Treasurer of the United States. A weekly transmittal of all SIAP changes and additions may be obtained by subscription at an annual rate of $150.00 per annum from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Additional copies mailed to the same address may be ordered for $30.00 each.

Since a situation exits that requires immediate adoption of this amendment, I find that further notice and public procedure hereon is impracticable and good cause exists for making it effective in less than 30 days.

In consideration of the foregoing, Part 97 of the Federal Aviation Regulations is amended as follows, effective on the dates specified:

1. Section 97.23 is amended by originating, amending, or canceling the following VOR–VOR/DME SIAPs, effective June 13, 1974:

Eugene, Ore.—Mahlon-Sweet Field, VORTAC Rwy 3, Orig.
Hobbs, N.M.—Cross Roads Intercontinental Arpt., VOR–A, Amdt. 1, canceled.
Hobbs, N.M.—Crossroads Intercontinental Arpt., VOR/DME Rwy 21, Amdt. 1, canceled.
Lafayette, Ind.—Purdue University Arpt., VOR–A, Amdt. 16.

* * * effective May 9, 1974:

Detroit, Mich.—Detroit City Arpt., VOR Rwy 33, Amdt. 14.

* * * effective April 19, 1974:

Indianapolis, Ind.—Indianapolis/Weir-Cook/Municipal Arpt., VOR Rwy 13, Amdt. 17.

2. Section 97.25 is amended by originating, amending, or canceling the following SDF–LOC–LDA SIAPs, effective June 13, 1974:

Atlanta, Ga.—The William B. Hartsfield Atlanta Int'l. Arpt., LOC (BC) Rwy 9R, Orig.

* * * effective April 19, 1974:

Indianapolis, Ind.—Indianapolis/Weir-Cook/Municipal Arpt., LOC (BC) Rwy. 13, Amdt. 5.

3. Section 97.27 is amended by originating, amending, or canceling the following NDB/ADF SIAPs, effective June 13, 1974:

Lafayette, Ind.—Purdue University Arpt., NDB Rwy 10, Amdt. 4.
Troutdale, Ore.—Portland-Troutdale Arpt., NDB–A, Amdt. 2.
Walla Walla, Wash.—Walla Walla City-County Arpt., NDB Rwy 20, Amdt. 1.

* * * effective May 9, 1974:

Searcy, Ark.—Searcy Municipal Arpt., NDB Rwy 01, Orig.

* * * effective April 19, 1974:

Indianapolis, Ind.—Indianapolis/Weir-Cook/Municipal Arpt., NDB Rwy 31, Amdt. 6.

4. Section 97.29 is amended by originating, amending, or canceling the following ILS SIAPs, effective June 13, 1974:

Atlanta, Ga.—The William B. Hartsfield Atlanta Int'l. Arpt., ILS Rwy 27L, Amdt. 1.
Lafayette, Ind.—Purdue University Arpt., ILS Rwy, 10, Amdt. 2.
Walla Walla, Wash.—Walla Walla City-County Arpt., ILS Rwy 20, Amdt. 1.

* * * effective April 19, 1974:

Indianapolis, Ind.—Indianapolis/Weir-Cook/Municipal Arpt., ILS Rwy 31, Amdt. 7.

5. Section 97.31 is amended by originating, amending, or canceling the following RADAR SIAPs, effective June 13, 1974:

Beaumont-Port Arthur, Tex.—Jefferson County Arpt., RADAR–1, Orig.

* * * effective April 19, 1974:

Indianapolis, Ind.—Indianapolis/Weir-Cook/Municipal Arpt., RADAR–1, Amdt. 20.

(Secs. 307, 313, 601, 1110, Federal Aviation Act of 1948; 49 U.S.C. 1438, 1354, 1421, 1510; sec. 6(c) Department of Transportation Act, (49 U.S.C. 1655(c)), (5 U.S.C. 552(a)(1)))

Issued in Washington, D.C., on April 25, 1974.

JAMES M. VINES,
Chief, Aircraft Programs Division.

NOTE: Incorporation by reference provisions in §§ 97.10 and 97.20 approved by the Director of the FEDERAL REGISTER on May 12, 1969, (35 FR 5610).

[FR Doc.74–9997 Filed 5–1–74;8:45 am]

Title 17—Commodity and Securities Exchanges

CHAPTER II—SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–5483, 34–10746, 35–18383, 40–8315, AS–154]

PART 210—FORM AND CONTENT OF FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, AND INVESTMENT COMPANY ACT OF 1940

Consolidated Financial Statements

The Commission today adopted amendments to Rule 4–02 [17 CFR 210.4–02] and rescinded Rule 4–07 [17 CFR 210.4–07] of Regulation S–X, both relating to requirements for consolidated and combined financial statements. This action was originally proposed on December 13, 1973, in Securities Act Release No. 5445 (34–10556, 35–18216, IC–8137) [38 FR 35333].

The rescission of Rule 4–07 eliminates the restriction on consolidation of subsidiaries engaged in financial and nonfinancial activities contained in Rule 4–07(b). Consolidated financial statements will now be subject to the general provisions of Rule 4–02(a) that a "registrant shall follow * * * principles of inclusion or exclusion which will clearly exhibit the financial position and results of operations."

The amendment to Rule 4–02 continues the present requirement of Rule 4–07 for supporting financial statements of consolidated subsidiaries engaged in certain financial activities. Consideration should also be given to improving the disclosure in annual reports to stockholders by including this information, suitably condensed, as supporting financial statements or as line of business disclosure. Although information concerning nonfinancial activities is not specifically required, such information may be given if deemed appropriate for a better understanding of registrant's business. The Financial Accounting Standards Board is considering the matter of reporting by diversified companies including the extent of disclosure of information about the different segments. These requirements will be reconsidered when a statement on this matter is adopted by the FASB.

A subparagraph added to Rule 4–02(a) is intended to prevent consolidation of subsidiaries of a registrant subject to the Bank Holding Company Act of 1956 as to which a decision has been made requiring divestiture or in cases where there is a substantial likelihood that divestiture will be necessary in order for registrant to comply with provisions of the Act.

Commission action. The Commission hereby amends Part 210 of 17 CFR Chapter II by revising § 210.4–02 by the addition of new paragraphs (a)(3) and (e) and rescinding § 210.4–07. The amended material reads as follows:

§ 210.4–02 Consolidated financial statements of the registrant and its subsidiaries.

(a) * * *

(3) Any subsidiary or group of subsidiaries of a registrant subject to the Bank Holding Company Act of 1956 as amended as to which (i) a decision requiring divestiture has been made, or (ii) there is substantial likelihood that divestiture will be necessary in order to comply with provisions of the Bank Holding Company Act.

* * * * *

(e) Separate financial statements shall be presented for each subsidiary or group of subsidiaries engaged in the business of life insurance, fire and casualty insurance, securities broker-dealer, finance, savings and loan or banking, including bank related finance activities; provided, however, that separate financial statements may be omitted:

(1) For a consolidated subsidiary or group of subsidiaries in the same business in which the registrant's and registrant's other subsidiaries' proportionate share of total assets or total sales and revenues (after intercompany eliminations) exceeds 90 percent of consolidated assets or consolidated sales and revenues.

(2) For a nonsignificant consolidated subsidiary which is registrant's only subsidiary in a business, or for a group of consolidated subsidiaries constituting all of registrant's subsidiaries in the same business which if considered in the aggregate would not constitute a significant subsidiary.

(3) For a consolidated subsidiary or group of subsidiaries in the same business if in excess of 90 percent of their sales and revenues are derived from registrant and registrant's other subsidiaries.

§ 210.4–07 [Revoked]

(Secs. 6, 7, 8, 10, and 19(a), Securities Act of 1933; secs. 13, 15(d) and 23(a), Securities Exchange Act of 1934; secs. 5(b), 14 and 20(a), Public Utility Holding Company Act of

1935; secs. 8, 30, 31(c) and 38(a), Investment Company Act of 1940)

The amendments shall be effective with respect to financial statements filed with the Commission subsequent to May 31, 1974.

By the Commission.

GEORGE A. FITZSIMMONS,
Secretary.

APRIL 19, 1974.

[FR Doc.74-10078 Filed 5-1-74;8:45 am]

[Release No. 33-5487]

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

Transactions By an Issuer Deemed Not To Involve Any Public Offering

The Securities and Exchange Commission today announced the adoption of Rule 146 (17 CFR 230.146) under the Securities Act of 1933 ("Act") which had been first noticed for comment in Securities Act Release No. 5336 (November 28, 1972) (37 FR 26137) and which had been reproposed for comment in revised form in Securities Act Release No. 5430 (October 10, 1973) (38 FR 28951). The adopted rule reflects a number of changes from the rule as last proposed. The changes are discussed in this release.

The Rule is designed to provide more objective standards for determining when offers or sales of securities by an issuer would be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Act and thus would be exempt from the registration provisions of the Act. The Rule is available only to issuers since section 4(2) provides an exemption for only the issuer. The Rule is not, however, the exclusive basis for determining whether that exemption is available. Accordingly, although persons claiming the exemption have the burden of proving its availability, persons may continue to rely on the section 4(2) exemption by complying with the relevant administrative and judicial interpretations in effect at the time of the transaction. The protection afforded by the Rule, however, is available only to those who satisfy all its conditions.

RULE 146

This release contains a general discussion of the background, purpose and general effect of the Rule to assist in a better understanding of its provisions. A brief analysis of each paragraph of the Rule is also included. However, attention is directed to the Rule itself for a more complete understanding.

BACKGROUND AND PURPOSE

Congress, in enacting the federal securities laws, created a continuous disclosure system designed to protect investors and to assure the maintenance of fair and honest securities markets. The Commission, in administering and implementing these laws, has sought to coordinate and integrate this disclosure system with the exemptive provisions provided by such laws. Rule 146 is a further effort in this direction.

The legislative history of the Securities Act of 1933 indicates that the main concern of Congress was to provide full and fair disclosure in connection with the offer and sale of securities. However, Congress recognized that there were certain situations in which the protections afforded by the Act were not necessary. Concerning those specified exemptions from the Act, of which section 4(2) is one, the House Report stated that "The Act carefully exempts from its applications certain types of * * * securities transactions where there is no practical need for its application or where the public benefits are too remote."[1]

Section 4(2) of the Act provides that "the provisions of section 5 shall not apply to * * * transactions by an issuer not involving any public offering." The phrase "transactions * * * not involving any public offering" is not defined in the Act[2] or, except in limited circumstances, in the existing rules under the Act. Accordingly, it has been left to Commission interpretations and court decisions to define the scope of the exemption.

The Supreme Court in the Ralston Purina[3] case established the basic criteria to be considered in determining the availability of section 4(2). The main consideration is whether the offerees need the protection afforded by the Act as evidenced by whether the offerees have "access" to the same kind of information that registration would disclose and whether they are able to fend for themselves. The application of these criteria and other guidelines set forth from time to time by the Commission and the courts has resulted in uncertainty about the availability of the exemption. In addition, some misconceptions have arisen in connection with certain methods used by persons who seek to claim the exemption.

For example, the questions arising under section 4(2) have generally dealt with what constitutes a non-public offering or a private offering. It has been asserted that an offering to a limited number of persons, not more than twenty-five, for example, does not involve a public offering. This is not by itself an appropriate test. As the Supreme Court stated in Ralston Purina, "the statute would seem to apply to a 'public offering' whether to few or many." 46 U.S. at 125. The Commission continues to be of the opinion that the question is not to be determined exclusively by the number of offerees.

Further, it is frequently asserted that wealthy persons and certain other persons such as lawyers, accountants and businessmen are "sophisticated" investors who do not need the protections afforded by the Act. It is the Commission's view that "sophistication" is not a substitute for access to the same type of information that registration would provide, and that a person's financial resources or sophistication are not, without more, sufficient to establish the availability of the exemption.[4]

On the other hand, the Commission is of the view that an offeree need not be an insider such as an officer or director of the issuer in order to have access to information. As a note to the Rule indicates, access can only exist by reason of the offeree's position with respect to the issuer. Position means an employment or family relationship or economic bargaining power that enables an offeree to obtain information from the issuer in order to evaluate the merits and risks of the investment as distinguished from situations where such position does not exist and the issuer voluntarily offers to provide or provides such information.

Moreover, it has been argued that the exemption is established by the issuer merely providing a brochure, or other writing, to the offerees containing the same kind of information that is found in a registration statement. The Commission is of the review that the mere disclosure of the same kind of information that would be contained in a registration statement is not sufficient in itself to establish the availability of an exemption under section 4(2) of the Act.[5]

It also has been argued that the private offering exemption can be established where it is represented that the securities are held for investment, where resale is restricted, and where the number of transferees is limited. In this regard, the practice has developed whereby issuers obtain investment letters from purchasers and cause a legend to be imprinted on the face of each certificate restricting transfer. As the Commission and the courts[6] have previously stated, the signing of an investment letter and the legending of stock certificates are not sufficient to render an offering a private one. Although such precautions should be taken by issuers to protect their claim of exemption by assuring that their purchasers will not in turn distribute securities to others, these are only precautions to prevent illegal distributions and are not, by themselves, to be regarded as a sufficient basis for an exemption from registration for the issuer.

The Commission believes that a rule creating greater certainty in the application of the section 4(2) exemption is in the public interest for two reasons.

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[1] H.R. Rep. No. 85, 73rd Cong., 1st Sess. 5 (1933).

[2] The House Report does indicate that the exemption was originally intended to permit an issuer to make a specific or isolated sale of its securities to a particular person or financial institution. *Id.* at p. 15-16.

[3] SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

[4] United States v. Custer Channel Wing Corp., 376 F. 2d 675 (4th Cir. 1967); SEC v. Tax Service, Inc., 357 F. 2d 143 (4th Cir. 1966).

[5] See SEC v. Continental Tobacco Company of South Carolina, Inc., 463 F. 2d 137 (5th Cir. 1972); Hill York Corp. v. Freeman, 448 F. 2d 680 (5th Cir. 1971).

[6] United States v. Custer Channel Wing, 376 F. 2d 675 (4th Cir. 1967).

First, such a rule should deter reliance on that exemption for offerings of securities to persons who are unable to fend for themselves in terms of obtaining and evaluating information about the issuer and in certain situations, of assuming the risk of investment. These persons need the protections afforded by the registration process. Second, such a rule should reduce uncertainty to the extent feasible and provide more objective standards upon which responsible businessmen may rely in raising capital in a manner that complies with the requirements of the Act.

The Rule is designed to protect investors while at the same time providing more objective standards in order to curtail uncertainty to the extent feasible. In view of the legislative history, statutory language, judicial decisions, and the Commission's reexamination of its interpretations of section 4(2) of the Act, the Commission is of the view that the significant concepts in determining when transactions are deemed not to involve any public offering are access to the same kind of information that registration would disclose and the ability of offerees to fend for themselves so as not to need the protections afforded by registration.

GENERAL DESCRIPTION

Rule 146 provides that transactions by an issuer involving the offer or sale of its securities shall be deemed not to involve any public offering within the meaning of section 4(2) of the Act if they are part of an offering that meets all the conditions of the Rule. These conditions relate to limitations on the manner of offering, the nature of the offerees, access to or furnishing of information about the issuer, limitations on the number of purchasers and limitations on the subsequent disposition of securities acquired pursuant to the Rule.

First, in determining whether an offeree needs the protections afforded by registration, it is essential to consider whether the offeree has access to or has been furnished with the same kind of information that registration would disclose as well as an opportunity to acquire additional information necessary to verify that disclosure. Accordingly, conditions relating to information concerning the issuer which must be available to the offeree or his representative are included in the Rule.

Second, in order to assure that the offerees can fend for themselves, the availability of the Rule is conditioned on the nature of the offerees. Thus, the issuer and any person acting on its behalf shall have reasonable grounds to believe, and shall believe, immediately prior to making an offer, either that the offeree has such knowledge and experience that he is capable of evaluating the merits and risks of the proposed investment or that the offeree can bear the economic risk of the investment. In addition, immediately prior to a sale, the issuer and any person acting on its behalf, after making reasonable inquiry, shall have reasonable grounds to believe and shall believe either that the offeree himself has the requisite knowledge and experience, or that the offeree and his offeree representative(s) have such knowledge and experience and that the offeree himself is capable of bearing the economic risk of the investment. The concept of bearing the economic risk of the investment is not inconsistent with the discussion in Ralston Purina about the offeree's ability to fend for himself. The Rule contains special provisions in this regard for offerings in connection with certain types of business combinations.

Third, the Commission believes that there must be limitations on the manner of offering securities pursuant to the exemption to assure that persons to whom such securities are offered have the necessary information available concerning the issuer and can fend for themselves. To assure the non-public manner of the offering, the Rule precludes general advertising or general solicitation, including promotional seminars or meetings in connection with the offering. The Rule would not preclude meetings with certain qualified offerees or with certain other qualified offerees and their offeree representatives to discuss the terms of and to impart information about the offering.

Fourth, the Commission believes that a limitation on the number of purchasers serves to assure that the offering does not involve or result in a deferred distribution. Limitations on the disposition of securities are necessary to assure that the offering does not involve a series of steps resulting in a distribution.

The Rule is only available to issuers of securities and is not available to affiliates of the issuer or other persons for sales of the issuer's securities. Persons who acquire securities from issuers in transactions complying with the Rule acquire securities that are restricted in that they can be reoffered and resold only if registered under the Act or pursuant to an exemption from such registration provisions. In this connection, Rule 144 (17 CFR 230.144) under the Act provides objective standards for the public resale of restricted securities. (See Securities Act Release No. 5223) (37 FR 596, 4329). Rule 146 has been adopted in the context of, and in conjunction with, several rules, amendments to rules and forms, and releases which the Commission has recently adopted or issued including:

1. Rule 144 under the Act (Securities Act Release No. 5223) (37 FR 596, 4329), as amended, Securities Act Release No. 5307 (37 FR 20558) and Securities Act Release No. 5452 (39 FR 6069).

2. Rule 145 (17 CFR 230.145) under the Act (Securities Act Release No. 5316) (37 FR 23636).

3. Adoption of Form S–16 (17 CFR 239.27) under the Act for securities offered in certain specified transactions (Securities Act Release No. 5117) (37 FR 777) and adoption of amendments to Form S–16 to liberalize the conditions under which the form could be used (Securities Act Release No. 5265) (37 FR 15990, 15991).

4. Amendments to Regulation A under Section 3(b) of the Act (Securities Act Release No. 5225) (37 FR 599).

5. Publication of a release relating to the use of legends and stop-transfer instructions as evidence of non-public offerings (Securities Act Release No. 5121) (36 FR 1525).

6. Publication of a release relating to the applicability of the anti-fraud provisions of the Securities Act to certain practices in connection with transactions by issuers and others not involving public offerings (Securities Act Release No. 5226) (37 FR 600).

7. Amendments to Forms 10–K (17 CFR 249.310) and 10–Q (17 CFR 249.308a) under the Securities Exchange Act of 1934 (Exchange Act) to require disclosure of securities sold pursuant to section 4(2) of the Act (Securities Exchange Act Release No. 9443) (36 FR 601, 4331).

8. Adoption of Rule 15c2–11 (17 CFR 240.15c2–11) under the Exchange Act which requires that dealers have adequate information available concerning any issuer in whose securities they make a market (Securities Exchange Act Release No. 9310) (36 FR 18641).

9. Adoption of amendments to Form 10–K to require more meaningful disclosure in reports on that Form (Securities Exchange Act Release No. 10180) (38 FR 17202).

SYNOPSIS OF THE PROVISIONS OF RULE 146

Preliminary notes. Preliminary Notes to the Rule briefly describe the Rule and make clear that all transactions which are, applying traditional integration standards, part of an offering must meet all the conditions of the Rule for it to be available. The Preliminary Notes also emphasize that compliance with all the conditions of the Rule is not the exclusive means of establishing an exemption pursuant to section 4(2) of the Act, that attempted compliance with Rule 146 does not act as an election, that the Rule does not relieve issuers from requirements of state securities laws, and that the Rule is an issuer's rule only. Another Preliminary Note makes clear that, for purposes of the Rule, clients of an investment adviser, customers of a broker or dealer, trusts administered by a bank trust department or persons with similar relationships will be considered to be the "offerees" or "purchasers," regardless of the amount of discretionary authority held by such investment adviser, broker or dealer, bank trust department, or other person. In addition, the Preliminary Notes restate the Commission's position, as with respect to Rules 144 and 147, that this Rule is not available to any issuer with respect to any transactions which, although in technical compliance with the Rule, are part of a plan or scheme to evade the registration provisions of the Act. In such cases registration pursuant to the Act is required.

Definitions — Offeree representative Rule 146(a)(1). The term "offeree representative" is defined in paragraph (a)(1) of the Rule as a person who the issuer

and any person acting on its behalf have, after making reasonable inquiry, reasonable grounds to believe and believe is not an affiliate, director, officer or other employee, or beneficial owner of 10 percent or more of the equity of the issuer (except when the offeree is a specified relative of such person or a trust or organization with which such person and/or such relative has a specified relationship) (subdivision (i)); has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment (subdivision (ii)); is acknowledged, in writing, by the offeree during the course of the transaction to be his offeree representative (subdivision (iii)); and disclose to the offeree, in writing, any material relationship existing or mutually understood to be contemplated between himself or his affiliates and the issuer or its affiliates or any such relationship which existed during the previous two years, and any compensation received as a result of such relationship (subdivision (iv)). As was noted in the release accompanying the Rule as proposed for comment in October 1973, the acknowledgment and disclosure of relationships must be made with respect to each prospective investment even in the case of a discretionary account. Where an adviser with discretionary authority wants to act as offeree representative, the Rule requires that the acknowledgment specified in paragraph (a)(1)(iii) of the Rule be obtained for each transaction. Accordingly, advance blanket acknowledgment for "all securities transactions" or "all private placements" or similar broad advance acknowledgments will not satisfy the Rule. This is particularly important, since the offeree representative is required by paragraph (a)(1)(iv) of the Rule to disclose to the offeree, in writing, any material relationships between the adviser and the issuer. This disclosure is required in connection with each offering pursuant to the Rule in order that the offeree be given an opportunity to consider any conflicts of interest the adviser may have prior to acknowledging the adviser as his offeree representative for the particular offering. A note has been added to the offeree representative definition making clear that where an offeree representative or its affiliates has a material relationship with the issuer or its affiliates, disclosure of such relationship does not relieve the offeree representative of its obligation to act in the interest of the offeree.

Several changes were made from the rule as last proposed. As proposed in October 1973, no affiliate, associate or employee of the issuer could be an offeree representative, except in specified situations; as adopted, the term "associate" has been deleted, but the definition now precludes officers and directors of the issuer, as well as 10 percent stockholders, from being offeree representatives, except in specified situations. In addition, the adopted Rule requires disclosure of any material relationship between the offeree representative or its affiliates and the issuer or its affiliates. The qualifier "material" is new to the Rule (and is defined in subparagraph (a)(4)) and disclosure of relationships with affiliates of the offeree representative is also new. The Rule also makes clear that an offeree can have more than one offeree representative. A note has been added reminding persons to consider the applicability of the Exchange Act and the Investment Advisers Act of 1940.

Issuer: Rule 146(a)(2). For purposes of the Rule the definition of issuer in Section 2(4) of the Act applies. However, paragraph (a)(2) includes a definition of "issuer" for purposes of offerings of certain securities in connection with proceedings under the Bankruptcy Act. The rule as proposed in October 1973 contained a definition of issuer for certain offerings involving partnerships. This has been deleted from the Rule as adopted because it was ambiguous and the Commission determined that Rule 146 was not the appropriate place to deal with that question at this time.

Affiliate: Rule 146(a)(3). A definition of "affiliate," similar to that in Rule 144 under the Act, has been added to the Rule.

Material: Rule 146(a)(4). A definition of "material" as it relates to the "material relationships" that must be disclosed by the offeree representative (subparagraph (a)(1)) and by the issuer (subparagraph (e)(3)) has been added to make clear that materiality is to be determined from the reasonable investor's point of view and not through some formula measuring the importance of the transaction to the offeree representative or the issuer. The definition is based on that used by the Supreme Court in Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 154 (1972).

Deletion of proposed rule 146(a)(2): direct communication. The term "direct communication" has been deleted from the Rule, although the substantive requirement of an opportunity for the offeree or his offeree representative to ask questions of, and receive answers from, the issuer or a person acting on its behalf, has been retained. The requirement is now part of paragraph (e), "Access to or Furnishing of Information."

Deletion of proposed rule 146(a)(3): Executive Officer. The definition of executive officer has been deleted from the definition section of the Rule because the term no longer appears in paragraph (g) of the Rule. The exclusion of "executive officers" from the count of thirty-five purchasers in a twelve month period is not necessary since the twelve month period has been abandoned as explained under paragraphs (b) and (g).

Rule 146(b): conditions to be met. Paragraph (b) of the Rule provides that transactions by an issuer involving the offer, offer to sell, offer for sale, or sale of securities of the issuer that are part of an offering that is made in accordance with all the conditions of the Rule are deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Act.

The Rule does not define "offering", as stated in the Preliminary Notes. In most cases, the traditional integration standards, as set forth in the Preliminary Notes, would have to be applied in order to determine what offers, offers to sell, offers for sale, and sales are part of an offering. The Rule, as adopted, does contain a safe harbor provision similar to that in Rule 147. In general, for purposes of the Rule only, an offering will be deemed not to include any offers, offers to sell, offers for sale or sales of securities of the issuer that take place prior to the six month period immediately preceding or after the six month period immediately following any offers, offers for sale, or sales pursuant to Rule 146, if during both of said six month periods there were no offers or sales of securities by or for the issuer of the same or similar class as those offered or sold pursuant to the Rule. If there were offers or sales during the six month periods before or after the offering pursuant to the Rule, the traditional integration factors set forth in Preliminary Note 3 would have to be looked to for guidance as to whether or not those offers or sales would be integrated with those made pursuant to the Rule. This concept of offering also relates specifically to the limitation on number of purchasers in paragraph (g) since that condition has been revised to limit to thirty-five the number of purchasers in any offering, as opposed to in any twelve month period, as proposed.

Rule 146(c): Limitations on manner of offering. Paragraph (c) of the Rule specifies limitations on the manner in which the securities can be offered and sold. The Rule prohibits the issuer or any person acting on its behalf from offering or selling the securities through any form of general advertising or general solicitation including, but not limited to, advertisements or other communications in newspapers, magazines, or other media; broadcasts on radio or television; seminars or promotional meetings or any letter, circular, or other written communication.

The prohibition on general advertising and general solicitation does not necessarily mean that there can be no meetings or written communication. It means that any such meetings can involve only offerees and their offeree representatives who can satisfy the conditions of paragraph (d), "Nature of Offerees," and that any written material can be distributed only to offerees who satisfy the conditions of paragraph (d) and only if such communications contain an undertaking to provide the information specified in paragraph (e)(1) on request. Of course, any person acting on behalf of the issuer can attend such meetings or seminars without satisfying the conditions of paragraph (d), assuming that he is not and will not become an offeree. The substance of the requirement that there will be direct communication has been moved from paragraph (c) of the Rule to Paragraph (e), "Access to and Furnishing of Information."

Rule 146(d): Nature of offerees. Paragraph (d)(1) of the Rule requires that

the issuer and any person acting on its behalf shall have reasonable grounds to believe and shall believe immediately prior to making an offer either that the offeree has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or that an offeree can bear the economic risk of the investment. Subparagraph (d)(2) requires that immediately prior to making a sale, the issuer and any person acting on its behalf, after making reasonable inquiry, shall have reasonable grounds to believe and shall believe either (1) that the offeree has the requisite knowledge and experience, or (2) that the offeree and his offeree representative(s) have the requisite knowledge and experience and that the offeree is a person who is able to bear the economic risk of the investment.

The Commission has determined to retain the economic risk test for offerees who need the knowledge and experience of an offeree representative in order to be qualified purchasers. This is necessary in order to control the types of persons to whom offers can be made. The Commission believes that the determination of "ability to bear the economic risk" will vary with the circumstances. Important considerations are whether the offeree could afford to hold unregistered securities for an indefinite period, and whether, at the time of the investment, he could afford a complete loss.

The structure of paragraphs (d)(1) and (d)(2) has been changed from the rule as proposed so that the sequence of events is clearer. The substance, however, is not significantly different. In addition, the requirement that the issuer make reasonable inquiry as to the offeree's qualifications prior to sale to the offeree has been made explicit. If, as a result of inquiry after the offer, but before the sale, or otherwise, the issuer discovers that the offeree was not qualified, the Rule is still available as to the offer if the issuer had reasonable grounds to believe and believed, immediately prior to making the offer, that the offeree was qualified.

The same would be true if it is discovered after a sale that the purchaser did not in fact meet the standards of paragraph (d)(2), as long as the issuer had had reasonable grounds to believe, and had believed, that the offeree met the standards of paragraph (d)(1) and, after making reasonable inquiry, that he met the standards of paragraph (d)(2). The rule as proposed contained a paragraph (d)(3) which was an attempt to clarify the above point. However, paragraph (d)(3) has been deleted because it was extraneous.

Rule 146(e): Access to or Furnishing of Information. Paragraph (e) of the Rule requires that the offeree have access to the same kind of information that is required by Schedule A of the Act to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense (paragraph (e)(1)(i)) or that the offeree or his offeree representative be furnished, during the course of the transaction and prior to sale, such information (paragraph (e)(1)(ii)). The term "access" is used in the Rule in the same sense that it has been used by courts and the Commission in the past—to refer to the offeree's position with respect to the issuer. This position can only exist because of an employment or family relationship or economic bargaining power that enables a person to obtain information from the issuer in order to evaluate the merits and risks of the prospective investment. A note to the Rule reflects the foregoing.

In addition, the offeree or his offeree representative must have available to him the opportunity to obtain any additional information necessary to verify the accuracy of the information obtained pursuant to paragraph (e)(1) to the extent the issuer possesses such information or can acquire it without unreasonable effort or expense (paragraph (e)(2)). The direct communication requirement in paragraph (c) of the rule as proposed was incorporated in substance into paragraph (e)(2) where it is more relevant. Such verification and opportunity for communication are appropriate in view of the absence of the statutory safeguards and sanctions attendant to the registration process, as well as the absence of traditional underwriter's due diligence. An explanatory note to this paragraph makes clear that information need not be continued to be furnished nor the opportunities for verification continued with respect to those offerees who have indicated that they are not interested in purchasing the securities offered, or to those to whom the issuer or any person acting on its behalf has determined not to sell (except where an undertaking was made pursuant to paragraph (c)(3)).

In order to provide standards for the types of information that would satisfy the conditions of paragraph (e)(1)(ii), the Rule has been revised to specify more meaningfully the information required to be furnished by reporting and nonreporting issuers. An issuer subject to the reporting provisions of the Exchange Act may satisfy the provisions of paragraph (e)(1)(ii) by providing each offeree or his representative with the information contained in the annual report required to be filed under that Act or in a registration statement on Form S–1 under the Act, or on Form 10 under the Exchange Act, whichever is the most recent required to be filed. In addition, the issuer must provide the information contained in any definitive proxy statement required to be filed, and in any reports or documents required to be filed by the issuer in compliance with Section 13 or 15(d) of the Exchange Act, since the filing of the annual report or registration statement. The issuer must also provide each offeree with a brief description of the securities being offered, the intended use of proceeds and any material changes in the issuer's affairs not disclosed in the forms filed. The Rule permits the information to be provided to offerees in one document, such as an offering circular, since the combined document may make the information more readily understandable.

Non-reporting issuers may satisfy paragraph (e)(1)(ii) by providing the information specified by the registration statement form which the issuer would be entitled to use, except that where certified financial statements are not available and cannot be obtained without unreasonable effort or expense, they may be provided on an unaudited basis.

A new subdivision of the Rule, paragraph (e)(1)(ii)(c), provides that exhibits required to be filed with registration statements and reports need not be given to the offeree or his representative as long as such exhibits are described and are available for inspection pursuant to paragraph (e)(2).

Paragraph (e)(3) requires, as it did in the proposal, that the issuer or any person acting on its behalf inform each offeree prior to sale and in writing, of the need to bear the economic risk of investment because the securities are not registered and of the restrictions on resale. In addition, the Rule now requires that the issuer or any person acting on its behalf disclose to each offeree, prior to sale, in writing, any material relationship between the offeree's offeree representative or its affiliates and the issuer or its affiliates of the type described in paragraph (a)(1)(iv). This additional requirement has been added because of the importance of this disclosure and because the burden for complying with the Rule must ultimately rest on the issuer.

Rule 146(f): Business combinations. Paragraph (f) of the Rule on business combinations has been substantially revised in form, although the substance is similar to that in the rule as last proposed for comment. Instead of including a definition of "business combination" in the rule itself, the Rule now refers to any transaction of the type described in paragraph (a) of Rule 145. The Rule 145 definition of business combination does not include an exchange offer although the October 1973 Rule 146 proposal did. In an exchange offer the issuer has a choice of offerees and, therefore, does not need the special provisions of paragraph (f).

Paragraph (f)(2) of the Rule provides that paragraph (d) of the Rule, "Nature of Offerees," does not apply to business combinations, but paragraph (f)(3) goes on to require that the issuer and any person acting on its behalf, after making reasonable inquiry, shall have reasonable grounds to believe and shall believe, prior to the submission of any plan for a business combination to security holders for their approval, that each offeree alone or with his offeree representative(s) has the requisite knowledge and experience.

Paragraph (f)(3) means that an offeree who needs an offeree representative in order to satisfy the knowledge and experience test, and who refuses to have one, may make the Rule unavailable for the transaction. Numerous comments on this point were received in response to a similar condition in the rule as last proposed. Although the Commission is aware of the possible problems this may cause,

the Commission does not believe that it can allow satisfaction of the state corporate law requirements as to business combinations to replace satisfaction of the federal securities laws. The Rule has been revised, however, to provide that paragraph (h)(4), which requires a written agreement from the purchaser that the securities will not be sold without registration or an exemption therefrom, will not apply to business combinations because of the difficulty of obtaining such an agreement in some cases where the purchasers are a group over which the issuer has no control. The securities acquired are restricted, however, in the same manner as other securities acquired pursuant to the Rule, and the issuer, for its own protection, should consider obtaining appropriate letters. The Rule also provides that the issuer must, in connection with the information furnished pursuant to paragraph (e)(3), inform each offeree in writing about any terms of the transaction relating to any security holder that are not proposed to be identical to those relating to all other security holders (paragraph (f)(4)).

The rule as proposed contained a provision that certain written communications would be deemed not to be "offers" for purposes of a business combination. We have deleted this provision since we believe it is no longer relevant in view of new paragraph (f)(3).

Rule 146(g): Number of purchasers. The Rule as last proposed provided that in any consecutive twelve month period there could be no more than thirty-five persons who purchased securities of the issuer of the same or similar class pursuant to the rule, or otherwise in reliance on section 4(2). The proposed rule also set forth various classes of purchasers who would not be included in counting the thirty-five. The Commission has decided that the thirty-five purchasers in twelve month test is too rigid and involves too many exceptions to be useful. In addition, it would have made it difficult for an issuer to know when the rule was available since it would have had to wait twelve months after every sale. Therefore, as described under Rule 146(b), "Conditions to be Met," the Rule is now based on the traditional concept of "an offering" and paragraph (g)(1) now requires that there be no more than thirty-five purchasers in any offering pursuant to the Rule. In order to determine what constitutes "an offering," reference would have to be made to the traditional integration standards, as set forth in a Preliminary Note. In addition, subparagraph (b)(1) of the Rule provides a safe harbor for certain offers and sales. Reliance on the traditional integration standards means that the various exclusions for directors and officers, bank lenders, subsidiaries, employee plans and business combinations are no longer necessary. The specific exclusions were only necessary when all sales of the same or similar class of securities during a twelve month period were automatically integrated.

In the Rule as adopted there are specific provisions for calculating the thirty-five purchasers. Paragraph (g)(2)(i) of the Rule, as adopted, indicates that for purposes of computing the number of purchasers, some purchasers would be excluded: certain relatives of a purchaser, trusts and estates in which the purchaser and such relatives own all of the beneficial interest and corporations or other organizations in which the purchaser and such relatives are beneficial owners of all of each class of equity securities or all of the equity interest. As in the rule as last proposed, for purposes only of counting the number of purchasers, those who purchase or agree in writing to purchase, for cash in a single payment or installments, securities for $150,000 or more would be excluded. However, the issuer would have to satisfy all the other provisions of the Rule with respect to such persons.

Paragraph (g)(2)(ii) provides that corporations, partnerships, trusts and certain other entities will be counted as one purchaser unless the entity was formed for the specific purpose of acquiring the securities offered, in which case each beneficial owner of an equity interest in the entity would be counted as a separate purchaser.

The rule as proposed would have treated clients of an investment adviser as separate persons in determining the number of persons to whom securities could be sold, regardless of the amount of discretion given to the investment adviser to act on behalf of the client in purchasing securities. The Commission received many comments suggesting that an investment adviser, broker-dealer or trust department that purchases securities for discretionary or advisory accounts should count as only one person for purposes of the Rule. Having reviewed the comments and considered the matter, the Commission still believes that, in order to avoid the possibility of a distribution, it is necessary to count each purchaser as a separate person for purposes of paragraph (g). This position is now set forth in Preliminary Note 5, discussed above. In determining the number of purchasers in an offering pursuant to the Rule each client of an investment adviser, each customer of a broker-dealer and each trust administered by a bank trust department will be counted as a separate purchaser. Pursuant to paragraph (g)(2)(ii), investment companies or pension or other trusts will be counted on one purchaser. However, each trust or investment company or group of trusts or investment companies under common management will be treated as a separate purchaser.

Rule 146(h): limitations on disposition. The Rule also provides that the issuer and any person acting on its behalf must take reasonable care to assure that the purchasers are not underwriters. Such reasonable care shall include but is not necessarily limited to (1) making reasonable inquiry to determine if the purchaser is purchasing for his own account or on behalf of others; (2) placing a legend on the certificates or other documents evidencing the securities indicating that they were not registered and setting forth or referring to the restrictions on transferability and sale; (3) issuing stop transfer instructions to the transfer agent, if any, or making an appropriate notation in the issuer's records if the issuer transfers its own securities; and (4) except as provided in paragraph (f)(2), obtaining a written agreement from the purchaser that the securities will not be resold without registration or exemption therefrom. The Commission believes that these limitations are necessary in order to protect the public from a deferred distribution. They are also in the self interest of the issuer.

Deletion of proposed rule 146(i): report of sale. The Commission has decided to delete the requirement that a report of sales made pursuant to Rule 146 be filed on Form 146. As the rule was last proposed, a report of sales had to be filed within 45 days after the end of any quarter of the issuer's fiscal year during which certain sales were effected pursuant to the proposed Rule. The Commission has determined that requiring the filing of such a Form as a condition of the Rule would unnecessarily increase the difficulty of complying with the Rule for many small issuers. In addition, filing requirements would generally affect only non-public companies, since public companies already supply similar information in their Form 10-Q and Form 10-K filings under the Exchange Act. The Commission will reexamine the need for a filing requirement after experience with the Rule has been gained, and if appropriate for the protection of investors and in the public interest, will propose amendments to the Rule to require such form.

Operation of Rule 146

The Rule will operate prospectively only starting from its effective date, June 10, 1974. Further, the staff will issue interpretive letters to assist persons in complying with the Rule. Although the staff will continue to consider no-action requests relating to section 4(2) of the Act, such letters will only be issued infrequently and only in the most compelling circumstances.

The Commission recognizes that no one rule adequately cover all legitimate private offerings and sales of securities. It is to be emphasized that the Rule does not provide the exclusive means for offering and selling securities in reliance on section 4(2). Issuers who satisfy the criteria set forth in relevant judicial and administrative interpretations of section 4(2) in effect at the time of a proposed transaction may offer and sell without compliance with the Rule. In addition, it should be noted that attempted compliance with Rule 146 does not act as an election so that the issuer can always claim the protection of both the Rule and section 4(2), but will have the burden of proving the availability of the exemption.

The courts and the Commission have consistently held that one claiming an exemption under section 4(2) of the Act has the burden of proving that the exemption is available to him and the Rule

does not shift that burden. In addition, it should be pointed out that the burden of proof applies with respect to each offeree and not just to the purchasers of the securities. See Lively v. Hirschfeld, 440 F. 2d 631 (10th Cir. 1971). Accordingly, any issuer who relies on the Rule has the burden of establishing that it has satisfied all the conditions of the Rule. Such issuer for its own protection should obtain and retain in its files written evidence that would assist in meeting this evidentiary burden.

The Commission has determined not to include within the terms and conditions of Rule 146 specific standards for determining whether a private offering should be regarded as a part of a larger public offering for which the exemption provided by section 4(2) would not be available. The Commission rather has determined that its existing guidelines relating to integration of offerings as set forth in Securities Act Release No. 4552 (27 FR 11316)* should apply to offerings made pursuant to Rule 146. The Commission believes that the following factors discussed in that Release are relevant to the question of integration: Whether (1) The offerings are part of a single plan of financing, (2) the offerings involve issuance of the same class of security, (3) the offerings are made at or about the same time, (4) the same type of consideration is to be received, and (5) the offerings are made for the same general purpose.

In view of the objectives and policies underlying the Act, the Rule is not available to any issuer with respect to any transaction which, although in technical compliance with the provisions of the Rule, is part of a plan or scheme to evade the registration provisions of the Act. In such case, registration is required.

Rule 146 relates to transactions exempted by section 4(2) of the Act from the registration provisions of section 5; it does not provide an exemption from the anti-fraud provisions of the securities laws or the civil liabilities provisions of section 12(2) of the Act or other provisions of the securities laws. In addition, investment companies or persons acting on their behalf proposing to offer or sell securities in reliance on the Rule should carefully consider all applicable provisions of the Investment Company Act of 1940 before proceeding.

The Rule is available only to the issuer of the securities and not to affiliates or other persons reselling or otherwise disposing of securities of the issuer. Such disposition must be made in compliance with the registration provisions of the Act unless an exemption from such provisions is available. Also, the Rule does not relieve issuers of their obligations under relevant state laws.

It should be recognized that the Rule is intended to be in the nature of an experiment and that the Commission will observe its operation to determine whether it is consistent with the objectives of the Act. If experience with the proposed Rule indicates that it is not operating for the protection of investors or in the public interest, it will be rescinded or appropriately amended.

Section 230.146 is added to 17 CFR Part 230 to read as follows:

§ 230.146 Transactions by an issuer deemed not to involve any public offering.

PRELIMINARY NOTES

1. The Commission recognizes that no one rule can adequately cover all legitimate private offers and sales of securities. Transactions by an issuer which do not satisfy all of the conditions of this rule shall not raise any presumption that the exemption provided by section 4(2) of the Act is not available for such transactions. Issuers wanting to rely on that exemption may do so by complying with administrative and judicial interpretations in effect at the time of the transactions. Attempted compliance with this rule does not act as an election; the issuer can also claim the availability of section 4(2) outside the rule.

2. Nothing in this rule obviates the need for compliance with any applicable state law relating to the offer and sale of securities.

3. Section 5 of the Act requires that all securities offered by the use of mails or other channels of interstate commerce be registered with the Commission. Congress, however, provided certain exemptions in the Act from such registration provisions where there was no practical need for registration or where the public benefits of registration were too remote. Among these exemptions is that provided by section 4(2) of the Act for transactions by an issuer not involving any public offering. The courts and the Commission have interpreted the section 4(2) exemption to be available for offerings to persons who have access to the same kind of information that registration would provide and who are able to fend for themselves. The indefiniteness of such terms as "public offering," "access" and "fend for themselves" has led to uncertainties with respect to the availability of the section 4(2) exemption. Rule 146 is designed to provide, to the extent feasible, objective standards upon which responsible businessmen may rely in raising capital under claim of the section 4(2) exemption and also to deter reliance on that exemption for offerings of securities to persons who need the protections afforded by the registration process.

In order to obtain the protection of the rule, all its conditions must be satisfied and the issuer claiming the availability of the rule has the burden of establishing, in an appropriate form, that it has satisfied them. The burden of proof applies with respect to each offeree as well as each purchaser. See "Lively v. Hirschfeld," 440 F. 2d 631 (10th Cir. 1971). Broadly speaking, the conditions of the rule relate to limitations on the manner of the offering, the nature of the offerees, access to or furnishing of information, the number of purchasers, and limitations on disposition.

The term "offering" is not defined in the rule. The determination as to whether offers, offers to sell, offers for sale, or sales of securities are part of an offering (i.e., are deemed to be "integrated") depends on the particular facts and circumstances. See Securities Act Release No. 4552 (November 6, 1962) (27 FR 11316). All offers, offers to sell, offers for sale, or sales which are part of an offering must meet all of the conditions of Rule 146 for the rule to be available. Release 33-4552 indicates that in determining whether offers and sales should be regarded as a part of a larger offering and thus should be integrated, the following factors should be considered:

(a) Whether the offerings are part of a single plan of financing;

(b) Whether the offerings involve issuance of the same class of security;

(c) Whether the offerings are made at or about the same time;

(d) Whether the same type of consideration is to be received; and

(e) Whether the offerings are made for the same general purpose.

4. Rule 146 relates to transactions exempted from section 5 by Section 4(2) of the Act. It does not provide an exemption from the anti-fraud provisions of the securities laws or the civil liability provisions of section 12(2) of the Act or other provisions of the securities laws, including the Investment Company Act of 1940.

5. Clients of an investment adviser, customers of a broker or dealer, trusts administered by a bank trust department or persons with similar relationships shall be considered to be the "offerees" or "purchasers" for purposes of the rule regardless of the amount of discretion given to the investment adviser, broker or dealer, bank trust department or other person to act on behalf of the client, customer or trust.

6. The rule is available only to the issuer of the securities and is not available to affiliates or other persons for sales of the issuer's securities.

7. Finally, in view of the objectives of the rule and the purposes and policies underlying the Act, the rule is not available to any issuer with respect to any transactions which, although in technical compliance with the rule, are part of a plan or scheme to evade the registration provisions of the Act. In such cases registration pursuant to the Act is required.

(a) *Definitions.* The following definitions shall apply for purposes of this rule.

(1) *Offeree representative.* The term "offeree representative" shall mean any person or persons, each of whom the issuer and any person acting on its behalf, after making reasonable inquiry, have reasonable grounds to believe and believe satisfies all of the following conditions:

(i) Is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer, except where the offeree is:

(*a*) Related to such person by blood, marriage or adoption, no more remotely than as first cousin;

(*b*) Any trust or estate in which such person or any persons related to him as specified in paragraph (a)(1)(i) (*a*) or (*c*) of this section collectively have 100 percent of the beneficial interest (excluding contingent interests) or of which any such person serves as trustee, executor, or in any similar capacity; or

(*c*) Any corporation or other organization in which such person or any persons related to him as specified in paragraph (a)(1)(i) (*a*) or (*b*) of this section collectively are the beneficial owners of 100 percent of the equity securities (excluding directors' qualifying shares) or equity interest;

(ii) Has such knowledge and experience in financial and business matters that he, either alone, or together with other offeree representatives or the offeree, is capable of evaluating the

*Issued November 6, 1962.

merits and risks of the prospective investment;

(iii) is acknowledged by the offeree, in writing, during the course of the transaction, to be his offeree representative in connection with evaluating the merits and risks of the prospective investment; and

(iv) discloses to the offeree, in writing, prior to the acknowledgement specified in paragraph (a)(1)(iii) of this section, any material relationship between such person or its affiliates and the issuer or its affiliates, which then exists or is mutually understood to be contemplated or which has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.

NOTE 1: Persons acting as offeree representatives should consider the applicability of the registration and anti-fraud provisions relating to brokers and dealers under the Securities Exchange Act of 1934 and relating to investment advisers under the Investment Advisers Act of 1940.

NOTE 2: The acknowledgement required by paragraph (a)(1)(iii) of this section and the disclosure required by paragraph (a)(1)(iv) of this section must be made with specific reference to each prospective investment. Advance blanket acknowledgment, such as for "all securities transactions" or "all private placements", is not sufficient.

NOTE 3: Disclosure of any material relationships between the offeree representative or its affiliates and the issuer or its affiliates does not relieve the offeree representative of its obligation to act in the interest of the offeree.

(2) *Issuer.* The definition of the term "issuer" in section 2(4) of the Act shall apply, provided that notwithstanding that definition, in the case of a proceeding under the Bankruptcy Act, the trustee, receiver, or debtor in possession shall be deemed to be the issuer in an offering for purposes of a plan of reorganization or arrangement, if the securities offered are to be issued pursuant to the plan, whether or not other like securities are offered under the plan in exchange for securities of, or claims against, the debtor.

(3) *Affiliate.* The term "affiliate" of a person means a person that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with such person.

(4) *Material.* The term "material" when used to modify "relationship" means any relationship that a reasonable investor might consider important in the making of the decision whether to acknowledge a person as his offeree representative.

(b) *Conditions to be met.* Transactions by an issuer involving the offer, offer to sell, offer for sale or sale of securities of the issuer that are part of an offering that is made in accordance with all the conditions of this rule shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Act.

(1) For purposes of this rule only, an offering shall be deemed not to include offers, offers to sell, offers for sale or sales of securities of the issuer pursuant to the exemptions provided by section 3 or section 4(2) of the Act or pursuant to a registration statement filed under the Act, that take place prior to the six month period immediately preceding or after the six month period immediately following any offers, offers for sale or sales pursuant to this rule, *Provided,* That there are during neither of said six month periods any offers, offers for sale or sales of securities by or for the issuer of the same or similar class as those offered, offered for sale or sold pursuant to the rule.

NOTE: In the event that securities of the same or similar class as those offered pursuant to the rule are offered, offered for sale or sold less than six months prior to or subsequent to any offer, offer for sale or sale pursuant to the rule, see Preliminary Note 3 hereof as to which offers, offers to sell, offers for sale or sales may be deemed to be part of the offering.

(c) *Limitations on manner of offering.* Neither the issuer nor any person acting on its behalf shall offer, offer to sell, offer for sale, or sell the securities by means of any form of general solicitation or general advertising, including but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine or similar medium or broadcast over television or radio;

(2) Any seminar or meeting, except that if paragraph (d)(1) of this section is satisfied as to each person invited to or attending such seminar or meeting, and, as to persons qualifying only under paragraph (d)(1)(ii) of this section, such persons are accompanied by their offeree representative(s), then such seminar or meeting shall be deemed not to be a form of general solicitation or general advertising; and

(3) Any letter, circular, notice or other written communication, except that if paragraph (d)(1) of this section is satisfied as to each person to whom the communication is directed and the communication contains an undertaking to provide the information specified by paragraph (e)(1) of this section on request, such communication shall be deemed not to be a form of general solicitation or general advertising.

(d) *Nature of offerees.* The issuer and any person acting on its behalf who offer, offer to sell, offer for sale or sell the securities shall have reasonable grounds to believe and shall believe:

(1) Immediately prior to making any offer, either:

(i) That the offeree has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or

(ii) That the offeree is a person who is able to bear the economic risk of the investment; and

(2) Immediately prior to making any sale, after making reasonable inquiry, either:

(i) That the offeree has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or

(ii) That the offeree and his offeree representative(s) together have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment and that the offeree is able to bear the economic risk of the investment.

(e) *Access to or furnishing of information.*

NOTE: Access can only exist by reason of the offeree's position with respect to the issuer. Position means an employment or family relationship or economic bargaining power that enables the offeree to obtain information from the issuer in order to evaluate the merits and risks of the prospective investment.

(1) Either

(i) Each offeree shall have access during the course of the transaction and prior to the sale to the same kind of information that is specified in Schedule A of the Act, to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense; or

(ii) Each offeree or his offeree representative(s), or both, shall have been furnished during the course of the transaction and prior to sale, by the issuer or any person acting on its behalf, the same kind of information that is specified in Schedule A of the Act, to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense. This condition shall be deemed to be satisfied as to an offeree if the offeree or his offeree representative is furnished with information, either in the form of documents actually filed with the Commission or otherwise, as follows:

(*a*) In the case of an issuer that is subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934:

(*1*) The information contained in the annual report required to be filed under the Exchange Act or a registration statement on Form S-1 under the Act or on Form 10 under the Exchange Act, whichever filing is the most recent required to be filed, and the information contained in any definitive proxy statement required to be filed pursuant to section 14 of the Exchange Act and in any reports or documents required to be filed by the issuer pursuant to section 13(a) or 15(d) of the Exchange Act, since the filing of such annual report or registration statement, and

(*2*) A brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs which are not disclosed in the documents furnished;

(*b*) In the case of all other issuers, the information that would be required to be included in a registration statement filed under the Act on the form which the issuer would be entitled to use, *Provided, however,* That if the issuer

does not have the audited financial statements required by such form and cannot obtain them without unreasonable effort or expense, such financial statements may be provided on an unaudited basis;

(c) Notwithstanding paragraph (e)(1)(ii) (a) and (b) of this section exhibits required to be filed with the Commission as part of a registration statement or report need not be furnished to each offeree or offeree representative if the contents of the exhibits are identified and such exhibits are available pursuant to paragraph (e)(2) of this section; and

(2) The issuer shall make available, during the course of the transaction and prior to sale, to each offeree or his offeree representative(s) or both, the opportunity to ask questions of, and receive answers from, the issuer or any person acting on its behalf concerning the terms and conditions of the offering and to obtain any additional information, to the extent the issuer possesses such information or can acquire it without unreasonable effort or expense, necessary to verify the accuracy of the information obtained pursuant to paragraph (e)(1) of this section; and

(3) The issuer or any person acting on its behalf shall disclose to each offeree, in writing, prior to sale:

(i) Any material relationship between his offeree representative(s) or its affiliates and the issuer or its affiliates, which then exists or mutually is understood to be contemplated or which has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship;

(ii) That a purchaser of the securities must bear the economic risk of the investment for an indefinite period of time because the securities have not been registered under the Act and, therefore, cannot be sold unless they are subsequently registered under the Act or an exemption from such registration is available; and

(iii) The limitations on disposition of the securities set forth in paragraph (h)(2), (3), and (4) of this section.

NOTE: Information need not be provided and opportunity to obtain additional information need not be continued to be provided to any offeree or offeree representative who, during the course of the transaction, indicates that he is not interested in purchasing the securities offered, or, except in the case of any undertaking made pursuant to paragraph (c)(3), to whom the issuer or any person acting on its behalf has determined not to sell the securities.

(f) *Business combinations.* (1) The term "business combination" shall mean any transaction of the type specified in paragraph (a) of Rule 145 under the Act.

(2) All the conditions of this rule except paragraph (d) and paragraph (h)(4) of this section shall apply to business combinations.

NOTE: Notwithstanding the absence of a written agreement pursuant to paragraph (h)(4), any securities acquired in an offering pursuant to paragraph (f) are restricted and may not be resold without registration under the Act or an exemption therefrom.

(3) For purposes of paragraph (f) only, the issuer and any person acting on believe, and shall believe, at the time that any plan for a business combination is submitted to security holders for their approval, that each offeree either alone or with his offeree representative(s) has such knowledge and experience in financial and business matters that he is or they are capable of evaluating the merits and risks of the prospective investment.

(4) In addition to information by paragraph (e), the issuer shall provide, in writing, to each offeree at the time the plan is submitted to security holders for approval, information about any terms or arrangements of the proposed transaction relating to any security holder that are not identical to those relating to all other security holders.

(g) *Number of purchasers.* (1) There shall be no more than thirty-five purchasers of the securities of the issuer from the issuer in any offering pursuant to the rule.

NOTE: See paragraph (b)(1) of this section, the note thereto and the Preliminary Notes as to what may or may not constitute an offering pursuant to the rule.

(2) For purposes of computing the number of purchasers for paragraph (g)(1) of this section only:

(i) The following purchasers shall be excluded:

(a) Any relative or spouse of a purchaser and any relative of such spouse, who has the same home as such purchaser; and

(b) Any trust or estate in which a purchaser or any of the persons related to him as specified in paragraph (g)(2)(i) (a) or (c) of this section collectively have 100 percent of the beneficial interest (excluding contingent interests);

(c) Any corporation or other organization of which a purchaser or any of the persons related to him as specified in paragraph (g)(2)(i) (a) or (b) of this section collectively are the beneficial owners of all the equity securities (excluding directors' qualifying shares) or equity interest; and

(d) Any person who purchases or agrees in writing to purchase for cash in a single payment or installments, securities of the issuer in the aggregate amount of $150,000 or more.

NOTE: The issuer would have to satisfy all the other provisions of the rule with respect to the purchasers specified in subdivision (g)(2)(i).

(ii) There shall be counted as one purchaser any corporation, partnership, association, joint stock company, trust or unincorporated organization, except that if such entity was organized for the specific purpose of acquiring the securities offered, each beneficial owner of equity interests or equity securities in such entity shall count as a separate purchaser.

NOTE: *See* Preliminary Note 5 as to other persons who are considered to be purchasers.

(h) *Limitations on disposition.* The issuer and any person acting on its behalf shall exercise reasonable care to assure that the purchasers of the securities in the offering are not underwriters within the meaning of section 2(11) of the Act. Such reasonable care shall include, but not necessarily be limited to, the following:

(1) Making reasonable inquiry to determine if the purchaser is acquiring the securities for his own account or on behalf of other persons;

(2) Placing a legend on the certificate or other document evidencing the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities;

(3) Issuing stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities, making a notation in the appropriate records of the issuer; and

(4) Obtaining from the purchaser a signed written agreement that the securities will not be sold without registration under the Act or exemption therefrom.

NOTE: Paragraph (h)(4) of this section does not apply to business combinations as described in paragraph (f) of this section. Notwithstanding the absence of a written agreement, the securities are restricted and may not be resolved without registration under the Act or an exemption therefrom. The issuer for its own protection should consider, however, obtaining such written agreement even in business combinations.

The Commission hereby adopts Rule 146 pursuant to sections 4(2) and 19(a) of the Securities Act of 1933, as amended, effective June 10, 1974 for offerings commencing on or after that date. The Commission finds that the changes reflected in the Rule as adopted, from the rule as last proposed for comment, are technical or generally have already been subject to public comment, and that further notice and other rule making procedures pursuant to the Administrative Procedure Act are not necessary.

(Secs. 4(2), 19(a), 48 Stat. 77, 85, sec. 209, 48 Stat. 908, sec. 12, 78 Stat. 580 (15 U.S.C. 77d(2), 77s(a)))

Effective date: June 10, 1974.

By the Commission.

[SEAL] GEORGE A. FITZSIMMONS,
Secretary.

APRIL 23, 1974.

[FR Doc.74-10079 Filed 5-1-74;8:45 am]

Title 21—Food and Drugs

CHAPTER I—FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SUBCHAPTER A—GENERAL

PART 1—REGULATIONS FOR THE ENFORCEMENT OF THE FEDERAL FOOD, DRUG, AND COSMETIC ACT AND THE FAIR PACKAGING AND LABELING ACT

Food Label Information Panel; Exemptions for Small Food Packages

In the FEDERAL REGISTER of December 5, 1973 (38 FR 33492), the Commissioner of Food and Drugs published proposed exemptions from the type size requirements

of § 1.8d (21 CFR 1.8d) for small packages. Six comments, four from industry and two from trade associations, were received in response to the proposal. One comment agreed with the proposal. The other comments requested clarification and/or an expansion of the proposed exemptions to encompass additional package types. The points raised and the Commissioner's responses are as follows:

1. One comment requested that the proposed § 1.8d(c)(2), which provides an exemption for packages with a single, obvious principal display panel of less than 12 square inches and no other available surface area, be expanded to include packages with a total surface area of less than 10 square inches.

The Commissioner recognizes that small packages with a total area of less than 12 square inches available for labeling would have no more space available for labeling than those packages with a single, obvious principal display panel of the same area. Section 1.8d(c)(2) was intended to encompass such packages with a total surface area of less than 12 square inches. To clarify this intention, § 1.8d(c) is modified to include a new paragraph (c)(3) providing for such packages.

2. One comment objected because the exemption would not encompass those packages bearing spot labels too small to include labeling in the type size required by § 1.8d. This comment asserted that spot labels large enough to contain all of the necessary information could not be used on some packages if a type size greater than 1/32 inch is required.

The Commissioner recognizes that certain small packages have available surface area that is insufficient in size to bear all information pursuant to § 1.8d in the required type size. Therefore, packages with either a total surface area of less than 12 square inches, or a single obvious principal display panel of less than 12 square inches are exempt from the 1/16 inch type requirement of § 1.8d provided that the information required by 1.8d is not less than 1/32 inch in height. In addition, other small packages meeting the qualifications of § 1.8d(c)(1) are exempted from the 1/16 inch type size if the required information is not less than 3/64 inch in height. However, for packages larger than those provided for by § 1.8d (c), the Commissioner advises, as he did in the preamble to the proposal, that there is not justification for granting exemptions because of small label size when available container or package surface area has not been fully utilized. No exemptions will be given for spot labels that are not sufficient in size, or the size of which is not in accordance with § 1.7 (21 CFR 1.7).

3. One comment requested that § 1.8d (c)(1) be amended to provide for a type size of 1/32 inch rather than 3/64 inch because the requirement for this additional type size serves no useful function. It was argued that the difference between 1/32 inch and 3/64 inch does not seem sufficiently great to justify an additional size.

The regulation grants a reduction in the type size required by § 1.8d only to the extent necessary to accommodate the size of the package. The Commissioner concluded, when he proposed § 1.8d(c), that packages provided for by § 1.8d(c)(1) are sufficient in size to bear information required by § 1.8d in 3/64 inch. Information submitted in the comment was insufficient to demonstrate that the packages are too small to bear labeling in the required 3/64 inch size or that there is no benefit in a type size as large as practical.

4. Two comments requested clarification regarding the determination of the area of the principal display panel of tub type containers. The argument was made that a tub lid cannot bear printing closer than 1/4 inch from the edge of the lid, and therefore that, in determining the area of the principal display panel, only the printable surface should be considered.

The Commissioner recognizes that it is the area of surface available for labeling which determines the size of the type possible for labeling, and § 1.8d(c)(1)(ii) and (2)(ii) have been changed accordingly.

Therefore, pursuant to provisions of the Federal Food, Drug, and Cosmetic Act (secs. 403, 701(a), 52 Stat. 1048, 1055 (21 U.S.C. 343), 371(a)) and under authority delegated to the Commissioner (21 CFR 2.120), Part 1 is amended in § 1.8d by adding thereto new paragraph (c)(1), (2), and (3) to read as follows:

§ 1.8d Food labeling; information panel.

* * * * *

(c) * * *

(1) Packaged foods are exempt from the type size requirements of this paragraph: *Provided*, That:

(i) The package is designed such that it has a surface area that can bear an information panel and/or an alternate principal display panel.

(ii) The area of surface available for labeling on the principal display panel of the package as this term is defined in § 1.7 is less than 10 square inches.

(iii) The label information includes nutrition information and a full list of ingredients in accordance with regulations in this part and the policy expressed in § 3.88 of this chapter.

(iv) The information required by paragraph (b) of this section appears on the principal display panel or information panel label in accordance with the provisions of this paragraph (c) except that the type size is not less than 3/64 inch in height.

(2) Packaged foods are exempt from the type size requirements of this paragraph: *Provided*, That:

(i) The package is designed such that it has a single "obvious principal display panel" as this term is defined in § 1.7 and has no other available surface area for an information panel or alternate principal display panel.

(ii) The area of surface available for labeling on the principal display panel of the package as this term is defined in § 1.7 is less than 12 square inches and bears all labeling appearing on the package.

(iii) The label information includes nutrition information and a full list of ingredients in accordance with regulations in this part and the policy expressed in § 3.88 of this chapter.

(iv) The information required by paragraph (b) of this section appears on the single, obvious principal display panel in accordance with the provisions of this paragraph (c) except that the type size is not less than 1/32 inch in height.

(3) Packaged foods are exempt from the type size requirements of this paragraph: *Provided*, That:

(i) The package is designed such that it has a total surface area available to bear labeling of less than 12 square inches.

(ii) The label information includes nutrition information and a full list of ingredients in accordance with regulations in this part and the policy expressed in § 3.88 of this chapter.

(iii) The information required by paragraph (b) of this section appears on the principal display panel or information panel label in accordance with the provisions of this paragraph (c) except that the type size is not less than 1/32 inch in height.

* * * * *

Effective date. This order shall become effective on June 3, 1974.

(Secs. 403, 701(a), 52 Stat. 1048, 1055; (21 U.S.C. 343, 371(a).))

Dated: April 26, 1974.

SAM D. FINE,
Associate Commissioner for Compliance.

[FR Doc.74-10044 Filed 5-1-74;8:45 am]

PART 3—STATEMENTS OF GENERAL POLICY OR INTERPRETATION

Ozone Generators and Other Devices Generating Ozone; Correction

In FR Doc. 74-8754 appearing at page 13773 in the FEDERAL REGISTER of April 17, 1974, the statement in the eighth line of paragraph (c)(1) of § 3.93 appearing in the second column on page 13774, which reads "76 millimeters of mercury", is corrected to read "760 millimeters of mercury".

Dated: April 26, 1974.

SAM D. FINE,
Associate Commissioner for Compliance.

[FR Doc.74-10043 Filed 5-1-74;8:45 am]

SUBCHAPTER B—FOOD AND FOOD PRODUCTS

PART 121—FOOD ADDITIVES

Subpart C—Food Additives Permitted in Feed and Drinking Water of Animals or for the Treatment of Food-Producing Animals

Anhydrous Ammonia

The Commissioner of Food and Drugs having evaluated the data submitted in