (a)(1)(iii) and (a)(3) before the Note; and by adding paragraph (a)(1)(iv) to read as follows:

§ 232.13 Date of filing; adjustment of filing date.

(a) * * *

(1) * * *

(ii) The filing conforms to the applicable technical standards regarding electronic format in the EDGAR Filer Manual;

(iii) With respect to Securities Act filings, including filings under Section 24(f) of the Investment Company Act (15 U.S.C. 80a-24(f)), the required fee payment:

(A) For registration statements filed in accordance with Forms SB–1, SB–2 or SB–3 (§§ 239.9, 239.10 or 239.11 of this chapter) is made no later than the earlier of:

(*1*) The date on which the small business issuer requests, under § 230.461 of this chapter, that the Commission accelerate the effective date of its registration statement; or

(*2*) The date on which the small business issuer files an amendment to the registration statement that contains the statement set forth in § 230.473(b) of this chapter.

(B) For registration statements other than those filed in accordance with Forms SB–1, SB–2 or SB–3 is confirmed upon filing; and

(iv) Notwithstanding paragraph (a)(1)(iii) of this section, the failure to pay an insignificant amount of the fee at the required time, as a result of a bona fide error, shall not affect the filing.

(2) * * *

(3) Notwithstanding paragraph (a)(2) of this section, any registration statement or any post-effective amendment thereto filed pursuant to §§ 230.462(b), 230.462(e) or 230.462(f) of this chapter by direct transmission commencing on or before 10:00 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect, shall be deemed filed on the same business day.

* * * * *

82. By amending § 232.101 by revising the Note following paragraph (a)(3); by removing paragraph (c)(7); and by redesignating paragraphs (c)(8), (c)(9), (c)(10), (c)(11), (c)(12), (c)(13), (c)(14), (c)(15), (c)(16) and (c)(17) as paragraphs (c)(7), (c)(8), (c)(9), (c)(10), (c)(11), (c)(12), (c)(13), (c)(14), (c)(15) and (c)(16) to read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(3) * * *

Note to Paragraph (a): Failure to submit a required electronic filing pursuant to paragraph (a) of this section, as well as any required confirming electronic copy of a paper filing made in reliance on a hardship exemption as provided in §§ 232.201 and 232.202, will result in the ineligibility to use Form B and S–8 (§§ 239.5 and 239.16b of this chapter), restrict incorporation by reference of the document submitted in paper (*see* § 232.303), and toll certain time periods associated with tender offers (*see* §§ 240.13e-4(f)(12) and 240.14e-1(e) of this chapter).

* * * * *

83. By amending § 232.201 revising Note 1 following paragraph (b) to read as follows:

§ 232.201 Temporary hardship exemption.

* * * * *

(b) * * *

Note 1 to Paragraph (b): Failure to submit the confirming electronic copy of a paper filing made in reliance on a temporary hardship exemption, as required in paragraph (b) of this section, will result in the ineligibility to use Form B and S–8 (§§ 239.5 and 239.16b of this chapter), restrict incorporation by reference of the document submitted in paper (*see* § 232.303), and toll certain time periods associated with tender offers (*see* §§ 240.13e-4(f)(12) and 240.14e-1(e) of this chapter).

* * * * *

84. By amending § 232.202 by revising Note 3 following paragraph (d) to read as follows:

§ 232.202 Continuing hardship exemption.

* * * * *

(d) * * *

Note: 3 Failure to submit the confirming electronic copy of a paper filing made in reliance on a continuing hardship exemption granted pursuant to paragraph (d) of this section will result in the ineligibility to use Forms B and S–8 (§§ 239.5 and 239.16b of this chapter), restrict incorporation by reference of the document submitted in paper (*see* § 232.303), and toll certain time periods associated with tender offers (*see* §§ 240.13e-4(f)(12) and 240.14e-1(e) of this chapter).

85. By adding a sentence at the end of paragraph (a) of § 232.304 to read as follows:

§ 232.304 Graphic and image material.

(a) * * * Additionally, five copies of any prospectus filed in accordance with § 230.425 that contains graphic, imagine or audio material that cannot be reproduced in the electronic filing must be filed with the Commission in its original form.

* * * * *

§ 232.311 [Amended]

86. By amending § 232.311 by removing paragraph (i).

87. By amending § 232.401 by revising the last sentence of the Note to read as follows:

§ 232.401 Financial Data Schedule.

* * * * *

Note: * * * Further, electronic filers that have not filed a required Financial Data Schedule will be ineligible to use Form B and Form S–8 (§§ 239.5 and 239.16b of this chapter).

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

88. By revising the general authority citation for part 239 to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 78mm, 78u-5, 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a-8, 80a-24, 80a-29, 80a-30 and 80a-37, unless otherwise noted.

* * * * *

§§ 239.11, 239.12, 239.13, 239.18, 239.25, 239.31, 239.32, 239.33, 239.34 and Forms S–1, S–2, S–3, S–4, S–11, F–1, F–2, F–3, and F–4 [Removed and Reserved]

89. By removing and reserving § 239.11, § 239.12, § 239.13, § 239.25, § 239.18, § 239.31, § 239.32, § 239.33, § 239.34, and by removing Forms S–1, S–2, S–3, S–4, S–11, F–1, F–2, F–3, and F–4.

90. By adding § 239.4 and Form A to read as follows:

§ 239.4 Form A, for registration under the Securities Act of 1933 and optional concurrent registration under the Securities Exchange Act of 1934.

(a) This form shall be used for registration under the Securities Act of 1933 (15 U.S.C. 77a *et. seq.*) (''Securities Act'') of any offering for which no other form is authorized or prescribed. Therefore, for example, this form shall not be used for:

(1) Any offering for which Form C or Form SB–3 (§ 239.6 or 239.11) is authorized; or

(2) Any offering by a foreign government or a political subdivision thereof for which Schedule B (15 U.S.C. 77aa) is authorized.

(b) A registrant also may use this form to register concurrently under Section 12(b) or 12(g) of the Securities Exchange Act of 1934 (''Exchange Act''). It may register under the Exchange Act any class of securities that are the subject of the offering it is registering under the Securities Act. To register, the registrant must check the appropriate box(es) on the cover page of this form and identify which class(es) of securities it is registering under Section 12(b) or 12(g) of the Exchange Act.

Note: The text of Form A will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form A—Registration Statement Under The Securities Act of 1933 [and Optional Registration Pursuant to Section 12(b) or 12(g) of The Securities Exchange Act of 1934]

(Exact name of Registrant as specified in its charter)

(Translation of Registrant's name into English, if applicable)

(State or other jurisdiction of incorporation or organization)

(I.R.S. Employer Identification Number)

(Address and telephone number of Registrant's principal executive offices)

(Name, address and telephone number of Registrant's agent for service)

(Web Site Address, if any)

(E-mail Address, if any)

* * * * *

Approximate date of commencement of sales

If you are a foreign private issuer as defined in Securities Act Rule 405, check the following box. [ ]

If you are not a foreign private issuer as defined in Securities Act Rule 405, check the following box. [ ]

If any of the securities being registered on this Form are to be offered pursuant to Securities Act Rule 415, check the following box. [ ] _____

If you are filing this Form to register additional securities for an offering in accordance with Securities Act Rule 462(b), check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If this Form is a post-effective amendment filed in accordance with Securities Act Rule 462(c) to re-start the 15-business-day period during which pricing must occur under Securities Act Rule 430A(a)(3) or to reflect a non-substantive change from, or addition to, the prospectus, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If this Form is a post-effective amendment filed in accordance with Rule 462(d) under the Securities Act solely to add exhibits, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If you are using this Form to register concurrently under Section 12(b) or 12(g) of the Exchange Act any class of securities that are the subject of the offering you are registering under the Securities Act, check the appropriate box and provide the information indicated below:

[ ] Securities being registered pursuant to Exchange Act Section 12(b):

Title of each class:

Name of exchange on which listed:

This Section 12(b) registration will become effective upon the later of (1) effectiveness of this Form A; or (2) receipt by the Commission of certification from the national securities exchange listed above.

[ ] Securities being registered pursuant to Exchange Act Section 12(g):

Title of each class:

Name of market on which quoted:

Section 12(g) registration statements become effective automatically 60 days after filing. You may check box 1 or 2, below, to shorten this time period. Also, you may check box 3, below, to preserve your option to shorten this time period. If you check box 3 and do not file a later amendment, the registration of the class of securities listed above will become effective 60 days after filing of this Form A.

We propose that this filing become effective (check appropriate box):

1. [ ] upon filing with the Commission. By checking this box, the undersigned are certifying compliance with the delivery requirements of Securities Act Rule 172(b) in connection with the offering. In addition, in checking this box, any underwriter in connection with the offering also is requesting that the registration statement become effective upon filing.

2. [ ] on _____ at _____. By checking this box, the undersigned are certifying compliance with the delivery requirements of Securities Act Rule 172(b) in connection with the offering. In addition, in checking this box, any underwriter in connection with the offering also is requesting that the registration statement become effective upon the date and time designated.

3. [ ] as specified in a later amendment to this Form.

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be registered	Amount to be registered	Proposed maximum offering price per unit	Proposed maximum aggregate offering price	Amount of registration fee

Notes to the Fee Table:

1. Set forth any explanatory details relating to the fee table in footnotes to the table.
2. If the basis for calculating the fee is not evident from the information presented in this table, refer to the applicable provisions of Securities Act Rule 457 in a footnote.
3. If the fee is calculated under Rule 457(o), the ''Amount to be registered'' and the ''Proposed maximum offering price per unit'' need not appear in this table.
4. If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

General Instructions

I. Rules as to Use of Form A

A. This Form shall be used for registration under the Securities Act of 1933 (''Securities Act'') of any offering for which no other form is authorized or prescribed. Therefore, for example, this Form shall not be used for:

1. any offering for which Form C or Form SB–3 is authorized; or

2. any offering by a foreign government or a political subdivision thereof for which Schedule B is authorized.

B. A registrant also may use this Form to register concurrently under Section 12(b) or 12(g) of the Securities Exchange Act of 1934 (''Exchange Act''). It may register under the Exchange Act any class of securities that are the subject of the offering it is registering under the Securities Act. To register, the

registrant must check the appropriate box(es) on the cover page of this Form and identify which class(es) of securities it is registering under Section 12(b) or 12(g).

II. Registrant Information—Incorporation by Reference

A. *Registrants Eligible to Incorporate by Reference.* Unless otherwise provided in General Instruction II.B., a registrant may comply with Items 12 and 13, instead of Item 14, if it meets the following requirements:

1. the registrant:

(a) has a class of securities registered pursuant to Section 12(b) or 12(g) of the Exchange Act; or

(b) is required to file reports pursuant to Section 15(d) of the Exchange Act;

2. for a period of at least twenty-four full calendar months and any portion of a month immediately preceding the date of filing this Form, the registrant:

(a) has been subject to the requirements of Section 12 or Section 15(d) of the Exchange Act;

(b) has filed all material it was required to file pursuant to Sections 13, 14 and 15(d) of the Exchange Act; and

(c) has filed two annual reports if its public float is less than $75 million.

(3) for a period of at least twelve full calendar months and any portion of a month immediately preceding the date of filing this Form, the registrant has filed in a timely manner all materials it was required to file pursuant to Sections 13, 14 and 15(d) of the Exchange Act.

Note to General Instruction II.A.2.(c):

If a registrant filed a Form 12b–25 to delay filing any report (or portion of a report) during that time period, it must have filed the related report (or portion) within the time prescribed by Rule 12b–25.

B. *Registrants Ineligible to Incorporate by Reference and Rely on Automatic Effectiveness.* A registrant must comply with Item 14 and is ineligible to rely on Securities Act Rule 462(f)(1)(iv) if it fails to meet any of the conditions of General Instruction II.A. or any of the following is true:

1. within 2 years before the date of filing this Form, the registrant was a development stage company that either:

(a) had no specific business plan or purpose; or

(b) indicated that its business plan was to engage in a merger or acquisition with an unidentified entity or entities;

2. within two years before the date of filing this Form, the registrant was a shell entity having few or no assets, earnings or operations;

3. the registrant is registering an offering of ''penny stock'' as defined in Exchange Act Rule 3a51–1 or has issued it in the two years prior to the date of filing this Form;

4. the registrant or any of its subsidiaries has, since the end of the last fiscal year for which the registrant included certified financial statements in an Exchange Act report:

(a) failed to pay any dividend or sinking fund installment on preferred stock;

(b) caused any material delinquency with respect to preferred stock that was not cured within 30 days; or

(c) defaulted on any payment of principal, interest, a sinking fund installment, a purchase fund installment or any other installment on indebtedness, or defaulted on any rental on a long-term lease, if such debt and lease defaults in the aggregate are material;

5. the independent accountant that examined the registrant's financial statements for the most recent fiscal year expressed in its report substantial doubt about the registrant's ability to continue as a going concern;

6. within three years before the date of filing, a petition under the federal bankruptcy laws or any state insolvency law was filed by or against the registrant, or a court appointed a receiver, fiscal agent or similar officer with respect to the business or property of the registrant. If true, however, this would not disqualify the registrant if it has filed an annual report with audited financial statements subsequent to its emergence from that bankruptcy, insolvency or receivership process;

7. within five years before the date of filing, the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or underwriter was convicted of any felony or misdemeanor described in clauses (i) through (iv) of Section 15(b)(4)(B) of the Exchange Act;

8. within five years before the date of filing, the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or underwriter was made the subject of a judicial or administrative decree or order arising out of a governmental action that:

(a) prohibits future violations of any antifraud provision of the securities laws or Section 5 of the Securities Act;

(b) requires that the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or underwriter cease and desist from violating any antifraud provision of the securities laws or from violating Section 5 of the Securities Act; or

(c) determines that the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or underwriter violated any antifraud provision of the securities laws or Section 5 of the Securities Act;

9. the registrant is a ''small business issuer,'' as defined in Securities Act Rule 405, that provided the ''Information Required in Annual Report of Transitional Small Business Issuers'' in its most recent annual report on Form 10–KSB; and

10. the registrant would incorporate by reference into its Form A registration statement a report under the Exchange Act that:

(a) the Commission, after review, requested that the registrant amend in accordance with its comments; and

(b) either the registrant did not amend the report or, in the Commission's judgment, did not amend the report in accordance with the Commission's comments.

C. *Successor Registrants.* We will deem a successor registrant to have satisfied the eligibility requirements of General Instruction II.A. of this Form if it satisfies either of the following requirements:

1.(a) taken together, the registrant and its predecessor(s) meet the eligibility requirements in General Instruction II.A. of this Form;

(b) the primary purpose of the succession was to change the state or other jurisdiction of incorporation of the predecessor(s) or to form a holding company for the predecessor(s); and

(c) the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

2. the predecessor(s) met the eligibility requirements of General Instruction II.A. of this Form at the time of succession and the registrant has continued to meet them since the succession.

III. Domestic and Foreign Registrants

A. *Definitions.*

1. As used in this Form, ''U.S. registrant'' includes all registrants other than foreign governments and foreign private issuers.

2. As used in this Form, ''foreign registrant'' includes only registrants that are foreign private issuers.

3. ''Foreign government'' and ''foreign private issuer'' are defined in Rule 405 of Regulation C.

B. *Information Required.*

1. U.S. registrants must provide all information required by the Items of this Form except where the Item expressly identifies the requirement as applying only to foreign registrants.

2. Foreign registrants must provide all information required by the Items of this Form except where the Item expressly identifies the requirement as applying only to U.S. registrants.

IV. Free Writing Prospectus Information

You should read Securities Act Rule 165. That rule permits a Form A registrant and those acting on its behalf to use ''free writing'' offering materials that do not meet the requirements of Section 10 of the Act. Those offering materials may be used after the registrant has filed with the Commission a registration statement containing the Section 10 prospectus. If you use a prospectus in reliance on that Rule, you must file it when required to do so by Securities Act Rule 425.

V. Securities Act Rules and Regulations

A. *Prospectus delivery.* You should read Securities Act Rule 172. That rule describes prospectus delivery obligations applicable to offerings registered on this Form.

B. *Preparation and filing of Form.* You should read the other rules and regulations under the Securities Act (Part 230 of Title 17 of the Code of Federal Regulations), particularly Regulation C, Regulation S–K and Form 20–F. Regulation C contains general requirements regarding the preparation and filing of registration statements. Regulation S–K contains non-financial statement disclosure requirements applicable to registration statements. Form 20–F also contains non-financial statement disclosure requirements, but they apply only to foreign private issuers.

C. *Blank check companies.* If the offering registered on this Form relates to a blank check company, you should read Securities Act Rule 419. Among other things, that Rule contains additional disclosure requirements.

VI. Foreign Registrant Financial Statements

A. A foreign registrant must reconcile its financial statements included in or incorporated into this registration statement. It must reconcile them to Item 18 of Form 20–F, except as otherwise permitted in paragraph B of this General Instruction.

B. A foreign registrant need only reconcile its financial statements to Item 17 of Form 20–F if:

1. it is registering an offering of its non-convertible investment grade securities. A security is ''investment grade'' if, at the time of sale:

(a) it is rated by at least one nationally recognized statistical rating organization (''NRSRO'') (as that term is used in Exchange Act Rule 15c3–1(c)(2)(vi)(F)) in one of the generic rating categories that signify investment grade; and

(b) no other NRSRO rating the security has placed it in a category that does not signify investment grade;

2. it is registering an offering of its securities to be issued upon the exercise of outstanding rights granted pro rata to all existing security holders of the class of securities to which the rights attach;

3. it is registering an offering of its securities pursuant to a dividend or interest reinvestment plan;

4. it is registering an offering of its securities upon the conversion of outstanding convertible securities that it (or its affiliate) issued; or

5. it is registering an offering of its securities upon the exercise of outstanding transferrable warrants that it (or its affiliate) issued.

C. Notwithstanding paragraphs B.2., B.3., B.4. and B.5. of this General Instruction, if securities are to be offered or sold in a standby underwriting in the United States or by similar arrangement, the registrant must reconcile its financial statements to Item 18 of Form 20–F.

VII. Roll-Up Transactions

A. The registrant must comply with the disclosure provisions of Subpart 900 of Regulation S–K if it registers a roll-up transaction (as defined in Item 901(c) of Regulation S-K) on this Form, even if the registrant is a ''small business issuer'' as defined in Securities Act Rule 405. To the extent that the disclosure requirements of Subpart 900 are inconsistent with the disclosure requirements of this Form, the requirements of Subpart 900 control.

B. If the registrant registers a roll-up transaction on this Form, special prospectus delivery requirements apply. *See* Securities Act Rule 172(e).

C. You should read the proxy rules and Rule 14e–7 of the tender offer rules. They contain provisions specifically applicable to roll-up transactions. Those provisions apply whether or not the entities involved have registered securities under Section 12 of the Exchange Act.

VIII. Effectiveness of Registration Statement and Post-Effective Amendments

A.1. Registration statements on this Form will become effective automatically pursuant to Securities Act Rule 462(f)(1)(iv) on the date designated by the registrant on the front page of the Form if:

(i) the registrant meets the requirements of General Instruction II.A. or II.C. and is not disqualified as specified in General Instruction II.B.; and

(A) the registrant has a public float of $75 million or more; or

(B) the annual report filed by the registrant for its most recently completed fiscal year end was reviewed by the staff of the Commission, was amended in accordance with the staff's comments (if so requested) and is incorporated by reference into the Form A.

2. ''Public float'' means the aggregate market value of the registrant's outstanding voting and non-voting common equity securities held by persons other than affiliates of the registrant, as of the end of the registrant's last fiscal quarter.

3. Under Rule 462(f)(1)(iv), registrants may designate that the Form will become effective either:

(i) upon filing with the Commission;

(ii) at the date and time as set forth on the front page of the Form;

(iii) as specified in a later amendment to the Form.

4. Before filing this Form in reliance on Rule 462(f)(1)(iv), registrants must obtain the concurrence of the underwriter with the designated effective date.

5. Registration statements on this Form filed in reliance on Securities Act Rule 462(f)(1)(iv) become public upon filing and are not reviewed by the Commission staff prior to the effective date designated by the issuer. Confidential treatment requests with respect to information that the registrant is required to file in this Form may, however, be reviewed by the staff. As a result, when the issuer plans to have the Form become effective upon filing or fewer than 20 days thereafter, it must furnish to the staff in advance of filing, any request it wishes to make for confidential treatment of information relating to the Form. *See* Securities Act Rule 406. The Commission must act on the confidential treatment request before this Form becomes effective.

B. Any post-effective amendment filed on this Form by a registrant eligible to designate its effective date as described in General Instruction VIII.A. also shall become effective as designated by the registrant. *See* General Instruction VIII.A.2. and Securities Act Rule 464.

IX. Registration of Additional Securities.

A. Under certain circumstances, the registrant may increase the size of an offering after the effective date through filing a short-form registration statement under Securities Act Rule 462(b). A Rule 462(b) registration statement may include only the following:

1. the facing page;

2. a statement that the earlier registration statement, identified by file number, is incorporated by reference;

3. any required opinions and consents;

4. the signature page; and

5. any price-related information omitted from the earlier registration statement in reliance on Securities Act Rule 430A, if the registrant so chooses.

B. The information contained in a Rule 462(b) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) registration statement.

C. The registrant may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) registration statement if:

1. the opinion or consent expressly allows that incorporation; and

2. the opinion or consent also relates to the Rule 462(b) registration statement.

Note to General Instruction IX.C.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

X. Concurrent Registration of Securities under the Exchange Act.

A. Registration on this Form of a class of securities under Exchange Act Section 12(b) shall become effective upon the later of:

1. receipt by the Commission of certification from the national securities exchange listed on the cover of this Form that the securities have been approved for listing; or

2. effectiveness of this registration statement.

B. Registration on this Form of a class of securities under Exchange Act Section 12(g) shall become effective upon the effectiveness of this registration statement.

C. If the registrant is required to file an annual report under Exchange Act Section 15(d) for its last fiscal year, it must file that annual report within the time period specified in the appropriate annual report form even if the Exchange Act registration becomes effective before the annual report is due.

D. The registrant must file at least one complete, signed copy of the registration statement with each exchange or market identified on the cover of this Form.

Part I—Information Required in the Prospectus

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

(a) Provide the information required by Item 501 of Regulation S–K.

(b) If the registrant is a real estate entity as defined in Item 1101 of Regulation S–K, provide the information required by Item 1102 of Regulation S–K.

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

Provide the information required by Item 502 of Regulation S–K.

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

(a) Provide the information required by Item 503 of Regulation S–K.

(b) If the registrant is a real estate entity as defined by Item 1101 of Regulation S–K,

provide the information required by Item 1103 of Regulation S–K.

Note to Item 3.

Information is required by this Item only to the extent that it is not already incorporated by reference from an Exchange Act report.

Item 4. Use of Proceeds

Provide the information required by Item 504 of Regulation S–K.

Item 5. Determination of Offering Price

Provide the information required by Item 505 of Regulation S–K.

Item 6. Dilution

Provide the information required by Item 506 of Regulation S–K.

Item 7. Selling Security Holders

Provide the information required by Item 507 of Regulation S–K.

Item 8. Plan of Distribution

Provide the information required by Item 508 of Regulation S–K.

Item 9. Description of Securities

Provide the information required by Item 202 of Regulation S–K.

Item 10. Interests of Named Experts and Counsel

Provide the information required by Item 509 of Regulation S–K.

Item 11. Real Estate Entities

If the registrant is a real estate entity as defined in Item 1101 of Regulation S–K, provide the information required by Item 1104 and Items 1108 through Item 1112 of Regulation S–K.

Item 12. Information Required for Seasoned Form A Companies

If the registrant meets the requirements of General Instruction II. of this Form and elects to comply with this Item and Item 13 (instead of Item 14), it must do the following:

(a) *Annual report.* Deliver together with the prospectus a copy of its latest annual report filed pursuant to Section 13(a) or 15(d) of the Exchange Act.

(b) *Quarterly information.* U.S. registrants: Provide the information required by Part I of Form 10–Q (or Form 10–QSB, if applicable) for the most recent fiscal quarter following the fiscal year covered by the annual report delivered pursuant to this Item. The registrant must:

(1) include that information in the prospectus; or (2) deliver together with the prospectus a copy of its latest Form 10–Q (or 10–QSB);

Notes to Items 12(a) and 12(b).

1. Indicate in the prospectus that it is accompanied by the reports that the registrant sends pursuant to paragraphs (a) and (b) of this Item.

2. If the registrant incorporates by reference portions of any other document into a report it delivers under this Item, it also must deliver the incorporated portions with it.

3. If the registrant's Form 10–Q (or 10–QSB) for the most recent quarter is not due to be filed prior to the effective date of the registration statement, it may provide the information for the previous fiscal quarter to satisfy Item 12(b). For this purpose, the due date is calculated without the extension provided by Exchange Act Rule 12b–25.

(c) *Current financial statements.* Foreign registrants: If the financial statements you incorporate by reference in accordance with Item 13 of this Form are not sufficiently current to comply with Rule 3–19 of Regulation S–X, you must provide financial statements necessary to comply with that Rule. You must do so through one of the following means:

(1) include that information in the prospectus; or

(2) include that information in an amended or a newly filed Exchange Act report, disclose in the prospectus that you have done so, incorporate that report by reference into the effective registration statement, and deliver it together with the prospectus.

(d) *Other financial information.* If not reflected in the registrant's annual report delivered to investors in accordance with paragraph (a) of this Item, provide:

(1) financial information required by Rule 3–05 and Article 11 of Regulation S–X with respect to transactions other than the one being registered;

(2) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S–X where:

(i) after the end of its most recent fiscal year, the registrant consummated one or more business combinations accounted for by the pooling of interest method of accounting; and

(ii) the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11–01(b) or Regulation S–X;

(3) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S–X, if a change in accounting principles or correction of an error required a material retroactive restatement of financial statements; or

(4) any financial information required because of a material disposition of assets outside the normal course of business. *See* Item 2 of Form 8–K and Instruction 3 to Rule 11–02(b) of Regulation S–X.

Instructions to Item 12(d).

1. You may incorporate by reference into the effective registration statement the information required by paragraph (d) of Item 12. If you incorporate it, you must deliver it together with the prospectus.

2. Foreign registrants: You should read Rules 4–01(a)(2) and 10–01 of Regulation S–X.

(e) *Material changes.* Describe any material change in the registrant's affairs that:

(1) has occurred since the end of the fiscal year covered by the annual report delivered pursuant to this Item; and

(2) the registrant has not described in an Exchange Act report delivered together with the prospectus in accordance with this Item.

Instructions to Item 12.

1. The registrant must deliver information required by this Item with the first prospectus it delivers. It need not deliver that information with any subsequent prospectus sent to the same person.

2. Any reports the registrant delivers together with the prospectus pursuant to this Item must be delivered without charge to the investor.

3. *Small business issuers.* Small business issuers may provide the information required by Item 11 of Form SB–2, instead of the information required by this Item.

Item 13. Incorporation of Certain Information by Reference for Seasoned Form A Companies

If the registrant provides information in accordance with Item 12 of this Form:

(a) it must incorporate by reference into the prospectus that is part of the effective registration statement:

(1) its latest annual report filed in accordance with Section 13(a) or 15(d) of the Exchange Act that contains audited financial statements;

(2) any reports it filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of that fiscal year covered by its annual report incorporated in this Form.

Instructions to Item 13(a).

1. List in the prospectus that is part of the effective registration statement all documents filed prior to effectiveness that are incorporated by reference.

2. You should read Rule 439 regarding consent to the use of material incorporated by reference.

(b) You must set forth the following undertakings in the prospectus:

(1) that you will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any information that has been incorporated by reference in the prospectus but not delivered with the prospectus;

(2) that you will provide this information upon written or oral request;

(3) that you will provide this information at no cost to the requester;

(4) that you will send a copy of that information within one business day of any request for that information;

(5) that you will send those incorporated documents in a manner that should result in delivery within three business days; and

(6) that the name, address and telephone number to which the request for this information must be made is: [*fill in information*].

Instructions to Item 13(b).

1. The undertakings cover all documents incorporated by reference through the date of responding to the request.

2. If you send any of the information that is incorporated by reference in the prospectus to security holders, you also must send any exhibits that are specifically incorporated by reference in that information.

(c) In the prospectus, you must:

(1) identify the reports and other information that you file with the Commission;

(2) state that the public:

(i) may read and copy materials you file with the Commission at the Commission's Public Reference Room at 450 Fifth Street, N.W., Washington, D.C. 20549; and

(ii) may obtain information on the operation of the Public Reference Room by calling the Commission at 1–800-SEC–0330; and

(3) if you are an electronic filer, state that the Commission maintains an Internet web site that contains reports, proxy and

information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet web site address, if available.

Item 14. Information Required for All Other Companies

Any registrant that does not provide information in accordance with Items 12 and 13 must provide the following information:

(a) *Description of Business.*

(1) U.S. registrants: Item 101 of Regulation S-K.

(2) Foreign registrants: Item 1 of Form 20-F.

(b) *Description of Property.*

(1) U.S. registrants: Item 102 of Regulation S-K.

(2) Foreign registrants: Item 2 of Form 20-F.

(3) If the registrant is a real estate entity as defined in Item 1101 of Regulation S-K, provide the information required by Items 1105, 1106 and 1107 of Regulation S-K in lieu of the information required by paragraph (b)(i) or (b)(ii) of this Item.

(c) *Legal Proceedings.*

(1) U.S. registrants: Item 103 of Regulation S-K.

(2) Foreign registrants: Item 3 of Form 20-F.

(d) *Market Information.*

(1) U.S. registrants: If the registrant is offering common equity securities, Item 201 of Regulation S-K.

(2) Foreign registrants: Item 5 of Form 20-F.

(e) *Financial Statements.*

(1) U.S. registrants:

(i) financial statements meeting the requirements of Regulation S-X and any information required by Rule 3–05 and Article 11 of Regulation S-X;

(ii) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S-X where:

(A) after the end of its most recent fiscal year, the registrant consummated one or more business combinations accounted for by the pooling of interest method of accounting; and

(B) the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11–01(b) or Regulation S-X;

(iii) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S-X, if a change in accounting principles or correction of an error required a material retroactive restatement of financial statements; and

(iv) any financial information required because of a material disposition of assets outside the normal course of business. *See* Item 2 of Form 8-K and Instruction 3 to Rule 11–02(b) of Regulation S-X.

(2) Foreign registrants: Item 18 of Form 20-F except if you may comply with Item 17 of Form 20-F pursuant to General Instruction VI.

Instructions to Item 14(e).

1. File schedules required by Regulation S-X as ''Financial Statement Schedules'' pursuant to Item 20 of this Form.

2. Foreign registrants: Your financial statements must comply with Rule 3–19 of Regulation S-X. See also Rules 4–01(a)(2) and 10–01 of Regulation S-X.

(f) *Exchange Controls.*

(i) U.S. registrants: Not applicable.

(ii) Foreign registrants: Item 6 of Form 20-F.

(g) *Taxation.*

(i) U.S. registrants: Not applicable.

(ii) Foreign registrants: Item 7 of Form 20-F.

(h) *Selected Financial Data.*

(i) U.S. registrants: Item 301 of Regulation S-K.

(ii) Foreign registrants: Item 8 of Form 20-F.

(i) *Supplementary Financial Information.*

(i) U.S. registrants: Item 302 of Regulation S-K.

(ii) Foreign registrants: Not applicable.

(j) *Management's Discussion and Analysis.*

(i) U.S. registrants: Item 303 of Regulation S-K.

(ii) Foreign registrants: Item 9 of Form 20-F.

(k) *Changes In and Disagreements With Accountants.*

(i) U.S. registrants: Item 304 of Regulation S-K.

(ii) Foreign registrants: Not applicable.

(l) *Quantitative and Qualitative Disclosures of Market Risk.*

(i) U.S. registrants: Item 305 of Regulation S-K.

(ii) Foreign registrants: Item 9A of Form 20-F.

(m) *Directors and Executive Officers.*

(i) U.S. registrants: Item 401 of Regulation S-K.

(ii) Foreign registrants: Item 10 of Form 20-F.

(n) *Executive and Officer Compensation.*

(i) U.S. registrants: Item 402 of Regulation S–K.

(ii) Foreign registrants: Item 11 of Form 20–F.

(o) *Control of Registrant.*

(i) U.S. registrant: Item 403 of Regulation S–K.

(ii) Foreign registrant: Item 4 of Form 20–F.

(p) *Options Issued by Registrant.*

(i) U.S. registrants: Not applicable.

(ii) Foreign registrants: Item 12 of Form 20–F.

(q) *Interest of Management in Certain Transactions.*

(i) U.S. registrant: Item 404 of Regulation S–K.

(ii) Foreign registrant: Item 13 of Form 20–F.

Item 15. Disclosure of Commission Position on Indemnification for Securities Act Liabilities

Provide the information required by Item 510 of Regulation S–K.

Part II—Information Not Required in the Prospectus

Item 16. Other Expenses of Issuance and Distribution

Provide the information required by Item 511 of Regulation S–K.

Item 17. Indemnification of Directors and Officers

Provide the information required by Item 702 of Regulation S–K.

Item 18. Recent Sales of Unregistered Securities

Provide the information required by Item 701 of Regulation S–K, unless incorporated by reference.

Item 19. Sales to Special Parties

If the registrant is a real estate entity as defined in Item 1101 of Regulation S–K, provide the information required by Item 1113 of Regulation S–K.

Item 20. Exhibits

(a) Provide the information required by Item 601 of Regulation S–K.

(b) Provide the financial statement schedules required by Regulation S–X and Items 11 or 13 of this Form. List each schedule according to the number assigned to it in Regulation S–X.

Item 21. Undertakings

Provide the information required by Item 512 of Regulation S–K.

Signatures

The registrant certifies that it has duly caused and authorized the undersigned to sign this registration statement on its behalf. The undersigned certifies that he/she has read this registration statement and to his/her knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement and to their knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

Signature Instructions.

1. The following persons, or persons performing similar functions, must sign the registration statement:

(a) the registrant;

(b) its principal executive officer or officers;

(c) its principal financial officer;

(d) its controller or principal accounting officer; and

(e) at least the majority of its board of directors.

2. Where the registrant is a foreign issuer, its authorized representative in the United States also must sign the registration statement.

3. Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement.

4. Type or print the name and title of each person who signs the registration statement beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs the registration statement. *See* Securities Act Rule 402 concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

91. By adding § 239.5 and Form B to read as follows:

§ 239.5 Form B, for registration under the Securities Act of 1933 of certain offerings, and optional concurrent registration under the Securities Exchange Act of 1934.

(a) A registrant may use this Form for registration of securities offerings under the Securities Act of 1933 (15 U.S.C. 77a et seq.) (''Securities Act'') if:

(1) It is not a foreign government as defined in § 230.405 of this chapter;

(2) It meets all of the requirements of General Instruction I.B. of this Form, unless otherwise specified in General Instruction I.C.;

(3) The offering is one of those described in General Instruction I.C. of this Form and is not a roll-up transaction as defined in Item 901(c) of Regulation S-K (§ 229.901(c) of this chapter); and

(4) Form C (§ 230.6 of this chapter) is not authorized for registration of the offering.

(b) A registrant also may use this Form to register concurrently under Section 12(b) or 12(g) of the Securities Exchange Act of 1934 (''Exchange Act''). It may register under the Exchange Act any class of securities that are the subject of the offering it is registering under the Securities Act. To register, the registrant must check the appropriate box(es) on the cover page of this Form and identify which class(es) of securities it is registering under Section 12(b) or 12(g) of the Exchange Act.

Note: The text of Form B will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

FORM B—Registration Statement Under The Act of 1933 [And Optional Registration Pursuant to Section 12(b) or 12(g) of the Securities Exchange Act of 1934]

_____

(Exact name of Registrant as specified in its charter)

_____

(Translation of Registrant's name into English, if applicable)

_____

(State or other jurisdiction of incorporation or organization)

_____

(I.R.S. Employer Identification Number)

_____

(Address and telephone number of Registrant's principal executive offices)

_____

(Name, address and telephone number of Registrant's agent for service)

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

Approximate date of commencement of sales

_____

If you are a foreign private issuer as defined in Securities Act Rule 405, check the following box. [ ]

If you are not a foreign private issuer as defined in Securities Act Rule 405, check the following box. [ ]

If any of the securities being registered on this Form are to be offered pursuant to Securities Act Rule 415, check the following box. [ ] _____

If you are using this Form to register concurrently under Section 12(b) or 12(g) Exchange Act any class of securities that are the subject of the offering you are registering under the Securities Act, check the appropriate box and provide the information indicated below:

[ ] Securities being registered pursuant to Exchange Act Section 12(b):

Title of each class:

_____

_____

Name of exchange on which listed:

_____

_____

This Section 12(b) registration will become effective upon the later of (1) effectiveness of this Form B; or (2) receipt by the Commission of certification from the national securities exchange listed above.

[ ] Securities being registered pursuant to Exchange Act Section 12(g):

Title of each class:

_____

_____

Name of market on which quoted:

_____

_____

Section 12(g) registration statements become effective automatically 60 days after filing. You may check box 1 or 2, below, to shorten this time period. Also, you may check box 3, below, to preserve your option to shorten this time period. If you check box 3 and do not file a later amendment, the registration of the class of securities listed above will become effective 60 days after filing of this Form B.

We propose that this filing become effective (check appropriate box):

1. [ ] upon filing with the Commission. By checking this box, the undersigned are certifying compliance with the delivery requirements of Securities Act Rule 172(a) in connection with the offering. In addition, in checking this box, any underwriter in connection with the offering also is requesting that the registration statement become effective upon filing.

2. [ ] on (date) at (time) . By checking this box, the undersigned are certifying compliance with the delivery requirements of Securities Act Rule 172(a) in connection with the offering. In addition, in checking this box, any underwriter in connection with the offering also is requesting that the registration statement become effective upon the date and time designated.

3. [ ] as specified in a later amendment to this Form.

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be registered	Amount to be registered	Proposed maximum offering price per unit	Proposed maximum aggregate offering price	Amount of registration fee

A**Notes to the Fee Table:**

A1. Set forth any explanatory details relating to the fee table in footnotes to the table.

A2. If the basis for calculating the fee is not evident from the information presented in this table, refer to the applicable provisions of Securities Act Rule 457 in a footnote.

A3. If the fee is calculated under Rule 457(o), the ''Amount to be registered'' and the ''Proposed maximum offering price per unit'' need not appear in this table.

A4. If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

A5. Where two or more classes of securities are being registered pursuant to General Instruction I.C.1., I.C.2. or I.C.4. on a delayed or continuous basis pursuant to Securities Act Rule 415(a)(1)(x) and Rule 457(o), the registrant need only specify the ''Proposed maximum aggregate offering price'' and the ''Amount of registration fee'' for all classes listed in the fee table as a group, not for each individual class. The registrant must, however, list each of the classes of securities under the ''Title of each class of securities to be registered'' section of the fee table.

General Instructions

I. Eligibility Requirements for Form B

A. *General Requirement.*

1. A registrant may use this Form for registration of securities offerings under the Securities Act of 1933 if:

(a) it is not a foreign government as defined in Securities Act Rule 405;

(b) it meets all of the requirements of General Instruction I.B., unless otherwise specified in General Instruction I.C.;

(c) the offering is one of those described in General Instruction I.C. and is not a roll-up transaction as defined in Item 901(c) of Regulation S–K; and

(d) Form C is not authorized for registration of the offering.

2. A registrant also may use this Form to register concurrently under Section 12(b) or 12(g) of the Exchange Act. It may register under the Exchange Act any class of securities that are the subject of the offering it is registering under the Securities Act. To register, the registrant must check the appropriate box(es) on the cover page of this Form and identify which class(es) of securities it is registering under Section 12(b) or 12(g).

B. *Eligible Registrants.*

1. The registrant:

(a) has a class of securities registered pursuant to Section 12(b) or 12(g) of the Exchange Act; or

(b) is required to file reports pursuant to Section 15(d) of the Exchange Act.

2. For a period of at least 12 full calendar months and any portion of a month immediately preceding the date of filing this Form, the registrant:

(a) has been subject to the requirements of Section 12 or 15(d) of the Exchange Act;

(b) has filed all the material it was required to file pursuant to Sections 13, 14 and 15(d) of the Exchange Act;

(c) has filed in a timely manner all materials it was required to file pursuant to Sections 13, 14 and 15(d) of the Exchange Act.

Note to General Instruction I.B.2.(c): If a registrant filed a Form 12b–25 to delay filing any report (or a portion of a report) during that time period, it must have filed the related report (or portion) within the time prescribed by Exchange Act Rule 12b–25;

3. The registrant filed at least one annual report on Form 10–K or Form 20–F prior to the date of filing this Form;

4. Prior to the date of filing this Form, the registrant registered an offering of securities under the Securities Act other than on a Form B, Form F–7, Form F–8, Form F–9, Form F–10, Form F–80 or on any form that became effective upon filing. A registrant need not satisfy this requirement, however, if it became a publicly held entity through an unregistered spin-off transaction whereby its parent company distributed equity shares of the registrant on a pro rata basis to the parent's shareholders;

5. *Successor Registrants.* We will deem a successor registrant to have satisfied the eligibility requirements of General Instruction I.B.2, I.B.3. and I.B.4. of this Form if it satisfies either of the following requirements:

(a)(1) taken together, the registrant and its predecessor(s) meet the eligibility requirements in General Instructions I.B.2, I.B.3. and I.B.4.;

(2) the primary purpose of the succession was to change the state or other jurisdiction of incorporation of the predecessor(s) or to form a holding company for the predecessor(s); and

(3) the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor(s); or

(b) the predecessor met the eligibility requirements of General Instructions I.B.2, I.B.3. and I.B.4. at the time of succession and the registrant has continued to meet them since the succession.

6. *Disqualifications.* None of the following is true:

(a) within two years before the date of filing this Form, the registrant was a development stage company that either:

(1) had no specific business plan or purpose; or

(2) indicated that its business plan was to engage in a merger or acquisition with an unidentified entity or entities;

(b) within two years before the date of filing this Form, the registrant was a shell entity having few or no assets, earnings or operations;

(c) the registrant is registering an offering of ''penny stock'' as defined in Exchange Act Rule 3a51–1 or has issued penny stock in the two years prior to the date of filing this Form;

(d) the registrant or any of its subsidiaries has, since the end of the last fiscal year for which the registrant included certified financial statements in an Exchange Act report:

(1) failed to pay any dividend or sinking fund installment on preferred stock;

(2) caused any material delinquency with respect to preferred stock that was not cured within 30 days; or

(3) defaulted on any payment of principal, interest, a sinking fund installment, a purchase fund installment or any other installment on indebtedness, or defaulted on any rental on a long-term lease, if such debt and lease defaults in the aggregate are material;

(e) the independent accountant that examined the registrant's financial statements for the most recent fiscal year expressed in its report substantial doubt about the registrant's ability to continue as a going concern;

(f) within three years before the date of filing, a petition under the federal bankruptcy laws or any state insolvency law was filed by or against the registrant, or a court appointed a receiver, fiscal agent or similar officer with respect to the business or property of the registrant. If true, however, this would not disqualify the registrant if it has filed an annual report with audited financial statements subsequent to its emergence from that bankruptcy, insolvency or receivership process;

(g) within five years before the date of filing, the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or underwriter was convicted of any felony or misdemeanor described in clauses (i) through (iv) of Section 15(b)(4)(B) of the Exchange Act;

(h) within five years before the date of filing, the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or underwriter was made the subject of a judicial or administrative decree or order arising out of a governmental action that:

(1) prohibits future violations of any antifraud provision of the securities laws or Section 5 of the Securities Act;

(2) requires that the registrant, any executive officer, director or general partner of the registrant or person nominated any of those positions, or underwriter cease and desist from violating any antifraud provision of the securities laws or from violating Section 5 of the Securities Act; or

(3) determines that the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or underwriter violated any antifraud provision of the securities laws or Section 5 of the Securities Act; and

(i) the registrant would incorporate by reference into its Form B registration statement a report under the Exchange Act that:

(*1*) the Commission, after review, requested that the registrant amend in accordance with its comments; and

(*2*) either the registrant did not amend the report or, in the Commission's judgment, did not amend the report in accordance with the Commission's comments; and

(j) the registrant is a ''small business issuer,'' as defined in § 230.405, that

provided the ''Information Required in Annual Report of Transitional Small Business Issuers'' in its most recent annual report on Form 10–KSB.

7. *MJDS Filers.* A registrant shall be ineligible to use Form B if the most recent annual report it filed pursuant to Section 13 or 15(d) of the Exchange Act was on Form 40–F.

C. *Eligible Offerings.*

1. *Offerings by Well-Followed Issuers.*

An offering of securities of a registrant that satisfies all of the registrant requirements in General Instruction I.B. is eligible where either the registrant's public float is $75 million or more and the average daily trading volume value of its equity securities is $1 million or more, or the registrant's public float is $250 million or more.

For purposes of this Instruction:

(a) ''affiliate'' has the meaning set forth in Securities Act Rule 144(a)(1);

(b) ''average daily trading volume'' means the average daily trading volume on U.S. markets during the three full calendar months, or any 90 consecutive calendar days ending within 10 calendar days, immediately preceding the filing of the registration statement;

(c) ''common equity'' has the meaning set forth in Securities Act Rule 405; and

(d) ''public float'' means the aggregate market value of the registrant's outstanding voting and non-voting common equity securities held by persons other than affiliates of the registrant, as of the end of the registrant's last fiscal quarter. The aggregate market value of the registrant's outstanding voting and non-voting common equity shall be computed by use of the price at which the common equity was last sold before the end of the last fiscal quarter, or the average of the bid and asked prices in the principal market for such common equity, as of the last reported date before the end of the last fiscal quarter.

2. *Offerings Made Solely to QIBs.*

An offering of securities of a registrant that satisfies the registrant requirements in General Instruction I.B. is eligible where the securities are offered and sold only to persons that the seller, and any person acting on behalf of the seller, reasonably believe are qualified institutional buyers.

Note to General Instruction I.C.2.: For purposes of this Instruction, ''qualified institutional buyer'' shall have the meaning set forth in Securities Act Rule 144A(a)(1) except that it shall not include dealers as defined in Section 2(a)(12) of the Act or investment advisers as defined in Section 202(a)(11) of the Investment Advisers Act of 1940. Rules 144A(a)(2)—(a)(5) shall apply to this Instruction. In determining whether an investor is a qualified institutional buyer, the registrant and any person acting on behalf of the registrant may rely on the non-exclusive methods set forth in Rule 144A(d)(1)(i)—(iv).

3. *Offerings to Certain Existing Shareholders.*

An offering by a registrant that satisfies all of the registrant requirements in General Instruction I.B. is eligible where the securities are offered and sold solely to existing security holders as follows:

(a) *Rights Offerings.* Securities of the registrant to be offered upon the exercise of outstanding rights granted by the registrant pro rata to all its existing security holders of the class to which the rights attach;

(b) *DRIPS.* Securities offered pursuant to a dividend or interest reinvestment plan, as defined in Securities Act Rule 405, provided that:

(1) with respect to a dividend reinvestment plan, securities will be offered only while the registrant has not discontinued dividend payments on the securities held, and with respect to an interest reinvestment plan, securities will be offered only while the registrant has not discontinued payment of interest on the securities held;

(2) the plan offering being registered on this Form represents no more than 15% of its public float (as defined in General Instruction I.C.1.(d)) when aggregated with the dollar amount of securities registered on this Form B by the registrant for offerings to its existing shareholders within the 12 months before the start of and during the offering on this Form. For purposes of determining the amount of 15% of the registrant's public float, the registrant should use the amount of public float reported on its most recently filed Form 10–K;

(3) the plan offering being registered on this Form is extended only to existing shareholders of the registrant that have held securities of the registrant continuously for at least a two-month period prior to becoming a participant; and

(4) the proposed aggregate purchase of securities by an existing shareholder and its affiliates in the offering registered on this Form and any other Form B offerings to existing shareholders made by the issuer during the preceding 12-month period, does not exceed the greater of:

(i) $10,000; or

(ii) whichever of the following amounts is smaller:

(A) 100% of the aggregate value of the same class(es) of the issuer's securities owned by the existing shareholder and its affiliates at the start of the 12-month period; or

(B) 5% of the total dollar amount of securities in the offering.

(c) *Common Stock Holders.* Offerings of the registrant's common stock solely to the registrant's existing common stock holders, without regard to whether pursuant to an ongoing plan, provided that:

(1) the offering being registered on this Form represents no more than 15% of the registrant's public float (as defined in General Instruction I.C.1.(d)) when aggregated with the dollar amount of securities registered by the registrant on Form B for offerings to its existing shareholders within the last 12 months before the start of and during the offering on this Form. For purposes of determining the amount of 15% of the registrant's public float, the registrant should use the amount of public float reported on its most recently filed Form 10–K;

(2) the offering is extended only to existing shareholders of the registrant that have held its common stock continuously for at least a two-month period prior to being offered the securities; and

(3) the proposed aggregate purchase of securities by an existing shareholder and its affiliates in the offering registered on this Form and any other Form B offerings to existing shareholders made by the issuer during the preceding 12-month period, does not exceed the greater of:

(i) $10,000; or

(ii) whichever of the following amounts is smaller:

(A) 100% of the aggregate value of the same class(es) of the issuer's securities owned by the existing shareholder and its affiliates at the start of the 12-month period; or

(B) 5% of the total dollar amount of securities in the offering.

(d) *Options Holders.* Securities of the registrant issued upon the exercise of its outstanding transferable options;

(e) *Holders of Convertible Securities.* Securities of the registrant issued upon conversion of its outstanding convertible securities; and (f)

(f) *Warrants Holders.* Securities of the registrant issued upon the exercise of its outstanding transferable warrants.

(g) *Standby Underwriting Agreements.* No portion of any offering registered pursuant to this paragraph 3. may be offered pursuant to a standby underwriting agreement, or similar arrangement, in the United States.

4. *Offerings of Non-Convertible Investment Grade Securities.*

(a) An offering of non-convertible investment grade securities of a registrant that satisfies the registrant requirements in General Instruction I.B. is eligible where the securities offered are, at the time of sale, investment grade securities.

(b) For purposes of this Form, a security is ''investment grade'' if, at the time of sale:

(1) it is rated by at least one nationally recognized statistical rating organization (''NRSRO'') (as that term is used in Exchange Act Rule 15c3–1(c)(2)(vi)(F)) in one of the generic rating categories that signify investment grade; and

(2) no other NRSRO rating the security has placed it in a category that does not signify investment grade.

5. *Offerings by Majority-Owned Subsidiaries.*

If a registrant is a majority-owned subsidiary, it may register offerings of its non-convertible securities on this Form notwithstanding the fact that it does not satisfy a registrant eligibility requirement in General Instruction I.B.1., I.B.2., I.B.3. or I.B.4., or the public float/ADTV test in General Instruction I.C.1. if:

(a) its parent satisfies all registrant eligibility requirements in General Instruction I.B. and the public float/ADTV test in General Instruction I.C.1.;

(b) the offering satisfies the applicable transaction requirement; and

(c) its parent fully and unconditionally guarantees the payment obligations on the securities being offered in the registered transaction.

Note to General Instruction I.C.5.

The parent must concurrently register its offering of the guarantee and may register that on the same registration statement used for the offering of the guaranteed securities. Rule 3–10 of Regulation S–X specifies the financial statements of the guarantor and its affiliates that are required.

6. *Market-Making Transactions.*

An offering by a registrant that satisfies the registrant requirements in General Instruction I.B.1. and I.B.6. is eligible if:

(a) it registers transactions of a broker-dealer that is an affiliate of the issuer;

(b) the broker-dealer engages in the transactions solely in its ordinary capacity as a market maker as defined in Exchange Act Section 3a–38; and

(c) the transactions involve outstanding securities of the issuer that the broker-dealer has not acquired directly from the issuer or an affiliate of the issuer or indirectly by arrangement with the issuer or an affiliate of the issuer.

II. Securities Act Rules and Regulations

A. You should read Securities Act Rule 172. That rule describes prospectus delivery obligations that may be applicable to offerings registered on this Form.

B. You should read the other rules and regulations under the Securities Act (Part 230 of Title 17 of the Code of Federal Regulations), particularly Regulation C. That Regulation contains general requirements regarding the preparation and filing of registration statements.

C. You should read Rules 101, 201 and 202 of Regulation S–T. Those rules require registrants subject to the electronic filing requirements to make all applicable filings through the Commission's EDGAR system. Those rules also provide that failure to submit a required electronic filing will result in ineligibility to use this Form and restrictions on use of incorporation by reference until the required electronic filing has been made.

III. Offering Materials

A. You should read Securities Act Rule 166. That rule permits an eligible registrant to make offers prior to filing a Form B registration statement. If you use a prospectus to make offers in reliance on that rule in the offering period, you must file that prospectus when required to do so by Securities Act Rule 425.

B. You should read Securities Act Rule 165. That rule permits a Form B registrant and those acting on its behalf to use ''free writing'' offering materials that do not meet the requirements of Section 10 of the Securities Act. If you use a prospectus in reliance on that Rule, you must file it when required to do so by Securities Act Rule 425.

IV. Foreign Issuer Financial Statements

A. A foreign issuer must reconcile its financial statements included in or incorporated into this registration statement. It must reconcile them to Item 18 of Form 20–F, except as otherwise permitted in paragraph B of this General Instruction.

B. A foreign issuer need only reconcile its financial statements to Item 17 of Form 20–F if:

1. an offering of the registrant's non-convertible investment grade securities is being registered. *See* General Instruction I.C.4. for the definition of ''investment grade'' securities; '

2. an offering of the registrant's securities upon the exercise of outstanding rights that it granted pro rata to all existing security holders of the class of securities to which the rights attach is being registered;

3. an offering of the registrant's securities pursuant to a dividend or interest reinvestment plan is being registered;

4. an offering of the registrant's securities upon the conversion of outstanding convertible securities that it (or its affiliate) issued is being registered; or

5. an offering of the registrant's securities upon the exercise of outstanding transferrable warrants that it (or its affiliate) issued is being registered.

C. Notwithstanding paragraphs B.2., B.3., B.4. and B.5. of this General Instruction, if securities are to be offered or sold in a standby underwriting in the United States or by similar arrangement, the registrant must reconcile to Item 18 of Form 20-F.

V. Requests for Confidential Treatment

All registration statements on this Form become public upon filing. Registration statements filed on this Form are not reviewed by the Commission staff prior to the effective date. Confidential treatment requests with respect to information that the registrant is required to file in this Form may, however, be reviewed by the staff. As a result, when the issuer plans to have the Form become effective upon filing or fewer than 20 days thereafter, it must furnish to the staff in advance of filing, any request it wishes to make for confidential treatment of information relating to the Form. *See* Securities Act Rule 406. The Commission must act on that request before this Form becomes effective.

VI. Concurrent Registration of Securities Under the Exchange Act

A. Registration on this Form of a class of securities under Exchange Act Section 12(b) shall become effective upon the later of:

1. receipt by the Commission of certification from the national securities exchange listed on the cover of this Form that the securities have been approved for listing; or

2. effectiveness of this registration statement.

B. Registration on this Form of a class of securities under Exchange Act Section 12(g) shall become effective automatically upon the earlier of (1) 60 days after the initial filing of this registration statement; or (2) the effectiveness of this registration statement.

C. If the registrant is required to file an annual report under Exchange Act Section 15(d) for its last fiscal year, it must file that annual report within the time period specified in the appropriate annual report form even if the Exchange Act registration becomes effective before the annual report is due.

D. The registrant must file at least one complete, signed copy of the registration statement with each exchange or market identified on the cover of this Form.

Information Required in the Prospectus That Is Part of the Effective Registration Statement

1. *Offering Information.*

(a) Disclose the following information, all of which constitutes the ''offering information'' for purposes of this Form:

(1) the amount of securities being offered;

(2) material changes in the issuer's affairs since the end of the latest fiscal year that are not reflected in incorporated Exchange Act reports;

(3) the information required by Item 504 of Regulation S–K regarding use of proceeds;

(4) the information required by Item 507 of Regulation S–K regarding who is selling the securities;

(5) material information about the terms of the securities offered as required by Item 202 of Regulation S–K, unless capital stock is to be registered and securities of the same class are registered pursuant to Section 12 of the Exchange Act;

(6) information about the risks of the offering of the type described in Item 503 of Regulation S–K;

(7) information about the underwriter's discounts and commissions required by Item 501(b)(3) of Regulation S–K; and

(8) all information regarding the transaction that is material, which may include where applicable, but is not limited to:

(i) information about dilution of the type described in Item 506 of Regulation S–K;

(ii) information about the determination of the offering price of the type described in Item 505 of Regulation S–K;

(iii) information about the plan of distribution of the type described in Item 508 of Regulation S–K;

(iv) ratio of earnings to fixed charges as described in Item 503 of Regulation S–K.

(b) You must include any offering information disclosed by or on behalf of the issuer during the offering period, other than information communicated orally.

(c) You may include offering information communicated orally. You may not include offering information that has not been disclosed by or on behalf of the issuer during the offering period.

(d) For purposes of this Form, ''offering period'' means the period beginning 15 days in advance of the first offer made in connection with the offering and ending when the offering is completed.

2. *Incorporation of Previously Filed Information.*

State that you are incorporating by reference into the prospectus that is part of the effective registration statement the following documents, and list them:

(a) your latest annual report filed in accordance with Section 13(a) or 15(d) of the Exchange Act that contains audited financial statements; and

(b) any reports you filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the annual report you incorporate in this Form;

3. *Incorporation of Subsequently Filed Information.*

(a) Subject to paragraph (b) of this instruction, state that all documents you subsequently file pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act during the offering period are deemed to be incorporated by reference into the prospectus that is part of the effective registration statement as of the date you file those documents.

(b) You may incorporate Exchange Act documents filed after the time of delivery in

accordance with Securities Act Rule 172 only if you otherwise disclosed to investors the information contained in those documents prior to or at the same time as you delivered.

(c) You may not incorporate Exchange Act documents filed after the end of the offering period. For offerings done as part of a delayed shelf under Securities Act Rule 415(a)(1)(x), each takedown will be treated as having its own offering period. In each takedown post-effective amendment on this Form you must state that you are incorporating the documents required by paragraph 2.(a) of this instruction and list them.

(d) Securities Act Rule 424 is not available in connection with offerings registered on this Form. Material changes in disclosure must be reflected in pre-effective amendments, in post-effective amendments that the registrant may choose to designate as effective upon filing, or in Exchange Act documents where permitted to be incorporated by reference.

4. *Financial statements*.

(a) *Foreign registrants*: If the financial statements you incorporate by reference in accordance with paragraph 2 of this instruction of the Form are not sufficiently current to comply with Rule 3–19 of Regulation S–X, you must provide financial statements necessary to comply with that Rule. You must through one of the following means:

(1) include that information in the prospectus; or

(2) include that information in an amended or a new Exchange Act report, disclose in the prospectus that you have done so, incorporate that report by reference into the effective registration statement, and deliver it together with the prospectus.

(b) *Other financial information*. Include the following information in the prospectus unless incorporated by reference:

(1) financial information required by Rule 3–05 and Article 11 of Regulation S–X with respect to transactions other than the one being registered;

(2) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S–X where:

(i) after the end of its most recent fiscal year, the registrant consummated one or more business combinations accounted for by the pooling of interest method of accounting; and

(ii) the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11–01(b) of Regulation S–X;

(3) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S–X, if a change in accounting principles or correction of an error required a material retroactive restatement of financial statements; or

(4) any financial information required because of a material disposition of assets outside the normal course of business.

Instruction to paragraph 4.

1. Foreign registrants: You should read Rules 4–01(a)(2) and 10–01 of Regulation S–X.

2. Small business issuers: You must provide the financial information specified in paragraph 4(b) if required by Item 310 of Regulation S-B.

5. *Securities Term Sheet*. File as part of the prospectus in the effective registration statement the term sheet prospectus that must be delivered to investors under Securities Act Rule 172(a)(2). That term sheet need contain only:

(a) an itemization of the material terms of the securities in summary format;

(b) the name of any person, other than the issuer, for whose account securities are offered and a brief identification of any material relationship such person has (or had within the past three years) with the issuer or any affiliate of the issuer;

(c) the identity and location of a contact person to whom questions may be directed; and

(d) the identity and location of a person to whom requests for documents defining the terms of the securities, which shall be sent promptly upon request, may be made.

6. *Material Changes Term Sheet*. File as part of the prospectus in the effective registration statement any document describing material changes that must be delivered to investors under Securities Act Rule 172(e).

7. *Undertakings*. Set forth the following undertakings in the prospectus:

(a) that you will provide to each investor, including any beneficial owner, a copy of any information that has been incorporated by reference in the prospectus but not delivered, as follows:

(i) upon written or oral request;

(ii) at no cost to the requester;

(b) that you will send that incorporated information within one business day of any request for it;

(c) that you will send that incorporated information in a manner that should result in delivery within three business days; and

(d) that the name, address, and telephone number to which the request for that information must be made is: [*fill in information*].

Notes to Paragraph 7.

(1) This undertaking covers all documents incorporated by reference through the date of responding to the request.

(2) If you send any of the information that is incorporated by reference in the prospectus to investors, you must also send any exhibits that are specifically incorporated by reference in that information.

8. *Aftermarket Delivery*. Include the legend required by Item 502(b) of Regulation S–K.

Information not Required in the Prospectus That Is Part of the Effective Registration Statement

1. *Exhibits*. Provide the exhibits required by Item 601 of Regulation S–K.

2. *Undertakings*.

(a) Include the undertakings required by Item 512 of Regulation S–K.

(b) *Aftermarket delivery period*. If not contained in the prospectus that is part of the effective registration statement, undertake that you will file a post-effective amendment to insert the date the aftermarket delivery period ends in the legend required by Item 502(b) of Regulation S–K.

Other Offering Materials

In addition to the offering information filed in the prospectus that is part of the effective registration statement, the registrant, any underwriter, any participating dealer or anyone acting on behalf of any of them may use free writing materials. ''Free writing'' materials for purposes of this Form consist of all information disclosed by or on behalf of the issuer during the offering period, other than offering information, factual business communications as defined in Securities Act Rule 169 or information disclosed orally. You must file free writing materials by the time of first sale. Securities Act Rule 425 describes the procedures for filing those offering materials with the Commission.

Signatures

The registrant hereby certifies that it meets all of the requirements for filing on Form B. The registrant also certifies that it has duly caused and authorized the undersigned to sign this registration statement on its behalf. The undersigned certifies that he/she has read this registration statement and to his/her knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement and to their knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

Signature Instructions

1. The following persons, or persons performing similar functions, must sign the registration statement:

(a) the registrant;

(b) its principal executive officer or officers;

(c) its principal financial officer;

(d) its controller or principal accounting officer; and

(e) at least the majority of its board of directors.

2. Where the registrant is a foreign issuer, its authorized representative in the United States also must sign the registration statement.

3. Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement.

4. Type or print the name and title of each person who signs the registration statement beneath the person's signature. Any person

who occupies more than one of the specified positions must indicate each capacity in which that person signs the registration statement. *See* Securities Act Rule 402 concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

5. Where eligibility for use of the Form is based on the assignment of a security rating, the registrant may sign the registration statement notwithstanding the fact that the security rating has not been assigned by the filing date, provided that the registrant reasonably believes, and so states in the registration statement, that the security rating requirement will be met by the time of sale.

6. *Rule 415(a)(1)(x) offerings.*

(a) All persons who sign this registration statement will be deemed by doing so to grant an authorized representative of the registrant the power to sign any post-effective amendment to the registration statement on their behalf if:

(i) the registration statement relates to an offering pursuant to Rule 415(a)(1)(x);

(ii) a power of attorney has not been granted by the person in connection with signatures of post-effective amendments; and

(iii) the post-effective amendment does not provide otherwise.

(b) If, at the time of filing a post-effective amendment, any person who signed the effective registration statement no longer acts in the capacity in which he or she signed it, the person who currently acts in that capacity must sign the post-effective amendment.

92. By adding § 239.6 and Form C to read as follows:

§ 239.6 Form C, for registration under the Securities Act of 1933 of securities issued in business combination transactions, and for optional concurrent registration under the Securities Exchange Act of 1934.

(a) A registrant other than a small business issuer must use this Form to register an offering under the Securities Act of 1933 (''Securities Act'') that is:

(1) A transaction of the type specified in paragraph (a) of § 230.145 of this chapter;

(2) A merger in which the applicable law would not require the solicitation of the votes or consents of all of the security holders of the company being acquired;

(3) An exchange offer for securities of the issuer or another entity;

(4) A public reoffering or resale of any such securities acquired pursuant to this registration statement; or

(5) More than one of the kinds of transactions listed in paragraphs (a)(1) through (a)(4) of this section registered on one registration statement.

(b) A registrant also may use this Form to register concurrently under Section 12(b) or 12(g) of the Securities Exchange Act of 1934 (''Exchange Act''). It may register under the Exchange Act any class of securities that are the subject of the offering it is registering under the Securities Act. To register, the registrant must check the appropriate box(es) on the cover page of this Form and identify which class(es) of securities it is registering under Section 12(b) or 12(g) of the Exchange Act.

Note: The text of Form C will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form C—Registration Statement Under the Securities Act of 1933 [And Optional Registration Pursuant to Section 12(b) or 12(g) of the Securities Exchange Act of 1934]

_____

(Exact name of Registrant as specified in its charter)

_____

(Translation of Registrant's name into English, if applicable)

_____

(State or other jurisdiction of incorporation or organization)

_____

(I.R.S. Employer Identification Number)

_____

(Address and telephone number of Registrant's principal executive offices)

_____

(Name, address and telephone number of Registrant's agent for service)

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

Approximate date of commencement of sales _____

If you are a foreign private issuer as defined in Securities Act Rule 405, check the following box. [ ]

If you are not a foreign private issuer as defined in Securities Act Rule 405, check the following box. [ ]

If you are filing this Form to register additional securities for an offering in accordance with Securities Act Rule 462(b), check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If this Form is a post-effective amendment filed in accordance with Securities Act Rule 462(c) to re-start the 15-business-day period during which pricing must occur under Securities Act Rule 430A(a)(3) or to reflect a non-substantive change from, or addition to, the prospectus, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If this Form is a post-effective amendment filed in accordance with Securities Act Rule 462(d) solely to add exhibits, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If you are using this Form to register concurrently under Section 12(b) or 12(g) of the Exchange Act any class of securities that are the subject of the offering you are registering under the Securities Act, check the appropriate box and provide the information indicated below:

[ ] Securities being registered pursuant to Exchange Act Section 12(b):

Title of each class:

_____

_____

Name of exchange on which listed:

_____

_____

[ ] Securities being registered pursuant to Exchange Act Section 12(g):

Title of each class:

_____

_____

Name of market on which quoted:

_____

_____

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be registered	Amount to be registered	Proposed maximum offering price per unit	Proposed maximum aggregate offering price	Amount of registration fee

Notes to the Fee Table:

1. Set forth any explanatory details relating to the fee table in footnotes to the table.

2. If the basis for calculating the fee is not evident from the information presented in this table, refer to the applicable provisions of Securities Act Rule 457 in a footnote.

3. If the fee is calculated under Rule 457(o), the ''Amount to be registered'' and the ''Proposed maximum offering price per unit'' need not appear in this table.

4. If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. See Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

General Instructions

I. Rules as to Use of Form C

A. A registrant other than a small business issuer must use this Form to register an offering under the Securities Act that is:

1. a transaction of the type specified in Securities Act Rule 145(a);

2. a merger in which the applicable law would not require the solicitation of the votes or consents of all of the security holders of the company being acquired;

3. an exchange offer for securities of the issuer or another entity;

4. a public reoffering or resale of any securities acquired pursuant to this registration statement; or 5. more than one of the kinds of transactions listed in paragraphs A.1. through A.4. of this instruction registered on one registration statement.

B. A registrant also may use this Form to register concurrently under Section 12(b) or 12(g) of the Exchange Act. It may register any class of securities that are the subject of the offering it is registering under the Securities Act. To register, the registrant must check the appropriate box(es) on the cover page of this Form and identify which class(es) of securities it is registering under Section 12(b) or 12(g).

C. You may not use this Form if you are a registered investment company or a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940.

D. You may not use this Form if you are a ''small business issuer'' as defined in Securities Act Rule 405 (§ 230.405). Small business issuers use Form SB–3 to register the transactions listed in General Instruction I.A.

II. Registrant Information

Provide information about the registrant as follows:

A. *Form B Registrants.* If the registrant meets the requirements of General Instructions I.B. and I.C.1. of Form B, it must comply with:

1. Items 11 and 12 of this Form;

2. Items 13 and 14 of this Form; or

3. Item 15 of this Form.

B. *Seasoned Form A Registrants.* If the registrant meets the requirements of General Instruction II. of Form A for incorporation by reference, it must comply with:

1. Items 13 and 14 of this Form; or

2. Item 15 of this Form.

C. *All Other Registrants.* All other registrants must comply with Item 15 of this Form.

III. Information With Respect to the Company Being Acquired

Provide information about the company being acquired (which includes any entity whose securities are to be exchanged for securities of the registrant) as follows:

A. *Form B Companies.* If the company being acquired meets the requirements of General Instructions I.B. and I.C.1. of Form B, provide information in accordance with:

1. Item 16 of this Form;

2. Item 17 of this Form; or

3. Item 18 of this Form.

B. *Seasoned Form A Companies.* If the company being acquired meets the requirements of General Instruction II. of Form A for incorporation by reference, provide information in accordance with:

1. Item 17 of this Form; or

2. Item 18 of this Form.

C. *All Other (Non-Small Business) Companies.* For all other companies being acquired, provide information in accordance with Item 18 of this Form.

D. *Transitional Small Business Issuer Companies.* If the company being acquired is a transitional small business issuer that meets the requirements of II.A.1. of Form SB–3, provide information in accordance with Item 19 of this Form.

E. *Seasoned Form SB–2 Companies.* If the company being acquired meets the requirements of General Instruction E.1. of Form SB–2, provide information in accordance with:

1. Item 20 of this Form; or

2. Item 21 of this Form.

F. *All Other Small Business Issuers.* All other companies being acquired that are small business issuers, including transitional small business issuers that choose to comply with this requirement, provide information in accordance with Item 21 of this Form.

IV. Securities Act Rules and Regulations

You should read the rules and regulations under the Securities Act (Part 230 of Title 17 of the Code of Federal Regulations), particularly Regulation C. That Regulation contains general requirements regarding the preparation and filing of registration statements.

V. Free Writing Prospectus Information

A. You should read Securities Act Rule 166. That Rule permits a registrant to make offers prior to filing a Form C registration statement. If you use a prospectus in reliance on that Rule, you must file that prospectus when required to do so by Securities Act Rule 425.

B. You should read Securities Act Rule 165. That Rule permits a Form C registrant and those acting on its behalf to use ''free writing'' offering materials that do not meet the requirements of Section 10 of the Securities Act. If you use a prospectus in reliance on Rule 165, you must file it when required to do so by Securities Act Rule 425.

VI. U.S. and Foreign Registrants.

A. *Definitions.*

1. As used in this Form, ''U.S. registrant'' includes all registrants other than foreign governments and foreign private issuers. ''U.S. company being acquired'' includes all entities being acquired other than foreign governments and foreign private issuers.

2. As used in this Form, ''foreign registrant'' includes only registrants that are foreign private issuers. ''Foreign company being acquired'' includes only entities being acquired that are foreign private issuers.

3. ''Foreign private issuer'' is defined in Rule 405 of Regulation C.

B. *Information Required.*

1. U.S. registrants must provide all information required by the Items of this Form except where the Item expressly identifies the requirement as applying only to foreign registrants or foreign companies being acquired.

2. Foreign registrants must provide all information required by the Items of this Form except where the Item expressly identifies the requirement as applying only to U.S. registrants or U.S. companies being acquired.

VII. Interaction With the Exchange Act

A. If Regulation 14A or 14C under the Exchange Act applies to the transaction registered on this Form:

1. the prospectus may be in the form of a proxy statement or information statement;

2. the prospectus must contain the information required by this Form in lieu of that required by Schedule 14A or 14C; and

3. material filed as a part of the registration statement shall be deemed filed also for purposes of Regulation 14A or 14C, as applicable.

B. If neither Regulation 14A nor 14C applies to the transaction registered on this Form, any proxy or information statement material sent to security holders must be filed prior to use as a part of the effective registration statement.

C. If you are registering an offering that is subject to Section 13(e), 14(d) or 14(e) of the Exchange Act, the provisions of those Sections and the rules and regulations thereunder shall apply to the transaction in addition to the provisions of this Form.

VIII. Business Combinations Effected on a Delayed Basis

A. A registrant may use this Form to register a transaction that will be effected on a delayed basis under Securities Act Rule 415(a)(1)(viii). In that event, it need only furnish information about the contemplated transaction and the company being acquired to the extent practicable as of the effective date of the registration statement. It must file

a post-effective amendment to include the remaining required information about the transaction and the company being acquired in the registration statement.

B. A registrant may use this Form to register a transaction that would qualify for an exemption from Section 5 of the Securities Act but for the proximity in time of other similar transactions. In that event, the registrant need only file a prospectus supplement to provide the required information about the transaction and the company being acquired.

C. *Unallocated Shelf.* The registrant may register two or more classes of securities on this Form that it will offer on a delayed or continuous basis pursuant to Rule 415(a)(1)(viii). If the registrant meets the requirements of General Instruction I.B. of Form B and General Instruction I.C.1., I.C.2. or I.C.4. of Form B, it need only identify on an aggregate basis (and not by class) in the ''Calculation of Registration Fee'' table:

1. the amount to be registered;
2. the proposed maximum offering price per unit; and
3. the proposed maximum aggregate offering price.

IX. Roll-Up Transactions

A. Roll-up transactions (as defined in Item 901(c) of Regulation S-K) may be registered on this Form. In that event, the registrant must comply with the disclosure requirements of Subpart 900 of Regulation S-K. To the extent that the disclosure requirements of Subpart 900 are inconsistent with those in this Form, the requirements of Subpart 900 control.

B. If the registrant registers a roll-up transaction on this Form, special prospectus delivery requirements apply. See Securities Act Rule 172(e).

C. The proxy rules and Exchange Act Rule 14e–7 of the tender offer rules contain provisions specifically applicable to roll-up transactions. Those provisions apply whether or not the entities involved have registered securities pursuant to Section 12 of the Exchange Act.

X. Registration of Additional Securities

A. Under certain circumstances, the registrant may increase the size of an offering after the effective date through filing a short-form registration statement under Securities Act Rule 462(b). A Rule 462(b) registration statement may include only the following:

1. the facing page;
2. a statement that the earlier registration statement, identified by file number, is incorporated by reference;
3. any required opinions and consents;
4. the signature page; and
5. any price-related information omitted from the earlier registration statement in reliance on Securities Act Rule 430A, if the registrant so chooses.

B. The information contained in a Rule 462(b) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) registration statement.

C. The registrant may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) registration statement if:

1. the opinion or consent expressly allows that incorporation; and
2. the opinion or consent also relates to the Rule 462(b) registration statement.

Note to General Instruction X.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

XI. Concurrent Registration of Securities Under the Exchange Act

A. Registration on this Form of a class of securities under Exchange Act Section 12(b) shall become effective upon the later of:

1. receipt by the Commission of certification from the national securities exchange listed on the cover of this Form that the securities have been approved for listing; or
2. effectiveness of this registration statement.

B. Registration on this Form of a class of securities under Exchange Act Section 12(g) shall become effective upon the effectiveness of this registration statement.

C. If the registrant is required to file an annual report under Exchange Act Section 15(d) for its last fiscal year, it must file that annual report within the time period specified in the appropriate annual report form even if the Exchange Act registration becomes effective before the annual report is due.

D. The registrant must file at least one complete, signed copy of the registration statement with each exchange or market identified on the cover to this Form.

Part I—Information Required in the Prospectus

A. Information About the Transaction

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

Provide the information required by Item 501 of Regulation S–K.

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

(a) Provide the information required by Item 502 of Regulation S–K.

(b) If you incorporate information by reference into the prospectus, state on the inside front cover page:

(1) that the prospectus incorporates by reference important business and financial information about the company that is not delivered with it;

(2) that this information is available without charge to any person, including any beneficial owner, upon written or oral request;

(3) that you will send those incorporated documents in a manner that should result in delivery within three business days of the request;

(4) the name, address and telephone number to which persons must make this request; and

(5) that to obtain timely delivery, persons must request this information no later than _____ [specify date five business days before the date on which the final investment decision must be made]. You must highlight this statement by print type or otherwise.

Instruction to Item 2.

1. The undertaking covers all documents incorporated by reference through the date of responding to the request.

2. If you send any of the information that is incorporated by reference in the prospectus, you also must send any exhibits that are specifically incorporated by reference in that information.

3. If information is incorporated by reference in any document you are sending upon request, you also must send the information incorporated by reference.

Item 3. Prospectus Summary and Other Information

In the forepart of the prospectus, provide a summary of the information contained in the prospectus as described in Item 503(a) of Regulation S–K and the following information:

(a) *Contact information.* The name, complete mailing address and telephone number of the principal executive offices of the registrant and the company being acquired;

(b) *Risk factors.*

(1) The information required by Item 503(c) of Regulation S–K;

(2) If the registrant or the company to be acquired is a real estate entity as defined in Item 1101 of Regulation S–K, provide the information required by Item 1103 of Regulation S–K in addition to the information required by paragraph (b)(1) of this Item.

(c) *Ratio of earnings to fixed charges.* The information required by Item 503(d) of Regulation S–K;

(d) *Business conducted.* A brief description of the general nature of the business conducted by the registrant and by the company being acquired;

(e) *Transaction being registered.* A brief description of the transaction in which the securities being registered will be offered;

(f) *Selected financial data.* The selected financial data required by Item 301 of Regulation S–K for U.S. registrants and U.S. companies being acquired and Item 8 of Form 20–F for foreign registrants and foreign companies being acquired. To the extent this information is required to be presented in the prospectus pursuant to other Items of this Form, it need not be presented pursuant to this Item;

(g) *Pro forma selected financial data.* If material, the information required by Item 301 of Regulation S–K for U.S. registrants and Item 8 of Form 20–F for foreign registrants, showing the pro forma effect of the transaction. To the extent the information is required to be presented in the prospectus pursuant to other Items of this Form, it need not be presented pursuant to this Item;

(h) *Pro forma information.* In a table designed to facilitate comparison, historical and pro forma per share data of the registrant and historical and equivalent pro forma per share data of the company being acquired for the following items:

(1) book value per share as of the date financial data is presented pursuant to Item 301 of Regulation S–K for U.S. registrants and U.S. companies being acquired and Item

8 of Form 20–F for foreign registrants and foreign companies being acquired;

(2) cash dividends declared per share for the periods for which financial data is presented pursuant to Item 301 of Regulation S–K for U.S. registrants and U.S. companies being acquired and Item 8 of Form 20–F for foreign registrants and foreign companies being acquired; and

1(3) income (loss) per share from continuing operations for the periods for which financial data is presented pursuant to Item 301 of Regulation S–K for U.S. registrants and U.S. companies being acquired and Item 8 of Form 20–F for foreign registrants and foreign companies being acquired;

Instructions to Item 3(g) and 3(h).

1. For a business combination accounted for as a purchase, present the financial information required by paragraphs (g) and (h) only for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, present the financial information required by paragraphs (g) and (h) (except for information with regard to book value) for the most recent three fiscal years and interim period. For a business combination accounted for as a pooling, present the book value information as of the end of the most recent fiscal year and interim period.

2. Calculate the equivalent pro forma per share amounts for one share of the company being acquired by multiplying the exchange ratio times each of:

(a) the pro forma income (loss) per share before non-recurring charges or credits directly attributable to the transaction;

(b) the pro forma book value per share; and (c) the pro forma dividends per share of the registrant.

3. Foreign Private Issuers: Instruction 7 to Item 8 of Form 20–F is applicable to the financial information presented hereunder to the extent that this Form requires reconciliation of financial statements of foreign private issuers to U.S. GAAP and Regulation S–X.

(i) *Market value of securities.* In a table designed to facilitate comparison, the market value of securities of the company being acquired (on a historical and equivalent per share basis) and the market value of the securities of the registrant (on a historical basis) as of the day before the date the public announcement of the proposed transaction. If no such public announcement was made, as of the day before the date the agreement with respect to the transaction was entered into;

(j) *Affiliates' voting shares.* With respect to the registrant and the company being acquired, a brief statement comparing the percentage of outstanding shares entitled to vote held by directors, executive officers and their affiliates. State the vote required for approval of the proposed transaction;

(k) *Regulatory approval.* A statement as to whether any regulatory requirements must be complied with or approval must be obtained in connection with the transaction, and if so, the status of such compliance or approval;

(l) *Dissenters' rights.* A statement about whether or not dissenters' rights of appraisal exist, including a cross-reference to the information provided pursuant to Item 21 or 22 of this Form; and

(m) *Tax consequences.* A brief statement about the tax consequences of the transaction or, if appropriate, a cross-reference to the information provided pursuant to Item 4 of this Form.

Item 4. Terms of the Transaction

(a) Provide a summary of the material features of the proposed transaction. The summary shall include, where applicable:

(1) 3 the information required by Item 1004(a) of Regulation M–A (§ 229.1004(a) of this chapter); and

(2) where not organized in the same country, a discussion of any material differences in the corporate laws applicable to the company being acquired and to the surviving entity. The discussion should include, but not necessarily be limited to: corporate governance, board structure, quorums, class action suits, shareholder derivative suits, rights to inspect corporate books and records, rights to inspect the shareholder list and rights of directors and officers to obtain indemnification from the company.

(b) If a report, opinion or appraisal materially relating to the transaction has been received from an outside party and such report, opinion or appraisal is referred to in the prospectus, provide the information called for by Item 1015(b) of Regulation S–K (§ 229.1015(b) of this chapter).

(c) Incorporate the acquisition agreement by reference into the prospectus.

Item 5. Pro Forma Financial Information

Provide the financial information required by Article 11 of Regulation S–X with respect to this transaction.

Instructions.

1. Present any Article 11 information required by the other Items of this Form (where not incorporated by reference) together with the information provided under this Item. In presenting this information, you must clearly distinguish between this transaction and any other one.

2. You need only show the pro forma effect that the registered transaction has on any pro forma financial information that:

(i) is incorporated by reference; and

(ii) reflects all prior transactions.

Item 6. Material Contacts With the Company Being Acquired

Provide the information required by Items 1005(b) and 1011(a) of Regulation M–A for the registrant or its affiliates and the company being acquired or its affiliates. The information provided only need cover the periods for which financial statements are presented or incorporated by reference into this Form.

Item 7. Real Estate Entities

If the registrant or the company to be acquired is a real estate entity as defined in Item 1101 of Regulation S–K, provide the information required by Item 1104 and Items 1108 through 1112 of Regulation S–K.

Item 8. Additional Information Required for Reoffering by Persons Deemed To Be Underwriters

If any person who is deemed to be an underwriter of the securities is reoffering any of the securities to the public, provide the following information in the prospectus prior to its use for the reoffer:

(a) The information required by Item 507 of Regulation S–K;

(b) Information with respect to the consummation of the transaction in which the securities were acquired; and

(c) A description of any material change in the registrant's affairs that occurred after the transaction in which the securities were acquired.

Note to Item 8.

You should read Item 512(g) of Regulation S–K regarding undertakings required in reoffering registration statements.

Item 9. Interests of Named Experts and Counsel

Provide the information required by Item 509 of Regulation S–K.

Item 10. Disclosure of Commission Position on Indemnification for Securities Act Liabilities

Provide the information required by Item 510 of Regulation S–K.

B. Information About the Registrant

Item 11. Information Required for Form B Companies

If the registrant meets the requirements of General Instructions I.B. and I.C.1. of Form B and elects to comply with this Item and Item 12 (instead of Items 13 and 14 or Item 15), it must provide the following information:

(a) *Material changes.* Describe any material change in the registrant's affairs that:

(1) has occurred since the end of the latest fiscal year for which it incorporates by reference audited financial statements in accordance with Item 12 of this Form; and

(2) the registrant has not described in an Exchange Act report.

(b) *Current financial statements.* Foreign registrants: If the financial statements you incorporate by reference in accordance with Item 12 of this Form are not sufficiently current to comply with Rule 3–19 of Regulation S–X, you must provide financial statements necessary to comply with that Rule. You must through one of the following means:

(1) include that information in the prospectus; or

(2) include that information in an amended or a newly filed Exchange Act report, disclose in the prospectus that you have done so, incorporate that report by reference into the effective registration statement, and deliver it together with the prospectus.

(c) *Other financial information.* Include the following information in the prospectus unless incorporated by reference:

(1) financial information required by Rule 3–05 and Article 11 of Regulation S–X with respect to transactions other than the one being registered;

(2) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S–X where:

(i) after the end of its most recent fiscal year, the registrant consummated one or more business combinations accounted for by the pooling of interests method of accounting; and

(ii) the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11–01(b) of Regulation S–X;

(3) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S–X, if a change in accounting principles or correction of an error requires a material retroactive restatement of financial statements; or

(4) any financial information required because of a material disposition of assets outside the normal course of business.

Instruction.

Foreign registrants: You should read Rules 4–01(a)(2) and 10–01 of Regulation S–X.

Item 12. Incorporation of Certain Information by Reference for Form B Companies

If the registrant provides information in accordance with Item 11 of this Form:

(a) It must incorporate by reference into the prospectus that is part of the effective registration statement the documents listed below:

(1) its latest annual report filed in accordance with Section 13(a) or 15(d) of the Exchange Act that contains audited financial statements;

(2) any reports it filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by its annual report incorporated in this Form; and

(3) the description of capital stock contained in an Exchange Act registration statement, including any amendments or reports updating such description, if:

(i) capital stock is being registered and securities of the same class are registered under Section 12 of the Exchange Act; and

(ii) such stock is listed for trading or admitted to unlisted trading privileges on a national securities exchange; or

(iii) bid and offer quotations for such stock are reported in an automated quotations system operated by a national securities association.

Instructions to Item 12(a).

1. List in the prospectus that is part of the effective registration statement all documents that are filed prior to effectiveness and incorporated by reference.

2. Notwithstanding Instruction 2 to Item 404 of Regulation S–K, you need only provide Item 404 information covering one year if you incorporate that information by reference pursuant to this Item.

3. Foreign registrants: All annual reports or registration statements you incorporate by reference pursuant to this Item must contain financial statements that comply with Item 18 of Form 20–F except that your financial statements may comply with Item 17 of Form 20–F if the only securities you are registering are investment grade securities.

A security is ''investment grade'' if, at the time of sale:

(a) it is rated by at least one nationally recognized statistical rating organization (''NRSRO'') (as that term is used in Exchange Act Rule 15c3–1(c)(2)(vi)(F)) in one of the generic rating categories that signify investment grade; and

(b) no other NRSRO rating the security has placed it in a category that does not signify investment grade.

4. Foreign registrants: You may incorporate by reference any Form 6–K satisfying the requirements of Form C. *See* Rules 4–01(a)(2) and 10–01 of Regulation S–X and Item 18 of Form 20–F.

(b) It must state in the prospectus that all documents it files pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act are deemed to be incorporated by reference into the prospectus that is part of the effective registration statement if filed after effectiveness and before the latest of the following that is applicable:

(1) the date of any meeting of security holders of either the registrant or the company being acquired relating to the transaction described in the prospectus;

(2) the date on which the transaction described in the prospectus is consummated, if no meeting of security holders of either the registrant or the company being acquired is held;

(3) the date of the termination of any exchange offer registered on this registration statement; or

(4) the date of termination of any reoffering or resale of securities registered on this registration statement.

Note to Item 12(b).

You should read Securities Act Rule 439 regarding consent to the use of material incorporated by reference.

(c) In the prospectus, you must:

(1) identify the reports and other information that you file with the Commission;

(2) state that the public:

(i) may read and copy any materials you file with the Commission at the Commission's Public Reference Room at 450 Fifth Street, N.W., Washington, D.C. 20549; and

(ii) may obtain information on the operation of the Public Reference Room by calling the Commission at 1–800–SEC–0330; and

(3) if you are an electronic filer, state that the Commission maintains an Internet web site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet web site address, if available.

Item 13. Information Required for Seasoned Form A Companies

If the registrant meets the requirements of General Instruction II. of Form A and elects to comply with this Item and Item 14 (instead of Item 15), it must do the following:

(a) *Annual report.* Deliver together with the prospectus a copy of its latest annual report filed pursuant to Section 13(a) or 15(d) of the Exchange Act;

(b) *Quarterly information.* U.S. registrants: provide the information required by Part I of Form 10–Q or Form 10–QSB for the most recent fiscal quarter following the fiscal year covered by the annual report delivered pursuant to this Item. The registrant must either:

(1) include that information in the prospectus; or

(2) deliver together with the prospectus a copy of its latest Form 10–Q or Form 10–QSB;

Notes to Item 13(a) and 13(b).

1. Indicate in the prospectus that it is accompanied by the reports that the registrant sends pursuant to paragraphs (a) or (b) of this Item.

2. If the registrant incorporates by reference portions of any document into a report it delivers under this Item, it also must deliver the incorporated portions with it.

3. If the registrant's Form 10–Q or Form 10–QSB for the most recent quarter is not due to be filed prior to the effective date of the registration statement, it may provide the information for the previous fiscal quarter to satisfy Item 13(b). For this purpose, the due date is calculated without the extension provided by Exchange Act Rule 12b–25.

(c) *Current financial statements.* Foreign registrants: If the financial statements you incorporate by reference in accordance with Item 14 are not sufficiently current to comply with Rule 3–19 of Regulation S–X, provide financial statements necessary to comply with that Rule. You must do so by one of the following means:

(1) include that information in the prospectus; or

(2) inclose that information in an amended or newly filed Exchange Act report, disclose in the prospectus that you have done so, incorporate that report by reference into the effective registration statement, and deliver it together with the prospectus.

(d) *Other financial information.* If not reflected in the registrant's annual report delivered to investors in accordance with paragraph (a) of this Item, provide:

(1) financial information required by Rule 3–05 and Article 11 of Regulation S–X with respect to transactions other than the one being registered;

(2) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S–X where:

(i) after the end of its most recent fiscal year, the registrant consummated one or more business combinations accounted for by the pooling of interests method of accounting; and

(ii) the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11–01(b) of Regulation S–X;

(3) restated financial statements prepared in accordance with or reconciled to U.S. GAAP and Regulation S–X, if a change in accounting principles or correction of an error requires a material retroactive restatement of financial statements; and

(4) any financial information required because of a material disposition of assets outside the normal course of business.

Instructions to Item 13(d).

1. You may incorporate by reference into the effective registration statement the information required by paragraph (d) of Item 13. If you incorporate it, you must deliver it together with the prospectus.

2. Foreign registrants: You should read Rules 4–01(a)(2) and 10–01 of Regulation S–X.

(e) *Material changes.* Describe any material change in the registrant's affairs that:

(1) has occurred since the end of the latest fiscal year for which it incorporates by reference audited financial statements in accordance with Item 14; and

(2) the registrant has not described in an Exchange Act report delivered with the prospectus in accordance with this Item;

Instructions to Item 13.

1. The registrant must deliver information required by this Item with the first prospectus it delivers. It need not deliver that information with any subsequent prospectus sent to the same person.

2. Any reports the registrant delivers together with the prospectus pursuant to this Item must be delivered without charge to the investor.

Item 14. Incorporation by Reference by Seasoned Form A Companies

If the registrant provides information in accordance with Item 13 of this Form:

(a) It must incorporate by reference into the prospectus that is part of the effective registration statement:

(1) its latest annual report filed in accordance with Section 13(a) or 15(d) of the Exchange Act that contains audited financial statements;

Note to Item 14(a)(1).

The registrant may satisfy this obligation to incorporate its annual report by incorporating a Form 40–F if it meets the requirements of General Instruction A.(2) of Form 40–F.

(2) any reports it filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by its annual report incorporated in this Form.

Instructions to Item 14(a).

1. List in the prospectus that is part of the effective registration statement all documents that are filed prior to effectiveness and incorporated by reference.

2. Notwithstanding Instruction 2 to Item 404 of Regulation S–K, you need only provide Item 404 information covering one year if you incorporate that information by reference pursuant to this Item.

3. Foreign registrants: All annual reports you incorporate by reference pursuant to this Item must contain financial statements that comply with Item 18 of Form 20–F, except that your financial statements may comply with Item 17 of Form 20–F if the only securities you are registering are investment grade securities as defined in Instruction 3 of Instructions to Item 12(a).

4. Foreign registrants may incorporate by reference and deliver with the prospectus any Exchange Act report containing information meeting the requirements of Form A. *See* Rules 4–01(a)(2) and 10–01 of Regulation S–X and Item 18 of Form 20–F.

5. You should read Rule 439 regarding consent to the use of material incorporated by reference.

(b) In the prospectus, you must:

(1) identify the reports and other information that you file with the Commission;

(2) state that the public;

(i) may read and copy any materials you file with the Commission at the Commission's Public Reference Room at 450 Fifth Street, N.W., Washington, D.C. 20549; and

(ii) may obtain information on the operation of the Public Reference Room by calling the Commission at 1–800–SEC–0330; and

(3) if you are an electronic filer, state that the Commission maintains an Internet web site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet web site address, if available.

Item 15. Information Required for All Other Companies

Any registrant that does not provide information in accordance with Items 11 and 12 or Items 13 and 14 must provide the following information:

(a) *Description of Business.*

(i) U.S. registrants: Item 101 of Regulation S–K.

(ii) Foreign registrants: Item 1 of Form 20–F.

(b) *Description of Property.*

(i) U.S. registrants: Item 102 of Regulation S–K.

(ii) Foreign registrants: Item 2 of Form 20–F.

(iii) If the registrant is a real estate entity as defined in Item 1101 of Regulation S–K, provide the information required by Items 1105, 1106 and 1107 of Regulation S–K in lieu of the information required by paragraph (b)(i) or (b)(ii) of this Item.

(c) *Legal Proceedings.*

(i) U.S. registrants: Item 103 of Regulation S–K.

(ii) Foreign registrants: Item 3 of Form 20–F.

(d) *Common Equity Securities.* If the registrant is issuing common equity securities:

(i) U.S. registrants: Item 201 of Regulation S–K.

(ii) Foreign registrants: Item 5 of Form 20–F. You must update such information to cover any subsequent interim periods for which financial statements are required pursuant to Rule 3–19 of Regulation S–X.

(e) *Financial Statements.*

(i) U.S. registrants: Regulation S–X.

(ii) Foreign registrants: Item 18 of Form 20–F except if you are registering only investment grade securities as defined in the second instruction of Instructions to Item 11(a) of this Form. In that event, you may comply with Item 17 of Form 20–F instead of Item 18.

Instructions to Item 15(e).

1. File schedules required by Regulation S–X as ''Financial Statement Schedules,'' as authorized by Item 25 of this Form.

2. Provide any financial information required by Rule 3–05 and Article 11 of Regulation S–X with respect to transactions other than the one being registered.

3. Foreign registrants: Your financial statements must comply with Rule 3–19 of Regulation S–X. *See also* Rules 4–01(a)(2) and 10–01 of Regulation S–X.

(f) *Exchange Controls.*

(i) U.S. registrants: not applicable.

(ii) Foreign registrants: Item 6 of Form 20–F.

(g) *Taxation.*

(i) U.S. registrants: not applicable.

(ii) Foreign registrants: Item 7 of Form 20–F.

(h) *Selected Financial Data.*

(i) U.S. registrants: Item 301 of Regulation S–K.

(ii) Foreign registrants: Item 8 of Form 20–F.

(i) *Supplementary Financial Information.*

(i) U.S. registrants: Item 302 of Regulation S–K.

(ii) Foreign registrants: not applicable.

(j) *Management's Discussion and Analysis.*

(i) U.S. registrants: Item 303 of Regulation S–K.

(ii) Foreign registrants: Item 9 of Form 20–F.

(k) *Changes in and Disagreements with Accountants.*

(i) U.S. registrants: Item 304 of Regulation S–K.

(ii) Foreign registrants: not applicable.

(l) *Quantitative and Qualitative Disclosures of Market Risk.*

(i) U.S. registrants: Item 305 of Regulation S–K.

(ii) Foreign registrants: Item 9A of Form 20–F.

C. Information About the Company Being Acquired

Item 16. Information Required for Form B Companies

If the company being acquired meets the requirements of General Instructions I.B. and I.C.1. of Form B and compliance with this Item is elected, provide the information required by Items 11 and 12 of this Form as if the company being acquired were the registrant.

Instruction.

Foreign companies being acquired: Notwithstanding the requirements of Items 11 and 12, the financial statements of the company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F.

Item 17. Information Required for Seasoned Form A Companies

If the company being acquired meets the requirements of General Instruction II. of Form A and compliance with this Item is elected, provide the information required by Items 13 and 14 of this Form as if the company being acquired were the registrant.

Instruction.

Foreign companies being acquired: Notwithstanding the requirements of Items 13 and 14, the financial statements of the company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F.

Item 18. Information Required for All Other (Non-Small Business) Companies

If the company being acquired does not meet the requirements of General Instructions I.B. and I.C.1. of Form B or General Instruction II. of Form A, or compliance with this Item is elected, provide the information that would be required by Item 15 of this Form as if the company being acquired were the registrant, subject to the following:

(a) Only those schedules required by Rules 12–15, 28 and 29 of Regulation S–X need be provided with respect to the company being acquired;

(b) Notwithstanding the requirements of Item 14, the financial statements of any

foreign company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F;

(c) If the company being acquired is not subject to the reporting requirements of Exchange Act Section 13(a) or 15(d), or has not furnished an annual report to its security holders under Rule 14a-3 or Rule 14c-3 for the latest fiscal year because of Exchange Act Section 12(i), furnish the financial statements that would be required in an annual report sent to security holders under Rules 14a-3(b)(1) and (b)(2) if one was required.

Instructions to paragraph (c).

1. If the registrant's security holders will not be voting on the transaction, financial statements for the two fiscal years before the latest fiscal year need be provided only to the extent that security holders of the company being acquired were previously furnished with financial statements (prepared in conformity with GAAP) for those periods.

2. The financial statements required by this paragraph for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited.

3. If the financial statements required by this paragraph are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20–F (§ 249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, however, when financial statements are prepared on a basis other than U.S. GAAP, a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. must be presented.

(d) Notwithstanding paragraph (c) of this Item, the financial statements of the company being acquired must be audited for the fiscal years required by paragraph (b)(2) of Rule 3–05 of Regulation S–X if this registration statement is used for resales by any person deemed to be an underwriter within the meaning of Securities Act Rule 145(c).

(e) If the company being acquired is not subject to the reporting requirements of Exchange Act Section 13(a) or 15(d), provide the information required by Part I of Form 10–Q or Form 10–QSB for the most recent quarter for which a quarterly report would be due if the company being acquired were subject to those reporting requirements.

Item 19. Information Required for Companies That Are Transitional Small Business Issuers

If the company being acquired meets the requirements of General Instruction II.A.1. of Form SB–3, provide information in accordance with either Item 14 or 16 of Form SB–3.

Item 20. Information Required for Companies That Are Seasoned SB–2 Issuers

If the company being acquired meets the requirements of General Instruction E.1. of Form SB–2 and compliance with this Item is elected, provide the information required by Items 11 and 12 of Form SB–3 as if the company being acquired were the registrant on Form SB–3.

Instruction to Item 20.

Canadian small business issuers being acquired: Notwithstanding the requirements of Items 11 and 12 of Form SB–3, the financial statements of the company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F.

Item 21. Information Required for All Other Small Business Issuers

If the company being acquired does not meet the requirements of General Instruction E.1. of Form SB–2, or compliance with this Item is elected, provide the information required by Item 13 of Form SB–3 as if the company being acquired were the registrant on Form SB–3, subject to the following:

(a) Canadian small business issuers being acquired: Notwithstanding the requirements of Item 13 of Form SB–3, the financial statements of the company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F.

(b) If the company being acquired is not subject to the reporting requirements of Exchange Act Section 13(a) or 15(d), or has not furnished an annual report to its security holders under Rule 14a-3 or Rule 14c-3 for the latest fiscal year because of Exchange Act Section 12(i), furnish the financial statements that would be required in an annual report sent to security holders under Rules 14a-3(b)(1) and (b)(2) if one was required.

Instructions to paragraph (b).

1. If the registrant's security holders will not be voting on the transaction, financial statements for the two fiscal years before the latest fiscal year need be provided only to the extent that security holders of the company being acquired were previously furnished with financial statements (prepared in conformity with GAAP) for those periods.

2. The financial statements required by this paragraph for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited.

3. If the financial statements required by this paragraph are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20–F (§ 249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, however, when financial statements are prepared on a basis other than U.S. GAAP, a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. must be presented.

(c) Notwithstanding paragraph (b) of this Item, the financial statements of the company being acquired must be audited for the fiscal years required by Item 310 of Regulation S–B if this registration statement is used for resales by any person deemed to be an underwriter within the meaning of Securities Act Rule 145(c).

(d) If the company being acquired is not subject to the reporting requirements of Exchange Act Section 13(a) or 15(d), provide the information required by Part I of Form 10–QSB for the most recent quarter for which a quarterly report would be due if the company being acquired were subject to those reporting requirements.

D. Voting and Management Information

Item 22. Information if Proxies, Consents or Authorizations Will Be Solicited

(a) If either the registrant or the company being acquired is soliciting proxies, consents or authorizations, provide the following information:

(1) *Date, Time and Place Information.* Item 1 of Schedule 14A;

(2) *Revocability of Proxy.* Item 2 of Schedule 14A;

(3) *Dissenters' Rights of Appraisal.* Item 3 of Schedule 14A;

(4) *Persons Making the Solicitation.* Item 4 of Schedule 14A;

(5) *Persons with a Substantial Interest in the Matter.* Item 5 of Schedule 14A, with respect to both the registrant and the company being acquired;

(6) *Voting Securities and Principal Holders.* Item 6 of Schedule 14A, with respect to both the registrant and the company being acquired;

Instructions to Item 22(a)(6).

1. Foreign registrants and foreign companies being acquired: You may provide the information specified in Item 4 of Form 20–F in lieu of the information specified in Item 6(d) of Schedule 14A.

2. Small business issuers being acquired: You may provide the information specified in the Instruction to Item 20(a)(6) of Form SB–3 instead of the information specified in Item 6(d) of Schedule 14A.

(7) *Vote Required for Approval.* Item 21 of Schedule 14A; and

(8) *Directors and Executive Officers.* With respect to each person who will serve as a director or an executive officer of the surviving or acquiring company, the information required by:

(i) U.S. registrants: Items 401, 402 and 404 of Regulation S–K; and

(ii) Foreign registrants: Items 10, 11, 12 and 13 of Form 20–F.

Instruction to Item 21(a)(8).

Small business issuers being acquired: You may provide the information specified in Item 20(a)(8)(i) or (ii) of Form SB–3 instead of the information specified in Item 21(a)(8) of this Form.

(b) If the registrant or the company being acquired meets the requirements of General Instructions I.B. and I.C.1. of Form B, General Instruction II. of Form A or General Instruction E.1. of Form SB–2, any information required by paragraphs (a)(6) or (a)(8) of this Item with respect to it may be incorporated by reference from its latest annual report.

Item 23. Information if Proxies, Consents or Authorizations Will Not Be Solicited or in an Exchange Offer

(a) If proxies, consents or authorizations will not be solicited in connection with the transaction or in an exchange offer, provide the following information:

(1) *Statement that Proxies are not to be Solicited.* Item 2 of Schedule 14C;

(2) *Date, Time and Place Information.* The date, time and place of the meeting of

security holders, unless such information is otherwise disclosed in material furnished to security holders with or preceding the prospectus;

(3) *Dissenters' Rights of Appraisal.* Item 3 of Schedule 14A;

(4) *Affiliates' Interests in the Transaction.* A brief description of any direct or indirect material interest of affiliates of the registrant and of the company being acquired in the proposed transaction;

Instruction to Item 23(a)(4).

You need not describe any interest arising from the ownership of securities where the affiliate receives no benefit not shared on a pro rata basis by all other holders of the same class.

(5) *Voting Securities and Principal Holders.* Item 6 of Schedule 14A, with respect to both the registrant and the company being acquired;

Instructions to Item 23(a)(5).

1. Foreign registrants and foreign companies being acquired: You may provide the information specified in Item 4 of Form 20–F in lieu of the information specified in Item 6(d) of Schedule 14A.

2. Small business issuers being acquired: You may provide the information specified in the Instruction to Item 21(a)(5) of Form SB–3 instead of the information specified in Item 6(d) of Schedule 14A.

(6) *Vote Required for Approval.* Item 21 of Schedule 14A; and

(7) *Directors and Executive Officers.* With respect to each person who will serve as a director or an executive officer of the surviving or acquiring company, the information required by:

(i) U.S. registrants: Items 401, 402 and 404 of Regulation S–K; and

(ii) Foreign registrants: Items 10, 11, 12 and 13 of Form 20–F.

Instruction to Item 23(a)(7).

Small business issuers being acquired: You may provide the information specified in Item 21(a)(7)(i) or (ii) of Form SB–3 instead of the information specified in Item 22(a)(7) of this Form.

Instruction to Item 23(a).

If proxies, consents or authorizations will not be solicited in connection with the transaction because the transaction is an exchange offer, you need not provide the information required by paragraphs (a)(1), (a)(2) and (a)(3).

(b) If the registrant or the company being acquired meets the requirements of General Instruction I.B. and I.C.1. of Form B or General Instruction II. of Form A, any information required by paragraphs (a)(5) and (a)(7) of this Item with respect to it may be incorporated by reference from its latest annual report.

Part II—Information Not Required in the Prospectus

Item 24. Indemnification of Directors and Officers

Provide the information required by Item 702 of Regulation S–K.

Item 25. Exhibits and Financial Statement Schedules

(a) Provide the exhibits required by Item 601 of Regulation S–K.

Instruction to Item 25(a).

Provide exhibits required by Item 601(b)(10) with respect to both the registrant and the company being acquired.

(b) Provide the financial statement schedules required by Regulation S–X and Item 14(e) or Item 17(a) of this Form. List each schedule according to the number assigned to it in Regulation S–X.

(c) If information is provided pursuant to Item 4(b) of this Form, provide the report, opinion or appraisal as an exhibit to this Form, unless it is included in the prospectus.

Item 26. Undertakings

(a) Set forth in the effective registration statement the undertakings required by Item 512 of Regulation S–K.

(b) Set forth the following undertaking if the registrant is using this Form for a transaction to be effected on a delayed basis:

[Name of registrant] will file a post-effective amendment containing all required information concerning a transaction and the company being acquired that was not included in the registration statement when it became effective because it was not practicable to do so.

Signatures

The registrant hereby certifies that it meets all of the requirements for filing on Form C. The registrant also certifies that it has duly caused and authorized the undersigned to sign this registration statement on its behalf. The undersigned certifies that he/she has read this registration statement and to his/her knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement and to their knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

Signature Instructions.

1. The following persons, or persons performing similar functions, must sign the registration statement:

(a) the registrant;

(b) its principal executive officer or officers;

(c) its principal financial officer;

(d) its controller or principal accounting officer; and

(e) at least the majority of its board of directors.

2. Where the registrant is a foreign issuer, its authorized representative in the United States also must sign the registration statement.

3. Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement.

4. Type or print the name and title of each person who signs the registration statement beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs the registration statement. *See* Securities Act Rule 402 concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

5. If the securities to be offered are those of an entity that is not yet in existence at the time the registration statement is filed, but which will be a party to a consolidation involving two or more existing entities, then each existing entity will be deemed a registrant and must be so designated on the cover page of the Form. In that case, each existing entity (and the applicable persons noted in Signature Instructions 1.—3.) must sign the registration statement as if it were the registrant.

93. By revising § 239.9 and amending Form SB–1 (referenced in § 239.9) by revising the title of the Form and the facing page, General Instruction A.3., General Instruction B.3., General Instruction H. and the Signatures section; by removing in General Instruction A.1.(b) the words ''S–4'' and adding, in their place, the words ''SB–3'' and by removing the words ''S–3 (if the issuer incorporates by reference transitional Exchange Act reports),''; and by adding General Instruction I. and General Instruction J. to read as follows:

§ 239.9 Form SB–1, optional Form for the registration under the Securities Act of 1933 of securities to be sold to the public by certain small business issuers, and for optional concurrent registration under the Securities Exchange Act of 1934.

(a) A ''small business issuer,'' as defined in Rule 405 of the Securities Act of 1933 (the ''Securities Act''), may use this Form to register an offering of securities under the Securities Act. It may register up to $10,000,000 of securities to be sold for cash, if it has not registered more than $10,000,000 in securities offerings in any continuous 12-month period, including the transaction being registered. In calculating the $10,000,000 ceiling, the issuer must include all offerings that were registered under the Securities Act, other than any amounts registered on Form S–8 (§ 239.16b).

(b) A small business issuer also may use this Form to register concurrently under Section 12(b) or 12(g) of the Securities Exchange Act of 1934 (''Exchange Act''). It may register under the Exchange Act any class of securities that are the subject of the offering it is

registering under the Securities Act. To register, the small business issuer must check the appropriate box(es) on the cover page of this Form and identify which class(es) of securities it is registering under Section 12(b) or 12(g) of the Exchange Act.

Note: The text of Form SB–1 does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

FORM SB–1—Registration Statement Under the Securities Act of 1933 [and Optional Registration Pursuant to Section 12(b) or 12(g) of the Securities Exchange Act of 1934]

(Amendment No. ____)

_____
(Name of Small Business Issuer in its charter)

_____
(Translation of Small Business Issuer's name into English, if applicable)

_____
(State or other jurisdiction of incorporation or organization)

_____
(Primary Standard Industrial Classification Code Number)

_____
(I.R.S. Employer Identification Number)

_____
(Address and telephone number of Registrant's principal executive offices)

_____
(Address of principal place of business or intended principal place of business)

_____
(Name, address and telephone number of agent for service)

_____
(Web Site Address, if any)

_____
(E-mail Address, if any)

* * * * *

Approximate date of commencement of sales _____

If you include the Securities Act Rule 473(a) delaying legend on this registration statement when you first file it, and you are relying on Securities Act Rule 456(b) to delay payment of the registration fee, check the following box. [ ]

If you do not include the Securities Act Rule 473(a) delaying legend on this registration statement when you first file it, or if you specifically state in a pre-effective amendment that this registration statement shall hereafter become effective in accordance with Section 8(a) of the Securities Act, check the following box. [ ]

Note: If you check this box, you must pay the registration fee required by Section 6 of the Securities Act (unless previously paid) before the registration statement or pre-effective amendment will be considered filed.

If you are filing this Form to register additional securities for an offering in accordance with Securities Act Rule 462(e), check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If this Form is a post-effective amendment filed in accordance with Securities Act Rule 462(c) to re-start the 15-business-day period during which pricing must occur under Securities Act Rule 430A(a)(3) or to reflect a non-substantive change from, or addition to, the prospectus, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If this Form is a post-effective amendment filed in accordance with Securities Act Rule 462(d) solely to add exhibits, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If you are using this Form to register concurrently under Section 12(b) or 12(g) of the Exchange Act any class of securities that are the subject of the offering you are registering under the Securities Act, check the appropriate box and provide the information indicated below:

[ ] Securities being registered pursuant to Exchange Act Section 12(b):
Title of each class:
_____
_____
Name of exchange on which listed:
_____
_____

[ ] Securities being registered pursuant to Exchange Act Section 12(g):
Title of each class:
Name of market on which quoted:
_____
_____
Name of market on which quoted:
_____
_____

Calculation of Registration Fee

Title of each class of securities to be registered	Amount to be registered	Proposed maximum offering price per unit	Proposed maximum aggregate offering price	Amount of registration fee

Notes to the Fee Table:

1. Set forth any explanatory details relating to the fee table in footnotes to the table.
2. If the basis for calculating the fee is not evident from the information presented in this table, refer to the applicable provisions of Securities Act Rule 457 in a footnote.
3. If the fee is calculated under Rule 457(o), the ''Amount to be registered'' and the ''Proposed maximum offering price per unit'' need not appear in this table.
4. If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. See Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

The following delaying amendment is optional, but see Securities Act Rule 473 before omitting it:

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Commission acting pursuant to said Section 8(a) may determine.

Disclosure alternative used (check one):
Alternative 1 _____ Alternative 2 _____

General Instructions

A. Use of Form and Place of Filing

* * * * *

3. A small business issuer also may use this Form to register concurrently under Section 12(b) or 12(g) of the Exchange Act. It may register under the Exchange Act any class of securities that are the subject of the offering it is registering under the Securities Act. To register, the small business issuer must check the appropriate box(es) on the cover page of this Form and identify which class(es) of securities it is registering under Section 12(b) or 12(g).

B. General Requirements

* * * * *

3. If you are engaged in real estate, oil and gas, or mining activities, you should read the Industry Guides in Item 801 or Regulation S-K. Real estate entities should also read Items 1105 (Real Estate and Other Investment Activities) and 1106 (Description of Real Estate and Operating Data) of Regulation S-K.

* * * * *

H. Registration of Additional Securities

1. Under certain circumstances, a small business issuer may increase the size of an offering after the effective date through filing a short-form registration statement under Securities Act Rule 462(b) or 462(e). That type of registration statement may include only the following:

(a) the facing page;

(b) a statement that the earlier registration statement, identified by file number, is incorporated by reference;

(c) any required opinions and consents;

(d) the signature page; and

(e) any price-related information omitted from the earlier registration statement in reliance on Securities Act Rule 430A, if the registrant so chooses.

2. The information contained in a Rule 462(b) or Rule 462(e) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) or Rule 462(e) registration statement.

3. The small business issuer may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) or Rule 462(e) registration statement if:

(a) the opinion or consent expressly allows that incorporation; and

(b) the opinion or consent also relates to the Rule 462(b) or Rule 462(e) registration statement.

Note to General Instruction H.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

I. Free Writing Prospectus Information

You should read Securities Act Rule 165. That rule permits the small business issuer and those acting on its behalf to use ''free writing'' offering materials that do not meet the requirements of Section 10 of the Securities Act. Those offering materials may be used after the small business issuer has filed that Section 10 prospectus with the Commission in the registration statement. If you use a prospectus in reliance on that Rule, you must file it when required to do so by Securities Act Rule 425.

J. Concurrent Registration of Securities Under Exchange Act

1. Registration on this Form of a class of securities under Exchange Act Section 12(b) shall become effective upon the later of:

(a) receipt by the Commission of certification from the national securities exchange listed on the cover of this Form that the securities have been approved for listing; or

(b) effectiveness of this registration statement.

2. Registration on this Form of a class of securities under Exchange Act Section 12(g) shall become effective automatically upon the earlier of (1) 60 days after the initial filing of this registration statement; or (2) the effectiveness of this registration statement.

3. If the registrant is required to file an annual report under Exchange Act Section 15(d) for its last fiscal year, it must file that annual report within the time period specified in the appropriate annual report form even if the Exchange Act registration becomes effective before the annual report is due.

4. The registrant must file at least one complete, signed copy of the registration statement with each exchange or market identified on the cover of this Form.

* * * * *

Signatures

The registrant hereby certifies that it meets all of the requirements for filing on Form SB–1. The registrant also certifies that it has duly caused and authorized the undersigned to sign this registration statement on its behalf. The undersigned certifies that he/she has read this registration statement and to his/her knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement and to their knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

Signature Instructions.

1. The following persons, or persons performing similar functions, must sign the registration statement:

(a) the small business issuer;

(b) its principal executive officer or officers;

(c) its principal financial officer;

(d) its controller or principal accounting officer; and

(e) at least the majority of its board of directors.

2. Where the small business issuer is a foreign issuer, its authorized representative in the United States also must sign the registration statement.

3. Where the small business issuer is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement.

4. Type or print the name and title of each person who signs the registration statement beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs the registration statement. *See* Securities Act Rule 402 concerning manual signatures and Item 601 of Regulation S–B concerning signatures pursuant to powers of attorney.

94. By revising § 239.10 and amending Form SB–2 by revising the title of the Form and the facing page, General Instruction A., General Instruction B.1. and B.2., and General Instruction C; by adding General Instructions B.4. and B.5., General Instruction D., General Instruction E., and General Instruction F.; by removing Items 9–11 and 15–23; by redesignating Items 12 and 13 as Items 9 and 10; by adding Items 11, 12 and 13; by redesignating Items 24–28 as Items 14–18; and by revising the Signatures section to read as follows:

§ 239.10 Form SB–2, optional Form for the registration under the Securities Act of 1933 of securities to be sold to the public by small business issuers, and for optional concurrent registration under the Securities Exchange Act of 1934.

(a) A ''small business issuer,'' as defined in § 230.405 of this chapter, may use this Form to register under the Securities Act of 1933 (15 U.S.C. 77a *et. seq.*) (''Securities Act'') an offering of securities for cash. *See also* Item 10(a) of Regulation S–B (§ 228.10(a) of this chapter).

(b) A small business issuer must file this registration statement in the Commission's Washington, D.C. office.

(c) A small business issuer also may use this Form to register concurrently under Section 12(b) or 12(g) of the Securities Exchange Act of 1934 (''Exchange Act''). It may register under the Exchange Act any class of securities that are the subject of the offering it is registering under the Securities Act. To register, the small business issuer must check the appropriate box(es) on the cover page of this Form and identify which class(es) of securities it is registering under Section 12(b) or 12(g) of the Exchange Act.

Note: The text of Form SB–2 does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form SB–2—Registration Statement Under the Securities Act of 1933 [and Optional Registration Pursuant to Section 12(b) or 12(g) of the Securities Exchange Act of 1934] (Amendment No. ____)

_____
(Name of Small Business Issuer in its charter)

_____
(Translation of Small Business Issuer's name into English, if applicable)

_____
(State or other jurisdiction of incorporation or organization)

_____
(Primary Standard Industrial Classification Code Number)

_____
(I.R.S. Employer Identification Number)

_____
(Address and telephone number of Registrant's principal executive offices)

_____
(Address of principal place of business or intended principal place of business)

_____
(Name, address and telephone number of agent for service)

_____
(Web Site Address, if any)

_____
(E-mail Address, if any)

* * * * *

Approximate date of commencement of sales _____

If you include the Securities Act Rule 473(a) delaying legend on this registration statement when you first file it, and you are relying on Securities Act Rule 456(b) to delay payment of the registration fee, check the following box. [ ]

If you do not include the Rule 473(a) delaying legend on this registration statement when you first file it, or if you specifically state in a pre-effective amendment that this registration statement shall hereafter become effective in accordance with Section 8(a) of the Securities Act, check the following box. [ ]

Note: If you check this box, you must pay the registration fee required by Section 6 of the Securities Act (unless previously paid) before the registration statement or pre-effective amendment will be considered filed.

If you are filing this Form to register additional securities for an offering in accordance with Securities Act Rule 462(e), check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If this Form is a post-effective amendment filed in accordance with Securities Act Rule 462(c) to re-start the 15-business-day period during which pricing must occur under Securities Act Rule 430A(a)(3) or to reflect a non-substantive change from, or addition to, the prospectus, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If this Form is a post-effective amendment filed in accordance with Securities Act Rule 462(d) solely to add exhibits, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If you are using this Form to register concurrently under Section 12(b) or 12(g) of the Exchange Act any class of securities that are the subject of the offering you are registering under the Securities Act, check the appropriate box and provide the information indicated below:

[ ] Securities being registered pursuant to Exchange Act Section 12(b):

Title of each class:

_____

_____

Name of exchange on which listed:

_____

_____

[ ] Securities being registered pursuant to Exchange Act Section 12(g):

Title of each class:

_____

_____

Name of market on which quoted:

_____

_____

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be registered	Amount to be registered	Proposed maximum offering price per unit	Proposed maximum aggregate offering price	Amount of registration fee

Notes to the Fee Table:

1. Set forth any explanatory details relating to the fee table in footnotes to the table.
2. If the basis for calculating the fee is not evident from the information presented in this table, refer to the applicable provisions of Securities Act Rule 457 in a footnote.
3. If the fee is calculated under Rule 457(o), the ''Amount to be registered'' and the ''Proposed maximum offering price per unit'' need not appear in this table.
4. If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

The following delaying amendment is optional, but see Securities Act Rule 473 before omitting it:

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Commission acting pursuant to said Section 8(a) may determine.

General Instructions

A. Use of Form and Place of Filing

1. A ''small business issuer,'' as defined in § 230.405 of this chapter, may use this Form to register under the Securities Act of 1933 (''Securities Act'') an offering of securities for cash. See also Item 10(a) of Regulation S–B.

2. A small business issuer must file this registration statement in the Commission's Washington, D.C. office.

3. A small business issuer also may use this Form to register concurrently under Section 12(b) or 12(g) of the Exchange Act. It may register under the Exchange Act any class of securities that are the subject of the offering it is registering under the Securities Act. To register, the small business issuer must check the appropriate box(es) on the cover page of this Form and identify which

class(es) of securities it is registering under Section 12(b) or 12(g).

B. General Requirements

1. If you are registering securities for the first time, you should be aware of Rule 463 under the Securities Act concerning sales of registered securities and the use of proceeds.

2. If you are engaged in real estate, oil and gas, or mining activities, you should read the Industry Guides in Item 801 of Regulation S–K.

* * * * *

4. You should read Securities Act Rule 172. That Rule describes prospectus delivery obligations applicable to offerings registered on this Form.

5. If the offering registered on this Form relates to a blank check company, you should read Securities Act Rule 419. Among other things, that Rule contains additional disclosure requirements.

C. Registration of Additional Securities

1. Under certain circumstances, a small business issuer may increase the size of an offering after the effective date through filing a short-form registration statement under Rule 462(b) or Rule 462(e). That type of registration statement may include only the following:

(a) the facing page;

(b) a statement that the earlier registration statement, identified by file number, is incorporated by reference;

(c) any required opinions and consents;

(d) the signature page; and

(e) any price-related information omitted from the earlier registration statement in reliance on Rule 430A, if the registrant so chooses.

2. The information contained in a Rule 462(b) or Rule 462(e) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) or Rule 462(e) registration statement.

3. The registrant may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) or Rule 462(e) registration statement if:

(a) the opinion or consent expressly allows that incorporation; and

(b) the opinion or consent also relates to the Rule 462(b) or Rule 462(e) registration statement.

Note to General Instruction C.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

D. Free Writing Prospectus Information

You should read Securities Act Rule 165. That Rule permits the small business issuer and those acting on its behalf to use ''free writing'' offering materials that do not meet the requirements of Section 10 of the Act. Those offering materials may be used after the small business issuer has filed that Section 10 prospectus with the Commission in the registration statement. If you use a prospectus in reliance on that Rule, you must file it when required to do so by Securities Act Rule 425.

E. Registrant Information—Incorporation by Reference

1. *Registrants Eligible to Incorporate by Reference.* Unless otherwise provided in General Instruction E.2., a registrant will be eligible to use Items 11 and 12, instead of Item 13, of this Form if it meets the following requirements:

(a) the registrant has a class of securities registered under Section 12(b) or 12(g) of the Exchange Act, or the registrant is required to file reports under Section 15(d) of the Exchange Act;

(b) the registrant has been subject to the requirements of Section 12 or 15(d) of the Exchange Act for at least 24 full calendar months and any portion of a month immediately preceding the date of filing this Form;

(c) the registrant has filed at least two annual reports under Section 13(a) or 15(d) of the Exchange Act; and

(d) the registrant has filed in a timely manner all reports and materials required by Section 13(a), 14 or 15(d) of the Exchange Act for at least 12 full calendar months and any portion of a month immediately before the date of filing this Form.

Note to General Instruction E.1.(d).

If the registrant filed an Exchange Act Rule 12b–25 notice to delay filing any report (or portion of a report) during that time period, it must have filed the related report (or portion) within the time prescribed by Rule 12b–25.

2. *Registrants Ineligible to Incorporate by Reference.* A registrant must comply with Item 13 if it fails to meet any of the conditions of General Instruction E.1. or any of the following is true:

(a) the registrant is a small business issuer that provided the ''Information Required in Annual Report of Transitional Small Business Issuers'' in its latest Form 10–KSB;

(b) within 2 years before the date of filing this Form, the registrant was a development stage company that either:

(1) had no specific business plan or purpose; or

(2) indicated that its business plan was to engage in a merger or acquisition with an unidentified entity or entities;

(c) within two years before the date of filing this Form, the registrant was a shell entity having few or no assets, earnings or operations;

(d) the registrant is registering an offering of ''penny stock'' as defined in Exchange Act Rule 3a51–1 or has issued it in the two years prior to the date of filing this Form;

(e) the registrant or any of its subsidiaries has, since the end of the last fiscal year for which the registrant included certified financial statements in an Exchange Act report:

(1) failed to pay any dividend or sinking fund installment on preferred stock;

(2) caused any other material delinquency with respect to preferred stock that was not cured within 30 days; or

(3) defaulted on any payment of principal, interest, a sinking fund installment, a purchase fund installment or any other installment on indebtedness, or defaulted on any rental on a long-term lease, if such debt and lease defaults in the aggregate are material;

(f) the independent accountant that examined the registrant's financial statements for the most recent fiscal year expressed in its report substantial doubt about the registrant's ability to continue as a going concern;

(g) within three years before the date of filing, a petition under the federal bankruptcy laws or any state insolvency law was filed by or against the registrant, or a court appointed a receiver, fiscal agent or similar officer with respect to the business or property of the registrant. If true, however, this would not disqualify the registrant if it has filed an annual report with audited financial statements subsequent to its emergence from that bankruptcy, insolvency or receivership process;

(h) within five years before the date of filing, the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or its underwriter was convicted of any felony or misdemeanor described in clauses (i) through (iv) of Section 15(b)(4)(B) of the Exchange Act;

(i) within five years before the date of filing, the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or its underwriter was made the subject of a judicial or administrative decree or order arising out of a governmental action that:

(1) prohibits future violations of any antifraud provision of the securities laws or Section 5 of the Securities Act;

(2) requires that the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or its underwriter cease and desist from violating any antifraud provision of the securities laws or from violating Section 5 of the Securities Act; or

(3) determines that the registrant, any executive officer, director or general partner of the registrant or person nominated to any of those positions, or underwriter violated any antifraud provision of the securities laws or Section 5 of the Securities Act; and

(j) the registrant would incorporate by reference into its Form SB–2 registration statement a report under the Exchange Act that:

(1) the Commission, after review, requested that the registrant amend in accordance with its comments; and

(2) either the registrant did not amend the report or, in the Commission's judgment, did not amend the report in accordance with the Commission's comments.

3. *Successor Registrants.* We will deem a successor registrant to have satisfied the eligibility requirements of General Instruction E.1. of this Item if it satisfies either of the following requirements:

(a)(1) taken together, the registrant and its predecessor meet the eligibility requirements in General Instruction B.1. of this Item;

(2) the primary purpose of the succession was to change the state of incorporation of the predecessor or to form a holding company for the predecessor; and

(3) the assets and liabilities of the successor at the time of succession are

substantially similar to those of the predecessor; or

(b) the predecessor met the eligibility requirements of General Instruction E.1. at the time of succession and the registrant continues to meet those requirements since the succession.

4. *Reporting Companies Recently Entering the Small Business Disclosure System.*

(a) If the small business issuer meets the requirements of General Instruction E.1. and its latest annual report was filed on Form 10–K or Form 20–F (rather than Form 10–KSB), it may use Items 11 and 12 and incorporate that annual report. The annual report on Form 10–K or 20–F must be updated by the Form 10–QSB for its most recent quarter. *See* Item 10(a)(2) of Regulation S–B which explains when and how a reporting company may enter the small business disclosure system.

(b) If a Canadian small business issuer incorporates an annual report on Form 20–F that includes financial statements prepared and presented under Item 17 of Form 20–F, it must include in the prospectus financial statements prepared and presented under Item 18 of Form 20–F unless otherwise permitted under Note 2 of Item 310 of Regulation S–B.

(c) If the small business issuer chooses not to incorporate information from its latest annual report on Form 10–K or 20–F, it must provide the information required by Item 13. Item 13 requires disclosure based upon Regulation S–B, including Item 310 financial statements.

F. Concurrent Registration of Securities Under the Exchange Act

1. Registration on this Form of a class of securities under Exchange Act Section 12(b) shall become effective upon the later of:

(a) receipt by the Commission of certification from the national securities exchange listed on the cover of this Form that the securities have been approved for listing; or

(b) effectiveness of this registration statement.

2. Registration on this Form of a class of securities under Exchange Act Section 12(g) shall become effective automatically upon the earlier of (1) 60 days after the initial filing of this registration statement; or (2) the effectiveness of this registration statement.

3. If the registrant is required to file an annual report under Exchange Act Section 15(d) for its last fiscal year, it must file that annual report within the time period specified in the appropriate annual report form even if the Exchange Act registration becomes effective before the annual report is due.

4. The registrant must file at least one complete, signed copy of the registration statement with each exchange or market identified on the cover of this Form.

* * * * *

Item 11. Information Required for Seasoned Form SB–2 Companies

If you meet the requirements of General Instruction E.1. of this Form and elect to comply with this Item and Item 12 (instead of Item 13), you must:

(a) *Annual Report.* Deliver together with the prospectus a copy of your latest annual report filed pursuant to Section 13(a) or 15(d) of the Exchange Act.

(b) *Canadian Annual Report.* If you are a Canadian small business issuer and you incorporate an annual report on Form 20–F that includes financial statements prepared and presented pursuant to Item 17 of Form 20–F, include in the prospectus financial statements prepared and presented pursuant to Item 18 of Form 20–F.

Notes to Item 11(b).

1. You must state in the prospectus that it is accompanied by that annual report.

2. Canadian small business issuers: You may not satisfy this obligation by delivering an annual report on Form 40–F.

3. Canadian small business issuers: You do not need to include financial statements that comply with Item 18 of Form 20–F if the only securities offered are those listed in paragraphs (a) through (c) of Note 2 of Item 310 of Regulation S–B.

(c) *Quarterly Information.* Provide the information required by Part I of Form 10–QSB for the most recent fiscal quarter following the fiscal year covered by the annual report delivered pursuant to this Item. You must either:

(1) include that information in the prospectus; or

(2) deliver together with the prospectus a copy of your latest Form 10–QSB.

Notes to Item 11(c).

1. If your Form 10–QSB for the most recent quarter is not due to be filed before effectiveness of the registration statement, it may provide the information for the previous fiscal quarter to satisfy Item 11(c). For this purpose, the due date is calculated without reference to the extension provided by Exchange Act Rule 12b–25.

2. If you deliver your latest Form 10–QSB, you must state in the prospectus that it is accompanied by that report.

(d) *Financial statements and information.* If not included in your latest annual report delivered to investors pursuant to this Item, provide:

(1) financial statements and information required by Items 310 (c)–(e) of Regulation S–B;

(2) restated financial statements prepared in accordance with or reconciled to U.S. GAAP where:

(i) after the end of its most recent fiscal year, the registrant consummated one or more business combinations accounted for by the pooling of interests method of accounting; and

(ii) the acquired businesses, considered in the aggregate, are significant pursuant to Item 310(c) of Regulation S–B;

(3) restated financial statements prepared in accordance with or reconciled to U.S. GAAP, if a change in accounting principles or correction of an error required a material retroactive restatement of financial statements;

(4) disclosure required by Item 310(b)(2)(v) of Regulation S–B regarding any material accounting change; or

(5) financial information required by Item 310(b)(2)(iv) of Regulation S–B regarding a significant disposition or purchase business combination;

Instruction to Item 11(d).

You may incorporate by reference into the effective registration statement the information required by paragraph (d) of Item 11. If you incorporate it, you must deliver it together with the prospectus.

(e) *Material changes.* Describe any material changes in your affairs which occurred since the end of the latest fiscal year covered by the annual report and which were not described in an Exchange Act Report that was delivered with the prospectus.

Instructions to Item 11.

1. You must deliver the information required by this Item with the first preliminary prospectus you deliver. You do not need to redeliver those documents with any later prospectus sent to the same person.

2. Any reports the registrant delivers together with the prospectus pursuant to this Item must be delivered without charge to the investor.

Item 12. Incorporation of Certain Information by Reference for Seasoned Form SB–2 Companies

If you provide information pursuant to Item 11 of this Form:

(a) You must incorporate by reference into the prospectus that is part of the effective registration statement:

(1) Your latest annual report filed in accordance with Section 13(a) or 15(d) of the Exchange Act that contains audited financial statements; and

Note to Item 12(a)(1).

Canadian small business issuers: You may not satisfy this obligation by incorporating an annual report on Form 40–F.

(2) All other reports you filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the annual report incorporated in this Form;

Instructions to Item 12(a).

1. List in the prospectus that is part of the effective registration statement all documents filed prior to effectiveness that are incorporated by reference.

2. You should read Rule 439 regarding consent to the use of material incorporated by reference.

(b) You must provide the following undertakings in the prospectus:

(1) that you will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any information that has been incorporated by reference in the prospectus but not delivered with the prospectus;

(2) that you will provide this information upon written or oral request;

(3) that you will provide this information at no cost to the requester;

(4) that you will send a copy of information incorporated by reference into the prospectus but not delivered with it within one business day of any request for that information;

(5) that you will send these incorporated documents in a manner that should result in delivery within three business days; and

(6) the name, address and telephone number to which the request for this information must be made is: [*fill in information*].

Notes to Item 12(b).

1. The undertaking covers all documents incorporated by reference through the date of responding to the request.

2. If you send any of the information that is incorporated by reference in the prospectus to security holders, you must also send any exhibits that are specifically incorporated by reference in that information.

(c) In the prospectus you must:

(1) identify the reports and other information that you file with the Commission;

(2) state that the public:

(i) may read and copy materials you file with the Commission at the Commission's Public Reference Room at 450 Fifth Street, N.W., Washington, D.C. 20549; and

(ii) may obtain information on the operation of the Public Reference Room by calling the Commission at 1–800–SEC–0330; and

(3) if you are an electronic filer, state that the Commission maintains an Internet web site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet web site address, if available.

Item 13. Information Required for all Other Small Business Issuer Registrants

If you do not provide information in accordance with Item 10 or Items 11 and 12, you must provide the following information:

(a) *Description of Business.* Item 101 of Regulation S–B;

(b) *Description of Property*. Item 102 of Regulation S–B;

(c) *Legal Proceedings.* Item 103 of Regulation S–B;

(d) *Market for Common Stock and Related Stockholder Matters.* Item 201 of Regulation S–B;

(e) *Financial Statements.* Item 310 of Regulation S–B;

(f) *Changes in and Disagreements with Accountants on Accounting and Financial Disclosure.* Item 304 of Regulation S–B;

(g) *Management's Discussion and Analysis or Plan of Operation*. Item 303 of Regulation S–B;

(h) *Directors, Executive Officers, Promoters and Control Persons.* Item 401 of Regulation S–B;

(i) *Executive Compensation*. Item 402 of Regulation S–B;

(j) *Security Ownership of Certain Beneficial Owners and Management.* Item 403 of Regulation S–B; and

(k) *Certain Relationships and Related Transactions.* Item 404 of Regulation S–B.

* * * * *

Signatures

The registrant hereby certifies that it meets all of the requirements for filing on Form SB–2. The registrant also certifies that it has duly caused and authorized the undersigned to sign this registration statement on its behalf. The undersigned certifies that he/she has read this registration statement and to his/her knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement and to their knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

Signature Instructions.

1. The following persons, or persons performing similar functions, must sign the registration statement:

(a) the small business issuer;

(b) its principal executive officer or officers;

(c) its principal financial officer;

(d) its controller or principal accounting officer; and

(e) at least the majority of its board of directors.

2. Where the small business issuer is a foreign issuer, its authorized representative in the United States also must sign the registration statement.

3. Where the small business issuer is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement.

4. Type or print the name and title of each person who signs the registration statement beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs the registration statement. *See* Securities Act Rule 402 concerning manual signatures and Item 601 of Regulation S–B concerning signatures pursuant to powers of attorney.

95. By revising § 239.11 and adding Form SB–3 to read as follows:

§ 239.11 Form SB–3, for registration under the Securities Act of 1933 of securities issued by small business issuers in business combination transactions.

Small business issuers must use this Form for registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) of offerings of securities:

(a) In a transaction of the type specified in paragraph (a) § 230.145 of this chapter;

(b) In a merger in which the applicable law would not require the solicitation of the votes or consents of all of the security holders of the company being acquired;

(c) In an exchange offer for securities of the issuer or another entity;

(d) In a public reoffering or resale of any securities acquired pursuant to this registration statement; or

(e) In more than one of the kinds of transactions listed in paragraphs (a) through (d) of this section registered on one registration statement.

Note: The text of Form SB–3 will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form SB–3—Registration Statement Under the Securities Act of 1933

_____

(Exact name of Registrant as specified in its charter)

_____

(Translation of Registrant's name into English, if applicable)

_____

(State or other jurisdiction of incorporation or organization)

_____

(I.R.S. Employer Identification Number)

_____

(Address and telephone number of Registrant's principal executive offices)

_____

(Name, address and telephone number of Registrant's agent for service)

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

If you include the Securities Act Rule 473(a) delaying legend on this registration statement when you first file it, and you are relying on Securities Act Rule 456(b) to delay payment of the registration fee, check the following box. [ ]

If you do not include the Rule 473(a) delaying legend on this registration statement when you first file it, or if you specifically state in a pre-effective amendment that this registration statement shall hereafter become effective in accordance with Section 8(a) of the Securities Act, check the following box. [ ]

Note: If you check this box, you must pay the registration fee required by Section 6 of the Securities Act (unless previously paid) before the registration statement or pre-effective amendment will be considered filed.

If you are filing this Form to register additional securities for an offering in accordance with Rule 462(e) under the Securities Act, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

If you are using this Form to register concurrently under Section 12(b) or 12(g) of the Exchange Act any class of securities that are the subject of the offering you are registering under the Securities Act, check the appropriate box and provide the information indicated below:

[ ] Securities being registered pursuant to Exchange Act Section 12(b):

Title of each class:

Name of exchange on which listed:

[ ] Securities being registered pursuant to Exchange Act Section 12(g):
Title of each class:

Name of market on which quoted:

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be registered	Amount to be registered	Proposed maximum offering price per unit	Proposed maximum aggregate offering price	Amount of registration fee

Notes to the Fee Table:

1. Set forth any explanatory details relating to the fee table in footnotes to the table.
2. If the basis for calculating the fee is not evident from the information presented in this table, refer to the applicable provisions of Securities Act Rule 457 in a footnote.
3. If the fee is calculated under Rule 457(o), the ''Amount to be registered'' and the ''Proposed maximum offering price per unit'' need not appear in this table.
4. If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

General Instructions

I. Rules as to Use of Form SB–3

A. A ''small business issuer'' as defined in Securities Act Rule 405 may use this Form to register an offering under the Securities Act of 1933 (''Securities Act'') that is:

1. a transaction of the type specified in Securities Act Rule 145(a);
2. a merger in which the applicable law would not require the solicitation of the votes or consents of all of the security holders of the company being acquired;
3. an exchange offer for securities of the issuer or another entity;
4. a public reoffering or resale of any securities acquired pursuant to this registration statement; or
5. more than one of the kinds of transactions listed in paragraphs 1. through 4. registered on one registration statement.

B. You also may use this Form to register concurrently under Section 12(b) or 12(g) of the Securities Exchange Act of 1934 (''Exchange Act''). You may register any class of securities that are the subject of the offering you are registering under the Securities Act. To register, you must check the appropriate box(es) on the cover page of this Form and identify which class(es) of securities it is registering under Section 12(b) or 12(g) of the Exchange Act.

C. You may not use this Form if you are a registered investment company or a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940.

II. Registrant Information

Provide information about the registrant as follows:

A. *Transitional Small Business Issuer Registrants.* A registrant may comply with either Item 10(b) or (c) of this Form, as applicable, if it meets the following requirements:

1. it is a reporting company under the Exchange Act;
2. it provided the disclosure required by Alternative 1 or 2 of ''Information Required in Annual Report of Transitional Small Business Issuers'' in its most recent Form 10–KSB; and
3. it is eligible to use Form SB–1.

B. *Seasoned Form SB–2 Registrants.* If the registrant meets the requirements of General Instruction E.1. of Form SB–2, it must comply with:

1. Items 11 and 12 of this Form; or
2. Item 13 of this Form.

C. *All Other Small Business Issuer Registrants.* All other small business issuer registrants, including transitional small business issuers that choose not to rely on Item 10, must comply with Item 13 of this Form.

III. Information With Respect to the Company Being Acquired

Provide information about the company being acquired (which includes any entity whose securities are to be exchanged for securities of the registrant) as follows:

A. *Transitional Small Business Issuers.* If the company being acquired is a transitional small business issuer that meets the requirements of General Instruction II.A.1., it may provide the information required by either Item 14 or 16 of this Form.

B. *Seasoned Form SB–2 Companies.* If the company being acquired meets the requirements of General Instruction E.1. of Form SB–2, provide the information required by:

1. Item 15 of this Form; or
2. Item 16 of this Form.

C. *All Other Small Business Issuers.* For all other small business issuers being acquired, provide the information required by Item 16 of this Form.

D. *Form B Companies.* If the company being acquired meets the requirements of General Instructions I.B. and I.C.1. of Form B, provide information in accordance with:

1. Item 17 of this Form;
2. Item 18 of this Form; or
3. Item 19 of this Form.

E. *Seasoned Form A Companies.* If the company being acquired meets the requirements of General Instruction II. of Form A, provide information in accordance with:

1. Item 18 of this Form; or
2. Item 19 of this Form.

F. *All Other Companies.* For all other companies being acquired, provide information in accordance with Item 19 of this Form.

IV. Securities Act Rules and Regulations

You should read the rules and regulations under the Securities Act (Part 230 of Title 17 of the Code of Federal Regulations), particularly Regulation C. That Regulation contains general requirements regarding the preparation and filing of registration statements.

V. Free Writing Prospectus Information

A. You should read Securities Act Rule 166. That Rule permits a registrant to make offers prior to filing a Form SB–3 registration statement. If you use a prospectus in reliance on that Rule, you must file that prospectus when required to do so by Securities Act Rule 425.

B. You should read Securities Act Rule 165. That Rule permits the use of ''free writing'' offering materials that do not meet the requirements of Section 10 of the Act. If you use a prospectus in reliance on Rule 165,

you must file it when required to do so by Securities Act Rule 425.

VI. U.S. and Foreign Companies Being Acquired

A. As used in this Form, ''larger U.S. company being acquired'' includes all entities being acquired other than U.S. small business issuers, foreign governments and foreign private issuers.

B. As used in this Form, ''larger foreign company being acquired'' includes only entities being acquired that are foreign private issuers. It does not include Canadian small business issuers.

C. ''Foreign private issuer'' is defined in Rule 405 of Regulation C.

D. ''Small business issuer being acquired'' includes only those entities being acquired that are small business issuers, as defined in Rule 405.

VII. Interaction With the Exchange Act

A. If Regulation 14A or 14C under the Exchange Act applies to the transaction registered on this Form:

1. the prospectus may be in the form of a proxy statement or information statement;

2. the prospectus must contain the information required by this Form in lieu of that required by Schedule 14A or 14C; and

3. material filed as a part of the registration statement shall be deemed filed also for purposes of Regulation 14A or 14C, as applicable.

B. If neither Regulation 14A nor 14C applies to the transaction registered on this Form, any proxy or information statement material sent to security holders must be filed prior to use as a part of the effective registration statement.

C. If you are registering an offering that is subject to Section 13(e), 14(d) or 14(e) of the Exchange Act, the provisions of those sections and the rules and regulations thereunder shall apply to the transaction in addition to the provisions of this Form.

VIII. Business Combinations Effected on a Delayed Basis

A. A registrant may use this Form to register a transaction that will be effected on a delayed basis under Securities Act Rule 415(a)(1)(viii). In that event, it need only furnish information about the contemplated transaction and the company being acquired to the extent practicable as of the effective date of the registration statement. It must file a post-effective amendment to include the remaining required information about the transaction and the company being acquired in the registration statement.

B. A registrant may use this Form to register a transaction that would qualify for an exemption from Section 5 of the Securities Act but for the proximity in time of other similar transactions. In that event, the registrant need only file a prospectus supplement to provide the required information about the transaction and the company being acquired.

C. A registrant may register two or more classes of securities on this Form that it will offer on a delayed or continuous basis pursuant to Rule 415(a)(1)(viii).

IX. Roll-Up Transactions

A. Roll-up transactions (as defined in Item 901(c) of Regulation S–K) may be registered on this Form. In that event, the small business issuer registrant must comply with the disclosure requirements of Subpart 900 of Regulation S–K. To the extent that the disclosure requirements of Subpart 900 are inconsistent with those in this Form, the requirements of Subpart 900 control.

B. If the registrant registers a roll-up transaction on this Form, special prospectus delivery requirements apply. *See* Securities Act Rule 172(e).

C. The proxy rules and Exchange Act Rule 14e–7 of the tender offer rules contain provisions specifically applicable to roll-up transactions. Those provisions apply whether or not the entities involved have registered securities pursuant to Section 12 of the Exchange Act.

X. Registration of Additional Securities

A. Under certain circumstances, a small business issuer may increase the size of an offering after the effective date through filing a short-form registration statement under Securities Act Rule 462(b) or Rule 462(e). That type of registration statement may include only the following:

1. the facing page;

2. a statement that the earlier registration statement, identified by file number, is incorporated by reference;

3. any required opinions and consents;

4. the signature page; and

5. any price-related information omitted from the earlier registration statement in reliance on Securities Act Rule 430A, if the registrant so chooses.

B. The information contained in a Rule 462(b) or Rule 462(e) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) or Rule 462(e) registration statement.

C. The registrant may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) or Rule 462(e) registration statement if:

1. the opinion or consent expressly allows that incorporation; and

2. the opinion or consent also relates to the Rule 462(b) or Rule 462(e) registration statement.

Note to General Instruction X.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

XI. Concurrent Registration of Securities Under the Exchange Act

A. Registration on this Form of a class of securities under Exchange Act Section 12(b) shall become effective upon the later of:

1. receipt by the Commission of certification from the national securities exchange listed on the cover of this Form that the securities have been approved for listing; or

2. effectiveness of this registration statement.

B. Registration on this Form of a class of securities under Exchange Act Section 12(g) shall become effective automatically upon the earlier of (1) 60 days after the initial filing of this registration statement; or (2) the effectiveness of this registration statement.

C. If the registrant is required to file an annual report under Exchange Act Section 15(d) for its last fiscal year, it must file that annual report within the time period specified in the appropriate annual report form even if the Exchange Act registration becomes effective before the annual report is due.

D. The registrant must file at least one complete, signed copy of the registration statement with each exchange or market identified on the cover to this Form.

Part I—Information Required in the Prospectus

A. Information About the Transaction

Item 1. Front of Registration Statement and Front Cover of Prospectus

Provide the information required by Item 501 of Regulation S–B.

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

(a) Provide the information required by Item 502 of Regulation S–B.

(b) If you incorporate information by reference into the prospectus, state on the inside front cover page:

(1) that the prospectus incorporates by reference important business and financial information about the company that is not delivered with it;

(2) that this information is available without charge to any person, including any beneficial owner, upon written or oral request;

(3) that you will send those incorporated documents in a manner that should result in delivery within three business days of the request;

(4) the name, address and telephone number to which persons must make this request; and

(5) that to obtain timely delivery, persons must request this information no later than ____ [specify date five business days before the date on which the final investment decision must be made. You must highlight this statement by print type or otherwise.

Instruction to Item 2.

1. The undertaking covers all documents incorporated by reference through the date of responding to the request.

2. If you send any of the information that is incorporated by reference in the prospectus, you also must send any exhibits that are specifically incorporated by reference in that information.

3. If information is incorporated by reference in any document you are sending to a security holder upon request, you also must send the information incorporated by reference.

Item 3. Prospectus Summary and Other Information

In the forepart of the prospectus, provide a summary of the information contained in the prospectus as described in Item 503(a) of Regulation S–B and the following information:

(a) *Contact information.* The name, complete mailing address and telephone

number of the principal executive offices of the registrant and the company being acquired;

(b) *Risk factors.* The information required by Item 503(c) of Regulation S–B;

(c) *Ratio of earnings to fix charges.* The information required by Item 503(d) of Regulation S–K;

(d) *Business conducted.* A brief description of the general nature of the business conducted by the registrant and by the company being acquired;

(e) *Transaction being registered.* A brief description of the transaction in which the securities being registered will be offered;

(f) *Selected financial data.* The selected financial data required by Item 301 of Regulation S–K for larger U.S. companies being acquired and Item 8 of Form 20–F for larger foreign companies being acquired. To the extent this information is required to be presented in the prospectus pursuant to other Items of this Form, it need not be presented pursuant to this Item;

(g) *Pro forma selected financial data.* If material, the information required by Item 310 of Regulation S–B for the registrant showing the pro forma effect of the transaction. To the extent the information is required to be presented in the prospectus pursuant to other Items of this Form, it need not be presented pursuant to this Item;

(h) *Pro forma information.* In a table designed to facilitate comparison, historical and pro forma per share data of the registrant and historical and equivalent pro forma per share data of the company being acquired for the following items:

(1) book value per share as of the dates financial data is presented;

(2) cash dividends declared per share for the periods for which financial data is presented; and

(3) income (loss) per share from continuing operations for the periods for which financial data is presented.

Instructions to Item 3(g) and 3(h).

1. For a business combination accounted for as a purchase, present the financial information required by paragraphs (g) and (h) only for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, present the financial information required by paragraphs (g) and (h) (except for information with regard to book value) for the most recent two fiscal years and interim period. For purposes of these paragraphs, book value information need only be provided for the most recent balance sheet date.

2. Provide the per share data of the registrant and the company being acquired as of the dates that, or for the periods for which, financial data is presented pursuant to the applicable requirements of:

(a) Item 310 of Regulation S–B for small business issuer registrants and companies being acquired that are small business issuers;

(b) Item 301 of Regulation S–K for larger U.S. companies being acquired; and

(c) Item 8 of Form 20–F for larger foreign companies being acquired;

3. Calculate the equivalent pro forma per share amounts for one share of the company being acquired by multiplying the exchange ratio times each of:

(a) the pro forma income (loss) per share before non-recurring charges or credits directly attributable to the transaction;

(b) the pro forma book value per share; and

(c) the pro forma dividends per share of the registrant.

4. Larger foreign companies: Instruction 7 to Item 8 of Form 20–F is applicable to the financial information presented hereunder to the extent that this Form requires reconciliation of financial statements of foreign private issuers to U.S. GAAP and Regulation S–X.

(i) *Market value of securities.* In a table designed to facilitate comparison, the market value of securities of the company being acquired (on a historical and equivalent per share basis) and the market value of the securities of the registrant (on an historical basis) as of the day before the date the public announcement of the proposed transaction. If no such public announcement was made, as of the day before the date the agreement with respect to the transaction was entered into;

(j) *Affiliates' voting shares.* With respect to the registrant and the company being acquired, a brief statement comparing the percentage of outstanding shares entitled to vote held by directors, executive officers and their affiliates. State the vote required for approval of the proposed transaction;

(k) *Regulatory approval.* A statement as to whether any regulatory requirements must be complied with or approval must be obtained in connection with the transaction, and if so, the status of such compliance or approval;

(l) *Dissenters' rights.* A statement about whether or not dissenters' rights of appraisal exist, including a cross-reference to the information provided pursuant to Item 20 or 21 of this Form; and

(m) *Tax consequences.* A brief statement about the tax consequences of the transaction or, if appropriate, a cross-reference to the information provided pursuant to Item 4 of this Form.

Item 4. Terms of the Transaction

(a) Provide a summary of the material features of the proposed transaction. The summary shall include, where applicable:

(1) the information required by paragraphs (a)(1) and (a)(2) of Regulation M–A (§ 229.1004(a)(1) and (a)(2) of this chapter) and

(2) where not organized in the same country, a discussion of any material differences in the corporate laws applicable to the company being acquired and to the surviving entity. The discussion should include, but not necessarily be limited to: corporate governance, board structure, quorums, class action suits, shareholder derivative suits, rights to inspect corporate books and records, rights to inspect the shareholder list and rights of directors and officers to obtain indemnification from the company.

(b) If a report, opinion or appraisal materially relating to the transaction has been received from an outside party and such report, opinion or appraisal is referred to in the prospectus, provide the information called for by Item 1015(b) of Regulation M–A (§ 229.1015(b) of this chapter).

(c) Incorporate the acquisition agreement by reference into the prospectus.

Item 5. Pro Forma Financial Information

Provide the financial information required by Item 310(d) of Regulation S–B with respect to this transaction.

Instructions.

1. Present any Item 310(d) information required by the other Items of this Form (where not incorporated by reference) together with the information provided under this Item. In presenting this information, you must clearly distinguish between this transaction and any other one.

2. You need only show the pro forma effect that the registered transaction has on any pro forma financial information that:

(i) is incorporated by reference; and

(ii) reflects all prior transactions.

Item 6. Material Contacts With the Company Being Acquired

Provide the information required by Items 1005(b) and 1011(a) of Regulation M–A (§ 229.1005(b) and § 229.1011(a) of this chapter) for the registrant or its affiliates and the company being acquired or its affiliates. The information provided only need cover the periods for which financial statements are presented or incorporated by reference into this Form.

Item 7. Additional Information Required for Reoffering by Persons Deemed To Be Underwriters

If any person who is deemed to be an underwriter of the securities is reoffering any of the securities to the public, provide the following information in the prospectus prior to its use for the reoffer:

(a) The information required by Item 507 of Regulation S–B;

(b) Information with respect to the consummation of the transaction in which the securities were acquired; and

(c) A description of any material change in the registrant's affairs that occurred after the transaction in which the securities were acquired.

Note to Item 7.

You should read Item 512(g) of Regulation S–K regarding undertakings required in reoffering registration statements.

Item 8. Interests of Named Experts and Counsel

Provide the information required by Item 509 of Regulation S–B.

Item 9. Disclosure of Commission Position on Indemnification for Securities Act Liabilities

Provide the information required by Item 510 of Regulation S–B.

B. Information About the Registrant

Item 10. Information Required for Transitional Small Business Issuers

(a) The registrant may rely upon either paragraph (b) or (c), as applicable, of this Item (instead of Item 13), if it meets all of the following requirements:

(1) it is a reporting company under the Exchange Act;

(2) it relied upon Alternative 1 or 2 of ''Information Required in Annual Report of Transitional Small Business Issuers'' in its most recent Form 10–KSB; and

(3) it is eligible to use Form SB–1.

(b) A registrant that meets the requirements of paragraph (a) of this Item and relied upon

Alternative 1 in its most recent Form 10–KSB may provide the information required by:

(1) *Offering Circular Model A of Form 1–A*. Questions 3, 4, 11, 43 and 47–50;

(2) *Market for Common Equity and Related Stockholder Matters*. If common equity securities are being issued, Item 201 of Regulation S–B;

(3) *Changes in and Disagreements with Accountants on Accounting and Financial Disclosure*. Item 304 of Regulation S–B; and

(4) *Financial Statements*. Item 310 of Regulation S–B.

(c) A registrant that meets the requirements of paragraph (a) of this Item and relied upon Alternative 2 in its most recent Form 10–KSB may provide the information required by:

(1) *Offering Circular Model B of Form 1–A*. Items 6 and 7;

(2) *Legal Proceedings*. Item 103 of Regulation S–B;

(3) *Market for Common Equity and Related Stockholder Matters*. If the registrant is issuing common equity securities, Item 201 of Regulation S–B;

(4) *Changes in and Disagreements with Accountants on Accounting and Financial Disclosure*. Item 304 of Regulation S–B; and

(5) *Financial Statements*. Item 310 of Regulation S–B.

Item 11. Information Required for Seasoned Form SB–2 Companies

If you meet the requirements of General Instruction E.1. of Form SB–2 and elect to comply with this Item and Item 12 (instead of Item 13), you must:

(a) *Annual Report*. Deliver together with the prospectus a copy of your latest annual report filed pursuant to Section 13(a) or 15(d) of the Exchange Act;

(b) *Canadian Annual Report*. If you are a Canadian small business issuer and you incorporate an annual report on Form 20–F that includes financial statements prepared and presented pursuant to Item 17 of Form 20–F, include in the prospectus financial statements prepared and presented pursuant to Item 18 of Form 20–F.

Notes to Item 11(a) and (b).

1. You must state in the prospectus that it is accompanied by that annual report.

2. Canadian small business issuers: You may not satisfy the requirement to deliver an annual report with an annual report on Form 40–F.

3. Canadian small business issuers: You do not need to include financial statements that comply with Item 18 of Form 20–F if the only securities offered are those listed in paragraphs (a) through (c) of Note 2 of Item 310 of Regulation S–B.

(c) *Quarterly Information*. Provide the information required by Part I of Form 10–QSB for the most recent fiscal quarter following the fiscal year covered by the annual report delivered pursuant to this Item. You must either:

(1) include that information in the prospectus; or

(2) deliver together with the prospectus a copy of your latest Form 10–QSB;

Notes to Item 11(c):

1. If your Form 10–QSB for the most recent quarter is not due to be filed before effectiveness of the registration statement, you may provide the information for the previous fiscal quarter to satisfy Item 11(c). For this purpose, the due date is calculated without reference to the extension provided by Exchange Act Rule 12b–25.

2. If you deliver your latest Form 10–QSB, you must state in the prospectus that it is accompanied by that report.

(d) *Financial statements and information*. If not included in your latest annual report delivered to investors pursuant to this Item, provide:

(1) financial statements and information required by Items 310(c)–(e) of Regulation S–B;

(2) restated financial statements prepared in accordance with or reconciled to U.S. GAAP where:

(i) after the end of its most recent fiscal year, the registrant consummated one or more business combinations accounted for by the pooling of interests method of accounting; and

(ii) the acquired businesses, considered in the aggregate, are significant pursuant to Item 310(c) of Regulation S–B;

(3) restated financial statements prepared in accordance with or reconciled to U.S. GAAP, if a change in accounting principles or correction of an error required a material retroactive restatement of financial statements;

(4) disclosure required by Item 310(b)(2)(v) of Regulation S–B regarding any material accounting change; or

(5) financial information required by Item 310(b)(2)(iv) of Regulation S–B regarding a significant disposition or purchase business combination.

Instruction to Item 11(d).

You may incorporate by reference into the effective registration statement the information required by paragraph (d) of Item 11. If you incorporate it, you must deliver it together with the prospectus.

(e) *Material Changes*. Describe any material changes in your affairs that occurred since the end of the latest fiscal year covered by the annual report and were not described in an Exchange Act report that was delivered with the prospectus.

Instructions to Item 11:

1. You must deliver the information required by this Item with the first preliminary prospectus you deliver. You do not need to redeliver those documents with any later prospectus sent to the same person.

2. Any reports the registrant delivers together with the prospectus pursuant to this Item must be delivered without charge to the investor.

Item 12. Incorporation of Certain Information by Reference for Seasoned Form SB–2 Companies

If you provide information pursuant to Item 11 of this Form:

(a) You must incorporate by reference into the prospectus that is part of the effective registration statement:

(1) Your latest annual report filed in accordance with Section 13(a) or 15(d) of the Exchange Act that contains audited financial statements; and

Note to Item 12(a)(1).

Canadian small business issuers: you may not satisfy this obligation by incorporating an annual report on Form 40–F.

(2) All other reports you filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the annual report incorporated in this Form.

Instructions to Item 12(a).

1. List in the prospectus that is part of the effective registration statement all documents filed prior to effectiveness that are incorporated by reference.

2. You should read Securities Act Rule 439 regarding consent to the use of material incorporated by reference.

(b) In the prospectus you must:

(1) identify the reports and other information that you file with the Commission;

(2) state that the public:

(i) may read and copy materials you file with the Commission at the Commission's Public Reference Room at 450 Fifth Street, N.W., Washington, D.C. 20549; and

(ii) may obtain information on the operation of the Public Reference Room by calling the Commission at 1–800–SEC–0330; and

(3) if you are an electronic filer, state that the Commission maintains an Internet web site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet web site address, if available.

Item 13. Information Required for all Other Small Business Issuer Registrants

If you do not provide information in accordance with Item 10 or Items 11 and 12, you must provide the following information:

(a) *Description of Business*. Item 101 of Regulation S–B;

(b) *Description of Property*. Item 102 of Regulation S–B;

(c) *Legal Proceedings*. Item 103 of Regulation S–B;

(d) *Market for Common Stock and Related Stockholder Matters*. Item 201 of Regulation S–B;

(e) *Financial Statements*. Item 310 of Regulation S–B;

(f) *Changes In and Disagreements With Accountants on Accounting and Financial Disclosure*. Item 304 of Regulation S–B;

(g) *Management's Discussion and Analysis or Plan of Operations*. Item 303 of Regulation S–B;

(h) *Directors, Executive Officers, Promoters and Control Persons*. Item 401 of Regulation S–B;

(i) *Executive Compensation*. Item 402 of Regulation S–B;

(j) *Security Ownership of Certain Beneficial Owners and Management*. Item 403 of Regulation S–B; and

(k) *Certain Relationships and Related Transactions*. Item 404 of Regulation S–B.

C. Information About the Company Being Acquried

Item 14. Information Required for Companies That Are Transitional Small Business Issuers

(a) If the company being acquired meets the requirements to use Item 10(b) of this Form and compliance with this Item is elected, provide the information required by

Item 10(b) as if the company being acquired were the registrant.

(b) If the company being acquired meets the requirements to use Item 10(c) of this Form and compliance with this Item is elected, provide the information required by Item 10(c) as if the company being acquired were the registrant.

Item 15. Information Required for Seasoned SB–2 Issuers

If the company being acquired meets the requirements of General Instruction E.1. of Form SB–2 and compliance with this Item is elected, provide the information required by Items 11 and 12 of this Form as if the company being acquired were the registrant.

Instruction.

Canadian small business issuers being acquired: Notwithstanding the requirements of Items 11 and 12, the financial statements of the company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F.

Item 16. Information Required for all Other Small Business Issuers

If the company being acquired does not meet the requirements of General Instruction E.1. of Form SB–2, or compliance with this Item is elected, provide the information required by Item 13 of this Form as if the company being acquired were the registrant, subject to the following:

(a) Canadian small business issuers being acquired: Notwithstanding the requirements of Item 13 of this Form, the financial statements of the company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F.

(b) If the company being acquired is not subject to the reporting requirements of Exchange Act Section 13(a) or 15(d), or has not furnished an annual report to its security holders under Rule 14a–3 or Rule 14c–3 for the latest fiscal year because of Exchange Act Section 12(i), furnish the financial statements that would be required in an annual report sent to security holders under Rules 14a–3(b)(1) and (b)(2) if one was required.

Instructions to paragraph (b).

1. If the registrant's security holders will not be voting on the transaction, financial statements for the two fiscal years before the latest fiscal year need be provided only to the extent that security holders of the company being acquired were previously furnished with financial statements (prepared in conformity with GAAP) for those periods.

2. The financial statements required by this paragraph for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited.

3. If the financial statements required by this paragraph are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20–F (§ 249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, however, when financial statements are prepared on a basis other than U.S. GAAP, a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. must be presented.

(c) Notwithstanding paragraph (b) of this Item, the financial statements of the company being acquired must be audited for the fiscal years required by Item 310 of Regulation S–B if this registration statement is used for resales by any person deemed to be an underwriter within the meaning of Rule 145(c).

(d) If the company being acquired is not subject to the reporting requirements of Exchange Act Section 13(a) or 15(d), provide the information required by Part I of Form 10–QSB for the most recent quarter for which a quarterly report would be due as if the company being acquired were subject to those reporting requirements.

Item 17. Information Required for Form B Companies

If the company being acquired meets the requirements of General Instructions I.B. and I.C.1. of Form B and compliance with this Item is elected, provide the information required by Items 10 and 11 of Form C as if the company being acquired were the registrant on Form C.

Instruction.

Larger foreign companies being acquired: Notwithstanding the requirements of Items 10 and 11 of Form C, the financial statements of the company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F.

Item 18. Information Required for Seasoned Form A Companies

If the company being acquired meets the requirements of General Instruction II. of Form A and compliance with this Item is elected, provide the information required by Items 12 and 13 of Form C as if the company being acquired were the registrant on Form C.

Instruction.

Foreign companies being acquired: Notwithstanding the requirements of Items 12 and 13 of Form C, the financial statements of the company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F.

Item 19. Information Required for All Other Companies

If the company being acquired does not meet the requirements of General Instructions I.B. and I.C.1. of Form B or General Instruction II. of Form A, or compliance with this Item is elected, provide the information required by Item 14 of Form C as if the company being acquired were the registrant on Form C, subject to the following:

(a) Only those schedules required by Rules 12–15, 28 and 29 of Regulation S–X need be provided with respect to the company being acquired.

(b) Notwithstanding the requirements of Item 14 of Form C, the financial statements of any foreign company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20–F.

(c) If the company being acquired is not subject to the reporting requirements of Exchange Act Section 13(a) or 15(d), or has not furnished an annual report to its security holders under Rule 14a–3 or Rule 14c–3 for the latest fiscal year because of Exchange Act Section 12(i), furnish the financial statements that would be required in an annual report sent to security holders under Rules 14a–3(b)(1) and (b)(2) if one was required.

Instructions to paragraph (c).

1. If the registrant's security holders will not be voting on the transaction, financial statements for the two fiscal years before the latest fiscal year need be provided only to the extent that security holders of the company being acquired were previously furnished with financial statements (prepared in conformity with GAAP) for those periods.

2. The financial statements required by this paragraph for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited.

3. If the financial statements required by this paragraph are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20–F (§ 249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, however, when financial statements are prepared on a basis other than U.S. GAAP, a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. must be presented.

(d) Notwithstanding paragraph (c) of this Item, the financial statements of the company being acquired must be audited for the fiscal years required by paragraph (b)(2) of Rule 3–05 of Regulation S–X if this registration statement is used for resales by any person deemed to be an underwriter within the meaning of Rule 145(c).

(e) If the company being acquired is not subject to the reporting requirements of Exchange Act Section 13(a) or 15(d), provide the information required by Part I of Form 10–Q or 10–QSB for the most recent quarter for which a quarterly report would be due as if the company being acquired were subject to those reporting requirements.

D. Voting and Management Information

Item 20. Information if Proxies, Consents or Authorizations Will Be Solicited

(a) If either the registrant or the company being acquired is soliciting proxies, consents or authorizations, provide the following information:

(1) *Date, Time and Place Information*. Item 1 of Schedule 14A;

(2) *Revocability of Proxy*. Item 2 of Schedule 14A;

(3) *Dissenters' Rights of Appraisal*. Item 3 of Schedule 14A;

(4) *Persons Making the Solicitation*. Item 4 of Schedule 14A;

(5) *Persons with a Substantial Interest in the Matter*. Item 5 of Schedule 14A, with respect to both the registrant and the company being acquired;

(6) *Voting Securities and Principal Holders*. Item 6 of Schedule 14A, with

respect to both the registrant and the company being acquired;

Instruction to Item 20(a)(6).

The following registrants and companies being acquired may provide the information required below instead of the information required by Item 6(d) of Schedule 14A:

1. Transitional small business issuers that rely upon Item 10(b) (if a registrant) or 14(a) (if an acquiree) of this Form: the information required by Questions 37 and 38 of Offering Circular Model A of Form 1–A;

2. Transitional small business issuers that rely upon Item 10(c) (if a registrant) or 14(b) (if an acquiree) of this Form: the information required by Item 10 of Offering Circular Model B of Form 1–A;

3. All other small business issuers, whether registrants or acquirees: the information required by Item 403 of Regulation S–B; and

4. Larger foreign companies being acquired: the information specified in Item 4 of Form 20–F.

(7) *Vote Required for Approval.* Item 21 of Schedule 14A; and

(8) *Directors and Executive Officers.* For the following companies, with respect to each person who will serve as a director or an executive officer of the registrant:

(i) Transitional Small Business Issuers:

(A) Questions 29–36 and 39–42 of Offering Circular Model A of Form 1–A, if the registrant or acquiree relied upon Item 10(b) or 14(a), respectively; or

(B) Items 8, 9 and 11 of Offering Circular Model B of Form 1–A, if the registrant or acquiree relied upon Item 10(c) or 14(b), respectively;

(ii) All other Small Business Issuers: Items 401, 402 and 404 of Regulation S–B;

(iii) Larger U.S. companies being acquired: Items 401, 402 and 404 of Regulation S–K; and

(iv) Larger foreign companies being acquired: Items 10, 11, 12 and 13 of Form 20–F.

(b) If the registrant or the company being acquired meets the requirements of General Instruction E.1. of Form SB–2, General Instructions I.B. and I.C.1. of Form B or General Instruction II. of Form A, any information required by paragraphs (a)(6) or (a)(8) of this Item with respect to it may be incorporated by reference from its latest annual report.

Item 21. Information if Proxies, Consents or Authorizations Will Not Be Solicited or in an Exchange Offer

(a) If proxies, consents or authorizations will not be solicited in connection with the transaction or in an exchange offer, provide the following information:

(1) *Statement that Proxies Are Not To Be Solicited.* Item 2 of Schedule 14C;

(2) *Date, Time and Place Information.* The date, time and place of the meeting of security holders, unless such information is otherwise disclosed in material furnished to security holders with or preceding the prospectus;

(3) *Dissenters' Rights of Appraisal.* Item 3 of Schedule 14A;

(4) *Affiliates' Interests in the Transaction.* A brief description of any direct or indirect material interest of affiliates of the registrant and of the company being acquired in the proposed transaction;

Instruction to Item 21(a)(4).

You need not describe any interest arising from the ownership of securities where the affiliate receives no benefit not shared on a pro rata basis by all other holders of the same class.

(5) *Voting Securities and Principal Holders.* Item 6 of Schedule 14A, with respect to both the registrant and the company being acquired;

Instruction to Item 21(a)(5).

The following registrants and companies being acquired may provide the information required below instead of the information required by Item 6(d) of Schedule 14A:

1. Transitional small business issuers that rely upon Item 10(b) (if a registrant) or 14(a) (if an acquiree) of this Form: the information required by Questions 37 and 38 of Offering Circular Model A of Form 1–A;

2. Transitional small business issuers that rely upon Item 10(c) (if a registrant) or 14(b) (if an acquiree) of this Form: the information required by Item 10 of Offering Circular Model B of Form 1–A;

3. All other small business issuers, whether registrants or acquirees: the information required by Item 403 of Regulation S–B; and

4. Larger foreign companies being acquired: the information specified in Item 4 of Form 20–F.

(6) *Vote Required for Approval.* Item 21 of Schedule 14A; and

(7) *Directors and Executive Officers.* With respect to each person who will serve as a director or an executive officer of the registrant, the information required by:

(i) Transitional Small Business Issuers:

(A) Questions 29–36 and 39–42 of Offering Circular Model A of Form 1–A, if the registrant or acquiree relied upon Item 10(b) or 14(a) of this Form, respectively; or

(B) Items 8, 9 and 11 of Offering Circular Model B of Form 1–A, if the registrant or acquiree relied upon Item 10(c) or 14(b) of this Form, respectively;

(ii) All other Small Business Issuers: Items 401, 402 and 404 of Regulation S–B;

(iii) Larger U.S. companies being acquired: Items 401, 402 and 404 of Regulation S–K; and

(iv) Larger foreign companies being acquired: Items 10, 11, 12 and 13 of Form 20–F.

Instruction to Item 21(a).

If proxies, consents or authorizations will not be solicited in connection with the transaction because the transaction is an exchange offer, you need not provide the information required by paragraphs (a)(1), (a)(2) and (a)(3).

(b) If the registrant or the company being acquired meets the requirements of General Instruction E.1. of Form SB–2, General Instruction I.B. and I.C.1. of Form B or General Instruction II. of Form A, any information required by paragraphs (a)(5) and (a)(7) of this Item with respect to it may be incorporated by reference from its latest annual report.

Part II—Information Not Required in the Prospectus

Item 22. Indemnification of Directors and Officers

Provide the information required by Item 702 of Regulation S–B.

Item 23. Exhibits and Financial Statement Schedules .

(a) Transitional small business issuer registrants must provide the exhibits required by Part II of Form SB–1. All other small business issuer registrants must provide the exhibits required by Item 601 of Regulation S–B.

Instruction to Item 23(a).

For the following companies being acquired, provide the exhibits required below:

(1) Transitional small business issuer being acquired: Item 2(6) of Part III—Exhibits of Form 1–A;

(2) Any other small business issuer being acquired: Item 601(b)(10) of Regulation S–B;

(3) Larger U.S. company being acquired: Item 601(b)(10) of Regulation S–K; or (4) Larger foreign company being acquired: Item 601(b)(10) of Regulation S–K.

(b) Provide the financial statement schedules required by Regulation S–X and Item 19 of this Form. List each schedule according to the number assigned to it in Regulation S–X.

(c) If information is provided pursuant to Item 4(b) of this Form, provide the report, opinion or appraisal as an exhibit to this Form, unless it is included in the prospectus.

Item 24. Undertakings

(a) Set forth in the effective registration statement the undertakings required by Item 512 of Regulation S–B.

(b) Set forth the following undertaking if the registrant is using this Form for a transaction to be effected on a delayed basis:

[Name of registrant] will file a post-effective amendment containing all required information concerning a transaction and the company being acquired that was not included in the registration statement when it became effective because it was not practicable to do so.

Signatures

The registrant hereby certifies that it meets all of the requirements for filing on Form SB–3. The registrant also certifies that it has duly caused and authorized the undersigned to sign this registration statement on its behalf. The undersigned certifies that he/she has read this registration statement and to his/her knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement and to their knowledge the registration statement does not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to

make the statements therein not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

Signature Instructions.

1. The following persons, or persons performing similar functions, must sign the registration statement:

(a) the registrant;

(b) its principal executive officer or officers;

(c) its principal financial officer;

(d) its controller or principal accounting officer; and

(e) at least the majority of its board of directors.

2. Where the registrant is a foreign issuer, its authorized representative in the United States also must sign the registration statement.

3. Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement.

4. Type or print the name and title of each person who signs the registration statement beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs the registration statement. *See* Securities Act Rule 402 concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

5. If the securities to be offered are those of an entity that is not yet in existence at the time the registration statement is filed, but which will be a party to a consolidation involving two or more existing entities, then each existing entity will be deemed a registrant and must be so designated on the cover page of the Form. In that case, each existing entity (and the applicable persons noted in Signature Instructions 1.–3.) must sign the registration statement as if it were the registrant.

96. By amending Form S–8 (referenced in § 239.16b) by adding four lines immediately preceding the heading ''Calculation of Registration Fee''; Note 3 immediately preceding the General Instructions; by removing General Instruction C.; by redesignating General Instructions D. through G. as General Instructions C. through F.; and by revising newly designated General Instruction D. to read as follows:

Note: The text of Form S–8 does not and this amendment will not appear in the Code of Federal Regulations.

Form S–8—Registration Statement Under the Securities Act of 1933

* * * * *

Telephone number, including area code, of agent for service _____

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

Calculation of Registration Fee

* * * * *

Note 3: If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Securities Act Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

General Instructions

* * * * *

D. Registration of Additional Securities

An issuer may register additional securities of the same class of securities that have been previously registered on this form. The registration statement for the additional securities shall consist only of the following:

(1) a facing page;

(2) a statement that the contents of the earlier registration statement, identified by its file number, is incorporated by reference;

(3) all required opinions;

(4) all required consents;

(5) any information required in the new registration statement that is not in the earlier registration statement; and

(6) a signature page; A filing fee required by the Act and Rule 457 of this chapter shall be paid with respect to the additional securities only.

* * * * *

97. By amending Form F–7 (referenced in § 239.37) to add four lines to the cover page of the registration statement, to add one check box to the cover page of the registration statement immediately before the Calculation of Registration Fee table, a paragraph to appear as the last paragraph on the cover page of the registration statement, paragraph K to General Instruction II, and General Instruction IV. and in Part II following the center heading to add the heading ''Exhibits;'' to designate the introductory text as paragraph (a); to add a heading ''Undertakings;'' and to add paragraph (b) to read as follows:

Note: The text of Form F–7 does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form F–7—Registration Statement Under the Securities Act of 1933

* * * * *

_____

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

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

If you are filing this Form to register additional securities for an offering in accordance with Securities Act Rule 462(b), check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

Calculation of Registration Fee*

* * * * *

If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Securities Act Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

General Instructions

* * * * *

II. Application of General Rules and Regulations

* * * * *

K. You should read Securities Act Rule 172. That rule describes prospectus delivery obligations applicable to offerings registered on this Form.

* * * * *

IV. Registration of Additional Securities

A. Under certain circumstances, the registrant may increase the size of an offering after the effective date through filing a short-form registration statement under Securities Act Rule 462(b). A Rule 462(b) registration statement may include only the following:

1. the facing page;

2. a statement that the earlier registration statement, identified by file number, is incorporated by reference;

3. any required opinions and consents;

4. the signature page; and

5. any price-related information omitted from the earlier registration statement in reliance on Securities Act Rule 430A, if the registrant so chooses.

B. The information contained in a Rule 462(b) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) registration statement.

C. The registrant may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) registration statement if:

1. the opinion or consent expressly allows that incorporation; and

2. the opinion or consent also relates to the Rule 462(b) registration statement.

Note to General Instruction IV.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

Part II—Information Not Required to be Sent to Shareholders

Exhibits

(a) * * *

* * * * *

Undertakings

(b) Include the following undertaking.

The registrant will file with the Commission, on or before the date of first use, all free writing materials used in connection with the securities registered on this registration statement after effectiveness and before the offering is completed.

* * * * *

98. By amending § 239.38 to revise paragraph (d)(4) and the heading ''Instructions''; to add Instruction 5 to the Instructions to paragraph (d); and to revise paragraph (h)(3) to read as follows:

§ 239.38 Form F–8, for registration under the Securities Act of 1933 of securities of certain Canadian issuers to be issued in exchange offers or a business combination.

* * * * *

(d) * * *

(4) *Public Float/ADTV.*

(i) Satisfies either of the following thresholds:

(A) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the registrant's outstanding equity shares is $250 million or more; and

(ii) A registrant conducting its own exchange offer need not meet either of the thresholds in paragraph (d)(4)(i) of this section.

Instructions to Paragraph (d).

* * * * *

5. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume the registrant's equity securities on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10 calendar days immediately preceding the filing of the registration statement.

* * * * *

(h) * * *

(3) *Public Float/ADTV.*

(i) Except for the successor registrant, each company participating in the business combination satisfies either of the following thresholds:

(A) The market value of the public float of the company's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the company's outstanding equity shares is $250 million or more; and

(ii) Any company participating in the business combination need not meet either of the thresholds in paragraph (h)(3)(i) of this section if the assets and gross revenues from continuing operations of the other companies participating in the business combination comprise at least 80 percent of successor registrant's total assets and gross revenues from continuing operations, and each of the other participating companies meets either of the thresholds in paragraph (h)(3)(i) of this section. Measurement of the successor registrant's total assets and gross revenues from continuing operations must be based on the pro forma combined financial statements of all the participating companies' most recently completed fiscal years.

(iii) Any company participating in a business combination will be deemed to have met either of the thresholds in paragraph (h)(3)(i) of this section if, within the last twelve months:

(A) In connection with an exchange offer, the company's equity securities either were registered or could have been registered on Form F–8, F–9, F–10 or F–80 (§ 239.28, 239.39, 239.40 or 239.41) or, in connection with a terminated tender offer, the company filed or could have filed Schedule 13E–4F (§ 240.13e–102 of this chapter) or Schedule 14D–1F (§ 240.14d–102 of this chapter); and

(B) The company would have satisfied either of the thresholds in paragraph (h)(3)(i) of this section immediately before commencing the exchange offer or tender offer.

* * * * *

99. By amending Form F–8 (referenced in § 239.38) by adding four lines to the cover page of the registration statement, by adding one check box to the cover page of the registration statement immediately before the Calculation of Registration Fee table, by adding a paragraph to appear as the last paragraph on the cover page of the registration statement, by revising paragraph (4) of General Instruction II.A., by adding Instruction 5 to the Instructions to General Instruction II.A., by revising paragraph (3) of General Instruction III.A, by adding General Instruction VI., by adding paragraph (c) to Part III. Item 1., to read as follows:

Note: The text of Form F–8 does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form F–8—Registration Statement Under the Securities Act of 1933

* * * * *

_____

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

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

If you are filing this Form to register additional securities for an offering in accordance with Securities Act Rule 462(b), check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

Calculation of Registration Fee *

* * * * *

If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Securities Act Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

General Instructions

* * * * *

II. Eligibility Requirements for Exchange Offers

A. * * *

(4) *Public Float/ADTV.*

(i) Satisfies either of these thresholds:

(A) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the registrant's outstanding equity shares is $250 million or more.

(ii) A registrant conducting its own exchange offer need not meet either of the thresholds in paragraph A.(4)(i).

Instructions

* * * * *

5. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume of the registrant's equity securities on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10

calendar days immediately preceding the filing of the registration statement.

* * * * *

III. Eligibility Requirements for Business Combinations

A. * * *

(3) *Public Float/ADTV.*

(i) Except for the successor registrant, each company participating in the business combination satisfies either of the following thresholds:

(A) The market value of the public float of the company's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the company's outstanding equity shares is $250 million or more.

(ii) Any company participating in the business combination need not meet either of the thresholds in paragraph A.(3)(i) of this instruction if the assets and gross revenues from continuing operations of the other companies participating in the business combination comprise at least 80 percent of successor registrant's total assets and gross revenues from continuing operations, and each of the other participating companies meets either of the thresholds in paragraph (A)(3)(i) of this section. Measurement of the successor registrant's total assets and gross revenues from continuing operations must be based on the pro forma combined financial statements of all the participating companies' most recently completed fiscal years.

(iii) Any company participating in a business combination will be deemed to have met either of the thresholds in paragraph A.(3)(i) of this Instruction if, within the last twelve months:

(A) In connection with an exchange offer, the company's equity securities either were registered or could have been registered on Form F–8, F–9, F–10 or F–80 or, in connection with a terminated tender offer, the company filed or could have filed Schedule 13E–4F or 14D–1F; and

(B) The company would have satisfied either of the thresholds in paragraph A.(3)(i) immediately before commencing the exchange offer or tender offer.

* * * * *

VI. Registration of Additional Securities

A. Under certain circumstances, the registrant may increase the size of an offering after the effective date through filing a short-form registration statement under Securities Act Rule 462(b). A Rule 462(b) registration statement may include only the following:

1. the facing page;

2. a statement that the earlier registration statement, identified by file number, is incorporated by reference;

3. any required opinions and consents;

4. the signature page; and

5. any price-related information omitted from the earlier registration statement in reliance on Rule 430A, if the registrant so chooses.

B. The information contained in a Rule 462(b) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) registration statement.

C. The registrant may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) registration statement if:

1. the opinion or consent expressly allows that incorporation; and

2. the opinion or consent also relates to the Rule 462(b) registration statement.

Note to General Instruction VI.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

* * * * *

Part III—Undertakings and Consent to Service of Process

Item 1. Undertakings

(a) * * *

(b) * * *

(c) The registrant will file with the Commission, on or before the date of first use, all free writing materials used in connection with the securities registered on this registration statement after effectiveness and before the offering is completed.

* * * * *

100. By amending § 239.39 to revise paragraph (b)(4); and to add Instruction 7 to the Instructions to paragraph (b) to read as follows:

§ 239.39 Form F–9, for registration under the Securities Act of 1933 of certain investment grade debt or investment grade preferred securities of certain Canadian issuers.

* * * * *

(b) * * *

(4) *Public Float/ADTV.*

(i) Satisfies either of the following thresholds:

(A) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the registrant's outstanding equity shares is $250 million or more.

(ii) A registrant need not meet either of the thresholds in paragraph (b)(4)(i) of this section if it is using this Form to register securities that are not convertible into another security.

Instructions

* * * * *

7. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume of the registrant's equity securities on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10 calendar days immediately preceding the filing of the registration statement.

* * * * *

101. By amending Form F–9 (referenced in § 239.39) to add four lines to the cover page of the registration statement, to add a check box to the cover page of the registration statement immediately before the ''Calculation of Registration Fee'' table, and one paragraph to appear as the last paragraph on the cover page of the registration statement; to revise paragraph (4) of General Instruction I.B.; to add Instruction 7 to the Instructions to General Instruction I.B., paragraph M. to General Instruction II., General Instruction IV.; and in Part III Item 1., to designate the existing text as paragraph (a) and to add paragraph (b) to read as follows:

Note: The text of Form F–9 will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington D.C., 20549 Form F–9— Registration Statement Under the Securities Act of 1933

* * * * *

_____

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

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

If you are filing this Form to register additional securities for an offering in accordance with Securities Act Rule 462(b) under the Securities Act, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ]

_____

Calculation of Registration Fee *

* * * * *

If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Securities Act Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

General Instructions

I. Eligibility Requirements for Use of Form F–9

* * * * *

B. * * *

(4) *Public Float/ADTV.*

(i) Satisfies either of the following thresholds:

(A) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the registrant's outstanding equity shares is $250 million or more.

(ii) A registrant need not meet either of the thresholds in paragraph B.(4)(i) of this Instruction if it is using this Form to register securities that are not convertible into another security.

Instructions

* * * * *

7. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10 calendar days immediately preceding the filing of the registration statement.

* * * * *

II. Application of General Rules and Regulations

* * * * *

M. You should read Securities Act Rule 172. That rule describes prospectus delivery obligations applicable to offerings registered on this Form.

* * * * *

IV. Registration of Additional Securities

A. Under certain circumstances, the registrant may increase the size of an offering after the effective date through filing a short-form registration statement under Securities Act Rule 462(b). A Rule 462(b) registration statement may include only the following:

1. the facing page;

2. a statement that the earlier registration statement, identified by file number, is incorporated by reference;

3. any required opinions and consents;

4. the signature page; and

5. any price-related information omitted from the earlier registration statement in reliance on Rule 430A, if the registrant so chooses.

B. The information contained in a Rule 462(b) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) registration statement.

C. The registrant may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) registration statement if:

1. the opinion or consent expressly allows that incorporation; and

2. the opinion or consent also relates to the Rule 462(b) registration statement.

Note to General Instruction IV.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

* * * * *

Part III—Undertakings and Consents to Service of Process

Item 1. Undertakings

Include the following undertakings:

(a) * * *

(b) The registrant will file with the Commission, on or before the date of first use, all free writing materials used in connection with the securities registered on this registration statement after effectiveness and before the offering is completed.

* * * * *

102. By amending § 239.40 to revise paragraph (c)(4); and to add Instruction 5 to the Instructions to paragraph (c) to read as follows:

§ 239.40 Form F–10, for registration under the Securities Act of 1933 of securities of certain Canadian issuers.

* * * * *

(c) * * *

(4) *Public Float/ADTV.*

(i) Satisfies either of the following thresholds:

(A) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the registrant's outstanding equity shares is $250 million or more.

(ii) Except for the successor issuer, any company participating in the business combination need not meet either of the thresholds in paragraph (c)(4)(i) of this section if the assets and gross revenues from continuing operations of the other companies participating in the business combination comprise at least 80 percent of successor registrant's total assets and gross revenues from continuing operations, and each of the other participating companies meets either of the thresholds in paragraph (c)(4)(i) of this section. Measurement of the successor registrant's total assets and gross revenues from continuing operations must be based on the pro forma combined financial statements of all the participating companies' most recently completed fiscal years.

(iii) Any company participating in a business combination will be deemed to have satisfied either of the thresholds in paragraph (c)(4)(i) of this section if, within the last twelve months:

(A) In connection with an exchange offer, the company's equity securities either were registered or could have been registered on Form F–8, F–9, F–10 or F–80 (§ 239.38, 239.39, 239.40 or 239.41) or, in connection with a terminated tender offer, the company filed or could have filed Schedule 13E–4F (§ 240.13e–102 of this chapter) or Schedule 14D–1F (§ 240.14d–102 of this chapter); and

(B) The company would have satisfied either threshold in paragraph (c)(4)(i) of this section immediately before commencing the exchange offer or tender offer.

Instructions

* * * * *

5. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume of the registrant's equity securities on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10 calendar days immediately preceding the filing of the registration statement.

* * * * *

103. By revising Form F–10 (referenced in § 239.40) to add four lines to the cover page of the registration statement, to add one check box to the cover page of the registration statement immediately before the ''Calculation of Registration Fee'' table, one paragraph to appear as the last paragraph on the cover page of the registration statement; to revise paragraph (4) of General Instruction I.C.; to add Instruction 5 to the Instructions to General Instruction I.C. and paragraph N. to General Instruction II, General Instruction IV.; and in Part III Item 1., to designate the second paragraph as paragraph (a) and to add paragraph (b) to read as follows:

* * * * *

Note: The text of Form F–10 does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form F–10—Registration Statement Under the Securities Act of 1933

* * * * *

_____

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

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

If you are filing this Form to register additional securities for an offering in accordance with Securities Act Rule 462(b), check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

Calculation of Registration Fee *

* * * * *

If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Securities Act Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

General Instructions

I. General Eligibility Requirements for Use of Form F–10

* * * * *

C. * * *

(4) *Public Float/ADTV.*

(i) Satisfies either of the following thresholds:

(A) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the registrant's outstanding equity shares is $250 million or more.

(ii) Any individual company participating in the business combination need not meet either of the thresholds in paragraph C.(4)(i) of this Instruction if the assets and gross revenues from continuing operations of the other companies participating in the business combination comprise at least 80 percent of successor registrant's total assets and gross revenues from continuing operations, and each of the other participating companies meets either of the thresholds in paragraph C.(4)(i). Measurement of the successor registrant's total assets and gross revenues from continuing operations must be based on the pro forma combined financial statements of all the participating companies' most recently completed fiscal years.

(iii) Any company participating in a business combination will be deemed to have satisfied either of the thresholds in paragraph C.(4)(i) of this Instruction if, within the last twelve months:

(A) In connection with an exchange offer, the company's equity securities either were registered or could have been registered on Form F–8, F–9, F–10 or F–80 or, in connection with a terminated tender offer, the company filed or could have filed Schedule 13E–4F or 14D–1F; and

(B) The company would have satisfied either threshold in paragraph C.(4)(i) of this Instruction immediately before commencing the exchange offer or tender offer.

Instructions

* * * * *

5. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume of the registrant's equity securities on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10 calendar days immediately preceding the filing of the registration statement.

* * * * *

II. Application of General Rules and Regulations

* * * * *

N. You should read Securities Act Rule 172. That rule describes prospectus delivery obligations applicable to offerings registered on this Form.

* * * * *

IV. Registration of Additional Securities

A. Under certain circumstances, the registrant may increase the size of an offering after the effective date through filing a short-form registration statement under Securities Act Rule 462(b). A Rule 462(b) registration statement may include only the following:

1. the facing page;

2. a statement that the earlier registration statement, identified by file number, is incorporated by reference;

3. any required opinions and consents;

4. the signature page; and

5. any price-related information omitted from the earlier registration statement in reliance on Securities Act Rule 430A, if the registrant so chooses.

B. The information contained in a Rule 462(b) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) registration statement.

C. The registrant may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) registration statement if:

1. the opinion or consent expressly allows that incorporation; and

2. the opinion or consent also relates to the Rule 462(b) registration statement.

Note to General Instruction IV.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

* * * * *

Part III—Undertakings and Consent to Service of Process

Item 1. Undertakings

Include the following undertakings:

(a) * * *

(b) The registrant will file with the Commission, on or before the date of first use, all free writing materials used in connection with the securities registered on this registration statement after effectiveness and before the offering is completed.

* * * * *

104. By amending § 239.41 to revise paragraph (d)(4); to add Instruction 5 to the Instructions to paragraph (d); and to revise paragraph (h)(3) to read as follows:

§ 239.41 Form F–80, for registration under the Securities Act of 1933 of securities of certain Canadian issuers to be issued in exchange offers or a business combination.

* * * * *

(d) * * *

(4) *Public Float/ADTV.*

(i) Satisfies either of the following thresholds:

(A) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the registrant's outstanding equity shares is $250 million or more.

(ii) A registrant conducting its own exchange offer need not meet either of the thresholds in paragraph (d)(4)(i) of this section.

Instructions

* * * * *

5. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume of the registrant's equity securities on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10 calendar days immediately preceding the filing of the registration statement.

* * * * *

(h) * * *

(3) *Public Float/ADTV.*

(i) Except for the successor registrant, each company participating in the business combination satisfies either of the following thresholds:

(A) The market value of the public float of the company's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the company's outstanding equity shares is $250 million or more.

(ii) Any company participating in the business combination need not meet either of the thresholds in paragraph (h)(3)(i) of this section if the assets and gross revenues from continuing operations of the other companies participating in the business combination comprise at least 80 percent of successor registrant's total assets and gross revenues from continuing operations, and each of the other participating companies meets either of the thresholds in paragraph (h)(3)(i) of this section. Measurement of the successor registrant's total assets and gross revenues from continuing operations must be based on the pro forma combined financial statements of all the participating companies' most recently completed fiscal years.

(iii) Any company participating in a business combination will be deemed to have met either of the thresholds in paragraph (h)(3)(i) of this section if, within the last twelve months:

(A) In connection with an exchange offer, the company's equity securities either were registered or could have been registered on Form F–8, F–9, F–10 or F–80 (§ 239.38, 239.39, 239.40 or 239.41) or, in connection with a terminated tender offer, the company filed or could have filed Schedule 13E–4F (§ 240.13e–102 of this chapter) or 14D–1F (§ 240.14d–102 of this chapter); and

(B) The company would have satisfied either threshold in paragraph (h)(3)(i) of this section immediately before commencing the exchange offer or tender offer.

105. By amending Form F–80 (referenced in § 239.41) to add four lines to the cover page of the registration

statement, to add one check box to the cover page of the registration statement immediately before the ''Calculation of Registration Fee'' table, one paragraph to appear as the last paragraph on the cover page of the registration statement; to revise paragraph (4) of General Instruction II.A.; to add Instruction 5 to the Instructions to General Instruction II.A.; to revise paragraph (3) of General Instruction III.A.; to add General Instruction VI.; and in Part III Item 1. to add paragraph (c) to read as follows:

* * * * *

Note: The text of Form F–80 does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form F–80—Registration Statement Under the Securities Act of 1933

* * * * *

_____

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

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

If you are filing this Form to register additional securities for an offering in accordance with Securities Act Rule 462(b), check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering. [ ] _____

Calculation of Registration Fee*

If any of the securities registered are not sold in connection with this offering, the registrant (or a qualifying wholly-owned subsidiary) may use the dollar amount of the fee paid with respect to the unsold securities to offset the total fee due on its subsequent registration statement. *See* Securities Act Rule 457(p). When offsetting any part of the fee under Rule 457(p), the registrant must state the dollar amount being offset in a footnote to the fee table and must identify the file number of the registration statement and the amount and class of securities in connection with which the offsetting fee was previously paid. Use of Rule 457(p) to offset any fee automatically deregisters the securities in connection with which the fee was previously paid.

General Instructions

* * * * *

II. Eligibility Requirements for Exchange Offers

A. * * *

(4) *Public Float/ADTV.*

(i) Satisfies either of these thresholds:

(A) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the registrant's outstanding equity shares is $250 million or more.

(ii) A registrant conducting its own exchange offer need not meet either of the thresholds in paragraph A.(4)(i) of this Instruction.

Instructions

* * * * *

5. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume of the registrant's equity securities on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10 calendar days immediately preceding the filing of the registration statement.

* * * * *

III. Eligibility Requirements for Business Combinations

A. * * *

(3) *Public Float/ADTV.*

(i) Except for the successor registrant, each company participating in the business combination satisfies either of the following thresholds:

(A) The market value of the public float of the company's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more; or

(B) The market value of the public float of the company's outstanding equity shares is $250 million or more.

(ii) Any company participating in the business combination need not meet either of the thresholds in paragraph A.(3)(i) of this Instruction if the assets and gross revenues from continuing operations of the other companies participating in the business combination comprise at least 80 percent of successor registrant's total assets and gross revenues from continuing operations, and each of the other participating companies meets either of the thresholds in paragraph A.(3)(i) of this Instruction. Measurement of the successor registrant's total assets and gross revenues from continuing operations must be based on the pro forma combined financial statements of all the participating companies' most recently completed fiscal years.

(iii) Any company participating in a business combination will be deemed to have met either of the thresholds in paragraph A.(3)(i) of this Instruction if, within the last twelve months:

(A) In connection with an exchange offer, the company's equity securities either were registered or could have been registered on Form F–8, F–9, F–10 or F–80 or, in connection with a terminated tender offer, the company filed or could have filed Schedule 13E–4F or 14D–1F; and

(B) The company would have satisfied either threshold in paragraph A.(3)(i) of this Instruction immediately before commencing the exchange offer or tender offer.

* * * * *

VI. Registration of Additional Securities

A. Under certain circumstances, the registrant may increase the size of an offering after the effective date through filing a short-form registration statement under Securities Act Rule 462(b). A Rule 462(b) registration statement may include only the following:

1. the facing page;

2. a statement that the earlier registration statement, identified by file number, is incorporated by reference;

3. any required opinions and consents;

4. the signature page; and

5. any price-related information omitted from the earlier registration statement in reliance on Securities Act Rule 430A, if the registrant so chooses.

B. The information contained in a Rule 462(b) registration statement is deemed to be a part of the earlier effective registration statement as of the date of effectiveness of the Rule 462(b) registration statement.

C. The registrant may incorporate by reference from the earlier registration statement any opinion or consent required in the Rule 462(b) registration statement if:

1. the opinion or consent expressly allows that incorporation; and

2. the opinion or consent also relates to the Rule 462(b) registration statement.

Note to General Instruction VI.

You should read Securities Act Rule 411(c) regarding incorporation by reference of exhibits and Securities Act Rule 439(b) regarding incorporation by reference of consents.

* * * * *

Part III—Undertakings and Consent to Service of Process

Item 1. Undertakings

(a) * * *

(b) * * *

(c) The registrant will file with the Commission, on or before the date of first use, all free writing materials used in connection with the securities registered on this registration statement after effectiveness and before the offering is completed.

* * * * *

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

106. By revising the general authority citation for part 240 to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

107. By amending § 240.12b–2 by revising the definition of ''small business issuer'' to read as follows:

§ 240.12b–2 Definitions.

* * * * *

Small Business Issuer. The term ''small business issuer'' means an entity that meets the following criteria:

(1) Has revenues (including revenues of any consolidated subsidiaries) of less than $50,000,000;

(2) Is a U.S. or Canadian issuer;

(3) Is not an investment company;

(4) If a majority-owned subsidiary, the parent corporation is also a small business issuer; and

(5) Each majority-owned subsidiary of the entity, if any, meets the criteria of paragraphs (2) and (3) of this definition.

* * * * *

108. By adding § 240.12b–24 to read as follows:

§ 240.12b–24 Plain English risk factor disclosure.

(a) To enhance the readability of risk factor disclosure, you must use plain English principles in the organization, language and design of the risk factor section of any Exchange Act registration statement or report.

(b) Any disclosure you provide in those registration statements or reports that relates to risk factors must, at a minimum, substantially comply with each of the following plain English writing principles:

(1) Short sentences;

(2) Definite, concrete, everyday words;

(3) Active voice;

(4) Tabular presentation or bullet lists for complex material, whenever possible;

(5) No legal jargon or highly technical business terms; and

(6) No multiple negatives.

Note to this section.

You should read Securities Act Release No. 7497 (January 28, 1998) for more information on plain English principles.

109. By adding two notes at the end of § 240.12d1–2 to read as follows:

§ 240.12d1–2 Effectiveness of registration.

* * * * *

Notes to Rule 12d1–2

(1) As established by Section 12(g) of the Exchange Act (15 U.S.C. 78l(g)), a Form 8–A (§ 249.208a of this chapter) filed under paragraph (c) of this section becomes effective no more than 60 days after the date that registration statement is filed with the Commission. The automatic effectiveness described in paragraph (c) permits earlier effectiveness of the Form 8–A only.

(2) Registrants may use Forms A, B, C, SB–1, SB–2, or SB–3 or Schedule B (§ 239.4, 239.5, 239.6, 239.9, 239.10, or 239.11 or 15 U.S.C. 77aa) to register a class of securities under Section 12 of the Exchange Act concurrently with the registration of a public offering of securities of that class under the Securities Act. The Exchange Act registration on Forms A, B, C, SB–1, SB–2 or SB–3 will become effective as described in those forms. The Exchange Act registration on Schedule B will become effective as described in Securities Act Rule 499. Securities Act Rule 499 also sets forth disclosure and procedural requirements for registrants using Schedule B for concurrent registration under the Exchange Act and the Securities Act.

§ 240.13a–10 [Amended]

110. By amending § 240.13a–10 by removing the word ''six'' and adding, in its place, the word ''five'' in paragraph (g)(3).

* * * * *

111. By amending § 240.13a–13 by revising paragraph (d) to read as follows:

§ 240.13a–13 Quarterly reports on Form 10–Q and Form 10–QSB (§ 249.308a and § 249.308b of this chapter).

* * * * *

(d) Notwithstanding the foregoing provisions of this section, market risk disclosure required by Item 3 of Part I of Form 10–Q shall not be deemed to be ''filed'' for the purpose of Section 18 of the Act (15 U.S.C. 78r). That disclosure, therefore, shall not be subject to the liabilities of that Section. That disclosure shall, however, be subject to all other provisions of the Act.

112. By amending § 240.14a–2 by removing at the end of paragraph (a)(5) the words ''Act of 1935; and'' and adding, in their place, the words ''Act of 1935;'', at the end of paragraph (a)(6)(iii) the words ''by security holders.'' and adding, in their place, the words ''by security holders; and''; and by adding paragraph (a)(7) to read as follows.

§ 240.14a–2 Solicitations to which § 240.14a–3 to § 240.14a–15 apply.

* * * * *

(a) * * *

(7) Any solicitation by a broker or dealer made in accordance with § 230.138 or § 230.139 of this chapter in connection with an offering registered under the Securities Act of 1933.

113. By amending § 240.14a–101 by revising Note E., by revising paragraph (b)(1), and by revising the heading to paragraph (b)(2) of Item 13 to read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

E. In Item 13 of this Schedule, the reference to ''meets the requirements of Form B'' shall mean a registrant who meets:

(1) the requirements of General Instruction I.B. of Form B; and

(2) one of the following:

(a) General Instruction I.C.1. of Form B;

(b) General Instruction I.C.4. of Form B, if action is to be taken as described in Item 11, 12 and 14 of this schedule that concerns non-convertible debt or preferred securities which are ''investment grade securities.'' The time by which the rating must be assigned shall be the date on which definitive copies of the proxy statement are first sent or given to security holders; or

(c) General Instruction I.C.5. of Form B.

* * * * *

Item 13. Financial and Other Information

(See Notes D and E at the Beginning of this Schedule.)

* * * * *

(b) * * *

(1) *Form B registrants.* If the registrant meets the requirements of Form B (as defined in Note E), it may incorporate by reference to previously filed documents any of the information required by paragraph (a) of this Item, provided that the requirements of paragraph (c) are met. Where the registrant meets these requirements of Form B and has elected to furnish the required information by incorporation by reference, the registrant may elect to update the information incorporated by reference to information in subsequently filed documents.

(2) *All other registrants.*

* * * * *

114. By revising the section heading and paragraph (b) and by removing the words ''of paragraphs (b) and (d)'' in the last sentence of paragraph (d) of § 240.15c2–8 to read as follows:

§ 240.15c2–8 Delivery of prospectus information.

* * * * *

(b) A broker or dealer, and any person acting on behalf of them, must deliver prospectus information to each person offered securities in connection with an offering registered under the Securities Act as follows:

(1) *Form B and Schedule B Seasoned Issuers.* If the issuer is offering securities as described in paragraph (b)(1)(i), then delivery under paragraph (b)(1)(ii) must be made.

(i) Securities in an offering registered on:

(A) Form B (§ 239.5 of this chapter), other than pursuant to General Instruction I.C.6. of that Form; or

(B) Schedule B (15 U.S.C. 77aa) where a firm commitment underwritten offering in excess of $250 million in securities takes place more than one year after the effective date of the issuer's initial registered offering;

(ii) A term sheet prospectus that contains the following information must be sent in a manner reasonably designed to arrive before the date an investor makes a binding investment decision:

(A) An itemization of the material terms of the securities in summary format;

(B) The name of any person, other than the issuer, for whose account securities are offered and a brief identification of any material relationship such person has (or had within the past three years) with the issuer or any affiliate of the issuer;

(C) The identity and location of a contact person to whom questions may be directed; and

(D) The identity and location of a person who, upon request, will send

promptly the documents that define the terms of the securities.

(2) *Other issuers—firm commitment underwritten offerings.* If an offering is registered on Form A, Form SB–1, Form SB–2, Form F–7, Form F–9, Form F–10 (other than in a business combination), (§ 239.4, 239.9, 239.10, 239.37, 239.39 or 239.40 of this chapter) or on Schedule B (other than as described in paragraph (b)(1) of this section), is underwritten on a firm commitment basis and the offering:

(i) Is the issuer's initial offering registered in accordance with Section 5 of the Securities Act (15 U.S.C. 77e) or is an offering taking place within one year of the effective date of the issuer's initial registered offering, then a prospectus satisfying Section 10 (15 U.S.C. 77j) of the Securities Act must be sent to each investor in a manner reasonably designed to arrive at least 7 calendar days before the pricing of the securities.

(ii) Takes place more than one year after the effective date of the issuer's initial offering registered in accordance with Section 5 of the Securities Act, then a prospectus satisfying Section 10 of the Securities Act must be sent to each investor in a manner reasonably designed to arrive at least 3 calendar days before the pricing of the securities.

(3) *Other issuers—non-firm commitment underwritten offerings.* If an offering is registered on Form A, Form SB–1, Form SB–2, Form F–7, Form F–9, Form F–10 (other than in a business combination), or on Schedule B (other than as described in paragraph (b)(1) of this section), is *not* underwritten on a firm commitment basis and the offering:

(i) Is the issuer's initial offering in accordance with Section 5 of the Securities Act or is an offering taking place within one year of the effective date of the issuer's initial registered offering, then a prospectus satisfying Section 10 of the Securities Act must be sent to each investor in a manner reasonably designed to arrive at least 7 calendar days before the investor signs a subscription agreement or otherwise commits to purchase securities.

(ii) Takes place more than one year after the effective date of the issuer's initial registered offering in accordance with Section 5 of the Securities Act, then a prospectus satisfying Section 10 of the Securities Act must be sent to each investor in a manner reasonably designed to arrive at least 3 calendar days before the investor signs a subscription agreement or otherwise commits to purchase securities.

Note to paragraphs (b)(2) and (b)(3). A broker or dealer may choose to deliver a prospectus meeting the requirements of Section 10(a) of the Securities Act, instead of a prospectus meeting the requirements of Section 10 of the Securities Act, if it does so in accordance with the terms of paragraphs (b)(2) and (b)(3).

(4) *Roll-ups.* Notwithstanding paragraphs (b)(1) through (b)(3) of this section, if an issuer is registering a roll-up transaction as defined in § 229.901(c) of this chapter, a prospectus that satisfies the requirements of Section 10 of the Securities Act must be sent to each investor no later than the earlier of:

(i) 60 calendar days before the meeting at which the roll-up transaction will be submitted to a vote or 60 calendar days before the earliest date on which partnership action could be taken by consent; and

(ii) The date calculated by applying the maximum number of days permitted for giving notice under applicable state law.

(5) *Material changes.* If not previously disclosed by any other means to investors, a broker or dealer must send to each investor a document setting forth material changes to the information in the prospectus delivered in a manner reasonably designed to arrive at least 24 hours before:

(i) The securities are priced, if the offering is subject to paragraph (b)(2) of this section;

(ii) The investor signs a subscription agreement or otherwise commits to purchase securities, if the offering is subject to paragraph (b)(3) of this section; or

(iii) The date of the meeting at which the transaction will be submitted to a vote or on which partnership action could be taken by consent, if the offering is subject to paragraph (b)(4) of this section.

(6) *Rule 462 registration statements.* Notwithstanding paragraphs (b)(1) through (b)(4) of this section, if an offering is registered in part through a registration statement filed under § 230.462(b) or § 230.462(e), a prospectus delivered with respect to the earlier registration statement to an investor in compliance with this § 240.15c2–8 will be deemed to satisfy the delivery requirements with respect to that investor under this § 240.15c2–8 with respect to the § 230.462(b) or § 230.462(e) registration statement for the offering, provided that the broker or dealer otherwise informs investors purchasing in the offering of the change in the size of the offering.

* * * * *

115. By amending § 240.15d–10 by removing the word ''six'' and adding, in its place, the word ''five'' in paragraph (g)(3).

116. By amending § 240.15d–13 by revising paragraph (d) and removing paragraph (e) to read as follows:

§ 240.15d–13 Quarterly reports on Form 10–Q and Form 10–QSB (§ 249.308a and § 249.308b of this chapter).

* * * * *

(d) Notwithstanding the foregoing provisions of this section, market risk disclosure required by of Item 3 of Part I of Form 10–Q shall not be deemed to be ''filed'' for the purpose of Section 18 of the Act (15 U.S.C. 78r). That disclosure, therefore, shall not be subject to the liabilities of that Section. That disclosure shall, however, be subject to all other provisions of the Act.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

117. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

§ 249.210 Authority Citation [Removed]

118. The authority citations following § 249.210 are removed.

119. By amending Form 8–A (referenced in § 249.208a) by revising the title of General Instruction A. and paragraph (a) of General Instruction A.; by designating Instruction D. of General Instructions as paragraph (a) of Instruction D. of General Instructions; by adding a sentence at the end of paragraph (a) of Instruction D. of General Instructions, paragraphs (b), (c), (d) and (e) to Instruction D. of General Instructions; and by revising the Signatures section to read as follows:

Note: The text of Form 8–A does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 8–A

* * * * *

General Instructions

* * * * *

A. Use of Form 8–A

(a) Subject to paragraph (b), you may use this Form for registration pursuant to Section 12(b) or 12(g) of the Securities Exchange Act of 1934 of any class of securities of any issuer that:

(1) Is required to file reports pursuant to Section 13(a) or 15(d) of the Act, and has filed all material required to be filed under Section 13, 14 or 15(d) for a period of at least 12 full calendar months and any portion of

a month immediately preceding the date of filing this Form (or such shorter period that the issuer was subject to those requirements); or

(2) Has securities listed on an exchange that is not registered as a national securities exchange, pursuant to an order exempting that exchange from such registration.

* * * * *

D. Signature and Filing of Registration Statement

(a) * * * *See* Exchange Act Rule 12b–11(d) concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

(b) The following persons, or persons performing similar functions, must sign the registration statement:

(1) The registrant;

(2) Its principal executive officer or officers;

(3) Its principal financial officer;

(4) Its controller or principal accounting officer; and

(5) At least the majority of its board of directors.

(c) Where the registrant is a foreign issuer, its authorized representative in the United States also must sign the registration statement.

(d) Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement.

(e) Type or print the name and title of each person who signs the registration statement beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs the registration statement.

* * * * *

Signatures*

The registrant hereby certifies that it meets all of the requirements for filing on Form 8–A. The registrant also certifies that it has duly caused and authorized the undersigned to sign this registration statement on its behalf. The undersigned certifies that he/she has read this registration statement and to his/her knowledge the registration statement does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement and to their knowledge the registration statement does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The following persons also certify that they are signing on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

*See General Instruction D.

* * * * *

120. By amending Form 10 (referenced in § 249.210) by designating Instruction D. of General Instructions as paragraph (a) of Instruction D. of General Instructions; by adding a sentence at the end of paragraph (a) of Instruction D. of General Instructions, paragraphs (b), (c), (d) and (e) to Instruction D. of General Instructions, by adding four lines to the cover page of the registration statement, Item 1A. to the ''Information Required in the Registration Statement'' section; and by revising the Signatures section to read as follows:

Note: The text of Form 10 does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 10

* * * * *

General Instructions

* * * * *

D. Signature and Filing of Registration Statement

(a) * * * *See* Exchange Act Rule 12b–11(d) concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

(b) The following persons, or persons performing similar functions, must sign the registration statement:

(1) the registrant;

(2) its principal executive officer or officers;

(3) its principal financial officer;

(4) its controller or principal accounting officer; and

(5) at least the majority of its board of directors.

(c) Where the registrant is a foreign issuer, its authorized representative in the United States also must sign the registration statement.

(d) Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement.

(e) Type or print the name and title of each person who signs the registration statement beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs the registration statement.

* * * * *

Form 10—General Form for Registration of Securities Pursuant to Section 12 (b) or (g) of the Securities Exchange Act of 1934

* * * * *

_____

(Exact name of registrant as specified in its charter)

Registrant's telephone number, including area code _____

* * * * *

Information Required in Registration Statement

* * * * *

Item 1A. Company Risk Factors

If the registrant is not required, as of the date of filing, to file reports pursuant to Section 13(a), set forth, under the caption ''Company Risk Factors,'' the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance. Explain briefly how the risk affects the registrant. Do not present risk factors that could apply to any registrant. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b–24.

* * * * *

Signatures*

The registrant certifies that it has duly caused and authorized the undersigned to sign this registration statement on its behalf. The undersigned certifies that he/she has read this registration statement and to his/her knowledge the registration statement does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement and to their knowledge the registration statement does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The following persons also certify that they are signing on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

*See General Instruction D.

121. By amending Form 10–SB (referenced in § 249.210b) by adding four lines to the cover page of the registration statement, by adding a sentence at the end of General Instruction B.2., General Instruction B.3., B.4., B.5. and B.6., and Item 1A. to Part II; and by revising the Signatures section to read as follows:

Note: The text of Form 10–SB does not and these amendments will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 10–SB

* * * * *

General Instructions

* * * * *

Issuer's telephone number _____

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

B. Signature and Filing of Registration Statement

* * * * *

2. * * * *See* Exchange Act Rule 12b–11(d) concerning manual signatures and Item 601 of Regulation S–B concerning signatures pursuant to powers of attorney.

3. The following persons, or persons performing similar functions, must sign the registration statement:

(a) The small business issuer;

(b) Its principal executive officer or officers;

(c) Its principal financial officer;

(d) Its controller or principal accounting officer; and

(e) At least the majority of its board of directors.

4. Where the small business issuer is a foreign issuer, its authorized representative in the United States also must sign the registration statement.

5. Where the small business issuer is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement.

6. Type or print the name and title of each person who signs the registration statement beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs the registration statement.

* * * * *

Part II

* * * * *

Item 1A. Company Risk Factors

If the registrant is not required, as of the date of filing, to file reports pursuant to Section 13(a), set forth, under the caption ''Company Risk Factors,'' the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance. Explain briefly how the risk affects the registrant. Do not present risk factors that could apply to any registrant. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b–24.

* * * * *

Signatures*

The registrant hereby certifies that it meets all of the requirements for filing on Form 10–SB. The registrant also certifies that it has duly caused and authorized the undersigned to sign this registration statement on its behalf. The undersigned certifies that he/she has read this registration statement and to his/her knowledge the registration statement does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement and to their knowledge the registration statement does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The following persons also certify that they are signing on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

*See General Instruction B.

122. By amending Form 18 (referenced in § 249.218) by revising the title of the Form, by adding four lines to the cover page of the registration statement, by revising the ''Rule as to the Use of Form 18'' section and by adding paragraph 3A. after paragraph 3.(g) to the ''Definitions'' section to read as follows:

Note: The text of Form 18 does not and this amendment will not appear in the Code of Federal Regulations.

Form 18

* * * * *

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

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

Application for Registration Pursuant to Section 12(b) of the Securities Exchange Act of 1934

* * * * *

Rule as to the Use of Form 18

Foreign governments and political subdivisions shall use Form 18 for registration pursuant to Section 12(b) of the Securities Exchange Act of 1934.

* * * * *

Definitions

* * * * *

3A. If the registrant is not required, as of the date of filing, to file reports pursuant to Section 13, set forth, under the caption ''Risk Factors'': (i) the most significant factors with respect to the registrant's financial position; and (ii) country risks that are unlikely to be known or anticipated by investors. Explain briefly how the risk affects the registrant. Do not present risk factors that could apply to any registrant. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b–24.

* * * * *

123. By amending Form 20–F (referenced in § 249.220f) by adding four lines to the cover page of registration statement, by removing in General Instruction G.(c) the words ''Forms F–3 (§ 239.33 of this chapter) or F–2 (§ 239.32 of this chapter)'' and adding, in their place, the words ''Form B (§ 239.5 of this chapter) or Form A (§ 239.4 of this chapter)'', in Item 1(a)(2)(i) the words ''Form F–1 (§ 239.31 of this chapter)'' and adding, in their place, the words ''Form A (§ 239.4 of this chapter)'', in Item 1(a)(2)(iii)(B)(*1*) the words ''Form F–1'' and adding, in their place, the words ''Form A''; by revising paragraph (b) of General Instruction A. and General Instruction C.(a); by designating Instruction D. of General Instructions as paragraph (a) of Instruction D. of General Instructions; by adding a sentence at the end of paragraph (a) of Instruction D. of General Instructions, paragraphs (b), (c) and (d) to Instruction D. of General Instructions, by revising Item 1.(b); by redesignating the Instruction following Item 1.(b) as Instruction number 1; by adding Instruction number 2; by revising paragraph D. to General Instructions to Items 9A(a), 9A(b), 9A(c), 9A(d) and 9A(e); and by revising the Signatures section to read as follows:

Note: The text of Form 20–F does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 20–F

* * * * *

_____

(Address of principal executive offices)

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

General Instructions

A. Rule as to Use of Form 20–F

* * * * *

(b) A foreign private issuer must file its annual report on this Form within five months after the end of the fiscal year covered by the report.

* * * * *

C. Preparation of Registration Statements and Reports

(a) Do not use this Form as a blank form to be filled in; use it only as a guide in the preparation of the registration statement or annual report. See General Instruction G. as to the items to be responded to in the registration statement or annual report. Where any item requires information in tabular form, provide the information in substantially the tabular form specified in the item. The registration statement or report must contain the numbers and captions of all items. The text following each caption in this Form, which describes what must be disclosed under each item, may be omitted if the disclosure provided in response to each item indicates the coverage of the item without the necessity of referring to the text. Omit the text of all instructions in this Form. Unless expressly provided otherwise, if any item is inapplicable or the answer thereto is in the negative, make an appropriate statement to that effect.

* * * * *

D. Signature and Filing of Registration Statements and Reports

(a) * * * *See* Exchange Act Rule 12b–11(d) concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

(b) The following persons, or persons performing similar functions, must sign the registration statement or report:

(1) the registrant;

(2) its principal executive officer or officers;

(3) its principal financial officer;

(4) its controller or principal accounting officer;

(5) at least the majority of its board of directors; and

(6) its authorized representative in the United States.

(c) Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement or report.

(d) Type or print the name and title of each person who signs the registration statement or report beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs it.

* * * * *

Part I

Item 1. Description of Business

* * * * *

(b) Set forth, under the caption ''Company and Country Risk Factors'': (i) the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance; and (ii) any material country risks that are unlikely to be known or anticipated by investors and could materially affect the registrant's operations. Explain briefly how the risk affects the registrant. Do not present risk factors that could apply to any registrant. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b–24.

Instructions

1. * * *

2. If this Form is being used to register securities, registrants that are required, as of the date of filing, to file reports pursuant to Section 13(a) need not comply with the requirements of paragraph (b) of this Item.

* * * * *

Item 9A. Quantitative and Qualitative Disclosures About Market Risk

* * * * *

General Instructions to Items 9A(a), 9A(b), 9A(c), 9A(d), and 9A(e).

* * * * *

2. * * *

D. For purposes of paragraph 1. of this Instruction, market capitalization is the aggregate market value of common equity as set forth in General Instruction I.C.1. of Form B; provided, however that common equity held by affiliates is included in the calculation of market capitalization; and provided further that the market capitalization measurement date is January 28, 1997.

* * * * *

Signatures*

The registrant hereby certifies that it meets all of the requirements for filing on Form 20–F. The registrant also certifies that it has duly caused and authorized the undersigned to sign this registration statement [report] on its behalf. The undersigned certifies that he/she has read this registration statement [report] and to his/her knowledge the registration statement [report] does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement [report] and to their knowledge the registration statement [report] does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

*See General Instruction D.

* * * * *

By amending § 249.240f by revising paragraph (b)(4); and adding Instruction 7 to the Instructions following paragraph (b)(4) to read as follows:

§ 249.240f Form 40–F, for registration of securities of certain Canadian issuers pursuant to Section 12(b) or (g) and for reports pursuant to Section 15(d) and Rule 15d–4 (§ 240.15d–4 of this chapter).

* * * * *

(b) * * *

(4) *Public Float/ADTV.*

(i) The registrant meets either of the following thresholds:

(A) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more, or

(B) The market value of the public float of the registrant's outstanding equity shares is $250 million or more.

(ii) A registrant need not meet either of the thresholds in paragraph (b)(4)(i) of this section if it registered or is eligible to register non-convertible securities on Form F–9 (§ 239.39 of this chapter).

Instructions

* * * * *

7. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume of the registrant's equity securities on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10 calendar days immediately preceding the filing of the registration statement.

* * * * *

125. By amending Form 40–F (referenced in § 249.240f) by adding four lines to the cover page of the registration statement, by revising paragraph (2)(iv) of General Instruction A.; adding Instruction 7 to the Instructions following paragraph (2)(iv) of General Instruction A.; revising paragraph (8) and adding paragraph (10) (before the Notes) to General Instruction D.; by revising the Signatures section; by redesignating Instructions A and B following the Signatures section as Instructions D and E; and by adding Instructions A, B and C following the Signatures section to read as follows:

Note: The text of Form 40–F does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

FORM 40–F—[ ] Registration Statement Pursuant to Seciton 12 of the Securities Exchange Act of 1934 or [ ] Annual Report Pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934

* * * * *

_____

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

(Web Site Address, if any) _____

(E-mail Address, if any) _____

* * * * *

General Instructions

* * * * *

A. Rules as to Use of Form 40–F

(2) * * *

(iv) *Public Float/ADTV.*

(A) The registrant meets either of the following thresholds:

(*1*) The market value of the public float of the registrant's outstanding equity shares is $75 million or more and the average trading volume value is $1 million or more, or

(*2*) The market value of the public float of the registrant's outstanding equity shares is $250 million or more.

(B) A registrant need not meet either of the thresholds in paragraph A.(2)(iv) of this Instruction if it registered or is eligible to register non-convertible securities on Form F–9 (§ 239.39 of this chapter).

Instructions

* * * * *

7. For the purposes of this Form, ''average daily trading volume'' shall mean the average daily trading volume of the registrant's equity securities on Canadian markets during the three full calendar months or any 90 consecutive calendar days ending within 10 calendar days immediately preceding the filing of the registration statement.

* * * * *

D. Application of General Rules and Regulations

* * * * *

(8) At least one copy of every registration statement or report filed on this Form shall be signed manually. Unsigned copies shall be conformed.

* * * * *

(10) Where this Form requires a manual signature on a document, the document may be manually signed, signed using typed signatures, or signed using duplicated or facsimile versions of manual signatures. Where typed, duplicated or facsimile signatures are used, each signatory must manually sign, no later than the time of filing, a signature page or other document authenticating, acknowledging or otherwise adopting the signature that appears in the filing. That manually signed page or document must be retained for five years by the registrant and must be furnished to the Commission or its staff upon request.

* * * * *

Signatures

The registrant hereby certifies that it meets all of the requirements for filing on Form 40–F. The registrant also certifies that it has duly caused and authorized the undersigned to sign this registration statement [report] on its behalf. The undersigned certifies that he/she has read this registration statement [report] and to his/her knowledge the registration statement [report] does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this registration statement [report] and to their knowledge the registration statement [report] does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

Instructions

A. The following persons, or persons performing similar functions, must sign the registration statement or report:

(1) the registrant;

(2) its principal executive officer or officers;

(3) its principal financial officer;

(4) its controller or principal accounting officer;

(5) at least the majority of its board of directors; and

(6) its authorized representative in the United States.

B. Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the registration statement or report.

C. Type or print the name and title of each person who signs the registration statement or report beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs it. *See* Exchange Act Rule 12b–11(d) concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

* * * * *

126. By amending Form 6–K (referenced in § 249.306) by revising the second paragraph of General Instruction B., by revising General Instruction C., by adding General Instruction E., by adding four lines to the cover page, a sentence and a check box to the cover page immediately before ''Signatures''; and by revising the Signatures section to read as follows:

Note: The text of Form 6–K does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 6–K

* * * * *

General Instructions

* * * * *

B. Information and Document Required To Be Furnished

* * * * *

The information required to be furnished pursuant to (i), (ii) or (iii) above is that which is material with respect to the issuer and its subsidiaries. The information may concern, for example:

1. Changes in business;
2. Changes in the issuer's name;
3. Changes in control;
4. Acquisitions or dispositions of assets;
5. Bankruptcy or receivership;
6. Changes in the issuer's certifying accountants;
7. The financial condition and results of operations;
8. Material legal proceedings;
9. Changes in securities or in the security for registered securities;
10. Material modifications to the rights of security holders;
11. Material increases or decreases in the amount outstanding of securities or indebtedness;
12. Material defaults on indebtedness, material arrearages in dividends and other material delinquencies;
13. The results of the submission of matters to a vote of security holders;
14. Transactions with directors, officers, or principal security holders;
15. Departure of the issuer's chief executive officer, chief financial officer, chief operating officer or president (or anyone serving those functions);
16. The granting of options or payment of other compensation to directors or officers; and
17. Any other information that the issuer deems of importance to security holders.

* * * * *

C. Preparation and Filing of Report

1. This report shall consist of: a cover page, the document or report furnished by the issuer and a signature page. Furnish to the Commission eight complete copies of each report on this Form. File with any national securities exchange or the Nasdaq stock market on which any class of the registrant's securities is listed at least one complete copy of the report.

2. The following persons, or persons performing similar functions, must sign the report:

(a) the principal executive officer or officers;

(b) the principal financial officer;

(c) the controller or principal accounting officer.

3. Type or print the name and title of each person who signs the report beneath the person's signature. Any person who occupies more than one position must indicate each capacity in which that person signs it. *See* Exchange Act Rule 12b–11(d) concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

* * * * *

E. Voluntary Reporting of Other Events of Information

A foreign private issuer also may use this Form to disclose voluntarily events and

information that it believes may be of interest or importance to its security holders. We encourage foreign private issuers to submit voluntary reports on this Form promptly after they learn about the information they are disclosing.

* * * * *

Form 6–K

_____

(Address of principal executive offices)

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

If you are submitting information voluntarily pursuant to General Instruction E., check the following box. [ ]

Signatures *

The registrant hereby certifies that it meets all of the requirements for filing on Form 6–K. The registrant also certifies that it has duly caused and authorized the undersigned to sign this report on its behalf. The undersigned certifies that he/she has read this report and to his/her knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The undersigned also certifies that he/she has provided a copy of this report to each member of the registrant's board of directors.

(Registrant) _____

By (Signature and Title) _____

Date _____

* See General Instruction C.

By amending Form 8–K (referenced in § 249.308) by adding four lines to the cover page, by revising General Instruction B.1.; by redesignating General Instructions B.3. and B.4. as General Instructions B.2. and B.3.; by revising General Instruction E., paragraph (a) and the Instruction following paragraph (b) of Item 4; by adding Items 10, 11, 12, 13 and 14; and by revising the Signatures section to read as follows:

Note: The text of Form 8–K does not and these amendments will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 8–K—Current Report

* * * * *

Registrant's telephone number, including area code

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

General Instructions

* * * * *

B. Events To Be Reported and Time for Filing of Reports

1. The date on which a report required by this Form is due is as follows:

(a) With respect to Items 1–3, 6, 9, 10, and 13 of this Form, within 5 calendar days after the occurrence of the event;

(b) With respect to Item 7 of this Form, in accordance with paragraph (a)(4) of that Instruction;

(c) With respect to Item 8 of this Form, within 5 calendar days after the date on which the registrant makes the determination to use a fiscal year end different than that used in its most recent filing with the Commission; and

(d) With respect to Items 4, 11 and 12 of this Form, within one business day after the reportable event occurred. In the case of Item 11, if the default occurred on a Saturday, Sunday or federal holiday, the due date would be within two business days after the day the default occurred.

(e) With respect to Item 14 of this Form:

(1) The date on which financial information for the registrant's most recent fiscal year is publicly released, but no later than 60 calendar days after the end of that fiscal year; and

(2) The date on which financial information for the registrant's most recent quarter (except for the last quarter of any fiscal year) is publicly released, but no later than 30 calendar days after the end of that quarter.

Instruction to General Instruction B.1.(e):

No report under Item 14 is due, however, if the registrant has filed its Form 10–Q (or Form 10–QSB) or Form 10–K (or Form 10–KSB) for the period that is required to be presented in the Item 14 report.

* * * * *

E. Signature and Filing of Report

1. File with the Commission three complete copies of the report, including any financial statements, exhibits or other papers or documents filed as a part thereof, and five additional copies which need not include exhibits. File with any national securities exchange or the Nasdaq stock market on which any class of the registrant's securities is listed at least one complete copy of the report, including any financial statements, exhibits or other documents filed as a part of it.

2. The following persons, or persons performing similar functions, must sign the report:

(a) The principal executive officer or officers;

(b) The principal financial officer; and

(c) The controller or principal financial officer.

3. Type or print the name and title of each person who signs the report beneath the person's signature. Any person who occupies more than one position must indicate each capacity in which that person signs it. *See* Exchange Act Rule 12b–11(d) concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

* * * * *

Item 4. Changes in Registrant's Certifying Accountant

(a) Provide the information required by Item 304(a)(1) of Regulation S–K, including compliance with the related instructions to Item 304 and with Item 304(a)(3), if the registrant's principal independent accountant or a significant subsidiary's independent accountant upon whom the registrant's principal accountant expressed reliance in its report:

(1) resigns;

(2) declines to stand for re-election after the current audit;

(3) is dismissed;

(4) notifies the registrant that reliance on its prior audit report with respect to the registrant or a significant subsidiary is no longer permissible; or

(5) notifies the registrant that it will not consent to the use of its prior audit report with respect to the registrant or a significant subsidiary in a filing with the Commission.

(b) * * *

Instruction. The events described in paragraphs (a)(1)—(a)(5) are reportable events separate from the engagement of a new independent accountant. On some occasions involving a change in accountants, two reports on Form 8–K will be required. (For example, the registrant may file the first Form 8–K upon the accountant's resignation and the second Form 8–K upon the later engagement of a new accountant.) Under such circumstances, the registrant need not disclose information ordinarily required in the second Form 8–K if it was previously disclosed in the first Form 8–K.

* * * * *

Item 10. Material Modifications to the Rights of Security Holders

(a) If the instruments defining the rights of holders of any class of registered securities have been materially modified, identify the class of securities involved and state briefly the general effect of the modification upon those holders' rights.

(b) If the rights evidenced by any class of registered securities have been materially limited or qualified by the issuance or modification of any other class of securities, state briefly the general effect of the issuance or modification upon the rights of holders of the registered securities.

Instruction. Working capital restrictions and other limitations upon the payment of dividends are to be reported pursuant to Item 9.

Item 11. Defaults, Dividend Arrearages and Delinquencies

(a) Disclose the information required by paragraph (b) of this Item if, with respect to indebtedness of the registrant or any of its significant subsidiaries exceeding 5% of the total assets of the registrant and its consolidated subsidiaries, there has been:

(1) any material default in the payment of principal, interest, a sinking or purchase fund installment; or

(2) any other material default.

(b) Identify the indebtedness and state the nature of the default. In the case of such a default under paragraph (a)(1), state the amount of the default and the total arrearage on the date of filing this report.

Instruction. Paragraph (a) refers only to events that have become defaults under the governing instruments, *i.e.*, after the expiration of any grace period and compliance with any notice requirements.

(c) Disclose the information required by paragraph (d) of this Item if there is any material arrearage in the payment of dividends or any other material delinquency with respect to:

(1) Any class of the registrant's preferred stock that is registered;

(2) Any class of the registrant's preferred stock that ranks prior to any class of the registrant's securities that is registered; or

(3) Any class of preferred stock of any significant subsidiary of the registrant.

(d) State the title of the class and state the nature of the arrearage or delinquency. In the case of an arrearage in the payment of dividends, state the amount and the total arrearage as of the date of filing this report.

Instruction to Item 11. You need not report under this Item defaults or dividend arrearages relating to any class of securities all of which is owned by, or for the account of, the registrant or its wholly-owned subsidiaries.

Item 12. Departure of Registrant's Key Officers

If the registrant's chief executive officer, chief financial officer, chief operating officer, president or any person serving an equivalent function, has ceased serving the registrant in that capacity:

(a) State the date when that occurred;

(b) Indicate the reason for his or her departure; and

(c) State the name of any person chosen, to date, as a replacement.

Item 13. Name Change

If the registrant has changed its name, state both the former name and the current name of the registrant.

Item 14. Annual and Quarterly Financial Information

(a) Provide the financial information required by Item 301 of Regulation S–K, in a table designed to facilitate comparison, for the following periods:

(1) If the most recently completed fiscal period was the registrant's fiscal year:

(i) The most recently fiscal year ended; and

(ii) The preceding fiscal year (or for the life of the registrant and its predecessor, if less).

(2) If the most recently completed fiscal period was one of the first three quarters of the registrant's fiscal year:

(i) The most recent fiscal quarter ended;

(ii) The quarterly periods between the end of the last fiscal year and the end of the most recent fiscal quarter; and

(iii) The periods of the preceding fiscal year corresponding to the periods referred to in paragraphs (a)(2)(i) and (a)(2)(ii).

Instructions to Item 14.

The financial information required by this Item means the financial information for the registrant and its subsidiaries on a consolidated basis. The financial information may be unaudited.

Signatures*

The registrant certifies that it has duly caused and authorized the undersigned to sign this report on its behalf. The undersigned certifies that he/she has read this report and to his/her knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The undersigned also certifies that he/she has provided a copy of this report to each member of the registrant's board of directors.

(Registrant) _____

By (Signature and Title) _____

Date _____

* See General Instruction E.

128. By amending Form 10–Q (referenced in § 249.308a) by revising General Instructions A., F., G., and H.2.b.; by adding four lines to the cover page, by adding Item 1A. to Part II; and in Part II, Item 2 by revising the heading, by removing paragraphs (a) and (b) and the Instruction following paragraph (d), and by redesignating paragraphs (c) and (d) as paragraphs (a) and (b); by removing Item 3 of Part II; by redesignating Items 4, 5 and 6 of Part II as Items 3, 4 and 5 of Part II; and by revising the Signatures section to read as follows:

Note: The text of Form 10–Q does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 10–Q

* * * * *

General Instructions

A. Rule as to Use of Form 10–Q

1. Unless eligible to use Form 10–QSB, a registrant must use Form 10–Q for quarterly reports under Section 13 or 15(d) of the Securities Exchange Act of 1934 as required by Exchange Act Rule 13a–13 or Rule 15d–13. A registrant must file a quarterly report on this Form within 45 days after the end of each of the first three fiscal quarters of each fiscal year. It need not file a quarterly report for the fourth quarter of any fiscal year.

2. Unless eligible to use Form 10–QSB, a registrant also must use Form 10–Q for transition and quarterly reports under Exchange Act Rule 13a–10 or Rule 15d–10. It must file those reports in accordance with the requirements set forth in those Rules which are applicable when a registrant changes its fiscal year end.

* * * * *

F. Filed Status of Market Risk Disclosure in the Form 10–Q

Pursuant to Exchange Act Rule 13a–13(d) and Rule 15d–13(d), market risk disclosures required by Item 3 of Part I of this Form are not deemed to be ''filed'' for purposes of Section 18 of the Act. That disclosure is therefore not subject to the liabilities of Section 18. Disclosure required by other Items of the Form is ''filed'' for purposes of Section 18, however, even if it is also required by Item 3 of Part I of the Form. Market risk disclosure required by Item 3 of Part I of this Form is subject to all other provisions of the Act.

G. Signature and Filing of Report

1. File with the Commission three complete copies of the report, including any financial statements, exhibits or other papers or documents filed as a part thereof, and five additional copies which need not include exhibits. File with each exchange or the Nasdaq stock market on which any class of securities of the registrant is registered at least one complete copy of the report, including any financial statements, exhibits or other papers or documents filed as a part thereof. Manually sign at least one complete copy of the report filed with the Commission and with each exchange or market. Type or print signatures on copies not manually signed. See Exchange Act Rule 12b–11(d) concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

2. The following persons, or persons performing similar functions, must sign the report:

a. The registrant;

b. Its principal executive officer or officers;

c. Its principal financial officer;

d. Its controller or principal accounting officer; and

e. At least the majority of its board of directors.

3. Where the registrant is a foreign issuer, its authorized representative in the United States also must sign the report.

4. Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the report.

5. Type or print the name and title of each person who signs the report beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs it.

H. Omission of Information by Certain Wholly-Owned Subsidiaries

* * * * *

2. * * *

b. Such registrants may omit the information called for by Item 2 of Part II, Sales of Securities and Use of Proceeds, and Item 3. of Part II, Submission of Matters to a Vote of Security Holders.

* * * * *

Form 10–Q

* * * * *

_____

(Registrant's telephone number, including area code)

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

Part II—Other Information:

* * * * *

Item 1A. Updated Company Risk Factors

Set forth any material disclosure regarding company risk factors (as described in Item 1A. of Part I of Form 10–K) that either was not included in the later of the registrant's most recent Securities Act registration statement or Exchange Act annual report, or has changed since the date of that registration statement or annual report. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b–24.

Item 2. Sales of Securities and Use of Proceeds

* * * * *

Signatures *

The registrant certifies that it has duly caused and authorized the undersigned to sign this report on its behalf. The undersigned certifies that he/she has read this report and to his/her knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this report and to their knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

* See General Instruction G.

129. By amending Form 10–QSB (referenced in § 249.308b) by adding four lines to the cover page; by removing General Instruction E.; by redesignating General Instructions F., G. and H. as General Instructions E., F. and G.; in newly designated General Instructions E, F and G, by revising the first sentence of E.1. and E.2.; by adding E.3., E.4., E.5. and E.6.; by revising General Instruction F.2.(b); by adding a title and removing the words ''Item 6(a)'' and adding, in their place, the words ''Item 5(a)'' in General Instruction G.; in Part II, by adding Item 1A; by revising the title in Item 2; by removing paragraphs (a) and (b) and the Instruction to Item 2 following paragraph (d) and redesignating paragraphs (c) and (d) as paragraphs (a) and (b); by removing Item 3; and redesignating Items 4, 5 and 6 as Items 3, 4 and 5; and by revising the Signatures section to read as follows:

Note: The text of Form 10–QSB does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 10–QSB

* * * * *

_____

(Registrant's telephone number, including area code)

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

General Instructions

* * * * *

E. Signature and Filing of Report

1. File three ''complete'' copies and five ''additional'' copies of the report with the Commission and file at least one complete copy with each exchange or the Nasdaq stock market on which any class of securities of the registrant is registered. * * *

2. Manually sign at least one complete copy of the report filed with the Commission and with each exchange or market. Type or print signatures on copies not manually signed. *See* Exchange Act Rule 12b–11 concerning manual signatures and Item 601 of Regulation S–B concerning signatures pursuant to powers of attorney.

3. The following persons, or persons performing similar functions, must sign the report:

(a) The small business issuer;

(b) Its principal executive officer or officers;

(c) Its principal financial officer;

(d) Its controller or principal accounting officer; and

(e) At least the majority of its board of directors.

4. Where the small business issuer is a foreign issuer, its authorized representative in the United States also must sign the report.

5. Where the small business issuer is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the report.

6. Type or print the name and title of each person who signs the report beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs.

F. Omission of Information by Certain Wholly-Owned Subsidiaries

* * * * *

2. * * *

b. Such registrants may omit the information called for by Items 2 and 3 of Part II.

G. Exhibits

* * * * *

Part II—Other Information:

* * * * *

Item 1A. Updated Company Risk Factors

Set forth any material disclosure regarding company risk factors (as described in Item 1A. of Form 10–KSB) that either was not included in the later of the registrant's most recent Securities Act registration statement or Exchange Act annual report, or has changed since the date of that registration statement or annual report. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b–24.

Item 2. Sales of Securities and Use of Proceeds

* * * * *

Signatures*

The registrant hereby certifies that it meets all of the requirements for filing on Form 10–QSB. The registrant also certifies that it has duly caused and authorized the undersigned to sign this report on its behalf. The undersigned certifies that he/she has read this report and to his/her knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this report and to their knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

*See General Instruction F.

130. By amending Form 10–K (referenced in § 249.310) by revising General Instruction D.(1) and D.(2); by redesignating General Instruction D.(3) as General Instruction D.(7); by adding General Instructions D.(3), D.(4), D.(5) and D.(6); by revising the first two sentences of General Instruction G.(4); by adding four lines to the cover page; in Part I, by adding Item 1A. and by revising Item 2 and the Signatures section to read as follows:

Note: The text of Form 10–K does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 10–K

* * * * *

General Instructions

* * * * *

D. Signature and Filing of Report

(1) File with the Commission three complete copies of the report, including any financial statements, exhibits or other papers or documents filed as a part thereof, and five additional copies which need not include exhibits. File with each exchange or the Nasdaq stock market on which any class of securities of the registrant is registered at least one complete copy of the report, including any financial statements, exhibits or other papers or documents filed as a part thereof.

(2) Manually sign at least one complete copy of the report filed with the Commission and with each exchange or market. Type or print signatures on copies not manually signed. *See* Exchange Act Rule 12b–11(d) concerning manual signatures and Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

(3) The following persons, or persons performing similar functions, must sign the report:

(a) The registrant;

(b) Its principal executive officer or officers;

(c) Its principal financial officer;

(d) Its controller or principal accounting officer; and

(e) At least the majority of its board of directors.

(4) Where the registrant is a foreign issuer, its authorized representative in the United States also must sign the report.

(5) Where the registrant is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the report.

(6) Type or print the name and title of each person who signs the report beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs it.

* * * * *

G. Information To Be Incorporated by Reference

* * * * *

(4) Although Exchange Act Rule 12b–13 requires that this report contain the numbers and captions of all items, the material incorporated by reference into the report generally need not contain the numbers and captions. You must, however, caption the information provided in response to Item 1A. as ''Company Risk Factors'' even when incorporated by reference.

* * *

* * * * *

Form 10–K

* * * * *

_____

(Issuer's telephone number, including area code)

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

Part I

* * * * *

Item 1A. Company Risk Factors

Set forth, under the caption ''Company Risk Factors,'' the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance. Explain briefly how the risk affects the registrant. Do not present risk factors that could apply to any registrant. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b–24.

Item 2. Properties

(a) Furnish the information required by Item 102 of Regulation S–K; and

(b) If the registrant is a real estate entity as defined in Item 1101 of Regulation S–K, furnish the information required by Items 1105, 1106 and 1107 of Regulation S–K in lieu of the information required by paragraph (a) of this Item.

* * * * *

Signatures*

The registrant certifies that it has duly caused and authorized the undersigned to sign this report on its behalf. The undersigned certifies that he/she has read this report and to his/her knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this report and to their knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The following persons also certify that they are signing below on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

*See General Instruction D.

* * * * *

131. By amending Form 10–KSB (referenced in § 249.310b) by adding four lines to the cover page; in General Instruction C, by revising the first sentence and removing the last sentence of C.1.; by revising C.2.; by redesignating C.3. as C.7.; by adding General Instructions C.3., C.4., C.5. and C.6.; by revising the first two sentences of General Instruction E.4.; by removing the words ''S–4'' and adding, in their place, the words ''SB–3''; by removing the words ''S–3 (if the issuer incorporates by reference transitional Exchange Act reports)'' in General Instruction H.(b); by adding Item 1A. to Part I, by adding Item 1A. to Part II of the ''Information Required in Annual Report of Transitional Small Business Issuers'' section; and by revising the Signatures section to read as follows:

Note: The text of Form 10–KSB does not and this amendment will not appear in the Code of Federal Regulations.

U.S. Securities and Exchange Commission, Washington, D.C. 20549

Form 10–KSB

* * * * *

_____

(Registrant's telephone number, including area code)

_____

(Web Site Address, if any)

_____

(E-mail Address, if any)

* * * * *

General Instructions

* * * * *

C. Signature and Filing of Report

* * * * *

1. File three ''complete'' copies and five ''additional'' copies of the report with the Commission and file at least one complete copy with each exchange or the Nasdaq stock market on which any class of securities of the registrant is registered. * * *

2. Manually sign at least one complete copy of the report filed with the Commission and with each exchange or market. Type or print signatures on copies not manually signed. *See* Exchange Act Rule 12b–11 concerning manual signatures and Item 601 of Regulation S–B concerning signatures pursuant to powers of attorney.

3. The following persons, or persons performing similar functions, must sign the report:

(a) The small business issuer;

(b) Its principal executive officer or officers;

(c) Its principal financial officer;

(d) Its controller or principal accounting officer; and

(e) At least the majority of its board of directors.

4. Where the small business issuer is a foreign issuer, its authorized representative in the United States also must sign the report.

5. Where the small business issuer is a limited partnership, its general partner must sign. Where the general partner is a corporation, the majority of the board of directors of the corporate general partner must sign the report.

6. Type or print the name and title of each person who signs the report beneath the person's signature. Any person who occupies more than one of the specified positions must indicate each capacity in which that person signs.

* * * * *

E. Information To Be Incorporated by Reference

* * * * *

4. Although Exchange Rule 12b-13 requires that this report contain the numbers and captions of all items, the material incorporated by reference into the report generally need not contain the numbers and captions. You must, however, caption the information provided in response to Item 1A. as ''Company Risk Factors'' even when incorporated by reference.

* * * * *

Part I

* * * * *

Item 1A. Company Risk Factors

Set forth, under the caption ''Company Risk Factors,'' the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance. Explain briefly how the risk affects the registrant. Do not present risk factors that could apply to any registrant. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b-24.

* * * * *

Information Required in Annual Report of Transitional Small Business Issues

* * * * *

Part II

* * * * *

Item 1A. Company Risk Factors

Set forth, under the caption ''Company Risk Factors,'' the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance. Explain briefly how the risk affects the registrant. Do not present risk factors that could apply to any registrant. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b–24.

* * * * *

Signatures *

The registrant hereby certifies that it meets all of the requirements for filing on Form 10–KSB. The registrant also certifies that it has duly caused and authorized the undersigned to sign this report on its behalf. The undersigned certifies that he/she has read this report and to his/her knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(Registrant) _____

By (Signature and Title) _____

Date _____

The following persons certify that they have read this report and to their knowledge the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The following persons also certify that they are signing on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title) _____

Date _____

By (Signature and Title) _____

Date _____

* See General Instruction C.

* * * * *

132. By amending Form 18-K (referenced in § 249.318) by adding paragraph 1A., by revising the ''Rule as to Use of Form 18-K'' section of the Instruction Book for Form 18-K, and by revising Instructions 1. and 3.(a) of the ''Instructions as to the Preparation and Filing of the Report'' section to read as follows:

Note: The text of Form 18-K does not and this amendment will not appear in the Code of Federal Regulations.

Form 18-K

* * * * *

1A. Set forth, under the caption ''Risk Factors'': (i) the most significant factors with respect to the registrant's financial position; and (ii) country risks that are unlikely to be known or anticipated by investors. Explain briefly how the risk affects the registrant. Do not present risk factors that could apply to any registrant. Set forth each risk factor under a caption that adequately describes the risk. Provide the discussion of risk factors in plain English in accordance with Exchange Act Rule 12b-24.

* * * * *

Instruction Book for Form 18-K

* * * * *

Rule as to Use of Form 18-K

This Form is to be used for the annual reports of foreign governments and political subdivisions thereof.

Instructions as to the Preparation and Filing of the Report

1. Registrants shall file annual reports on this Form within nine months of the close of each fiscal year of the registrant.

2. * * *

3.(a) The registrant shall file the report on good quality, unglazed, white paper no larger than 8½ × 11 inches in size. If reduction of larger documents would render them illegible, the registrant may file such documents on paper larger than 8½ × 11 inches in size. The registrant may bind the report on the left.

* * * * *

By the Commission.

Dated: November 13, 1998.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–31045 Filed 12–3–98; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 229, 230, 232, 239, and 240

[Release No. 33–7607; 34–40633; IC–23520; File No. S7–28–98]

RIN 3235–AG84

Regulation of Takeovers and Security Holder Communications

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Securities and Exchange Commission proposes to update and simplify the rules and regulations applicable to takeover transactions (including tender offers, mergers, acquisitions and similar extraordinary transactions). We propose to permit significantly more communications with security holders and the markets before the filing of a registration statement involving a takeover transaction, a proxy statement or tender offer statement. We also propose to put cash and stock tender offers on a more equal regulatory footing; integrate the forms and disclosure requirements in issuer tender offers, third-party tender offers and going private transactions and consolidate the disclosure requirements in one location; permit security holders to tender their securities during a limited period after the successful completion of a tender offer; more closely align merger and tender offer requirements; and update the tender offer rules to clarify certain requirements and reduce compliance burdens where consistent with investor protection. The proposals presented in this release should be considered together with the companion release issued today, the Securities Act Reform Release.

DATES: Comments should be submitted on or before April 5, 1999.

ADDRESSES: Comments concerning the proposed amendments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Mail Stop 6–9, 450 Fifth Street, N.W., Washington, D.C. 20549–6009. Comments also may be submitted electronically to the following e-mail address: rule-comments@sec.gov. All comment letters