Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 106, 9001 Through 9007, 9012 and 9013 Through 9039

[Notice 1986-8]

Public Financing of Presidential Primary and General Election Candidates

AGENCY: Federal Election Commission.

ACTION: Extension of comment period.

SUMMARY: On August 5, 1986, the Federal Election Commission published a Notice of Proposed Rulemaking on regulations governing the public financing of Presidential primary and general election candidates (51 FR 28154). In that Notice, the Commission set a 45 day comment period, with comments due on September 19, 1986.

The Commission has, however, received a request to extend the comment period on this rulemaking. The Commission has therefore decided to accept comments through October 20, 1986.

DATE: Comments must be received on or before October 20, 1986.

ADDRESS: Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463.

FOR FURTHER INFORMATION CONTACT: Susan E. Propper, Assistant General Counsel, (202) 376-5690 or (800) 424-9530.

Dated: September 23, 1986.

Joan D. Aikens,

Chairman, Federal Election Commission.

[FR Doc. 86-21828 Filed 9-25-86; 8:45 am]
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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270 and 274

[Rel. No. IC-15314; File No. S7-22-86]

Exemption From the Investment Company Act of 1940 for the Offer or Sale of Debt Securities and Non-Voting Preferred Stock by Foreign Banks or Foreign Bank Finance Subsidiaries

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule and form.

SUMMARY: The Securities and Exchange Commission is proposing a rule which would, under certain circumstances, permit a foreign bank or the bank's finance subsidiary to offer or sell its own debt securities or non-voting preferred stock in the United States without registering as an investment company under the Investment Company Act of 1940. In connection with the rule, the Commission is proposing a related form. The Commission is also requesting comment on the conditions under which a foreign bank should be permitted to offer or sell its own equity securities in the United States without registering as an investment company.

DATE: Comments must be received on or before December 26, 1986.

ADDRESS: Comment letters should refer to file No. S7-22-86 and be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. The Commission will make all comment letters available for public inspection and copying in its Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Philip J. Niehoff, Esq., (202) 272-2048, or Elizabeth K. Norsworthy, Chief, (202) 272-2048, Office of Regulatory Policy, Division of Investment Management, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is asking for public comment on proposed rule 6c-9 under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*] ("Act"). Notwithstanding section 7 of the Act (15 U.S.C. 80a-7), the proposed rule would permit a foreign bank or the bank's finance subsidiary to offer or sell its own debt securities or non-voting preferred stock in the United States without registering as an investment company.[1] In connection with rule 6c-9, the Commission is also proposing a new form N-6C9 that foreign banks and certain foreign bank finance subsidiaries would be required to file with the Commission, appointing an agent for service of process.

After discussing the status of foreign banks and their finance subsidiaries under the Act, this release describes and requests comment on the provisions of proposed rule 6C-9 and form N-6c9. The release also invites specific comment on the conditions under which a foreign bank should be permitted to offer or sell its own equity securities in the United States without registering as an investment company. The release concludes by inviting comment on the costs and benefits of adopting the proposed rule and form.

Background

A. Status of foreign banks under the Act

A bank may be considered an investment company to the extent that it is involved in owning, holding, trading, investing or reinvesting in securities.[2]

[1] As discussed in greater detail below, section 7 requires, *inter alia*, that an investment company register with the Commission before using the mails or any means or instrumentality of interstate commerce to offer for sale, sell or deliver after sale any security or any interest in any security. Under section 7(d) (15 U.S.C. 80a-7(d)), an investment company organized or created under the laws of a country other than the United States may not use the mails or any means or instrumentality of interstate commerce to offer for sale, sell or deliver after sale, in connection with a public offering, any security of which the company is the issuer unless the Commission has issued an order permitting the company to register as an investment company and to make a public offering. *See infra* notes 7 and 16 and accompanying text.

[2] Investment company is defined in section 3(a)(1) of the Act [15 U.S.C. 80a-3(a)(1)] as any issuer which is, holds itself out as being, or proposes to engaged primarily in the business of investing, reinvesting, or trading in securities.

Investment company is defined in section 3(a)(3) of the Act [15 U.S.C. 80a-3(a)(3)] as any issuer which is engaged or proposes to engage in the business of investing, reinvesting, owning, holding or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 percent of the value of the issuer's total assets (exclusive of Government securities and cash items on an unconsolidated basis).

"Investment securities" are defined in section 3(a)(3) to include all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies.

Although U.S. banks are expressly expected from the definition of investment company by section 3(c)(3) of the Act [15 U.S.C. 80a-3(c)(3)], [3] foreign banks may not rely on that exception.[4] The Commission has also found that an exception or exemption from the definition of investment company is not available to foreign banks under section 3(b)(1) [15 U.S.C. 80a-3(b)(1)] or 3(b)(2) [15 U.S.C. 80a-3(b)(2)] [5] because those sections of the Act are intended to apply only to industrial companies.[6] Therefore, before a foreign bank uses the mails or any instrumentality of interstate commerce to offer or sell its securities in connection with a public offering, it must either register as an investment company [7] or apply to the Commission for an order under section 6(c) [15 U.S.C. 80a-6(c)] for an exemption from the Act.[8]

Since 1979, the Commission has granted exemptions to a number of foreign banks under section 6(c).[9] These orders have permitted the applicants to sell their own debt securities in the United States based on representations that typically fall into five categories:

1. *Status*—the foreign bank typically represents that it is bank and that it is regulated as a bank in its home country. It also frequently represents that the regulation is similar to that to which U.S. banks are subject. The bank may also represent that it is partially or wholly owned by a foreign sovereign.

2. *Securities Act registration*—The foreign bank makes representations about whether it can rely on an exemption from the registration requirements of the Securities Act of 1933 [15 U.S.C. 77a *et seq.*] ("Securities Act") while typically reserving the right to issue securities registered under that Act in the future. Representations in this area typically relate to the type, minimunm denomination and total value of the securities to be sold, the manner in which the securities will be sold, the type of investor to whom the securities will be sold, and the use of the offering proceeds.

3. *Quality of the securities*—The foreign bank usually represents that the securities will receive one of the three highest ratings from a major rating service U.S. counsel will certify that the rating has been obtained, and the obligations on the securities will rank equally among themselves and, with certain exceptions, with all of the bank's other unsecured, unsubordinated indebtedness and superior to the rights of shareholders.

4. *Disclosure*—The foreign bank represents that it will deliver to purchasers of the securities an offering memorandum at least as comprehensive as that customarily used by U.S. issuers of similar securities, containing the bank's most recently audited financial statements and explaining the differences between the accounting principles used to prepare the financial statements and U.S. Generally Accepted Accounting Principles.

5. *Jurisdiction*—The foreign bank represents that it will appoint an agent located in the United States for service of process and will consent to the jurisdiction of the State and Federal courts in the City and State of New York for any actions based on the offer or sale of the debt securities. The appointment and consent are typically irrevocable until all amounts due and to become due on the securities have been paid.

Three foreign banks have also recently requested and received exemptions from the Act to offer or sell their own equity securities in the United States.[10] These banks made a number of representations, many of which are similar to those made by foreign banks intending to offer or sell debt securities in the United States. Those representations fall into four categories:

1. *Status*—The foreign bank represents that it is organized and regulated as a commercial bank in its

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[3] Section 3(c)(3) excepts, *inter alia*, banks from the definition of investment company. "Bank" is defined in section 2(a)(5) of the Act [15 U.S.C. 80a-2(a)(5)] to inlcude (A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, or (C) any other banking institution or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks and which is not operated for the purpose of evading the provisions of the Act.

[4] *See Bank of America National Savings Association* (June 23, 1983) letter from the Division of Investment Management to Bank of America National Savings Association (pub. avail. July 25, 1983). *See also Continental Illinois Delaware Ltd.* letter from the Division of Investment Management to Continental Illinois Delaware (pub. avail. April 1, 1973). *But see Bank Leumi le-Israel B.M.* (July 28, 1976) letter from the Division of Investment Management to Bank Leumi le-Israel B.M. (pub. avail. August 27, 1976) (the Division said it would not recommend that the Commission take enforcement action against the bank if it sold Export Financing Bonds guaranteed by the Export-Import Bank of the United States based on the bank counsel's opinion that the bank, with a subsidiary in New York, a branch in Illinois and agencies in New York and California, was a "bank" within the meaning of the Act). *See also* rule 17f-5 revised proposed release, Investment Management Company Release No. 13724 (January 2, 1985) [49 FR 2904] at note 9 and accompanying text.

[5] Section 3(b)(1) provides that an issuer is not an investment company if it is primarily engaged, directly or through wholly-owned subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding or trading in securities. Section 3(b)(2) provides that the Commission may, upon application by an issuer, issue an order declaring that issuer to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities directly or through majority-owned subsidiaries or controlled companies conducting similar types of businesses.

[6] *See In re Paribas Corp.*, 40 SEC 487, 490 n. 5 (1961); *See also* Hearings on S. 3580 Before a Subcommittee of the Committee on Banking and Currency, 76th Cong., 3d Sess. 176–179 (1940); Hearings on H.R. 10065 Before a Subcommittee on the Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess. 102 (1940). *But see International Bank*, Investment Company Act Release No. 3986 (June 4, 1964) (finding under section 3(b)(2) that a holding company with sizeable interests in 23 U.S. banks, 3 foreign banks and various other financial institutions was involved in a business other than investing, reinvesting, owning, holding, or trading in securities). *See also* Gruson and Jackson, *Issuance of Securities by Foreign Banks and the Investment Company Act of 1940*, 1980 U. Ill. F. 185 (1980).

[7] *See supra* note 1. Under section 7(d), the Commission may, upon application by an investment company organized or otherwise created under the laws of a foreign country, issue a conditional or unconditional order permitting the company to register as an investment company and to make a public offering of its securities if the Commission finds that, by reason of special circumstances or arrangements, it is both legally and practically feasible effectively to enforce the provisions of the Act against such company and that the issuance of an order is otherwise consistent with the public interest and the protection of investors. *See Touche, Remnant & Co.* (July 27, 1984) letter from Division of Investment Managment to Touche, Remnant & Co. (pub. avail. August 27, 1984) (with respect to the meaning of "public offering" within the context of section 7(d)).

[8] Section 6(c) provides that the Commission may, by rules and regulations upon its own motion, or by order upon application, conditionally or unconditionally exempt any person, security, or transaction or any class of persons, securities, or transactions form any provision or provisions of the Act, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes intended by the policy and provisions of the Act.

[9] *See, e.g.*, notices of application and orders for Australian Resources Development Bank, Ltd., Investment Company Act Release Nos. 10629 (March 15, 1979) [44 FR 17843] and 10659 (April 11, 1979); Kansallis-Osake-Pankki, Investment Company Act Release Nos. 10765 (July 9, 1979) [44 FR 41371] and 10821 (August 7, 1979); Post-Och Kreditbanken, Investment Company Act Release Nos. 10766 (July 9, 1979) [44 FR 41372] and 10820 (August 7, 1979); Societe Generale (Canada), Investment Company Act Release Nos. 14876 (December 26, 1985) [51 FR 267] and 14905 (January 21, 1986); and Instituto Bancari San Paolo di Torino, Investment Company Act Release Nos. 14885 (January 3, 1986) [41 FR 1347] and 14930 (January 31, 1986).

[10] *See* notices of applications and orders for Westpac Banking Corporation, Investment Company Act Release Nos. 15181 (June 27, 1986) [51 FR 24774] and 15217 (July 23, 1986); Barclays PLC, Investment Company Act Release Nos. 15189 (July 2, 1986) [51 FR 24955] and 15228 (July 29, 1986); and National Westminster Bank PLC, Investment Company Act Nos. 15211 (July 18, 1986) [51 FR 26619] and 15248 (August 12, 1986).

home country. The bank also represents that it intends to continue to function and to be regulated as a commercial bank in its home country.

2. *U.S. presence*—The bank makes representations about the volume of commercial banking business done in the United States and the number of locations in the United States were that business is done.

3. *U.S. Banking regulation*—The bank represents that it is subject to limited regulation by State or Federal banking authorities and intends to remain subject to that regulation.

4. *Jurisdiction*—The bank represents that it will appoint an agent for service of process and will consent to be jurisdiction of the state and Federal courts in the City and State of New York for any actions based on the offer or sale of the equity securities. The appointment and consent are irrevocable for as long as any of the securities are outstanding.

B. Status of foreign bank finance subsidiaries under the Act

As the number of foreign banks selling their own debt securities in the United States grew and they sought expanding markets for their securities, the banks found that some regulated institutions, such as insurance companies, either could not purchase the debt securities of a foreign issuer, or the amount of securities that they could purchase was limited by "legal investment" laws in some states.[11] Since many foreign banks felt that the participation of such institutional investors would be important to the success of an offering, the banks formed wholly-owned U.S. subsidiaries to offer or sell debt securities in the United States.[12]

As is the case of other finance subsidiaries, the finance subsidiaries of foreign banks may be considered investment companies for purpose of the Act. The typical finance subsidiaries raises capital for its parent or a company controlled by its parent by selling its own debt securities. The subsidiary then loans the offering proceeds to its parent or to a company controlled by its parent, and receives in consideration evidence of indebtedness, such as promissory notes, from the parent or controlled company. These evidences of indebtedness may be considered investment securities under the Act,[13] and if those investment securities held by the finance subsidiary amount to more than 40% of its total assets, the finance subsidiary is considered an investment company under section 3(a)(3) of the Act unless excepted or exempted by some other section of the Act.[14] The Commission has found that an exception from the definition of investment company is not available to foreign bank finance subsidiaries under section 3(b)(3) of the Act [15 U.S.C. 80a-3(b)(3)] because that section is intended to apply only to the subsidiaries of industrial companies.[15]

Like its foreign bank parent, before offering or selling its own securities in the United States, a finance subsidiary that comes within the definition of investment company must either register as such with the Commission [16] or apply for an order under section 6(c) for an exemption from the Act.[17] The first exemption allowing a foreign bank finance subsidiary to offer or sell debt securities in the United States was granted in March, 1980.[18] The representations made by that finance subsidiary and by subsequent applicants are essentially the same as the representatives made by their foreign bank parents, except for the additional representation that any securities sold by the subsidiary will be unconditionally guaranteed by the parent and the guarantee will rank equally with other guarantees of the parent and, with certain exceptions, with all other unsecured, unsubordinated indebtedness of the parent bank and superior to the rights of shareholders.[19] Like the representations made by the foreign banks, the representations made by the foreign bank finance subsidiaries have not changed a great deal from those made by the first finance subsidiary.

Since 1979, the Commission has granted an average of twenty exemptions from the Act each year to foreign banks and their finance subsidiaries that intend to issue their own debt securities in the United States. Given the frequency and now routine nature of these applications, the Commission believes that it is appropriate to propose a rule and related form to allow foreign banks and their finance subsidiaries to offer or sell their own debt securities and non-voting preferred stock in the Unied States without registering as investment companies.[20] If the proposal is adopted, a foreign bank or finance subsidiary that is the subject of a prior exemptive order could either rely on the rule or continue to rely on the order. Although the proposed rule would not exempt the offer or sale of equity securities in the United States by foreign banks, this release does request comment on the conditions that should apply to such offerings in an applications context and in any future rule or rule amendment.

Discussion

Proposed rule 6c-9 would provide an exemption from section 7 of the Act for foreign banks and their finance subidiaries to offer or sell their own debt securities or non-voting preferred stock in the United States without registering as investing companies. As explained below, the exemption would depend upon the type of offeror, the type of security being offered, and the type of offering. The exemption would also depend upon a foreign bank and any

[11] For example, the New York Insurance Law, which applies to any insurance company authorized to do business in New York, provides that an insurance company may not purchase debt securities of foreign issuers in an aggregated amount that exceeds 1% of its "admitted assets" (N.Y. Ins. section 1404(a)(8)(C) McKinney (1985)).

[12] The Commission is offering no opinion on whether debt securities of such finance subsidiaries would meet any state law requirements regarding permissible investments by regulated institutions.

[13] Section 2(a)(36) of the Act [15 U.S.C. 80a-2(a)(36)] defines "security" to include, *inter alia*, any note or evidence of indebtedness. *See* supra note 2. *See also* release proposing revisions to rule 6c-1, Investment Company Act Release No. 12679 (September 21, 1982) [47 FR 42578] at note 2 and accompanying text.

[14] *See supra* note 2. The Commission has provided an exemption from the definition of investment company in rule 3a-5 [17 CFR 270.3-5] for the finance subsidiaries of parents not coming within the definition of investment company or that have been exceped or exempted by Commission order by section 3(b) or by the rules and regulations under section 3(a). That exemption is not available to the finance subsidiaries of foreign banks, however, because foreign banks are considered investment companies under the Act. *See* release proposing amendments to rule 6c-1, Investment Company Act Release No. 12679 (September 21, 1982) [47 FR 42578] at note 17.

[15] Section 3(b)(3) excepts an issuer whose outstanding shares (other than short-term paper and directors' qualifying shares) are directly or indirectly owned by a company excepted from the definition of investment company by section 3(b)(1) or 3(b)(2). *See supra* notes 5 and 6.

[16] The domestic finance subsidiary of a foreign bank that is considered an investment company and that proposes, *inter alia*, to "offer for sale, sell, or deliver after sale, by the use of mails or any means or instrumentality of interstate commerce, any security or any interest in a security" is required by section 7(a) of the Act [15 U.S.C. 80a-7(a)] to register with the Commission. *See supra* note 7 for a discussion of the registration requirements for a foreign finance subsidiary that could be considered a foreign investment company.

[17] *See supra* note 8.

[18] *See* notice of application and order for Credit Lyonnais North America, Investment Company Act Release Nos. 11040 (February 8, 1980) [45 FR 10101] and 1071 (March 6, 1980).

[19] *Compare* notice of application and order for Credit Lyonnais North America, *supra* note 18 *with* notice of application and order for Kansallis-Osake Pankki, *supra*, note 9.

[20] The reasons for including the offer or sale of non-voting preferred stock are discussed under *Type of security offered infra.*

finance subsidiary incorporated or organized under the laws of a country other than the United States appointing an agent located in the United States for service of process by filing proposed form N-6C9 with the Commission.

1. Type of Offeror

Two types of offerors could rely on the proposed rule—foreign banks and their finance subsidiaries.

a. *Definition of foreign bank.* A "foreign bank" would be defined as a banking institution incorporated or organized under the laws of a country other than the United States that is regulated as such by that country's government or an agency thereof. The rule would also require that the bank be primarily engaged in accepting demand deposits and making commercial loans.

The requirement that the bank be regulated as such by its home country's government or an agency of that government is intended to ensure that the bank is engaged primarily in the business of banking—a standard representation made in the applications relating to debt offerings by foreign banks.[21] The rule would also require that the bank be primarily engaged in commercial banking. The proposed rule defines "primarily engaged in commercial banking activities" as primarily engaged in accepting demand deposits and making commercial loans, the definition of bank that appears in the Bank Holding Company Act of 1956.[22]

b. *Definition of a finance subsidiary of a foreign bank.* The proposed rule would define a "finance subsidiary of a foreign bank" as a subsidiary meeting the conditions of paragraph (a) of rule 3a-5 under the Act. As in the exemptive orders, the subsidiary would have to be a wholly-owned subsidiary of its parent bank [23] and the securities that it offers or sells in the United States would have to be unconditionally guaranteed by that bank. In addition, the subsidiary would have to comply with the other conditions of rule 3a-5 that are intended to ensure that its primary purpose is to act as a conduit for its parent—not to engage in investment company activities. Any convertible or exchangeable securities issued by the subsidiary would have to be convertible or exchangeable only for securities issued by its parent or for other debt securities or non-voting preferred stock issued by the subsidiary and unconditionally guaranteed by the parent.[24] The subsidiary would have to remit at least 85% of any offering proceeds to its parent or a company controlled by its parent as soon as practicable but in no event later than six months after receipt.[25] In the intervening six month period and with the remaining 15%, the subsidiary could not invest in, reinvest in, own, hold or trade in securities other than Government securities, securities of its parent or a company controlled by its parent or debt securities exempted from the Securities Act by section 3(a)(3) of the Act [15 U.S.C. 77c(a)(3)].[26]

For purposes of applying these conditions to the finance subsidiaries of foreign banks, the proposed rule would redefine the terms "finance subsidiary", "parent company", and "company controlled by a parent company" that are used in rule 3a-5 so that the subsidiary or a company controlled by the parent company could be owned by only one foreign bank that could in turn be owned in whole or in part by a foreign government or a political subdivision of a foreign government.

Although rule 3a-5 permits a finance subsidiary or a company controlled by the parent company to be owned by multiple parents in partnership or as a joint venture, rule 6c-9 would limit ownership of a foreign bank finance subsidiary and a company controlled by a parent company to a single parent because there has been no indication that there is any need to furnish an exemption for debt offerings that are made by a finance subsidiary that is owned by more than one foreign bank. Nor has there been any indication that there is any need to draft the exemption so that offering proceeds may be remitted to a company that is controlled by more than one foreign bank. The Commission is, however, soliciting comment on whether rule 6c-9 should permit ownership by multiple bank parents of the subidiary or of the recipient of the offering proceeds.

The exemption provided by rule 3a-5 is available only to the finance subsidiaries of U.S. or foreign private issuers. The rule's exemption is limited to subsidiaries of these types of issuers because a foreign government parent and its subsidiaries might be immune from suit.[27] While the Commission is still concerned about that possibility, in view of the other conditions of proposed rule 6c-9 that are discussed below, the Commission believes that the proposed rule should provide an exemption for the finance subsidiaries of both government and non-government owned foreign banks.

2. Type of security offered

Rule 6c-9 would provide an exemption for foreign banks and their finance subsidiaries [28] to offer or sell their own debt securities and non-voting preferred stock in the United States. As discussed above, until recently, the Commission had granted exemptions from the Act only where the banks and subsidiaries intend to offer or sell debt securities in this country. The proposed rule would permit the offer or sale of non-voting preferred stock as well, because non-voting preferred stock has many of the characteristics of a debt instrument. For example, it traditionally has liquidation and dividend preferences over other equity securities; its liquidation value is constant while the liquidation value of other equity securities fluctuates with the value of the underlying assets; and it is priced and traded in a manner similar to a debt instrument.

As noted above, three foreign banks were recently granted exemptions from the Act to sell their common stock in the United States. Since these are the first such exemptions, the Commission is not including equity offerings, other than offerings of non-voting preferred stock, in proposed rule 6c-9 at this time. However, the Commission is soliciting comment on the conditions that should apply to equity offerings since the rule could be amended or a new rule adopted, to provide an exemption for such offerings. In particular, comment is requested on whether an exemption from the Act should be limited to foreign issuers that have registered their equity securities under the Securities Act or that have a continuing reporting

[21] Although applicants also typically represent that the regulation to which they are subject is similar to that to which U.S. banks are subject, the Commission has not included such a provision in the rule since it is too subjective a standard in the context of an exemptive rule.

[22] *See* 12 U.S.C. 1841(c).

[23] Rule 3a-5 requires that all of the subsidiary's securities, other than directors' qualifying shares or debt securities or non-voting preferred stock unconditionally guaranteed by the parent, must be owned by the parent or a company controlled by the parent. *See* paragraph (b)(1)(i) of rule 3a-5.

[24] *See* paragraph (a)(4) of rule 3a-5.

[25] *See* paragraph (a)(5) of rule 3a-5.

[26] *See* paragraph (a)(6) of rule 3a-5. "Government security" is defined in section 2(a)(16) of the Act [15 U.S.C. 80a-2(a)(16)] to mean any security issued or guaranteed as to principal or interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing.

[27] *See* Investment Comapany Act Release No. 14275 (December 14, 1984) [49 FR 49114] adopting proposed revisions to rule 6c-1 and renumbering the rule as 3a-5.

[28] The exemption is intended to apply only to offerings of securities issued by the bank or finance subsidiary, not to securities representing interests in a collective trust fund or similar investment pool maintained by the bank.

obligation under the Securities Exchange Act of 1934 [15 U.S.C. 78 *et seq.*] ("Exchange Act").[29] Comment is also requested on whether the issuer of equity securities should maintain a substantial presence in the United States. For example, should the exemption be conditioned upon a foreign bank maintaining a branch or agency within the United States that is regulated by state or Federal banking authorities?[30]

3. Type of offering

As indicated above, in considering whether to grant exemptions for the offer or sale of debt securities by foreign banks and their finance subsidiaries in this country, the Commission has focused upon whether the securities will be registered under the Securities Act, the quality of the securities and the type of disclosure document that will be delivered to purchasers. The proposed rule, in focusing upon the same concerns, would make an exemption available for registered offerings and, under certain conditions, unregistered offerings.

Under the rule, registration of the debt securities or non-voting preferred stock that a foreign bank or a foreign bank finance subsidiary intends to offer or sell in the United States and appointment of an agent for service of process on form N–6C9 would entitle that bank or subsidiary to an exemption from registration under the Investment Company Act. In view of the comprehensive disclosure requirements that are applicable to a registered offering,[31] the Commission does not believe that the offeror should have to comply with any other conditions to exempt the offering from the Investment Company Act.

However, if the foreign bank or its subsidiary does not intend to register its securities under the Securities Act and intends instead to rely on an available exemption from the registration requirements of that Act, the proposed rule would exempt the bank or its subsidiary from registration under the Investment Company Act only if the securities are of high quality and an agent for service of process is appointed. "High quality" would be defined to be one of the two highest ratings that may be assigned by a nationally recognized statistical rating organization ("NRSRO").[32] The rule would provide that the securities being offered or sold would have to receive a high quality rating from at least two NRSROs that are not affiliated persons as defined in section 2(a)(3)(C) of the Act [15 U.S.C. 80a–2(a)(3)(C)] of the issuer of or of any issuer, guarantor or provider of credit support for the securities.[33]

While applicants have represented that offering memoranda will be supplied to prospective pruchasers in such unregistered offerings, the issuer may not be required to disclose the information required of issuers in registered offerings. Since there may not be specific disclosure requirements under the Securities Act with respect to all unregistered offerings, the Commission believes an exemption from the Investment Company Act should be available only if the securities are of high quality and an agent for service of process is appointed.

The quality representations typically found in the applications—that the securities being offered would be assigned one of the three highest ratings by at least one major rating agency—have been reformulated in the proposed rule:

(1) To require that the securities be assigned one of the two highest ratings, rather than one of the three highest ratings;[34]

(2) To conform to other rules and regulations under the Federal securities laws by referring to NRSRO instead of "major rating agency";[35]

(3) To ensure that the NRSRO does not have a significant interest in the securities being rated by requiring that the NRSRO not control or be controlled by or under common control with the issuer or any issuer, guarantor or provider of credit support for the securities being rated; and

(4) To require that the high quality rating be assigned by at least two—instead of one—NRSRO.

4. Appointment of agent

As a condition for exemption, proposed rule 6c–9 would require any foreign bank that intends to offer or sell its debt securities or non-voting preferred stock directly or indirectly in the United States to have filed proposed form N–6C9 with the Commission appointing an agent located in the United States for service of process for as long as the bank has any debt securities or non-voting preferred stock outstanding. The rule would also require the bank to file an amended form in the event that the bank appoints a successor agent. Where the bank is offering or selling its securities indirectly in the United States through a finance subsidiary that is incorporated or organized under the laws of a jurisdiction other than the United States or any State, the subsidiary would also be required to file the form and keep it current. As in the prior exemptive orders, the purpose of requiring the foreign bank or subsidiary to appoint an agent for service of process in any action based on the offer or sale of the securities is to ensure that the Commission or a private plaintiff would be able to serve the defendant with notice of the proceeding.[36]

Cost/Benefit of Proposed Action

Proposed rule 6c–9 and form N–6C9 would not impose any significant additional burdens on foreign banks or foreign bank finance subsidiaries and would significantly reduce the costs that they already incur by eliminating the

[29] *See* sections 12 and 13 of that Act [15 U.S.C. 781 and 78m].

[30] *See, e.g.*, section 4 of the International Banking Act of 1978 [12 U.S.C. 3102].

[31] *See* registration statement forms F–1 through F–4 [17 CFR 239.31–239.34] which specify the information and documents that must be furnished by foreign private issuers in order to register their securities under the Securities Act; *see also* Schedule B [15 U.S.C. § 77aa] which specifies the information and documents that must be furnished by foreign governments in order to register their securities under that Act.

[32] To conform to other rules and regulations under the federal securities laws, the proposed rule would use the term NRSRO, as that term is used in the Commission's net capital rule, to describe the rating agency. *See* rule 15c3–1(c)(2)(vi)(F) under the Exchange Act [17 CFR 240.15c3–1(c)(2)(vi)(F)]. At the present time, the following organizations are considered NRSROs: Duff and Phelps, Inc.; Fitch Investors Services, Inc.; Moody's Investors Services, Inc.; McCarthy, Crisanti & Maffei; and Standard & Poors Corporation.

[33] Section 2(a)(3)(C) of the Act defines affiliated person to include a person controlling, controlled by or under common control with another person. Control is defined in section 2(a)(9) of the Act [15 U.S.C. 80a–2(a)(9)] as the power to exercise a controlling influence over the management or policies of a company, unless that power arises solely as a result of an official position with that company. Direct or indirect ownership of more than 25% of the voting securities of a company carries a presumption of control over that company.

As noted in a recent release, although the concept of independence is implicit in the term NRSRO, the Commission believes that for purposes of providing an exemption from some or all of the provisions of the Act, independence should be defined within the context of the Act. *See* Investment Company Act Release No. 14983 (March 12, 1986) [51 FR 9773] adopting rule 2a–7 under the Act [17 CFR 270.2a–7], the rule that permits money market funds to use the amortized cost method of valuation or the penny-rounding method of pricing under certain conditions, at note 17 and accompanying text.

[34] Comment is requested, however, on whether the proposed rule should require that the securities receive one of the top three ratings as represented by applicants.

[35] *See* Investment Company Act Release No. 14607 (July 1, 1986) [50 FR 27982] proposing, *inter alia*, amendments to rule 2a–7.

[36] Comment is requested, however, on whether this purpose can be achieved by some other means that does not require a filing with the Commission.

need to file exemptive applications. The Commission would also benefit because its staff would no longer have to review exemptive applications in this area.

The Commission specifically invites comments on its assessments of the costs and benefits associated with the proposal, including estimates of any costs and benefits perceived by commentators.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act [5 U.S.C. 605(b)], the Chairman of the Commission has certified that proposed rule 6c–9 and form N–6C9 will not, if adopted, have a significant impact on a substantial number of small entities. This certification, including the reasons therefore, is attached to this release.

List of Subjects in 17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Proposed Rule and Form

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

Part 270 of Chapter II of Title 17 of the Code of Federal Regulations is proposed to be amended as shown.

1. The authority citation for Part 270 is amended by adding the following citations:

Authority: Secs. 38, 40, 54 Stat. 841, 842, 15 U.S.C. 80a–37, 80c–89 * * * 270.6c–9 also issued under secs. 6(c) [15 U.S.C. 80a–6(c)] and 38(a) [15 U.S.C. 80a–37(a)].

2. By adding § 270.6c–9 to read as follows:

§ 270.6c–9 Exemption for the offer or sale of debt securities and non-voting preferred stock in the United States by foreign banks and subsidiaries organized to finance the operations of foreign banks.

(a) Notwithstanding section 7 of the Act [15 U.S.C. 80a–7], a foreign bank or a finance subsidiary of a foreign bank may offer or sell its own debt securities or non-voting preferred stock by the use of the mails or any means or instrumentality of interstate commerce ("offer or sale") without registering as an investment company; *Provided* that:

(1) The debt securities or non-voting preferred stock are registered under the Securities Act of 1933; or

(2) The debt securities or non-voting preferred stock are:

(i) Offered or sold pursuant to an exemption from the registration requirements of the Securities Act of 1933; and

(ii) Of high quality as determined by at least two nationally recognized statistical rating organizations that are not affiliated persons, as defined in section 2(a)(3)(C) [15 U.S.C. 80a–2(a)(3)(C)] of the Act, of the issuer of or of any insurer, guarantor or provider of credit support for the debt securities or non-voting preferred stock; and

(3) Form N–6C9 [17 CFR 274.304] and any required amendments thereto shall have been filed with the Commission by:

(i) The foreign bank offering or selling debt securities or non-voting preferred stock in the United States;

(ii) The finance subsidiary of a foreign bank offering or selling debt securities or non-voting preferred stock in the United States, if such finance subsidiary is organized under the laws of a jurisdiction other than the United States or any State; and

(iii) The foreign bank parent unconditionally guaranteeing the payment of principal, interest, and premium on the debt securities or the payment of dividends, liquidation preferences, and sinking fund payments on the non-voting preferred stock offered or sold by its finance subsidiary in the United States.

(b) For purposes of this rule:

(1) "Finance subsidiary of a foreign bank" means a foreign bank subsidiary meeting the requirements of paragraph (a) of rule 3a–5 [17 CFR 270.3a–5].

(2) "Foreign bank" means a banking institution incorporated or organized under the laws of a country other than the United States that is:

(i) Regulated as such by that country's government or any agency thereof; and

(ii) Primarily engaged in commercial banking activity.

(3) "High quality" means one of the two highest rating categories (within which there may be sub-categories or graduations indicating relative standing) that may be assigned by a nationally recognized statistical rating organization.

(4) "Nationally recognized statistical rating organization" means any nationally recognized statistical rating organization, as used in rule 15c3–1(c)(2)(vi)(F) under the Securities Exchange Act of 1934 [17 CFR 240.15c3–1(c)(2)(vi)(F)].

(5) "Primarily engaged in commercial banking activity" means primarily engaged in accepting demand deposits and making commercial loans.

(c) For purposes of determining whether a foreign bank subsidiary meets the requirements of paragraph (a) of rule 3a–5:

(1) "Finance subsidiary" means any corporation:

(i) Whose parent company owns all of its securities other than directors' qualifying shares or debt securities or non-voting voting preferred stock meeting the applicable requirements of paragraphs (a)(1) through (a)(3) of rule 3a–5; and

(ii) The primary purpose of which is to finance the business operations of its parent company or companies controlled by its parent company.

(2) "Parent company" means a foreign bank.

(3) "Company controlled by a parent company" means any corporation:

(i) That is either a foreign bank or is not considered an investment company under section 3(a) or that is excepted or exempted by order from the definition of investment company by section 3(b) or the rules or regulations under section 3(a); and

(ii) All of whose securities other than directors' qualifying shares or debt securities or non-voting preferred stock are owned by a foreign bank.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

Subpart D of Part 274 of Chapter II of Title 17 of the Code of Federal Regulations is proposed to be amended as shown:

3. The authority citation for Part 274 is amended by adding the following citations:

Authority: The Investment Company Act of 1940, 15 U.S.C. 80a–1 et seq. * * * § 274.304 also issued under secs. 6(c) [15 U.S.C. 80a–6(c)] and 38(a) [15 U.S.C. 80a–37(a)].

4. By adding § 274.304 to read as follows:

§ 274.304 Form N–6C9, appointment of agent for service of process by foreign banks and their finance subsidiaries offering or selling debt securities or non-voting preferred stock in the United States under rule 6c–9 of the Investment Company Act of 1940.

(a)(1) Form N–6C9 shall be filed by any foreign bank relying on rule 6c–9 (§ 270.6c–9 of this chapter) to offer or sell its debt securities or non-voting preferred stock in the United States directly or through a finance subsidiary. Where the finance subsidiary is incorporated or organized under the laws of a jurisdiction other than the United States or any State, the subsidiary must also file the form.

(2) Rule 6c–9 permits a foreign bank or the bank's finance subsidiary to offer or sell its own debt securities or non-voting preferred stock in the United States without registering as an investment company under the Investment Company Act of 1940, provided, *inter alia*, that form N–6C9 has been filed with the Commission.

(b) Form N–6C9 shall be filed in duplicate original.

By the Commission.

Jonathan G. Katz,

Secretary.

September 17, 1986.

BILLING CODE 8010–01–M

FORM N-6C9

U.S. Securities and Exchange Commission
Washington, D.C. 20549

APPOINTMENT OF AGENT FOR SERVICE OF PROCESS BY FOREIGN BANKS AND THEIR FINANCE SUBSIDIARIES OFFERING OR SELLING DEBT SECURITIES OR NON-VOTING PREFERRED STOCK IN THE UNITED STATES

General Instructions

I. Form N-6C9 shall be filed by any foreign bank relying on rule 6c-9 (§ 270.6c-9 of this chapter) to offer or sell its own debt securities or non-voting preferred stock in the United States directly or through a finance subsidiary. Where the finance subsidiary is incorporated or organized under the laws of a jurisdiction other than the United States or any State, the subsidiary must also file the form.

Rule 6c-9 permits a foreign bank or the bank's subsidiary to offer or sell its own debt securities or non-voting preferred stock in the United States without registering as an investment company under the Investment Company Act of 1940, provided, inter alia, that form N-6C9 has been filed with the Commission.

II. Form N-6C9 shall be filed in duplicate original.

Text of Form

1. The (Name of foreign entity)

"Filer"

is (select one)

☐ a foreign bank offering or selling debt securities or non-voting preferred stock in the United States;

☐ a finance subsidiary of a foreign bank offering or selling debt securities or non-voting preferred stock in the United States; or

☐ a foreign bank parent unconditionally guaranteeing the payment of principal, interest, and premium on the debt securities or the payment of dividends, liquidation preferences, and sinking fund payments on the non-voting preferred stock offered or sold by its finance subsidiary in the United States.

2. This is (select one)

☐ an original filing for the Filer in the capacity indicated above; or

☐ an amended filing for the Filer in the capacity indicated above.

3. The Filer is incorporated or organized under the laws of (Name of the jurisdiction under whose laws the Filer is organized or incorporated)

and has its principal place of business at (Address in full)

4. The Filer hereby designates and appoints, for as long as any of its debt securities or non-voting preferred stock referred to below are outstanding, (Name of Agent)

("Agent") located at (Address in full)

, USA

as the agent of the Filer upon whom process may be served in any action brought against the Filer arising out of or based on the offer or sale of debt securities or non-voting preferred stock in any place subject to the jurisdiction of any State or of the United States

5. The Filer hereby consents, stipulates and agrees, for as long as any such debt securities or non-voting preferred stock are outstanding, (a) that any such action may be commenced against it by the service of process upon the Agent and the forwarding by the Agent of a copy thereof by registered mail to it at the last address of record on file with the Agent, and (b) that such service and forwarding of process shall be held by any appropriate court to be as valid and binding as if personal service had been made

SEC 2174 (9-86)

6. The Filer hereby stipulates and agrees, for as long as any such debt securities or non-voting preferred stock are outstanding, to appoint a successor agent for service of process and file an amended form N-6C9 if the Filer discharges the Agent or the Agent is unwilling or unable to continue to accept service on behalf of the Filer;

The Filer certifies that it has duly caused this power of attorney, consent, stipulation and agreement to be signed on its behalf by the undersigned, thereunto duly authorized, in the

City of _____ Province (or State) of _____

this _____ day of _____ 19 _____ A.D.

Filer By (Signature and Title)

This statement has been signed by the following persons in the capacities and on the dates indicated.

(Signature) _____

(Title) _____

(Date) _____

Instructions:

1. The power of attorney, consent, stipulation and agreement shall be signed by the Filer, its principal executive officer or officers, at least a majority of the board of directors or persons performing similar functions, and its authorized Agent in the United States. Where the Filer is a limited partnership the power of attorney, consent, stipulation and agreement shall be signed by a majority of the board of directors of any corporate general partner signing the power of attorney, consent, stipulation and agreement.

2. The name of each person who signs form N-6C9 shall be typed or printed beneath his signature. Any person who occupies more than one of the specified positions shall indicate each capacity in which he signs form N-6C9. Each copy shall be manually signed by the persons specified in Instruction 1. Where any name is signed pursuant to a board resolution, a certified copy of the resolution shall be filed with each copy of the form. If any name is signed pursuant to a power of attorney, a manually signed copy of each power of attorney shall be filed with each copy of the form.

NOTE: The persons executing this power of attorney, consent, stipulation and agreement should appear before a person authorized to administer acknowledgements in the jurisdiction in which it is executed and acknowledge that they executed it on behalf of the Filer as its free and voluntary act. The acknowledgement should be in the form prescribed by the law of the jurisdiction in which it is executed. The form of acknowledgement suggested below should be used only if consistent with the requirements of the law of such jurisdiction.

The failure of any acknowledgement to meet applicable requirements shall not affect the validity or effect of the foregoing power of attorney, consent, stipulation and agreement.

Province (or State) of _____)
) ss.
County of _____)

I (Name) _____, a (Official position of person administering acknowledgement)

_____, in and for (said County in) the Province (or State) aforesaid, do hereby certify that foregoing named persons personally appeared before me this day, stated that they are the same persons named in the foregoing instument, that they serve in the capacity stated in the foregoing instrument, that they have been duly authorized to execute said instrument for the Filer, and that they signed and sealed said instrument for and on behalf of the Filer as its free and voluntary act for the uses and purposes set forth.

Given under my hand and seal this _____ day of _____ , 19_____ A.D.

Signature of official: _____

(Seal)

Official position: _____

My Commission (or Office) expires:

(Date) _____

BILLING CODE 8010-01-C

Regulatory Flexibility Certification

I, John S.R. Shad, Chairman of the Securities and Exchange Commission, hereby certify pursuant to 5 U.S.C. 605(b) that proposed rule 6c–9 and form N–6C9 under the Investment Company Act of 1940 ("Act") [15 U.S.C. 80a–1 *et seq.*], set forth in Investment Company Act Release No. 15314, if promulgated, will not have a significant impact on a substantial number of small entities. The reason for this certification is that it does not appear that a substantial number of small entities would be affected by the rule. Currently, foreign banks and foreign bank finance subsidiaries ("issuers") that offer or sell their securities in the United States must apply for an exemption from the Act or register with the Commission as an investment company. The Commission receives an average of 20 applications a year from these issuers; virtually all of them from large entities. It does not appear, therefore, that adoption of rule 6c–9 and form N–6C9 would affect a substantial number of small entities.

Dated: September 17, 1986.

John S.R. Shad,

Chairman.

[FR Doc. 86–21815 Filed 9–25–86; 8:45 am]

BILLING CODE 8010–0–1–M

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17 CFR Part 275

[Rel. No. IA–1035; File No. S7–24–86]

Financial and Disciplinary Information That Investment Advisers Must Disclose to Clients

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is soliciting public comment on, and information about the costs and benefits of, a rule under the Investment Advisers Act of 1940 to codify an investment adviser's fiduciary obligation to disclose material facts to clients with respect to any precarious financial condition and certain disciplinary events. The proposed rule sets forth a general standard and provides guidance on some of the disciplinary events that must be disclosed. By codifying the obligation and providing greater certainty to advisers in fulfilling it, the rule should help ensure that clients are provided with material facts about these conditions and events.

DATE: Comments on the proposed rule must be received on or before November 21, 1986.

ADDRESS: Comments must be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549 . Comment letters should refer to File No. S7–24–86. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Thomas S. Harman, Special Counsel, or Debra Kertzman, Attorney, (202) 272–2107, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is proposing for public comment Rule 206(4)–4 under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 *et seq.*] ("Advisers Act") which would require an adviser to disclose to clients material facts about any financial condition reasonably likely to impair the adviser's ability to meet contractual commitments to clients (referred to hereafter as "precarious financial condition") and certain legal or disciplinary events ("referred to hereafter as "disciplinary events"). The proposed rule would codify the Commission's longstanding interpretation that section 206 of the Advisers Act [1] requires an investment adviser to disclose this information to clients.[2] In addition to codifying this general standard, the rule would define certain recent disciplinary events that envolved the adviser or certain key personnel, as material. While providing guidance on some of the types of disciplinary events that advisers must disclose, the rule also would make clear that other disclosures might be required under the general standard and that compliance with the rule would not relieve advisers form other disclosure obligations.

Background

The Investment Advisers Act of 1940 reflects Congressional recognition, based upon knowledge that advisory clients place trust and confidence in the ability and integrity of their adviser, of the "delicate fiduciary nature of an investment advisory relationship."[3] This reliance on the adviser, in a relationship which is not arms-length, was acknowledged by the Supreme Court in *SEC* v. *Capital Gains*, where the Court held that as a fiduciary an investment adviser owes clients an affirmative duty of "utmost good faith and full and fair disclosure of material facts," as well as an affirmative obligation to "employ reasonable care to avoid misleading his clients."[4]

To prevent advisers from misleading clients, among other things, Congress, in section 206 of the Act, proscribed any practice which operates as a fraud or deceit upon advisory clients. The Supreme Court has interpreted fraudulent and deceptive practices under section 206 to include the nondisclosure of material facts.[5] Thus,

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[1] Section 206 [15 U.S.C. 80b–6] of the Advisers Act, in relevant part, states that: It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly- (1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; . . . (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purpose of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

[2] The Commission has held in enforcement proceedings that an adviser has a fiduciary obligation under section 206 to disclose its precarious financial condition or certain disciplinary events to clients. *See Intersearch Technology*, [1974–75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶80, 139 at 85, 178; *Dynamics Letter*, Investment Advisers Act Rel. No. 148 (Sept. 4, 1963); *In the Matter of Jesse Rosenblum*, Investment Advisers Act Rel. No. 913 (May 17, 1984). The Commission has also stated, in the rulemaking resulting in the "brochure rule," Rule 204–3 [17 CFR 275.204–3], that the omission of material facts by an adviser could constitute a fraudulent or deceptive act or practice under Section 206. Investment Advisers Act Rel. No. 442 (March 5, 1974). *Accord* Investment Advisers Act Rel. Nos. 601 and 664 (July 27, 1977, and Feb. 7, 1979).

[3] *SEC* v. *Capital Gains*, 375 U.S. 180, 191 (1963). In the legislative hearings preceding adoption of the Advisers Act, investment advisers emphasized their relationship of "trust and confidence" with their clients. For example, Robert H. Loomis, President of Loomis, Sayles & Co., stated that "the investment adviser's livelihood depends upon public trust and confidence." Hearings on S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. Part 1, 760 (1940).

Moreover, Congressional awareness of the confidential nature of the adviser-client relationship is reflected in section 210 of the Advisers Act [15 U.S.C. 80b–10] which contains provisions, unique among the federal securities laws, designed to protect information about advisory clients. Hearings on S. 3580, *supra*, at 719. *See also* S. Rep. No. 1775, 76th Cong., 3d Sess. 23 (1940).

[4] *Capital Gains*, *supra* note 3, at 194.

[5] *Capital Gains*, *supra* note 3, at 198–199. In holding that nondisclosure of material facts was one variety of fraud or deceit, the Supreme Court asserted that the essential purpose of the Advisers Act was to "substitute a philosophy of full disclosure for the philosophy of caveat emptor."

the broad proscriptions of section 206 against fraudulent and deceptive acts and practices, as interpreted by the Supreme Court, impose an enforceable fiduciary obligation upon an adviser to disclose material facts.[6]

Congress amended section 206, in 1960, to grant the Commission specific rulemaking authority to define "fraudulent, deceptive or manipulative acts and practices," [7] and to prescribe means "reasonably designed" to prevent such acts and practices.[8] The Commission now proposes through rulemaking to codify an adviser's general duty to disclose material facts about any precarious financial condition and certain disciplinary events, and to define some of the disciplinary events that must be disclosed. While the rule does not specify what facts must be disclosed, other than material facts, about these conditions and events, it does define some of the events that would be material and must be disclosed to clients under section 206.[9]

Under section 206, a financial condition and a disciplinary event would be required to be disclosed whenever there is a substantial likelihood that a reasonable client would consider it important in deciding the matter before him.[10] An adviser's precarious financial condition is important to clients because the adviser may not be able to provide an adequate level of service to clients and, in the event of the adviser's insolvency or inability to continue business, clients might lose prepaid fees or be forced to incur substantial costs and inconvenience in selecting another adviser.[11] A prior disciplinary event involving an adviser would be important to clients when it reflects upon the adviser's integrity or when it affects the degree of trust and confidence a client would place in the adviser.[12] Moreover, a disciplinary event which imposes limitations on an adviser's activities [13] also would reflect upon the adviser's ability to fulfill contractual commitments and thus would be important to clients.

Because it is substantially likely that a reasonable client would consider the adviser's precarious financial condition or certain disciplinary events important in choosing, or continuing to retain, an adviser, and because the nondisclosure of these conditions or events could mislead or deceive clients in their evaluation of the adviser's integrity or ability, Rule 206(4)–4 would mandate disclosure of any material facts with respect to these conditions or events. The proposed rule would codify the Commission's interpretation of section 206.[14] By specifying certain disciplinary events [15] about which material facts must be disclosed, the rule would help ensure that clients are provided with facts important to their evaluation of the adviser's ability and integrity, and also would prescribe means "reasonably designed" to prevent fraud or deception.

Discussion

Because section 206 applies to all advisers, the disclosure obligation codified in proposed Rule 206(4)–4 would apply to both registered advisers and those not required to be registered. Paragraph (a) of Rule 206(4)–4 sets forth a general disclosure standard.

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[6] In *Transamerica Mortgage Advisers* v. *Lewis*, 444 U.S. 11, 17 (1979), the Supreme Court stated that the legislative history of the Investment Adviser Act" leave no doubt that Congress intended to impose enforceable fiduciary obligations under Section 206." Moreover, in *Capital Gains, supra* note 3, at 198, the Supreme Court held that the Adviser Act's omission of a specific proscribtion against nondisclosure was not intended to limit the Commission's authority to enjoin material nondisclosures under the antifraud provisions. The fraud enjoined in *Capital Gains* was, in fact, a nondiclosure.

[7] In granting the Commission authority to enact rules to define the scope of the terms "fraudulent, deceptive, and manipulative" activities, Congress intended to clarify that the Commission's enforcement of the antifraud provisions was not to be limited by common law concepts of fraud and deceit. S. Rep. No. 1760, 86th Cong., 2d Sess. 4, 8 (1960).

[8] The 1960 amendments also extended the scope of Section 206 to include unregistered advisers and to specifically prohibit "manipulative practices."

[9] The Commission is proposing this rule to provide advisers with guidance on these federally-established fiduciary standards of conduct. The Supreme Court, in several decisions interpreting section 206 and other antifraud provisions of the federal securities laws, has held that Congress intended the Advisers Act to establish federal fiduciary standards to govern the conduct of advisers. *Transamerica, supra* note 6, at 17; *Santa Fe Industries* v. *Green*, 430 U.S. 462 U.S. 471 n.11 (1977); *Burks* v. *Lasker*, 441 U.S. 471, 481–82 n.10 (1979).

[10] In *TSC Industries* v. *Northway, Inc.*, 426 U.S. 483 (1976), a case involving Section 14(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78n(a)] ("Exchange Act"), the Supreme Court stated that "an omitted fact is material and required to be disclosed whenever there is a substantial likelihood that a reasonable investor would consider it important in deciding the matter before him." In *SEC* v. *Wall Street Publishing*, 591 F. Supp. 1070, 1082 (D.D.C. 1984), a case under Section 206 of the Advisers Act involving the nondisclosure of material facts, the court applied the *TSC* Standard of materiality.

[11] The Commission has decided, both in rulemaking and in enforcement proceedings, that an adviser's precarious financial condition is important to clients. *See* note 2, *supra*.

See generally Item 401(f)(1) of Regulation S–K [17 CFR 229.401(f)(1)] (requiring registrants to disclose bankruptcy and insolvency proceedings that are material to an evaluation of the ability or integrity of management).

[12] The Commission has held, under Section 206, that a prior disciplinary proceeding involving an adviser is important to clints. *See Rosenblum, supra* note 2. Also, the Commission has required, as part of a settlement in a section 203 [15 U.S.C. 80b–3] disciplinary proceeding, disclosure of its disciplinary order to clients and prospective clients of an adviser. *See In the Matter of Professional Capital Management*, Investment Advisers Act Rel. No. 856 (April 22, 1983); *In the Matter of Penny Stock Newsletter Inc.*, Investment Advisers Act Rel. No. 946 (Dec. 19, 1984); *In the Matter of Arthur Carlson, Investment Advisers Act Rel. No. 947 (Dec. 24, 1984)*.

[13] *See Arthur Carlson, supra* note 12, where the Commission, as part of a settlement in a section 203 disciplinary proceeding, suspended the registration of an adviser for nine months and barred the adviser from associating with any investment adviser for nine months.

[14] In prior enforcement proceedings involving section 206, not only did the Commission hold that these conditions and events were important, it also held that it would be fraudulent for the adviser not to disclose these conditions and events to clients. *See Rosenblum* and *Intersearch, supra* note 2.

The Commission recently reiterated this interpretation of section 206 in adopting revisions to Form ADV [17 CFR 279.1], the registration form for investment advisers, Part II of which specifies the disclosure to clients mandated by Rule 204–3, the "brochure rule." Investment Advisers Act Rel. No. 991 (Oct. 15, 1985). The Commission originally proposed that all disciplinary information reported to regulators in Part I of Form ADV be included in Part II of the Form. Investment Advisers Act Rel. No. 967 (April 24, 1985). When the Commission adopted the revisions to Form ADV, it did not include disciplinary disclosure provisions in Part II because disclosure of material disciplinary events was already required under section 206 independent of any rule or form requirement. paragraph (e) of the brochure rule makes clear that compliance with the rule's provisions does not relieve an adviser from other applicable disclosure obligations, and not all disciplinary information reported in Part I necessarily is important to clients.

[15] The Supreme Court in *Capital Gains, supra* note 3 at 195, held that the antifraud provisions of the Advisers Act were to be construed like the antifraud provisions of the Securities Act of 1933 ("Securities Act") and the Exchange Act. A majority of courts and the Commission found violations of section 17(a) of the Securities Act [15 U.S.C. 77q(a)], and sections 14(a) and 10(b) of the Exchange Act [15 U.S.C. 78n(a) and 78j(b)] and Rule 10b–5 thereunder [17 CFR 240.10b–5] for failure to disclose material facts about disciplinary events. *SEC* v. *Freeman*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,361, at 93,241 (N.D. Ill. 1978); *SEC* v. *Joseph Schlitz*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,464 at 93,692 (E.D. Wis. 1978); *Upton* v. *Trinidad Petroleum Corporation*, 468 F. Supp. 330, 337 (N.D. A1. 1979); *Sec.* v. *Kalvex, Inc.* 425 F. Supp. 310, 314–315 (S.D.N.Y. 1975); *Rafal* v. *Geneen*, [1972–73 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,505 at 92,440 (E.D. Pa. 1973). *Accord SEC* v. *American Board of Trade Inc.*, 751F.2d 529, 540–41 (2d Cir. 1984); *Freschi* v. *Grand Coal Venture* 767 F.2d 1041, 1048 n.9 (2d Cir. 1985). *But see SEC* v. *Lowe*, 556 F. Supp. 1359, 1370 (E.D.N.Y. 1983), 725 F.2d 892 (2d Cir. 1984), 105 S.Ct. 2557 (1985). The district court in *Lowe* refused to find a violation of section 206 for an adviser's failure to disclose criminal convictions in the absence of a Commission rule under section 204 [15 U.S.C. 80b–4] requiring it. While *Lowe* principally involved a First Amendment challenge to the Commission's authority to enforce its order revoking the registration of an advisory publisher, a collateral issue was whether Lowe was required under section 206 to disclose his criminal convictions to subscribers. While the Commission appealed the district court's holding on disclosure, neither the court of appeals nor the Supreme Court addressed this issue specifically on review.

Paragraph (a)(1) of the proposed rule would require disclosure of all material facts about a financial condition of an adviser that is reasonably likely to impair the ability of the adviser to meet contractual commitments to clients, while paragraph (a)(2) would require disclosure of all material facts about a legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients. As discussed above, these conditions and events must be disclosed because it is substantially likely that a reasonable client would consider them important in deciding whether to retain a particular adviser or, if the client has already retained an adviser, in structuring their relationship. While under the proposed rule the precarious financial condition of any adviser would be material and required to be disclosed to clients under section 206, the Commission requests comment on whether there is a reasonable basis to limit the disclosure required under paragraph (a)(1) of the proposed rule to certain types of advisers, *e.g.*, advisers with custody of, or discretion over, client funds, or advisers who require prepaid advisory fees.

Paragraph (b) of Rule 206(4)–4 would provide guidance on the adviser's minimum disclosure obligation under paragraph (a)(2) by defining ceratin legal or disciplinary events involving the adviser or certian key personnel (for simplicity, referred to as "management person," as discussed below) as "material" within the meaning of the general disclosure obligation found in paragraph (a)(2), and thus requiring disclosure of all material facts about those events. Paragraph (b) would require disclosure of all material facts about the specified events unless more than ten years have elapsed from the time the event occurred. While the ten-year period corresponds to the ten-year period found in section 203(e)(2) of the Advisers Act [16] and Item 11 of Part I of Form ADV, the Commission requests comment on whether a different time period should be used, for example, the five-year period specified in Item 401(f) of Regulation S–K.[17]

The Commission has defined the legal and disciplinary events about which disclosure of all material facts must be made to include court actions (both civil and criminal), agency proceedings, and SRO proceedings, involving the adviser or a management person engaged in activities as, or being associated with, a broker-dealer, investment company, investment adviser, futures commission merchant, commodity trading adviser, commodity pool operator, bank, savings and loan association, or fiduciary. These activities generally follow those specified in section 203(e) of the Advisers Act and Item 11 of Form ADV. However, not all the legal or disciplinary events specified in section 203(e) or reported to regulators in Item 11 would be covered by paragraph (b) of the rule. Rather, paragraph (b) has been drafted to exclude violations not ordinarily material to a client in evaluating the adviser's ability or integrity. For example, agency and self-regulatory organization ("SRO") proceedings involving findings of investment-related violations would have to be disclosed under paragraph (b) only if a significant sanction were involved, *e.g.*, a bar, a suspension, or an SRO fine of more than $2,500.[18]

Paragraph (b)(1)(i) of the rule, which specifies the criminal actions that must be disclosed, is patterned after the format of Item 11A(1) of Part I of Form ADV and the statutory disqualification provisions of section 203(e)(2) of the Advisers Act. Under this format, disclosure is required for felony or misdemeanor convictions involving certain specified crimes relating generally to fraud or the unlawful taking of money or property. The Commission requests comment on whether other disclosures should be required, for example, disclosure of all felony convictions, or whether another format should be used. One alternative might be to require disclosure of convictions for crimes subject to fines or imprisonment of specified amounts. Commenters should consider whether this, or another alternative, could simplify the rule while achieving its purposes and, if so, what the appropriate thresholds should be.

Paragraph (c) of the proposed rule reflects the Commission's belief that for disclosure to be meaningful to clients, it must be timely.[19] The proposed rule's timing provision is patterned after the brochure rule's time of delivery requirement,[20] and would require that these material facts be provided promptly to existing clients and not less than 48 hours prior to entering into a contract (or, where certain conditions are met, no later than the time of entering into the contract) with prospective clients.

Paragraph (d) of the proposed rule defines certain of the rule's key terms. The term "management person" would include any person with the power to exercise, directly or indirectly, a controlling influence over the management or policies of an adviser or to determine the general investment advice given to clients. The term "found" means determined or ascertained in any adverse final SRO proceeding, administrative proceeding, or court action, including a consent decree.[21] Other definitions are based on definitions in Form ADV.[22]

Paragraph (e) of the proposed rule provides instructions for calculating the ten-year period for minimum disclosure. The proposed rule also states that the ten-year period in paragraph (B) is only a minimum disclosure requirement. Depending on the facts and circumstances, events occurring outside this period could be material to clients and, if so, must be disclosed under paragraph (a).

Finally, paragraph (f) states that compliance with paragraph (b) of the rule would not necessarily constitute compliance with the adviser's disclosure obligations under paragraph (a) of the rule. Depending on the facts and circumstances, events not specifically listed in paragraph (b) may nonetheless trigger the general disclosure obligation found in paragraph (a). For example, events involving persons other than management persons, or events other than those specified in paragraph (b) would have to be disclosed under paragraph (a) when material to a client's evaluation of the adviser's ability or integrity. Furthermore, this paragraph makes clear that the guidance provided in the rule is neither exclusive nor a substitute for the adviser's general fiduciary obligation to disclose material facts.[23]

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[16] Section 203(e)(2) [15 U.S.C. 80b–3(e)(2)] limits the statutory disqualification period for criminal convictions to ten years.

[17] Item 401(f), *supra* note 11, specifies a five-year period for disclosure about legal proceedings involving management.

[18] The $2,500 threshold is patterned after Exchange Act Rule 19d–1(c)(2) [17 CFR 240.19d–1(c)(2)] which excepts SROs from the obligation to report promptly disciplinary actions for designated minor violations.

[19] *In the Matter of Arleen Hughes*, 27 SEC 629, 639 (1948).

[20] 17 CFR 275.204–3(b). *See also* Investment Advisers Act Rel. No. 442, *supra* note 2.

[21] *See* Investment Advisers Act Rel. No. 991, *supra* note 14.

[22] The definition of "investment-related" is patterned after Item 11 of Form ADV and Section 203(e)(2)(B) of the Advisers Act [15 U.S.C. 80b–3(e)(2)(B)]; the definition of "involved" is patterned after Item 11 of Form ADV and section 203(e)(5) of the Advisers Act; and the definition of "SRO" is identical to the definition of this term in the General Instructions to Form ADV.

[23] The legislative history of section 206(4) of the Advisers Act, the provision granting the Commission rulemaking authority to define and

Continued

Cost Benefit of the Proposed Action

Because the proposed rule would codify and investment adviser's existing fiduciary obligation under section 206 to disclose material facts about any precarious financial condition and certain disciplinary events to clients, the proposal should not impose any new obligations or costs on investment advisers. Moreover, by providing advisers with guidance and certainty in fulfilling these disclosure obligations, the proposed rule could decrease somewhat the cost of compliance with the Advisers Act. By alerting advisers to this disclosure obligations, the proposed rule also should result in more advisory clients receiving material facts about these conditions and events. The Commission's regulatory and enforcement costs also could decrease because codifying the standard should increase compliance. The Commission requests specific comment on its assessment of the costs and benefits associated with the proposal, including any specific estimates of any costs and benefits perceived by commenters.

Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis in accordance with 5 U.S.C. 603 regarding Rule 206(4)–4 proposed herein. The Analysis notes that proposed Rule 206(4)–4 would codify the Commission's position that section 206 of the Advisers Act requires an adviser to disclose material facts about any precarious financial condition and certain disciplinary events to clients. The objective of the proposed rule is to help ensure that clients are provided with material facts about these conditions or events that are important to making an informed decision whether to hire or retain a particular adviser. The Analysis indicates that while the rule's impact on small entities cannot be quantified, the proposal should not impose any additional costs on advisers. Rather, by providing greater certainty about disclosure requirements, the rule could decrease the cost of compliance for advisers. A copy of the Initial Regulatory Flexibility Analysis may be obtained by contacting Debra Kertzman, Attorney, Mail Stop 5–2, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

prescribe fraudulent and deceptive practices, indicates that Congress did not intend for such rules and regulations to substitute for the general antifraud provisions under section 206. S. Rep. No. 1760, *supra* note 7, at 3509; *Capital Gains, supra* note 3, at 199.

Paperwork Reduction Act

The information collection required by proposed Rule 206(4)–4 has been submitted to the Office of Management and Budget.

Statutory Authority

The Commission is proposing Rule 206(4)–4 under the authority set forth in sections 206(4) and 211(a) of the Advisers Act [15 U.S.C. 80b–6(4) and 80b–11(a)].

List of Subjects in 17 CFR Part 275

Investment advisers, Fraud, Securities.

Text of Proposed Rule

It is proposed that Part 275 of Chapter II of Title 17 of the Code of Federal Regulations under the Investment Advisers Act of 1940 be amended as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The authority citiation for Part 275 continues to read as follows:

Authority: Sec. 203, 54 Stat. 850, as amended 15 U.S.C. 80b–3; Sec. 204, 54 Stat. 852, as amended, 15 U.S.C. 80b–4; Sec. 206A, 84 Stat. 1433, as added, 15 U.S.C. 80b–6A; Sec. 211, 54 Stat. 855, as amended, 15 U.S.C. 80b–11.

2. By adding § 275.206(4)–4 as follows:

§ 275.206(4)–4 Financial and disciplinary information that investment advisers must disclose to clients.

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act for any investment adviser to fail to disclose to any client or prospective client all material facts with respect to:

(1) A financial condition of the adviser that is reasonably likely to impair the ability of the adviser to meet contractual commitments to clients; or

(2) A legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients.

(b) Legal or disciplinary events that are material to an evaluation of an adviser's integrity or ability to meet contractual commitment to clients within the meaning of paragraph (a)(2) of this section are hereby defined to include any of the following events involving the adviser or a management person of the adviser (any of the foregoing being referred to hereafter as "person") that were not resolved in the person's favor or subsequently reversed, suspended, or vacated, unless more than 10 years have elapsed from the time of the event:

(1) A criminal or civil action in a court of competent jurisdiction in which the person—

(i) Was convicted, pleaded guilty or nolo contendere ("no contest") to a felony or misdemeanor, or is the named subject of a pending criminal proceeding, involving an investment-related business; fraud, false statements, or omissions; wrongful taking of property; or bribery, forgery, counterfeiting, or extortion;

(ii) Was found to have been involved in a violation of an investment-related statute or regulation; or

(iii) Was the subject of any order, judgment, or decree permanently or temporarily enjoining the person from, or otherwise limiting the person from, acting as or being associated with a broker-dealer, investment company, investment adviser, futures commission merchant, commodity trading adviser, commodity pool operator, bank, savings and loan association, or fiduciary; or otherwise engaging in any investment-related activity.

(2) Administrative proceedings before the Securities and Exchange Commission, any other federal regulatory agency or any state agency (any of the foregoing being referred to hereafter as "agency") in which the person—

(i) Was found to have caused an investment-related business to lose its authorization to do business; or

(ii) Was found to have been involved in a violation of an investment-related statute or regulation and was the subject of an order by the agency denying, suspending, or revoking the authorization of the person to act as, or barring or suspending the person's association with, a broker-dealer, investment company, investment adviser, futures commission merchant, commodity trading adviser, commodity pool operator, bank, savings and loan association, or fiduciary; or otherwise significantly limiting the person's activities.

(3) SRO proceedings in which the person—

(i) Was found to have caused an investment-related business to lose its authorization to do business; or

(ii) Was found to have been involved in a violation of the SRO's rules and was the subject of an order by the SRO barring or suspending the person from membership or from association with other members, or expelling the person from membership; fining the person more than $2,500; or otherwise

significantly limiting the person's activities.

(c) The information required to be disclosed by paragraphs (a) and (b) of this section shall be disclosed to clients, promptly; and to prospective clients not less than 48 hours prior to entering into any written or oral investment advisory contract, or no later than the time of entering into such contract if the client has the right to terminate the contract without penalty within five business days after entering into the contract.

(d) For purposes of this rule:

(1) "Management person" means a person with power to exercise, directly or indirectly, a controlling influence over the management or policies of an adviser which is a company or to determine the general investment advice given to clients.

(2) "Found" means determined or ascertained in an adverse final SRO proceeding, administrative proceeding, or court action, including a consent decree.

(3) "Investment-related" means pertaining to securities, commodities, banking, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, investment company, investment adviser, futures commission merchant, commodity trading adviser, commodity pool operator, bank, savings and loan association, or fiduciary).

(4) "Involved" means acting or aiding, abetting, causing, counseling, commanding, inducing, conspiring with, or failing to reasonably supervise another's act.

(5) "SRO" means any national securities or commodities exchange or registered association, or registered clearing agency.

(e) For purposes of calculating the ten-year period referred to in paragraph (b) of this section, the date of a reportable event shall be deemed the date on which the final order, judgment, or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees lapsed. The ten-year period is only a minimum disclosure requirement and, depending on the facts and circumstances, events occurring outside this period may still be material and required to be disclosed under paragraph (a) of the rule.

(f) Compliance with paragraph (b) of this rule shall not relieve any investment adviser from the disclosure obligation of paragraph (a) of the rule or any other disclosure obligation under the Act, the rules and regulations thereunder, or under any other federal or state law.

By the Commission.

Shirley E. Hollis,

Assistant Secretary.

September 19, 1986.

[FR Doc. 86-21811 Filed 9-25-86; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD3 86-33]

Drawbridge Operation Regulations: Cold Spring Brook, Connecticut

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule.

SUMMARY: At the request of the Summerwood Condominium Association, the Coast Guard is considering adding regulations governing the footbridge over Cold Spring Brook, at mile 0.1, Old Saybrook, Connecticut, by requiring advance notice when the span is in place during the summer. This proposal is being made because of the limited requests for opening the draw. This action should relieve the bridge owner of the burden of having a person constantly available to open the draw and should still provide for the reasonable needs of navigation.

DATE: Comments must be received on or before November 10, 1986.

ADDRESS: Comments should be mailed to Commander (oan-br), Third Coast Guard District, Bldg. 135A, Governors Island, NY 10004. The comments and other materials referenced in this notice will be available for inspection and copying at this address. Normal office hours are between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Comments may also be hand delivered to this address.

FOR FURTHER INFORMATION CONTACT: William C. Heming, Bridge Administrator, Third Coast Guard District, (212) 668-7994.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this proposed rulemaking by submitting written views, comments, data, or arguments. Persons submitting comments should include their names and addresses, identify the bridge, and give reasons for concurrence with, opposition to, or any recommended change in the proposal. Persons desiring acknowledgment that their comments have been received should enclose a stamped, self-addressed postcard or envelope.

The Commander, Third Coast Guard District will evaluate all communications received and will determine a course of final action on this proposal. The proposed regulations may be changed in light of comments received.

Drafting Information

The drafters of this notice are Ciro Compagno, project manager, and Mary Ann Arisman, project attorney.

Discussion of Proposed Regulations

On February 7, 1984, the Coast Guard permitted the construction of a movable in lieu of a fixed bridge over Cold Spring Brook to provide for the navigational needs of upsteam property owners and emergency access to the waterway. On June 7, 1985, at the request of the bridge owner, the Coast Guard approved temporary regulations for a 60-day period to test the operation of a telephone system for requesting bridge openings. During the 1985 boasting season, only one bridge opening was recorded. Additionally, no comments or objections were received in response to Public Notice 3-596 implementing the temporary regulations. During the summer months, this proposal would allow a bridge opening within 15 minutes of a mariner's request by a telephone monitored and maintained by the bridge owner. The bridge owner would also provide a means for mariners to secure their boats upstream and downstream of the bridge while using this telephone.

Economic Assessment and Certification

These proposed regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979).

The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. There are no commercial water-dependent facilities or entities that will be adversely affected by this action. Since the economic impact of this proposal is expected to be minimal, the Coast Guard certifies that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend Part 117

of Title 33, Code of Federal Regulations as follows:

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g).

2. Section 117.202 is added to read as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

§ 117.202 Cold Spring Brook.

The draw of the footbridge, mile 0.1 at Saybrook, shall open within 15 minutes of a mariner's request by telephone. To enable mariners to request bridge openings, the owner shall maintain and monitor a telephone at the bridge and provide a means for mariners to secure their boats upstream and downstream of the bridge in order to use this telephone.

Dated: September 10, 1986.

J.C. Uilthol,

Captain, U.S. Coast Guard, Acting Commander, Third Coast Guard District.

[FR Doc. 86–21767 Filed 9–25–86; 8:45 am]

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