

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 230, 239, and 240

Release No. 33-7141; 34-35396; IC-20903
File No. S7-7-95

RIN 3235-AG40

Prospectus Delivery; Securities Transactions Settlement

AGENCY: Securities and Exchange Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is proposing revisions to its rules and forms and a new rule under the Securities Act of 1933 in order to implement two solutions to prospectus delivery issues arising in connection with the change to T+3 securities transaction settlement. The proposals are based on recommendations submitted by representatives of financial intermediaries. In addition, the Commission is proposing to amend an exemption from T+3 clearance and settlement for purchases and sales of securities pursuant to a firm commitment offering. Such exemption is proposed to be limited to offerings of asset-backed securities and structured securities and would provide an extended settlement time frame to firm commitment offerings under certain conditions.

DATES: Comments should be received on or before March 31, 1995.

ADDRESSES: Comment letters should refer to File Number S7-7-95 and be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 6-1, Washington, D.C. 20549. The Commission will make all comments available for public inspection and copying in its Public Reference Room at the same address.

FOR FURTHER INFORMATION CONTACT: Anita Klein, Michael Mitchell or Joseph Babits, (202) 942-2900, Division of Corporation Finance; and, with regard to questions concerning the T+3 settlement proposals, Jerry W. Carpenter or Christine Sibille, (202) 942-4187, Division of Market Regulation; and, with regard to questions concerning Rule 15c2-8 proposals, Alexander Dill, (202) 942-4892, Division of Market Regulation; and, with regard to questions concerning the application of the proposal to investment companies, Kathleen Clarke, (202) 942-0721, Division of Investment Management, U.S. Securities and Exchange Commission, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

Under the Securities Act of 1933 (the "Securities Act"),¹ a prospectus used after a registration statement has been filed must meet the disclosure requirements of Section 10 of the Securities Act.² The term "prospectus" is defined broadly to include any written communication that "offers a security for sale or confirms the sale of any security."³ Because information generally contained in a confirmation typically does not satisfy the disclosure requirements of Section 10, a prospectus meeting Section 10(a) requirements must be sent or given prior to or at the same time with the confirmation.⁴ In addition, the Securities Act prohibits persons from sending securities through interstate commerce "for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements" of Section 10(a).⁵

On October 6, 1993, the Commission adopted Rule 15c6-1 under the Securities Exchange Act of 1934 (the "Exchange Act")⁶ to establish three business days after trade (hereinafter, "T+3") as the standard settlement time frame for most broker-dealer trades.⁷ Rule 15c6-1 covers all securities other than exempted securities, government securities, municipal securities,⁸ commercial paper, bankers' acceptances, or commercial bills. That Rule is scheduled to become effective on June 7, 1995.⁹

When Rule 15c6-1 was proposed in February 1993, it provided that public offerings of debt and equity securities

¹ 15 U.S.C. 77a *et seq.*

² 15 U.S.C. 77j. *See also* Section 5(b)(1) of the Securities Act, 15 U.S.C. § 77e(b)(1).

³ *See* Section 2(10) of the Securities Act, 15 U.S.C. 77b(10).

⁴ The Securities Act provides that "a communication provided after the effective date of the registration statement * * * shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of" Section 10(a) is provided. *See* Section 2(10)(a) of the Securities Act, 15 U.S.C. 77b(10)(a).

A written confirmation must be sent to a purchaser prior to settlement pursuant to Rule 10b-10 under the Securities Exchange Act of 1934, 17 CFR 240.10b-10.

⁵ *See* Section 5(b)(2) of the Securities Act, 15 U.S.C. 77e(b)(2).

⁶ 15 U.S.C. 78a *et seq.*

⁷ 17 CFR 240.15c6-1. *See* Exchange Act Release No. 33023 (Oct. 6, 1993) [58 FR 52891].

⁸ The Commission has published notice of a proposed rule change of the Municipal Securities Rulemaking Board that will require transactions in municipal securities to settle by T+3. Exchange Act Release No. 34541 (Aug. 17, 1994) [59 FR 43603].

⁹ The effective date was changed from June 1, 1995 to June 7, 1995 in Exchange Act Release No. 34952 (Nov. 9, 1994) [59 FR 59137].

would have to be settled by T+3.

Commentators on the proposal raised concerns that new issues of securities¹⁰ could not be settled by T+3 because the prospectus could not be printed prior to the trade date (the date on which the securities are priced) and therefore the prospectus printing and delivery process could not be completed within a T+3 time frame. To address those concerns, Rule 15c6-1 was modified upon adoption to provide a limited exemption from T+3 for the sale of securities for cash pursuant to firm commitment offerings registered under the Securities Act.¹¹ Accordingly, an underwriter can set any settlement period for such offerings. Resales of such securities, other than the sale to an initial purchaser by a broker-dealer participating in such offering, remain subject to the T+3 time frame.

Since the adoption of Rule 15c6-1, members of the brokerage community have suggested that the Commission eliminate this exemption from T+3 and ease the problems associated with prospectus delivery within T+3 by other means. The primary reasons expressed for requiring T+3 settlement of such offerings are: (i) the secondary market for a new issue may be subject to greater price fluctuations or instability, which in turn may expose underwriters, dealers and investors to disproportionate credit and market risk; and (ii) the bifurcated settlement cycle created for initial sales and resales of new issues would be disruptive to broker-dealer operations and to the clearance and settlement system. In particular, it has been noted that if a purchaser of a new issue sells on the first or second day after pricing, the purchaser's broker will not be able to settle with the buyer's broker on a T+3 schedule because the securities will not yet be available for settlement purposes. As a result, all such trades by the purchasers would "fail" and result in expense, inefficiencies and greater settlement risk for all participants.¹² A bifurcated settlement cycle also may require the maintenance of separate computer systems and additional internal procedures.

¹⁰ The term "new issues" is used herein to refer to both initial public offerings by issuers and offerings of additional securities by reporting companies.

¹¹ Rule 15c6-1 also contains a specific exemption for sales of unlisted limited partnership interests.

¹² A system for when-issued trading could be developed to help alleviate such failed transactions, but commentators have suggested that when-issued trading would not be a solution since, among other reasons, many institutional customers are unable to engage in when-issued trading. *See* letter from Joseph McLaughlin, *infra* footnote 15.

According to the brokerage community, the primary reason that settlement within T+3 currently is not feasible for many new issues is the amount of time it takes to print and deliver prospectuses. Some of these timing difficulties can be expected to be alleviated as markets increasingly rely on electronic delivery of materials. In recognition of that development, the Commission staff has recently issued an interpretive letter to facilitate the use of electronic transmission to satisfy prospectus delivery requirements.¹³ Until the markets create systems that make electronic delivery the method of choice, and most investors have the means to accept electronic delivery, however, the Commission must address delivery of prospectuses in paper form.¹⁴

While multiple recommendations have been made that the Commission eliminate the existing T+3 exemption and facilitate the prospectus delivery process, members of the brokerage community are not in unanimity as to how the prospectus delivery process could best be expedited. Two proposals by members of the brokerage community have been presented for Commission consideration.¹⁵ Those proposals recommend markedly different solutions to accomplishing prospectus delivery in a T+3 time frame.¹⁶

¹³ See Brown & Wood (Feb. 17, 1995). An earlier no-action letter granted relief in connection with the use of electronic means to transmit confirmations. See Thomson Financial Services, Inc. (Oct. 8, 1993).

¹⁴ The Division of Corporation Finance staff, in addition to issuing the Brown & Wood letter, is considering generally delivery under the Securities Act of prospectuses through other non-paper media (e.g., audiotapes, videotapes, facsimile, directed electronic mail, and CD ROMs). The staff anticipates submitting to the Commission in the near future recommendations intended both to facilitate compliance with the Securities Act's prospectus delivery requirements and to encourage continued technological developments of non-paper delivery media.

¹⁵ See letter from Robin Shelby, CS First Boston Corporation; Goldman Sachs & Co.; Steven Barkenfield, Lehman Brothers Inc.; and John Ander, Morgan Stanley & Co. Inc. to Anita Klein, Securities and Exchange Commission, dated Jan. 24, 1995 and letter from Goldman Sachs to Anita Klein, Securities and Exchange Commission, dated Feb. 3, 1995. See also letter from Joseph McLaughlin, Brown & Wood, on behalf of the Securities Industry Association, to Anita Klein, Securities and Exchange Commission, dated Feb. 1, 1995. Copies of these proposals are available for inspection and duplication at the Commission's Public Reference Room, 450 Fifth St. NW, Washington, D.C. 20549, File Number S7-7-95.

¹⁶ Today's proposal is not the first time the Commission has addressed concerns that the settlement schedule is difficult to meet in connection with firm commitment offerings of securities for cash. In 1987, the Commission issued a release, in response to industry requests, making alternative proposals to expedite the prospectus

The approaches reflected in the two proposals are not mutually exclusive methods of expediting prospectus delivery. The Commission therefore is proposing amendments to its rules that would accomplish both proposals. Comment is sought regarding which alternative should be implemented or whether the Commission should implement both proposals and thereby allow market participants a choice as to which approach to use in any given offering. Alternatively, would some other combination of the proposals best expedite prospectus delivery? Comment also is solicited with respect to whether there is a need for any Commission action with respect to prospectus delivery to accommodate T+3 clearance and settlement.

II. The Prospectus Delivery Proposals

A. The Four Firms Proposal and Related Commission Proposals

The first proposal to facilitate T+3 settlement was made by a group of four firms: CS First Boston Corporation, Goldman, Sachs & Co., Lehman Brothers Inc. and Morgan Stanley & Co. Incorporated (hereinafter, the "Four Firms Proposal"). The Four Firms Proposal is premised on the view that the process of preparation and delivery of prospectuses in new issues can be accelerated sufficiently to comply with T+3 if six steps are taken by the Commission. According to the proponents, these steps would modify the registration process in ways that would facilitate the printing of a significant portion of the final prospectus prior to pricing, and therefore accommodate compliance with T+3. Certain aspects of the Four Firms Proposal also are proposed to apply to offerings of investment company shares. Comment is requested on whether some or all of those aspects of the Four Firms Proposal should apply to investment companies.

1. Re-ordering of Prospectuses

The Four Firms Proposal first suggests that the contents of prospectuses could be re-ordered so that all portions likely to be subject to change at the time of pricing are placed together at the front. The Four Firms Proposal indicates that this change would expedite printing of the prospectus because the bulk of it is unlikely to change as a result of pricing and, therefore, could be printed in advance of pricing.

delivery process. See Securities Act Release No. 6727 (July 31, 1987) [52 FR 29206]. Those proposals engendered opposition from commentators and were not adopted by the Commission.

In practice, prospectus information has been organized roughly in the order in which the Commission forms set forth the required items of disclosure. While information contained in a prospectus need not follow the order of the items in the form,¹⁷ some Commission rules currently require that certain information is to be included in a specified part of the prospectus, or in a specified order.¹⁸

Under the proposal, the Commission would not raise objections if a prospectus is re-ordered to place the sections likely to change at the front in order to expedite the printing process,¹⁹ provided that the cover pages of the prospectus continue to contain the information currently specified by Commission rules.²⁰ In addition, any

¹⁷ See Rule 421(a) under the Securities Act, 17 CFR 230.421(a). Rule 421(a) does require that information in a prospectus be set forth in a fashion so as not to obscure any of the required information or any information necessary to keep the required information from being incomplete or misleading.

¹⁸ Rules specifying information required on the cover pages of the prospectus are: (i) Item 501(c) of Regulation S-K, 17 CFR 229.501(c) (information that must be contained on the outside front cover page of the prospectus); and (ii) Item 502 of Regulation S-K, 17 CFR 229.502 (information that must be contained on the inside front cover page and the outside back cover page). See also Item 501 and Item 502 of Regulation S-B, 17 CFR 228.501 and 228.502.

Rules specifying information required in the forepart of the prospectus are: (i) Item 503(b) of Regulation S-K, 17 CFR 229.503(b) (mailing address and telephone number of the registrant's executive offices); and (ii) Item 503(c) of Regulation S-K, 17 CFR 229.503(c) (a discussion of the principal risk factors related to the offering). See also Item 503(b) and Item 503(c) of Regulation S-B, 17 CFR 228.503(b) and 228.503(c).

Other rules, certain Securities Act Industry Guides, and a Commission release, which are applicable only to limited categories of transactions, specify location or order of prospectus information: (i) Items 903(a) and 904(a) of Regulation S-K, 17 CFR 229.903(a) and 229.904(a) specify, respectively, that a summary of a roll-up transaction be included in the forepart of the disclosure document and that, immediately following the summary, a reasonably detailed description of each material risk and effect of the roll-up transaction be included; (ii) Securities Act Industry Guide 4, 17 CFR 229.801(d), for oil and gas programs, specifies that disclosure throughout the prospectus should appear in the sequence indicated; (iii) Securities Act Industry Guide 5, 17 CFR 229.801(e), relating to interests in real estate limited partnerships, specifies that suitability standards, if any, to be utilized by the registrant should be described immediately following the cover page; (iv) Securities Act Release No. 6900 (June 17, 1991) [56 FR 28979], relating to limited partnerships, requires that the forepart of the prospectus begin with a cover page, a table of contents, a summary, disclosure of risk factors and suitability standards, and requires that a glossary be located in the back of the prospectus.

¹⁹ Of course, the information set forth in the prospectus must nevertheless be presented in a clear, concise and understandable fashion, as required by Rule 421(b) under the Securities Act, 17 CFR 230.421(b). See also Rule 421(a), *supra* footnote 17.

²⁰ But see proposed revision to Item 502(f) of Regulation S-K, 17 CFR 229.502(f).

summary section, which logically can appear only near the front of the prospectus, and the discussion of risk factors must remain in the forepart of the prospectus, although those sections may immediately follow a "pricing information" section which would include disclosure likely to be subject to change at pricing, such as: use of proceeds, the plan of distribution and capitalization.²¹ Accordingly, certain Commission rules that specify the location of other information in the forepart of the prospectus, or in a specified order within the prospectus, are proposed to be eliminated.²² No revision to the remaining order and location rules, which relate to specific and limited classes of transactions, are proposed at this time.²³ Comment is requested as to whether the Commission should require that the summary and risk factors disclosure immediately follow the cover page of the prospectus. In addition, should other rules that would continue to specify order or location also be revised to accommodate expedited printing of prospectuses?

2. Extension of Pricing Period

Under Rule 430A under the Securities Act,²⁴ if a prospectus supplement containing pricing and other information omitted from a registration statement is not filed by the later of five business days after the effective date of the registration statement or any post-effective amendment thereto, the information omitted must be filed in a post-effective amendment rather than under Rule 424(b). Unlike a filing under Rule 424(b), a post-effective amendment must be declared effective prior to any sale of the securities. The second modification suggested by the Four Firms Proposal is a revision to Rule 430A to extend, from five business days to ten business days, the period during which an offering in reliance on that rule may be priced and a supplement filed. According to the Four Firms Proposal, issuers delay the time at which they seek to have registration statements effective, and therefore printing of the prospectus, because they have only five days thereafter in which to price and file the required pricing supplement. By extending the time in which to file the pricing supplement,

²¹ See proposed revisions to Item 503(c) of Regulation S-K, 17 CFR 229.503(c) and Item 503(c) of Regulation S-B, 17 CFR 228.503(c).

²² See proposed revisions to Item 503(b) of Regulation S-K, 17 CFR 229.503(b), Item 503(b) of Regulation S-B, 17 CFR 228.503(b) and Securities Act Industry Guide 4, 17 CFR 229.801(d).

²³ The requirements not proposed to be changed are those set forth *supra* footnote 18 other than the rules set forth *supra* footnotes 21 and 22.

²⁴ 17 CFR 230.430A.

the Commission would encourage issuers to have their filings become effective earlier, and consequently start the printing earlier.

The principal purpose of the five business day limitation was to ensure that delays in pricing securities under Rule 430A would not permit delayed offerings to be made by persons that do not meet the criteria for use of shelf registration.²⁵ An extension of the five-day period would not appear to defeat the purpose of that limitation. The Commission therefore proposes to extend the period during which the pricing supplement may be filed from five business days to ten business days after the effective date of the registration statement. Comment is requested as to whether any problems could arise from the extension, and whether such extension would in fact encourage earlier printing of all or a portion of the prospectus. Comment also is requested as to whether a longer period, such as 15, 25 or 30 business days, would provide additional flexibility and further expedite prospectus delivery for purposes of complying with T+3.

3. Changes in Offering Size and Estimated Price Range

The Four Firms Proposal also states that delays in printing prospectuses in 430A offerings arise because a post-effective amendment must be filed if there is a material decrease in the amount of securities offered or the pricing of the securities falls outside the range estimated in the effective registration statement. Printing and sales are delayed until such amendment is declared effective. Similarly, where participants decide to increase the size of the offering, a new registration statement to register the additional securities must be filed and declared effective.²⁶ The Four Firms Proposal suggests that no filing with the Commission be required if the size of the offering is increased or decreased up to 20% or the price deviates from the estimated price range by up to 20%.

a. *Increases in Offering Size.* Where a registrant wishes to offer and sell more securities than were included in the registration statement at the time it became effective, the Securities Act requires that it register the additional securities.²⁷ The Commission

²⁵ See Securities Act Release No. 6714 (May 27, 1987) [52 FR 21252].

²⁶ These increases are most common in the context of an initial public offering, since the lack of an existing market makes it difficult to estimate market demand and the appropriate price for such securities.

²⁷ See Section 6 of the Securities Act, 15 U.S.C. 77f, and Rule 413 under the Securities Act, 17 CFR 230.413.

understands that the determination of offering size, particularly in certain market climates, can change at the time when prospectus printing is imminent. In light of the timing difficulties presented by that situation, the Commission is proposing changes to facilitate expedited registration in a Rule 430A offering if it is done solely for the purpose of increasing an offering size by up to 20%.

Under the proposal, a short-form version of such a registration statement would be accepted.²⁸ Such registration would consist of: the facing page, a statement incorporating the contents of the earlier registration statement relating to the offering, all required consents and opinions, the signature page, and any information required in the new registration statement that is not in the earlier registration statement.²⁹ To ensure that no delay would result from Commission processing, such registration statements would be made effective automatically upon filing.³⁰ Such a short-form registration statement would be deemed to be a part of the earlier registration statement relating to the offering.³¹

To expedite preparation of such registration statements, the Commission also would provide that duplicated or facsimile versions of manual signatures could be included on the signature page of such registration statements, rather than the manual signatures currently required.³² In addition, opinions and consents required in such registration statements could be incorporated by reference to the extent that the opinions

²⁸ See proposed revisions to General Instructions of Forms SB-1, SB-2, S-1, S-2, S-3, S-11, F-1, F-2 and F-3.

²⁹ Information regarding the effect of the increase in offering size may be required in the new registration statement and would not have been contained in the earlier registration statement.

A similar short-form procedure was adopted by the Commission for registration of additional securities for employee benefit plans. See General Instruction E to Form S-8.

³⁰ See proposed Rule 462(b), 17 CFR 230.462(b). This registration statement would be required to be filed within two business days of the pricing of the securities registered on the earlier registration statement. While indications of interest may exceed the amount of securities registered in the earlier registration statement, no offers would be permitted prior to the filing of the registration statement with respect to the additional 20% and no sales of the additional 20% would be permitted prior to the effectiveness thereof.

³¹ See newly proposed Rule 430A(b), 17 CFR 230.430A(b).

³² See proposed revisions to Rule 402 under the Securities Act, 17 CFR 230.402. In addition, Items 601(b)(24) of Regulations S-K and S-B, 17 CFR 229.601(b)(24) and 17 CFR 228.601(b)(24), are proposed to be revised so that a power of attorney included in the earlier registration statement relating to the offering may also relate to the short-form registration statement filed to register the additional securities.

and consents contained in the earlier effective registration statement were drafted to apply to any subsequent registration statement filed solely to increase the offering up to the 20% threshold.³³ Where consents cannot be incorporated, duplicated or facsimile versions of manual signatures would be accepted in the new consents required to be filed.³⁴ Comment is requested with regard to whether some or all of these changes to facilitate expedited registration to increase a Rule 430A offering should be extended to all registered offerings.

The Commission also is proposing to increase registrants' flexibility with respect to the amount of securities registered in Rule 430A offerings and thereby minimize the instances in which an increase in offering size results in the need to file a new registration statement. Such offerings would be permitted to be registered by specifying only the title of the class of securities to be registered and the proposed maximum aggregate offering price in the "Calculation of Registration Fee" section.³⁵ The amount of securities to be registered and the proposed maximum offering price per unit would no longer be required to be set forth.³⁶

Under the proposal, an issuer would register a specified dollar amount of a class of securities, such as \$50 million of common stock, and would not be required to register more if the number of shares to be offered was increased, unless the aggregate amount of the offering would exceed the total dollar amount registered. If registrants register a dollar amount greater than what is used for the offering, Rule 429 under the Securities Act could be used to save any amount of the registration fee paid to the Commission for the remaining dollar amount. Under Rule 429, the registrant, in a new registration statement filed in the future for another offering of that class of securities, could simply indicate

that part of the registration fee had been paid previously in connection with the earlier registration. Comment is requested with regard to whether the flexibility provided by specifying the dollar amount of the class of securities registered should be extended to all registered offerings.

b. *Changes in Offering Size; Deviation from Price Range.* The Commission also is proposing to address the concerns raised in the Four Firms Proposal with respect to filings resulting from a 20% decrease of the offering size or a 20% deviation from the estimated price range. Currently, a post-effective amendment is not required to be filed where there is a decrease in volume of securities offered or a price chosen that is outside the disclosed estimated price range, unless the volume decrease or price change would materially change the disclosure included in the registration statement at the time of effectiveness.³⁷

The proposal would provide that a post-effective amendment need not be filed if there is a decrease in the offering size of up to 20% or a deviation in price from the estimated price range of up to 20%.³⁸ In addition, the proposal would provide that, where an increase of up to 20% in the offering size would not require additional securities to be registered, such an increase also would not result in the need to file a post-effective amendment.³⁹ Comment is requested with respect to whether lower thresholds, such as 15%, or higher thresholds, such as 25%, should be used. Commenters also should consider whether this proposal would facilitate non-Rule 430A offerings and should be extended to those offerings as well. While the proposal contemplates that no post-effective amendment need be filed, issuers would continue to be responsible for evaluating the effect of such a volume change or price deviation on the accuracy and completeness of disclosure made to investors, including disclosure regarding the use of offering proceeds, dilution and debt coverage.

4. Immediate Takedowns from a Shelf Registration

The Four Firms Proposal also requests that the Commission permit immediate takedowns after a shelf registration

statement becomes effective. Immediate offerings from an effective shelf registration statement currently are permitted. At the time of effectiveness, the shelf registration statement must accurately reflect all information known. If an offering of securities is certain at the time the registration statement becomes effective, the relevant information (e.g., description of securities, plan of distribution and use of proceeds) must be disclosed and the Rule 430A undertakings should be included, if the issuer wants Rule 430A pricing flexibility. Accordingly, no rule amendments are required to address this request.

5. Acceleration of Effectiveness

The Four Firms Proposal also recommends that requests to accelerate effectiveness of registration statements be accepted by fax transmission. Rule revisions are proposed to allow such transmissions.⁴⁰ The Four Firms Proposal also suggests that the Commission accept oral acceleration requests. Rule revisions also are proposed to permit oral requests for acceleration to be made, provided that a version of the registration statement filed with the Commission is accompanied by a letter indicating that the registrant and the managing underwriter may make oral requests for acceleration and that they are aware of their obligations under the Securities Act.⁴¹ Comment is requested regarding whether oral acceleration requests present greater risks of being transmitted by persons without the authority to do so, or being transmitted without the knowledge of all participants in the offering. If so, should written requests continue to be required?

6. Four-Day Settlement Period

Finally, the Four Firms Proposal suggests that Rule 15c6-1 be amended to provide that, if the offering is priced after the close of the market, payment of funds and delivery of securities may occur not later than the fourth business day thereafter ("T+4"). When such securities are priced late in the day, it is difficult to print the final prospectus for delivery by T+3. Further, the majority of secondary trading in the securities generally does not begin until

³³ See Rule 411(c) under the Securities Act, 17 CFR 230.411(c), proposed Rule 439(b) under the Securities Act, 17 CFR 230.439(b), and proposed changes to General Instructions of Forms SB-1, SB-2, S-1, S-2, S-3, S-11, F-1, F-2 and F-3.

³⁴ See proposed changes to Rules 402 and 439 under the Securities Act, 17 CFR 230.402 and 230.439.

³⁵ See proposed revisions to Rule 457(o) under the Securities Act, 17 CFR 230.457(o). Such flexibility already is provided in connection with unallocated shelf registration statements.

³⁶ In most non-shelf offerings, such information currently is required to be included on the cover page of the registration statement. See, e.g., the "Calculation of Registration Fee" section in Form S-1. The registrant would continue to be required in Rule 430A offerings to specify in the prospectus, however, the amount of securities offered and, where the registrant is not a reporting company, a bona fide estimate of the range of the maximum offering price.

³⁷ See Securities Act Release No. 6964 (Oct. 22, 1992) [57 FR 48970] for a discussion of the materiality standard as it applies to these changes.

³⁸ See proposed revision to Instruction to Paragraph (a) of Rule 430A, 17 CFR 230.430A. As proposed, a change or deviation beyond the 20% threshold would continue to require a post-effective amendment only if it materially changes the previous disclosure.

³⁹ *Id.*

⁴⁰ See Securities Act Rule 461(a), 17 CFR 230.461(a). The facsimile or duplicate version need not be followed by transmission of the manually signed version to the Commission.

⁴¹ See Securities Act Rule 461(a), 17 CFR 230.461(a). The liability of persons who sign the registration statement, the underwriters and others under Section 11(a) of the Securities Act, 15 U.S.C. § 77k(a), is based upon the registration statement at the time it becomes effective.

the opening of the market on the next business day. Thus, for these offerings there is less concern about an increase in failed transactions from secondary market trading or the need for special systems to accommodate two days of when-issued trading in order to effect delivery of securities in secondary market trades. The Four Firms are of the view that only minor systems modifications would be needed to accommodate a T+4 cycle, so the concerns previously expressed by the industry about the costs of maintaining systems for T+3 for all purposes except firm commitment offerings is reduced substantially.

The Commission is proposing to revise Rule 15c6-1 to establish T+4 as the standard settlement cycle for sales in connection with firm commitment offerings priced after the market closed and invites comment as to whether such a T+4 settlement period is workable. Specifically, would this period create confusion in the marketplace?

Some industry participants may believe that a T+4 requirement for firm commitment offerings is not sufficiently flexible. As an alternative, the Commission is publishing for comment a provision that would permit the settlement cycle for a firm commitment offering to be set for any period equal to or less than T+5.⁴² Rule 15c6-1(a) contains an override provision that permits the parties to a contract to establish an alternate settlement time frame if expressly agreed to at the time of the transaction. In the release adopting the Rule 15c6-1, the Commission stated that this provision was not intended to permit broker-dealers to specify before execution of specific trades that a group of trades will settle in a time frame other than T+3.

If a situation occurs that requires more time for settlement of a firm commitment offering, it may be onerous for every broker-dealer in the offering to expressly set an alternate time frame for each individual trade. The Commission invites comment as to whether it would be appropriate to expand the override provision to allow the managing underwriter to establish T+3, T+4, or T+5 as the settlement time frame for the entire offering.⁴³ The underwriter would be required to provide notice of

⁴² See proposed Rule 15c6-1(e), 17 CFR 240.15c6-1(e).

⁴³ This provision will be available for firm commitment offerings subject to a T+3 settlement time frame under paragraph (a) of Rule 15c6-1, 17 CFR 240.15c6-1(a), and for firm commitment offerings subject to a T+4 settlement time frame under paragraph (d) of Rule 15c6-1, 17 CFR 240.15c6-1(d).

its intent to set an alternate time frame by sending written notice to prospective purchasers on or before the date the securities are priced and by providing notice of the alternate time frame to an exchange where the securities are listed or a registered securities association through which quotations are disseminated. Additionally, broker-dealers participating in the offering would retain their ability to use the specific trade override provision. Commenters are requested to provide comments on the benefits and drawbacks to this approach, including whether such an amendment would create uncertainty in the marketplace.

What are the relative benefits and drawbacks of the proposal establishing T+4 as the standard settlement cycle for offerings priced after the close of the market and the proposal giving underwriters the ability to select an alternate trade date? Would adoption of the first proposal make it unnecessary to adopt the second proposal? Should T+3 or T+4 be the standard for offerings that are priced after the close of the market?

B. The SIA Proposal and Related Commission Proposals

In the other proposal received by the Commission, the Securities Industry Association has recommended that the Commission adopt a rule allowing prospectus information to be delivered without the use of the traditional final prospectus (hereinafter, the "SIA Proposal"). Where short-form registration⁴⁴ is not used, the SIA Proposal would provide that all required prospectus information be delivered to investors in the preliminary prospectus traditionally disseminated and, if necessary, a supplementing memorandum.⁴⁵ This supplementing memorandum would either set forth or summarize: (i) previously undisclosed information describing the registered securities (other than certain price-related information contained in the confirmation);⁴⁶ and (ii) previously undisclosed actual or anticipated changes between the preliminary prospectus circulated to investors and

⁴⁴ Short-form registration is used herein to refer to registration on Commission Forms S-3 or F-3.

⁴⁵ "Preliminary prospectus" is used herein to refer to either a preliminary prospectus used in reliance on Rule 430, 17 CFR 230.430, or a prospectus filed in accordance with Rule 430A(a), 17 CFR 230.430A(a), which omits specified price-related information.

⁴⁶ This price-related information may be omitted from the registration statement at the time it is declared effective pursuant to Rule 430A under the Securities Act. The description of securities would be made in accordance with Item 202 of Regulation S-K, 17 CFR 229.202, or be a summary of such information.

the final prospectus filed with the Commission.⁴⁷

For securities offerings that use short-form registration, the SIA Proposal contemplates different methods of delivery depending upon whether or not shelf registration is used.⁴⁸ For shelf offerings, the SIA Proposal would require delivery of the base prospectus⁴⁹ contained in the registration statement at the time it is declared effective and an abbreviated supplementing memorandum.⁵⁰ The abbreviated supplementing memorandum in that case would set forth or summarize only a description of the material changes in the registrant's affairs pursuant to Item 11 of Form S-3 or Form F-3 ("Item 11 information") that have not been disclosed in its Exchange Act reports. For non-shelf offerings using short-form registration, the SIA Proposal would require delivery of only an abbreviated supplementing memorandum describing Item 11 information. A preliminary prospectus would be delivered only at the issuer's discretion. Supplementing memoranda and abbreviated supplementing memoranda used under the SIA Proposal would be required to be filed with the Commission within two business days after first being sent to investors.

The Commission's proposal varies from the rule proposed by the SIA. Like the SIA Proposal, however, proposed Rule 434 under the Securities Act⁵¹ would permit issuers to convey prospectus information in more than one document and allow such documents to be delivered to investors at separate intervals and in varying manners.⁵²

The rule would provide that, in the aggregate, all required information be disclosed to investors on a timely basis

⁴⁷ The final prospectus filed with the Commission would be the prospectus contained in the registration statement at the time it becomes effective, as modified subsequently by any prospectus filed pursuant to Rule 424(b), 17 CFR 230.424(b).

⁴⁸ "Shelf registration" is used herein to refer to registration of a delayed offering pursuant to Rule 415(a)(1)(x) under the Securities Act, 17 CFR 230.415(a)(1)(x).

⁴⁹ "Base prospectus" is used herein to refer to a prospectus contained in a registration statement at the time of effectiveness that omits information that is not yet known concerning a delayed offering pursuant to Rule 415(a)(1)(x), 17 CFR 230.415(a)(1)(x).

⁵⁰ For medium-term note programs, however, any program supplement also would be delivered under the SIA proposal.

⁵¹ 17 CFR 230.434.

⁵² The Commission provided analogous treatment with respect to prospectus delivery in connection with employee benefit plans when it adopted revisions to Form S-8 in 1990. See Securities Act Release No. 6867 (June 13, 1990) [55 FR 23909].

(i.e., prior to or at the same time as a confirmation is sent). Reliance upon this rule would allow participants in a firm commitment underwritten offering of securities for cash (hereinafter, an "eligible offering") to forego last-minute mass printing, shipping and mailing of a traditional final prospectus, which is generally undertaken only after pricing of the offering. The proposed rule sets forth two methods for delivering prospectus information: one that is available for eligible offerings not using shelf registration, and one that is available for eligible offerings using short-form registration.

1. *Prospectus Delivery Method for Offerings Not Made Using Short-Form Registration*

In all eligible offerings not made using short-form registration, persons could comply with their prospectus delivery obligations by delivering a preliminary prospectus, a confirmation and, as needed, a supplementing memorandum. A supplementing memorandum would be required to be delivered only if information material to investors with respect to the offering is not disclosed in the preliminary prospectus or the confirmation. This method of delivery differs from traditional prospectus delivery primarily in that it is accomplished in more than one document. Investors would be delivered information comparable to that which is currently required to be delivered.

a. *Rule 430A Offerings.* In Rule 430A offerings, a preliminary prospectus omitting the price-related information specified in the rule would be delivered in addition to a supplementing memorandum that contains such price-related information (to the extent not contained in the confirmation). The supplementing memorandum also would contain any other necessary material disclosure missing from the preliminary prospectus. Together, the preliminary prospectus and the supplementing memorandum would contain information comparable to the traditional final prospectus.⁵³

b. *Offerings Not Made in Reliance on Rule 430A.* In offerings not proceeding under Rule 430A, a preliminary prospectus containing price-related information alone could be delivered to investors. Unlike in Rule 430A offerings, the price-related information

could be included in the preliminary prospectus. If such information is included in the preliminary prospectus, a supplementing memorandum would not have to be delivered unless material changes or material additions to the information in the preliminary prospectus must be disclosed. In all cases, the preliminary prospectus and any supplementing memorandum, together, would contain information comparable to the traditional final prospectus, which currently reflects the information set forth in the registration statement at the time it goes effective.

c. *Use of Incremental Disclosure.* As the SIA Proposal notes, the use of a preliminary prospectus and a separate supplementing memorandum may not be feasible in all offerings. Whether the latter document, which is anticipated to be brief, can convey clearly the missing or changed information will depend upon the nature and magnitude of the disclosure differences between the preliminary prospectus and the prospectus contained in the effective registration statement (as modified by post-effective amendments). In some cases, the disclosure that would have to be contained in the supplementing memorandum may not be able to be described in isolation from other disclosure in the preliminary prospectus. Where disclosure in many parts of the preliminary prospectus has changed, participants may find the option of preparing a supplementing memorandum is not of great benefit.

Comment is requested as to whether the proposal should be limited either with respect to the amount of time that could elapse between delivery of the preliminary prospectus and the supplementing memorandum, or with respect to the magnitude of changes that a supplementing memorandum could contain. If the latter, how would the acceptable magnitude be defined?

d. *Filing and Review of Registration Statements.* Although the method of delivering prospectus information would change under the proposed rule, neither the process of filing registration statements and amendments thereto, nor the Commission's registration statement review process, would be altered.⁵⁴ The proposed rule would require that the

preliminary prospectus and the supplementing memorandum, taken together, not materially differ from the disclosure filed with the Commission in connection with the registration statement.⁵⁵ This provision would preserve the integrity of the Commission's review process and ensure that the delivered prospectus disclosure is comparable to that contained in the registration statement.

Under the proposed rule, a supplementing memorandum would be filed with the Commission pursuant to Rule 424(b)(1) under the Securities Act within two business days after the earlier of pricing and first use. Thus, the Commission staff generally would not review supplementing memoranda prior to use.⁵⁶ Comment is requested as to whether the proposal should require that the supplementing memorandum be filed prior to use and, therefore, be subject to staff review.

e. *Comparison With SIA Proposal.* The proposed method of prospectus delivery applicable to non-short form offerings departs from the SIA Proposal in one significant respect. While the SIA Proposal contemplates that a supplementing memorandum could summarize previously undisclosed information, the proposed rule would require full disclosure of material changes or material additions. Comment is requested regarding whether a summary version of material information should be permitted under the proposed rule.

2. *Prospectus Delivery Method for Offerings Using Short-Form Registration*

As in the case of non-short-form offerings, the proposed delivery method for offerings using short-form registration would allow the disclosure to be contained in more than one document delivered at different times. In addition, delivery would have to occur prior to or with a confirmation. Unlike the proposed delivery method for other offerings, however, the proposal for offerings using short-form registration relies upon delivery of certain prospectus information by publication with the Commission.

Currently, in recognition of the market following that exists for issuers

⁵³ The traditional final prospectus currently reflects the information set forth in the registration statement at the time of effectiveness, any post-effective amendment and the pricing supplement. Post-effective amendments, however, are unlikely to be filed unless the pricing date exceeds the five business day limitation allowing for use of a pricing supplement.

⁵⁴ Thus, investors that wish to acquire a traditional final prospectus would have access to one through the Commission, where the issuer would continue to file all required prospectus disclosure in the traditional, integrated format. Comment is requested as to whether access to a final prospectus in traditional, integrated format should be ensured other than through the Commission's facilities, such as through the issuer or underwriter(s)' facilities. See also proposed Rule 434(c)(4), 17 CFR 230.434(c)(4), with regard to short-form registrants.

⁵⁵ The delivered documents could not materially differ from the prospectus disclosure in the registration statement at the effective date, in any post-effective amendment thereto and in the pricing supplement.

⁵⁶ As under the current practice, the staff will continue to consider whether recirculation of a prospectus is needed when there are material changes in disclosure arising after the prospectus subject to completion has been given to investors. See Rules 460 and 461(b) of Regulation S-K, 17 CFR 230.460 and 230.461(b).

using short-form registration, physical delivery of most issuer-specific information is not required for offerings by such persons.⁵⁷ Instead, such information is incorporated by reference into the prospectus from the issuer's Exchange Act reports. Delivery of such information is therefore accomplished by publication of such information through filing with the Commission. Thus, the traditional final prospectus that is physically delivered by short-form issuers contains primarily "offering-specific" information as to which the efficient market theory generally has not been applied, including a description of: the terms of the securities offered, risk factors specific to the registered transaction, the intended use of offering proceeds, and the plan of distribution for the securities. The balance between information physically delivered to investors and information published would be altered by the proposed rule.

a. *Short-Form, Non-Shelf Registration.* The proposed rule would permit participants in non-shelf offerings using short-form registration to comply with their delivery obligations by distributing a preliminary prospectus and an abbreviated supplementing memorandum. The abbreviated supplementing memorandum would be required to contain: (i) a fair and accurate summary of the description of securities;⁵⁸ and (ii) Item 11 information, to the extent not disclosed in the preliminary prospectus or the registrant's Exchange Act reports.⁵⁹

Under the proposed rule, it is likely that the preliminary prospectus would contain the bulk of offering-specific disclosure that would have been physically delivered in a traditional final prospectus.⁶⁰ Thus, offering-

specific information physically delivered would continue to surpass offering-specific information published in those offerings. Where Rule 430A is relied upon, certain price-related information that may be excluded at effectiveness also would not be in the preliminary prospectus. Such information generally would not be included in the abbreviated supplementing memorandum, but it would be on file with the Commission prior to the time confirmations are sent. The price itself will be set forth in the confirmation.

b. *Short-Form Delayed Shelf Registration.* The proposed rule would permit participants in delayed shelf offerings using short-form registration to comply with their delivery obligations by distributing a base prospectus and an abbreviated supplementing memorandum. As in the case of non-shelf offerings, the abbreviated supplementing memorandum would be required to contain: (i) a fair and accurate summary of the description of securities; and (ii) Item 11 information, to the extent not disclosed in the base prospectus or the registrant's Exchange Act reports.⁶¹

Traditionally, the final prospectus delivered to investors in delayed shelf offerings would include information set forth in both the base prospectus and a prospectus supplement.⁶² Information in the prospectus supplement would no longer be delivered physically to investors, except to the extent it is disclosed pursuant to the abbreviated supplementing memorandum. For example, use of proceeds, syndicate and plan of distribution information and a full description of securities need not be included in the abbreviated supplementing memorandum. The proposal would require, however, that the prospectus supplement in such

offerings be filed with the Commission by the time any confirmation is sent or given to investors.⁶³ In addition, such prospectus supplement would be deemed a part of the registration statement upon filing with the Commission.

As proposed, Rule 434 would not apply to offerings pursuant to the Commission's shelf registration rules other than delayed shelf offerings made by persons using short-form registration.⁶⁴ It appears that other types of shelf offerings would not be contemplated within the parameters of firm commitment underwritten offerings for cash. Comment is requested, however, with respect to whether any other type of shelf offerings, including secondary offerings,⁶⁵ could take place in connection with a firm commitment underwritten offering for cash. If so, should the proposed rule be extended to such offerings?

c. *Variations from the SIA Proposal.* Under the SIA Proposal, in the case of short-form delayed shelf offerings, publication of prospectus information would only occur after the time confirmations had been sent, since the prospectus supplement would not be required to be filed with the Commission until two business days after the earlier of pricing or first use. The proposed rule does not incorporate this aspect of the SIA Proposal because delaying the availability of disclosure to a time after delivery of the confirmation appears inconsistent with Sections 5(b) and 2(10)(a) of the Securities Act and may not be particularly useful to investors.

For non-shelf offerings using short-form registration, the proposed rule also diverges from the SIA Proposal in that it would require delivery of a preliminary prospectus, rather than just an abbreviated supplementing memorandum. Under the SIA Proposal, the abbreviated supplementing memorandum would include only a summary of Item 11 information. Thus, the SIA Proposal essentially would not require physical delivery of offering-specific information. The proposed rule would require physical delivery of certain offering-specific disclosure.

Comment is requested with respect to whether the proposed rule strikes the

⁵⁷ To be eligible to use short-form registration for a primary offering, an issuer must have a public float of \$75 million and must have been reporting with the Commission for one year. See General Instructions I.A.3. and I.B.1. to Form S-3 and General Instructions I.A.1. and I.B.1. to Form F-3.

⁵⁸ This disclosure would be a fair and accurate summary of that which is required under Item 202 of Regulation S-K, 17 CFR 229.202.

⁵⁹ The abbreviated supplementing memorandum would be required to be filed with the Commission pursuant to Rule 424(b)(1) under the Securities Act, 17 CFR 230.424(b)(1) (or, if the disclosure represents a fundamental change in the information contained in the registration statement, in a post-effective amendment declared effective prior to the time a confirmation is sent or given). Pursuant to Rule 430A, the abbreviated supplementing memorandum would be deemed to be a part of the registration statement at the time it became effective.

⁶⁰ The information currently required to be physically delivered in a short-form final prospectus would consist of disclosure required by Items 501-510 and 202 of Regulation S-K, 17 CFR 229.502-229.510 and 229.202, as well as Item 11 information.

Section 5(b)(1) of the Securities Act, 15 U.S.C. § 77e(b)(1), prohibits transmission of any prospectus relating to any security with respect to which a registration statement has been filed unless the prospectus meets the requirements of Section 10 of the Securities Act, 15 U.S.C. 77j.

⁶¹ As proposed, an abbreviated supplementing memorandum would be filed with the Commission in accordance with Rule 424(b)(1), 17 CFR 230.424(b)(1), and would be deemed a part of the registration statement pursuant to Rule 430A. If the disclosure represents a fundamental change in the information contained in the registration statement, however, a post-effective amendment rather than a filing pursuant to Rule 424(b)(1) would be required. See proposed Rule 434(c)(3), 17 CFR 230.434(c)(3).

⁶² The base prospectus omits information that is not yet known with respect to the terms of a specific securities offering. The omitted information is included in the prospectus supplement filed after the effective date of the registration statement. The base prospectus and prospectus supplement, which are physically delivered together, comprise the final prospectus.

⁶³ See proposed Rule 424(e), 17 CFR 230.424(e). Prospectus supplements for shelf offerings generally are required to be filed with the Commission two or more business days after the earlier of pricing or first use. See Rule 424(b)(2), 17 CFR 230.424(b)(2).

⁶⁴ See proposed Rule 434(b) and (c), 17 CFR 230.434(b) and (c).

⁶⁵ These offerings are described in Rule 415(a)(1)(i) under the Securities Act, 17 CFR 230.415(a)(1)(i).

appropriate balance between physical delivery of prospectus information and publication by filing. Should the full description of securities required by Item 202 of Regulation S-K be required to be physically delivered? If so, would such description cause the abbreviated supplementing memorandum to become so lengthy that the timing difficulties associated with prospectus delivery would not be surmounted? Should the proposed rule require physical delivery of other offering-specific information, such as disclosure of risk factors?

Offerings registered through short-form registration currently proceed frequently with delivery of only a final prospectus, although a preliminary or base prospectus is prepared for filing with the Commission.⁶⁶ Those offerings could proceed under the proposed rule only if a preliminary or base prospectus is delivered. Although base prospectuses are commonly prepared well in advance of a takedown from the delayed shelf, comment is requested with respect to whether a preliminary prospectus could be prepared and delivered sufficiently in advance of pricing in such offerings to warrant adoption of the proposed rule as it relates to non-shelf offerings made in short-form registration. If not, what alternative document should be allowed to be used to convey the required information? On the other hand, commenters should address whether physical delivery of all offering-specific information should be required for offerings using short-form registration.

3. Conforming Changes to Rule 15c2-8

Although the delivery of a prospectus to investors in advance of the final prospectus is not required by the Securities Act, paragraph (b) of Rule 15c2-8 under the Exchange Act⁶⁷ requires broker-dealers, in the case of certain initial public offerings, to deliver a copy of the preliminary prospectus at least 48 hours prior to the mailing of the confirmation.⁶⁸ Other provisions of Rule 15c2-8 govern the furnishing of the prospectus to broker-dealers participating in the offering to ensure that they have the latest available information when they solicit investors.

The Commission is proposing amendments to Rule 15c2-8 to reflect

the provisions of proposed Rule 434 and new means of disseminating confirmations and prospectuses. The proposed revisions would add new paragraph (j) that states that, for purposes of Rule 15c2-8, the terms "preliminary prospectus" and "final prospectus" include the terms "prospectus subject to completion" and "Section 10(a) prospectus," respectively, as such terms are used in proposed Rule 434. Also, the proposals substitute the term "sending" for the term "mailing." These proposed revisions are not intended to make substantive changes to Rule 15c2-8. Commenters are requested to provide their views on whether these proposals are appropriate in light of proposed Rule 434, and whether any other changes to Rule 15c2-8 are necessary in light of Securities Act rule revisions proposed herein.

4. Scope of the Proposed Rule

a. Exchange Offers and Business Combinations; Best Efforts Offerings. Proposed Rule 434 extends only to offerings where the sole consideration given in exchange for securities is cash. Offerings such as exchange offers and business combinations would not be included. In those offerings, the final prospectus is traditionally used to begin the process of soliciting votes or consents to a transaction. Thus, the logistical difficulties of prospectus delivery intended to be minimized by the proposal should not be associated with those offerings.

The proposed rule also does not extend to offerings that are made other than on a firm commitment basis with underwriters. The SIA Proposal would cover agency transactions in securities registered on a delayed shelf registration statement. In a firm commitment underwriting, the underwriter(s) agree to purchase the securities from the issuer for a fixed price and then resells the securities to the public, thereby assuming the risk of market fluctuations in the price of securities. According to the SIA Proposal, the prospectus delivery pressures appear to be greatest in such firm commitment offerings where the underwriter must make payment of its own funds to the issuer on a specified date, whether or not its customers have paid for the securities. In contrast, in a best efforts offering,⁶⁹ the broker-dealer is required to pay customers' funds promptly to the issuer (or to a separate bank or escrow account in the case of a contingency) upon

receipt. In that case, a broker-dealer would not pay out funds that it has not received, or use its own funds to pay for securities that have not been sold.

Comment is requested as to whether there are other types of offerings with comparable timing pressures to which the proposed rule ought to be expanded. Should the proposal be extended to some or all agency transactions in delayed-shelf-registered securities? Are such transactions subject to particular timing pressures in connection with settlement that are absent in best efforts offerings? Are such transactions sold to such a large number of investors that mass printing and delivery is required?

b. Offerings of Asset-backed Securities. The SIA Proposal recommends including firm commitment underwritten offerings of asset-backed securities ("ABS") within the scope of the proposed rule. The Commission, however, has determined to exclude ABS offerings from proposed Rule 434 for several reasons.⁷⁰ First, it appears that settlement in connection with ABS offerings currently takes place outside of the T+3 time frame, on approximately a T+10 cycle, and is likely to continue to do so. The existing settlement schedule is the result primarily of factors unique to these offerings, which include: (i) the distinctive structuring process for most ABS offerings; (ii) the time needed for identification of the specific pool of collateral which will support the ABS; and (iii) the necessity of assembling the prospectus (or prospectus supplement), which describes all material features of the collateral and the transaction's structure, shortly before sale of the ABS. Furthermore, concerns relating to a bifurcated settlement cycle do not appear to be a pressing problem in the ABS market.

The SIA Proposal treats ABS offerings the same as other offerings using short-form registration. Unlike other issuers using short-form registration, however, the special purpose ABS issuer is not required to have a history of filing Exchange Act reports to use such forms. In fact, these special purpose issuers typically are newly created with each securities offering. Investors in ABS offerings have recourse only to the special purpose issuer's assets as the

⁶⁶ Offerings of novel or complex securities, even when done through short-form registration, are sometimes sold through use of a preliminary prospectus.

⁶⁷ 17 CFR 240.15c2-8(b).

⁶⁸ Any person who is expected to receive a confirmation must have been sent a preliminary prospectus at least 48 hours prior to the sending of the confirmation. This requirement is satisfied by delivering a preliminary prospectus that is current at the time of its delivery.

⁶⁹ In a best efforts offering, the underwriter acts as an agent for the issuer and agrees to use its best efforts to sell the securities on behalf of the issuer.

⁷⁰ "Asset-backed security" is defined for purposes of this release the same way it is defined in General Instruction I.B.5. of Form S-3: a security that is primarily serviced by the cashflows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the securityholders.

source of payment on their ABS.⁷¹ The Commission's treatment of short-form issuers under proposed Rule 434 is predicated, in part, on the fact that significant issuer-specific information is available through Exchange Act reports. There is no equivalent source of information about the special-purpose issuer in ABS offerings.

In addition, most ABS offerings are registered as delayed offerings under the Commission's shelf registration rule. While the base prospectus includes a general description of the securities that may be offered from time to time, the terms of a specific ABS offering are included in the prospectus supplement. Such supplement details the characteristics of specific pool assets and the structure of the transaction, and is of significant length and complexity. The Commission's proposed rule would provide that only a summary of such information be physically delivered in short-form delayed shelf offerings. In the case of ABS offerings, a summary of such terms would not serve as an adequate substitute for the complete description in the prospectus supplement.

Treating ABS offerings the same as non-short-form offerings under the proposed rule, and thereby requiring use of a preliminary prospectus, also would not be appropriate. Offerings of ABS differ significantly from conventional offerings of corporate securities. The principal focus in ABS offerings is on the structure of the transaction and the nature of the collateral generating the payment streams supporting the ABS. As a particular offering evolves, a variety of structures may be considered as the sponsor attempts to meet investors' needs by adjusting the impact of, *e.g.*, prepayment rate and cash flow variables on particular classes within the structure. The process of developing a satisfactory structure typically extends almost to the time when the security is priced. Consequently, a preliminary prospectus (or, in the case of a delayed shelf offering, a preliminary prospectus supplement) is virtually never utilized.

Finally, even in the rare instance when an ABS offering may employ a preliminary prospectus, the complexity of the disclosure and the structural modifications occurring during the course of the offering do not lend themselves to incremental delivery of prospectus information. Nevertheless, comment is requested regarding

whether any ABS offerings could be accomplished within the strictures of the proposed rule while maintaining the present quality of prospectus disclosure.

c. Offerings of Structured Securities. As in the case of asset-backed securities, the SIA Proposal would extend relief to structured securities. The Commission's proposed Rule 434, however, would exclude offerings of such securities. These securities usually have terms that are highly complex, with many employing one or more indices as a basis for determining the issuer's payment obligations (*e.g.*, coupon, principal, redemption payments). Structured securities often are designed with specific market risks in mind, as well as risks relating to the issuer. Consequently, a structured security's value is derived not only from the creditworthiness of its issuer, but also from any underlying assets, indices, interest rates or cash flow upon which the security is predicated.

The incremental distribution of information proposed under the rule, when combined with the complex nature of these securities, may result in material disclosure not being readily accessible to investors. Additionally, issuers of securities with complex terms or formulas for the calculation of payment obligations may not be able to develop a summary description (as contemplated by the rule for short-form offerings) that is an adequate substitute for the complete description presently delivered to investors. A complete description of offering-specific information is of particular importance to investors in making an investment decision, given the market risks resulting from the structure of these securities.

Comment is solicited regarding the exclusion or inclusion of these securities with respect to the proposed rule. Comment is requested as to whether the proposed incremental delivery procedure would impede an investor's ability to consider and evaluate material information about structured securities. Can structured securities be adequately summarized? Also, are there additional concerns that further warrant the exclusion of structured securities? Comment also is solicited regarding whether "structured securities" as used in proposed Rule 434 should be defined. If so, how should such securities be defined? For example, should such definition conform to the proposed definition in Rule 15c6-1(c)(2) discussed below?

d. Investment Companies. The proposed rule provides that it does not apply to the offering of any security of any company registered or required to

be registered under the Investment Company Act of 1940⁷² or any company that is treated as a business development company under that Act.

In making its proposal, the SIA did not specifically address the applicability to registered investment companies. The Commission understands that open-end investment company (mutual fund) initial offerings typically do not raise the prospectus delivery logistical concerns that have led to these proposals. Mutual fund shares are normally offered on a continuous basis, and a preliminary prospectus is not generally printed. Moreover, the Commission has concerns that separate delivery of a document that supplements and modifies a prospectus may be inconsistent with efforts to simplify investment company prospectuses.

Comment is requested on whether adoption of a T+3 settlement period will raise prospectus delivery concerns with respect to initial offerings of closed-end funds and unit investment trusts. Commenters favoring the application of proposed Rule 434 to investment companies should address the effects of the proposal on retail investors' ability to understand their investment in these types of companies, as well as the specific investment company-related rules that would require modification.

5. Feasibility of the Proposal

A number of concerns have been raised about the feasibility of the SIA Proposal for issuers and underwriters and the utility of the disclosure to investors.⁷³ Comment is requested with respect to each of the issues raised under the following captions.

a. Investor Confusion and Resistance. Investors may be obliged to read multiple documents to ascertain the required information about the transaction and securities. While prospectuses included in short-form registrations currently are not self-contained, given the incorporation by reference of issuer-specific information, would investors expect and require an integrated disclosure document for other offerings, *e.g.*, initial public offerings?

Because a supplementing memorandum could reflect additions to, or changes from, the disclosure contained in a preliminary prospectus, thereby modifying or superseding such information, would investors be confused and frustrated in attempting to determine the important and relevant information? Is this process further

⁷¹ While the sponsor/depositor associated with the offering may be a seasoned, reporting company, the reporting history of the sponsor/depositor usually is not relevant because there is no recourse to the sponsor/depositor.

⁷² 15 U.S.C. § 80a-1 *et seq.*

⁷³ See the Four Firms letter, *supra* note 15.

exacerbated when a preliminary prospectus is distributed before staff comments on the document are resolved and multiple changes to the document are reflected in the supplementing memorandum? Are concerns that investors might not be shown all changes made in response to staff comments appropriate? Is the purported function of the supplementing memorandum inconsistent with its anticipated brevity?

Investors also may be required to examine multiple documents in order to obtain price-related information. Purchasers in secondary trades may receive prospectus information that does not disclose pricing information included only in the confirmations in connection with the primary offering. Would such delivery be adequate with respect to secondary market trading transactions effected during the prospectus delivery period specified in Securities Act Section 4(3) and Rule 174 thereunder?⁷⁴

Investors who receive a supplementing memorandum may not have retained, or may have difficulty locating, a copy of the preliminary prospectus previously sent. Does this possibility compromise the utility of this proposed method for prospectus delivery?

Is there a risk that investors who receive more than one preliminary prospectus will be unwilling to be responsible for matching related supplementing memoranda to such preliminary prospectuses? How significant are concerns relating to investor confusion from mismatches or the inability to match related documents?

Will investors require the delivery of a traditional final prospectus (even if delivered after the confirmation) for convenience of reference or for other reasons?

b. Monitoring Delivery. Because prospectus information would be delivered incrementally, would participants in the offering require re-delivery of the preliminary prospectus at the time any supplementing memorandum is delivered? If so, to what extent would this negate the intended benefits of the modified delivery method? Would new recordkeeping burdens be incurred in connection with recording the delivery of the prospectus where delivery is effected incrementally? Would other variables exist under this delivery scheme that would impose substantial additional monitoring and recordkeeping burdens on underwriters?

In the event an issuer delivers more than one version of the preliminary prospectus, would recordkeeping regarding which investors received which versions be burdensome? Commenters also should consider whether broker-dealers will be able to comply with Rule 15c2-8 and, if not, specifically discuss why compliance would not be feasible.

c. Third Parties' Opinions. Would issuers' and underwriters' counsel have difficulty giving opinions as to the adequacy of disclosure in the supplementing memorandum and preliminary prospectus, particularly if the supplementing memorandum only summarizes certain changes fully set forth in the filing declared effective? Auditors also may be expected to perform additional work. The additional work required by third parties may result in higher legal and accounting costs to issuers. How likely is it that disagreements, or the time required to reach agreement, among the parties about the content of a supplementing memorandum will negate the purported benefits of the proposal?

III. Revision of the Rule 15c6-1 Exemption

Because the difficulties associated with prospectus delivery within a T+3 time frame were the principal reason for the current exemption for firm commitment offerings in Rule 15c6-1, the Commission believes that the necessity for such exemption should be reconsidered in light of the proposals to alleviate those timing difficulties. It is consistent with the purposes of Rule 15c6-1 to establish T+3 as the standard settlement cycle for firm commitment offerings. It has been estimated that approximately \$20 billion in new issues may be subject to settlement risk in any given day.⁷⁵ Rule 15c6-1 was intended to reduce the credit and market risk inherent in the settlement of securities transactions. Thus, by including these trades within a T+3 settlement time frame, the goal of risk reduction will be greatly enhanced. Moreover, by revising the exemption, the Commission believes that it will provide certainty to the industry in the form of a written standard.

As discussed above in connection with the SIA Proposal, offerings of asset-backed securities raise concerns different from other offerings, and it does not appear that settlement of such offerings typically will occur within a T+3 time frame. The Commission therefore preliminarily believes that it

would be appropriate to continue to exempt from T+3 settlement sales of asset-backed securities sold pursuant to a firm commitment offering.

The release adopting Rule 15c6-1 includes an interpretation with respect to the treatment of a type of asset-backed security, mortgage pass-throughs in the to-be-announced market. With respect to the purchase or sale of such securities, the Commission interprets Rule 15c6-1 to permit settlement to occur within three days after the date a specific pool of mortgages is identified as collateral for the securities for purposes of the sales agreement with the customer. The Commission invites comment as to whether a similar interpretation should be applied to all asset-backed securities. If such an interpretation is provided, is an express exemption still needed for offerings of asset-backed securities?

While it appears that offerings of structured securities⁷⁶ currently settle within a T+5 settlement cycle, it may be difficult to settle offerings of structured securities by T+3 because of the time difficulties associated with prospectus delivery. As proposed, Rule 434 would not apply to such securities. The revisions contemplated in connection with the Four Firms Proposal, however, would provide the same benefits with respect to prospectus delivery in offerings of structured securities as to other offerings. Although an exemption for offerings of structured securities may create problems in secondary market trading as described above, the Commission currently believes that it is preferable that the exemption for firm commitment offerings be continued for offerings of structured securities because of the possible difficulties of settling such instruments within a T+3 time frame. The Commission invites comment as to the feasibility of this approach. In addition, the Commission invites comment as to the proposed Rule 15c6-1 definition of structured securities. Does the definition provide sufficient guidance as to the class of securities included?

The Commission invites commenters to address the merits of the proposed Rule 15c6-1 amendments. Assuming the adoption of the proposals relating to prospectus delivery, should the exemption for firm commitment

⁷⁶ For purposes of Rule 15c6-1, a structured security is proposed to be defined as a security whose cash flow characteristics depend upon one or more indices or that have imbedded forwards or options or a security where an investor's investment return and the issuer's payment obligations are contingent on, or highly sensitive to, changes in the value of underlying assets, indices, interest rates or cash flows. See proposed Rule 15c6-1(c)(2), 17 CFR 240.15c6-1(c)(2).

⁷⁴ 15 U.S.C. § 77d(3); 17 CFR 230.174.

⁷⁵ See letter from Joseph McLaughlin, *supra* footnote 15, page 4.

offerings be modified? Comment is specifically requested on the treatment of asset-backed securities and structured securities and particularly whether any exemption from the requirements of Rule 15c6-1 is needed for offerings of such securities. Would any exemption be needed if managing underwriters are given the ability to set alternate settlement time frames as previously discussed? Further, the Commission also invites comment on whether offerings of any other classes of securities pursuant to a firm commitment underwriting may need to be exempted from the scope of Rule 15c6-1.

IV. Cost-Benefit Analysis

To evaluate fully the costs and benefits associated with the proposals, the Commission requests commenters to provide views and empirical data as to the costs and benefits associated with such proposals. The proposals are expected to benefit issuers and other participants in certain offerings by lowering the transaction costs associated with the printing and delivery of prospectuses, and by providing them additional flexibility in reacting to changes in market conditions and in clearance and settlement of trades. For example, mass printing and delivery of a supplementing memorandum or abbreviated supplementing memorandum, due to its expected brevity, would be expected to consume far less time and be less expensive for issuers to undertake than would production of a traditional final prospectus. Furthermore, the proposals are not expected to diminish investor protection; rather, investors would be expected to benefit from the proposals since offering participants would be required to settle certain underwritten offerings in T+3 as opposed to T+5.

V. Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA"), pursuant to the requirements of the Regulatory Flexibility Act,⁷⁷ regarding the proposed rule and amendments to existing regulations. The IRFA notes that the proposed rule and amendments are intended to provide entities with, and reflect the availability of, greater flexibility and efficiency with respect to the timing of printing and delivery of prospectus information, thereby facilitating compliance with Rule 15c6-1 under the Exchange Act and access to the public securities markets. As discussed more fully in the

analysis, the proposed rule and amendments to Securities Act regulations are anticipated to decrease costs associated with fulfilling entities' prospectus delivery obligations under the Securities Act. The proposed amendments to Exchange Act regulations are not anticipated to have any significant economic impact on entities. The proposed rule could impose minimal additional reporting, recordkeeping or compliance requirements, while the proposed amendments would not impose any new reporting, recordkeeping or compliance requirements on any entities. No alternatives to the proposed rule and amendments consistent with their objectives and the Commission's statutory mandate were found.

It is expected that the overall effect of the proposed rule and amendments will provide entities increased efficiency in raising capital from the public securities markets. The proposal to provide for the incremental delivery of prospectus information, if adopted, would apply to any entity engaged in a public distribution with respect to an eligible offering. The proposed amendments to Securities Act regulations are intended to streamline the registration process and thereby facilitate compliance with prospectus delivery within T+3 and would apply to any entity engaged in a public offering of securities. The proposed amendments to Exchange Act regulations are intended to reflect the availability of expedited delivery of prospectus information provided by the proposed new rule and amendments to the Securities Act regulations.

Commenters are encouraged to comment on any aspect of the analysis. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis if the proposed rule and amendments are adopted. A copy of the IRFA may be obtained from Michael Mitchell, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 3-3, Washington, DC 20549, (202) 942-2900.

VI. General Request for Comments

Any interested person wishing to submit written comments on any aspect of the proposed rule and amendments to the rules and forms, as well as on other matters that might have an impact on the proposals contained herein, is requested to do so. In addition, the Commission requests comment on whether any further changes to the rules and forms are necessary or appropriate to facilitate T+3 at this time. Comment is requested specifically from investors, broker-dealers, underwriters, issuers,

analysts and other persons that rely on the information provided in the prospectus supplement. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549 and should refer to file number S7-7-95.

VII. Statutory Bases

The proposed rule and the amendments to the Commission's rules and forms under the Securities Act are being proposed pursuant to sections 6, 7, 8, 10 and 19(a) of the Securities Act of 1933, as amended. The proposed revisions to the Commission's rules under the Exchange Act are being proposed pursuant to sections 3, 10, 12, 15 and 23 of the Securities Exchange Act of 1934, as amended.

List of Subjects in 17 CFR Parts 228, 229, 230, 239, and 240

Brokers, Investment companies, Reporting and recordkeeping requirements, Securities, Small businesses.

Text of Proposed Amendments

In accordance with the foregoing, Title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78w, 78ll, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, unless otherwise noted.

2. By revising paragraph (b) and paragraph (c) of § 228.503 to read as follows:

§ 228.503 (Item 503) Summary Information and Risk Factors.

* * * * *

(b) *Address and telephone number.* Include in the prospectus the complete mailing address and telephone number of the small business issuer's principal executive offices.

(c) *Risk factors.* Small business issuers discuss, on the page immediately following the cover page of the prospectus (or following the summary, if included), or on the page immediately following a section containing pricing information where such section immediately follows the cover page (or following the summary, if included), any factors that make the offering speculative or risky. These

⁷⁷ 5 U.S.C. 603 (1988).

factors may include no operating history, no recent profit from operations, poor financial position, the kind of business in which the small business issuer is engaged or proposes to engage, or no market for the small business issuer's securities.

Instruction to Item 503(c). "Pricing information" as used in paragraph (c) includes disclosure required by Items 504 and 508 of Regulation S-B (§ 228.504 and § 228.508) and information regarding the small business issuer's capitalization.

3. By amending § 228.601 to revise the third sentence of paragraph (b)(24) to read as follows:

§ 228.601 (Item 601) Exhibits.

* * * * *

(b) * * *
 (24) *Power of attorney.* * * * A power of attorney that is filed with the Commission shall relate to a specific filing, an amendment thereto, or a related registration statement that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act (§ 230.462(b) of this chapter). * * *

* * * * *

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

4. 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, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78w, 78ll(d), 79e, 79n, 79t, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, unless otherwise noted.

* * * * *

5. By revising the last sentence of the introductory text of paragraph (f) of § 229.502 to read as follows:

§ 229.502 (Item 502) Inside front and outside back cover pages of prospectus.

* * * * *

(f) * * * Such disclosure need not be included on the inside front cover page of the prospectus, if it is included, under appropriate caption, elsewhere in the prospectus.

* * * * *

6. By revising paragraph (b) and paragraph (c) of § 229.503 to read as follows:

§ 229.503 (Item 503) Summary information, risk factors and ratio of earnings to fixed charges.

* * * * *

(b) *Address and telephone number.* Registrants shall include in the

prospectus the complete mailing address, including zip code, and the telephone number, including area code, of their principal executive offices.

(c) *Risk factors.* Registrants, where appropriate, shall set forth, on the page immediately following the cover page of the prospectus (or following the summary, if included), or on the page immediately following a section containing pricing information where such section immediately follows the cover page (or following the summary, if included), under an appropriate caption, a discussion of the principal factors that make the offering speculative or one of high risk; these factors may be due, among other things, to such matters as an absence of an operating history of the registrant, an absence of profitable operations in recent periods, the financial position of the registrant, the nature of the business in which the registrant is engaged or proposes to engage, or, if common equity or securities convertible into or exercisable for common equity are being offered, the absence of a previous market for the registrant's common equity.

Instruction to Item 503(c). "Pricing information" as used in paragraph (c) includes disclosure required by Items 504 and 508 of Regulation S-K (§ 229.504 and § 229.508) and information regarding the registrant's capitalization.

* * * * *

7. By amending § 229.601 to revise the fourth sentence of paragraph (b)(24) to read as follows:

§ 229.601 (Item 601) Exhibits.

* * * * *

(b) * * *
 (24) *Power of attorney.* * * * A power of attorney that is filed with the Commission shall relate to a specific filing, an amendment thereto, or a related registration statement that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act (§ 230.462(b) of this chapter). * * *

* * * * *

8. Guide 4 (referenced in § 229.801(d)) is amended by removing the first sentence of the Guide.

Note: The text of Guide 4 does not and the amendments will not appear in the Code of Federal Regulations.

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

9. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78l, 78m, 78n, 78o, 78w,

78ll(d), 79t, 80a-8, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

10. By amending § 230.402(a) to add a sentence between the fourth and fifth sentences to read as follows:

§ 230.402 Number of copies; binding; signatures.

(a) * * * Registration statements filed pursuant to Rule 462(b) under the Act (§ 230.462(b)), however, may include duplicated or facsimile versions of manual signatures of persons required to sign, and such signatures shall be considered manual signatures for purposes of the Act and rules and regulations thereunder. * * *

* * * * *

11. By amending § 230.424 by redesignating paragraphs (e) and (f), respectively, as paragraphs (f) and (g) and by adding paragraph (e) to read as follows:

§ 230.424 Filing of prospectuses; number of copies.

* * * * *

(e) Ten copies of each form of prospectus which, but for the application of Rule 434 under the Act (§ 230.434) would be filed pursuant to paragraphs (b)(2) or (b)(5) of this section, shall be filed pursuant to this paragraph with the Commission on or prior to the date on which a confirmation is sent or given.

* * * * *

12. By amending § 230.430A by removing the word "five" and adding, in each place it appears, the word "ten" in paragraph (a)(3); by adding a sentence at the end of Instruction to paragraph (a); by redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f) and by adding paragraph (c) 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 up to 20% or deviation in the price range of up to 20% may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b)(1) (§ 230.424(b)(1)) or Rule 497(h) (§ 230.497(h)), provided that in the case of a volume increase no form of prospectus filed pursuant to Rule 424(b)(1) (§ 230.424(b)(1)) may be used if the total dollar value of securities offered exceeds that which was registered.

* * * * *

(c) Where a registration statement is filed to increase the amount of securities in a Rule 430A (§ 230.430A) offering and it is to be effective upon filing pursuant to Rule 462(b) (§ 230.462(b)),

such registration statement upon its effectiveness shall be deemed part of the earlier filed registration statement with respect to such offering.

* * * * *

13. By adding § 230.434 to read as follows:

§ 230.434 Prospectus delivery requirements in firm commitment underwritten offerings of securities for cash.

(a) Where securities, other than asset-backed securities and structured securities, are offered for cash in a firm commitment underwritten offering and the conditions described in paragraph (b) or paragraph (c) of this section are satisfied:

(1) The prospectus subject to completion and the supplementing memorandum described in paragraphs (b)(1) and (b)(2) of this section, taken together, and the prospectus subject to completion and the supplementing memorandum described in paragraphs (c)(1) and (c)(2) of this section, taken together, shall constitute prospectuses that meet the requirements of Section 10(a) of the Act (15 U.S.C. 77j(a)) for purposes of Section 5(b)(2) and Section 2(10)(a) of the Act (15 U.S.C. 77e(b)(2) and 77b(10)(a)); and

(2) Such Section 10(a) prospectuses 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(10)(a) of the Act; and

(ii) Accompanied or preceded the transmission of the securities for purposes of sale or for delivery after sale for purposes of Section 5(b)(2) of the Act.

(b) With respect to offerings of securities (other than offerings pursuant to Rule 415 under the Act (§ 230.415)) that are registered on any form other than Form S-3 or Form F-3 (§§ 239.13 and 239.33 of this chapter) under the Act the following conditions are satisfied:

(1) A prospectus subject to completion and any supplementing memorandum described in paragraph (b)(3) of this section are sent or given prior to or at the same time with the confirmation;

(2) Except for information omitted from the prospectus in a registration statement at the time of effectiveness in accordance with Rule 430A (§ 230.430A), such prospectus subject to completion and supplementing memorandum, together, are not materially different from the prospectus in the registration statement at the time of its effectiveness or post-effective

amendment thereto at the time of its effectiveness; and

(3) A supplementing memorandum setting forth all information material to investors with respect to the offering that is not disclosed in the prospectus subject to completion or the confirmation is filed with the Commission pursuant to Rule 424(b)(1) under the Act (§ 230.424(b)(1)).

(c) With respect to offerings of securities (other than offerings pursuant to Rule 415(a)(1)(i)-(ix) and (xi) (§ 230.415(a)(1)(i)-(ix) and (xi)) that are registered on Form S-3 or Form F-3 (§§ 239.13 and 239.33 of this chapter) the following conditions are satisfied:

(1) A prospectus subject to completion and the abbreviated supplementing memorandum described in paragraph (c)(2) of this section are sent or given prior to or at the same time with the confirmation;

(2) The abbreviated supplementing memorandum delivered to investors sets forth:

(i) If not disclosed in the prospectus subject to completion, a description of securities required to be disclosed pursuant to Item 202 of Regulation S-K (17 CFR 229.202 of this chapter), or a fair and accurate summary thereof; and

(ii) If not disclosed in the registrant's Exchange Act reports or the prospectus subject to completion, all material changes in the registrant's affairs required to be disclosed pursuant to Item 11 of Form S-3 or Form F-3 (§§ 239.13 and 239.33 of this chapter), as applicable;

(3) The abbreviated supplementing memorandum described in paragraph (c)(2) of this section is filed with the Commission pursuant to Rule 424(b)(1) under the Act (§ 230.424(b)(1)) or, if the disclosure represents a fundamental change in the information set forth in the prospectus filed as part of the registration statement declared effective or any post-effective amendment thereto, is filed in a post-effective amendment to the registration statement that is declared effective prior to the time any confirmation is sent or given;

(4) In an offering made pursuant to Rule 415(a)(1)(x) under the Act (§ 230.415(a)(1)(x)), a form of prospectus is filed pursuant to Rule 424(e) under the Act (§ 230.424(e)), and in an offering not made pursuant to Rule 415(a)(1)(x) under the Act (§ 230.415(a)(1)(x)), a prospectus meeting the requirements of Section 10(a) of the Act other than by virtue of paragraph (a)(1) of this section is filed with the Commission prior to the effective date of the registration statement; and

(d) The information contained in any form of prospectus filed with the Commission pursuant to Rule 424(e) under the Act (§ 230.424(e)) shall be deemed to be a part of the registration statement as of the time such information is filed with the Commission.

(e) For purposes of this section, *asset-backed securities* shall mean asset-backed securities as defined in General Instruction I.B.5 of Form S-3 (§ 239.13 of this chapter).

(f) 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), a prospectus filed in accordance with Rule 430A(a) (§ 230.430A(a)), or a prospectus omitting information that is not yet known concerning a delayed offering pursuant to Rule 415(a)(i)(x) under the Act (§ 230.415(a)(1)(x)) that is contained in a registration statement at the time of effectiveness.

(g) Notwithstanding paragraphs (a) through (f) of this section, this section shall not apply to the offering of any security of any company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*, as amended) or any company that is exempt from the requirement to register under that Act through filing either a notification of election or a notice of intent to file a notification of election to be treated as a business development company under that Act.

14. By designating the existing text as paragraph (a) and adding paragraph (b) to § 230.439 to read as follows:

§ 230.439 Consent to use of material incorporated by reference.

(a) * * *

(b) In a registration statement filed pursuant to Rule 462(b) under the Act (§ 230.462(b)), any required consent may be incorporated by reference into the registration statement from a previously filed registration statement relating to the offering, provided that the consent contained in the previously filed registration statement expressly provides for such incorporation. Any consent filed in a Rule 462(b) (§ 230.462(b)) registration statement may contain duplicated or facsimile versions of required signatures, and such signatures shall be considered manually signed for purposes of the Act and the rules thereunder.

15. By amending § 230.457 to revise paragraph (o) to read as follows:

§ 230.457 Computation of fee.

* * * * *

(o) Where an issuer is offering securities pursuant to Rule 430A under the Act (§ 230.430A) or where an issuer eligible to use Form S-3 (§ 239.13 of this chapter) is registering securities pursuant to General Instruction I.B.1 or I.B.2 to Form S-3 to be offered on a delayed or continuous basis pursuant to Rule 415(a)(1)(x) under the Act (§ 230.415(a)(1)(x)), or pursuant to General Instruction H. to Form S-4 (§ 239.25 of this chapter) in connection with a business combination transaction pursuant to Rule 415(a)(1)(viii) under the Act (§ 230.415(a)(1)(viii)), the registration fee may be calculated on the basis of the maximum offering price of all the securities listed in the "Calculation of Registration Fee" table.

16. By revising the first sentence of paragraph (a) and adding two new sentences immediately after the first sentence of paragraph (a) to § 230.461 to read as follows:

§ 230.461 Acceleration of effective date.

(a) Requests for acceleration of the effective date of a registration statement shall be made by the registrant and the managing underwriters of the proposed issue, or, if there are no managing underwriters, by the principal underwriters of the proposed issue, and shall state the date upon which it is desired that the registration statement shall become effective. Such requests may be made in writing or orally, provided that, if oral requests are to be made, a letter indicating that fact and stating that the registrant and the managing or principal underwriters are aware of their obligations under the Act must accompany the filing of the registration statement with the Commission. Written requests may be sent to the Commission by facsimile transmission. * * *

17. By revising the section heading, designating the existing text as paragraph (a), and adding paragraph (b) to § 230.462 to read as follows:

§ 230.462 Effective date of certain registration statements.

(a) * * *

(b) A registration statement and any post-effective amendment thereto shall become effective upon filing with the Commission if:

(1) The registration statement is for the sole purpose of registering additional securities of the same class(es) as were included in an earlier registration statement for the same offering filed pursuant to Rule 430A under the Act (§ 230.430A) and declared effective by the Commission;

(2) The new registration statement is filed within two business days of the pricing of the earlier registration statement; and

(3) The new registration statement registers no more than 20% of the amount of such class(es) of securities that were registered in the earlier registration statement.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

18. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78w(a), 78ll(d), 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 80a-8, 80a-29, 80a-30 and 80a-37, unless otherwise noted.

* * * * *

19. By amending Form SB-1 (referenced in § 239.9) by adding one check box to the cover page immediately before "Calculation of Registration Fee," by adding a Note to appear immediately after the Calculation of Registration Fee table, and by adding paragraph H to General Instructions to read as follows:

Note: The text of Form SB-1 does not and the amendments will not appear in the Code of Federal Regulations.

Form SB-1

Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is registering additional securities pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. [] 33-_____

* * * * *

Calculation of Registration Fee

* * * * *

Note: For offerings made pursuant to Rule 430A under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

* * * * *

General Instructions

* * * * *

H. Registration of Additional Securities

With respect to offerings registered pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following:

the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. Any opinion or consent required in such a registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) Such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

* * * * *

20. By amending Form SB-2 (referenced in § 239.10) by adding one check box to the cover page immediately before "Calculation of Registration Fee," by adding two sentences to the end of the Note following the Calculation of Registration Fee table, and by adding paragraph C to General Instructions to read as follows:

Note: The text of Form SB-2 does not and the amendments will not appear in the Code of Federal Regulations.

Form SB-2

Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is registering additional securities pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. [] 33-_____

* * * * *

Note: * * * For offerings made pursuant to Rule 430A under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

* * * * *

General Instructions

* * * * *

C. Registration of Additional Securities

With respect to offerings registered pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. Any opinion or consent required

in such a registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) Such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

21. By amending Form S-1 (referenced in § 239.11) by adding one check box to the cover page immediately before "Calculation of Registration Fee," and by adding two sentences to the end of the Note following the Calculation of Registration Fee table, and by adding paragraph V to General Instructions to read as follows:

Note: The text of Form S-1 does not and the amendments will not appear in the Code of Federal Regulations.

Form S-1

Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is registering additional securities pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. [] 33-_____

* * * * *

Note: * * * For offerings made pursuant to Rule 430A under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

General Instructions

* * * * *

V. Registration of Additional Securities

With respect to offerings registered pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. Any opinion or consent required in such a registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) Such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

* * * * *

22. By amending Form S-2 (referenced in § 239.12) by adding one check box to the cover page immediately before "Calculation of Registration Fee," by adding two sentences to the end of the Note following the Calculation of Registration Fee table, and by adding paragraph III to General Instructions to read as follows:

Note: The text of Form S-2 does not and the amendments will not appear in the Code of Federal Regulations.

Form S-2

Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is registering additional securities pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. [] 33-_____

* * * * *

Note: * * * For offerings made pursuant to Rule 430A under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offering and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

General Instructions

* * * * *

III. Registration of Additional Securities

With respect to offerings registered pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. Any opinion or consent required in such a registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

* * * * *

23. By amending Form S-3 (referenced in § 239.13) by adding one check box to the cover page immediately before "Calculation of Registration Fee," by adding two sentences to the end of the Note following the Calculation of Registration

Fee table, and by adding paragraph IV to General Instructions to read as follows:

Note: The text of Form S-3 does not and the amendments will not appear in the Code of Federal Regulations.

Form S-3

Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is registering additional securities pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. [] 33-_____

* * * * *

Note: * * * For offerings made pursuant to Rule 430A under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

General Instructions

* * * * *

IV. Registration of Additional Securities

With respect to offerings registered pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. Any opinion or consent required in such a registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

* * * * *

24. By amending Form S-11 (referenced in § 239.18) by adding paragraph G to General Instructions, by adding one check box to the cover page immediately before "Calculation of Registration Fee" and by adding two sentences to the end of the Note following the Calculation of Registration Fee table to read as follows:

Note: The text of Form S-11 does not and the amendments will not appear in the Code of Federal Regulations.

Form S-11

For Registration Under the Securities Act of 1933 of Securities of Certain Real Estate Companies

General Instructions

* * * * *

G. Registration of Additional Securities

With respect to offerings registered pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. Any opinion or consent required in such a registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

* * * * *

Form S-11

Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is registering additional securities pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. [] 33-_____

* * * * *

Note: * * * For offerings made pursuant to Rule 430A under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

* * * * *

25. By amending Form F-1 (referenced in § 239.31) by adding one check box to the cover page immediately before "Calculation of Registration Fee," by adding two sentences to the end of the Note following the Calculation of Registration Fee table, and by adding paragraph V to General Instructions to read as follows:

Note: The text of Form F-1 does not and the amendments will not appear in the Code of Federal Regulations.

Form F-1

Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is registering additional securities pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. [] 33-_____

* * * * *

Note: * * * For offerings made pursuant to Rule 430A under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

General Instructions

* * * * *

V. Registration of Additional Securities

With respect to offerings registered pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. Any opinion or consent required in such a registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

* * * * *

26. By amending Form F-2 (referenced in § 239.32) by adding one check box to the cover page immediately before "Calculation of Registration Fee," by adding two sentences to the end of the Note following the Calculation of Registration Fee table, and by adding paragraph IV to General Instructions to read as follows:

Note: The text of Form F-2 does not and the amendments will not appear in the Code of Federal Regulations.

Form F-2

Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is registering additional securities pursuant to Rule 462(b) under the Securities Act, please check the following

box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. [] 33-_____

* * * * *

Note: * * * For offerings made pursuant to Rule 430A under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

General Instructions

* * * * *

IV. Registration of Additional Securities

With respect to offerings registered pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. Any opinion or consent required in such a registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

* * * * *

27. By amending Form F-3 (referenced in § 239.33) by adding one check box to the cover page immediately before "Calculation of Registration Fee," by adding two sentences to the end of the Note following the Calculation of Registration Fee table, and by adding paragraph IV to General Instructions to read as follows:

Note: The text of Form F-3 does not and the amendments will not appear in the Code of Federal Regulations.

Form F-3

Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is registering additional securities pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. [] 33-_____

* * * * *

Note: * * * For offerings made pursuant to Rule 430A under the Securities Act, only the title of the class of securities to be registered,

the proposed maximum aggregate offering price for that class of securities and the amount of registration fee need to appear in the Calculation of Registration Fee table. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 429 under the Securities Act.

General Instructions

* * * * *

IV. Registration of Additional Securities

With respect to offerings registered pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. Any opinion or consent required in such a registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

* * * * *

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

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

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

* * * * *

29. Section 240.15c2-8(b) is amended by revising the phrase "mailing" to read "sending".

30. Section 240.15c2-8(c) is amended by revising the phrase "mail" to read "send".

31. Section 240.15c2-8(d) is amended by revising the phrase "mail" to read "send".

32. Section 240.15c2-8 is amended by adding paragraph (j) to read as follows:

§ 240.15c2-8 Delivery of prospectus.

* * * * *

(j) For purposes of this section, the term *preliminary prospectus* shall include the term *prospectus subject to completion* as used in 17 CFR 230.434(f), and the term *final prospectus* shall include the term *Section 10(a) prospectus* as used in 17 CFR 230.434(f).

33. Amend § 240.15c6-1 by revising the phrase "paragraph (b)" contained in paragraph (a) to read "paragraphs (b), (d), and (e)"; by revising the phrase "Paragraph (a)" contained in the introductory text of paragraph (b) to read "Paragraphs (a) and (d)"; by revising the phrase "the sale for cash of securities" contained in paragraph (b)(2) to read "the sale for cash of asset-backed securities or structured securities"; and by adding paragraphs (c), (d), and (e) to read as follows:

§ 240.15c6-1 Settlement cycle.

* * * * *

(c) For purposes of this section:

(1) *Asset-backed security* means an asset-backed security as defined in General Instruction I.B.5 of Form S-3 (§ 239.13 of this chapter); and

(2) *Structured security* means a security whose cash flow characteristics depend upon one or more indices or that have imbedded forwards or options or a security where an investor's investment return and the issuer's payment obligations are contingent on, or highly sensitive to, changes in the value of underlying assets, indices, interest rates or cash flows.

(d) Paragraph (a) of this section shall not apply to securities that are sold pursuant to a firm commitment underwritten offering registered under the Securities Act of 1933 and that are priced after 4:30 p.m. Eastern time on the date such securities are priced,

provided that a broker or dealer shall not effect or enter into a contract for the purchase or sale of such securities that provides for payment of funds and delivery of securities later than the fourth business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(e) For purposes of paragraphs (a) and (d) of this section, the parties to a contract shall be deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering registered under the Securities Act of 1933 if:

(1) The alternate date is no later than the fifth business day after the date of the contract;

(2) The managing underwriter has selected such date for all securities sold pursuant to such offering;

(3) Information disclosing the alternate date is contained in a written notice sent or given to all prospective purchasers on or before the date the securities which are sold pursuant to such offering are priced;

(4) The managing underwriter provides written notification to all exchanges on which the securities are listed and all registered securities associations through which quotations for such securities are disseminated prior to the date the securities which are sold pursuant to such offering are priced; and

(5) The parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

Dated: February 21, 1995.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95-4647 Filed 2-24-95; 8:45 am]

BILLING CODE 8010-01-P