obligation was discharged in full or the last installment paid.

By the Commission.

Dated: February 20, 1997.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–4667 Filed 2–27–97; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 230, and 249

[Release No. 33–7392; 34–38315; File No. S7–8–97 International Series Release No. 1056]

RIN 3235–AG34

Offshore Offers and Sales

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') is publishing for comment proposed amendments to the Regulation S safe harbor procedures. The proposed amendments relate to offshore sales of equity securities of U.S. issuers, and foreign issuers where the principal market for the securities is in the United States. The proposals are designed to stop abusive practices in connection with offerings of equity securities purportedly made in reliance on Regulation S.

DATES: Comments should be received on or before April 29, 1997.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Stop 6–9, Washington, D.C. 20549. Comment letters also may be submitted electronically to the following electronic mail address: rule-comments@sec.gov. Comment letters should refer to File No. S7–8–97; this file number should be included in the subject line if electronic mail is used. All comment letters received will be available for public inspection and copying in the Commission's public reference room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Paul M. Dudek, Luise M. Welby, or Walter G. Van Dorn, Jr., Office of International Corporate Finance, Division of Corporation Finance, at (202) 942–2990.

SUPPLEMENTARY INFORMATION: The Commission is proposing to revise Rule 903 [1] of Regulation S,[2] the issuer safe harbor under the Securities Act of 1933 [3] for offshore offerings of securities, to address abusive practices under the rule. The changes would apply to offshore sales of equity securities of domestic issuers, and of foreign issuers where the principal market for those securities is in the United States.[4] Further, the Commission proposes amendments to Rule 144(a)(3) [5] and a new Rule 905 to deem these equity securities to be ''restricted securities,'' as defined in Rule 144 under the Securities Act.[6] New Rule 905 also would make clear that offshore resales under Rule 904 of restricted equity securities of covered issuers will not affect the status of these securities as restricted securities after the resale.[7] In addition, the Commission is proposing to eliminate the current requirement that reporting issuers disclose Regulation S sales of equity securities on a Form 8–K within 15 days of the transaction. In light of the longer restricted period proposed today, issuers would report these sales on a Form 10–Q on the same basis that issuers report their other unregistered sales of equity securities. Finally, the Commission is proposing additional technical and clarifying revisions to Regulation S, in part to make the rule more concise and understandable.

I. Executive Summary

The Commission constantly seeks to reduce burdens on capital formation as long as the deregulatory measures do not harm investor protection. When adopting safe harbors and other deregulatory measures, the Commission will include protections designed to minimize the risk that those measures will be abused. If abuses nevertheless occur, the Commission will make the necessary adjustments to prevent further abuse while, to the extent possible, preserving the original goals of the reform. Today, the Commission is proposing amendments to Regulation S to prevent continued abuse of the rule.

In 1990, the Commission adopted Regulation S to clarify the extraterritorial application of the registration requirements of the Securities Act. In the interests of both comity and the internationalization of the world's securities markets, the Commission believed that the registration provisions under U.S. law should not apply where the offshore placements were truly offshore. Instead, the laws of the foreign jurisdiction regulating the public offerings of securities would serve to protect investors in that market. Regulation S permits both foreign and domestic issuers to avail themselves of the safe harbors when conducting offshore placements of their securities.

Since the adoption of Regulation S in 1990, the Commission has become aware of uses of Regulation S that the rule not only did not contemplate, but in fact expressly prohibited. Some issuers, affiliates and others involved in the distribution process are using Regulation S as a guise for distributing securities into the U.S. markets without the protections of registration under Section 5 of the Securities Act. In June 1995, the Commission issued an interpretive release that listed certain problematic practices under Regulation S and requested comment on whether the Regulation should be amended to limit its vulnerability to abuse.[8]

As a result of the continuation of certain of these abusive practices and in response to the comment letters received on the Interpretive Release, the Commission is proposing to stop these abusive practices by amending Regulation S for placements of equity securities by domestic companies. In addition, although abusive practices involving the equity securities of foreign issuers are not as evident as with domestic issuers, there is equal potential for abuse where the principal trading market for those securities is in the United States. Therefore, the Commission also is proposing to amend the safe harbor procedures for placements of equity securities of foreign issuers where the principal market for those securities is in the United States. In general, the ''principal market'' would be in the United States if more than half of the trading in that security takes place in the United States.[9]

These Regulation S proposals would:

- classify these equity securities placed offshore under Regulation S as ''restricted securities'' within the meaning of Rule 144;
- align the Regulation S restricted period for these equity securities with the Rule 144 holding periods by lengthening from 40 days

[1] 17 CFR 230.903.

[2] 17 CFR 230.901–230.904 and Preliminary Notes.

[3] 15 U.S.C. 77a *et seq.* (the ''Securities Act'').

[4] *See* Proposed Rule 902(h) for the proposed definition of ''principal market in the United States.''

[5] 17 CFR 230.144(a)(3).

[6] Proposed Rule 905.

[7] *Id.*

[8] Securities Act Release No. 7190 (June 27, 1995) [60 FR 35663 (July 10, 1995)] (the ''Interpretive Release'').

[9] *See infra* Section III.E.1. for a further discussion of the proposed definition of ''principal market in the United States.''

(currently applicable to reporting issuers) or one year (currently applicable to non-reporting issuers) to two years the period during which persons relying on the Regulation S safe harbor may not sell these equity securities to U.S. persons (unless pursuant to registration or an exemption);

- impose certification, legending and other requirements now only applicable to sales of equity securities by non-reporting issuers;
- require purchasers of these securities to agree not to engage in hedging transactions with regard to such securities unless such transactions are in compliance with the Securities Act;
- prohibit the use of promissory notes as payment for these securities; and
- make clear that offshore resales under Rule 901 or 904 of equity securities of these issuers that are ''restricted securities,'' as defined in Rule 144, will not affect the restricted status of those securities.

The combination of these proposed amendments should prevent the sale of equity securities offshore under Regulation S in transactions that effectively result in unregistered distributions of the securities into the U.S. markets.

II. Background

Regulation S contains a general statement that the registration requirements of Section 5 of the Securities Act do not apply to offers or sales of securities that occur outside the United States, and two non-exclusive safe harbors. The first safe harbor applies to offers and sales by issuers, persons involved in the distribution process pursuant to contract (''distributors''), their affiliates, and any person acting for those persons (''issuer safe harbor'').[10] The other safe harbor applies to *offshore* resales by persons other than the issuer, distributors, their affiliates (except certain officers and directors) and persons acting for them (the ''offshore resale safe harbor'').[11] The rule considers an offer or sale of securities that satisfies all conditions of the applicable safe harbor to be outside the United States and thus not subject to the registration requirements of Section 5. Regulation S does not provide a safe harbor for resales back into the United States of any securities sold or resold offshore, whether under Regulation S or otherwise.

The issuer safe harbor distinguishes three categories of securities offerings. The categories are based upon factors such as the jurisdiction of incorporation of the company whose securities are being sold under Regulation S, the company's reporting status under the Securities Exchange Act of 1934,[12] and the degree of U.S. market interest in the issuer's securities. ''Category 1'' offerings generally encompass debt and equity offerings by foreign reporting and non-reporting issuers when there is no ''substantial U.S. market interest'' [13] in the security to be offered. ''Category 2'' offerings now encompass, among other things, offshore offerings of debt and equity securities of any domestic reporting issuer, debt and equity securities of any foreign reporting issuer where there is a ''substantial U.S. market interest,'' as well as the debt securities of any foreign non-reporting issuer where there is a ''substantial U.S. market interest.'' ''Category 3'' offerings are subject to the greatest restrictions and include offshore offerings of debt and equity securities by any domestic non-reporting issuer, as well as equity securities of any foreign non-reporting issuer where there is a ''substantial U.S. market interest.''

All offerings under the Regulation S safe harbors are subject to two general conditions: the offer and sale must be made in an offshore transaction,[14] and the offering must not involve directed selling efforts in the United States.[15] Offers and sales made in reliance on the Category 2 and Category 3 issuer safe harbors are subject to additional restrictions that the Commission anticipated would assure that the securities came to rest offshore. These restrictions include a 40-day or one-year restricted period [16] during which persons entitled to rely on the Rule 903 safe harbor (that is, the issuer, a distributor, or any of their respective affiliates or any person acting on their behalf) cannot sell the Regulation S securities to a U.S. person [17] or to a person acting for the account of a U.S. person (other than a distributor), and still rely on the safe harbor.[18] The purpose of the restricted period is to ensure that persons relying on the safe harbor are not engaged in an unregistered, non-exempt distribution into the U.S. capital markets.[19]

The Commission based many of the safe harbor procedures incorporated into Regulation S on procedures that market participants already had developed and were the subject of no-action letters issued by the Commission's staff before the adoption of Regulation S.[20] Before 1990, offshore transactions largely involved substantial global offerings of the debt or equity securities of foreign issuers, or the debt securities of domestic issuers in the Euromarkets. Since the adoption of Regulation S, these types of offshore offerings have not resulted in widespread problematic practices.

The Commission's primary area of concern has been the use of Regulation S for sales of equity securities by domestic issuers, the area in which market participants had not developed established procedures before the adoption of Regulation S. Some U.S. issuers appear to have used the Regulation S issuer safe harbor to effect unregistered distributions of their equity securities into the United States.[21]

In response, the Commission has taken enforcement action against persons who sought to evade the registration requirements of the Securities Act through purported Regulation S offerings that were in effect U.S. distributions of securities.[22] In addition, on June 27, 1995, the Commission issued the Interpretive Release to state its views concerning these abusive practices under Regulation S. The Interpretive Release

---

[10] Rule 903 of Regulation S [17 CFR 230.903].

[11] Rule 904 of Regulation S [17 CFR 230.904].

[12] 15 U.S.C. 78a *et seq.* (the ''Exchange Act'').

[13] *See* Rule 902(n) of Regulation S for the definition of ''substantial U.S. market interest'' [17 CFR 230.902(n)].

[14] Rule 903(a) of Regulation S [17 CFR 230.903(a)]. *See* Rule 902(i) of Regulation S for the definition of ''offshore transaction'' [17 CFR 230.902(i)].

[15] Rule 903(b) of Regulation S [17 CFR 230.903(b)].

[16] For debt securities issued under either Category 2 or Category 3, the restricted period is 40 days. The restricted period for equity securities sold under Category 3 is one year, instead of the shorter 40-day period under Category 2.

[17] ''U.S. person'' is defined under Rule 902(*o*) of Regulation S [17 CFR 230.902(*o*)].

[18] In addition to the restricted period, ''Category 2'' and ''Category 3'' offerings also must comply with certain ''offering restrictions,'' and the requirement that distributors give certain notices when selling securities to other distributors prior to the expiration of the restricted period. *See* Rule 902(h) of Regulation S [17 CFR 230.902(h)]. In addition, offerings of equity securities under Category 3 are subject to certification, legending and other requirements that are not imposed on Category 2 offerings. *See* Rule 903(c)(2) for Category 2 offerings [17 CFR 230.903(c)(2)] and Rule 903(c)(3) for Category 3 offerings [17 CFR 230.903(c)(3)].

[19] *See* Securities Act Release No. 6863 (Apr. 24, 1990) [55 FR 18306] (the ''Adopting Release'') at Section III.B.

[20] See, *e.g.*, InfraRed Associates, Inc. (Sept. 13, 1985); Proctor & Gamble Co. (Feb. 21, 1985); Fairchild Camera and Instrument International Finance N.V. (Dec. 15, 1976); Raymond International Inc. (June 28, 1976); Pan-American World Airways, Inc. (June 30, 1975); The Singer Company (Sept. 3, 1974).

[21] *See, e.g.*, ''Pirates' Play?'', Barron's, at 17 (Jan. 7, 1997); ''Storm Brewing Offshore?'', Barron's, at 12 (Sept. 16, 1996); ''Easy Money—How Foreign Investors Profit at the Expense of Americans,'' Barron's, at 31 (Apr. 29, 1996); ''Rule Permitting Offshore Stock Sales Yields Deals that Spark SEC Concerns,'' Wall St. J., at C1 (Apr. 26, 1994); ''Foreign Stock Sales: Don't Get Blindsided,'' Worth, at 37 (Mar. 1994).

[22] *See In re: Candies, Inc., et al.*, Securities Act Release No. 7263 (Feb. 21, 1996); *SEC v. Softpoint, Inc., et al.*, Litigation Release No. 14480 (Apr. 27, 1995). *See also U.S. v Sung and Feher*, Litigation Release No. 14500 (May 15, 1995).

described a number of abusive practices in offerings purportedly made under Regulation S and stated that such abusive practices ran afoul of the ''scheme-to-evade'' prohibition in Preliminary Note 2 of Regulation S,[23] would not be covered by the safe harbors, and would not be found to be an offer and sale outside the United States for purposes of the general statement under Rule 901.[24]

The Interpretive Release also asked for comments whether the Commission should amend Regulation S to impose additional restrictions on the use of the safe harbors to impede attempts to use the Regulation to evade the registration requirements of the Securities Act. The Commission received 36 comment letters in response to the Interpretive Release.[25] There was no consensus among commenters whether Regulation S should be amended and, if so, what restrictions should be imposed.

As a complement to these initiatives, the Commission also has taken, and is currently undertaking, several other actions. To deter abusive Regulation S practices while providing important information to the markets, the Commission recently adopted amendments to the Exchange Act periodic reporting forms for domestic issuers to require disclosure of unregistered equity offerings, including a current report on Form 8–K filing requirement to disclose sales made under Regulation S.[26] At the same time, by adopting amendments to Rule 3–05 of Regulation S–X, which relaxed the financial statement requirements for acquired businesses, the Commission took another step to remove unnecessary barriers to registered offerings that may cause companies to conduct unregistered offshore offerings.[27] The Commission today also is issuing three companion releases that should help alleviate concerns that the more restrictive Regulation S procedures will cut off access to capital on a cost-effective basis for smaller companies. These releases (i) adopt amendments to the Rule 144 safe harbor governing resales of restricted securities to shorten the holding period requirements, (ii) propose further revisions to Rule 144 to simplify the rule, and (iii) propose allowing delayed pricing in registered securities offerings conducted by smaller issuers so they would have more flexibility in timing registered offerings.[28]

The increasing internationalization of global securities markets, the growing use of the Internet for securities transactions, the further integration of the European and other markets through common currencies and regulatory treatments, and other recent and ongoing developments in the securities markets may make it appropriate for the Commission to re-address many facets of the territorial approach to the Securities Act that has been adopted under Regulation S. These issues arise apart from the abusive practices addressed in today's proposals. However, the Commission encourages commenters to discuss these and other matters in order to permit the Commission to evaluate whether to propose revisions to Regulation S to reflect these developments.

III. Proposed Amendments to Issuer Safe Harbor

A. Continue Safe Harbor Protection for Equity Sales

The Commission does not believe at this time that the abuses identified to date warrant precluding domestic reporting issuers from making equity offerings under Regulation S, particularly since many smaller issuers access foreign sources of capital to satisfy their financing requirements. Indeed, some of the abusive practices, such as hedging transactions, are engaged in by purchasers, and not necessarily with the knowledge or acquiescence of the issuer. Rather than make the Regulation S safe harbor unavailable for such offerings, the proposals are designed to curtail the abusive practices that have developed, while retaining for U.S. issuers the flexibility to make an offshore offering with the certainty provided by a safe harbor. Nevertheless, would it be more appropriate to end the safe harbor entirely for offshore offerings of equity securities of domestic reporting issuers, domestic non-reporting issuers, and foreign issuers where the principal market for their equity securities is in the United States?

B. Impose New Restrictions on Equity Offerings of Domestic Issuers and of Foreign Issuers Where the Principal Market for the Securities is in the United States

In light of the continuing abuses, the Commission proposes requiring compliance with the more rigorous procedures under Category 3, including a longer restricted period, for all offshore offerings of equity securities of domestic companies, and of foreign companies where the principal market for the securities is in the United States. There are five new requirements that the proposed amendments would impose on offerings of these securities by moving those offerings from Category 2 to Category 3:

1. Longer Restricted Period

The restricted period for equity securities of domestic reporting issuers, and of foreign reporting issuers whose principal market is in the United States, would be lengthened from 40 days to two years; the restricted period for equity securities of domestic non-reporting issuers, and of foreign non-reporting issuers where the principal market for the securities is in the United States, would be lengthened from one year to two years. In order to qualify for the Regulation S safe harbor for offers and sales made during the restricted period, issuers, distributors, and their affiliates must comply with the documentation requirements discussed below and any such offers and sales during this period may not be made to a U.S. person (except pursuant to registration or an exemption). Rule 903 would be further amended to clarify that registered offers and sales, or offers and sales to a U.S. person made pursuant to an exemption such as Rule 144 or 144A, are permitted in the initial distribution and during the restricted period.

As described below, the Commission is proposing that covered equity securities be defined as ''restricted securities'' under Rule 144. The new two-year restricted period under the issuer safe harbor would track the time period during which the securities would be subject to resale restrictions as ''restricted securities'' under Rule 144.

The Commission adopted the current 40-day restricted period during which the selling restrictions are applicable to protect against an indirect unregistered

---

[23] Preliminary Note 2 to Regulation S specifically states that:

In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

[24] Interpretive Release, *supra* note 8, at Section II.

[25] These comment letters, together with a Summary of Comments prepared by Commission staff, are available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Persons seeking these materials should make reference to File No. S7–20–95.

[26] Exchange Act Release No. 37801 (Oct. 10, 1996) [61 FR 54506 (Oct. 18, 1996)]. Sales of equity securities by domestic issuers under Regulation S are required to be reported on Form 8–K within 15 days of occurrence. All other unregistered sales of equity securities by domestic issuers (*e.g.,* private placements) must be reported quarterly in the issuer's Form 10–Q and in its Form 10–K (for the last fiscal quarter).

[27] Securities Act Release No. 7355 (Oct. 10, 1996) [61 FR 54509 (Oct. 18, 1996)].

[28] Securities Act Release Nos. 7390, 7391, and 7393.

public offering in the United States. The practices of some companies, distributors and their affiliates, however, demonstrate that the current 40-day restricted period is far too short to achieve this goal. In some instances, they appear to have orchestrated resales in the United States following the restricted period as part of the distribution process.

Before the adoption of Regulation S, market participants generally used a 90-day period for offshore offerings of U.S. debt securities and a one-year period for offshore offerings of equity securities of domestic non-reporting issuers.[29] When the Commission initially proposed a 90-day restricted period for offshore offerings of both debt and equity securities of domestic reporting issuers, many commenters advocated a shorter 40-day restricted period. These commenters stated that the shorter period would be sufficient to protect against use of an offshore offering to make an indirect offering into the United States.[30] In the Commission's view, however, experience has not borne out the commenters' beliefs in the area of domestic equity securities. Also, the same potential for abuse exists with foreign equity securities if the principal market for the securities is in the United States.

2. Purchaser Certifications

The new procedures would require purchasers of these new Category 3 equity securities to certify that they are not U.S. persons and are not acquiring the securities for the account or benefit of a U.S. person, or that they are U.S. persons who purchased securities in a transaction that did not require registration under the Securities Act. This certification procedure should help protect against some of the sham transactions noted in the Interpretive Release where issuers or distributors ''park'' securities offshore with affiliates or shell entities that are actually owned by U.S. persons.

3. Purchaser and Distributor Agreements

The new procedures would require purchasers of securities to agree to resell the securities only in accordance with the registration or exemptive provisions of the Securities Act, or in accordance with Regulation S. Imposing this agreement on purchasers of the covered equity securities should help ensure that purchasers are aware of the resale restrictions applicable to the securities, particularly considering the Commission's proposal to classify these securities as restricted securities.[31]

In addition, under a new requirement proposed to be added to the current Category 3 purchaser agreement requirement,[32] purchasers of Category 3 equity securities would be required to agree not to engage in hedging transactions except in compliance with the registration or exemptive provisions of the Securities Act.[33] The proposals also would require distributors to agree to the same restrictions on hedging until the expiration of the restricted period,[34] and that all offering materials and documents used in the offering of these securities would be required, until the expiration of the restricted period, to include a statement that hedging transactions involving those securities may not be conducted except in compliance with the Securities Act.[35]

4. Legended Certificates

The proposals would require all covered issuers of equity securities to place a legend on the securities sold offshore. This legend would advise that transfer of such securities is prohibited other than in accordance with the Securities Act. Currently, the required legend for sales of equity securities of domestic non-reporting issuers is required to state that transfers of securities are prohibited except ''in accordance with the provisions of this Regulation S.'' [36] The Commission proposes amending the current legend requirement to make clear that the rule permits transfers made in accordance with the provisions under the Securities Act.

The legend requirement would provide notice to any subsequent purchasers of the resale restrictions applicable to the securities. The Commission understands that legending equity securities of domestic reporting issuers until the expiration of the current 40-day restricted period is a common practice under Regulation S. The Commission thus believes that the addition of an express legending requirement should not impose a different or new burden. In addition, the Commission proposes amending the current legend requirement to state that hedging transactions may not be conducted except in compliance with the Securities Act.

Regulation S does not require, and the Commission is not proposing, that the legend contain specific language to describe these restrictions. Issuers and distributors should prepare such legends in a form that conveys to holders the restricted nature of the securities and that they can only be resold under Regulation S, pursuant to registration under the Act, or under an exemption. Nor is the legend requirement intended to require that securities sold under Category 3 be in certificated form. Issuers whose securities are in uncertificated form may satisfy the legend requirement by any means reasonably designed to put holders and subsequent purchasers on notice of the applicable resale restrictions. The Commission requests comment whether, if covered securities are in uncertificated form, certain forms of notice would be adequate to inform holders and subsequent purchasers of the resale restrictions. Should securities covered by the Category 3 safe harbor be required to be in certificated form? Are there alternative means of notice that

[29] *See* Securities Act Release No. 6779 (June 10, 1988)[53 FR 22661 (June 17, 1988)], which proposed Regulation S (the ''Proposing Release''), at nn.10 and 11 for a discussion of the time periods that were used by market participants prior to the adoption of Regulation S.

[30] *See* Securities Act Release No. 6838 (July 11, 1989)[54 FR 30063 (July 18, 1989)], which reproposed Regulation S, at Section II.C.2.b. (the ''Reproposing Release'').

[31] Of course, issuers and distributors could not accept at face value certifications and agreements by purchasers and disclaim responsibility for investigation and consideration of relevant facts pertinent to the establishment of the Regulation S safe harbor. *See Re: Lee Petillon,* Adm. Proc. File 3–2393 (Nov. 30. 1972) (initial decision); *Re: The Crowell-Collier Publishing Company,* Securities Act Release No. 3825 (Aug. 12, 1957); *Regulation D Revisions,* Securities Act Release No. 6759 (Mar. 3, 1988) [53 FR 7870 (Mar. 10, 1988)] at Section B.

[32] This Category 3 purchaser agreement requirement currently is applicable only to sales of equity securities by non-reporting issuers. *See* Rule 903(c)(3)(iii)(B)(2) of Regulation S [17 CFR 230.903(c)(3)(iii)(B)(2)].

[33] Since the Commission also proposes that these securities will be deemed ''restricted securities,'' Commission guidance under Rule 144 with regard to hedging transactions (such as short sales, and purchases and sales of put and call options) would be applicable to these securities sold under Regulation S. *See* Securities Act Release No. 7391.

[34] Under the ''offering restrictions,'' as defined in Rule 902(h) of Regulation S, distributors are required to agree that all offers and sales prior to the expiration of the restricted period will be made either in accordance with Regulation S, pursuant to a registration of the securities under the Securities Act, or pursuant to an available exemption from registration. The proposals would expand the agreement requirement to include the proposed hedging agreement where the securities to be offered and sold are equity securities of domestic issuers, or of foreign issuers where the principal market for the security is in the United States. *See* Rule 902(h) of Regulation S [17 CFR 230.902(h)].

[35] Currently, the ''offering restrictions'' require certain statements to be included in all offering materials and documents (other than press releases) used in connection with offers and sales of certain securities prior to the expiration of the applicable restricted period. The required statements would include this additional statement regarding hedging where the securities to be offered and sold are equity securities of domestic issuers, or of foreign issuers where the principal market for the security is in the United States.

[36] Rule 903(c)(3)(iii)(B)(3) of Regulation S [17 CFR 230.903(c)(3)(iii)(B)(3)].

can be used for both certificated and uncertificated securities?

5. Stop Transfer Instructions

The proposals would require an issuer, by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of securities unless made in accordance with the registration or exemptive provisions of the Securities Act, or in accordance with Regulation S. This requirement would impose on issuers a policing role similar to that which is often imposed in connection with unregistered private placements. Such a role would appear appropriate considering the abuses in this area.

Currently, the stop transfer instruction for sales of equity securities of domestic non-reporting issuers is required to state that the issuer will refuse to register any transfer of securities ''not made in accordance with the provisions of this Regulation S.'' [37] As with the legend requirement, the Commission proposes amending the current stop transfer instruction requirement to make clear that the rule permits transfers made in accordance with the provisions under the Securities Act.

6. Request for Comment on New Requirements

Should some or all of the new requirements, including the longer restricted period, not be applied as proposed to offerings of equity securities of domestic issuers, and of foreign issuers where the principal market for the securities is in the United States? If so, which ones and why? For example, is legending equity securities of either domestic issuers or foreign issuers feasible in foreign markets? Are there other alternatives available that would achieve the same purpose? In addition to, or in lieu of, the specific documentation requirements of Category 3, should issuers be subject to an express general duty to take reasonable steps to ensure that purchasers do not resell the securities in violation of the Act, similar to that imposed by Regulation D? [38] Should satisfaction of any or all of the current specific documentation requirements of Category 3 be deemed to satisfy this express general duty?

Should the reporting status of the issuer matter, and if so, how? Should it matter whether those issuers also have a trading market for their equity securities in the United States, and if so, in what respect? Should certain classes of reporting issuers, such as those eligible for Form S–3 or F–3, be excluded from any or all of these restrictions?

Conversely, are any or all of these requirements so burdensome, either alone or with the proposals to prohibit the use of promissory notes and to classify these securities as restricted securities under Rule 144, that companies would effectively be foreclosed from relying on the Regulation S safe harbor for offshore offerings of equity securities? Would any or all of these proposed changes, either alone or with the reporting requirement for recent sales of equity securities under Regulation S (in the case of reporting companies), obviate the need for the longer restricted period? Should the restricted period be shorter than two years (*e.g.*, the current 40 days, 90 days, 180 days, 270 days or one year)? Would the classification of these securities as restricted securities within the meaning of Rule 144 eliminate the need for *any* restricted period?

7. Elimination of Form 8–K Filing Requirement

At the time the Commission adopted the existing Form 8–K 15-day reporting requirement, the Commission stated that if it extended the restricted period for sales of equity securities under Regulation S, it would consider revising the reporting requirement. As the Commission is now proposing to lengthen the restricted period for Regulation S sales, the Commission has determined to propose revising Item 701 of Regulation S–K and the relevant forms to require issuers to report Regulation S sales of equity securities only on a quarterly basis as presently required for other unregistered sales of equity securities. Comment is requested whether requiring only quarterly reporting of Regulation S sales will provide sufficiently timely disclosure if the covered equity securities are deemed ''restricted securities'' and thus not subject to resales under Rule 144 until at least one year after sale. Should the current Form 8–K filing requirement be continued because such securities may be resold in unlimited amounts either offshore or in the United States pursuant to Rule 144A (or another exemption)?

C. Revise Category 3 To Prohibit Payments With Promissory Notes for Domestic Equity Securities, and Foreign Equity Securities Where the Principal Market for the Securities is in the United States

In some sales purportedly made in reliance on Regulation S, the offshore purchaser has used a promissory note payable after the end of the restricted period to pay all or a portion of the purchase price of the securities. In some cases the notes are secured only by the Regulation S securities; in other cases the notes are unsecured. Some notes provide recourse to the buyer if the note is not repaid; others do not. The purchasers have resold the securities into the U.S. markets upon expiration of the 40-day restricted period and used the proceeds of the resale to repay the note. Under such an arrangement, the issuer and purchaser clearly expect a U.S. resale to provide the funds necessary to repay the note; in economic substance, the issuer is raising funds from the U.S. public markets. As noted in the Interpretive Release, this practice is inconsistent with an offshore distribution.

The proposals would revise the Category 3 safe harbor to make clear that the safe harbor is unavailable for transactions for equity securities of a domestic company, and for a foreign company where the principal market for the securities is in the United States, in which a purchaser delivers a promissory note as payment for some or all of the purchase price, or enters into an installment purchase contract relating to the sale. Comment is requested whether there should be any exceptions from the proposed prohibition to accommodate established international offering practices. Commenters favoring such exceptions are asked to describe the established practices and explain why they would not be likely to result in unregistered distributions of securities in the United States. Should there be a distinction between full and non-recourse promissory notes?

For example, could the Commission restrict the use of promissory notes without completely prohibiting their use by applying the Rule 144 standard for tolling [39] to permit promissory notes to be used under Regulation S as long as the promissory note or similar obligation or contract is by its terms required to be discharged by payment in full prior to resale of the securities by the obligor and satisfies the following conditions: the promissory note, obligation or contract must provide for

[37] Rule 903(c)(3)(iii)(B)(4) of Regulation S [17 CFR 230.903(c)(3)(iii)(B)(4)].

[38] Securities Act Rule 502(d)[17 CFR 230.502(d)].

[39] Rule 144(d)(2) [17 CFR 230.144(d)(2)].

full recourse against the purchaser of the securities, and must be secured by collateral (other than the securities purchased) having a fair market value at least equal to the purchase price of the securities purchased?[40] Given that the Commission proposes to classify these equity securities as ''restricted securities'' within the meaning of Rule 144, and that the holding period under Rule 144 is tolled unless promissory notes meet the above conditions, is it even necessary to amend Regulation S at all with regard to the use of promissory notes?

The Commission understands that some abusive Regulation S offerings have involved non-cash payments to the issuer other than promissory notes. Examples include the purported sale of equity securities under Regulation S in exchange for services rendered or in exchange for cancellation of a supposed pre-existing debt owed by the issuer to the offshore purchaser. The Commission requests comment on whether the Regulation S safe harbor should be available for offshore offerings of equity securities of domestic companies, and of covered foreign companies, only when cash is paid and received in the offering. Would such a requirement restrict the use of Regulation S for bona fide exchange offers? Should exchange offers be accommodated under the Regulation S safe harbor only if the securities being acquired have a readily ascertainable market value or have been outstanding for some time? Would such a requirement unnecessarily restrict the use of Regulation S for mergers and other business combination transactions?

D. Classify Domestic Equity Securities, and Foreign Equity Securities Where the Principal Market for the Securities is in the United States, as ''Restricted Securities''

Regulation S does not provide any safe harbor protection for resales by purchasers of securities placed offshore under Regulation S back into the United States. Preliminary Note 6 to Regulation S specifically states that:

> Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the [Securities] Act or an exemption from registration is available.

In the absence of guidance from the Commission or the staff,[41] some market participants appear to view the expiration of the restricted periods under Regulation S (applicable to issuers and other distribution participants entitled to rely on the Rule 903 safe harbor) as providing a safe harbor for U.S. resales by purchasers of Regulation S securities, particularly equity securities of domestic reporting issuers. This view is not correct. Instead, such purchasers must determine whether an exemption for resales into the United States is available.

Because some of the abusive practices under Regulation S have involved activities by persons other than issuers, distributors and their affiliates (that is, investors who purchased in Regulation S offerings with a view to distributing those securities into the U.S. markets at the end of the 40-day restricted period), the Commission believes that it is appropriate to clarify the legal obligations of purchasers of securities under Regulation S. Consequently, the Commission is proposing new Rule 905, and amendments to Rule 144(a)(3), to classify equity securities of domestic issuers (both reporting and non-reporting) placed offshore under Regulation S as ''restricted securities'' within the meaning of Rule 144. The Commission is also proposing to so classify as ''restricted securities'' equity securities of foreign issuers (both reporting and non-reporting) where the principal market is in the United States. While the Commission is not aware of widespread abuses involving these foreign issuers, the potential for abuse does exist since these securities are more likely to be resold into their principal market.

By expressly defining these Regulation S securities as falling within the definition of ''restricted securities'' under the Rule 144 resale safe harbor, purchasers of those securities are provided with clear guidance regarding when and how those securities may be resold in the United States without registration under the Securities Act.[42] Given the concurrent adoption of shortened holding periods under Rule 144, the Commission believes that it is appropriate to harmonize the resale restrictions for all securities sold without the benefit of registration with the Commission. For purposes of resale prohibitions, an unregistered sale offshore would be treated no differently than a private sale domestically; the burdens and benefits would be equalized. Nevertheless, are there reasons why securities sold offshore should be treated differently? Instead of applying the Rule 144 holding period, should a shorter holding period apply (for example, one year or six months)? To further integrate the requirements in this area, should the Commission craft a single regulation that would contain both the requirements applicable to offshore and to domestic unregistered offerings (for example, combine Regulation S and Regulation D)?

Currently, equity securities offered and sold to non-U.S. resident employees of the issuer through an employee benefit plan governed by non-U.S. law are Category 1 transactions and thus are not subject to a 40-day restricted period regardless of the domicile of the issuer or U.S. market interest in its securities. Under proposed Rule 905, however, those equity securities when issued by domestic or covered foreign issuers would be restricted within the meaning of Rule 144. Comment is requested whether this type of equity security should be excluded from the ''restricted security'' classification. If so, commenters are requested to address why, if such securities were not deemed restricted, problematic practices would not develop with respect to such plans and securities.

E. Application of Proposed Changes

1. Foreign Companies Where the Principal Market for the Securities is in the United States

Although abusive practices under Regulation S have not been as evident in offerings by foreign issuers, the Commission is concerned that the economic incentives for indirect distributions and resales into the United States are the same for equity offerings

---

[40] These conditions are similar to those found under Rule 144 governing the computation of the Rule 144 holding period in the context of payment with promissory notes. *See* Rule 144(d)(2) [17 CFR 230.144(d)(2)].

[41] The Adopting Release did not provide further guidance in this area, other than to state in a footnote that, upon the expiration of any restricted period, the Commission would view securities sold under Regulation S (other than unsold allotments) as unrestricted. Adopting Release, *supra* note 18, at n.110. Since the adoption of Regulation S, the Commission's staff has received numerous inquiries on whether and when securities that have been sold under Regulation S may be freely resold in the United States without registration under the Securities Act. Regardless of the issuer's compliance with Regulation S when it sold the securities offshore, persons who would be considered underwriters under Section 2(11) of the Securities Act are not permitted to make unregistered public resales of these securities in the United States in reliance on the Section 4(1) exemption from registration. As the Commission stated in the Interpretive Release, *supra* note 8, at n.17:

> Public resales in the United States by persons that would be deemed underwriters under Section 2(11) of the Securities Act [15 U.S.C. 77b(11)] would not be permissible absent registration or an exemption from registration. Footnote 110 of the Adopting Release, which addresses the restricted periods, should not be read to provide otherwise.

[42] They are also put on notice that resales outside the Rule 144 safe harbor must be evaluated independently against the statutory underwriter concepts embodied in Section 2(11), regardless of the issuer's compliance with Regulation S.

of both domestic companies, and foreign companies where the principal market for the securities is in the United States (that is, the majority of the trading occurs here). Therefore, the proposed Regulation S changes would treat both similarly for each requirement. Nonetheless, is there an appropriate basis to distinguish between the two for any or all of the conditions of the proposed amendments to the safe harbors, including the ''restricted securities'' classification?

As noted above, the Commission proposes defining ''principal market in the United States'' for a security as when more than 50 percent of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation. Should the percentage be greater than 50 percent (for example, 75%) or lower (for example, 10%, 25% or 35%), so long as the United States is the largest market? Should it matter for purposes of this definition where the security is traded (for example, New York Stock Exchange, American Stock Exchange, Nasdaq-NMS, any of the regional exchanges, the OTC Bulletin Board, the ''pink sheets,'' or any private trading system such as Instinet) and whether such market is relatively liquid or active? Commenters should explain the reasons for any distinctions between or among trading markets or mechanisms for trading.

Other possible alternatives under consideration include applying the restrictions to (i) all foreign issuers, (ii) only foreign reporting issuers, (iii) only foreign reporting issuers with a ''substantial U.S. market interest'' (as currently defined in Regulation S) in the class of equity securities to be offered offshore; or (iv) only foreign reporting issuers whose only equity market is in the United States. Should a different test other than trading market be used, such as percentage (*e.g.*, 10%, 25% or 50%) of U.S. resident ownership of the company's outstanding equity securities? Should the Commission use similar percentage thresholds based on an ''Average Daily Trading Volume'' test, like that recently adopted in Regulation M [43] for purposes of defining ''principal market in the United States?'' If so, what percentage (10%, 25% or 50% of U.S. Average Daily Trading Volume as compared to total worldwide Average Daily Trading Volume), and what measurement period (three, six or 12 months, or some other period) should be used?

2. Equity Securities

As proposed, the procedures and restrictions under Category 3 and the ''restricted securities'' classification would apply only to offerings of equity securities. Rule 405 of Regulation C under the Securities Act defines the term ''equity security'' to include stock, securities convertible or exchangeable into stock, warrants, options, rights to purchase stock, and other types of equity related securities.[44] The Commission does not propose to apply the new restrictions to offerings of debt securities, since the nature of the trading markets for debt securities appear not to have facilitated abusive practices that result in a distribution of these securities into U.S. markets.

Comment is requested concerning whether any or all of the restrictions proposed for equity securities also should be applied to offerings of debt securities, and if so, whether such applicability should depend on the status of the issuer (for example, whether the issuer is foreign or domestic, reporting or non-reporting, Form S–3 or F–3 eligible)? Should it matter whether there is a trading market for any security (whether debt or equity) of the issuer in the United States, and if so, what security is traded? Are there circumstances where any such debt offering would be likely to result in an unregistered U.S. distribution? If the restrictions cover offerings of debt securities, should they be limited to certain types of debt securities, such as debt securities where the amount due is tied to the price of the issuer's common equity securities, or debt securities that are listed for trading on a U.S. securities exchange?

The Commission is aware that many Regulation S abuses have involved the use of convertible or exchangeable securities or warrants.[45] Many companies, however, legitimately offer under Regulation S either convertible or exchangeable debt securities, or warrants for common stock as a unit with other securities, to lower their costs of capital. Comment is requested as to whether all convertible or exchangeable securities or warrants of domestic issuers, and of foreign issuers where the principal market for the underlying equity securities is in the United States, should be subject to the proposed Category 3 restrictions and the ''restricted securities'' classification, as proposed. Are there certain types of convertible or exchangeable securities or warrants where there is minimal likelihood that such offerings will result in an unregistered U.S. distribution of either the convertible or exchangeable securities or warrants, or the equity securities underlying the convertible or exchangeable securities or warrants, and, therefore, the proposed restrictions may not be necessary?

Should it matter if the convertible or exchangeable debt security is not convertible or exchangeable for some period of time after the offering (for example, six months, one year, two years, three years)? Should they be excluded if, at the time of issuance, the securities had an effective conversion or exercise premium over a specified amount (for example, five percent, 10 percent, 20 percent, or more)? [46] If a specified conversion or exercise premium approach is used, should it matter whether such conversion or exercise rate is allowed to float in relation to the market price of the underlying security, or is set at some future point in time based upon a formula known when the security was issued? Does it matter whether the issuer of the convertible or exchangeable security or warrant, or the issuer of the underlying equity security, is a reporting company, and if so, how? Although many of the larger capitalization domestic companies issue convertible securities and warrants under Regulation S, does the Form S–3 eligibility of these companies render any carve out for their securities unnecessary? Commenters are asked to provide information on the likelihood that convertible or exchangeable securities or warrants containing particular conversion, exchange or exercise terms will be sold offshore under Regulation S under circumstances that are not likely to result in an unregistered distribution of equity securities in the United States.

[43] Securities Act Release No. 7375 (Dec. 20, 1996) [62 FR 520 (Jan. 3, 1997)].

[44] 17 CFR 230.405. Under the proposed changes, non-participating preferred stock and asset-backed securities would continue to be treated in the same manner as debt securities for purposes of the Regulation S safe harbors and the restricted security classification. *See* Rule 903(c)(4) [17 CFR 230.903(c)(4)], proposed to be redesignated as Rule 902(a).

[45] *See* ''Pirates' Play?'', *supra* note 21.

[46] The Commission has imposed similar standards under the Rule 144A resale safe harbor. *See* Rule 144A(d)(3)(i) [17 CFR 230.144A(d)(3)(i)]. *See also* Securities Act Release No. 6862 (Apr. 23, 1990) at nn.25 and 26 for a discussion of how the conversion or exercise premium is determined for purposes of Rule 144A. Comment is requested whether the same methods of calculations should apply under any proposed changes to Regulation S.

F. Other Possible Restrictions

1. Hedging

As discussed in the companion proposing release for Rule 144, the Commission is concerned that some hedging activity may undermine the safeguards against indirect distributions provided by Regulation S and Rule 144. If a purchaser shifts the economic risk of a transaction through short sales, swaps, or derivative securities transactions, for example, the Commission is concerned that the purchaser may not have a bona fide investment intent. This is especially true in the Regulation S area, where the Commission looks for indicia that a transaction is truly ''offshore.''

In the Interpretive Release, the Commission warned that a transaction may not be viewed as offshore if there is evidence that a substantial portion of the economic risk is left in or returned to the U.S. market during the restricted period. Based on discussions with market participants, there is reason to believe that hedging during the Regulation S restricted periods is still occurring.

The Commission is addressing this concern in two ways. First, the proposed changes include purchaser and distributor agreements and legends warning against inappropriate hedging, as discussed above. Second, by treating equity securities purchased from domestic and covered foreign companies as ''restricted'' for purposes of resale, the Commission is imposing the holding period requirement of Rule 144. Maintaining a hedge for one or two years, as opposed to 40 days, is more costly and may be impossible for many of the illiquid securities sold in abusive cases.

The companion proposing release for Rule 144 does not specifically prohibit hedging during the holding period, but asks a series of questions designed to determine whether certain types of hedging are inconsistent with the spirit of Rule 144. Should the Commission go beyond its Rule 144 approach and simply preclude any or all hedging activity during the Regulation S restricted period? Should it matter whether the hedging occurs offshore? Should specific hedging provisions apply to equity securities only? Should the size of the issuer be determinative (for example, permit more hedging with issuers eligible to file Form S–3 or F–3)? As with convertible securities, should it matter whether a derivative security is ''out of the money'' by a specified amount? Should there be a cap on the amount that could be hedged within the safe harbor? For example, should all or some hedging be permitted as long as the purchaser retains a majority or a substantial amount of economic risk?

2. Discounts

As evidenced by the offering practices described in the Interpretive Release, securities sold offshore at a discount from the U.S. market price are likely to be resold in the United States at the earliest possible date in order for the purchaser to realize a profit. In the Interpretive Release, the Commission requested comment as to whether it should limit the use of the safe harbor under Regulation S for offerings of common stock of domestic issuers to those sold at the market price or with a specified minimal discount.

The Commission is not proposing to amend Regulation S to require that sales of equity securities of reporting companies under Regulation S be made at a specified minimum price or to otherwise impose requirements or restrictions that are tied to the offering price of securities.[47] Although many of the abusive practices under Regulation S appear to involve significant discounts, the Commission believes there are other means to curtail such practices without mandating that safe harbor sales take place at a specific price or within a range of prices.

The Commission again requests comment on whether certain discounted offers (particularly by domestic reporting companies) should be excluded from the Regulation S safe harbor. Commenters addressing whether discounted sales should be accorded different treatment also should address how such discount should be measured (especially in the case of illiquid securities that trade infrequently, and convertible and exchangeable securities where other factors (such as interest rate and maturity) will affect the offering price of a security) and at what level of discount, if any, such different treatment should apply.

IV. Offshore Resales of Restricted and Affiliate Securities

The Commission is concerned that the more stringent requirements proposed for offshore offerings could lead to the development of abusive practices under the Rule 904 offshore resale safe harbor. Such practices could involve the private placement of equity securities in the United States by an issuer, the resale of those securities to a foreign purchaser under Rule 904, and the attempted resale of those securities back into the U.S. public markets without apparent restrictions. Without express guidance from the Commission, these holders of restricted equity securities (whether obtained under Regulation S, Regulation D, Rule 144A, or any other exemption from registration pursuant to which restricted status is designated) could mistakenly believe that a resale of securities to a foreign purchaser under Rule 904 results in such securities no longer being restricted securities.

In the Interpretive Release, the Commission stated that the offshore resale safe harbor under Rule 904 cannot be used for ''washing off'' resale restrictions, such as the holding period requirement for restricted securities in Rule 144. The Commission is proposing in new Rule 905 to make explicit that when restricted equity securities of any domestic issuer, or of a foreign issuer where the principal market for the equity securities is in the United States, are resold offshore under Regulation S, such securities will retain their status as restricted securities after the resale. Thus, subsequent resales of these securities by the offshore purchaser back into the United States may only take place pursuant to registration under the Securities Act, or a Securities Act exemption (for example, resales in accordance with the provisions of either Rule 144A or Rule 144).

Proposed Rule 905 would codify the Commission's view that resale restrictions applicable to equity securities of domestic issuers and foreign issuers where the principal market for the equity securities is in the United States will follow the securities in the hands of each subsequent transferee. Any purchaser of such restricted securities (including the initial sellers of such restricted securities who replace them with a repurchase of the same or fungible *restricted* securities) would be considered to have restricted securities. On the other hand, sellers of such restricted securities who replace them with a repurchase of fungible but *unrestricted* securities would not be considered to have restricted securities.[48]

Comment is requested on whether the proposed rule, either alone or with the

[47] The Commission's view as expressed in the Interpretive Release, however, remains applicable: neither the general statement under Rule 901 nor the safe harbors are intended to cover offshore offerings of such securities where the fees or discounts indicate that the transaction was intended to create a parking scheme or other scheme where the securities were merely being held offshore temporarily to evade the registration requirements of the Securities Act.

[48] This interpretation clarifies and supercedes the Commission's previous interpretation regarding ''prearranged'' repurchases of restricted securities set forth in the Interpretive Release, *supra* note 8.

Commission's other proposed and recently adopted initiatives, is sufficient to deter the improper use of the Rule 904 safe harbor. Should other types of restricted securities (such as debt securities) also expressly be considered restricted securities after a Regulation S resale, and if so, which ones? Should the applicability depend on the status of the issuer (for example, whether the issuer is foreign or domestic, reporting or non-reporting, Form S–3 or F–3 eligible)? Should it matter the extent to which there is a trading market for the security in the United States, and if so, how?

Should the proposed preservation of resale restrictions apply to resales of equity securities of (i) all foreign issuers, (ii) only foreign reporting issuers, (iii) only foreign reporting issuers with a ''substantial U.S. market interest'' (as currently defined in Regulation S) in the class of equity securities to be resold offshore; or (iv) only foreign reporting issuers whose only equity market is in the United States? Should some restricted equity securities of domestic or foreign issuers be excluded from this aspect of proposed Rule 905, such as certain types of convertible or exchangeable securities or warrants, and if so, which ones?

When restricted securities proposed to be covered by the new rule are resold under Rule 904 on a ''designated offshore securities market'' as defined under Regulation S,[49] is it practical for such securities to be identified to the subsequent purchaser as restricted securities under the U.S. federal securities laws (whether through legending or otherwise)? Commenters are requested to address the practical effect of offshore hedging activity involving these securities as well.

Any officer or director of the issuer who is an affiliate solely by virtue of holding such position may sell unrestricted securities offshore pursuant to Rule 904 without those securities becoming restricted securities, even if the sales exceed the volume limitations of Rule 144(e) (offshore resales of restricted securities pursuant to Regulation S are not subject to the volume limitations of Rule 144(e)). Any other affiliates, however, who decide to sell securities offshore are required to conduct such offerings under either Rule 901 or Rule 903, not Rule 904. Thus, if the securities to be sold are restricted or unrestricted equity securities of a domestic issuer, or of a covered foreign issuer, such securities will be considered restricted securities in the hands of any offshore purchaser, and may not be resold into the United States absent registration or a valid exemption.[50] Comment is requested whether this disparate treatment of different types of affiliates is appropriate. Should all unrestricted affiliate shares sold offshore be deemed restricted unless the offshore sales comply with Rule 144?

Alternatively, should the Rule 904 offshore resale safe harbor simply be made unavailable for restricted equity securities of domestic issuers and covered foreign issuers? Should the Commission make the Rule 904 safe harbor unavailable for all equity securities sold by any affiliate of the issuer? If the Rule 904 offshore resale safe harbor is not available, these securities would be able to be resold offshore under the general statement of Rule 901, but no safe harbor provisions under Regulation S would apply to such resale.

Proposed Rule 905 does not apply to other types of securities, such as debt securities of domestic issuers and equity securities of foreign issuers where the principal market for the equity securities is not in the United States. The Commission requests comment as to whether Rule 905 should apply to debt securities of domestic issuers, equity securities of foreign issuers where the principal market for the equity securities is not in the United States, or other types of securities or other types of issuers. Does the nature of offshore trading markets in various types of securities make it impracticable for such securities to remain restricted in the hands of offshore purchasers? Is there less need for concern in this area inasmuch as the likelihood of an unregistered distribution of such securities in the United States is diminished? Comment is requested on current practices in this area and the need for Commission guidance.

V. Technical and Clarifying Revisions

The Commission proposes mainly non-substantive technical and clarifying revisions to Regulation S to make the rule more concise and understandable. The principal changes include:

- Revising the captions of the three sections of the Rule 903 issuer safe harbor to refer to them as commonly known: ''Category 1,'' ''Category 2'' and ''Category 3'';
- Revising the Rule 903 issuer safe harbors to state clearly for each category what procedures are to be followed and what securities are eligible for each category;
- Combining some definitions within Rule 902, the definition section of Regulation S, or moving certain definitions to the Rule 903 safe harbor to make the rule easier to read and understand;
- If the same terms are already defined elsewhere in the Commission's rules and regulations, deleting those definitions from Rule 902 and adding cross references to the definitions contained elsewhere; and
- Generally editing the language in the rule to make it more understandable.

Comment is requested on each of the proposed changes. Are there any other clarifying or technical changes that the Commission could make to Regulation S to make the rule more readable and understandable?

VI. Request for Comments

Any interested persons wishing to submit written comments on the proposed revisions are requested to do so by submitting them in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comment letters also may be submitted electronically to the following electronic mail address: rule-comments@sec.gov. Comments are requested on the impact of the proposals on issuers, investors, and others. Comments should specifically address any possible effects on investor protection, capital formation or market efficiency resulting from the proposals. The Commission also requests comment on whether the proposed rules, if adopted, would have an adverse impact on competition that is neither necessary nor appropriate in furthering the purposes of the Exchange Act. Comments will be considered by the Commission in complying with its responsibilities under Section 23(a)[51] of the Exchange Act. Comment letters should refer to File No. S7–8–97; this file number should be included in the subject line if electronic mail is used. All comment letters received will be available for public inspection and copying in the Commission's Public

[49] *See* Rule 902(a) of Regulation S [17 CFR 230.902(a)] for the definition of ''designated offshore securities market.''

[50] If these affiliates sell the securities offshore in compliance with the appropriate provisions applicable to affiliate or restricted shares under Rule 144, then those securities will be unrestricted in the hands of the offshore purchaser. In calculating the amount of securities that have been resold pursuant to Rule 144 for the purposes of the volume limitations of Rule 144(e), the staff has taken the position that restricted securities resold offshore pursuant to Regulation S need not be included—similar to the treatment of other non-Rule 144 exempt resales, such as those made pursuant to Rule 144A. The Commission is proposing an amendment to Rule 144(e)(vii) to codify that position.

[51] 15 U.S.C. 78w(a).

Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

VII. Cost-Benefit Analysis

To assist the Commission in its evaluation of the costs and benefits that may result from the proposals, commenters are requested to provide views and empirical data relating to any costs and benefits associated with these proposals. The proposed amendments to Regulation S would impose restrictions on purchasers of equity securities of domestic issuers, and of foreign issuers where the principal market for the securities is in the United States. For example, issuers could not accept promissory notes as payment for the securities, and purchasers may have to wait a longer period of time before they could publicly resell the securities into the United States. Also, the new requirement that purchasers of certain types of equity securities sold under Regulation S provide certification of compliance with the Securities Act may impose additional recordkeeping burdens on issuers attempting to maintain records of such compliance. These restrictions may make it more difficult or costly for some issuers to raise funds through the sales of equity securities. At the same time, the Commission believes that such restrictions are necessary to deter abusive practices that may have defrauded investors of millions of dollars. The Commission believes that deterring abusive market practices will protect investors and, in the long run, promote capital formation and efficient, competitive markets.

The proposed amendments to Item 701 of Regulation S–K, Item 701 of Regulation S–B and Forms 8–K, 10–Q, 10–QSB, 10–K and 10–KSB relax the existing requirements to report unregistered sales of equity securities. As such, the Commission believes that these amendments would decrease reporting, recordkeeping and compliance burdens, while, at the same time, continuing to provide investors with sufficient information regarding changes in outstanding securities of public companies.

The Commission invites commenters to submit empirical data that will help it assess the costs and benefits of its proposals. The Commission also encourages commenters to suggest alternative ways of deterring the abusive practices cited in this release. It would be most helpful if commenters would state the reasons that a proposed alternative is preferable to the Commission's proposals and why the proposed alternative is more cost-effective. If possible, commenters should submit data that support their views.

Despite the possible increase in cost to issuers resulting from proposed new requirements such as purchaser certifications and purchaser and distributor agreements, the Commission does not believe that the proposed amendments would result in a major increase in costs or prices for investors, issuers, individual industries or consumers. The Commission believes that the proposed amendments relaxing the existing requirements to report unregistered sales of equity securities would serve to reduce issuer costs. Likewise, the Commission does not believe that the proposed amendments would have an adverse effect on competition, employment, investment, productivity, innovation, market efficiency, or capital formation. In fact, the Commission believes that the proposed amendments will promote capital formation and efficient, competitive markets by enhancing investors' confidence in the integrity of the securities markets. However, the Commission requests comment on these preliminary views. The Commission encourages commenters to provide empirical data or other facts to support their views.

Because some of the abusive practices under Regulation S have involved activities by persons other than issuers, distributors and their affiliates (that is, investors who purchased in Regulation S offerings with a view to distributing those securities into the U.S. markets at the end of the 40-day restricted period), the Commission believes that it is appropriate to clarify the legal obligations of purchasers of securities under Regulation S. By expressly defining these Regulation S securities as falling within the definition of ''restricted securities'' under the Rule 144 resale safe harbor, purchasers of those securities are provided with clear guidance regarding when and how those securities may be resold in the United States without violating the registration requirements of the Securities Act.[52] Given the concurrent adoption of shortened holding periods under Rule 144, as well as the ability of some purchasers in Regulation S placements to demand registration rights, the Commission does not believe that this classification will be unduly burdensome for purchasers in those offerings. To the extent that a purchaser chooses to resell the securities under the Rule 144 safe harbor, the Commission also does not believe that the requirement to file a Form 144 under certain circumstances will be unduly burdensome, particularly in light of the benefit of obtaining safe harbor protection for the resale.

The proposed amendments to Regulation S could reduce the annual amount of unregistered equity securities initially sold by issuers and the annual amount resold by the initial purchasers of those securities. The Commission requests comments on the likelihood of these effects and their size in terms of annual dollar amounts. In particular, are the proposed amendments likely to have a $100,000,000 or larger annual effect on the securities markets or the economy? If possible, commenters should provide empirical data or other facts to support their views.

VIII. 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,[53] regarding the proposals. The proposed amendments to Regulation S are intended to stop abusive practices under Regulation S where issuers with a market for their securities in the United States conduct offshore placements of their securities pursuant to Regulation S that are in essence indirect distributions of these securities into the U.S. markets without the protections of registration under the Securities Act. Over the last several months, the Commission staff has met with numerous participants in the market for Regulation S securities. Based on the anecdotal information obtained through these discussions, it appears that many small businesses currently use Regulation S with respect to equity sales. However, there appears to be no significant alternative to the current proposals that would impose less burdens on small entities, yet forestall further abuse under Regulation S.

The proposed amendments to Item 701 of Regulation S–K, Item 701 of Regulation S–B and Forms 8–K, 10–Q, 10–QSB, 10–K and 10–KSB would relax the existing requirements to report unregistered sales of equity securities. These amendments would decrease reporting, recordkeeping and compliance burdens, while, at the same time, continuing to provide investors with sufficient information regarding

[52] They are also put on notice that resales outside the Rule 144 safe harbor must be evaluated independently against the statutory underwriter concepts embodied in Section 2(11), regardless of the issuer's compliance with Regulation S.

[53] 5 U.S.C. 603.

changes in outstanding securities of public companies.

There are new reporting, recordkeeping or other compliance requirements proposed as part of the proposed Regulation S rules. The Commission proposes to lengthen the restricted period during which persons relying on the Regulation S safe harbor may not publicly resell these equity securities (absent registration) to U.S. persons from 40 days or one year to two years. In addition, since covered equity securities placed offshore pursuant to Regulation S would be classified as ''restricted securities'' within the meaning of Rule 144, purchasers of these securities may choose to resell under the Rule 144 safe harbor, and therefore would be required to comply with the conditions of that safe harbor, including the Rule 144 holding periods. These proposals may reduce incentives to conduct equity placements under Regulation S due to a perceived reduction in the liquidity of the securities absent registration under the Securities Act or a valid exemption.

The Regulation S proposals also would impose on reporting issuers certification, legending and other requirements currently only applicable to sales of equity securities by non-reporting issuers. The purpose of these requirements is to assure that the participants in the distribution and the purchasers are aware of the restricted nature of these securities. These proposals would expand the current purchaser and distributor agreement requirements to require that they agree not to engage in hedging transactions with regard to such securities unless the transactions are in compliance with the Securities Act, and would make sure that participants in the offering are aware of and comply with these restrictions. In addition, promissory notes would be prohibited for use as payment for these securities. These last two proposals are intended to address abusive transactions involving hedging transactions and the use of promissory notes that from a practical perspective result in indirect distributions of securities into the U.S. markets without the protections of registration.[54] Although these additional purchaser requirements could increase recordkeeping and compliance burdens, in almost all instances, purchasers of securities sold pursuant to Regulation S would be non-U.S. persons. Any such additional purchaser requirements could have an indirect impact on U.S. small businesses.

Lastly, the Regulation S proposals would make clear that offshore resales under Rule 904 of equity securities of these issuers that are ''restricted securities,'' as defined in Rule 144, will not affect the restricted status of those securities. Consequently, holders of restricted securities could not attempt to remove the restrictions by selling the securities offshore.

All of these requirements are imposed on domestic issuers, and foreign issuers with the principal market for the equity securities in the United States, regardless of size. As proposed, small businesses would be able to obtain the protections of the proposed safe harbors on the same basis as larger companies. The Commission considered yet rejected alternatives applicable to small businesses, as the Commission believes that distinctions between companies based on size would negate the beneficial effects of the proposed safeguards. The Commission seeks comment on these views. Commenters are encouraged to suggest alternatives that would be appropriate and beneficial to small businesses, and data to support any alternative approach.

The IRFA notes that the proposed amendments to Regulation S, if adopted, would affect persons that are small entities, as defined by the Commission's rules. The term ''small business,'' as used in reference to a registrant for purposes of the Regulatory Flexibility Act, is defined by Rule 157[55] under the Securities Act as an issuer that, on the last day of its most recent fiscal year, had total assets of $5 million or less and is engaged or proposing to engage in small business financing. An issuer is considered to be engaged in small business financing if it is conducting or proposes to conduct an offering of securities which does not exceed the $5 million dollar limitation prescribed by Section 3(b) of the Securities Act. When used with reference to an issuer other than an investment company, the term also is defined in Rule 0–10[56] of the Exchange Act as an issuer that, on the last day of its most recent fiscal year, had total assets of $5 million or less. When used with respect to an investment company, the term is defined under Rule 0–10 as an investment company with net assets of $50 million or less as of the end of its most recent fiscal year.

Small entities meeting these definitions would be able to rely on the Regulation S safe harbors on the same basis as larger entities. The Commission is aware of approximately 1,019 Exchange Act reporting companies that currently satisfy the definition of ''small business'' under Rule 0–10. There is no reliable way of determining, however, how many non-reporting companies would be subject to the rule or how many small businesses may become subject to Commission registration and reporting obligations in the future. The Commission solicits comments regarding how to estimate the number of non-reporting issuers that may be affected by the proposed changes, together with data or assumptions to support such an approach.

The Commission estimates that over 500 Exchange Act reporting companies conduct over 750 sales pursuant to Regulation S per year and therefore would be affected by the proposals. The Commission further estimates that up to 160 of such reporting companies would meet the Regulatory Flexibility Act definition of small businesses. The total number of companies conducting Regulation S sales—including companies that are not Exchange Act reporting companies—undoubtedly would exceed the above numbers. Because no data are available as to non-reporting companies' sales due to the absence of any filings with the Commission regarding such sales, the exact number is impossible to determine. It is important to note that the Commission only recently began receiving data from reporting issuers regarding their placements of equity securities pursuant to Regulation S,[57] and therefore, does not have long-term data that would assist it in determining how many small businesses may actually rely on the Regulation S safe harbors, or may otherwise be impacted by the rule proposals. The Commission solicits comments regarding how to estimate the number of small businesses that may be affected by the proposed changes together with data or assumptions to support such an approach.

The proposed changes to Item 701 of Regulation S–B and Forms 8–K, 10–QSB and 10–KSB also would affect persons that are small businesses, as defined by the Commission's rules. The Commission expects, however, that the proposed changes would decrease

[54] *See* notes 21 and 22 and accompanying text, *supra*, for a discussion of the abusive transactions.

[55] 17 CFR 230.157.

[56] 17 CFR 240.0–10.

[57] Since November 18, 1996, sales of equity securities by domestic issuers under Regulation S are required to be reported on Form 8–K within 15 days of occurrence. This reporting requirement does not apply to any issuer who is not subject to the periodic reporting requirements under the Exchange Act, and in general does not apply to foreign issuers. *See* Exchange Act Release No. 37801, *supra* note 26.

reporting, recordkeeping and compliance burdens. The Commission estimates that up to 160 reporting companies qualifying as small businesses would be relieved of the burden of filing up to 300 additional Forms 8–K per year, thereby reducing the total annual record keeping burden by 1,500 hours. The analysis also indicates that there are no current federal rules that duplicate, overlap or conflict with the revised disclosure provisions.

While the Regulation S proposals may affect the ability of some small entities to access offshore capital, these restrictions should be sufficient to end the abusive practices under Regulation S, and forestall any further abuse, while not foreclosing the offshore market entirely for unregistered offshore offerings of equity securities. In addition, the concurrent adoption of shortened holding periods under Rule 144, coupled with the proposal to allow delayed pricing by smaller issuers in registered offerings, should help offset any adverse effect on small entities. No alternatives to the proposed rules consistent with their objectives and the Commission's statutory authority were found.

Comments are encouraged on any aspect of this analysis. A copy of the analysis may be obtained by contacting Walter G. Van Dorn, Jr., Office of International Corporate Finance, Division of Corporation Finance, Mail Stop 3–9, 450 Fifth Street, N.W., Washington, D.C. 20549.

IX. Paperwork Reduction Act

The staff has consulted with the Office of Management and Budget (the ''OMB'') and has submitted the proposals for review in accordance with the Paperwork Reduction Act of 1995 (the ''Act'').[58] Under the proposed amendments to Regulation S, if adopted, equity securities of domestic issuers, and of foreign issuers where the principal market for the equity securities is in the United States, that are issued offshore pursuant to Regulation S would be deemed ''restricted securities'' as defined in Rule 144 under the Securities Act. Consequently, purchasers of these securities in the offshore placement, and any subsequent purchasers, may choose to resell these securities into the U.S. markets pursuant to the conditions of the Rule 144 safe harbor for resales of restricted securities. Such conditions may include filing with the Commission a notice of proposed sale on Form 144, containing information about the issuer of the securities, the seller, the securities to be sold and the proposed manner of sale.

Prior to November 18, 1996, issuers of equity securities under Regulation S were not explicitly required to disclose such issuances in Commission filings. Since then, domestic reporting issuers of equity securities under Regulation S are required to file a Current Report on Form 8–K within 15 days of occurrence.[59] The Commission estimates that approximately 500 domestic issuers reporting under the Exchange Act conduct approximately 750 offshore offerings of equity securities pursuant to Regulation S each year. The Commission is not able to estimate the number of Regulation S sales by non-reporting companies. Assuming an average of two purchasers in each of these sales, and assuming that approximately one-half of such purchasers will choose to resell the securities under Rule 144, the Commission estimates approximately 750 additional filings on Form 144 on a yearly basis. Based on past Commission experience with Form 144 filings, the Commission estimates the total annual reporting and recordkeeping burden that will result from the collection of information to be two hours per respondent, and 1,500 hours in the aggregate on a yearly basis. Under the proposed amendments to Item 701 of Regulation S–K, Item 701 of Regulation S–B and Forms 8–K, 10–Q, 10–QSB, 10–K and 10–KSB, if adopted, the existing requirements to report unregistered sales of equity securities would be relaxed by delaying when the unregistered sale would have to be reported. Thus, the Commission believes that the proposed amendments would decrease reporting, recordkeeping and compliance burdens.

In addition, the proposed changes include the requirement that purchasers of certain types of equity securities sold under Regulation S certify that they are not U.S. persons and are not acquiring the securities for the account or benefit of a U.S. person, or that they are U.S. persons who purchased securities in a transaction that did not require registration under the Securities Act. This certification requirement also could result in a corresponding increase in recordkeeping burden on the part of issuers attempting to keep records of such certifications. The amendments also require distributors and certain purchasers of Regulation S equity securities to enter into agreements not to engage in hedging transactions with regard to those securities unless such transactions are in compliance with the Securities Act. This requirement too could result in an increase in recordkeeping burden on the part of issuers or distributors attempting to keep records of these purchase agreements. Additionally, the proposals would necessitate revised stop transfer instructions that would require an issuer, by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of securities unless made in accordance with the registration or exemptive provisions of the Securities Act, or in accordance with Regulation S. The creation and safekeeping of the necessary documentation for such stop transfer instructions would increase issuers' recordkeeping and compliance burdens.

The Commission solicits comment on (i) whether the proposed changes in collection of information are necessary, (ii) the accuracy of the Commission's estimate of the burden of the proposed changes to the collection of information, (iii) the quality, utility and clarity of the information to be collected, and (iv) whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, with reference to File No. S7–8–97. The OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

X. Statutory Bases

The amendments to Regulation S are being proposed pursuant to Sections 5 and 19 of the Securities Act, as amended, and the amendments to Rule 144 are being proposed pursuant to sections 2(11), 4, 5 and 19 of the

[58] 44 U.S.C. 3501 *et seq.*

[59] This reporting requirement does not apply to any issuer who is not subject to the periodic reporting requirements under the Exchange Act, and in general does not apply to foreign issuers. *See* Exchange Act Release No. 37801, *supra* note 26.

Securities Act, as amended.[60] The amendments to Item 701 of Regulation S-B and of Regulation S-K and to Form 8–K, Form 10–QSB, Form 10–Q, Form 10–KSB, and Form 10–K are being proposed pursuant to sections 3(b), 4A, 12, 13, 14, 15, 16 and 23 of the Securities Exchange Act.

List of Subjects in 17 CFR Parts 228, 229, 230, and 249

Reporting and recordkeeping requirements, Securities.

Text of the Proposals

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, 78*l*, 78m, 78n, 78o, 78w, 78*ll*, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

§ 228.701 [Amended]

2. By amending paragraph (e) of § 228.701 by removing the words ''Form 8–K,'' and ''249.308,''.

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

3. 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, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

§ 229.701 [Amended]

4. By amending paragraph (e) of § 229.701 by removing the words ''Form 8–K,'' and ''249.308,''.

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

5. 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, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 78t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

[60] 15 U.S.C. 77d, 77e and 77s.

6. Section 230.144 is amended by revising paragraphs (a)(3) and (e)(3)(vii) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(a) * * *

(3) The term *restricted securities* means:

(i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering;

(ii) Securities acquired from the issuer that are subject to the resale limitations of § 230.502(d) under Regulation D or § 230.701(c);

(iii) Securities acquired in a transaction or chain of transactions meeting the requirements of § 230.144A;

(iv) Securities acquired from the issuer in a transaction subject to the conditions of Regulation CE (§ 230.1001); and

(v) Equity securities of domestic issuers, and of foreign issuers where the principal market for such securities is in the United States (as defined in § 230.902(h)), acquired in a transaction or chain of transactions subject to the conditions of § 230.901 or § 230.903 under Regulation S (§ 230.901 through § 230.905 and Preliminary Notes).

* * * * *

(e) * * *

(3) * * *

(vii) The following sales of securities need not be included in determining the amount of securities sold in reliance upon this section: securities sold pursuant to an effective registration statement under the Act; securities sold pursuant to an exemption provided by Regulation A (§ 230.251 through § 230.263) under the Act; securities sold in a transaction exempt pursuant to Section 4 of the Act (15 U.S.C. 77(e)) and not involving any public offering; and securities sold offshore pursuant to Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) under the Act.

* * * * *

7. Section 230.902 is revised to read as follows:

§ 230.902. Definitions.

As used in Regulation S, the following terms shall have the meanings indicated.

(a) *Debt securities.* ''Debt securities'' of an issuer will be defined to include any security other than an equity security as defined in § 230.405, as well as the following:

(1) Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; or

(2) Asset-backed securities, which are defined as the securities of a type that either:

(i) Represents an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its affiliates; or

(ii) Is secured by one or more assets or certificates of interest or participation in such assets, and the securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of paragraph (a)(2)(i) of this section, or certificates of interest or participations in assets meeting such requirements.

(3) For purposes of paragraph (a)(2) of this section, the term ''assets'' means securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time.

(b) *Designated offshore securities market.* ''Designated offshore securities market'' means:

(1) The Eurobond market, as regulated by the Association of International Bond Dealers; the Alberta Stock Exchange; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bermuda Stock Exchange; the Bourse de Bruxelles; the Copenhagen Stock Exchange; the Frankfurt Stock Exchange; the Helsinki Stock Exchange; The Stock Exchange of Hong Kong Limited; the Irish Stock Exchange; the Istanbul Stock Exchange; the Johannesburg Stock Exchange; the London Stock Exchange; the Bourse de Luxembourg; the Mexico Stock Exchange; the Borsa Valori di Milan; the Montreal Stock Exchange; the Oslo Stock Exchange; the Bourse de Paris; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; and the Zurich Stock Exchange; and

(2) Any foreign securities exchange or non-exchange market designated by the

Commission. Attributes to be considered in determining whether to designate such a foreign securities market, among others, include:

(i) Organization under foreign law;

(ii) Association with a generally recognized community of brokers, dealers, banks, or other professional intermediaries with an established operating history;

(iii) Oversight by a governmental or self-regulatory body;

(iv) Oversight standards set by an existing body of law;

(v) Reporting of securities transactions on a regular basis to a governmental or self-regulatory body;

(vi) A system for exchange of price quotations through common communications media; and

(vii) An organized clearance and settlement system.

(c) *Directed selling efforts.*

(1) ''Directed selling efforts'' means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes). Such activity includes placement of an advertisement in a publication ''with a general circulation in the United States'' that refers to the offering of securities being made in reliance upon this Regulation S.

(2) Publication ''with a general circulation in the United States'':

(i) Is defined as any publication that is printed primarily for distribution in the United States, or has had, during the preceding twelve months, an average circulation in the United States of 15,000 or more copies per issue; and

(ii) Only the U.S. edition of any publication printing a separate U.S. edition will be deemed a publication ''with a general circulation in the United States'' if such publication, without consideration of its U.S. edition, would not meet the requirements of paragraph (c)(2)(i) of this section; and the U.S. edition itself meets the requirements of paragraph (c)(2)(i) of this section.

(3) The following are not ''directed selling efforts'':

(i) Placement of an advertisement required to be published under United States or foreign law, or under rules or regulations of a United States or foreign regulatory or self-regulatory authority, provided the advertisement contains no more information than legally required and includes a statement to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 in § 230.903) absent registration or an applicable exemption from the registration requirements;

(ii) Contact with persons excluded from the definition of ''U.S. person'' pursuant to paragraph (l)(2)(vi) of this section or persons holding accounts excluded from the definition of ''U.S. person'' pursuant to paragraph (l)(2)(i) of this section, solely in their capacities as holders of such accounts;

(iii) A tombstone advertisement in any publication with a general circulation in the United States, provided:

(A) The publication has less than 20% of its circulation, calculated by aggregating the circulation of its U.S. and comparable non-U.S. editions, in the United States;

(B) Such advertisement contains a legend to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 in § 230.903) absent registration or an applicable exemption from the registration requirements; and

(C) Such advertisement contains no more information than:

(*1*) The issuer's name;

(*2*) The amount and title of the securities being sold;

(*3*) A brief indication of the issuer's general type of business;

(*4*) The price of the securities;

(*5*) The yield of the securities, if debt securities with a fixed (non-contingent) interest provision;

(*6*) The name and address of the person placing the advertisement, and whether such person is participating in the distribution;

(*7*) The names of the managing underwriters;

(*8*) The dates, if any, upon which the sales commenced and concluded;

(*9*) Whether the securities are offered or were offered by rights issued to security holders and, if so, the class of securities that are entitled or were entitled to subscribe, the subscription ratio, the record date, the dates (if any) upon which the rights were issued and expired, and the subscription price; and

(*10*) Any legend required by law or any foreign or U.S. regulatory or self-regulatory authority;

(iv) Bona fide visits to real estate, plants or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer, a distributor, any of their respective affiliates or a person acting on behalf of any of the foregoing;

(v) Distribution in the United States of a foreign broker-dealer's quotations by a third-party system that distributes such quotations primarily in foreign countries if:

(A) Securities transactions cannot be executed between foreign broker-dealers and persons in the United States through the system; and

(B) The issuer, distributors, their respective affiliates, persons acting on behalf of any of the foregoing, foreign broker-dealers and other participants in the system do not initiate contacts with U.S. persons or persons within the United States, beyond those contacts exempted under § 240.15a–6 of this chapter; and

(vi) Publication by an issuer of a notice in accordance with § 230.135 or § 230.135c.

(d) *Distributor.* ''Distributor'' means any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes).

(e) *Domestic issuer.* ''Domestic issuer'' means any issuer other than a foreign issuer (as defined in § 230.405).

(f) *Offering restrictions.* ''Offering restrictions'' means:

(1) Each distributor agrees in writing:

(i) That all offers and sales of the securities prior to the expiration of the restricted period specified in Category 2 or 3 in § 230.903, as applicable, shall be made only in accordance with the provisions of § 230.903 or § 230.904; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act; and

(ii) For offers and sales of equity securities of domestic issuers, and of foreign issuers where the principal market for those securities is in the United States, not to engage in hedging transactions with regard to such securities prior to the expiration of the restricted period specified in Category 2 or 3 in § 230.903, as applicable, unless in compliance with the Act; and

(2) All offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the restricted period specified in Category 2 or 3 in § 230.903, as applicable, shall include statements to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are registered under the Act, or an exemption from the registration

requirements of the Act is available. For offers and sales of equity securities of domestic issuers, and of foreign issuers where the principal market for those securities is in the United States, such offering materials and documents also must state that hedging transactions involving those securities may not be conducted unless in compliance with the Act. Such statements shall appear:

(i) On the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;

(ii) In the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and

(iii) In any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in advertisements.

(g) *Offshore transaction*.

(1) An offer or sale of securities is made in an ''offshore transaction'' if:

(i) The offer is not made to a person in the United States; and

(ii) Either:

(A) At the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States; or

(B) For purposes of:

(*1*) § 230.903, the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States; or

(*2*) § 230.904, the transaction is executed in, on or through the facilities of a designated offshore securities market described in paragraph (a) of this section, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

(2) Notwithstanding paragraph (g)(1) of this section, offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, shall not be deemed to be made in ''offshore transactions.''

(3) Notwithstanding paragraph (g)(1) of this section, offers and sales of securities to persons excluded from the definition of ''U.S. person'' pursuant to paragraph (l)(2)(vi) of this section or persons holding accounts excluded from the definition of ''U.S. person'' pursuant to paragraph (l)(2)(i) of this section, solely in their capacities as holders of such accounts, shall be deemed to be made in ''offshore transactions.''

(h) *Principal market in the United States.* With respect to a class of equity securities, a foreign issuer has its ''Principal market in the United States'' if more than 50 percent of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.

(i) *Reporting issuer.* ''Reporting issuer'' means an issuer other than an investment company registered or required to register under the 1940 Act that:

(1) Has a class of securities registered pursuant to Section 12(b) or 12(g) of the Exchange Act (15 U.S.C. 78*l*(b) or 78*l*(g)) or is required to file reports pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78*o*(d)); and

(2) Has filed all the material required to be filed pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78*o*(d)) for a period of at least twelve months immediately preceding the offer or sale of securities made in reliance upon this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) (or for such shorter period that the issuer was required to file such material).

(j) *Restricted period.* ''Restricted period'' means a period that commences on the later of the date upon which the securities were first offered to persons other than distributors in reliance upon this Regulation S or the date of closing of the offering, and expires a specified period of time thereafter; *provided, however,* that all offers and sales by a distributor of an unsold allotment or subscription shall be deemed to be made during the restricted period; *provided, further,* that in a continuous offering, the restricted period shall commence upon completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions; *provided, further,* that in a continuous offering of non-convertible debt securities offered and sold in identifiable tranches, the restricted period for securities in a tranche shall commence upon completion of the distribution of such tranche, as determined and certified by the managing underwriter or person performing similar functions; *provided, further,* that in a continuous offering of securities to be acquired upon the exercise of warrants, the restricted period shall commence upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person performing similar functions, if requirements of § 230.903(b)(5) are satisfied.

(k) *Substantial U.S. market interest.*

(1) ''Substantial U.S. market interest'' with respect to a class of an issuer's equity securities means:

(i) The securities exchanges and inter-dealer quotation systems in the United States in the aggregate constituted the single largest market for such class of securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation; or

(ii) 20 percent or more of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States and less than 55 percent of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.

(2) ''Substantial U.S. market interest'' with respect to an issuer's debt securities means:

(i) Its debt securities, in the aggregate, are held of record by 300 or more U.S. persons;

(ii) $1 billion or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons; and

(iii) 20 percent or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons.

(3) Notwithstanding paragraph (k)(2) of this section, substantial U.S. market interest with respect to an issuer's debt securities is calculated without reference to securities that qualify for the exemption provided by Section 3(a)(3) of the Act (15 U.S.C. 77c(a)(3)).

(l) *U.S. person.*

(1) ''U.S. person'' means:

(i) Any natural person resident in the United States;

(ii) Any partnership or corporation organized or incorporated under the laws of the United States;

(iii) Any estate of which any executor or administrator is a U.S. person;

(iv) Any trust of which any trustee is a U.S. person;

(v) Any agency or branch of a foreign entity located in the United States;

(vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;

(vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) Any partnership or corporation if:

(A) Organized or incorporated under the laws of any foreign jurisdiction; and

(B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in § 230.501(a)) who are not natural persons, estates or trusts.

(2) The following are not ''U.S. persons'':

(i) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(ii) Any estate of which any professional fiduciary acting as executor or administrator is a U.S. person if:

(A) An executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and

(B) The estate is governed by foreign law;

(iii) Any trust of which any professional fiduciary acting as trustee is a U.S. person if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

(iv) An employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country;

(v) Any agency or branch of a U.S. person located outside the United States if:

(A) The agency or branch operates for valid business reasons; and

(B) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located; and

(vi) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(m) *United States.* ''United States'' means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

8. Section 230.903 is revised to read as follows:

§ 230.903. Offers or sales of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; conditions relating to specific securities.

(a) An offer or sale of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if the offer or sale shall be made in an offshore transaction, and no directed selling efforts shall be made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing.

(b) *Additional conditions.*

(1) *Category 1.* Securities in this category may be offered and sold without any conditions other than those set forth in § 230.903(a) of this section. The securities eligible for this category are:

(i) The issuer is a foreign issuer that reasonably believes at the commencement of the offering that:

(A) There is no substantial U.S. market interest in the class of securities to be offered or sold (if equity securities are offered or sold);

(B) There is no substantial U.S. market interest in its debt securities (if debt securities are offered or sold);

(C) There is no substantial U.S. market interest in the securities to be purchased upon exercise (if warrants are offered or sold); and

(D) There is no substantial U.S. market interest in either the convertible securities or the underlying securities (if convertible securities are offered or sold);

(ii) The securities are offered and sold in an overseas directed offering, which means:

(A) An offering of securities of a foreign issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country; or

(B) An offering of non-convertible debt securities of a domestic issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country, provided that the principal and interest of the securities (or par value, as applicable) are denominated in a currency other than U.S. dollars and such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner that in effect converts the securities to U.S. dollar-denominated securities.

(iii) The securities are backed by the full faith and credit of a foreign government; or

(iv) The securities are offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States, and customary practices and documentation of such country, provided that:

(A) The securities are issued in compensatory circumstances for bona fide services rendered to the issuer or its affiliates in connection with their businesses and such services are not rendered in connection with the offer and sale of securities in a capital-raising transaction;

(B) Any interests in the plan are not transferable other than by will or the laws of descent or distribution;

(C) The issuer takes reasonable steps to preclude the offer and sale of interests in the plan or securities under the plan to U.S. residents other than employees on temporary assignment in the United States; and

(D) Documentation used in connection with any offer pursuant to the plan contains a statement that the securities have not been registered under the Act and may not be offered or sold in the United States unless registered or an exemption from registration is available.

(2) *Category 2.* Securities in this category may be offered and sold provided that:

(i) The following conditions are met:

(A) The conditions set forth in § 230.903(a) are met;

(B) Offering restrictions are implemented;

(C) The offer or sale, if made prior to the expiration of a 40-day restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor), unless

made pursuant to registration or an exemption therefrom under the Act; and

(D) Each distributor selling securities to a distributor, a dealer, as defined in section 2(12) of the Act (15 U.S.C. 77b(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of a 40-day restricted period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor; and

(ii) The securities are equity securities of reporting foreign issuers unless the principal market for those securities is in the United States, or the securities are debt securities of a reporting issuer or of a foreign issuer.

(3) *Category 3.* Securities that are not eligible for Category 1 or 2 (paragraphs (b) (1) or (2)) in this section may be offered or sold provided that the following conditions are met:

(i) The conditions set forth in § 230.903(a) are met;

(ii) Offering restrictions are implemented;

(iii) In the case of debt securities:

(A) The offer or sale, if made prior to the expiration of a 40-day restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor), unless made pursuant to registration or an exemption therefrom under the Act; and

(B) The securities are represented upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day restricted period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(iv) In the case of equity securities, if made prior to the expiration of a two-year restricted period with respect to domestic issuers and foreign issuers where the principal market for the securities is in the United States, and a one-year restricted period with respect to other issuers:

(A) The offer or sale is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor), unless made pursuant to registration or an exemption therefrom under the Act; and

(B) The offer or sale is made pursuant to the following conditions:

(*1*) The purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(*2*) The purchaser of the securities agrees to resell such securities only in accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the Act;

(*3*) The securities of a domestic issuer, or of a foreign issuer where the principal market for the securities is in the United States, contain a legend to the effect that transfer is prohibited except in accordance with the provisions of this Regulation S, pursuant to registration under the Act, or pursuant to an available exemption from registration; and that hedging transactions involving those securities may not be conducted unless in compliance with the Act;

(*4*) The issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of this Regulation S, pursuant to registration under the Act, or pursuant to an available exemption from registration; *provided, however,* that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend described in paragraph (b)(3)(iv)(B)(*3*) of this section) are implemented to prevent any transfer of the securities not made in accordance with the provisions of this Regulation S; and

(*5*) If the issuer is a domestic issuer, or a foreign issuer and the principal market for the equity securities is in the United States, no promissory note or other executory obligation may be received as payment for the securities, nor may an installment purchase contract be entered into; and

(v) Each distributor selling securities to a distributor, a dealer (as defined in section 2(12) of the Act (15 U.S.C. 77b(12)), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day restricted period in the case of debt securities, or a two-year restricted period in the case of equity securities, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(4) *Guaranteed securities.* Notwithstanding paragraphs (b)(1) through (b)(3) of this section, in offerings of debt securities fully and unconditionally guaranteed as to principal and interest by the parent of the issuer of the debt securities, only the requirements of paragraph (b) of this section that are applicable to the offer and sale of the guarantee need be satisfied with respect to the offer and sale of the guaranteed debt securities.

(5) *Warrants.* An offer or sale of warrants under Category 2 or 3 (paragraphs (b) (2) or (3)) of this section also must comply with the following requirements:

(i) Each warrant must bear a legend stating that the warrant and the securities to be issued upon its exercise have not been registered under the Act and that the warrant may not be exercised by or on behalf of any U.S. person unless registered under the Act or an exemption from such registration is available;

(ii) Each person exercising a warrant is required to give:

(A) Written certification that it is not a U.S. person and the warrant is not being exercised on behalf of a U.S. person; or

(B) A written opinion of counsel to the effect that the warrant and the securities delivered upon exercise thereof have been registered under the Act or are exempt from registration thereunder; and

(iii) Procedures are implemented to ensure that the warrant may not be exercised within the United States, and that the securities may not be delivered within the United States upon exercise, other than in offerings deemed to meet the definition of ''offshore transaction'' pursuant to § 230.902(g), unless registered under the Act or an exemption from such registration is available.

9. Section 230.904 is revised to read as follows:

§ 230.904. Offshore resales.

(a) An offer or sale of securities by any person other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if the offer or sale are made in an offshore transaction, and no directed selling efforts are made in the United States by the seller, an affiliate, or any person acting on their behalf.

(b) *Additional conditions.* In addition to the conditions set forth in paragraph

(a) of this section, the following requirements must be satisfied:

(1) *Resales by dealers and persons receiving selling concessions.* In the case of an offer or sale of securities of any issuer prior to the expiration of the restricted period specified in Category 2 or 3 (paragraphs (b) (2) or (3)) of § 230.903, as applicable, by a dealer, as defined in Section 2(12) of the Act (15 U.S.C. 77b(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold:

(i) Neither the seller nor any person acting on his behalf knows that the offeree or buyer of the securities is a U.S. person; and

(ii) If the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, as defined in Section 2(12) of the Act (15 U.S.C. 77b(12)), or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the restricted period only: in accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes); pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act.

(2) *Resales by certain affiliates.* In the case of an offer or sale of securities of any issuer by an officer or director of the issuer or a distributor, who is an affiliate of the issuer or distributor solely by virtue of holding such position, no selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

10. By adding § 230.905 to read as follows:

§ 230.905 Resale limitations.

Equity securities of domestic issuers, and of foreign issuers where the principal market for such securities is in the United States, acquired from the issuer, a distributor, or any of their respective affiliates in an offshore transaction subject to the conditions of § 230.901 or § 230.903 are deemed to be ''restricted securities'' as defined in § 230.144. Resales of any of such restricted securities by the offshore purchaser must be made in accordance with this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), the registration requirements of the Act or an exemption therefrom. Any ''restricted securities'' as defined in § 230.144(a)(3) that are equity securities of domestic issuers, and of foreign issuers where the principal market for the securities is in the United States, will continue to be deemed to be restricted securities, notwithstanding that they were acquired in a resale transaction made pursuant to § 230.901 or § 230.904.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

11. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

12. By amending Form 8–K (referenced in § 249.308) by removing the last sentence of General Instruction B.1. and Item 9.

13. By amending Form 10–Q (referenced in § 249.308a) by revising paragraph (c) of Item 2 of Part II prior to the Instruction to read as follows:

Note: Form 10–Q does not and these amendments will not appear in the Code of Federal Regulations

Form 10–Q

* * * * *

Part II

Item 2. Changes in Securities.

* * * * *

(c) Furnish the information required by Item 701 of Regulation S–K (§ 229.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act.

* * * * *

14. By amending Form 10–QSB (referenced in § 249.308b) by revising paragraph (c) to Item 2 of Part II prior to the Instruction to read as follows:

Note: Form 10–QSB does not and these amendments will not appear in the Code of Federal Regulations

Form 10–QSB

* * * * *

Part II

* * * * *

Item 2. Changes in Securities.

* * * * *

(c) Furnish the information required by Item 701 of Regulation S–B (§ 228.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act.

* * * * *

15. By amending Form 10–K (referenced in § 249.310) by revising Item 5 of Part II to read as follows:

Note: Form 10–K does not and these amendments will not appear in the Code of Federal Regulations

Form 10–K

* * * * *

Part II

* * * * *

Item 5. Market for Registrant's Common Equity and Related Stockholder Matters.

Furnish the information required by Item 201 of Regulation S–K (§ 229.201 of this chapter) and Item 701 of Regulation S–K (§ 229.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act. *Provided* that if the Item 701 information previously has been included in a Quarterly Report on Form 10–Q or 10–QSB (§ 249.308a or 249.308b of this chapter) it need not be furnished.

* * * * *

16. By amending Form 10–KSB (referenced in § 249.310b) by revising Item 5 of Part II to read as follows:

Note: Form 10–K does not and these amendments will not appear in the Code of Federal Regulations

Form 10–KSB

* * * * *

Part II

* * * * *

Item 5. Market for Common Equity and Related Stockholder Matters.

Furnish the information required by Item 201 of Regulation S–B and Item 701 of Regulation S–B as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act. *Provided* that if the Item 701 information previously has been included in a Quarterly Report on Form 10–Q or 10–QSB it need not be furnished.

* * * * *

Dated: February 20, 1997.

By the Commission.

Margaret H. McFarland,

Deputy Secretary

[FR Doc. 97–4668 Filed 2–27–97; 8:45 am]

BILLING CODE 8010–01–P