

NOTICE OF PROPOSED CHANGES ON SECURITIES IN THE
REGULATIONS OF THE DEPARTMENT OF COMMERCE,
COMMUNITY, AND ECONOMIC DEVELOPMENT

BRIEF DESCRIPTION

The Department of Commerce, Community, and Economic Development proposes regulation changes to sections dealing with securities in order to clarify and update existing regulations, update fees for certain securities filings, and establish a new registration fee for broker-dealer branch offices.

The Department of Commerce, Community, and Economic Development proposes to adopt regulation changes in Title 3, Chapter 8 of the Alaska Administrative Code, dealing with securities, including the following:

- (1) 3 AAC 08.011 is proposed to be amended to clarify when an agent application is considered to be abandoned.
- (2) 3 AAC 08.015 is proposed to be amended by establishing a \$75 annual registration fee for a broker-dealer branch office.
- (3) 3 AAC 08.075 is proposed to be added to require a registered person to fully cooperate with the administration during a determination of whether a securities violation has occurred under AS 45.55 and that failure to do so may constitute a violation and be grounds for denial, suspension, or revocation of registration.
- (4) 3 AAC 08.085 is proposed to be amended to clarify that notice filings for mutual funds are not effective in Alaska until they have become effective with the Securities and Exchange Commission (SEC). This section is proposed to be amended to eliminate references to a filing fee option for an automatic one-year extension and to clarify that renewals for these filings will not be accepted more than 60 days prior to their expiration.
- (5) 3 AAC 08.222 is proposed to be amended to conform to the North American Securities Administration Association's (NASAA) model rules on suitability standards.
- (6) 3 AAC 08.230 is proposed to be amended to clarify that the administrator may request additional information to be submitted relating to a filing and to clarify when an application for registration or exemption is terminated, abandoned, or withdrawn.
- (7) 3 AAC 08.506 is proposed to be amended to clarify that an issuer who has filed an SEC Form D may still choose to claim an applicable state exemption. This section is proposed to be amended to eliminate references to a filing fee option for an automatic one-year extension and to clarify that renewals for these filings will not be accepted more than 60 days prior to their expiration.
- (8) 3 AAC 08.900 is proposed to be amended to require applicants to file advertising material with the administrator ten days, rather than five days, prior to use or dissemination and gives the administrator ten days, rather than five days, to disallow the advertising. This section is proposed to be amended to include websites, social media and portals/intermediaries.
- (9) 3 AAC 08.920 is proposed to be amended to eliminate expedited review and fees for filings and refundable portions of filing fees. This section is proposed to be amended to eliminate a filing fee option for an automatic one-year extension. This section is proposed to be amended to raise fees for an interpretative opinion under AS 45.55.970(e) from

- \$100 to \$250. This section is proposed to be amended to raise fees for offer to pay notices under AS 45.55.900(b)(19) from \$50 to \$250.
- (10) 3 AAC 08.950(74) is proposed to be amended by adding a definition for "institutional buyer."
 - (11) Various other provisions throughout the chapter are proposed to be amended to correct outdated or incorrect citations to federal law.

You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments to:

Emily Gaffney, Regulations Specialist
Division of Banking and Securities
Department of Commerce, Community, and Economic Development
P.O. Box 110807
Juneau, AK 99811-0807

Additionally, the Department of Commerce, Community, and Economic Development will accept comments by facsimile at (907) 465-1230 and by electronic mail at emily.gaffney@alaska.gov. Comments may also be submitted through the Alaska Online Public Notice System, by accessing this notice on the system and using the "comment" link. The comments must be received no later than **4:30 p.m. on October 12, 2015**.

You may submit written questions relevant to the proposed action to Emily Gaffney by electronic mail at emily.gaffney@alaska.gov or by mail at P.O. Box 110807, Juneau, AK 99811-0807. The questions must be received at least 10 days before the end of the public comment period. The Department of Commerce, Community, and Economic Development will aggregate its response to substantially similar questions and make the questions and response available at www.commerce.alaska.gov/web/dbs/Securities.aspx and on the Alaska Online Public Notice System. The Department of Commerce, Community, and Economic Development may, but is not required to, answer written questions received after the 10-day cut-off date and before the end of the comment period.

If you are a person with a disability who needs a special accommodation in order to participate in this process, please contact Emily Gaffney at (907) 465-6338 no later than October 5, 2015 to ensure that any necessary accommodations can be provided.

A copy of the proposed regulation changes and material proposed for adoption by reference is available on the Alaska Online Public Notice System or on the Division of Banking and Securities website at www.commerce.alaska.gov/web/dbs/Securities.aspx. You may also request a copy by contacting Emily Gaffney at (907) 465-6338 or P.O. Box 110807, Juneau, AK 99811-0807.

After the public comment period ends, the Department of Commerce, Community, and Economic Development will either adopt the proposed regulation changes or other provisions dealing with the same subject, without further notice, or decide to take no action. The language of the final regulations may be different from that of the proposed regulations. **You should comment during the time allowed if your interests could be affected.**

Statutory Authority: AS 45.55.950

Statutes Being Implemented, Interpreted, or Made Specific: AS 45.55.040; AS 45.55.050; AS 45.55.060; AS 45.55.075; AS 45.55.110; AS 45.55.120; AS 45.55.139; AS 45.55.150; AS 45.55.170; AS 45.55.910; AS 45.55.915; AS 45.55.950; AS 45.55.980; AS 45.55.990

Fiscal Information: The proposed regulation changes are not expected to require an increased appropriation.

DATE: September 10, 2015

/s/ Emily Gaffney
Regulations Specialist

The Department of Commerce, Community, and Economic Development, Division of Banking and Securities keeps a list of individuals and organizations interested in its regulations. Those on the list will automatically be sent a copy of all of the Division's Notices of Proposed Regulations Changes. To be added to or removed from the list, send the request to:

Division of Banking and Securities
Department of Commerce, Community, and Economic Development
P.O. Box 110807
Juneau, AK 99811-0807

Please include your name and either your e-mail address or mailing address, as you prefer for receiving notices.

3 AAC 08.011(p) is repealed and readopted to read:

(p) The administrator may consider an application abandoned if the applicant:

(1) has not passed the required qualifying examination(s), if any, within 180 days of application;

(2) has failed to receive registration approval within 90 days of the application from the state of primary jurisdiction;

(3) has failed to respond within 60 days to the administrator's request for information under (o) of this section; or

(4) has failed to respond within 30 days to an administrator's request under AS 45.55.910.

(Eff. 4/19/2000, Register 154; am __/__/__, Register __)

Authority: AS 45.55.040 AS 45.55.050 AS 45.55.060
AS 45.55.950

3 AAC 08.015(a)(1) is amended by adding a new subparagraph to read:

(F) a broker-dealer branch office, \$75;

(Eff. 9/8/1991, Register 119; am 10/1/1999, Register 151; am __/__/__, Register __)

Authority: AS 45.55.040 AS 45.55.910 AS 45.55.915

3 AAC 08 is amended by adding a new section to read:

3 AAC 08.075. Failure to Cooperate.

(a) A registered person shall cooperate in any inquiry, investigation or inspection conducted by, or on behalf of, the administrator, for the purposes of determining whether

or not any person has violated or is about to violate any provision of AS 45.55 or any regulation or order promulgated under the Act.

(b) A registered person's willful failure to cooperate, absent good cause or bona fide claim of privilege, may be deemed by the administrator a violation of AS 45.55 within the meaning of AS 45.55.060 and therefore subject the registered person to denial, suspension or revocation of registration.

(c) The following are examples of conduct by a registered person that may be deemed failure to cooperate:

(1) the failure to timely respond by way of appearance or production of documents to a subpoena or order issued by the administrator under AS 45.55.910 or as may otherwise be provided by law;

(2) the failure to answer any question pertinent to inquiry or request for information made pursuant to AS 45.55 or this chapter unless the response to said question is subject to a bona fide claim of privilege;

(3) the failure to grant the administrator access to the business premises of a registered person or to the records and documents the registered person is required under AS 45.55 or this chapter to make available for inspection;

(4) the failure to attend any scheduled proceeding at which the registered person's appearance is directed; or

(5) aiding or abetting another registered person's failure to cooperate.

(d) for purposes of this section, "registered person" includes a person who has been approved by the administrator to conduct business as a broker-dealer, agent, state investment adviser, or investment adviser representative and a person applying for

registration as a broker-dealer, agent, state investment adviser or investment adviser representative.

(Eff. __/__/____, Register ____)

Authority: AS 45.55.060 AS 45.55.910 AS 45.55.950

3 AAC 08.085(c) is amended by adding a new paragraph to read:

(4) evidence the filing is SEC effective.

3 AAC 08.085(e) is amended to read:

(e) A notice filing under this section is valid for one year from the effective date established under (d) of this section[, OR FOR TWO YEARS FROM THAT DATE IF, WHEN SUBMITTING THE ITEMS REQUIRED BY (c) OF THIS SECTION, THE ISSUER PAID THE FEE REQUIRED BY 3 AAC 08.920(a)(4) FOR AN AUTOMATIC EXTENSION]. To renew a notice, the issuer must submit the items required by (c) of this section, as if the issuer were making an initial filing. **Renewals will not be accepted more than 60 days prior to the expiration date of the filing.**

(Eff. 4/19/2000, Register 154; am __/__/____, Register ____)

Authority: AS 45.55.075 AS 45.55.110 AS 45.55.950

3 AAC 08.222(1) is amended to read:

(1) a minimum annual gross income of **\$70,000** [\$60,000] and a minimum net worth of **\$70,000** [\$60,000], exclusive of principal automobile, principal residence, and home furnishings; or

3 AAC 08.222(2) is amended to read:

- (1) a minimum net worth of \$250,000 [\$225,000], exclusive of principal automobile, principal residence, and home furnishings.

(Eff. 4/19/2000, Register 154; am ___/___/___, Register ___)

Authority: AS 45.55.120 AS 45.55.950

3 AAC 08.230(a) is amended to read:

- (a) After an application for registration of securities or a notice filing for federal covered securities becomes effective the offering may be commenced in accordance with AS 45.55 and the terms and conditions of the certificate of registration. **The administrator may request the applicant submit additional information relating to an applicant's filing. The applicant shall furnish and properly identify the additional information requested by the administrator within 30 days of the request.** The administrator may delay issuance of a certificate of registration of securities, but not a certificate of notice pending an applicant's completion of arrangements satisfactory to the administrator for the sale and distribution of the securities.

3 AAC 08.230(b) is repealed and readopted to read:

- (b) The administrator may determine an application for registration or exemption is terminated, abandoned or withdrawn if one of the following has occurred:

- (1) an applicant requests withdrawal before the effective date of the registration or exemption;

(2) an applicant requests termination after the effective date of the registration or exemption;

(3) an application for registration or exemption is deemed abandoned because the applicant fails to complete the application process including paying the appropriate fee, completing and filing the required documents or failing to respond to a request for information within 90 days of the application;

(4) an application for registration or exemption is deemed terminated if the applicant has failed to respond within 30 days of a request made under AS 45.55.910.

3 AAC 08.230 is amended by adding a new subsection to read:

(n) Termination, abandonment or withdrawal under (b) of this section does not preclude commencement of proceedings for denial, suspension, or revocation of registration as provided in AS 45.55.120.

(Eff. 2/20/72, Register 41; am 4/19/2000, Register 154; am 10/26/2000, Register 156; am __/__/____, Register ____)

Authority: AS 45.55.075 AS 45.55.110 AS 45.55.950

3 AAC 08.506(a) is amended to read:

(a) An issuer offering a federal covered security in a transaction that is not a public offering for the purposes of 15 U.S.C. 77r(b)(4)(D) (secs 4(a)(2) and 18(b)(4)(D) of the Securities Act of 1933) shall file with the administrator no later than 15 days after the first sale of that federal covered security in this state

3 AAC 08.506(d) is amended to read:

(d) A notice filing under this section is valid for one year from the effective date established under (b) of this section[, OR FOR TWO YEARS FROM THAT DATE IF, WHEN SUBMITTING THE ITEMS REQUIRED UNDER (a) OF THIS SECTION, THE ISSUER PAID THE FEE REQUIRED BY 3 AAC 08.920(a)(3) FOR AN AUTOMATIC EXTENSION]. To renew a notice, the issuer must submit the items required by (a) of this section, as if the issuer were making an initial filing. **Renewals will not be accepted more than 60 days prior to the expiration date of the filing.**

3 AAC 08.506 is amended by adding new sections to read:

(e) To qualify as a federal covered security under AS 45.55.075, offers and sales must satisfy all the terms and conditions of this section and 17 C.F.R. 230.506.

(f) Notwithstanding (a) of this section, an issuer may choose to claim an available exemption under AS 45.55.900 even if they have filed an SEC Form D with the SEC; however, securities offered pursuant to an available exemption under AS 45.55.900 will not be considered federal covered securities.

(Eff. 5/24/84, Register 90; am 4/19/2000, Register 154; am __/__/__, Register __)

Authority: AS 45.55.075 AS 45.55.950

3 AAC 08.900(a) is amended to read:

(a) Except as provided in (c) of this section, an advertisement to be used or circulated in connection with the sale and promotion of a public offering of securities is subject to the following requirements and restrictions:

(1) at least ten [FIVE] days before the intended use or dissemination of the advertisement, the applicant shall file with the administrator one copy of the proposed material;

(2) the use of the material is permitted if not disallowed by the administrator by written notice or otherwise within ten [FIVE] days from the date filed;

(3) the administrator will not issue formal approval of the literature, and the user is responsible for determining the accuracy and reliability of the statements and material to be used in conformity with this section.

3 AAC 08.900(e) is amended by adding a new paragraph to read:

(4) issuer-based website, social media account, blogging site, or other investing portal or intermediary.

(Eff. 2/20/72, Register 41; am 4/19/2000, Register 154; am 6/8/2001, Register 158; am ___/___/___, Register ___)

Authority: AS 45.55.150 AS 45.55.170 AS 45.55.950

3 AAC 08.920(a)(3) is amended to read:

(3) the nonrefundable notice fee for offerings of securities covered under 15 U.S.C. 77r(b)(4)(D) (sec. 18(b)(4)(D) of the Securities Act of 1933), as amended is \$600 for one year [,OR \$1,100 IF AN AUTOMATIC EXTENSION OF ONE YEAR IS DESIRED BY THE ISSUER AT THE TIME THE NOTICE IS FILED];

3 AAC 08.920(a)(4) is amended to read:

(4) the nonrefundable notice fee for offerings of securities covered under 15 U.S.C. 77(r)(b)(2) (sec. 18(b)(2) of the Securities Act of 1933), as amended is \$600 for one year[, OR \$1,100 IF AN AUTOMATIC EXTENSION OF ONE YEAR IS DESIRED BY THE ISSUER AT THE TIME THE NOTICE IS FILED];

3 AAC 08.920(a)(5) is amended to read:

(5) a person filing an application for registration of securities shall pay a nonrefundable [FILING FEE OF \$100 AND A REFUNDABLE REGISTRATION] fee of ~~\$600~~ [\$500] for one year[, OR A NONREFUNDABLE FILING FEE OF \$100 AND A REFUNDABLE REGISTRATION FEE OF \$1,100 IF AN AUTOMATIC EXTENSION OF ONE YEAR IS DESIRED BY THE ISSUER AT THE TIME THE APPLICATION FOR REGISTRATION APPLICATION IS FILED];

3 AAC 08.920(a)(6) is amended to read:

(6) a person filing or required to file a notice under AS 45.55.900, except under AS 45.55.900(b)(19), shall pay a nonrefundable fee of \$50[, OR A NONREFUNDABLE FEE OF \$125 IF AN EXPEDITED REVIEW PROCEDURE IS REQUESTED AND THE FEE IS PAID IN A FORM AUTHORIZED BY (2) OF THIS SUBSECTION];

3 AAC 08.920(a)(7) is amended to read:

(7) a person filing a request for interpretative opinions under AS 45.55.970 (e), including requests for "No Action Letters", shall pay a nonrefundable fee of ~~\$250~~ [\$100];

THE EXPEDITED REVIEW PROCEDURE IS NOT AVAILABLE FOR THESE REQUESTS];

3 AAC 08.920(a)(9) is amended to read:

(9) a person submitting a solicitation of interest form under 3 AAC 08.087 shall pay a nonrefundable fee of \$50 [, OR A NONREFUNDABLE FEE OF \$125 IF AN EXPEDITED REVIEW PROCEDURE IS REQUESTED AND THE FEE IS PAID IN A FORM AUTHORIZED BY (2) OF THIS SECTION];

3 AAC 08.920(a) is amended by adding a new paragraph to read:

(11) a person filing or required to file a notice under AS 45.55.900(b)(19) shall pay a nonrefundable fee of \$250.

(Eff. 2/20/72, Register 41; am 10/1/99, Register 151; am 4/19/2000, Register 154; am 4/20/2000, Register 154; am 1/4/2013, Register 205; am __/__/__, Register __)

Authority: AS 45.55.110 AS 45.55.139 AS 45.55.950
AS 45.55.980

3 AAC 08.950(32)(I) is amended to read:

(I) qualified purchaser as defined under 15 U.S.C. 80a-2(a)(51)(A) as revised as of July 21, 2010 and adopted by reference [P.L. 104-290 (NATIONAL SECURITIES MARKETS IMPROVEMENT ACT OF 1996)];

3 AAC 08.950 is amended by adding a new subsection to read:

(74) "Institutional buyer" has the meaning given in 17 C.F.R. 230.144A, as revised as of October 1, 2013 and adopted by reference;

(Eff. 2/20/72, Register 41; am 10/1/99, Register 151; am 4/19/2000, Register 154; am 4/20/2000, Register 154; am 12/7/2006, Register 180; am __/__/__, Register ____)

Authority: AS 45.55.950 AS 45.55.990

SUBCHAPTER I—INVESTMENT COMPANIES

§ 80a-1. Findings and declaration of policy

(a) Findings

Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 79z-4¹ of this title, and facts otherwise disclosed and ascertained, it is found that investment companies are affected with a national public interest in that, among other things—

(1) the securities issued by such companies, which constitute a substantial part of all securities publicly offered, are distributed, purchased, paid for, exchanged, transferred, redeemed, and repurchased by use of the mails and means and instrumentalities of interstate commerce, and in the case of the numerous companies which issue redeemable securities this process of distribution and redemption is continuous;

(2) the principal activities of such companies—investing, reinvesting, and trading in securities—are conducted by use of the mails and means and instrumentalities of interstate commerce, including the facilities of national securities exchanges, and constitute a substantial part of all transactions effected in the securities markets of the Nation;

(3) such companies customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce;

(4) such companies are media for the investment in the national economy of a substantial part of the national savings and may have a vital effect upon the flow of such savings into the capital markets; and

(5) the activities of such companies, extending over many States, their use of the instrumentalities of interstate commerce and the wide geographic distribution of their security holders, make difficult, if not impossible, effective State regulation of such companies in the interest of investors.

(b) Policy

Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 79z-4¹ of this title, and facts otherwise disclosed and ascertained, it is declared that the national public interest and the interest of investors are adversely affected—

(1) when investors purchase, pay for, exchange, receive dividends upon, vote, refrain from voting, sell, or surrender securities issued by investment companies without adequate, accurate, and explicit information, fairly presented, concerning the character of such securities and the circumstances, policies, and financial responsibility of such companies and their management;

(2) when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the in-

terest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other investment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders;

(3) when investment companies issue securities containing inequitable or discriminatory provisions, or fail to protect the preferences and privileges of the holders of their outstanding securities;

(4) when the control of investment companies is unduly concentrated through pyramiding or inequitable methods of control, or is inequitably distributed, or when investment companies are managed by irresponsible persons;

(5) when investment companies, in keeping their accounts, in maintaining reserves, and in computing their earnings and the asset value of their outstanding securities, employ unsound or misleading methods, or are not subjected to adequate independent scrutiny;

(6) when investment companies are reorganized, become inactive, or change the character of their business, or when the control or management thereof is transferred, without the consent of their security holders;

(7) when investment companies by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character of their junior securities; or

(8) when investment companies operate without adequate assets or reserves.

It is declared that the policy and purposes of this subchapter, in accordance with which the provisions of this subchapter shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.

(Aug. 22, 1940, ch. 686, title I, §1, 54 Stat. 789.)

REFERENCES IN TEXT

Section 79z-4 of this title, referred to in text, was repealed by Pub. L. 109-58, title XII, §1263, Aug. 8, 2005, 119 Stat. 974.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 80a-2. Definitions; applicability; rulemaking considerations

(a) Definitions

When used in this subchapter, unless the context otherwise requires—

(1) "Advisory board" means a board, whether elected or appointed, which is distinct from the board of directors or board of trustees, of an investment company, and which is composed solely of persons who do not serve such company in any other capacity, whether or not the functions of such board are such as to render its members "directors" within the definition of that term, which board has advisory

¹ See References in Text note below.

functions as to investments but has no power to determine that any security or other investment shall be purchased or sold by such company.

(2) "Affiliated company" means a company which is an affiliated person.

(3) "Affiliated person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

(4) "Assignment" includes any direct or indirect transfer or hypothecation of a contract or chose in action by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but does not include an assignment of partnership interests incidental to the death or withdrawal of a minority of the members of the partnership having only a minority interest in the partnership business or to the admission to the partnership of one or more members who, after such admission, shall be only a minority of the members and shall have only a minority interest in the business.

(5) "Bank" means (A) a depository institution (as defined in section 1813 of title 12) or a branch or agency of a foreign bank (as such terms are defined in section 3101 of title 12), (B) a member bank of the Federal Reserve System, (C) any other banking institution or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this subchapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(6) The term "broker" has the same meaning as given in section 3 of the Securities Exchange Act of 1934 [15 U.S.C. 78c], except that such term does not include any person solely by reason of the fact that such person is an underwriter for one or more investment companies.

(7) "Commission" means the Securities and Exchange Commission.

(8) "Company" means a corporation, a partnership, an association, a joint-stock com-

pany, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under title 11 or similar official or any liquidating agent for any of the foregoing, in his capacity as such.

(9) "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company. A natural person shall be presumed not to be a controlled person within the meaning of this subchapter. Any such presumption may be rebutted by evidence, but except as hereinafter provided, shall continue until a determination to the contrary made by the Commission by order either on its own motion or on application by an interested person. If an application filed hereunder is not granted or denied by the Commission within sixty days after filing thereof, the determination sought by the application shall be deemed to have been temporarily granted pending final determination of the Commission thereon. The Commission, upon its own motion or upon application, may by order revoke or modify any order issued under this paragraph whenever it shall find that the determination embraced in such original order is no longer consistent with the facts.

(10) "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

(11) The term "dealer" has the same meaning as given in the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], but does not include an insurance company or investment company.

(12) "Director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated, including any natural person who is a member of a board of trustees of a management company created as a common-law trust.

(13) "Employees' securities company" means any investment company or similar issuer all of the outstanding securities of which (other than short-term paper) are beneficially owned (A) by the employees or persons on retainer of a single employer or of two or more employers each of which is an affiliated company of the other, (B) by former employees of such employer or employers, (C) by members of the immediate family of such employees, persons on retainer, or former employees, (D) by any two or more of the foregoing classes of persons, or (E) by such employer or employers together with any one or more of the foregoing classes of persons.

(14) "Exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(15) "Face-amount certificate" means any certificate, investment contract, or other security which represents an obligation on the part of its issuer to pay a stated or determinable sum or sums at a fixed or determinable date or dates more than twenty-four months after the date of issuance, in consideration of the payment of periodic installments of a stated or determinable amount (which security shall be known as a face-amount certificate of the "installment type"); or any security which represents a similar obligation on the part of a face-amount certificate company, the consideration for which is the payment of a single lump sum (which security shall be known as a "fully paid" face-amount certificate).

(16) "Government security" means any security issued or guaranteed as to principal or interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing.

(17) "Insurance company" means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar official or any liquidating agent for such a company, in his capacity as such.

(18) "Interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof.

(19) "Interested person" of another person means—

(A) when used with respect to an investment company—

(i) any affiliated person of such company,

(ii) any member of the immediate family of any natural person who is an affiliated person of such company,

(iii) any interested person of any investment adviser of or principal underwriter for such company,

(iv) any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such company has acted as legal counsel for such company,

(v) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of

the determination of whether that person or affiliated person is an interested person, has executed any portfolio transactions for, engaged in any principal transactions with, or distributed shares for—

(I) the investment company;

(II) any other investment company having the same investment adviser as such investment company or holding itself out to investors as a related company for purposes of investment or investor services; or

(III) any account over which the investment company's investment adviser has brokerage placement discretion,

(vi) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has loaned money or other property to—

(I) the investment company;

(II) any other investment company having the same investment adviser as such investment company or holding itself out to investors as a related company for purposes of investment or investor services; or

(III) any account for which the investment company's investment adviser has borrowing authority, and

(vii) any natural person whom the Commission by order shall have determined to be an interested person by reason of having had, at any time since the beginning of the last two completed fiscal years of such company, a material business or professional relationship with such company or with the principal executive officer of such company or with any other investment company having the same investment adviser or principal underwriter or with the principal executive officer of such other investment company:

Provided, That no person shall be deemed to be an interested person of an investment company solely by reason of (aa) his being a member of its board of directors or advisory board or an owner of its securities, or (bb) his membership in the immediate family of any person specified in clause (aa) of this proviso; and

(B) when used with respect to an investment adviser of or principal underwriter for any investment company—

(i) any affiliated person of such investment adviser or principal underwriter,

(ii) any member of the immediate family of any natural person who is an affiliated person of such investment adviser or principal underwriter,

(iii) any person who knowingly has any direct or indirect beneficial interest in, or who is designated as trustee, executor, or guardian of any legal interest in, any security issued either by such investment adviser of principal underwriter or by a controlling person or such investment adviser or principal underwriter,

(iv) any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such investment company has acted as legal counsel for such investment adviser or principal underwriter,

(v) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has executed any portfolio transactions for, engaged in any principal transactions with, or distributed shares for—

(I) any investment company for which the investment adviser or principal underwriter serves as such;

(II) any investment company holding itself out to investors, for purposes of investment or investor services, as a company related to any investment company for which the investment adviser or principal underwriter serves as such; or

(III) any account over which the investment adviser has brokerage placement discretion,

(vi) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has loaned money or other property to—

(I) any investment company for which the investment adviser or principal underwriter serves as such;

(II) any investment company holding itself out to investors, for purposes of investment or investor services, as a company related to any investment company for which the investment adviser or principal underwriter serves as such; or

(III) any account for which the investment adviser has borrowing authority, and

(vii) any natural person whom the Commission by order shall have determined to be an interested person by reason of having had at any time since the beginning of the last two completed fiscal years of such investment company a material business or professional relationship with such investment adviser or principal underwriter or with the principal executive officer or any controlling person of such investment adviser or principal underwriter.

For the purposes of this paragraph (19), "member of the immediate family" means any parent, spouse of a parent, child, spouse of a child, spouse, brother, or sister, and includes step and adoptive relationships. The Commission may modify or revoke any order issued under clause (vii) of subparagraph (A) or (B) of this paragraph whenever it finds that such order is no longer consistent with the facts. No order issued pursuant to clause (vii) of subparagraph (A) or (B) of this paragraph shall become effective until at least sixty days after the entry thereof, and no such order shall af-

fect the status of any person for the purposes of this subchapter or for any other purpose for any period prior to the effective date of such order.

(20) "Investment adviser" of an investment company means (A) any person (other than a bona fide officer, director, trustee, member of an advisory board, or employee of such company, as such) who pursuant to contract with such company regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or other property shall be purchased or sold by such company, and (B) any other person who pursuant to contract with a person described in clause (A) of this paragraph regularly performs substantially all of the duties undertaken by such person described in said clause (A); but does not include (i) a person whose advice is furnished solely through uniform publications distributed to subscribers thereto, (ii) a person who furnishes only statistical and other factual information, advice regarding economic factors and trends, or advice as to occasional transactions in specific securities, but without generally furnishing advice or making recommendations regarding the purchase or sale of securities, (iii) a company furnishing such services at cost to one or more investment companies, insurance companies, or other financial institutions, (iv) any person the character and amount of whose compensation for such services must be approved by a court, or (v) such other persons as the Commission may by rules and regulations or order determine not to be within the intent of this definition.

(21) "Investment banker" means any person engaged in the business of underwriting securities issued by other persons, but does not include an investment company, any person who acts as an underwriter in isolated transactions but not as a part of a regular business, or any person solely by reason of the fact that such person is an underwriter for one or more investment companies.

(22) "Issuer" means every person who issues or proposes to issue any security, or has outstanding any security which it has issued.

(23) "Lend" includes a purchase coupled with an agreement by the vendor to repurchase; "borrow" includes a sale coupled with a similar agreement.

(24) "Majority-owned subsidiary" of a person means a company 50 per centum or more of the outstanding voting securities of which are owned by such person, or by a company which, within the meaning of this paragraph, is a majority-owned subsidiary of such person.

(25) "Means or instrumentality of interstate commerce" includes any facility of a national securities exchange.

(26) "National securities exchange" means an exchange registered under section 6 of the Securities Exchange Act of 1934 [15 U.S.C. 78f].

(27) "Periodic payment plan certificate" means (A) any certificate, investment contract, or other security providing for a series of periodic payments by the holder, and representing an undivided interest in certain

specified securities or in a unit or fund of securities purchased wholly or partly with the proceeds of such payments, and (B) any security the issuer of which is also issuing securities of the character described in clause (A) of this paragraph and the holder of which has substantially the same rights and privileges as those which holders of securities of the character described in said clause (A) have upon completing the periodic payments for which such securities provide.

(28) "Person" means a natural person or a company.

(29) "Principal underwriter" of or for any investment company other than a closed-end company, or of any security issued by such a company, means any underwriter who as principal purchases from such company, or pursuant to contract has the right (whether absolute or conditional) from time to time to purchase from such company, any such security for distribution, or who as agent for such company sells or has the right to sell any such security to a dealer or to the public or both, but does not include a dealer who purchases from such company through a principal underwriter acting as agent for such company. "Principal underwriter" of or for a closed-end company or any issuer which is not an investment company, or of any security issued by such a company or issuer, means any underwriter who, in connection with a primary distribution of securities, (A) is in privity of contract with the issuer or an affiliated person of the issuer; (B) acting alone or in concert with one or more other persons, initiates or directs the formation of an underwriting syndicate; or (C) is allowed a rate of gross commission, spread, or other profit greater than the rate allowed another underwriter participating in the distribution.

(30) "Promoter" of a company or a proposed company means a person who, acting alone or in concert with other persons, is initiating or directing, or has within one year initiated or directed, the organization of such company.

(31) "Prospectus", as used in section 80a-22 of this title, means a written prospectus intended to meet the requirements of section 10(a) of the Securities Act of 1933 [15 U.S.C. 77j(a)] and currently in use. As used elsewhere, "prospectus" means a prospectus as defined in the Securities Act of 1933 [15 U.S.C. 77a et seq.].

(32) "Redeemable security" means any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

(33) "Reorganization" means (A) a reorganization under the supervision of a court of competent jurisdiction; (B) a merger or consolidation; (C) a sale of 75 per centum or more in value of the assets of a company; (D) a restatement of the capital of a company, or an exchange of securities issued by a company for any of its own outstanding securities; (E) a

voluntary dissolution or liquidation of a company; (F) a recapitalization or other procedure or transaction which has for its purpose the alteration, modification, or elimination of any of the rights, preferences, or privileges of any class of securities issued by a company, as provided in its charter or other instrument creating or defining such rights, preferences, and privileges; (G) an exchange of securities issued by a company for outstanding securities issued by another company or companies, preliminary to and for the purpose of effecting or consummating any of the foregoing; or (H) any exchange of securities by a company which is not an investment company for securities issued by a registered investment company.

(34) "Sale", "sell", "offer to sell", or "offer for sale" includes every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value.

(35) "Sales load" means the difference between the price of a security to the public and that portion of the proceeds from its sale which is received and invested or held for investment by the issuer (or in the case of a unit investment trust, by the depositor or trustee), less any portion of such difference deducted for trustee's or custodian's fees, insurance premiums, issue taxes, or administrative expenses or fees which are not properly chargeable to sales or promotional activities. In the case of a periodic payment plan certificate, "sales load" includes the sales load on any investment company securities in which the payments made on such certificate are invested, as well as the sales load on the certificate itself.

(36) "Security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(37) "Separate account" means an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, or of Canada or any province thereof, under which income,

gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(38) "Short-term paper" means any note, draft, bill of exchange, or banker's acceptance payable on demand or having a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof payable on demand or having a maturity likewise limited; and such other classes of securities, of a commercial rather than an investment character, as the Commission may designate by rules and regulations.

(39) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(40) "Underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer. When the distribution of the securities in respect of which any person is an underwriter is completed such person shall cease to be an underwriter in respect of such securities or the issuer thereof.

(41) "Value", with respect to assets of registered investment companies, except as provided in subsection (b) of section 80a-28 of this title, means—

(A) as used in sections 80a-3, 80a-5, and 80a-12 of this title, (i) with respect to securities owned at the end of the last preceding fiscal quarter for which market quotations are readily available, the market value at the end of such quarter; (ii) with respect to other securities and assets owned at the end of the last preceding fiscal quarter, fair value at the end of such quarter, as determined in good faith by the board of directors; and (iii) with respect to securities and other assets acquired after the end of the last preceding fiscal quarter, the cost thereof; and

(B) as used elsewhere in this subchapter, (i) with respect to securities for which market quotations are readily available, the market value of such securities; and (ii) with respect to other securities and assets, fair value as determined in good faith by the board of directors;

in each case as of such time or times as determined pursuant to this subchapter, and the rules and regulations issued by the Commission hereunder. Notwithstanding the fact that

market quotations for securities issued by controlled companies are available, the board of directors may in good faith determine the value of such securities: *Provided*, That the value so determined is not in excess of the higher of market value or asset value of such securities in the case of majority-owned subsidiaries, and is not in excess of market value in the case of other controlled companies.

For purposes of the valuation of those assets of a registered diversified company which are not subject to the limitations provided for in section 80a-5(b)(1) of this title, the Commission may, by rules and regulations or orders, permit any security to be carried at cost, if it shall determine that such procedure is consistent with the general intent and purposes of this subchapter. For purposes of sections 80a-5 and 80a-12 of this title in lieu of values determined as provided in clause (A) above, the Commission shall by rules and regulations permit valuation of securities at cost or other basis in cases where it may be more convenient for such company to make its computations on such basis by reason of the necessity or desirability of complying with the provisions of any United States revenue laws or rules and regulations issued thereunder, or the laws or the rules and regulations issued thereunder of any State in which the securities of such company may be qualified for sale.

The foregoing definition shall not derogate from the authority of the Commission with respect to the reports, information, and documents to be filed with the Commission by any registered company, or with respect to the accounting policies and principles to be followed by any such company, as provided in sections 80a-8, 80a-29, and 80a-30 of this title.

(42) "Voting security" means any security presently entitling the owner or holder thereof to vote for the election of directors of a company. A specified percentage of the outstanding voting securities of a company means such amount of its outstanding voting securities as entitles the holder or holders thereof to cast said specified percentage of the aggregate votes which the holders of all the outstanding voting securities of such company are entitled to cast. The vote of a majority of the outstanding voting securities of a company means the vote, at the annual or a special meeting of the security holders of such company duly called, (A) of 67 per centum or more of the voting securities present at such meeting, if the holders of more than 50 per centum of the outstanding voting securities of such company are present or represented by proxy; or (B) of more than 50 per centum of the outstanding voting securities of such company, whichever is the less.

(43) "Wholly-owned subsidiary" of a person means a company 95 per centum or more of the outstanding voting securities of which are owned by such person, or by a company which, within the meaning of this paragraph, is a wholly-owned subsidiary of such person.

(44) "Securities Act of 1933" [15 U.S.C. 77a et seq.], "Securities Exchange Act of 1934" [15 U.S.C. 78a et seq.], and "Trust Indenture Act of 1939" [15 U.S.C. 77aaa et seq.] mean those

acts, respectively, as heretofore or hereafter amended.

(45) "Savings and loan association" means a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution, and a receiver, conservator, or other liquidating agent of any such institution.

(46) "Eligible portfolio company" means any issuer which—

(A) is organized under the laws of, and has its principal place of business in, any State or States;

(B) is neither an investment company as defined in section 80a-3 of this title (other than a small business investment company which is licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958 [15 U.S.C. 661 et seq.] and which is a wholly-owned subsidiary of the business development company) nor a company which would be an investment company except for the exclusion from the definition of investment company in section 80a-3(c) of this title; and

(C) satisfies one of the following:

(i) it does not have any class of securities with respect to which a member of a national securities exchange, broker, or dealer may extend or maintain credit to or for a customer pursuant to rules or regulations adopted by the Board of Governors of the Federal Reserve System under section 7 of the Securities Exchange Act of 1934 [15 U.S.C. 78g];

(ii) it is controlled by a business development company, either alone or as part of a group acting together, and such business development company in fact exercises a controlling influence over the management or policies of such eligible portfolio company and, as a result of such control, has an affiliated person who is a director of such eligible portfolio company;

(iii) it has total assets of not more than \$4,000,000, and capital and surplus (shareholders' equity less retained earnings) of not less than \$2,000,000, except that the Commission may adjust such amounts by rule, regulation, or order to reflect changes in 1 or more generally accepted indices or other indicators for small businesses; or

(iv) it meets such other criteria as the Commission may, by rule, establish as consistent with the public interest, the protection of investors, and the purposes fairly intended by the policy and provisions of this subchapter.

(47) "Making available significant managerial assistance" by a business development company means—

(A) any arrangement whereby a business development company, through its directors, officers, employees, or general partners, offers to provide, and, if accepted, does so provide, significant guidance and counsel concerning the management, operations, or business objectives and policies of a portfolio company;

(B) the exercise by a business development company of a controlling influence over the management or policies of a portfolio company by the business development company acting individually or as part of a group acting together which controls such portfolio company; or

(C) with respect to a small business investment company licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958 [15 U.S.C. 661 et seq.], the making of loans to a portfolio company.

For purposes of subparagraph (A), the requirement that a business development company make available significant managerial assistance shall be deemed to be satisfied with respect to any particular portfolio company where the business development company purchases securities of such portfolio company in conjunction with one or more other persons acting together, and at least one of the persons in the group makes available significant managerial assistance to such portfolio company, except that such requirement will not be deemed to be satisfied if the business development company, in all cases, makes available significant managerial assistance solely in the manner described in this sentence.

(48) "Business development company" means any closed-end company which—

(A) is organized under the laws of, and has its principal place of business in, any State or States;

(B) is operated for the purpose of making investments in securities described in paragraphs (1) through (3) of section 80a-54(a) of this title, and makes available significant managerial assistance with respect to the issuers of such securities, provided that a business development company must make available significant managerial assistance only with respect to the companies which are treated by such business development company as satisfying the 70 per centum of the value of its total assets condition of section 80a-54 of this title; and provided further that a business development company need not make available significant managerial assistance with respect to any company described in paragraph (46)(C)(iii), or with respect to any other company that meets such criteria as the Commission may by rule, regulation, or order permit, as consistent with the public interest, the protection of investors, and the purposes of this subchapter; and

(C) has elected pursuant to section 80a-53(a) of this title to be subject to the provisions of sections 80a-54 through 80a-64 of this title.

(49) "Foreign securities authority" means any foreign government or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(50) "Foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization

empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate the participation of its members in activities listed above.

(51)(A) "Qualified purchaser" means—

(i) any natural person (including any person who holds a joint, community property, or other similar shared ownership interest in an issuer that is excepted under section 80a-3(c)(7) of this title with that person's qualified purchaser spouse) who owns not less than \$5,000,000 in investments, as defined by the Commission;

(ii) any company that owns not less than \$5,000,000 in investments and that is owned directly or indirectly by or for 2 or more natural persons who are related as siblings or spouse (including former spouses), or direct lineal descendants by birth or adoption, spouses of such persons, the estates of such persons, or foundations, charitable organizations, or trusts established by or for the benefit of such persons;

(iii) any trust that is not covered by clause (ii) and that was not formed for the specific purpose of acquiring the securities offered, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clause (i), (ii), or (iv); or

(iv) any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than \$25,000,000 in investments.

(B) The Commission may adopt such rules and regulations applicable to the persons and trusts specified in clauses (i) through (iv) of subparagraph (A) as it determines are necessary or appropriate in the public interest or for the protection of investors.

(C) The term "qualified purchaser" does not include a company that, but for the exceptions provided for in paragraph (1) or (7) of section 80a-3(c) of this title, would be an investment company (hereafter in this paragraph referred to as an "excepted investment company"), unless all beneficial owners of its outstanding securities (other than short-term paper), determined in accordance with section 80a-3(c)(1)(A) of this title, that acquired such securities on or before April 30, 1996 (hereafter in this paragraph referred to as "pre-amendment beneficial owners"), and all pre-amendment beneficial owners of the outstanding securities (other than short-term paper) of any excepted investment company that, directly or indirectly, owns any outstanding securities of such excepted investment company, have consented to its treatment as a qualified purchaser. Unanimous consent of all trustees, directors, or general partners of a company or trust referred to in clause (ii) or (iii) of sub-

paragraph (A) shall constitute consent for purposes of this subparagraph.

(52) The terms "security future" and "narrow-based security index" have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(55)].

(53) The term "credit rating agency" has the same meaning as in section 3 of the Securities Exchange Act of 1934 [15 U.S.C. 78c].

(54) The terms "commodity pool", "commodity pool operator", "commodity trading advisor", "major swap participant", "swap", "swap dealer", and "swap execution facility" have the same meanings as in section 1a of title 7.

(b) Applicability to government

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(c) Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

(Aug. 22, 1940, ch. 686, title I, §2, 54 Stat. 790; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Aug. 10, 1954, ch. 667, title IV, §401, 68 Stat. 688; Pub. L. 86-70, §12(d), June 25, 1959, 73 Stat. 143; Pub. L. 86-624, §7(c), July 12, 1960, 74 Stat. 412; Pub. L. 91-547, §2(a), Dec. 14, 1970, 84 Stat. 1413; Pub. L. 95-598, title III, §310(a), Nov. 6, 1978, 92 Stat. 2676; Pub. L. 96-477, title I, §101, Oct. 21, 1980, 94 Stat. 2275; Pub. L. 97-303, §5, Oct. 13, 1982, 96 Stat. 1409; Pub. L. 100-181, title VI, §§601-603, Dec. 4, 1987, 101 Stat. 1260; Pub. L. 101-550, title II, §206(a), Nov. 15, 1990, 104 Stat. 2720; Pub. L. 104-290, title I, §106(c), title II, §209(b), title V, §§503, 504, Oct. 11, 1996, 110 Stat. 3425, 3434, 3445; Pub. L. 105-353, title III, §301(c)(1), Nov. 3, 1998, 112 Stat. 3236; Pub. L. 106-102, title II, §§213(a), (b), 215, 216, 223, Nov. 12, 1999, 113 Stat. 1397, 1399, 1401; Pub. L. 106-554, §1(a)(5) [title II, §209(a)(1), (3)], Dec. 21, 2000, 114 Stat. 2763, 2763A-435, 2763A-436; Pub. L. 109-291, §4(b)(2)(A), Sept. 29, 2006, 120 Stat. 1337; Pub. L. 111-203, title VII, §769, title IX, §§985(d)(1), 986(c)(1), July 21, 2010, 124 Stat. 1801, 1934, 1936.)

AMENDMENT OF SECTION

Unless otherwise provided, amendment by subtitle B (§§761-774) of title VII of Pub. L. 111-203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B requires a rulemaking, not less than 60 days after publication of the final rule or

regulation implementing such provision of subtitle B, see 2010 Amendment notes and Effective Date of 2010 Amendment note below.

REFERENCES IN TEXT

The Securities Exchange Act of 1934, referred to in subsec. (a)(11), (44), is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified principally to chapter 2B (§78a et seq.) of this title. For complete classification of this Act to the Code, see section 78a of this title and Tables.

The Securities Act of 1933, referred to in subsec. (a)(31), (44), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, which is classified generally to subchapter I (§77a et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77a of this title and Tables.

The Trust Indenture Act of 1939, referred to in subsec. (a)(44), is title III of act May 27, 1933, ch. 38, as added Aug. 3, 1939, ch. 411, 53 Stat. 1149, which is classified generally to subchapter III (§77aaa et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77aaa of this title and Tables.

The Small Business Investment Act of 1958, referred to in subsec. (a)(46)(B), (47)(C), is Pub. L. 85-599, Aug. 21, 1958, 72 Stat. 689, which is classified principally to chapter 14B (§661 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

CODIFICATION

Words "Philippine Islands" deleted from definition of term "State" under authority of Proc. No. 2695, which granted independence to the Philippine Islands. Proc. No. 2695 was issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse, and is set out as a note under that section.

AMENDMENTS

2010—Subsec. (a)(19). Pub. L. 111-203, §985(d)(1)(A), substituted "clause (vii)" for "clause (vi)" in two places in concluding provisions.

Subsec. (a)(19)(A)(vi)(III), (B)(vi)(III). Pub. L. 111-203, §985(d)(1)(B), inserted "and" at end.

Subsec. (a)(44). Pub. L. 111-203, §986(c)(1), struck out "Public Utility Holding Company Act of 1935," after "Securities Exchange Act of 1934,".

Subsec. (a)(54). Pub. L. 111-203, §769, added par. (54).

2006—Subsec. (a)(53). Pub. L. 109-291 added par. (53).

2000—Subsec. (a)(36). Pub. L. 106-554, §1(a)(5) [title II, §209(a)(1)], inserted "security future," after "treasury stock,".

Subsec. (a)(52). Pub. L. 106-554, §1(a)(5) [title II, §209(a)(3)], added par. (52).

1999—Subsec. (a)(5)(A). Pub. L. 106-102, §223, substituted "a depository institution (as defined in section 1813 of title 12) or a branch or agency of a foreign bank (as such terms are defined in section 3101 of title 12)" for "a banking institution organized under the laws of the United States".

Subsec. (a)(6). Pub. L. 106-102, §215, amended par. (6) generally. Prior to amendment, par. (6) read as follows: "Broker means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank or any person solely by reason of the fact that such person is an underwriter for one or more investment companies."

Subsec. (a)(11). Pub. L. 106-102, §216, amended par. (11) generally. Prior to amendment, par. (11) read as follows: "Dealer means any person regularly engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, insurance company, or investment company, or any person insofar as he is engaged in investing, reinvesting, or trading in securities, or in owning or holding securities, for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business."

Subsec. (a)(19)(A)(v). Pub. L. 106-102, §213(a)(1), added cl. (v) and struck out former cl. (v) which read as fol-

lows: "any broker or dealer registered under the Securities Exchange Act of 1934 or any affiliated person of such a broker or dealer, and".

Subsec. (a)(19)(A)(vi), (vii). Pub. L. 106-102, §213(a)(2), (3), added cl. (vi) and redesignated former cl. (vi) as (vii).

Subsec. (a)(19)(B)(v). Pub. L. 106-102, §213(b)(1), added cl. (v) and struck out former cl. (v) which read as follows: "any broker or dealer registered under the Securities Exchange Act of 1934 or any affiliated person of such a broker or dealer, and".

Subsec. (a)(19)(B)(vi), (vii). Pub. L. 106-102, §213(b)(2), (3), added cl. (vi) and redesignated former cl. (vi) as (vii).

1998—Subsec. (a)(8). Pub. L. 105-353 made a technical amendment to reference in original act which appears in text as reference to title 11.

1996—Subsec. (a)(46)(C)(iii), (iv). Pub. L. 104-290, §503, added cl. (iii) and redesignated former cl. (iii) as (iv).

Subsec. (a)(48)(B). Pub. L. 104-290, §504, inserted at end "provided further that a business development company need not make available significant managerial assistance with respect to any company described in paragraph (46)(C)(iii), or with respect to any other company that meets such criteria as the Commission may by rule, regulation, or order permit, as consistent with the public interest, the protection of investors, and the purposes of this subchapter; and".

Subsec. (a)(51). Pub. L. 104-290, §209(b), added par. (51).

Subsec. (c). Pub. L. 104-290, §106(c), added subsec. (c).

1990—Subsec. (a)(49), (50). Pub. L. 101-550 added pars. (49) and (50).

1987—Subsec. (a)(19). Pub. L. 100-181, §601, inserted "completed" before "fiscal years" wherever appearing in subpars. (A)(iv), (vi) and (B)(iv), (vi).

Subsec. (a)(39). Pub. L. 100-181, §602, struck out reference to Canal Zone.

Subsec. (a)(48)(B). Pub. L. 100-181, §603, substituted "paragraphs (1) through (3) of section 80a-54(a) of this title" for "sections 80a-54(a)(1) through (3) of this title".

1982—Subsec. (a)(36). Pub. L. 97-303 inserted "any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency," after "mineral rights,".

1980—Subsec. (a)(46) to (48). Pub. L. 96-477 added pars. (46) to (48).

1978—Subsec. (a)(8). Pub. L. 95-598 substituted "a case under title 11" for "bankruptcy".

1970—Subsec. (a)(5). Pub. L. 91-547, §2(a)(1), substituted "under the authority of the Comptroller of the Currency" for "under section 248(k) of title 12,".

Subsec. (a)(19). Pub. L. 91-547, §2(a)(3), added par. (19). Former par. (19) redesignated (20).

Subsecs. (a)(20) to (36). Pub. L. 91-547, §2(a)(2), redesignated former pars. (19) to (35) as (20) to (36), respectively.

Subsec. (a)(37). Pub. L. 91-547, §2(a)(4), added par. (37). Former par. (37) redesignated (39).

Subsecs. (a)(38) to (44). Pub. L. 91-547, §2(a)(2), redesignated former pars. (36) to (42) as (38) to (44).

Subsec. (a)(45). Pub. L. 91-547, §2(a)(5), added par. (45).

1960—Subsec. (a)(37). Pub. L. 86-624 struck out reference to Hawaii.

1959—Subsec. (a)(37). Pub. L. 86-70 struck out reference to Alaska.

1954—Subsec. (a)(30). Act Aug. 10, 1954, substituted "section 10(a) of the Securities Act of 1933" for "section 5(b) of the Securities Act of 1933".

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 985(d)(1) and 986(c)(1) of Pub. L. 111-203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111-203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Amendment by section 769 of Pub. L. 111-203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761-774) of title VII of Pub. L. 111-203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111-203, set out as a note under section 77b of this title.

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106-102 effective 18 months after Nov. 12, 1999, see section 225 of Pub. L. 106-102, set out as a note under section 77c of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

Pub. L. 104-290, title II, § 209(e), Oct. 11, 1996, 110 Stat. 3436, provided that: "The amendments made by this section [amending this section and section 80a-3 of this title] shall take effect on the earlier of—

"(1) 180 days after the date of enactment of this Act [Oct. 11, 1996]; or

"(2) the date on which the rulemaking required under subsection (d)(2) [set out below] is completed."

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-598 effective Oct. 1, 1979, see section 402(a) of Pub. L. 95-598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-547 effective Dec. 14, 1970, see section 30 of Pub. L. 91-547, set out as a note under section 80a-52 of this title.

EFFECTIVE DATE OF 1954 AMENDMENT

Amendment by act Aug. 10, 1954, effective 60 days after Aug. 10, 1954, see note set out under section 77b of this title.

REGULATIONS

Pub. L. 104-290, title II, § 209(d)(2), Oct. 11, 1996, 110 Stat. 3435, provided that: "Not later than 180 days after the date of enactment of this Act [Oct. 11, 1996], the Commission shall prescribe rules defining the term, or otherwise identifying, 'investments' for purposes of section 2(a)(51) of the Investment Company Act of 1940 [15 U.S.C. 80a-2(a)(51)], as added by this Act."

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 80a-3. Definition of investment company

(a) Definitions

(1) When used in this subchapter, "investment company" means any issuer which—

(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of

Government securities and cash items) on an unconsolidated basis.

(2) As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exception from the definition of investment company in paragraph (1) or (7) of subsection (c) of this section.

(b) Exemption from provisions

Notwithstanding paragraph (1)(C) of subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer primarily engaged, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

(2) Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses. The filing of an application under this paragraph in good faith by an issuer other than a registered investment company shall exempt the applicant for a period of sixty days from all provisions of this subchapter applicable to investment companies as such. For cause shown, the Commission by order may extend such period of exemption for an additional period or periods. Whenever the Commission, upon its own motion or upon application, finds that the circumstances which gave rise to the issuance of an order granting an application under this paragraph no longer exist, the Commission shall by order revoke such order.

(3) Any issuer all the outstanding securities of which (other than short-term paper and directors' qualifying shares) are directly or indirectly owned by a company excepted from the definition of investment company by paragraph (1) or (2) of this subsection.

(c) Further exemptions

Notwithstanding subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities. Such issuer shall be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 80a-12(d)(1) of this title governing the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer. For purposes of this paragraph:

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(2) The Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon this rule or the execution directly with a market maker of such a sale. Neither the filing of such notice nor the failure of the Commission to comment on such notice shall be deemed to preclude the Commission from taking any action that it deems necessary or appropriate with respect to the sale of the securities referred to in such notice. The person filing the notice required by this paragraph shall have a bona fide intention to sell the securities referred to in the notice within a reasonable time after the filing of such notice.

(1) *Unavailability to securities of issuers with no or nominal operations and no or nominal non-cash assets.* (1) This section is not available for the resale of securities initially issued by an issuer defined below:

(1) An issuer, other than a business combination related shell company, as defined in §230.405, or an asset-backed issuer, as defined in Item 1101(b) of Regulation AB (§229.1101(b) of this chapter), that has:

(A) No or nominal operations; and

(B) Either:

(1) No or nominal assets;

(2) Assets consisting solely of cash and cash equivalents; or

(3) Assets consisting of any amount of cash and cash equivalents and nominal other assets; or

(i) An issuer that has been at any time previously an issuer described in paragraph (i)(1)(i).

(2) Notwithstanding paragraph (i)(1), if the issuer of the securities previously had been an issuer described in paragraph (i)(1)(i) but has ceased to be an issuer described in paragraph (i)(1)(i); is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act; has filed all reports and other materials required to be filed by section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and materials), other than Form 8-K reports (§249.308 of this chapter);

and has filed current "Form 10 information" with the Commission reflecting its status as an entity that is no longer an issuer described in paragraph (i)(1)(i), then those securities may be sold subject to the requirements of this section after one year has elapsed from the date that the issuer filed "Form 10 information" with the Commission.

(3) The term "Form 10 information" means the information that is required by Form 10 or Form 20-F (§249.210 or §249.220f of this chapter), as applicable to the issuer of the securities, to register under the Exchange Act each class of securities being sold under this rule. The issuer may provide the Form 10 information in any filing of the issuer with the Commission. The Form 10 information is deemed filed when the initial filing is made with the Commission.

[37 FR 596, Jan. 14, 1972]

EDITORIAL NOTE: FOR FEDERAL REGISTER citations affecting §230.144 see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 230.144A Private resales of securities to institutions.

PRELIMINARY NOTES: 1. This section relates solely to the application of section 5 of the Act and not to antifraud or other provisions of the federal securities laws.

2. Attempted compliance with this section does not act as an exclusive election; any seller hereunder may also claim the availability of any other applicable exemption from the registration requirements of the Act.

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

4. Nothing in this section obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (the *Exchange Act*), whenever such requirements are applicable.

5. Nothing in this section obviates the need for any person to comply with any applicable state law relating to the offer or sale of securities.

6. Securities acquired in a transaction made pursuant to the provisions of this section are deemed to be *restricted securities* within the meaning of §230.144(a)(3) of this chapter.

7. The fact that purchasers of securities from the issuer thereof may purchase such securities with a view to reselling such securities pursuant to this section will not affect the availability to such issuer of an exemption under section 4(2) of the Act, or Regulation D under the Act, from the registration requirements of the Act.

(a) *Definitions.* (1) For purposes of this section, *qualified institutional buyer* shall mean:

(i) Any of the following entities, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the entity:

(A) Any *insurance company* as defined in section 2(13) of the Act;

NOTE: A purchase by an insurance company for one or more of its separate accounts, as defined by section 2(a)(37) of the Investment Company Act of 1940 (the "Investment Company Act"), which are neither registered under section 8 of the Investment Company Act nor required to be so registered, shall be deemed to be a purchase for the account of such insurance company.

(B) Any *investment company* registered under the Investment Company Act or any *business development company* as defined in section 2(a)(48) of that Act;

(C) Any *Small Business Investment Company* licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958;

(D) Any *plan* established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees;

(E) Any *employee benefit plan* within the meaning of title I of the Employee Retirement Income Security Act of 1974;

(F) Any trust fund whose trustee is a bank or trust company and whose participants are exclusively plans of the types identified in paragraph (a)(1)(i) (D) or (E) of this section, except trust funds that include as participants indi-

vidual retirement accounts or H.R. 10 plans.

(G) Any *business development company* as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(H) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation (other than a bank as defined in section 3(a)(2) of the Act or a savings and loan association or other institution referenced in section 3(a)(5)(A) of the Act or a foreign bank or savings and loan association or equivalent institution), partnership, or Massachusetts or similar business trust; and

(I) Any *investment adviser* registered under the Investment Advisers Act.

(ii) Any *dealer* registered pursuant to section 15 of the Exchange Act, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$10 million of securities of issuers that are not affiliated with the dealer, *Provided*, That securities constituting the whole or a part of an unsold allotment to or subscription by a dealer as a participant in a public offering shall not be deemed to be owned by such dealer;

(iii) Any *dealer* registered pursuant to section 15 of the Exchange Act acting in a riskless principal transaction on behalf of a qualified institutional buyer;

NOTE: A registered dealer may act as agent, on a non-discretionary basis, in a transaction with a qualified institutional buyer without itself having to be a qualified institutional buyer.

(iv) Any investment company registered under the Investment Company Act, acting for its own account or for the accounts of other qualified institutional buyers, that is part of a family of investment companies which own in the aggregate at least \$100 million in securities of issuers, other than issuers that are affiliated with the investment company or are part of such family of investment companies. *Family of investment companies* means any two or more investment companies registered under the Investment Company Act, except for a unit investment trust whose assets consist solely of shares of one or more registered investment companies, that have the same investment adviser

(or, in the case of unit investment trusts, the same depositor), Provided That, for purposes of this section:

(A) Each series of a series company (as defined in Rule 18f-2 under the Investment Company Act [17 CFR 270.18f-2]) shall be deemed to be a separate investment company; and

(B) Investment companies shall be deemed to have the same adviser (or depositor) if their advisers (or depositors) are majority-owned subsidiaries of the same parent, or if one investment company's adviser (or depositor) is a majority-owned subsidiary of the other investment company's adviser (or depositor);

(v) Any entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of other qualified institutional buyers; and

(vi) Any *bank* as defined in section 3(a)(2) of the Act, any savings and loan association or other institution as referenced in section 3(a)(5)(A) of the Act, or any foreign bank or savings and loan association or equivalent institution, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with it and that has an audited net worth of at least \$25 million as demonstrated in its latest annual financial statements, as of a date not more than 16 months preceding the date of sale under the Rule in the case of a U.S. bank or savings and loan association, and not more than 18 months preceding such date of sale for a foreign bank or savings and loan association or equivalent institution.

(2) In determining the aggregate amount of securities owned and invested on a discretionary basis by an entity, the following instruments and interests shall be excluded: bank deposit notes and certificates of deposit; loan participations; repurchase agreements; securities owned but subject to a repurchase agreement; and currency, interest rate and commodity swaps.

(3) The aggregate value of securities owned and invested on a discretionary basis by an entity shall be the cost of such securities, except where the enti-

ty reports its securities holdings in its financial statements on the basis of their market value, and no current information with respect to the cost of those securities has been published. In the latter event, the securities may be valued at market for purposes of this section.

(4) In determining the aggregate amount of securities owned by an entity and invested on a discretionary basis, securities owned by subsidiaries of the entity that are consolidated with the entity in its financial statements prepared in accordance with generally accepted accounting principles may be included if the investments of such subsidiaries are managed under the direction of the entity, except that, unless the entity is a reporting company under section 13 or 15(d) of the Exchange Act, securities owned by such subsidiaries may not be included if the entity itself is a majority-owned subsidiary that would be included in the consolidated financial statements of another enterprise.

(5) For purposes of this section, *riskless principal transaction* means a transaction in which a dealer buys a security from any person and makes a simultaneous offsetting sale of such security to a qualified institutional buyer, including another dealer acting as riskless principal for a qualified institutional buyer.

(6) For purposes of this section, *effective conversion premium* means the amount, expressed as a percentage of the security's conversion value, by which the price at issuance of a convertible security exceeds its conversion value.

(7) For purposes of this section, *effective exercise premium* means the amount, expressed as a percentage of the warrant's exercise value, by which the sum of the price at issuance and the exercise price of a warrant exceeds its exercise value.

(b) *Sales by persons other than issuers or dealers.* Any person, other than the issuer or a dealer, who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter of such securities within the

meaning of sections 2(11) and 4(1) of the Act.

(c) *Sales by dealers.* Any dealer who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be a participant in a distribution of such securities within the meaning of section 4(3)(C) of the Act and not to be an underwriter of such securities within the meaning of section 2(11) of the Act, and such securities shall be deemed not to have been offered to the public within the meaning of section 4(3)(A) of the Act.

(d) *Conditions to be met.* To qualify for exemption under this section, an offer or sale must meet the following conditions:

(1) The securities are offered or sold only to a qualified institutional buyer or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer. In determining whether a prospective purchaser is a qualified institutional buyer, the seller and any person acting on its behalf shall be entitled to rely upon the following non-exclusive methods of establishing the prospective purchaser's ownership and discretionary investments of securities:

(i) The prospective purchaser's most recent publicly available financial statements, *Provided* That such statements present the information as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;

(ii) The most recent publicly available information appearing in documents filed by the prospective purchaser with the Commission or another United States federal, state, or local governmental agency or self-regulatory organization, or with a foreign governmental agency or self-regulatory organization, *Provided* That any such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;

(iii) The most recent publicly available information appearing in a recog-

nized securities manual, *Provided* That such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser; or

(iv) A certification by the chief financial officer, a person fulfilling an equivalent function, or other executive officer of the purchaser, specifying the amount of securities owned and invested on a discretionary basis by the purchaser as of a specific date on or since the close of the purchaser's most recent fiscal year, or, in the case of a purchaser that is a member of a family of investment companies, a certification by an executive officer of the investment adviser specifying the amount of securities owned by the family of investment companies as of a specific date on or since the close of the purchaser's most recent fiscal year;

(2) The seller and any person acting on its behalf takes reasonable steps to ensure that the purchaser is aware that the seller may rely on the exemption from the provisions of section 5 of the Act provided by this section;

(3) The securities offered or sold:

(1) Were not, when issued, of the same class as securities listed on a national securities exchange registered under section 6 of the Exchange Act or quoted in a U.S. automated inter-dealer quotation system; *Provided*, That securities that are convertible or exchangeable into securities so listed or quoted at the time of issuance and that had an effective conversion premium of less than 10 percent, shall be treated as securities of the class into which they are convertible or exchangeable; and that warrants that may be exercised for securities so listed or quoted at the time of issuance, for a period of less than 3 years from the date of issuance, or that had an effective exercise premium of less than 10 percent, shall be treated as securities of the class to be issued upon exercise; and *Provided further*, That the Commission may from time to time, taking into account then-existing market practices, designate additional securities and classes of securities that will not be deemed of the same class as securities listed on a national securities exchange or quoted

in a U.S. automated inter-dealer quotation system; and

(ii) Are not securities of an open-end investment company, unit investment trust or face-amount certificate company that is or is required to be registered under section 8 of the Investment Company Act; and

(4)(i) In the case of securities of an issuer that is neither subject to section 13 or 15(d) of the Exchange Act, nor exempt from reporting pursuant to Rule 12g3-2(b) (§240.12g3-2(b) of this chapter) under the Exchange Act, nor a foreign government as defined in Rule 405 (§230.405 of this chapter) eligible to register securities under Schedule B of the Act, the holder and a prospective purchaser designated by the holder have the right to obtain from the issuer, upon request of the holder, and the prospective purchaser has received from the issuer, the seller, or a person acting on either of their behalf, at or prior to the time of sale, upon such prospective purchaser's request to the holder or the issuer, the following information (which shall be reasonably current in relation to the date of resale under this section): a very brief statement of the nature of the business of the issuer and the products and services it offers; and the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available).

(ii) The requirement that the information be *reasonably current* will be presumed to be satisfied if:

(A) The balance sheet is as of a date less than 16 months before the date of resale, the statements of profit and loss and retained earnings are for the 12 months preceding the date of such balance sheet, and if such balance sheet is not as of a date less than 6 months before the date of resale, it shall be accompanied by additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than 6 months before the date of resale; and

(B) The statement of the nature of the issuer's business and its products

and services offered is as of a date within 12 months prior to the date of resale; or

(C) With regard to foreign private issuers, the required information meets the timing requirements of the issuer's home country or principal trading markets.

(e) Offers and sales of securities pursuant to this section shall be deemed not to affect the availability of any exemption or safe harbor relating to any previous or subsequent offer or sale of such securities by the issuer or any prior or subsequent holder thereof.

[55 FR 17945, Apr. 30, 1990, as amended at 57 FR 48722, Oct. 28, 1992]

§ 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.

PRELIMINARY NOTE: Rule 145 (§230.145 of this chapter) is designed to make available the protection provided by registration under the Securities Act of 1933, as amended (Act), to persons who are offered securities in a business combination of the type described in paragraphs (a) (1), (2) and (3) of the rule. The thrust of the rule is that an *offer*, *offer to sell*, *offer for sale*, or *sale* occurs when there is submitted to security holders a plan or agreement pursuant to which such holders are required to elect, on the basis of what is in substance a new investment decision, whether to accept a new or different security in exchange for their existing security. Rule 145 embodies the Commission's determination that such transactions are subject to the registration requirements of the Act, and that the previously existing *no-sale* theory of Rule 133 is no longer consistent with the statutory purposes of the Act. *See* Release No. 33-5316 (October 6, 1972) [37 FR 23631]. Securities issued in transactions described in paragraph (a) of Rule 145 may be registered on Form S-4 or F-4 (§239.25 or §239.34 of this chapter) or Form N-14 (§239.23 of this chapter) under the Act.

Transactions for which statutory exemptions under the Act, including those contained in sections 3(a)(9), (10), (11) and 4(2), are otherwise available are not affected by Rule 145.

NOTE 1: Reference is made to Rule 153a (§230.153a of this chapter) describing the prospectus delivery required in a transaction of the type referred to in Rule 145.

NOTE 2: A reclassification of securities covered by Rule 145 would be exempt from registration pursuant to section 3(a)(9) or (11) of the Act if the conditions of either of these sections are satisfied.