

[7535-01-M]

## Title 12—Banks and Banking

CHAPTER VII—NATIONAL CREDIT  
UNION ADMINISTRATIONPART 701—ORGANIZATION AND  
OPERATIONS OF FEDERAL CREDIT  
UNIONSFinal Rule—Share Accounts and  
Share Certificate Accounts

AGENCY: National Credit Union Administration.

ACTION: Final rule.

SUMMARY: This rule authorizes Federal credit unions to issue nonnegotiable certificates with minimum deposits of \$10,000 and maturities of 26 weeks at a maximum rate of return equal to one-quarter of one percent above the discount rate on the most recently issued 26-week United States Treasury Bills (auction average).

EFFECTIVE DATE: November 20, 1978.

ADDRESS: National Credit Union Administration, 2025 M Street NW., Washington, D.C., 20456.

FOR FURTHER INFORMATION  
CONTACT:

J. Leonard Skiles, Deputy General Counsel, Office of the General Counsel, at the above address. Telephone: 202-632-4870.

SUPPLEMENTARY INFORMATION: To enable Federal credit unions to adjust their operations during credit contractions involving rising short-term rates, the National Credit Union Administration (NCUA) is further amending its regulations governing share certificate accounts. Effective July 7, 1978, the NCUA amended § 701.35 to permit Federal credit unions to offer: (1) Special share certificates for IRA and Keogh accounts at a maximum dividend rate of 8 percent and (2) share certificates with principal amounts of \$100,000 or more at dividend rates determined by money market conditions.

The NCUA has determined that an additional category of share certificate account is necessary in order to increase returns for members by authorizing dividend rates paid on share certificates that are competitive with interest rates available in the market on instruments possessing similar characteristics. This new share certificate category would enable Federal credit unions to pay dividends on nonnegotiable deposits of \$10,000 or more with required maturities of 26 weeks, at a

maximum rate of return equal to one-quarter of one percent above the discount rate on the most recently issued 26-week United States Treasury bills (auction average). United States Treasury bills maturing in 26 weeks are auctioned weekly by the Treasury Department, normally on Monday, and are issued 3 business days later, normally on Thursday. Beginning on such issuance date, Federal credit unions may pay the above-described rate on such certificates and may continue to pay that rate for new certificates until new 26-week United States Treasury bills are issued, at which time the rate paid on such bills (plus one-quarter of one percent) becomes the ceiling rate for this category of account. The 26-week United States Treasury bill rate is published widely in many newspapers throughout the country.

Once established, the maximum rate of return Federal credit unions may specify or contract for may not be increased during the 26 weeks the certificates remain outstanding. If such certificates are renewed, automatically or otherwise, the maximum rate that may be paid may not exceed one-quarter of one percent above the 26-week Treasury bill rate (discount basis) in effect at the time of renewal. This type of certificate account must be issued in nonnegotiable form with a maturity of 26 weeks; a maturity in excess of, or less than, 26 weeks is not permitted. The general limitations governing share certificate accounts apply.

Federal credit unions will be permitted to base payment calculations on the average auction rate paid (discount basis). Rounding off may be done only by rounding down. For example, if the auction average rate is 6.4638 percent on a discount basis, it may be rounded down to 6.463 percent, 6.46 percent, or 6.4 percent. The one-quarter of one percent additional amount will be added to such figure. The higher rates may be paid only on new deposits; rates on existing certificate accounts may not be increased prior to the maturity of such accounts. Public unit accounts may be invested in the new 26-week certificate account.

In utilizing this new share certificate account, Federal credit unions are urged to consider the needs of borrowers as well as savers and to consider the earnings limitations imposed by the 1 percent per month loan rate ceiling.

The NCUA's decision to provide greater flexibility for Federal credit unions offering share certificates was taken after consultation with the Board of Governors of the Federal Reserve System, the Department of

Treasury, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Federal Home Loan Bank Board. In order to facilitate the achievement of the above stated objectives as rapidly as possible, the NCUA finds that application of the notice and public participation provisions of 5 U.S.C. Section 553 would be contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Accordingly, 12 CFR 701.35(g) is amended as set forth below.

(Sec. 120, 73 Stat. 635 (12 U.S.C. 1766) and Sec. 209, 84 Stat. 1104 (12 U.S.C. 1789).)

LAWRENCE CONNELL,  
Administrator.

NOVEMBER 15, 1978.

(1) Subsection (g) is amended by deleting the word "or" at the end of paragraph (3); deleting the period at the end of paragraph (4) and, in lieu thereof, inserting "or", and adding a new paragraph to read as follows:

§ 701.35 Share accounts and share certificate accounts.

(g) \* \* \*

(5) one-quarter of one percent above the rate established (auction average on a discount basis) for 26 week United States Treasury bills issued on or immediately prior to the date of the purchase of any share certificate of \$10,000 or more having a fixed or minimum term or qualifying period of 26 weeks. Rounding off such rate may be done only by rounding down.

[FR Doc. 78-32629 Filed 11-20-78; 8:45 am]

[6351-01-M]

Title 17—Commodity and Securities  
ExchangesCHAPTER I—COMMODITY FUTURES  
TRADING COMMISSIONPART 32—REGULATION OF COM-  
MODITY OPTION TRANSACTIONSReissuance of and Amendments to  
Commodity Option Regulations

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commission has reissued and has adopted certain amendments to its commodity option regulations. The purpose of the Commis-

sion's action is to implement the provisions of the Futures Trading Act of 1978 which direct the Commission to issue regulations governing the offer and sale of options on physical commodities (so-called "dealer options"). The Commission's action does not affect the statutory and administrative general prohibition against the offer and sale of commodity options to the public. The Commission's action will become effective in 30 days; however, the Commission is soliciting comment on the amendments to its commodity option regulations it has adopted, particularly the registration requirement being imposed on commodity option grantors.

**EFFECTIVE DATE:** December 21, 1978, except that the amendment to § 32.12(d) shall be effective immediately.

**FOR FURTHER INFORMATION CONTACT:**

Mark N. Rae, Esq., Office of General Counsel, Commodity Futures Trading Commission, 2033 K Street NW., Washington, D.C. 20581, telephone 202-254-7295.

**SUPPLEMENTARY INFORMATION:**

On November 24, 1976, the Commission published interim commodity option regulations governing the offer and sale of options involving all commodities other than those specifically enumerated in section 2(a) of the Commodity Exchange Act prior to enactment of the Commodity Futures Trading Commission Act of 1974.<sup>1</sup> On April 12, 1978, the Commission adopted rule 32.11 as an amendment to its commodity option regulations.<sup>2</sup> Rule 32.11 generally suspended the offer and sale of commodity options to the public on and after June 1, 1978. The rule did not, however, prohibit the offer and sale of commodity options to commercial interests for use in connection with their businesses (so-called "trade options") in accordance with rule 32.4(a), 17 CFR 32.4(a) (1977).

Thereafter, on May 26, 1978, the Commission adopted rule 32.12, which exempted the offer and sale of options on physical commodities—dealer options—from the general suspension

created by rule 32.11, if the grantor of the option and the futures commission merchant offering the option each met specified conditions. See 43 FR 23704 et seq. (June 1, 1978). Rule 32.12 was adopted by the Commission in anticipation of possible Congressional action allowing the offer and sale of dealer options by certain persons to continue notwithstanding any general prohibition that Congress might impose or that otherwise might be in effect.<sup>3</sup>

On October 1, 1978, the Futures Trading Act of 1978, Pub. L. 95-405, 92 Stat. 865 et seq. (September 30, 1978), became effective. Among other things, section 3 of that Act amends section 4c of the Commodity Exchange Act ("the Act") so as to prohibit any commodity option transactions involving any commodity that first became subject to regulation under the Act in 1974, thereby codifying the Commission's suspension of option sales. Certain trade option transactions are, however, exempted from the congressional prohibition. In addition, section 4c(d)(2) of the Act directs the Commission to issue regulations permitting grantors and futures commission merchants to grant and offer dealer options if they comply with statutorily specified conditions and with such additional uniform and reasonable conditions as the Commission may prescribe.

In accordance with these provisions, the Commission has determined to re-issue its commodity option regulations with certain amendments. The Commission believes that its existing regulations generally are in accord with the new provisions of section 4c of the Act and that the reasons for its adoption of these regulations continue to be valid. The Commission recognizes, however, that it is necessary to amend its rules to some extent to conform the regulations to requirements of the new legislation. Set forth below is a brief discussion of the amendments the Commission has adopted for this purpose.

1. Section 4c(c) of the Act, among other things, exempts from the general congressional prohibition on commodity option transactions certain trade option transactions effected in

accordance with Commission regulations, "in which the purchaser is a producer, processor, commercial user of, or a merchant handling the commodity involved in the transaction, or the products or byproducts thereof." The trade option exemption contained in section 4c(c) is not as broad as that contained in Commission rule 32.4(a). Under rule 32.4(a), option transactions are exempt from the effect of the suspension imposed by rule 32.11 where the offeror has a "reasonable basis to believe" that the offeree is a commercial enterprise and that the offeree enters the transaction solely for purposes relating to its business as such. Section 4c(c), however, exempts only those transactions in which the "purchaser is" a commercial enterprise. Rule 32.4(a) has been amended accordingly, but the Commission has retained the provision that the offeror have a reasonable basis to believe that the purchaser enters the transaction for business purposes.

Thus, rule 32.4(a) will provide that the provisions of part 32 generally:

shall not apply to a commodity option transaction in which the purchaser is a producer, processor, or commercial user of, or a merchant handling, the commodity which is the subject of the commodity option transaction, or the products or byproducts thereof, and in which the person offering the commodity option has a reasonable basis to believe that such producer, processor, commercial user or merchant purchases the commodity option solely for purposes related to its business as such \* \* \*

The purpose of rule 32.4(a) as initially adopted was to exempt from the requirements of the Commission's option regulations the acquisition of a commodity option for a non-speculative purpose by a commercial enterprise engaged in transactions in physical commodities. See 42 FR 51815 (November 24, 1976). In order to qualify to grant dealer options under rule 32.12, a person must be in the business of buying, selling, producing, or otherwise using the commodity on which its options are granted, it must be a bona fide commercial enterprise.

A person that qualifies as a rule 32.12 grantor is, therefore, in the Commission's view, a commercial interest to whom an option may be offered and sold under rule 32.4(a), both as originally adopted and as presently amended. There is, however, a question whether a rule 32.12 grantor that purchases an option from a third party to cover its obligations as grantor of an option which has been sold to the public has purchased the option "solely for purposes related to its business" as a producer, processor, commercial user or merchant handling the commodity within the meaning of rule 32.4(a). The underlying rationale of rule 32.4(a) is that commercial enterprises engaged in the commodity busi-

<sup>1</sup>See 41 FR 51814 et seq. See also 17 CFR Part 32 (1977), as amended 42 FR 61831 (Dec. 6, 1977). Sec. 4c(a)(B) of the Commodity Exchange Act, 7 U.S.C. 6c(a)(B) (1976), prohibits option transactions involving those commodities specifically enumerated in sec. 2a. Those commodities are: Wheat; cotton; rice; corn; oats; barley; rye; flaxseed; grain sorghums; mill feeds; butter; eggs; onions; Solanum tuberosum (Irish potatoes); wool; wool tops; fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils); cottonseed meal; cottonseed; peanuts; soybeans; soybean meal; livestock products; and frozen concentrated orange juice.

<sup>2</sup>See 43 FR 16153 et seq. (Apr. 17, 1978).

<sup>3</sup>Rule 32.12 requires that an option grantor and the persons offering or selling the grantor's options to the public make such reports to the Commission as the Commission may by rule, regulation, or order require. On Aug. 24, 1978, the Commission published for comment a proposal to establish the form and content of reports to be submitted by grantors of dealer options and persons offering or selling such options to the public. See 43 FR 37715 et seq. The Commission has adopted these proposals in a modified form as amendments to rules 32.12 (a)(6) and (b)(1), and as new rules 32.12 (f), (g), (h), and (i). See 43 FR 52467 et seq. (Nov. 13, 1978).

ness do not require the protection of the Commission's option regulations if they decide to acquire commodity options for business purposes, such as inventory management.

The Commission understands that these commercial enterprises might also sell options for such business purposes.<sup>4</sup> The Commission has therefore amended rule 32.4(a) expressly to provide that a rule 32.12 grantor of dealer options may acquire options under the trade option exemption for the purpose of covering the grantor's open option positions. Of course, a grantor who chooses to cover its obligations under open option positions through the purchase of options or in some other manner will not be relieved of its obligations under section 4c(d)(2)(A) of the Act to segregate amounts accruing as profits to option customers. See discussion under item 3 below.

Protection of option customers has been the paramount concern of the Commission in the development of its option policy and regulations. To that end rule 32.12 requires grantors to have a net worth of \$5,000,000 and to segregate the profits that accrue on the options that they grant. In addition, rule 32.12 grantors are jointly and severally liable with the persons through which their options are sold for any damages sustained by an option customer as a result of any unlawful act or omission, or any breach of contract, by the person that sold the option to the customer, or any agent or employee of that person.<sup>5</sup>

Allowing a rule 32.12 grantor to purchase options from third parties to cover its obligations to the public should provide additional protection for option customers. The purchase of an option by a grantor which, in effect, covers an option the grantor has granted should reduce the risk to which the grantor is exposed<sup>6</sup> and, in so doing, enhance the grantor's financial stability.

The question has also arisen whether a producer, processor, commercial

user, or merchant handling a physical commodity may grant an option on that commodity through the facilities of a foreign exchange for purposes solely related to its business as such.

The Commission is not purporting to regulate the business affairs of commercial enterprises within the United States, but only to regulate the offer and sale of options in this country. Nor does the Commission interpret the general prohibition on option transactions imposed by section 4c(c) of the Act to prevent commercial enterprises from granting options through foreign boards of trade. Accordingly, in the Commission's view, the grant of an option through a foreign board of trade by a domestic commercial enterprise would not contravene the purpose of the general prohibition on option transactions imposed by section 4c(c) of the Act or rule 32.11 so long as it is not part of a scheme to offer, sell, or resell the option to a member of the public in the United States.

2. Section 4c(d)(2) of the Act directs the Commission to issue regulations allowing grantors and futures commission merchants to grant and offer dealer options subject to certain conditions. Section 4c(d)(2)(A) requires that a grantor be a person domiciled in the United States who:

(i) Is in the business of buying, selling, producing, or otherwise using the underlying commodity;

(ii) At all times has a net worth of at least \$5,000,000 certified annually by an independent public accountant using generally accepted accounting principles; and

(iii) Notifies the Commission and every futures commission merchant offering the grantor's option if the grantor knows or has reason to believe that the grantor's net worth has fallen below \$5,000,000 \* \* \*

Commission rule 32.12(a) requires, among other things, that a dealer option grantor be a person who, on May 1, 1978, was both in the business of granting options on a physical commodity and in the business of buying, selling, producing, or otherwise utilizing that commodity.<sup>7</sup> Section

4c(d)(2)(A)(i) of the Act, however, requires only that the grantor be a person who is in the business of buying, selling, producing, or otherwise using the commodity underlying the option. The May 1, 1978, limitation contained in rule 32.12(a) is, therefore, being deleted.

As indicated above, the requirement in section 4c(d)(2)(A) and in rule 32.12(a) that a grantor be in the business of buying, selling, producing, or otherwise using the commodity on which the option is granted reflects both a congressional and a Commission judgment that grantors must be bona fide commercial enterprises utilizing the commodity—as opposed to persons who, for example, merely acquire or own a few kilos of gold and engage in isolated transactions in the physical commodity as a justification for granting options. The Commission will, therefore, consider an individual or firm that is not a bona fide commercial enterprise utilizing the underlying commodity to be in violation of the provisions of the prohibition imposed by section 4c(c) of the Act if it nonetheless grants options under the guise of rule 32.12. See also the discussion under item 8 below.

As stated above, sections 4c(d)(2)(A)(ii) and (iii) of the Act require that a dealer option grantor have a net worth of at least \$5,000,000; that the grantor's net worth be certified annually by an independent public accountant; and that the grantor notify both the Commission and the futures commission merchants through which its options are sold whenever the grantor knows or has reason to believe that its net worth has fallen below the \$5,000,000 minimum. As a result of these amendments the Commission recently reduced the \$10,000,000 net worth requirement in rule 32.12(a)(1) to \$5,000,000. See 43 FR 47492 et seq. (October 16, 1978). The Commission is now amending rule 32.12(a)(1) to incorporate the other specific requirements of sections 4c(d)(2)(A)(ii) and (iii). The amended rule also requires the grantor to provide a copy of the accountant's certification to the Commission no later than 90 days after the close of the fiscal year of the grantor. The conditions imposed by Congress that a grantor have net worth of at least \$5,000,000 and that it notify the Commission whenever it knows or has "reason to believe" that its net worth has fallen below that amount must at all times be met in order for a person to grant options lawfully. Thus, grantors have a continuing duty of inquiry to ascertain that their net worth meets the statutory minimum. The Commission therefore interprets

<sup>4</sup> See reauthorization of the Commodity Futures Trading Commission: Hearings before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess. pt. II, at 106, 425 (1978).

<sup>5</sup> The Commission requests comment on whether the joint and several liability provisions should be retained or be modified in any respect.

<sup>6</sup> The only risk to which a grantor would be exposed where it has purchased an option whose terms coincided generally with those of an option it has granted would be that the person from which it has purchased the option would not perform. A rule 32.12 grantor should, however, be in a position to evaluate the reliability and integrity of the person from which it buys an option, and would have every incentive to do so.

<sup>7</sup> The House version of the bill that became the Futures Trading Act of 1978 contained provisions similar to these requirements of rule 32.12(a). See H.R. 10285, 95th Cong., 2d Sess. § (2) (1978); H.R. Rept. No. 1181, 95th Cong., 2d Sess. 25-26 (1978). These provisions were not, however, adopted by the Conference Committee or enacted into law. As explained by Representative Thomas Foley, Chairman of the House Agriculture Committee and Co-Chairman of the Conference Committee: The House bill permitted so-called dealer options pursuant to regulations issued under expedited proceedings but the provision applied only to those who were dealing in options on May 1, 1978. The conferees were concerned that the House provision was too restrictive and would allow only two or three firms to exercise a monopoly on this business. 124 Cong.

Rec. H. 11219 (daily ed. Sept. 29, 1978). See also 124 Cong. Rec. S. 16530 (daily ed. Sept. 28, 1978) (remarks of Sen. Huddleston).

"reason to believe" in section 4c(d)(2)(A)(iii) to include the standard of "should have known" in the exercise of prudent business practices.

3. Section 4c(d)(2)(A) also directs the Commission to issue regulations requiring dealer options grantors to:

(iv) Segregat[e] daily, exclusively for the benefit of purchasers, money, exempted securities (within the meaning of sec. 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), commercial paper, bankers' acceptances, commercial bills, or unencumbered warehouse receipts, equal to an amount by which the value of each transaction exceeds the amount received or to be received by the grantor for such transaction;

(v) Provid[e] an identification number for each transaction; and

(vi) Provid[e] confirmation of all orders for such transactions executed, including the execution price and a transaction identification number \* \* \*

The language of these provisions is virtually identical to that of rules 32.12(a)(3-5). The only differences are that rule 32.12(a)(3) uses the term "option customers" rather than word "purchasers" used in section 4c(d)(2)(A)(iv) and that rule 32.12(a)(5) employs the terms "striking price and premium" instead of the term "execution price" used in section 4c(d)(2)(A)(vi). The Commission does not interpret the words of section 4c(d)(2)(A) to include different persons or elements of a transaction than those used in the Commission's rules. Accordingly, the Commission has determined that no changes are necessary in rule 32.12(a)(3-5) in order to reflect the terms "purchasers" and "execution price."

In requiring grantors to segregate amounts representing option customer accrued profits, Congress has endeavored to assure that option customers will be in a position to receive the benefits of their bargain. In order to effectuate fully this congressional purpose, the Commission is amending rule 32.12(a)(3) to provide that grantors should segregate accrued profits in the same manner as futures commission merchants are presently required to segregate the purchase price paid by the option customer under rule 32.6. Thus, for example, grantors will be required to segregate in the United States as the property of option customers amounts representing profits and may not commingle the segregated property with the property of any other person except other option customers.

4. Section 4c(d)(2)(B) of the Act directs the Commission to impose certain requirements on futures commission merchants that offer and sell dealer options. Subsection (i) of that section requires that a futures commission merchant that sells dealer options have evidence that the grantor of

those options is in compliance with all of the requirements of section 4c(d)(2)(A), i.e., that the grantor (1) is domiciled in the United States; (2) is a bona fide commercial enterprise; (3) has a net worth of at least \$5,000,000; (4) segregates customer profits; (5) provides a transaction identification number for each transaction; and (6) provides confirmation of all transactions.<sup>8</sup> The Commission is, therefore, adding rule 32.12(a)(9)(ii) to require that persons through which dealer options are sold have evidence in the form of an affidavit executed by the grantor or a partner or officer of the grantor that the grantor is in compliance with each of these requirements and specifies the facts evidencing such compliance.

5. Commission rule 32.6(a), 17 CFR § 32.6(a) (1977), requires, in part, that a person treat and deal with all money, securities, or property received from an option customer as payment of the purchase price in connection with a commodity option transaction as belonging to that customer until the expiration of the term of the option or, if the customer exercises the option, until all rights of the customer under the option have been fulfilled. This language is virtually identical to that of section 4c(d)(2)(B)(ii) of the Act. Rule 32.6(a), however, also provides that up to a maximum of 10 percent of the money, securities, or property received from an option customer need not be treated and dealt with as belonging to that customer. Section 4c(d)(2)(B)(ii) does not contain such a provision. The 10-percent provision of rule 32.6(a) is, therefore, being deleted. Thus, from and after December 1, 1978, 100 percent of the purchase price received from customers must be segregated as belonging to customers.

As discussed above, section 4c(d)(2)(A) of the Act and rule 32.12(a)(3) require the grantor to segregate accrued profits for the benefit of options customers. To implement fully the congressional purpose underlying these provisions, the Commission is amending rule 32.6 to provide that the segregation obligations imposed on futures commission merchants also apply to any funds or other property remitted by the grantor to the futures

<sup>8</sup>Sec. 4c(d)(2) also authorizes, but does not require, the Commission to permit persons not domiciled in the United States to grant options under such additional terms and conditions as the Commission may adopt to provide customers protections that are substantially equivalent to those applicable to grantors domiciled in the United States. The Commission does not intend to exercise this authority casually. Accordingly, the Commission is interested in receiving comments on the type of terms and conditions that might be imposed on nondomestic grantors to insure adequate customer safeguards.

commission merchant for payment to option customers as a result of the option transaction.

6. Section 4c(d)(2)(B)(iii) of the Act, as amended, requires that futures commission merchants that offer and sell dealer options record "each transaction in its customer's name by the transaction identification number provided by the grantor." While Rule 32.12(a)(6)(ii) requires that futures commission merchants furnish their customers with confirmation statements which include the transaction identification number provided by the grantor, it does not specifically require a futures commission merchant to keep a record which matches customer names with grantor identification numbers. A requirement of this nature is now being added as rule 32.12(a)(9)(i).

7. Section 4c(d)(2)(B)(iv) of the Act, as amended, requires that a futures commission merchant provide

a disclosure statement to its customers under regulations of the Commission, that discloses, among other things, all costs, including any markups or commissions involved in such transaction \* \* \*

Under existing rule 32.5(a) futures commission merchants are already required to deliver to option customers a summary disclosure statement containing, among other things, a listing of the elements comprising the purchase price to be charged, including the premium, markups on the premium and other charges, as well as the method by which the premium is established. The summary disclosure statement must also contain a description of any and all costs (including commissions however characterized) in addition to the striking price that the customer may incur upon exercise of the option. The summary disclosure statement need not contain particularized price data of all costs which the customer may incur in the transaction, but to the extent such information is known prior to the entry into a particular transaction, rule 32.5(c) requires the futures commission merchant to inform the option customer of this price information. In addition, rule 32.5(d) requires the futures commission merchant to furnish to the customer not more than 24 hours after the execution of a transaction, a written confirmation statement which sets forth, among other things, (1) the actual amount of the purchase price including a separate listing of the premium, of markups on the premium, and of costs, fees, and other charges, and (2) the striking price.

The Commission believes that these provisions of its existing rules are consistent with the requirements of new section 4c(d)(2)(B)(iv) of the act. In order to implement fully the Congressional purpose of this section, howev-

er, the Commission is amending rule 32.5 in two respects. First, in addition to disclosing the method by which the premium is established in the summary disclosure statement, disclosures shall also be made of the method by which all other costs, fees, and charges comprising the purchase price are to be calculated. For example, if the futures commission merchant is to charge a transaction fee or similar charge based on a percentage of the premium, this fact and the percentage must be disclosed. Second, to the extent any particular cost to be incurred by the option customer is not known precisely prior to the entry into the option transaction, the futures commission merchant must inform the option customer of this fact, identify the costs involved and provide a bona fide estimate of what the costs are expected to be.<sup>9</sup>

8. Prior to the enactment of the Futures Trading Act of 1978, the only persons that could lawfully grant options on a physical commodity offered or sold to the public were those who, on May 1, 1978, were in the business of granting options on a physical commodity and in the business of buying, selling, producing, or otherwise utilizing that commodity. See rule 32.12(a), 43 FR 23704 et seq. (June 1, 1978). However, as stated above, as a result of the new legislation, the Commission has amended rule 32.12 to delete the May 1, 1978, limitation. Thus, any person that is in the business of buying, selling, producing, or otherwise using a commodity may grant options on that commodity if—but only if—the person complies with the requirements set forth in section 4c(d) of the Act and the regulations adopted by the Commission to implement that section. Included among these statutory requirements, Congress has directed that grantors must comply with "any additional uniform and reasonable terms and conditions the Commission may prescribe, including registration with the Commission." Section 4c(d)(2)(C). Thus, while Congress has provided that persons who were not in the business of granting options on May 1, 1978, should generally be able to grant options under the Act, as amended, Congress also wanted to insure that no person will be permitted to grant options to the public if the person may be found unfit to be registered with the Commission. Accordingly, the Commission has adopted rule 32.12(a)(10), imposing a registration requirement for commodity option grantors consistent with other registration requirements contained in the Act. The Commission believes that

<sup>9</sup>Of course, all known costs are required to be disclosed either in the summary disclosure statement or prior to the entry into the transaction.

this registration requirement will benefit the public in that it will allow the Commission to determine whether or not an applicant is fit to assume the position of sensitive public trust that being an option grantor entails.<sup>10</sup>

As stated above, in order to grant options on a physical commodity the Act requires that a person be in the business of buying, selling, producing or otherwise using the commodity on which the option is written. Accordingly, the Commission is requiring that, as part of the registration process, applicants for registration as commodity options grantors provide the Commission with information which will enable the Commission to determine if the applicant is a bona fide commercial enterprise with respect to the commodity underlying the option. Each applicant must submit the following information with respect to each commodity upon which it intends to grant options: (1) The type and number of commercial enterprises with which it has engaged in business during the preceding 12 months (or such shorter period as the applicant may have been in business), (2) the type and size (by quantity of commodity) of transactions with such enterprises during the preceding 12 months (or such shorter period), (3) the amount of production, inventories, and cash market sales or purchases for the most recently concluded fiscal quarter and at least the three preceding fiscal quarters (or such shorter period), and (4) any additional information evidencing the fact that the applicant is a bona fide commercial enterprise with respect to each such commodity.

Under new rule 32.12(a)(10), no person will be allowed to grant or issue options on a physical commodity unless registered with the Commission as a commodity options grantor. In passing upon applications for registration, the Commission will apply the specific statutory requirements set forth in section 4c(d) of the Act and also the same standards of fitness for registration that Congress has made applicable to other commodity professionals as set forth in sections 4n and 8a of the Act, as amended. The Commission may therefore deny registration, for example, if the applicant does not establish that the applicant is a bona fide commercial enterprise, or has at least \$5,000,000 net worth or if one or more of the bases for denial of registration set forth in sections 4n or 8a exist, including the bases set forth in the Commission's published inter-

<sup>10</sup>The Commission's regulations already require that dealer options may not be sold to the public except through registered futures commission merchants and associated persons. See rules 32.3 (a) and (b), 17 CFR 32.3 (a) and (b) (1977).

pretation of the "good cause" standard contained in section 8a.<sup>11</sup>

Prospective grantors will be required to file applications for registration with the Commission on Commission form 7-R,<sup>12</sup> the form presently used by applicants for registration as futures commission merchants, commodity pool operators and commodity trading advisors, together with a filing fee of \$200 and a signed statement that the applicant is applying for registration as a commodity options grantor and containing the information relating to its commercial activities referred to above. Among other things, form 7-R requires an applicant for registration to provide the Commission with information concerning (1) its form of organization, i.e., sole proprietorship, partnership or corporation; (2) certain types of adverse actions which may have been taken or are pending against it; and (3) the names and duties of its principal personnel. In addition, the principal personnel of an applicant registration as a commodity option grantor will be required to file Commission form 8-R.<sup>13</sup> This form requests information concerning an individual's background, including information regarding certain types of adverse actions that may have been taken against the individual.

Applicants for registration with the Commission as commodity options grantors that are registered with the Commission in another capacity, and the principal personnel thereof, need not execute and file 7-R and 8-R forms with their applications to the extent they have current 7-R and 8-R forms on file with the Commission. Prospective grantors must, however, indicate the capacity in which they are registered with the Commission in the statement required by rule 32.12(a)(10)(i). Of course, by virtue of rule 1.19, 17 CFR 1.19 (1977), futures commission merchants may not lawfully grant options and therefore may not be registered as commodity option grantors. Prospective grantors need not defer filing applications for registration until the effective date of rule 32.12(a)(10.)

Consistent with section 8a(2) of the Act, rule 32.12(a)(10) provides that pending final Commission action on an application for registration as a commodity options grantor, registration shall not be granted. However, section 4c(d)(1) of the Act, as amended, permits persons domiciled in the United States who, on May 1, 1978, were in the business of granting options on a physical commodity and in the business of buying, selling, producing, or

<sup>11</sup>40 FR 28125 (June 30, 1975). The Commission expects to publish a revised interpretation of this standard in the near future.

<sup>12</sup>See 42 FR 23988 et seq. (May 11, 1977).

<sup>13</sup>Ibid.

otherwise using that commodity, to continue to grant options on that commodity in accordance with the Commission regulations in effect on August 17, 1978, until 30 days after the effective date of the regulations issued by the Commission under section 4c(d)(2).<sup>14</sup> Thus, these grantors may continue to grant options until January 22, 1979; i.e., 30 days after the effective date of the regulations which the Commission has now issued.

Section 4c(d)(1) also provides that if one of these grantors files an application for registration with the Commission within 30 days after the effective date of these regulations, that grantor may continue to grant options pending final Commission action on its application. As a result, persons presently granting options in accordance with rule 32.12 that file applications for registration before January 22, 1979, will be entitled to continue to grant or issue options in accordance with the provisions of section 4c(d)(1) until the Commission makes a final determination on their applications; those who do not make timely application must, of course, cease granting options until they are registered.

Section 4c(d) of the Act also provides that:

The Commission may terminate the right of any person to grant, offer, or sell options under this subsection only after a hearing, including a finding that the continuation of such right is contrary to the public interest: *Provided*, That pending the completion of such termination proceedings, the Commission may suspend the right to grant, offer, or sell options of any person whose activities in the Commission's judgment present a substantial risk to the public interest.

The Commission is adding rule 32.12(a)(11) to implement this provision. In doing so, the Commission has interpreted the public interest standard in light of the relevant purposes and provisions of the Act. Accordingly, the Commission has expressly recognized and provided that the public interest standard of this provision includes considerations of whether any substantial economic purpose is served by the options granted, offered or sold and whether there exists any of the bases upon which the Commission may deny, suspend, or revoke the registration of a commodity professional under the Act. The economic purpose criterion is consistent with the public interest standard contained in section 5(g) of the Act applicable to futures contracts and with the Commission's

previously announced policy with respect to commodity options. See, e.g., 42 FR 18248 (April 5, 1977), 42 FR 55545 (October 17, 1977), and 43 FR 16155-56 (April 17, 1978).

9. Rule 32.12(c) presently provides in pertinent part that the Commission may for good cause shown waive any of the requirements of paragraphs (a) and (b) of rule 32.12. As more fully discussed above, however, sections 4c(d)(1) and (2) (A) and (B) of the Act impose specific statutory requirements on grantors and futures commission merchants. The Commission may not, of course, waive any of these requirements. Rule 32.12(c) is, therefore, being amended accordingly.

10. The Commission's action implementing the requirements of section 4c(d)(2) of the Act will render paragraph (d) of rule 32.12 obsolete. Paragraph (d) has provided that the exemption for dealer options contained in rule 32.12 would expire 60 days after the effective date of any amendment to section 4c(b) of the Act. Since section 4c(b) was amended effective October 1, 1978, rule 32.12(d) will expire by its terms on November 30, 1978. To prevent a regulatory gap from occurring, the Commission is repealing rule 32.12(d) effective immediately.

11. The Commission has also determined to amend the statutory authority citations applicable to part 32 in order to reflect the enactment of the Futures Trading Act of 1978.

12. Section 4c(d)(2) of the Act directs the Commission to issue regulations governing the offer and sale of dealer options. Those portions of its existing regulations that the Commission has determined to reissue for this purpose were originally adopted in compliance with the notice and public procedures provided for in 5 U.S.C. 553 (1976). For this reason, the Commission finds that further compliance with these procedures is unnecessary. With respect to the amendments to its regulations that the Commission is now adopting to implement section 4c(d)(2), the Commission finds that compliance with the preadoption notice and public procedures of 5 U.S.C. 553 is in part unnecessary and in any event contrary to the public interest.

Section 4c(d)(2) expressly requires the Commission to issue regulations conforming to certain specific statutory requirements; since the Act gives the Commission little discretion, if any, over these matters, public comment on these requirements is unnecessary. Certain of the amendments the Commission is now adopting effectuate this express congressional mandate. The Commission recognizes, however, that in adopting certain other amendments, such as the regis-

tration requirement imposed on commodity options grantors, the Commission is endeavoring to implement the purposes—as well as the specific requirements—of section 4c(d)(2). While the Commission might have deferred adoption of amendments implementing the specific statutory requirements until it had an opportunity to receive comment on the other amendments, the Commission believes that to have done so would have been contrary to the public interest.

In enacting section 4c(d)(2) Congress wanted to insure not only that dealer options would be sold under adequate customer safeguards, but also that firms in addition to those that were in business on May 1, 1978, would be permitted to enter the field as soon as practicable. Entry into the field by additional firms is not possible under the Act, however, until regulations have been promulgated for that purpose. In view of these considerations, as well as the Commission's obligation under section 15 of the Act, 7 U.S.C. 19 (1976), to endeavor to take the least anticompetitive means of achieving the Act's purposes, the Commission has determined to issue these regulations without delay. If a registration requirement should not be imposed on grantors concurrently with the balance of the regulations, however, the public will be exposed to unwarranted risks since firms that might not be fit to assume the position of sensitive public trust that granting options entails might thereby gain access to the field. For this reason it would be contrary to the public interest to delay the effective date of the registration requirement beyond the date that the balance of the regulations become effective.

In any event the reissuance and amendment of the Commission regulations will not become effective until December 21, 1978, and the Commission will consider any comments on its action it may receive prior to that date in order to determine whether the Commission should modify these regulations in any respect. To be considered comments should be sent to the Commission at its Washington address, 2033 K Street NW., Washington D.C. 20581, attention: Secretariat.

In its adoption of the options regulations presently in effect, the Commission, consistent with its obligations under section 15 of the Act, 7 U.S.C. 19 (1976), has taken into account the public interest to be protected by the antitrust laws and has endeavored to take the least anticompetitive means of achieving the objectives, policies, and purposes of the Act. See, e.g., 41 FR 51809 (November 24, 1976); 43 FR 16156 (April 17, 1978). The Commission has also done so in determining to continue these regulations in effect at

<sup>14</sup>Section 4c(d)(1) does not, however, exempt the futures commission merchants through which these grantors sell their options from the effect of the Commission's regulations during this 30-day period. Thus, futures commission merchants must be in full compliance with the regulations from and after the December 21, 1978 effective date.

this time and to adopt these amendments and has also considered the congressional judgment reflected in the Futures Trading Act of 1978 that options may be offered and sold only under terms and conditions that are designed to insure adequate customer safeguards.

In consideration of the foregoing, the Commission pursuant to the authority contained in sections 2(a)(1), 4c and 8a of the Commodity Exchange Act, 7 U.S.C. 2, 6c and 12a (1976), as amended by Pub. L. 95-405, 92 Stat. 865 et seq. (September 30, 1978), hereby amends part 32 of chapter I of title 17 of the Code of Federal Regulations as follows:

1. By continuing in effect the following sections of Part 32:

- Sec.  
 32.1 Definitions (17 CFR 32.1 (1977)).  
 32.2 Prohibited transactions (17 CFR 32.2 (1976)).  
 32.3 Unlawful commodity option transactions (17 CFR 32.3 (1977), as amended 42 FR 61831 (December 6, 1977)).  
 32.4 Exemptions (17 CFR 32.4 (1977)) (except paragraph (a)).  
 32.5 Disclosure (17 CFR 32.5 (1977)) (except paragraphs (a)(1)(ii) and (c)).  
 32.6 Segregation (17 CFR 32.6 (1977)) (except paragraph (a)).  
 32.7 Books and record keeping (17 CFR 32.7 (1977)).  
 32.8 Unlawful representations (17 CFR 32.8 (1977)).  
 32.9 Fraud in connection with commodity option transactions (17 CFR 32.9 (1977)).  
 32.10 Option transactions entered into prior to the effective date of this part (17 CFR 32.10 (1977)).  
 32.11 Suspension of commodity option transactions (43 FR 16153 et seq. (April 17, 1978)).  
 32.12 Exemption from suspension of commodity option transactions (43 FR 23704 et seq. (June 1, 1978), as amended by 43 FR 52467 et seq. (November 13, 1978)) (except paragraphs (a)(1), (a)(3), (c) and (d)).<sup>12</sup>

2. By amending § 32.4(a) to read as follows:

#### § 32.4 Exemptions.

(a) Except for the provisions of §§ 32.2, 32.8 and 32.9, which shall in any event apply to all commodity option transactions, the provisions of this part shall not apply to a commodity option transaction in which the purchaser is a producer, processor, or commercial user of, or a merchant handling, the commodity which is the subject of the commodity option transaction, or the products or byproducts thereof, and in which the person offering the commodity option has a reasonable basis to believe that such producer, processor, commercial user

<sup>12</sup> Amendments to paragraphs (a)(6) and (b)(1) of rule 32.12 and new rules 32.12(f), (g), (h) and (i) were recently adopted. See 43 FR 52467 et seq. (November 13, 1978), and note 2, supra.

or merchant purchases the commodity option solely for purposes related to its business as such or for the purpose of meeting its obligations to option customers under outstanding options it has granted in accordance with the provisions of section 32.12.

3. By amending paragraphs (a)(1)(ii) and (c) of § 32.5 as follows:

#### § 32.5 Disclosure.

- (a) \* \* \*  
 (1) \* \* \*  
 (ii) A listing of the elements comprising the purchase price to be charged, including the premium, markups on the premium, costs, fees and other charges, as well as the method by which the premium and such costs, fees and other charges are established;

(c) \* \* \* to the extent any of the foregoing amounts are not known, such person shall inform the option customer or prospective option customer of that fact, identify which amounts are not known, and provide a bona fide estimate of what the amounts are expected to be.

4. By amending § 32.6(a) to read as follows:

#### § 32.6 Segregation.

(a) Any person which accepts money, securities, or property from an option customer as payment of the purchase price in connection with a commodity option transaction or which accepts money, securities, or property payable to an option customer as a result of a commodity option transaction shall treat and deal with such money, securities, and property as belonging to such option customer until expiration of the term of the option, or, if the option customer exercises the option, until all rights of the option customer under the commodity option or as a result of such exercise have been fulfilled. Such money, securities, and property (1) shall be separately accounted for and segregated as belonging to such option customer, (2) shall be kept in the United States, and (3) shall not be commingled with the money, securities, or property of any other person, including the money, securities, or property received by a futures commission merchant to margin, guarantee or secure the trades or contracts of commodity customers (as defined in § 1.3(k) of this chapter) or with the money accruing to such commodity customers as the result of such trades or contracts: *Provided, however,*

That the money, securities, or property treated as belonging to an option customer may for convenience be commingled with the money, securities, or property treated as belonging to any other option customer and deposited in the same account or accounts with any bank or trust company in the United States. Such money, securities, and property, when so deposited with any bank or trust company, shall be deposited under an account name which will clearly show that it contains money, securities, or property, segregated as required by this part. Each person depositing such money, securities, or property shall obtain and retain in its files for the period provided in § 1.31 of this chapter an acknowledgment from such bank or trust company that it was informed that the money, securities, and property therein are being treated as belonging to option customers and are being held in accordance with the provisions of this part. Such bank or trust company shall allow inspection of such accounts at any reasonable time by representatives of the Commission.

5. By amending paragraphs (a)(1), (a)(3) and (c), adding paragraphs (a)(9), (a)(10) and (a)(11) and revoking paragraph (d) of § 32.12, but reserving paragraph (d) for future use, as follows:

#### § 32.12 Exemption from suspension of commodity option transactions.

(a) The provisions of § 32.11 shall not apply to the solicitation or acceptance of orders for, or the acceptance of money, securities, or property in connection with, the purchase or sale of any commodity option on a physical commodity granted by a person domiciled in the United States who is in the business of buying, selling, producing, or otherwise using that commodity if all of the following conditions are met at the time of the solicitation or acceptance:

(1) The grantor at all times has a net worth of at least \$5,000,000 certified annually by an independent public accountant using generally accepted accounting principles, provides a copy of such certification to the Commission no later than 90 days after the close of the fiscal year of the grantor, and notifies in writing the Commission and every futures commission merchant offering and selling the grantor's options whenever the grantor knows or has reason to believe that the grantor's net worth has fallen below \$5,000,000;

(3) \* \* \* and the grantor shall treat and deal with and shall segregate the

foregoing property in the same manner and subject to the same conditions as set forth in § 32.6 of this chapter with respect to the treatment and segregation of the purchase price paid by option customers;

(9) Each person who is offering and selling the option to an option customer (i) records each transaction in its customer's name by the transaction identification number provided by the grantor and (ii) has evidence in the form of an affidavit executed upon actual knowledge by the proprietor of a sole proprietorship grantor, a general partner of a partnership grantor, or the chief executive officer or chief financial officer of a corporate grantor, that the grantor of the options that it sells is in compliance with paragraphs (a), (a)(1), (a)(3), (a)(4), and (a)(5) of this section and specifies the facts evidencing such compliance.

(10)(i) The grantor is registered with the Commission as a commodity options grantor: *Provided*, That any person domiciled in the United States who on May 1, 1978, was in the business of granting an option on a physical commodity and was in the business of selling, producing, or otherwise utilizing that commodity and who files an application for registration under this paragraph on or prior to December 31, 1978, may continue to grant or issue options in accordance with this § 32.12 pending a final determination by the Commission on the application. Applications for registration as a commodity options grantor shall be filed with the Commission on form 7-R together with a statement executed by the applicant (A) that the applicant is seeking registration as a commodity options grantor under this section and (B) containing the following information with respect to each commodity upon which the applicant intends to grant options: (1) The type and number of commercial enterprises with which the applicant has engaged in business during the preceding 12 months (or such shorter period as the applicant may have been in business); (2) the type and size (by quantity of commodity) of transactions with such enterprises during the preceding 12 months (or such shorter period); (3) the amount of production, inventories, and cash market sales or purchases of the applicant for the most recently concluded fiscal quarter and at least the three preceding fiscal quarters (or such shorter period); and (4) any additional information evidencing the fact that the applicant is a bona fide commercial enterprise with respect to each such commodity. A form 7-R need not be executed and filed by an applicant that is registered with the Commission and has an up-to-date form 7-R on file

with the Commission, but such an applicant must state the capacity in which it is registered with the Commission in the statement accompanying the application required by this paragraph. The application for registration shall also be accompanied by a form 8-R executed and filed by each sole proprietor and by each natural person who is a general partner, officer, director, or branch office manager of the applicant, or performs similar functions, or is any other controlling person of the applicant; except that an accompanying form 8-R need not be filed by any individual who (i) is registered as a floor broker or an associated person or has applied for registration as a floor broker or an associated person and such application has not been withdrawn or denied or who is affiliated with any registrant, (ii) has an up-to-date form 8-R on file with the Commission and (iii) is identified on the form 7-R or statement filed by the grantor under this paragraph. Any natural person (other than a floor broker or associated person) who subsequently becomes a general partner, officer, director, or branch office manager of the registrant, or performs similar functions, or becomes any other controlling person of the registrant, shall promptly execute and file a form 8-R. Each form 8-R shall be filed in accordance with the instructions contained therein. Individuals who were previously required to submit biographical information on form 94 or who have filed a form 8-R as required by this section shall file a current form 8-R, upon request by the Commission.

(ii) Each application for registration, or renewal thereof, as a commodity options grantor shall be accompanied by a fee of \$200. Fees shall be remitted by money order, bank draft, or check, payable to the Commodity Futures Trading Commission. All registrations under this section shall expire on the 30th day of June of each year, and shall be renewed upon application therefore subject to the same requirements as in the case of an original application. Each person registered under this section shall comply with the provisions of §§ 1.14(a)(4) and (c) of this chapter.

(iii) The Commission may refuse to register any person seeking registration under this section if it is found, after opportunity for hearing, that the applicant has not established that the applicant meets the requirements of section 4(c)(d) of the Act or of paragraph (a)(1) of this section or that the applicant is unfit to engage in business because of the existence of any of the reasons upon which the Commission is authorized to refuse registration under sections 4n or 8a of the Act: *Provided*, That pending final determi-

nation of the applicant's fitness for registration, registration shall not be granted: *And provided further*, That the applicant may appeal from a refusal of registration in the manner provided in section 6(b) of the Act.

(11) Notwithstanding the foregoing provisions of this section, the Commission may terminate the right of any person to grant, offer, or sell options under this section only after a hearing, including a finding that the continuation of such right is contrary to the public interest: *Provided*, That pending the completion of such termination proceedings, the Commission may suspend the right to grant, offer, or sell options of any person whose activities in the Commission's judgment present a substantial risk to the public interest. In determining whether to terminate or suspend the right of any person to grant, offer, or sell options, the Commission will consider, among other public interest factors, whether any substantial economic purpose is served by the options granted, offered, or sold, whether any cause exists under sections 4n or 8a of the Act which would warrant refusal, suspension or revocation of registration with the Commission and whether the person is in violation of any provision of the Act or the Commission's regulations thereunder, including the regulations contained in this part.

(c) Upon written application the Commission may for good cause shown in any particular case waive the requirements of any provision of paragraph (a) or (b) of this section other than those requirements expressly imposed by sections 4c(d)(1) and (2) (A) and (B) of the Act, subject to such other terms and conditions as the Commission may find appropriate in the public interest and for the protection of option customers.

(d) [Reserved].

6. By amending the authority citations applicable to part 32 as follows:

**AUTHORITY:** Secs. 2(a)(1), 4c and 8a, Commodity Exchange Act (7 U.S.C. 2, 6c and 12a (1976), as amended by Pub. L. 95-405, 92 Stat. 865, 867-869).

The foregoing action shall become effective on December 21, 1978, except that the foregoing repeal of rule 32.12(d) shall be effective immediately.

Issued in Washington, D.C., on November 15, 1978, by the Commission.

WILLIAM T. BAGLEY,  
Chairman, Commodity  
Futures Trading Commission.

[FR Doc. 78-32644 Filed 11-20-78; 8:45 am]

[8010-01-M]

## CHAPTER II—SECURITIES AND EXCHANGE COMMISSION

[Release No. SAB-26]

### PART 211—INTERPRETATIVE RELEASURES RELATING TO ACCOUNTING MATTERS

#### Subpart B—Staff Accounting Bulletins

STAFF ACCOUNTING BULLETIN No. 26

AGENCY: Securities and Exchange Commission.

ACTION: Publication of Staff Accounting Bulletin.

SUMMARY: The interpretations in this Staff Accounting Bulletin express the staff's views concerning three accounting and disclosure matters relating to bank holding companies. The first matter presents the staff's suggestion for items to be included in a capsule updating of a summary of operations. The second matter is concerned with disclosure believed appropriate in connection with reporting of dividends which can be paid by bank subsidiaries. The third matter discusses the use of tax equivalent adjusted amounts in financial statements and management's discussion of the results of operations.

DATE: November 13, 1978.

FOR FURTHER INFORMATION CONTACT:

Lawrence J. Bloch, Office of the Chief Accountant, Securities and Exchange Commission, Washington, D.C. 20549, 202-472-3782.

SUPPLEMENTARY INFORMATION: The statements in Staff Accounting Bulletins are not rules or interpretations of the Commission nor are they published as bearing the Commission's official approval; they represent interpretations and practices followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure re-

quirements of the Federal securities laws.

SHIRLEY E. HOLLIS,  
Assistant Secretary.

NOVEMBER 13, 1978.

STAFF ACCOUNTING BULLETIN No. 26

The following interpretations express the staff's view regarding certain accounting and disclosure matters relating to bank holding companies.

#### TOPIC 1: FINANCIAL STATEMENTS

J. Summary of operations—capsule updating.

*Facts:* Registrants may be required to update the summary of operations or statement of income presented in lieu of a summary in 1933 Act registration statements with condensed (or capsule) information through the end of the latest month-end or quarter.

*Question:* What specific items are appropriate for presenting capsule information for a bank holding company?

*Interpretive Response:* Capsule income information for a bank holding company should include at least the following items:

Interest income; Net interest income; Provision for loan losses and Income before income taxes and securities gains (losses).

Income before securities gains (losses); Net income and Earnings per share.

#### TOPIC 4: EQUITY ACCOUNTS

I. Limitation on payment of dividends by subsidiary banks to parent holding company.

*Facts:* The principal source of income and funds for a bank holding company is dividends paid by subsidiary banks. Bank regulatory agencies limit the amount of dividends which a bank can pay without obtaining approval from the agencies.

*Question:* What disclosure is the staff requesting from bank holding companies?

*Interpretive Response:* The staff is requesting that bank holding companies disclose in a note to the financial statements the dollar amount of dividends which can be paid to the parent company by bank subsidiaries without obtaining prior approval from a bank regulatory agency.

#### TOPIC 10: MISCELLANEOUS DISCLOSURE

K. Tax equivalent adjustment in financial statements of bank holding companies.

*Facts:* Bank subsidiaries of bank holding companies frequently hold substantial amounts of state and municipal bonds, interest income from which is exempt from Federal income taxes. Because of the tax exemption the stated yield on these securities is lower than the yield on securities

with similar risk and maturity characteristics whose interest is subject to Federal tax. In order to make the interest income and resultant yields on tax exempt obligations comparable to those on taxable investments and loans, a "tax equivalent adjustment" is often added to interest income when presented in analytical tables or charts. When the data presented also includes income taxes, a corresponding amount is added to income tax expense so that there is no effect on net income. Adjustment may also be made for the tax equivalent effect of exemption from state and local income taxes.

*Question 1:* Is the concept of the tax equivalent adjustment appropriate for inclusion in financial statements and related notes?

*Interpretive Response:* No. The tax equivalent adjustment represents a credit to interest income which is not actually earned and realized and a corresponding charge to taxes (or other expense) which will never be paid, consequently it should not be reflected on the income statement or in notes to financial statements included in a report or registration statement filed with the Commission. Financial statements and related notes in an annual report to stockholders which include a tax equivalent adjustment are not considered appropriate for incorporation by reference in a 1933 Act or 1934 Act filing. The staff will request amendment of filings containing income statements and notes which have tax equivalent adjustments or which incorporate by reference statements and notes in a stockholders' report which contain such adjustments.

In connection with the adoption of article 9 of regulation S-X (17 CFR 210.9-01 to 210.9-05) which is concerned with requirements for financial statements of bank holding companies and banks, it was stated that "The tax equivalency adjustment is not in accordance with generally accepted accounting principles but reflects theoretical income never actually realized by a company." The AICPA Industry Audit Guide, "Audits of Banks," (1968) states that "The purpose of the income statement is to disclose factually the period's transactions as they occurred; it should not be used to present results which might have been realized if conditions had been different from those which actually existed."

*Question 2:* May a tax equivalent adjustment be reflected in a summary of operations included in a report or registration statement filed with the Commission?

*Interpretive Response:* No. The staff does not believe that such an adjustment is appropriate for inclusion in a summary of operations included in filings with the Commission for the reasons stated in the response to Question 1.

*Question 3:* May amounts representing tax equivalent adjustments be included in the body of a statement of income or summary of earnings provided they are designated as not being included in the totals and balances on the statement?

*Interpretive Response:* No. The tabular format of a statement or summary develops information in an orderly manner which becomes confusing when additional numbers not an integral part of the statement are inserted into it.

*Question 4:* If the summary of operations in an annual report to stockholders includes income on tax exempt securities adjusted to

a tax equivalent basis, could the statement be incorporated by reference in a 1933 Act or 1934 Act filing?

*Interpretive Response:* No. An adjusted summary of operations in an annual report to stockholders would not be considered appropriate for incorporation by the reference in a 1933 Act or 1934 Act filing. The registrant would be requested to amend the filing to include a summary of operations based on generally accepted accounting principles, and to add a headnote stating that the summary in the annual report to stockholders was not acceptable for incorporation by reference because it did not comply with generally accepted accounting principles.

*Question 5:* May information adjusted to a tax equivalent basis be included in management's discussion and analysis of the summary of operations (or statement of income)?

*Interpretive Response:* The purpose of management's discussion and analysis is to enable investors to appraise the extent that earnings have been affected by changes in business activity and accounting principles or methods. Material changes in items or revenue or expense should be analyzed and explained in textual discussion and statistical tables. It may be appropriate to use amounts or to present yields on a tax equivalent basis. If this is done the tax equivalent amounts should be clearly identified and related to the corresponding unadjusted amount on the financial statement. Yields computed on a tax equivalent basis should be identified. If appropriate, the discussion should include a comment on material changes in investment securities positions that affect tax exempt interest income. For example, there might be a comment on a change from investments in tax exempt securities to nontax exempt securities because of the availability of net operating losses to offset taxable income of current and future periods, or a comment on a change in the quality level of the tax exempt investments resulting in increased interest income and risk and a corresponding increase in the tax equivalent adjustment.

Because of differences among registrants in making the tax equivalency computation, a brief note should describe the extent of recognition of exemption from Federal, State and local taxes and the combined marginal or incremental rate used. Where net operating losses exist, the note should indicate the nature of the tax equivalency adjustment made.

[FR Doc. 78-32628 Filed 11-20-78; 8:45 am]

[8010-01-M]

[Release No. 33-5995]

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

**PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

**Resales of Securities**

AGENCY: Securities and Exchange Commission.

**ACTION:** Final rule and form amendments.

**SUMMARY:** The Commission is amending rule 144, which provides a safe harbor for the resale of securities, and two forms relating to it. The amendments are technical in nature and are designed primarily to conform the rule and the forms in their entirety to certain recent changes which relaxed the limitations on the amount of securities that can be sold under the rule and the manner in which such securities may be sold.

**EFFECTIVE DATE:** November 15, 1978.

**FOR FURTHER INFORMATION CONTACT:**

Peter J. Romeo, Division of Corporation Finance, Securities and Exchange Commission, Washington, D.C. 20549, 202-755-1240.

**SUPPLEMENTARY INFORMATION:** The Commission today announced the adoption of amendments to rule 144 (17 CFR 230.144), form 144 (17 CFR 239.144), and form S-8 (17 CFR 239-16b) under the Securities Act of 1933 ("1933 Act") (15 U.S.C. 77a et seq.). The purpose and nature of the amendments are discussed in detail in the following sections of this release.

**BACKGROUND**

Rule 144 provides a safe harbor for the resale of "restricted securities"<sup>1</sup> and securities held by affiliates<sup>2</sup> of an issuer. The rule sets forth standards which, if met, permit persons who hold such securities to sell them publicly without the need for registration and without being deemed underwriters<sup>3</sup> under the 1933 Act.

In release No. 33-5979 (September 19, 1978) (43 FR 43709) the Commission announced the adoption of certain significant amendments to Rule 144. The amendments directly affected the volume limitation and manner of sale requirements of the rule. Although other provisions of rule 144, form 144, and form S-8 were indirectly affected by the changes, these other provisions, through oversight, were not amended at the time. To correct this oversight, and in order to imple-

<sup>1</sup>The term "restricted securities" includes securities acquired in nonpublic offerings, such as those under sec. 4(2) of the 1933 Act, as well as securities acquired in offerings made in reliance upon rule 240 (17 CFR 230.240) under the Act.

<sup>2</sup>An "affiliate" of an entity is defined in rule 405 (17 CFR 230.405) under the 1933 Act as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the (entity)."

<sup>3</sup>The term "underwriter" is broadly defined in sec. 2(11) of the 1933 Act and includes persons who acquire securities "with a view to . . . distribution."

ment the recent changes to the fullest degree possible, the Commission has determined to adopt the amendments described herein.

**SUMMARY OF THE AMENDMENTS**

Four types of revisions have been made to the items referred to above. These are summarized in the paragraphs which follow.

**1. REFERENCES TO 6-MONTH PERIODS CHANGED**

As previously noted, the amendments announced in release No. 33-5979 in part involved the volume limitation provisions of rule 144. Formerly, the rule permitted a person to sell the amounts specified in the rule during periods of 6 months. The amendments reduced this 6-month period measuring sales to 3 months.

In making the above revision, the Commission amended paragraphs (e)(1) and (e)(2) of rule 144, which deal directly with the volume limitation requirements. However, other parts of the rule which contain references to 6-month measuring periods, including subparagraphs (ii) through (vi) of paragraph (e)(3), note (ii)(c) to paragraph (g)(3), and paragraph (h), were not so amended. The references to 6-month measuring periods in those other provisions have now been changed to 3 months so that the rule will now be consistent in all respects on this point. Similar changes have been made, where appropriate, in form 144 and in general instruction E to form S-8.

**2. VOLUME LIMITATION FOR UNLISTED SECURITIES CLARIFIED**

In amending the volume limitation provisions of rule 144 in release No. 33-5979, the Commission stated in the explanatory section of the release that, among other things, it was "eliminating the disparity that formerly existed in rule 144 between the volume standards for listed securities and those for unlisted securities." This statement reflected the fact that under the revised rule trading volume reported through NASDAQ<sup>4</sup> for an unlisted security could be considered in determining the maximum amount of such securities that could be sold. Formerly, trading volume could be considered only if one were selling securities listed on a national securities exchange.

Notwithstanding the above statement, the Commission's staff has received a number of inquiries as to whether NASDAQ trading volume may be taken into account in connection with sales of unlisted securities under the rule. Apparently, these in-

<sup>4</sup>NASDAQ is the name of the automated quotation service of the NASD, Inc.

quiries have been prompted by the fact that paragraph (e)(1) of the rule states that in determining the maximum amount of securities that may be sold under the rule, one may consider the average weekly volume of trading reported "on all national securities exchanges and reported through (NASDAQ)" (emphasis added). As pointed out by the persons making the inquiries, the use of the conjunction "and" suggests that NASDAQ trading volume is relevant only to sales of listed securities.

In order to dispel any further confusion in regard to the above matter, the Commission has amended paragraph (e)(1) to state that one may consider the average weekly volume of trading "reported on all national securities exchanges and/or reported through (NASDAQ)" (emphasis added). The use of the dual connective "and/or" will make it clear that for purposes of determining the volume limitation under rule 144, both exchange volume and NASDAQ volume may be considered for listed securities, while NASDAQ volume may be considered for unlisted securities.

### 3. REQUIREMENT TO FILE AMENDED FORM 144 ELIMINATED

Paragraph (h) of rule 144 until now has required the filing of a notice on form 144 of a proposed sale of securities under the rule if the amount of securities to be sold during any 6-month period exceeded 500 shares or the aggregate sale price was in excess of \$10,000. In addition, the paragraph has required that if all of the securities for which a notice was filed were not sold within 90 days after the filing of the notice, an amended notice must be filed concurrently with the commencement of any further sales of the securities.

In view of the fact that the measuring period for determining the volume limitation for sales under the rule has been reduced from 6 months to 3 months, it now appears that the requirement for filing an amended notice after the 90-day period mentioned above has elapsed is superfluous. That is, 90 days is comparable to the new 3-month measuring period, and since a new notice would have to be filed in any event for further sales after a 3-month period, no useful purpose would be served by requiring an amended notice after 90 days. Accordingly, the Commission has deleted from paragraph (h) the sentence which required the filing of an amended form 144 in the circumstances mentioned above.

### 4. STATEMENTS CONCERNING EXPANDED METHOD OF SELLING INSERTED

The amendments to rule 144 announced in release No. 33-5979 now

permit sales of securities under the rule to be made directly to a market maker in lieu of selling such securities through a broker. Formerly, the rule required that all sales of securities under it be made in brokers' transactions. In order to implement this change fully, the Commission has inserted in paragraph (h) of the rule, as well as form 144, statements which indicate that the notice on form 144 shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale under the rule or the execution directly with a market maker of such a sale. In addition, the form has been revised to require, in connection with sales to a market maker, the name of any such entity.

### TEXT OF THE AMENDMENTS

I. 17 CFR is amended by revising § 230.144(e) (1), (2), and (3), (e)(3)(ii)-(vi), (g)(3) note (ii) (c), and (h) to read as follows:

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

(e) *Limitation on amount of securities sold.* Except as hereinafter provided, the amount of securities which may be sold in reliance upon this rule shall be determined as follows:

(1) *Sales by affiliates.* If restricted or other securities are sold for the account of an affiliate of the issuer, the amount of securities sold, together with all sales of restricted and other securities of the same class for the account of such person within the preceding three months, shall not exceed the greater of: (i) 1 percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or (ii) the average weekly volume of trading in such securities reported on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the 4 calendar weeks preceding the filing of the notice required by paragraph (h) of this section, or, if no such notice is required, the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker, or (iii) the average weekly volume of trading in such securities reported through the consolidated transaction reporting system contemplated by rule 17a-15 under the Securities Exchange Act of 1934 during the 4-week period specified in subdivision (ii) of this subparagraph.

(2) *Sales by persons other than affiliates.* The amount of restricted securities sold for the account of any person

other than an affiliate of the issuer, together with all other sales of restricted securities of the same class for the account of such person within the preceding 3 months, shall not exceed the amount specified in paragraph (e)(1)(i), (1)(ii), or (1)(iii) of this section, whichever is applicable.

(3) *Determination of amount.* For the purpose of determining the amount of securities specified in paragraphs (e) (1) and (2) of this section, the following provisions shall apply:

(ii) The amount of securities sold for the account of a pledgee thereof, or for the account of a purchaser of the pledged securities, during any period of 3 months within 2 years after a default in the obligation secured by the pledge, and the amount of securities sold during the same 3-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable.

(iii) The amount of securities sold for the account of a donee thereof during any period of 3 months within 2 years after the donation, and the amount of securities sold during the same 3-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable;

(iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any period of 3 months within 2 years after the acquisition of the securities by the trust, and the amount of securities sold during the same 3-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable;

(v) The amount of securities sold for the account of the estate of a deceased person, or for the account of a beneficiary of such estate, during any period of 3 months and the amount of securities sold during the same period for the account of the deceased person prior to his death shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable; *Provided*, That no limitation on amount shall apply if the estate or beneficiary thereof is not an affiliate of the issuer;

(vi) When two or more affiliates or other persons agree to act in concert for the purpose of selling securities of an issuer, all securities of the same class sold for the account of all such persons during any period of 3 months shall be aggregated for the purpose of

determining the limitation on the amount of securities sold;

\* \* \* \* \*

(g) *Brokers' transactions.* \* \* \*

NOTES.—(i) \* \* \*

(ii) The reasonable inquiry required by paragraph (g) (3) of this section should include, but not necessarily be limited to, inquiry as to the following matters:

\* \* \* \* \*

(c) The amount of securities of the same class sold during the past 3 months by all persons whose sales are required to be taken into consideration pursuant to paragraph (e) of this section;

\* \* \* \* \*

(h) *Notice of proposed sale.* If the amount of securities to be sold in reliance upon the rule during any period of 3 months exceeds 500 shares or other units or has an aggregate sale price in excess of \$10,000, three copies of a notice on form 144 shall be filed with the Commission at its principal office in Washington, D.C.; and if such securities are admitted to trading on any national securities exchange, one copy of such notice shall also be transmitted to the principal exchange on which such securities are so admitted. 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 execu-

tion directly with a market maker of such a sale. Neither the filing of such notice nor the failure of the Commission to comment thereon shall be deemed to preclude the Commission from taking any action it deems necessary or appropriate with respect to the sale of the securities referred to in such notice.

\* \* \* \* \*

II. 17 CFR 239.144 (a) and (b) is amended to read as follows:

§ 239.144 Form 144, for notice of proposed sale of securities pursuant to § 230.144 of this chapter.

(a) Except as indicated in paragraph (b) of this section, this form shall be filed in triplicate with the Commission at its principal office in Washington, D.C., by each person who intends to sell securities in reliance upon § 230.144 of this chapter and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities or the execution directly with a market maker of a sale of securities.

(b) This form need not be filed if the amount of securities to be sold during any period of 3 months does not exceed 500 shares or other units and the aggregate sale price thereof does not exceed \$10,000.

\* \* \* \* \*

III. Form 144 under the Securities Act of 1933 is amended to read as follows:

[8010-01-C]

FORM 144

U.S. SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

NOTICE OF PROPOSED SALE OF SECURITIES  
Pursuant to Rule 144 under the Securities Act of 1933

ATTENTION: Transmittal for filing 3 copies of this form concurrently with either placing an order with a broker to execute a sale or executing a sale directly with a market maker.

SEC USE ONLY	
STATEMENT SEQUENCE NO.	
FORM NUMBER	
FORM EDITION	
FILE NUMBER	
FILE CODE	

1/ Name of Issuer		2/ Filing Office No.		3/ S.E.C. File No.	
4/ Address of Issuer		5/ City		6/ State	
7/ Name of Person for Whose Account the Securities are to be Sold		8/ Social Security No. or I.D. Ident. No.		9/ Relationship to Issuer	
10/ Address		11/ City		12/ State	

INSTRUCTION: The person filing this notice should contact the issuer to obtain the I.R.S. Identification Number and the S.E.C. File Number.

3/ (a) Title of the Class of Securities To Be Sold	4/ (b) Name and Address of Each Broker Through Whom the Securities are to be Offered or Each Market Maker who is Acquiring the Securities	SEC USE ONLY	5/ (c) Number of Shares or Other Units To Be Sold	6/ (d) Aggregate Market Value	7/ (e) Number of Shares or Other Units Outstanding	8/ (f) Approximate Date of Sale	9/ (g) Name of Each Securities Exchange
		Broker-Dealer File Number	(See instr. 3c)	(See instr. 3d)	(See instr. 3e)	See instr. 3f	See instr. 3g

- INSTRUCTIONS: 1. (a) Name of issuer  
(b) Issuer's I.R.S. Identification Number  
(c) Issuer's S.E.C. file number, if any  
(d) Issuer's address, including zip code  
(e) Issuer's telephone number, including area code
2. (a) Name of person for whose account the securities are to be sold  
(b) Such person's Social Security or I.R.S. identification number  
(c) Such person's relationship to the issuer (e.g., officer, director, 10% stockholder, or member of immediate family of any of the foregoing)  
(d) Such person's address, including zip code

3. (a) Title of the class of securities to be sold  
(b) Name and address of each broker through whom the securities are intended to be sold  
(c) Number of shares or other units to be sold (if debt securities, give the aggregate face amount)  
(d) Aggregate market value of the securities to be sold as of a specified date within 10 days prior to the filing of this notice  
(e) Number of shares or other units of the class outstanding (if debt securities the face amount thereof outstanding) as shown by the most recent report or statement published by the issuer  
(f) Approximate date on which the securities are to be sold  
(g) Name of each securities exchange, if any, on which the securities are intended to be sold

TABLE I - SECURITIES TO BE SOLD

Furnish the following information with respect to the acquisition of the securities to be sold and with respect to the payment of all or any part of the purchase price or other consideration therefor:

Title of the Class	Date Year Acquired	Nature of Acquisition Transaction	Name of Person from Whom Acquired (If gift, also give date donor acquired)	Amount of Securities Acquired	Date of Payment	Nature of Payment
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**INSTRUCTIONS**

1. If the securities were purchased and full payment therefor was not made in cash at the time of purchase, explain in the table or in a note therein the nature of the consideration given. If the consideration consisted of any note or other obligation, or if payment was made in installments describe the arrangement and state when the note or other obligation was discharged in full or the last installment paid.

2. If within two years after the acquisition of the securities the person for whose account they are to be sold had any option, contract, or other right to dispose of securities related to the securities to be sold, furnish full information with respect thereto.

TABLE II - SECURITIES SOLD DURING THE PAST 3 MONTHS

Furnish the following information as to all securities of the issuer sold during the past 3 months by the person for whose account the securities are to be sold.

Name and Address of Seller	Title of Securities Sold	Date of Sale	Amount of Securities Sold	Gross Proceeds
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REMARKS:

U.S. GOVERNMENT PRINTING OFFICE: 1978

**INSTRUCTIONS:**

See the definition of "person" in paragraph (a) of Rule 144. Information to be given not only as to the person for whose account the securities are to be sold but also as to all other persons included in that definition. In addition, information shall be given as to sales by all persons whose sales are required by paragraph (e) of Rule 144 to be aggregated with sales for the account of the person filing this notice.

**ATTENTION:**

The Person for whose account the securities to which this notice relates are to be sold hereby represents by signing this notice that he does not know any material adverse information in regard to the current and prospective operations of the issuer of the securities to be sold which has not been publicly disclosed.

DATE OF NOTICE

SIGNATURE

The notice shall be signed by the person for whose account the securities are to be sold. At least one copy of the notice shall be manually signed. Any copies not manually signed shall bear typed or printed signatures.

**ATTENTION:** Intentional misstatements or omission of facts constitute Federal Criminal Violations (See 18 U.S.C. 1001).

(Secs. 2(11), 4(1), 4(4), 19(a), 48 Stat. 74, 77, 85; secs. 201, 203, 209, 210, 48 Stat. 904, 906, 908; secs. 1-4, 6, 68 Stat. 683, 684; sec. 12, 78 Stat. 580 (15 U.S.C. 77b(11), 77d(1), 77d(4), 77s(a)).)

IV. General instruction E to form S-8 is revised to read as follows:

§ 239.16b Form S-8, for registration under the Securities Act of 1933 of securities to be offered to employees pursuant to certain plans.

E. Unavailability of the form S-8 prospectus for reoffers or resales. The form S-8 prospectus will not be available for reoffers or resales of securities acquired pursuant to this registration statement by affiliates of the issuer, as defined in rule 405 under the Act. However, such affiliates may reoffer or resell such securities pursuant to a separate prospectus, filed with the registration statement on this form S-8, prepared in the following manner:

(1) Such prospectus may be prepared in accordance with the requirements of form S-16 if:

(a) The issuer, at the time of filing such prospectus, satisfies the conditions set forth in the rule as to the use of form S-7; or

(b) The amount of securities proposed to be reoffered or resold pursuant to the prospectus, by each person affiliated with the issuer, and any other person with whom he is acting in concert for the purpose of selling securities of the issuer, does not exceed, during any 3-month period, the amount specified in rule 144(e), calculated as of the date of filing such prospectus.

(2) Such prospectus shall be prepared in accordance with the requirements of form S-1 under the Act, if subparagraph (1), above, does not permit the use of a prospectus on form S-16.

(Secs. 6, 10, 19(a), 48 Stat. 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908, sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57 (15 U.S.C. 77f, 77j, 77s(a)).)

#### STATUTORY BASIS

The amendments to rule 144 and form 144 have been adopted by the Commission pursuant to the Securities Act of 1933, particularly sections 2(11), 4(1), 4(4), and 19(a) thereof. The amendments to form S-8 have also been adopted pursuant to the 1933 Act, particularly sections 6, 10, and 19(a) thereof.

Because all of the amendments adopted today generally are of a technical nature and do not impose any new substantive requirements, the Commission finds that prior notice and public comment under the Administrative Procedure Act (5 U.S.C. 553) are not necessary.

By the Commission.

GEORGE A. FITZSIMMONS,  
Secretary.

NOVEMBER 8, 1978.

[FR Doc. 78-32627 Filed 10-20-78; 8:45 am]

[4810-22-M]

#### Title 19—Customs Duties

### CHAPTER I—UNITED STATES CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

[T.D. 78-451]

#### PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

##### Special Tonnage Tax and Light Money; Libya

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This rule adds Libya to the list of nations whose vessels are exempted from the payment of higher tonnage duties than are applicable to vessels of the United States and from the payment of light money. Satisfactory evidence has been obtained by the Department of State that no discriminating duties of tonnage or impost are imposed in Libyan ports upon vessels belonging to citizens of the United States or on their cargo.

EFFECTIVE DATE: The exemption became effective for Libya on September 1, 1969.

FOR FURTHER INFORMATION CONTACT:

Patrick J. Casey, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229, 202-566-5706.

SUPPLEMENTARY INFORMATION:

#### BACKGROUND

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton, known as "light money," on all foreign vessels which enter U.S. ports (46 U.S.C. 121, 128). However, vessels of a foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of proof satisfactory to the President that no discriminating duties of tonnage or imposts are imposed by that foreign nation on U.S. vessels or their cargo (46 U.S.C. 141). The President has delegated the authority to grant this exemption to the Secretary of the Treasury. Section 4.22 of the Customs Regulations (19 CFR 4.22) lists those na-

tions whose vessels have been exempted from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

On October 6, 1977, the Department of State advised that satisfactory evidence has been obtained from the Government of Libya that no discriminating duties of tonnage or impost are imposed or levied in ports of that country upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported into that country in those vessels.

In its communication, the Department of State advised no discriminating duties of tonnage or impost were imposed or levied upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise, imported into Libyan ports from September 1, 1969. The date of September 1, 1969, is based upon statements by the Government of Libya, established on September 1, 1969, that it has never imposed discriminatory duties of tonnage or impost on U.S. vessels.

#### DECLARATION

Therefore, by virtue of the authority vested in the President by section 4228 of the Revised Statutes, as amended (46 U.S.C. 141), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951, as amended by Executive Order No. 10882, July 18, 1960 (3 CFR, 1959-1963 Comp., Ch. II), and pursuant to the authorization provided by Treasury Department order No. 190, Rev. 15 (43 FR 11884), I declare that the foreign discriminating duties of tonnage and impost within the United States are suspended and discontinued, in respect to vessels of Libya, and the produce, manufactures, or merchandise imported into the United States in such vessels from Libya, or from any other foreign country.

This suspension and discontinuance shall take effect from September 1, 1969, in respect to vessels of Libya, and shall continue for so long as the reciprocal exemptions of vessels wholly belonging to citizens of the United States and their cargoes shall be continued and no longer.

#### AMENDMENT TO THE REGULATIONS

In accordance with this declaration, § 4.22 of the Customs Regulations (19 CFR 4.22) is amended by adding "Libya" in the appropriate alphabetical sequence in the list of nations whose vessels are exempted from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

(R.S. 251, as amended, 4219, as amended, 4225, as amended, 4228, as amended, sec. 3, 23 Stat. 119, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624, 46 U.S.C. 3, 121, 128, 141).)

Because this amendment merely implements a statutory requirement, notice and public procedure thereon are found to be unnecessary and good cause exists for dispensing with the delayed effective date provisions of 5 U.S.C. 553.

**DRAFTING INFORMATION**

The principal author of this document was Todd J. Schneider, Regulations and Legal Publications Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices of the Customs Service and the Department of State participated in developing the document, both on matters of substance and style.

Dated: November 7, 1978.

RICHARD J. DAVIS,  
Assistant Secretary  
of the Treasury.

[FR Doc. 78-32675 Filed 11-20-78; 8:45 am]

[1505-01-M]

**Title 20—Employee's Benefits**

**CHAPTER III—SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE**

[Reg. No. 16]

**PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED**

**Deeming of Income**

*Correction*

In FR Doc. 78-25007 appearing at page 39564 in the issue of Wednesday, September 6, 1978, in the third column, on page 39569, paragraph (d)(1) which reads: "(d) *Income not included.* (1) For purposes of this section, the term income does not include:" should be moved below *Example 2.*

[4110-03-M]

**Title 21—Food and Drugs**

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

**SUBCHAPTER A—GENERAL**

[Docket No. 77C-0208]

**PART 73—LISTING OF COLOR ADDITIVES EXEMPT FROM CERTIFICATION**

**PART 81—GENERAL SPECIFICATIONS AND GENERAL RESTRICTIONS FOR PROVISIONAL COLOR ADDITIVES FOR USE IN FOODS, DRUGS, AND COSMETICS**

**Ferric Ferrocyanide (Iron Blue)**

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: This document permanently lists ferric ferrocyanide (iron blue) for use in externally applied drugs and cosmetics, including drugs and cosmetics intended for use in the area of the eye. This action, taken in response to two citizen petitions, will also remove ferric ferrocyanide (iron blue) from the provisional listing.

DATES: Effective December 22, 1978; objections by December 21, 1978.

**FOR FURTHER INFORMATION CONTACT:**

Gerard L. McCowin, Bureau of Foods (HFF-334), Food and Drug Administration, Department of Health, Education, and Welfare, 200 C Street SW., Washington, D.C. 20204, 202-472-5740.

**SUPPLEMENTARY INFORMATION:** In the FEDERAL REGISTER of August 15, 1978 (43 FR 36061), the Food and Drug Administration (FDA) restored ferric ferrocyanide (iron blue) to the provisional list of color additives for use in externally applied drugs and cosmetics, including those intended for use in the area of the eye. The closing date for ferric ferrocyanide was established as November 30, 1978, contingent upon submission by September 14, 1978, of analytical data supporting necessary specifications for the color additive. Published elsewhere in this issue of the FEDERAL REGISTER is a notice extending the closing date to December 31, 1978.

The necessary data was submitted in a timely fashion by two manufacturers. The Commissioner has evaluated this information along with information contained in the petitions and

concludes that ferric ferrocyanide is safe, under the conditions set forth below, for use in coloring externally applied drugs and cosmetics, including those intended for use in the area of the eye, and that certification is not necessary for the protection of the public health.

The potential environmental effects of this action have been carefully considered, and FDA has concluded that the action will not significantly affect the quality of the human environment. This action is one of a type for which the agency has determined under 21 CFR 25.1(f)(6) that the preparation of an environmental impact statement is not required, except in rare and unusual circumstances. Accordingly, under 21 CFR 25.1(g), the preparation of an environmental impact analysis report for this action is not required.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 706 (b), (c), and (d), 74 Stat. 399-403 as amended (21 U.S.C. 376 (b), (c), and (d))) and the transitional provisions of the Color Additive Amendments of 1960 (Title II, Pub. L. 86-618, section 203, 74 Stat. 404-407 (21 U.S.C. 376 note)) and under authority delegated to the Commissioner (21 CFR 5.1), Parts 73 and 81 are amended as follows:

1. Part 73 is amended by adding new §§ 73.1299 and 73.2299 to read as follows:

§ 73.1299 Ferric ferrocyanide.

(a) *Identity.* (1) The color additive ferric ferrocyanide is a ferric hexacyanoferrate pigment characterized by the structural formula  $Fe_3[Fe(CN)_6]_x \cdot xH_2O$ , which may contain small amounts of ferric sodium ferrocyanide and ferric potassium ferrocyanide.

(2) Color additive mixtures for drug use made with ferric ferrocyanide may contain only those diluents listed in this subpart as safe and suitable for use in color additive mixtures for coloring drugs.

(b) *Specifications.* Ferric ferrocyanide shall conform to the following specifications and shall be free from impurities other than those named to the extent that such impurities may be avoided by good manufacturing practice:

- Water soluble cyanide, not more than 10 parts per million.
- Lead (as Pb), not more than 20 parts per million.
- Arsenic (as As), not more than 3 parts per million.
- Nickel (as Ni), not more than 200 parts per million.
- Cobalt (as Co), not more than 200 parts per million.
- Mercury (as Hg), not more than 1 part per million.
- Oxalic acid, not more than 0.1 percent.

Water soluble matter, not more than 3 percent.

Volatile matter, not more than 10 percent.  
Total iron (as Fe corrected for volatile matter), not less than 37 percent and not more than 45 percent.

(c) *Uses and restrictions.* Ferric ferrocyanide may be safely used in amounts consistent with good manufacturing practice to color externally applied drugs including those intended for use in the area of the eye.

(d) *Labeling requirements.* The label of the color additive and of any mixtures prepared therefrom intended solely or in part for coloring purposes shall conform to the requirements of § 70.25 of this chapter.

(e) *Exemption from certification.* Certification of this color additive is not necessary for the protection of the public health, and therefore batches thereof are exempt from certification requirements of section 706(c) of the act.

#### § 73.2299 Ferric ferrocyanide.

(a) *Identity and specifications.* The color additive ferric ferrocyanide shall conform in identity and specifications to the requirements of § 73.1299(a)(1) and (b).

(b) *Uses and restrictions.* Ferric ferrocyanide is safe for use in coloring externally applied cosmetics, including cosmetics applied to the area of the eye, in amounts consistent with good manufacturing practice.

(c) *Labeling.* The color additive and any mixture prepared therefrom intended solely or in part for coloring purposes shall bear, in addition to any information required by law, labeling in accordance with § 70.25 of this chapter.

(d) *Exemption from certification.* Certification of this color additive is not necessary for the protection of the public health, and therefore batches thereof are exempt from certification under section 706(c) of the act.

2. Part 81 is amended:

#### § 81.1 [Amended]

a. In § 81.1 *Provisional lists of color additives* by deleting from the table in paragraph (g) the entry for "Ferric ferrocyanide (iron blue)."

b. In § 81.27 by revising the introductory text of paragraph (c), and by revising paragraph (c)(2) to read as follows:

#### § 81.27 Conditions of provisional listing of additives.

(c) The closing date for D & C Red No. 6, D & C Red No. 7, and D & C Red No. 30 is postponed until October 31, 1978, while chemistry data and analytical methods to establish speci-

cations are developed and evaluated and subject to compliance with the requirements of this paragraph.

(2) The required chemistry data and analytical methods shall be submitted to the Division of Food and Color Additives, Food and Drug Administration, 200 C Street SW., Washington, D.C. 20204, by July 31, 1978, for D & C Red No. 6, D & C Red No. 7, and D & C Red No. 30.

Any person who will be adversely affected by the foregoing regulation may at any time on or before December 21, 1978, file written objections with the Hearing Clerk (HFA-305), Food and Drug Administration, Room 4-65, 5600 Fishers Lane, Rockville, Md. 20857. Objections should show how the person filing them will be adversely affected by the order, specify with particularity the provisions of the order thought to be objectionable, and state the grounds for each objection. Objections are to be filed in accordance with the requirements of § 71.30 (21 CFR 71.30). If a hearing is requested, the objections must state the issues for the hearing, be supported by grounds factually and legally sufficient to justify the relief sought, and include a detailed description and analysis of the factual information intended to be presented in support of each objection in the event that a hearing is held. Four copies of all documents should be filed. Each document should be identified with the Hearing clerk docket number found in brackets in the heading of this document. Objections may be seen in the Hearing Clerk's office between 9 a.m. and 4 p.m., Monday through Friday.

*Effective date.* December 22, 1978, except as to any provisions that may be stayed by the filing of proper objections. Notice of the filing objections or lack thereof will be announced by publication in the FEDERAL REGISTER.

(Sec. 706(b), (c), and (d)); 74 Stat. 399-403 as amended (21 U.S.C. 376(b), (c), and (d)); sec. 203, 74 Stat. 404-407 (21 U.S.C. 376 note.)

Dated: November 13, 1978.

JOSEPH P. HILE,  
Associate Commissioner for  
Regulatory Affairs.

[FR Doc. 78-32502 Filed 11-20-78; 8:45 am]

[4110-03-M]

[Docket No. 77C-0208]

## PART 81—GENERAL SPECIFICATIONS AND GENERAL RESTRICTIONS FOR PROVISIONAL COLOR ADDITIVES FOR USE IN FOODS, DRUGS, AND COSMETICS

### Ferric Ferrocyanide (Iron Blue)

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Commissioner of Food and Drugs on his own initiative is postponing the closing date for provisional listing of ferric ferrocyanide (iron blue) until December 31, 1978, to allow time for publication and comment on a regulation to provide for the safe use of ferric ferrocyanide in externally applied drugs and cosmetics, including those intended for use in the area of the eye.

EFFECTIVE DATE: November 21, 1978.

FOR FURTHER INFORMATION CONTRACT:

Gerard L. McCowin, Bureau of Foods (HFF-334), Food and Drug Administration, Department of Health, Education, and Welfare, 200 C Street SW., Washington, D.C. 20204, 202-472-5740.

SUPPLEMENTARY INFORMATION: An order published in the FEDERAL REGISTER of August 15, 1978 (43 FR 36061) reinstated ferric ferrocyanide (iron blue) to the provisional list of color additives until November 30, 1978, to provide an opportunity for data to be submitted and reviewed so that specifications could be established for permanent listing of ferric ferrocyanide for use in externally applied drugs and cosmetics, including those intended for use in the area of the eye.

The required data have been submitted and are adequate to establish specification for "permanent" listing of ferric ferrocyanide. Published elsewhere in this issue of the FEDERAL REGISTER is a rule permanently listing ferric ferrocyanide (iron blue) for use in externally applied drugs and cosmetics, including those used in the area of the eye. The provisional listing of ferric ferrocyanide (iron blue) will be terminated when that separate rule becomes effective on December 22, 1978.

Postponement of the closing date until December 31, 1978, is necessary to provide a brief period within which to publish the final order to list ferric ferrocyanide permanently, and to allow a suitable comment period