appropriate qualified registered securities depository.

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PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, and 80b-11, unless otherwise noted.

* * * * *

2. Section 240.17Ad–16 is added to read as follows:

§ 270.17Ad–16 Notice of Assumption or Termination of Transfer Agent Services.

(a) A registered transfer agent that ceases to perform transfer agent services on behalf of an issuer of securities, including a registered transfer agent that ceases to perform transfer agent services on behalf of an issuer of securities because of a merger or acquisition by another transfer agent, shall send written notice of such termination to the appropriate qualified registered securities depository on or before the later of ten calendar days prior to the effective date of such termination or the day the transfer agent is notified of the effective date of such termination. Such notice shall include the full name, address, telephone number, and Financial Industry Number Standard ("FINS") number of the transfer agent ceasing to perform the transfer agent services for the issuer; the issuer's name; the issue or issues handled and their CUSIP number(s); and if known, the name, address, and telephone number of the transfer agent that thereafter will provide transfer services for the issuer. If no successor transfer agent is known, the notice shall include the name and address of a contact person at the issuer.

(b) A registered transfer agent that changes its name or address or that assumes transfer agent services on behalf of an issuer of securities, including a transfer agent that assumes transfer agent services on behalf of an issuer of securities because of a merger or acquisition of another transfer agent, shall send written notice of such to the appropriate qualified registered securities depository on or before the later of ten calendar days prior to the effective date of such change in status or the day the transfer agent is notified of the effective date of such change in status. A notice regarding a change of name or address shall include the full name, address, telephone number, and FINS number of the transfer agent and the location where certificates are received for transfer. A notice regarding the assumption of transfer agent services on behalf of an issuer of securities, including assumption of transfer agent services resulting from the merger or acquisition of another transfer agent, shall include the full name, address, telephone number, and FINS number of the transfer agent assuming the transfer agent services for the issuer; the issuer's name; and the issue or issues handled and their CUSIP number(s).

(c) The notice described in paragraphs (a) and (b) of this section shall be delivered by means of secure communication. For purposes of this section, secure communication shall include telegraph, overnight mail, facsimile, or any other form of secure communication.

(d)(1) The appropriate qualified registered securities depository that receives notices pursuant to paragraphs (a) and (b) of this section shall deliver within 24 hours a copy of such notices to each qualified registered securities depository. A qualified registered securities depository that receives notice pursuant to this section shall deliver a copy of such notices to its own participants within 24 hours.

(2) A qualified registered securities depository may comply with its notice requirements under paragraph (d)(1) of this section by making available the notice of all material information from the notice within 24 hours in a manner set forth in the rules of the qualified registered securities depository.

(3) A qualified registered securities depository shall maintain such notices for a period of not less than two years, the first six months in an easily accessible place. Such notice shall be made available to the Commission or other persons as the Commission may designate by order.

(4) A registered transfer agent that provides notice pursuant to paragraphs (a) and (b) of this section shall maintain such notice for a period of not less than two years, the first six months in an easily accessible place.

(e) For purposes of this section, a *qualified registered securities depository* shall mean a clearing agency registered under Section 17A of the Act (15 U.S.C. 78q-1) that performs clearing agency functions as described in Section 3(a)(23)(A)(i) of the Act (15 U.S.C. 78c(a)(23)(A)(i)) and that has rules and procedures concerning its responsibility for maintaining, updating, and providing appropriate access to the information it receives pursuant to this section.

(f) For purposes of this section, an *appropriate qualified registered securities depository* shall mean the qualified registered securities depository that the Commission so designates by order or, in the absence of such designation, the qualified registered securities depository that is the largest holder of record of all qualified registered securities depositories as of the most recent record date.

Dated: December 1, 1994.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–30125 Filed 12–7–94; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-35040; File No. S7-35-94]

RIN 3235-AG24

Proposed Amendments to the Transfer Agent Rules

AGENCY: Securities and Exchange Commission.

ACTION: Notice of Proposed Rulemaking and Request for Comments.

SUMMARY: The Securities and Exchange Commission is proposing amendments to certain transfer agent rules regarding turnaround time, recordkeeping, and safekeeping of funds. The Commission is proposing these rules in light of the changes in the clearance and settlement of corporate securities from five days after the trade ("T+5") to three days after the trade ("T+3") and the proposal to establish a transfer agent operated book-entry registration system (hereinafter referred to as the "direct registration system" or "DRS"). The proposed amendments to the transfer agent rules are designed to minimize disruptions, delays, and financial losses in the securities markets, particularly in the national clearance and settlement system for securities, that may be caused by poor turnaround performance, substandard or inaccurate recordkeeping practices, and inadequate safekeeping procedures. The Commission also is soliciting comment on whether additional rules are needed in light of T+3 and DRS, including net worth and insurance requirements.

DATES: Comments should be submitted on or before February 6, 1995.

ADDRESSES: Interested persons should submit three copies of their written data, views, and opinions to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comment letters should refer to File No. S7-35-94 and will be available for public inspection and copying at the Commission's public reference room, 450 Fifth St., NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Ester Saverson, Jr., Special Counsel, or Michele J. Bianco, Attorney, at 202/942-4187, Office of Market Supervision, Mail Stop 5-1, Division of Market Regulation, Securities and Exchange Commission, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background and Summary

Transfer agents are an integral component of the clearance and settlement process. There are approximately 1,576 registered transfer agents that maintain the official registers of stockholders or bondholders on behalf of the issuers of securities. Transfer agents issue negotiable certificates evidencing security ownership, communicate on behalf of issuers with securityholders, and record changes in securities ownership as a result of securities transactions.

A certificate issued in the name of the securityholder is one method of evidencing ownership of a security. The certificate is a negotiable instrument, and the proper indorsement of the securities has been the traditional method of transferring ownership. Because of the desire to immobilize certificates to facilitate the clearance and settlement of the increasingly large number of transactions that occur every day, transfer agents began to maintain custody of securities for which they act as transfer agent. Some transfer agents maintain custody of certificates on behalf of securities depositories,[1] exchange information with the relevant depositories about position balances each day, and issue and transmit certificates pursuant to the depositories' instructions.[2] Transfer agents also may function as custodian for individual securityholders through dividend reinvestment and stock purchase programs ("DRSPPs"), employee stock purchase programs, and similar transfer agent book-entry custody programs.

The functions performed by transfer agents are critical to the safe and efficient processing of securities transactions. Substandard performance by transfer agents can affect the accuracy of an issuer's securityholder records, interrupt the channels of communication between issuers and securityholders, frustrate investor expectations, and cause financial loss to investors and intermediaries such as broker-dealers, banks, and clearing agencies.[3]

Congress authorized federal regulation of transfer agent activities in 1975 as one component of a regulatory scheme designed to foster a National Clearance and Settlement System ("National System") among broker-dealers, issuers, exchanges, and clearing agencies.[4] The Securities and Exchange Commission ("Commission") has adopted certain rules governing the performance of transfer agent functions by registered transfer agents to protect investors and to facilitate the prompt, accurate, and safe transfer, clearance, and settlement of securities transactions.[5] For example, Rules 17AD-1 through 17AD-7 ("turnaround rules") under the Securities Exchange Act of 1934 ("Act") establish minimum performance standards for registered transfer agents in connection with the timely cancellation and issuance of securities certificates.[6] In addition, Rules 17Ad-9 through 17Ad-13 establish standards for registered transfer agents governing recordkeeping practices and the safeguarding of securities and funds.[7] These rules were intended to promote, among other things, accurate securityholder records.[8]

The Commission believes it is appropriate to solicit comment on the proposed amendments to the transfer agent rules. The Commission also solicits comment on whether other changes are needed to the transfer agent regulations in light of impending changes in the National System. Effective in June 1995, Rule 15c6-1 will shorten the standard time frame for settling securities transactions from T+5 to T+3. As discussed more fully in a companion release issued today,[9] industry efforts are underway to develop expanded direct registration systems that rely on account statements instead of negotiable certificates, automated recordkeeping systems, and automated links between securities

[1] Securities depositories are registered as clearing agencies under Section 17A of the Securities Exchange Act of 1934. Depositories serve as clearinghouses for the settlement of trades in corporate and municipal securities and perform securities safekeeping services for their participating banks and broker-dealers.

[2] Securities Exchange Act Release No. 13342 (March 8, 1977), 42 FR 14792.

[3] *See* SEC, *Study of Unsafe and Unsound Practices of Brokers and Dealers*, H.R. Doc. No. 231, 92nd Cong., 1st Sess., 37-39 (1971); *Clearance and Settlement of Securities Transactions, Hearings on S. 3412, S. 3297 and S. 2551 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 92nd Cong., 2d Sess., 94-96, 105-106 (1972); *Securities Processing Act Hearings on H.R. 14567, H.R. 14826 and S. 3876 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92nd Cong. 2d Sess., 100 (1972).

[4] S. Rep. No. 75, 94th Cong., 1st Sess. 103, *reprinted in* 1975 U.S. Code Cong. & Admin. News 179, 281.

[5] A transfer agent is required to register with its appropriate regulatory agency. Bank transfer agents register with one of the banking agencies (*i.e.*, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Depository Insurance Corporation) and non-bank transfer agents register with the Commission.

[6] 17 CFR 240.17Ad-1 through 240.17Ad-7 (1994). *See* Securities Exchange Act Release No. 13636 (June 16, 1977), 42 FR 32404.

[7] Securities Exchange Act Release No. 19860 (June 10, 1983), 48 FR 28231.

[8] 17 CFR 240.17Ad-9 through 240.17Ad-13 (1994). The Commission last amended these rules in 1986. Securities Exchange Act Release No. 22882 (February 10, 1986), 51 FR 5703.

[9] Securities Exchange Act Release No. 35038 (December 1, 1994) (hereinafter referred to as "companion release").

depositories, broker-dealers and banks. In light of these developments, the performance and operational efficiency of transfer agents increasingly will be important to the smooth functioning of the National System. Substandard or inefficient performance by transfer agents could have a significant adverse impact on the functioning of the National System.[10]

II. Discussion

A. Turnaround of Requests for Transfer

The current turnaround rule[11] requires a transfer agent to process ("turnaround") within three business days of receipt at least 90% of all routine items[12] received for transfer during that month.[13] In addition, most transfer agents that transfer New York Stock Exchange ("NYSE") listed securities meet the more stringent NYSE requirement that requires transfer agents to transfer NYSE-listed securities within 48 hours of receipt.[14]

In light of the shortening of the settlement cycle to T+3, the Commission is proposing to amend Rule 17Ad–2 to reduce the turnaround requirement from three business days to two business days for transfer agents that do not qualify for the exemption under Rule 17Ad–4(b). Although there are several ways to transfer ownership of securities in settlement of secondary market trades,[15] changing ownership on the books maintained by the transfer agent can still be a critical step in that process. The Commission also is proposing to amend Rule 17AD–2(e) to require "exempt" transfer agents that transfer depository-eligible securities to turnaround ninety percent of all routine items received during a month within three business days of receipt.[16] Currently, those transfers must be completed within five business days.

The Commission invites commenters to address whether a shorter turnaround standard should be established for all transfer agents.[17] Currently, Rule 17Ad–2 establishes different turnaround standards for "low-volume" transfer agents because these transfer agents are generally small businesses and the cost associated with requiring faster turnaround might be significant to these entities. The Commission invites commenters to address whether the distinction among transfer agents based on volume should be maintained. Commenters addressing this issue are requested to provide data in support of their views.

B. Accurate Securityholder Records

Rule 17Ad–10 requires all recordkeeping transfer agents "promptly"[18] and accurately to update the securityholders file. Issuer transfer agents[19] and transfer agents that employ batch posting systems must post certificate detail[20] to the master securityholder file within 10 business days. Transfer agents that qualify for the exemption under Rule 17Ad–4(b) must post certificate detail to the master securityholder files within 30 calendar days. All other recordkeeping transfer agents must post certificate detail to the master securityholder files within five business days.

The Commission is proposing to amend Rule 17Ad–10(a)(2) to require "exempt" registered transfer agents to update the master securityholder file within ten business days of an issuance, purchase, transfer, or redemption of a security instead of the 30 calendar days current required. Although recordkeeping transfer agents would continue to have as much as two weeks from the transfer of ownership to update the master security holder file, their subsidiary file system must contain records that reflect all transfers and that are readily accessible. The Commission understands that many transfer agents maintain systems that provide for same-day or immediate updates to the master securityholder files, while other transfer agents update the file periodically and direct their staff to review transfer ledgers between updates. The Commission invites commenters to address whether more stringent time frames should be mandated, such as same-day, next-day, or five business days, and whether the rule should continue to reflect differences in the automation and size of registered transfer agents.

One of the major functions of a transfer agent is to transfer the security from the seller to the buyer after a transaction. Typically this is evidenced by cancelling the old certificate and issuing a new certificate. With the growth of uncertificated recordkeeping functions by transfer agents, an increasing number of transfers are effected by book-entry only. Without the certificate, the integrity of the records of the transfer agent is crucial. As discussed in the Companion Release, under the DRS Concept and other uncertificated recordkeeping functions, the request for transfer in many instances may no longer be submitted in writing but will be submitted electronically. In addition, the DRS

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[10] This discussion is limited to transfer agent regulation and does not address the application of the broker-dealer registration provisions of the Exchange Act to DRS or DRSPPs. Some of the activities in connection with DRS or DRSPPs may raise broker dealer registration issues under section 15 of the Exchange Act. Refer to companion release at n. 21.

[11] 17 CFR 240.17Ad–2 (1994).

[12] 17 CFR 250.17Ad–1(i) (1994) defines a routine item as follows: "An item is routine if it does not: (1) Require requisitioning certificates of an issue for which the transfer agent, under the terms of its agency, does not maintain a supply of certificates; (2) include a certificate as to which the transfer agent has received notice of a stop order, adverse claim, or any other restriction on transfer; (3) require any additional certificates, documentation, instructions, assignments, guarantees, endorsements, explanations or opinions of counsel before transfer may be effected; (4) require review of supporting documentation other than assignments, endorsements or stock powers, certified corporate resolutions, signature or other common and ordinary guarantees or appropriate tax or tax waivers; (5) involve a transfer in connection with a reorganization, tender offer, exchange, redemption or liquidation; (6) include a warrant, right or convertible security presented for transfer of record ownership within five business days before any day upon which exercise or conversion privileges lapse or change; (7) include a warrant, right, or convertible security presented for exercise or conversion; or (8) include a security of an issue which within the previous 15 business days was offered to the public, pursuant to a registration statement effective under the Securities Act of 1933, in an offering of a continuing nature."

[13] An exempt transfer agent *i.e.*, a transfer agent that during any six consecutive months has received fewer than 500 items for transfer and fewer than 500 items for processing does not have to meet the three day turnaround requirement. 17 CFR 240.17Ad–4 (1994). An exempt transfer agent that handles any depository-eligible securities must turnaround 90% of all routine items received during a month within five business days of receipt. 17 CFR 240.17Ad–2(e)(2) (1994). All other exempt transfer agents must turnaround all items promptly. 17 CFR 240.17Ad–2(e)(1) (1994).

[14] NYSE Rule 496, NYSE Guide (CCH) ¶2496 at 4225.

[15] *See, e.g.*, N.Y. U.C.C. LAW § 8–313(1) (McKinney 1994). The most common method today is by book-entry notation on the records of a securities depository, bank, or broker-dealer. *See* 1993 SEC Annual Report at 125.

[16] The Commission invites commenters to address whether other time frames, such as one or two business days, would be more appropriate.

[17] The Securities Transfer Association ("STA") questioned the validity of other distinctions of exempt transfer agents. STA's Petition for Commission Rulemaking to Rule IVa of the Securities and Exchange Commission's Rules of Practice to Eliminate Differential Regulatory Standards for Transfer Agents Under Section 17A of the Securities Exchange Act of 1934 (November 23, 1988). Those distinctions include different exemptions for independent audit requirements, and recordkeeping requirements. A copy of the petition will be placed in the public file and will be available for inspection. The Commission invites commenters to address the continued validity of these exceptions.

[18] Promptly is defined as five business days, ten business days, or 30 calendar days depending on the category of the transfer agent. 17 CFR 240.17Ad–10(a)(2)(ii) (1994).

[19] Issuer transfer agents are those transfer agents which perform transfer agent functions exclusively with respect to their own securities or those issued by an affiliate. *See* 17 CFR 240.17Ad–10(2) (1994).

[20] "Certificate detail" is defined in 17 CFR 240.17Ad–9(a) (1994) and generally means those data elements that identify the owner and the certificate or positions held by that owner.

Concept could allow an investor to direct the sale of securities or to request a certificate by telephone. Accordingly, the Commission invites commenters to address whether additional recordkeeping requirements are necessary in light of the trend toward statement-based securities ownership accounting (*i.e.*, recording ownership without issuing a negotiable certificate evidencing those securities). For example, are there additional records transfer agents should maintain concerning transfer instructions transmitted electronically or by telephone?

The Commission also invites commenters to address the following questions. Should the Commission require transfer agents to issue confirmation statements every time there is a transaction that changes an investor's DRSPP or DRS account similar to those required to be sent by broker-dealers in Rule 10b–10.[21] If there is no activity in an account, how often should a transfer agent send an account statement? What, if anything, should the Commission require to be disclosed on such account statements?

C. Investors' Funds and Securities

Currently Rule 17Ad–12 requires transfer agents that have custody or possession of funds or securities related to their transfer agent activities to assure that:

(1) All such securities are held in safekeeping and are handled, in light of all facts and circumstances, in a manner reasonably free from risk of destruction, theft or other loss; and (2) all such funds are protected, in light of all facts and circumstances, against misuse. In evaluating which particular safeguards and procedures must be employed, the cost of the various safeguards and procedures as well as the nature and degree of potential financial exposure are two relevant factors.[22]

The Commission believes a transfer agent should not commingle investor funds with other funds of the transfer agent. With the growth of DRSPPs, it is not unusual for transfer agents to hold considerable sums of investor funds. Although the Commission is not aware of any losses to investors from existing practices, the Commission believes it is appropriate to take steps to reduce the potential for such losses. Accordingly, the Commission is proposing to amend Rule 17Ad–12 to require every registered transfer agent to maintain with a bank or banks at all times a "Bank Account for the Exclusive Benefit of Securityholders" (hereinafter referred to as the "Securityholders' Bank Account") which shall remain separate from any other bank account of the transfer agent. The proposed amendment to Rule 17Ad–12 also would require every registered transfer agent to maintain at all times in such Securityholders' Bank Account all securityholders' funds in the transfer agent's custody and possession that are related to its transfer agent activities.

The proposed rule is intended to restrict transfer agents from using or investing securityholders' funds for any purpose and to protect those funds from the transfer agent's general creditors. As proposed, transfer agents must deposit cash in a bank, as that term is defined is Section 3(a)(6) of the Act. The Commission invites comments on whether other financial institutions or account structures might be used or mandated to preserve the liquidity and safety of funds.

D. Minimum Net Worth and Insurance Requirements

During its 1983 rulemaking process, the Commission sought comment on whether it should impose minimum net worth and insurance requirements on transfer agents registered under Section 17A of the Exchange Act, other than federally regulated banks or transfer agents that perform transfer agent functions exclusively for their own securities.[23] The Commission also requested comment on whether a minimum net worth requirement would be necessary if an appropriate insurance requirement were imposed. Most commenters favored a minimum insurance requirement and many favored both minimum insurance and net worth requirements. Commenters, however, suggested widely varying ranges of minimum insurance and net worth levels. In June 1983, when the Commission adopted recordkeeping rules and safeguarding procedures for registered transfer agents, the Commission considered, but decided to defer, promulgating rules regarding transfer agent net worth and insurance requirements.[24]

Thereafter, the Securities Transfer Association, Inc. ("STA") petitioned the Commission for changes to rules concerning transfer agents which included, among other things, minimum insurance and net worth requirements.[25] As discussed below, the Commission believes it is appropriate to reconsider the merits and costs of minimum net worth and insurance requirements for transfer agents.

1. Net Worth Requirements

The STA advocated net worth requirements for several reasons. First, transfer agents may require a minimum amount of net worth to permit efficient and safe transfer operations.[26] Second, transfer agents may require a minimum amount of net worth to meet potential liabilities in connection with those functions. Although the Uniform Commercial Code ("UCC") imposes liability on issuers for damages to securityholders and bona fide purchasers as a result, among other things, of a refusal to register transfers,[27] that liability is often borne by the transfer agent (if the issuer does not perform its own transfer agent functions) under the terms of the contract governing the transfer agent's appointment.[28] If, for example, inadequate procedures, internal controls, employee errors, or defalcations result in inaccurate records, transfer agents must have sufficient net worth to enable them to reestablish accurate records.[29] In addition, if errors, omissions, or employee defalcations result in an overissuance of securities, transfer agents may be required to purchase securities for delivery to securityholders or bona fide purchasers who have suffered consequential damages. Because the market value of securities can fluctuate significantly and considerable time can elapse between the event giving rise to liability and the discovery of that liability, an insignificant error today can result in significant expense when it is finally discovered.[30] Although many transfer

[21] 17 CFR 240.10b–10 (1994).

[22] 17 CFR 240.17Ad–12 (1994).

[23] *See* Securities Exchange Act Release No. 19860 (June 10, 1983), 48 FR 28231.

[24] *Id.*

[25] The STA's Petition for Commission Rulemaking Filed Pursuant to Rule IVa of the Securities and Exchange Commission's Rules of Practice to Establish Minimum Capital and Adequate Insurance Requirements for Transfer Agents Under Section 17A of the Securities Exchange Act of 1934 (November 23, 1988).

[26] Of course, the amount of net worth necessary to sustain efficient operations and service levels will depend, among other things, on the number of securities issues, the number of securityholder accounts to be serviced, and the volume of transfers in those securities issues.

[27] UCC 8–401 and 8–404 (Official Text, 1978).

[28] *See* UCC 8–406 (Official Text, 1978) and E. Guttman, *Modern Securities Transfer* (revised ed. 1987) at 3–34.

[29] Record reconstruction can be very expensive, depending on the number of accounts affected, since research and reconciliation procedures are time-consuming and labor-intensive.

[30] For example, a transfer agent might incorrectly account for a conversion of debentures into common stock because a conversion tender was lost in processing at the transfer agent. Upon discovery of the error, the transfer agent likely will be liable not only for delivery of the number of shares pursuant to the conversion, but also for any intervening dividends, distributions and stock splits the securityholder would have realized if the securityholder's instructions had not been lost.

agents can purchase insurance against some of these risks, many of those policies contain deductibles, exclusions or conditions that result in the transfer agent bearing a significant percentage of the ultimate cost.

The Commission is not aware of any formal studies assessing transfer agent losses or liabilities. Nevertheless, based on its oversight of transfer agents since 1975 and episodic recordkeeping and transfer difficulties, the Commission believes that financial exposure associated with erroneous, unsafe or inaccurate transfer agent functions can range from several thousand dollars to several hundred thousand dollars.[31]

The Commission requests comment as to whether minimum net worth requirements for transfer agents are necessary or appropriate.[32] Would the financial risks to shareholders and financial intermediaries be reduced significantly if a minimum net worth requirement for transfer agents were imposed? Would the existence of a minimum net worth requirement cause transfer agents to make a greater commitment to their transfer agent business? If the Commission were to establish minimum net worth requirements, should it consider whether a transfer agent issues negotiable certificates evidencing ownership? Should the Commission limit any minimum net worth requirements to transfer agents that provide the DRS services or engage in other unregistered recordkeeping functions? Would investors have sufficient confidence in the integrity of the proposed DRS, in the absence of either minimum net worth or minimum insurance requirements? Does the present lack of minimum net worth requirements for transfer agents performing transfer functions exclusively for non-NYSE and non-Amex issues create undue risk to investors?[33]

The Commission also invites comment on whether net worth requirements would impose undue expense on transfer agents and whether alternatives to net worth requirements might achieve the goals of prompt, accurate, and safe transfer, clearance, and settlement of securities transactions. Such alternatives might include reliance on existing market forces, such as the incentive for issuers to avoid liability by policing transfer agent performance. Persons addressing these issues are invited to submit data in support of their views.

2. Insurance Requirement

Unlike funds and securities held by broker-dealers, funds and securities held by transfer agents are not covered under the Securities Investors Protection Act of 1970 ("SIPA").[34] SIPA established the Securities Investors Protection Corporation ("SIPC") fund, which insures each customer of a broker-dealer against the loss of funds and securities at the broker-dealer in the event of the broker-dealer's insolvency for cash and securities up to a maximum of $500,000, with a limit of $100,000 on claims for cash. Nothing analogous exists with respect to transfer agents, although non-issuer transfer agents that transfer securities listed on the Amex or the NYSE are required to obtain insurance.[35] SIPC was established for broker-dealers because they regularly handle customers' funds and securities, and, without such protection, investors face the potential loss of funds and securities if they fail.

To cover liabilities that might arise in connection with the transfer process, many transfer agents have purchased insurance similar to insurance coverage obtained by broker-dealers and banks. Insurance currently available to transfer agents is designed to protect the transfer agent against financial loss resulting from liabilities for substandard transfer agent performance, including, but not limited to premises loss, in transit loss, breach of duty of fidelity, and fraudulent transfers.[36] In addition, many transfer agents already are subject to self-regulatory organization insurance requirements.

The Commission requests comment on whether an insurance requirement is necessary or appropriate for the protection of investors or to further other statutory goals.[37] For example, requiring transfer agents to maintain an adequate amount of insurance or bonding might reduce the risks posed by transfer agents to investors and other participants in the clearance and settlement system.

The Commission invites commenters to address whether an insurance requirement for registered transfer agents would be necessary if a net worth requirement is adopted. Should an insurance requirement be imposed as an alternative to a net worth requirement? Assuming a net worth requirement is not adopted, are there safeguards other than an insurance requirement that might be appropriate?

The Commission invites commenters to address the type and amount of insurance they believe should be

[31] For example, an operational crisis in the transfer agent industry (such as the collapse of First Independent Stock Transfer Agent, Inc. ("FISTA") in 1981), that makes it necessary for issuers to find an alternative means to ensure the performance of transfer functions could significantly delay the transfer of certificates, causing brokers, financial institutions, securities depositories and investors to sustain financial losses. *See In the Matter of First Independent Stock Transfer Agent, Inc.*, Securities Exchange Act Release No. 19608 (March 17, 1983). *See also* cases cited in Securities Exchange Act Release No. 19142 (October 15, 1982), 47 FR 47269 and *SEC. v. Dynapac, Inc., et al.*, Civ. No. C–86–20694–RPA, NDCA (Final Judgment of Permanent Injunction and Other Equitable Relief entered November 7, 1988) where the Commission filed a complaint against 23 defendants alleging fraudulent distribution of unregistered stock and numerous other violations of the securities laws.

[32] The STA proposed that every registered transfer agent maintain a level of net worth related to the number of issues handled by the transfer agent. The proposed level of required net worth for registered transfer agents is: (i) $150,000 for five or fewer issues; (ii) $200,000 for six to 24 issues; (iii) $300,000 for 25 to 99 issues; (iv) $500,000 for 100 to 499 issues; (v) $650,000 for 500 to 999 issues; and (vi) $1,000,000 for 1,000 issues or more. While the STA's proposal is a starting point, the Commission believes that transfer agents that engage in uncertificated recordkeeping functions may need more net worth than transfer agents that do not perform such functions to adequately perform their duties. The NYSE and the American Stock Exchange ("Amex") impose a $10,000,000 and a $3,000,000 minimum capital requirement, respectively, for non-issuer transfer agents that perform transfer functions for NYSE-listed and Amex-listed issues, respectively. *See* NYSE Rule 496 and Amex Rule 891.

[33] *See* note 32.

[34] 15 U.S.C. 78aaa–111 (1993).

[35] Amex Rule 891 requires a minimum of $10,000,000 of insurance coverage and NYSE Rule 496 requires $25,000,000 of insurance coverage for non-issuer transfer agents that transfer Amex-listed and NYSE-listed securities, respectively. *See* note 32.

[36] On Premises Loss insurance covers loss of funds or securities through criminal acts of other than employees and through unexplained causes while on the insured's premises. In Transit Loss insurance covers all methods of shipping securities and to any destination or addresses (*e.g.*, mail, overnight delivery service, messenger, or armored carrier). Fidelity insurance covers losses through any dishonest, fraudulent, or criminal act of any employee of the insured. Fraudulent Transfers insurance covers losses when a security is registered to a person because of a wrongful transfer. This usually occurs because the signature of the person authorizing the transfer is fraudulent or the person signing the transfer request does not have the authority to make such transfer. Such insurance is generally available to transfer agents under a blanket bond coverage. *See* E. Guttman, *Modern Securities Transfer* (revised ed. 1987).

[37] The STA proposed that every registered transfer agent maintain a level of insurance that will reasonably protect the transfer agent in the event it incurs liabilities in performing its transfer activities. The STA recommended that the Commission expand the Annual Study and Evaluation of Internal Accountant Control ("Internal Control Report"), under Commission Rule 17Ad–13, to require the auditor to determine the appropriate level of insurance to cover those liabilities. Specifically, the STA recommended that the Internal Control Report cover insurance or bonding protection including whether such coverage is adequate in light of its operational capability, level of net worth, nature and degree of financial exposure from its transfer activities, and cost of various insurance and bonding alternatives. The STA also recommended requiring bank and issuer transfer agents to comply with Rule 17Ad–13 and to the proposed insurance requirements.

required. Commenters addressing these issues also might consider the following questions. What criteria should be considered in determining the appropriate amount of insurance (*e.g.*, volume of business, types of securities)? Should there be some minimum amount of insurance coverage coupled with subsequent increases reflecting the transfer agent's potential financial liability based on the dollar value of securities for which the transfer agent performs transfer functions? Is an insurance requirement necessary in light of NYSE and Amex rules? Should the Commission rely on the insurance requirements in the NYSE and Amex listing standards?

III. Request for Comment

The Commission is interested in receiving comment on all aspects of transfer agent regulations in light of the upcoming change in settlement time frames. The Commission also invites comment on whether new transfer agent recordkeeping systems, as discussed in the Companion Release, justify new or different regulations to promote prompt, accurate, and safe transfer of securities. The Commission also invites commenters to address the costs associated with the proposed amendments, whether the proposed amendments would impose a burden on competition, and whether such a burden, if any, is necessary or appropriate to achieve the purposes of the Act.[38]

IV. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis ("Analysis"), in accordance with 5 U.S.C. 603, as amended by the Regulatory Flexibility Act ("RFA") regarding the proposed amendments to Rules 17Ad–2, 17Ad–10, and 17Ad–12.

The Analysis notes that the proposed rule changes would affect approximately 393 low volume transfer agents that qualify as "exempt transfer agents" within the meaning of Rule 17Ad–4(b). Furthermore, the Analysis notes that the proposed rule changes would affect 174 transfer agents that perform transfer functions for depository eligible securities. The proposals would affect all transfer agents, including issuer, bank and small mutual fund transfer agents, that handle book-entry securities.

The Analysis notes the Commission's belief that the majority of the 174 transfer agents performing transfer functions for depository eligible securities affected by the proposed rule change to Rule 17Ad–2 will not incur significant additional compliance costs because many of these registered transfer agents currently comply with the proposed rule changes. Moreover, many transfer agents performing transfer functions for issues listed on the NYSE are presently required to transfer securities within 48 hours of receipt. The Analysis, therefore, notes the Commission's belief that the new transfer turnaround time frames will have a practical effect only on those transfer agents that are currently not subject to the NYSE requirement.

The Analysis states that the proposed amendment to Rule 17Ad–10, to require that exempt transfer agents update the master securityholder files every 10 days of transfer instead of 30 days, will not impose significant cost on exempt transfer agents because these exempt transfer agents are low volume transfer agents (*i.e.*, transfer agents that process fewer than 500 items in a six month period). The Commission believes that 10 days is sufficient time to allow such small transfer agents to update their master securityholder files. The 10 day updating requirement is the same requirement for transfer agents that employ batch posting systems and thus should not significantly effect small transfer agents that employ such systems. In addition, the Commission believes that the benefits to investors outweigh any additional cost to comply with the 10 day updating requirement.

The Analysis also notes the Commission's belief that the additional requirements to have a Securityholders' Bank Account in Rule 17Ad–12 will not impose significant cost on registered transfer agents, including exempt transfer agents, because most registered transfer agents that currently handle dividends, interest, or funds involving DRSPPs currently maintain accounts at banks similar to the Securityholders' Bank Account. For those registered transfer agents that do not have such accounts, the Commission stated that it believes that establishment and maintenance of such an account will not impose significant cost on registered transfer agents.

The Commission has considered alternatives to the proposed rule changes consistent with the requirements of the RFA. The alternatives have been fully considered as to their economic impact and compliance with the statutory objectives. The Commission has not found an acceptable alternative to the proposed rule changes. Accordingly, the Commission does not believe that the proposal would impose undue costs on small transfer agents, and that any costs incurred by transfer agents who do not currently comply with these proposed rules would be outweighed by the benefits that would accrue to the securities industry.

A copy of the Analysis may be obtained by contacting Michele Bianco, Attorney, Division of Market Regulation, U.S. Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C., 20549, at 202/942–4187

V. Text of the Amendments

List of Subjects in 17 CFR Part 240

Transfer agents; Reporting and recordkeeping requirements; Securities.

For the reasons set out in the preamble, the Commission proposes to amend Part 240 of Chapter II of Title 17 of the Code of Federal Regulations to read as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 24D continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

§ 240.17Ad–2 [Amended]

2. By amending § 240.17Ad–2(a) by removing the phrase "three business days" and adding in its place "two business days".

3. By amending § 240.17Ad–2(c) by removing the phrase "four business days" and adding in its place "three business days".

4. By amending § 240.17Ad–2(e)(1) by removing the phrase "three business days" and adding in its place "two business days".

5. By amending § 240.17Ad–2(e)(2) by removing the phrase "five business days" and adding in its place "three business days".

§ 240.17Ad–10 [Amended]

6. By amending § 240.17Ad–10 by removing paragraph (a)(2)(i) and redesignating paragraphs (a)(2)(ii) and (a)(2)(iii) as paragraphs (a)(2)(i) and (a)(2)(ii).

7. By amending § 240.17Ad–12 to add paragraph (b) to read as follows:

§ 240.17Ad–12 Safeguarding of funds and securities.

* * * * *

(b) Reserve account for the exclusive benefit of securityholders. Every

[38] *See* 15 U.S.C. 78w(a) (1993).

registered transfer agent shall maintain with a bank or banks at all times a "Bank Account for the Exclusive Benefit of Securityholders" (hereinafter referred to as the "Securityholders' Bank Account"), and it shall be separate from any other bank account of the transfer agent. Every registered transfer agent at all times shall maintain in such Securityholders' Bank Account all securityholders' funds in its custody and possession that are related to its transfer agent activities.

Dated: December 1, 1994.

By the Commission.

Margaret H. McFarland,

Deputy Secretary

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Thursday
December 8, 1994

Part VI

Department of Labor

Employment and Training Administration

20 CFR Part 625

Disaster Unemployment Assistance Program; Advance Notice of Proposed Rulemaking

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 625

RIN 1205–AA50

Disaster Unemployment Assistance Program; Advance Notice of Proposed Rulemaking and Request for Comments

AGENCY: Employment and Training Administration, Labor.

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: The agency is considering revision of certain sections of the implementing regulation of the Disaster Unemployment Assistance (DUA) Program. Such revisions would clarify and simplify the States' administration of the Program which provides a weekly assistance amount to individuals unemployed as a direct result of a major disaster. The Department hereby provides an opportunity for public participation in developing proposed rules. If the Department decides to proceed with this rulemaking after reviewing the comments filed in response to this notice, a proposed rule will be published in accordance with the Administrative Procedure Act (5 U.S.C. 553).

DATES: Written comments on this advance notice of proposed rulemaking must be received in the Department of Labor on or before February 6, 1995.

ADDRESSES: Written comments may be mailed or delivered to Mary Ann Wyrsch, Director, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, Room S4231, 200 Constitution Avenue NW., Washington, DC 20210.

All comments received will be available for public inspection during normal business hours in Room S4231 at the above address.

FOR FURTHER INFORMATION CONTACT: Robert Gillham, Group Chief, Federal Programs Group, Division of Program Development and Implementation, Office of Program Management in the Unemployment Insurance Service at the above address: Telephone (202) 219–5312 (this is not a toll-free number). This advanced notice of proposed rulemaking is available in alternative formats for the disabled, such as on electronic file, on computer disk and audio tape. They may be obtained at the above office.

SUPPLEMENTARY INFORMATION: Section 410(a) of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (42 U.S.C. 5177) sets forth the outlines of the DUA Program. The President is authorized by section 410(a) of the Stafford Act to provide to any individual unemployed as a result of a major disaster declared by the President under the Stafford Act "such benefit assistance as he deems appropriate while such individual is unemployed for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation * * * or waiting period credit." Other terms of section 410(a) provide that disaster unemployment assistance (DUA) is to be furnished to individuals for no longer than 26 weeks after the major disaster is declared; and for any week of unemployment a DUA payment is not to exceed the maximum weekly benefit amount authorized under the unemployment compensation (UC) law of the State in which the disaster occurred.

Pursuant to a delegation of authority (51 FR 4988, February 10, 1986) to the Secretary of Labor from the Director of the Federal Emergency Management Agency (FEMA), the DUA Program authorized by section 410(a) of the Stafford Act and the appeals of assistance provisions at section 423 are implemented in regulations promulgated by the Department of Labor (Department) and published at Part 625 of title 20 of the Code of Federal Regulations. The DUA program is administered by the States in accordance with an agreement each State has signed with the Secretary of Labor.

The DUA Program regulations were last amended with the publishing of a final rule in the **Federal Register** on May 16, 1991 (56 FR 22800). These amendments were basically limited to the changes to the DUA Program effected by the Disaster Relief and Emergency Assistance Amendments of 1988 (Pub. L. 100–107, November 23, 1988). Prior to the 1991 final rule, the DUA Program regulations were last revised with publication of a final rule in the **Federal Register** on September 16, 1977 (42 FR 46712).

From 1977 until the summer of 1993 only occasional questions (primarily from the State agencies administering the program) concerning application or interpretation of the regulations to individual cases arose. The Department was able to respond to these occasional questions with specific answers relative to the individual case or to provide other guidance. The questions and responses did not warrant revisions of the DUA regulations.

However, the major disasters declared in nine Midwest States due to the magnitude and severity of storms and flooding during the late spring and summer of 1993 caused the Department to respond to hundreds of inquiries from the State agencies concerning the DUA Program. These inquiries stemmed from the diversity of occupations and situations for thousands of unemployed individuals; the unavailability of individual and employer records due to flooding; the loss of transportation or accessibility to roads, bridges, etc.; and the fact that many thousands of individuals were able to continue partial employment. The Department's responses ranged from policy interpretations, such as the use of projected income expected for the year if the disaster had not occurred for purposes of computing a weekly amount and utilization of projected income after the disaster for determining reductions from the weekly amount for partial unemployment during a week, to blanket extensions of the filing period. These inquiries required the Department's review of the regulations and its past policy and guidance before a response could be provided. This review pointed out inconsistencies, lack of clarity, and unnecessary complexities in the regulations that hindered the Department's and States' administration of the DUA Program.

Based on the hundreds of inquiries and questions from the State agencies administering the program, individuals, Governors, members of Congress, and other organizations, the Department believes that changes need to be made to the DUA Program regulations to address the above concerns. Therefore, the Department has decided to follow the process described below to make necessary amendments. The Department has also solicited comments from all the State agencies administering the DUA Program concerning needed changes. The paramount concern expressed in all the inquiries mentioned above and comments solicited from the State agencies dealt with the computation and amount of DUA payable for a week of unemployment under the provisions of 20 CFR 625.6, "Disaster Unemployment Assistance: Weekly Amount." Therefore, the Department has determined that § 625.6 should be amended as expeditiously as possible in order to provide a simpler, less complex computation of a reasonable DUA weekly payment to individuals unemployed due to a major disaster. To that end, the Department is planning to publish separately in the **Federal Register** an interim final rule amending

§ 625.6, effective upon publication, with a request for comments. Due to the inconsistencies and unduly restrictive provisions in the current § 625.6, the Department believes that it is contrary to the public interest and harmful to potential beneficiaries to not have the changes in place prior to the seasons of the year when most major disasters occur. Any comments received on that separate interim final rule amending § 625.6 will be considered before a final rule is issued. Comments on the interim final rule should be submitted in accordance with the instructions provided therein, not as part of this notice.

The purpose of this document is to inform the public of other provisions in 20 CFR Part 625 to which the Department is considering amendments, in order to provide the public with an opportunity for input prior to the specific Departmental proposed regulation. In addition, comments are requested on any other provisions of 20 CFR Part 625, other than § 625.6.

As a matter of background, the first line of defense to an individual's unemployment due to a disaster is the UC program. UC partially replaces wages lost during temporary periods of unemployment so an individual can continue to obtain certain necessities (food, clothing, and shelter). Weekly DUA payments are designed to provide UC-type assistance to the individual who is unemployed as a direct result of a major disaster declared by the President and is not eligible for UC. Like UC payments, the DUA Program is designed to provide temporary partial income replacement in order that the individual unemployment as a direct result of a major disaster can provide for the necessities of living. DUA and UC are not programs designed to provide 100 percent income replacement or to ameliorate business losses to self-employed individuals who suffer such losses due to a major disaster.

In addition, DUA and UC payments are not based on need. Individuals must have performed some services indicating an attachment to the workforce, and, in the cases of DUA, an individual may qualify if the individual was prevented from commencing employment or self-employment. This is the major difference between unemployment programs and needs-based programs.

Therefore, considering that the framework and purpose of the DUA Program is akin to the UC Program, the Department is considering the following proposed amendments to 20 CFR Part 625. The Department requests comments on these proposed amendments as well as any other provision of 20 CFR 625, other than § 625.6.

Amendments Under Consideration

1. The Department is considering amending § 625.2 to add a definition for "Department" to mean the U.S. Department of Labor and the Employment and Training Administration (ETA) within the Department. Under Secretary's Order No. 4–75 (40 FR 18515), ETA has authority to administer the DUA Program. In various documents issued to implement the DUA Program, references are made to the Department. Adding the definition is a technical clarification only to set forth in the regulations what is commonly understood by customers, such as State agencies, and is a common practice in all Departmental issuances.

2. The Department is considering amending § 625.2 (s) and (t), the definitions of an "unemployed worker" and "unemployed self-employed individual." Currently, these definitions include, in part, individuals who were employed or self-employed, or were to commence employment or self-employment, in the major disaster area at the time the major disaster began. The amendment to § 625.2 (s) and (t) would also include individuals who reside in the major disaster area but are unable to reach their place of employment or self-employment outside of the major disaster area, and individuals who must travel through a major disaster area to their employment or self-employment, but are unable to do so as a direct result of the major disaster. The Department is considering this amendment based on the "liberal construction" requirement of § 625.1(b). To limit eligibility for DUA to only those individuals who were employed or self-employed, or who were to commence employment or self-employment, in the major disaster area is a narrow construction and does not carry out the purposes of the Stafford Act.

This amended definition would recognize that in today's mobile labor force not everyone resides in or near the location of his/her employment or self-employment. If a major disaster occurs that directly prevents the individual from performing services, *i.e.*, meeting one or more of the causes of unemployment set out in § 625.5, the individual should not be denied eligibility simply because he/she actually worked outside the major disaster area or was to commence work outside the disaster area. The State agency would make the same fact-finding as it does now for individuals who are unable to reach their place of employment or self-employment under § 625.5 (a)(2) and (b)(2). The State agencies would consider factors such as alternate means of transportation, other routes to work where the major disaster has disrupted the usual and/or shortest route, commuting patterns in the area, and the reasonableness of utilizing such alternatives in order to continue employment or self-employment.

3. The Department is considering amending § 625.4(g) to provide that an individual must be a citizen or national of the United States or, if an alien, be in "satisfactory immigration status," as a condition of eligibility for DUA. This is based on the able and available requirements common to all State UC laws.

The DUA Program provides for a type of unemployment compensation in which cash benefits are payable to individuals with respect to their unemployment as the direct result of a major disaster, which is analogous to the basis under which compensation is awarded under the Federal-State UC program. Accordingly, in implementing section 410(a) of the Stafford Act, § 625.4(g) adapted the able and available requirement from the Federal-State unemployment compensation program by requiring the individual to be able and available "within the meaning of the applicable State law * * *."

This able and available requirement pertains to all applicants for DUA, including aliens. The Department addressed the availability requirement for unemployment as it pertains to aliens in UIPL 1–86 (51 FR 29713, August 20, 1986) and UIPLs 12–87, 12–87, Change 1, and 6–89 (54 FR 10102, 10113 and 10116, respectively, March 9, 1989). The Department stated in these documents that an alien must be authorized to work by the Immigration and Naturalization Service to be available for work.

Since the able and available provisions of State law apply to the DUA Program by virtue of § 625.4(g), an alien must be authorized to work for those weeks for which DUA is claimed in order to be eligible for DUA. If an alien meets the exception provision of § 625.4(g), in that an individual injured as a result of the major disaster is deemed to meet the able and available requirement, such alien must still be in "satisfactory immigration status" because the injury does not convey such status to an alien. The Department plans to amend § 625.4(g) to make this clear.

The requirement that a DUA claimant be authorized to work during the period that benefits are claimed also parallels the requirements of sections 303(f) and

1137(d) of the Social Security Act (SSA) (42 U.S.C. 503(f) and 42 U.S.C. 1320b–7(d), respectively) applicable to UC programs. The application of these provisions to the DUA Program was discussed in the preamble of the final rule implementing the 1988 amendments, discussed above, and published in the Federal Register on May 16, 1991 (56 FR 22800, 22802–22803).

4. The Department is considering amending § 625.4(g) to provide that a deceased individual will not meet the able and available requirement within the meaning of the applicable State law after the date of death. See item 6 of this Advanced Notice of Proposed Rulemaking (ANPRM) which would provide for the new breadwinner or major support for a household to receive DUA in lieu of the decedent.

5. The Department is considering amending § 625.4 to add a new paragraph (j). This new paragraph would provide that employment in a Federal, State or locally funded temporary job designed to assist in clean-up or other activities to enable the community to recover from the effects of the major disaster is not employment that renders the individual ineligible for future DUA once the temporary job ends. Under the DUA Program, an individual is ineligible for further DUA under a major disaster declaration if that individual is reemployed in suitable employment or has commenced services in self-employment, since the individual would no longer be unemployed as a direct result of the major disaster. This amendment would clarify the Department's position that such temporary employment is not suitable employment, since it is not employment that was or is the individual's principal source of income and the individual's livelihood was or is dependent on such employment. Thus, the temporary employment would not disqualify the individual from continuing to receive DUA after the temporary employment ends.

6. The Department is considering amending § 625.5, "Unemployment caused by a major disaster," to provide a definition of the phrase "as a direct result of the major disaster," as utilized for purposes of § 625.5(a) and (b) in determining if an individual's unemployment is directly caused by the major disaster. Section 410(a) of the Stafford Act provides that "the President is authorized to provide to any individual unemployed as a result of a major disaster * * *." This same language was in the Disaster Relief Acts of 1969, 1970, and 1974. The Department's regulations have always provided that the unemployment must be "as a direct result" of the major disaster, but it has never been defined. Over the years, various interpretations have been applied by the States and the Department, with the result that some individuals unemployed for indirect or secondary reasons have been determined eligible. Therefore, to ensure greater uniformity, the Department is considering defining the phrase "as a direct result of the major disaster."

For purposes of § 625.5(a)(1) and (3) and § 625.5(b)(1) and (3), the definition would limit eligibility to an unemployed individual who: (1Z) Can no longer perform services or commerce services in employment or self-employment because the job site or work location is made inoperable or is inaccessible as a direct result of the major disaster or (2) is unable to perform a majority (over 50 percent) of his/her usual and customary services that were being performed prior to the major disaster because sales to customers coming to the job site or work location have been substantially reduced as a direct result of the major disaster. Examples of reasons that may qualify an individual for DUA are:

(1) The building(s) where services are performed in employment or self-employment is destroyed, under water, or has had structural damage causing it to be closed for safety reasons.

(2) In the case of self-employed farmers or agricultural workers, the crop land or other real property where services are performed is under water, destroyed, or otherwise unavailable for performing services, or the crop(s) ready for harvest have been destroyed or cannot be harvested.

(3) Power and/or water services that are necessary for performing services have been disrupted and work sites are closed until utility services are restored.

(4) Tourists who usually come to a craft and souvenir shop within the major disaster area no longer are able to come to the major disaster area because of the disruption caused by the major disaster, and, therefore, a majority of the services of providing crafts and souvenirs can no longer be performed.

The intent of amending § 625.5(a)(1) and (3) and § 625.5(b)(1) and (3) would be to provide equal treatment, for DUA eligibility purposes, among individuals who produce a product and those who provide a service (e.g., salespersons, shop owners, suppliers, etc.). Under the Department's current interpretation, an individual in the service section is not eligible for DUA if that individual can perform his/her customary services but customers are not seeking these services for reasons directly related to the major disaster. This amendment would change the Department's current interpretation and provide DUA eligibility (assuming the individual met the other DUA qualifying requirements) to an unemployed individual providing a service when a majority of his/her customers are not seeking these services as a direct result of the major disaster.

On another point, under current § 625.5(a)(2) and (b)(2), eligibility is limited to those cases where the individual's principal means of transportation to the job site or work location was made inoperable or destroyed as a direct result of the major disaster and there were no reasonable alternative means of transportation. In addition, under § 625.5(a)(2) and (b)(2), an individual is considerable unable to reach a place of employment or self-employment as a direct result of the major disaster if all reasonable routes, by whatever means of transportation utilized by the individual, are closed or inaccessible to the individual, and there are no other reasonable routes or methods of transportation available that could be utilized. In determining eligibility under the provisions of paragraph (a)(2) and (b)(2), State agencies currently consider factors such as the normal commuting patterns and distances for the area, the availability of alternate transportation, and any attempts by the individual to get to the work site. The State agencies would continue to utilize the above factors in determining DUA eligibility under paragraphs (a)(2) and (b)(2). Paragraphs (a)(2) and (b)(2) of § 625.5 are applicable to the amendments to § 625.2(s) and (t) that the Department is considering and are described in item 2 of this ANPRM.

Examples of situations where an individual may be eligible for DUA are:

(1) The individual's only means of transportation is destroyed or made inoperable by the disaster and there are no other reasonable means of transportation available.

(2) The primary route utilized by the individual (private or public transportation) to the work site or job location is destroyed or made impassable as a direct result of the major disaster and there are no reasonable alternate routes or means of transportation available.

(3) An individual, such as a traveling salesperson, over-the-road or local truck driver, real estate salesperson, or supplier, is unable to perform a majority (over 50 percent) of the usual and customary services because of closed or impassable streets or roads to the location(s) where sales would occur or products are to be delivered.

The Department is also considering amending § 625.5(a)(5) and (b)(4) to clarify its position on individuals who are unable to perform services in employment or self-employment because of an injury caused as a direct result of the major disaster. The Department has interpreted these paragraphs to mean that the injury must have been accidental and coincidental with the disaster, not as a result of individuals putting themselves in a position (by personal choice not directly related to the individual's employment or self-employment) where there was likelihood or risk of personal injury or other physical harm due to the individuals' overall health condition(s).

Some examples of injuries not caused as a direct result of the major disaster are:

(1) An individual does not report to work because he/she elects to participate in sandbagging activities to prevent flooding of the community and, as a result, suffers an injury.

(2) An individual elects not to report to work because he/she elects to repair damage to his/her house caused by the major disaster, and the individual is injured while doing the repairs.

Examples of injuries caused as a direct result of a major disaster where an individual may be eligible for DUA are:

(1) An individual is asleep at home and a tornado strikes the house injuring the individual.

(2) An individual is performing service in employment or self-employment at a work site and an explosion or fire occurs as a direct result of a major disaster causing the individual to be injured.

(3) While traveling to or from the worksite, the individual is injured as the result of the destruction of the mode of transportation used which is the direct result of the major disaster.

(4) While carrying out normal day-to-day activities not associated with the effects of the major disaster (e.g., going to the grocery store or doing usual household chores), the individual is injured as a direct result of the major disaster.

The above examples indicate situations where individuals may be considered unemployed as a direct result of a major disaster under the amendments to § 625.5 the Department is considering. They illustrate the direct link between the major disaster and the individuals' unemployment that the Department would require, but they are not limiting situations. They reflect the Department's position that an individual's unemployment must be the immediate result of the major disaster—the major disaster must be the primary cause of the unemployment, not some remote, indirect or distant cause of the individual's unemployment or loss of income, as would be the case where the injury stemmed from a personal choice related to the major disaster. In this regard, the Department recognizes that individuals may be faced with personal choices such as protecting property and family. However, in these situations, the unemployment of the individual may not be the direct result of the major disaster, but may be the result of the personal choice which is an indirect or secondary link to the major disaster.

For purposes of § 625.5(a)(4), the Department is considering adopting the following position on an individual who becomes the breadwinner or major support for a household because the head of the household has died as a direct result of the major disaster. The Department is considering a requirement that the deceased head of the household must have been a wage earning member of the household related by blood, marriage, adoption, or other legal arrangement to the individual who becomes the breadwinner or major support for the household, and who shared a common residence with the individual. The deceased wage earning head of household must have provided, through employment for wages, one-half or more of the household income or means of livelihood during the base period utilized for purposes of computing a DUA weekly amount under § 625.6, or would have provided such income but for unemployment during the base period.

7. The Department is considering amending § 625.8(a) to provide that the period to file a timely DUA initial application is 60 days from the date of the State agency's announcement of the availability of DUA, or, if longer, the period announced by FEMA for individuals to file for other disaster relief programs under the jurisdiction or coordination of FEMA. For those few major disaster declarations where DUA is the only disaster relief program authorized in the agreement between FEMA and the Governor of the State in which the major disaster was declared, the Department is considering a filing deadline of 60 days from the announcement date of the major disaster. This deadline, at the request of the State agency for good cause, could be uniformly extended by the Department for all DUA applicants filing in the State. In no event, however, would any extension of the timely filing period granted by the Department extend beyond 15 days after the expiration of the Disaster Assistance Period. The current provision in § 625.8(a) that authorizes acceptance of an application filed more than 30 days after the State agency's announcement of the availability of DUA if an individual had good cause for the late filing would be considered for elimination for the following reasons.

During the past few years the Department has received numerous requests from State agencies to authorize a blanket extension of the filing period for good cause for all individuals who are filing after the end of the 30-day announced filing period rather than the State agency having to determine good cause for late filing on an individual basis. Good cause has existed because of: concern about the successful notification of the availability of DUA to the entire potential applicant population; local State Agency offices being damaged or closed; destruction of roads and bridges that applicants would normally use to reach a local office; several amendments to major disaster declarations adding additional jurisdictions causing confusion on timely filing periods; and various other reasons. In addition, the current last filing date for the FEMA-announced disaster relief program does not coincide with the separately announced filing period for DUA. This has caused DUA applicants further confusion and, in some instances, to miss the DUA filing deadline because of the assumption that all disaster relief programs had the same filing period. Other Federal agencies, such as the Small Business Administration utilize the FEMA-determined filing deadline for its programs. The FEMA-determined filing period is applicable to an entire State or, in the case of the Midwest flooding, to all the States. Adoption of this change to § 625.8(a) would eliminate the confusion surrounding amendments made to declarations and would have the various disaster relief programs utilizing the same ending date.

The State agencies' requests for a blanket extension of the filing period have usually been for 30 days. When approved by the Department, this has resulted in a 60-day filing period, and this time period equals the 60-day period the Department is considering as a proposed amendment. Therefore, the Department does not expect many requests to be made for extensions, but it is the Department's view that provision should be made for them in the regulations.

8. The Department is considering amending § 625.8(c) to add a new paragraph to provide that an authorized

legal representative, as determined under the laws of the applicable State, may file a DUA application and take any subsequent action on the application (such as an appeal) on behalf of an incapacitated applicant or an applicant's estate. This regulatory provision would set forth the Department's position and guidance now provided in UIPL No. 29–91.

9. The Department is considering amending § 625.14(c) to provide for two changes concerning exceptions to the recovery by offset of any debt due the United States. Section 625.14(c) provides that any DUA payable to an individual shall be applied by the State agency for the recovery by offset of any debt due the United States. It also provides that DUA payable shall not be applied or used by the State agency in any manner for the payment of any debt of the individual to any State or any other entity or person. The literal reading of this provision would limit offset to only those instances where a Federal debt is due. However, since the provisions of § 625.14(c) went into effect, Federal laws have been amended to require the offset of UC for child support obligations being enforced under title IV-D of the SSA (section 303(e)(2)(A)(iii), SSA; 42 U.S.C. 503(e)(2)(A)(iii)), as well as to make optional the offset of food stamp over-issuances (section 303(d)(2)(B)(iii), SSA; 42 U.S.C. 503(d)(2)(B)(iii)). DUA payments are considered to be UC under 26 U.S.C. 85(c) and are, therefore, subject to the requirements of section 303(e)(2)(A)(iii) of the SSA in the case of child support obligations. Therefore, the Department is considering amending § 625.14(c) to include the requirements for the offset of DUA for child support obligations being enforced under title IV-D of the SSA. The Department is also considering amending § 625.14(c) to require the offset of DUA for food stamp over-issuances if the State makes such offsets under its State UC program.

In addition, States are permitted to enter into cross-program offset agreements with the Secretary of Labor in accordance with section 303(g) of the SSA (42 U.S.C. 503(g)). In the final rule published May 16, 1991 (cited above), the Department added a new paragraph (3) to § 625.14(b) providing that if the State has an agreement in effect to implement the cross-program offset provisions of section 303(g)(2) of the SSA, the provisions of such agreement are applicable to the DUA Program. However, no language was added to § 625.14(c) to provide that if a State had a cross-program offset agreement in place under the provisions of section 303(g) of the SSA, intercept of DUA could be made to liquidate a debt due a State UC program. See UIPL 50–86 (51 FR 29713, 34273). For this reason, the Department is considering an amendment to § 625.14(c) to provide for the intercept of DUA to liquidate a debt due the State UC program if the State has a cross-offset agreement under the section 303(g) of the SSA in place.

10. The Department is considering amending § 625.14(j), *Criminal penalties*, to specifically provide that the applicable Federal law under which an individual is subject to prosecution is 18 U.S.C. 1001. In addition, State agencies would be required to notify each applicant at the time of filing an initial application for DUA of the possibility of criminal prosecution under § 1001 for fraudulently claiming DUA.

11. The Department is considering amending § 625.17, "Announcement of the beginning of a Disaster Assistance Period," to instruct the States to issue a notification setting the DUA filing deadline not later than the applicable date determined in accordance with § 625.8. This provision would accommodate any filing period proposed under the amendments to § 625.8 described in item 6 of this ANPRM.

Comments Invited

The Department invites comments on the proposals listed above, or any other area of the DUA regulations, except § 625.6, that the public views as needing clarification or amending. Comments on § 625.6 may be filed in response to the separate rulemaking action to be published in the **Federal Register**.

Drafting Information

This document was prepared under the direction and control of the Director, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210: Telephone (202) 219–7831 (this is not a toll-free number).

Classification—Executive Order 12866

This advance notice of proposed rulemaking provided in this document is classified as a "significant regulatory action" under Executive Order 12866 on Federal Regulations. The resulting final rule may:

(1) Materially alter the budgetary impact of entitlements or the rights and obligations of recipients thereof; or

(2) Raise novel legal or policy issues arising out of legal mandates and the President's priorities. It is not likely to:

(3) Result in an annual effect on the economy of $100 million or more;

(4) Create a serious inconsistency or interfere with action taken or planned by another agency.

Any cost and benefit analysis or assessment of the potential effects cannot be made with this advance notice of proposed rulemaking since the scope of the amendments will not be finalized until the notice of proposed rulemaking is completed based on comments received to this advance notice.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. Ch 35, approval has been obtained from the Office of Management and Budget (OMB) for the recordkeeping and reporting requirements under § 625.16(a) for the DUA forms ETA 90–2, 81, 81A, 82, 83, and 84. The OMB control number for the 90–2 is 1205–0234, and for the 81, 81A, 82, 83, and 84 it is 1205–0051. OMB approval has also been obtained for the recordkeeping and reporting requirements under § 625.19(b), under OMB control number 1205–0051.

Catalog of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance at No. 17.225, "Disaster Unemployment Assistance (DUA)."

Lists of Subjects in 20 CFR Part 625

Disaster Unemployment Assistance, Labor, reemployment services, unemployment compensation.

Signed at Washington, DC, on December 1, 1994.

Doug Ross,

Assistant Secretary of Labor.

[FR Doc. 94–30234 Filed 12–7–94; 8:45 am]

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federal register

Thursday
December 8, 1994

Part VII

Securities and Exchange Commission

17 CFR Part 229 et al.
Limited Partnership Roll-Up Transactions; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 239 and 240

[Release Nos. 33–7113; 34–35036; File No. S7–26–94]

RIN 3235–AG09

Limited Partnership Roll-Up Transactions

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting new rules and amendments to its rules regarding limited partnership roll-up transactions. The effect of the rule is to implement provisions of the Limited Partnership Rollup Reform Act of 1993 ("Act"), which, among other matters, added new Section 14(h) of the Securities Exchange Act of 1934. In addition, the amendments will conform the current Commission definition of "roll-up transaction" more closely to the definition of that term in the Act.

DATES: *Effective date:* The rule and amendments are effective on December 17, 1994.

Transition dates: For a discussion of transition provisions, *see* Section III in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Robert B. Toomey, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 3–12, Washington DC 20549, at (202) 942–2910.

SUPPLEMENTARY INFORMATION: The Commission today adopts amendments to change the definition of limited partnership roll-up transaction contained in Item 901(c) of Regulation S–K [1] to conform more closely to the definition in the Act,[2] which added new provisions regarding roll-up transactions to the Securities Exchange Act of 1934 ("Exchange Act").[3] The Commission, consistent with the Act, also is adopting amendments to Exchange Act Rules 14a–2,[4] Rule 14a–6,[5] and 14a–7,[6] as well as adding new Exchange Act Rules 3b–11, 14a–15 and 14e–7, and a new Notice of Exempt Preliminary Roll-up Communication. Finally, revisions to Item 911 of Regulation S–K [7] and Forms S–1,[8] S–4,[9] S–11,[10] F–1,[11] and F–4 [12] under the Securities Act of 1933 ("Securities Act") [13] are being adopted.

I. Introduction

In response to investor complaints and serious concerns raised in Congressional hearings about limited partnership roll-up transactions, in 1991, the Commission adopted subpart 900 of Regulation S–K [14] to enhance the quality of information provided to investors in connection with roll-up transactions, and established a minimum 60-day proxy solicitation or tender offer period for them.[15] The Commission acted again in the area of roll-ups in 1992, when, as part of its proxy reform, it provided rights to security holders to obtain a list of security holders in connection with a roll-up related proxy solicitation involving Section 12 registered securities.[16]

In December 1993, Section 14(h) was added to the Exchange Act to address roll-up abuses.[17] The Act represented the culmination of Congressional inquiry into the area of roll-ups. New Section 14(h) of the Exchange Act imposes certain disclosure and other requirements for roll-up transactions. With respect to disclosure requirements, the Act largely codifies the disclosure requirements of subpart 900 of Regulation S–K; revisions to the Commission's proxy and tender offer rules also are required. The Act also contains a definition of "limited partnership roll-up transaction" [18] and sets forth a number of exclusions for its coverage, which makes it narrower than the Commission definition of roll-up transaction in current Item 901 of Regulation S–K ("S–K Definition").[19]

In September 1994, the Commission published for comment proposed amendments to its rules concerning roll-up transactions as well as new rules to implement the provisions of the Act ("Proposing Release").[20] The Proposing Release noted that while many of the requirements of the Act parallel existing rules of the Commission, minor revisions were required in the area of disclosure [21] and the proxy and tender offer rules. The proposed changes also included amendments to the Commission's S–K Definition of roll-up transaction to conform that definition more closely to the definition contained in the Act.

The Commission received five letters of comment on the proposals; the letters were submitted from two professional associations, a law firm, the North American Securities Administrators Association ("NASAA"), and the New York Stock Exchange ("NYSE").[22] Commenters generally support the proposals,[23] and agree that the S–K Definition should be more closely conformed to that in the Act. However, two commenters advocate complete conformity of the S–K Definition to the one in the Act.[24] Other specific

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[1] 17 CFR 229.901(c).

[2] Government Securities Act Amendments of 1993, Pub. L. 103–202, Title III, 107 Stat 2344 (1993).

15 U.S.C. 78a *et seq.*

[4] 17 CFR 240.14a–2.

17 CFR 240.14a–6.

[6] 17 CFR 240.14a–7

[7] 17 CFR 229.911.

[8] 17 CFR 239.11.

[9] 17 CFR 239.25.

[10] 17 CFR 239.18.

[11] 17 CFR 239.31.

[12] 17 CFR 239.34.

[13] 15 U.S.C. 77a *et seq.*

[14] 17 CFR 229.901–915.

[15] Release No. 33–6922 (October 30, 1991) [56 FR 57237]. In June 1991, the Commission issued a release providing interpretive guidance of the existing disclosure requirements applicable to roll-up transactions. See Release No. 33–6900 (June 17, 1991) [56 FR 28979].

[16] The requesting security holder has the option of receiving the list of security holders or having the issuer mail his or her material. Exchange Act Rule 14a–7(b) [17 CFR 240.14a–7(b)].

[17] 15 U.S.C. 78n(h). The Act also amended Sections 6(b) and 15A of the Exchange Act [15 U.S.C. 78f(b) and 15 U.S.C. 78o–3] to require registered securities associations and national securities exchanges to adopt rules providing for certain protections for investors whose securities are the subject of a roll-up transaction ("SRO Rules"). See Release No. 34–34533 (August 15, 1994) [59 FR 43147] and Release No. 34–34803 (October 7, 1994) [59 FR 52202] for recent rulemaking of the National Association of Securities Dealers ("NASD") in this area. For example, registered securities associations are required to promulgate rules preventing their members from participating in roll-up transactions unless a dissenting limited partner is given the opportunity to receive an appraisal and compensation for the limited partnership security, or other comparable rights are provided.

The Act requires that the Commission prescribe regulations implementing its provisions by December 17, 1994. Section 302(b) of the Government Securities Act Amendments of 1993,

[18] The legislation generally defines the term as a transaction involving the combination or reorganization of one or more limited partnerships, directly or indirectly, in which some or all the investors receive new securities or securities in another entity. A roll-up may be structured as an acquisition, a merger, a tender (exchange) offer or in some other fashion.

[19] 17 CFR 229.901(c).

[20] Release No. 33–7090 (September 1, 1994) [59 FR 46365].

[21] See Items 901–915 of Regulation S–K.

[22] The comment letters are available for inspection and copying at the Commission's Public Reference Room (see File No. S7–26–94).

[23] The NYSE addressed only one part of the proposals, namely, the definition of "regularly traded," which it opposed. *See* Section II.A.2, below, for further discussion.

[24] *See* letter from Tony M. Edwards, General Counsel, National Association of Real Estate Investment Trusts, dated November 1, 1994 ("NAREIT Letter"); *see also* letter from Judith D. Fryer, Kaye, Scholer, Fierman, Hays & Handler, for the Subcommittee on Partnerships, Trusts and Unincorporated Associations of the Committee on Federal Regulation of Securities, Section of Business Law of the American Bar Association, dated October 31, 1994 ("ABA Letter").

comments and concerns are discussed below.

After consideration of the comments and the Commission's experience in the area of roll-up transactions, the proposed amendments are being adopted substantially as proposed. Although not required by the Act, and as outlined more completely below, the Commission today adopts a definition of roll-up transaction for disclosure and certain other requirements governing roll-ups that conforms more closely to the definition in the Act; the legislative definition applies to all of the new substantive requirements imposed by the Act. Under today's amendments, the S–K Definition, as amended ("Amended S–K Definition"), will continue to be broader than that in the legislation. The sole difference between the proposals and the amendments being adopted today is that, as discussed below, the "listed to listed" exclusion of the Amended S–K Definition adopted today will not include securities listed on the American Stock Exchange's ("Amex") Emerging Company Marketplace ("ECM").

II. Discussion of Amendments and New Rules

A. Amendments to Regulation S–K Definition of Roll-Up Transaction

1. Definition and Exclusions

Consistent with the proposals, the amendments to the S–K Definition adopted today add certain, but not all, of the exclusions contained in the Act. Thus, the Amended S–K Definition is narrower in scope than the current S–K Definition,[25] but broader than that in the Act. The Amended S–K Definition applies to the disclosure [26] and certain other requirements governing roll-ups, as discussed below, while the legislative definition applies to the SRO Rules and the new rule relating to differential compensation.

For purposes of disclosure provided to investors in connection with roll-up transactions, the S–K Definition, as amended today, differs from the legislative definition in two principal respects, as discussed in more detail below. First, the Act applies only to transactions involving limited partnership entities, while the Amended S–K Definition of a "roll-up transaction" will continue to cover transactions involving finite-life entities, however organized.[27] Second, the Act includes two separate exclusions that depend upon the listed status of the securities to be issued or exchanged, which are replaced in the Amended S–K Definition by a different exclusion for transactions in which both the securities to be exchanged and the securities to be issued in the roll-up are listed securities.[28]

Under today's amendments to the S–K Definition, the following transactions, which do not generally present the concerns the roll-up regulatory framework was designed to address,[29] are excluded from the S–K Definition for the first time: [30]

(1) Transactions wherein the interests of all of the investors in each of the partnerships are repurchased, recalled, or exchanged in accordance with the terms of the preexisting partnership agreement for securities in an operating company specifically identified at the time of the formation of the original partnership; [31]

(2) Transactions that involve only issuers that are not required to register or report under Section 12 of the Exchange Act,[32] both before and after the transaction; [33]

(3) Transactions that involve the combination or reorganization of one or more partnerships in which a non-affiliated party succeeds to the interests of a general partner or sponsor, if: (A) such action is approved by not less than 66⅔% of the outstanding units of each of the participating partnerships; and (B) as a result of the transaction, the existing general partners will receive only compensation to which they are entitled as expressly provided for in the preexisting partnership agreements; [34]

(4) Transactions in which the securities offered to investors are securities of another entity that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Exchange Act,[35] if: (A) such other entity was formed, and such class of securities was reported and regularly traded,[36] not less than 12 months before the date on which soliciting material is mailed to investors; and (B) the securities of that entity issued to investors in the transaction do not exceed 20% of the total outstanding securities of the entity exclusive of any securities of such class held by or for the account of the entity or a subsidiary of the entity; [37]

(5) Transactions in which all of the investors' partnership securities are

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[25] Thus, certain transactions that would have been covered by the current S–K Definition will no longer be covered under the Amended S–K Definition. Disclosure and procedural compliance burdens for these transactions will be reduced.

[26] As there is no analogue to subpart 900 in Regulation S–B [17 CFR 228.10 *et seq.*], small business issuers, as defined in Rule 405 of Regulation C [17 CFR 230.405], engaged in roll-up transactions eligible to register on Form S–4 must furnish the information required by subpart 900 of Regulation S–K as well as the other requirements of that form. *See* General Instruction D.3 to Form S–4. Today's amendments add a sentence to General Instruction I.1 to Form S–4, as proposed, to refer specifically to the applicability of subpart 900 of Regulation S–K to small business roll-up transactions.

The disclosure requirements apply to registration statements on Form S–4 or Form F–4, the forms generally used in connection with business combinations or reorganizations. If securities to be issued in a roll-up transaction are registered on another form, but would be authorized to be registered on Form S–4 or Form F–4, the roll-up rules apply in that context. *See* n. 15 to Release No. 33–6922. Instructions today are added to Forms S–1, F–1 and S–11 to such effect. These instructions do not expand the transactions subject to the roll-up rules, but merely state that transactions that otherwise meet the definition of roll-up adopted today and are registered on those forms will be subject to the roll-up rules.

[27] "Partnership" is defined currently at Item 901(b) of Regulation S–K [17 CFR 229.901(b)] to mean any finite-life limited partnership, or other finite-life entity. "Finite-life" is defined currently at Item 901(b)(2)(i) [17 CFR 229.901(b)(2)(i)]. Today's amendments do not change these definitions.

[28] The term "listed securities" is discussed in Section II.A.1, below.

[29] Although such transactions will be excluded from the coverage of the roll-up rules, if a transaction raises concerns addressed by the roll-up rules, whether or not excluded from the rules, the disclosure required under the rules should be considered from an anti-fraud perspective. *See* Release No. 33–6922, Section III.B.

[30] The Amended S–K Definition, like the legislative definition, also excludes transactions where the securities to be issued or exchanged are not required to be, and are not, registered under the Securities Act. *See* amended Item 901(c)(2)(ii) of Regulation S–K. Transactions meeting the criteria of this exclusion have never been subject to the Commission's roll-up requirements, since such requirements are triggered by the filing of a Securities Act registration statement.

[31] Amended Item 901(c)(2)(i) of Regulation S–K.

[32] 15 U.S.C. 78*l*.

[33] Amended Item 901(c)(2)(iii) of Regulation S–K As discussed in the Proposing Release, if a transaction involves the issuance of a security that, after the transaction, would be convertible into a security of an issuer that is required to register or report under Section 12, this exclusion would not be available since the transaction would not involve only non-Section 12 issuers. *See* n 31 to the Proposing Release.

Three commenters voice concern that since no time limit was placed on the convertibility of the security, certain transactions that provide for convertibility to a Section 12 registered security after a long period of time would unnecessarily be subject to the roll-up requirements. *See* NAREIT Letter, ABA Letter and letter from James E. Showen of Hogan & Hartson L.L.P., dated November 1, 1994 ("Hogan & Hartson Letter"). The Commission acknowledges the commenters' concerns, but rather than set a time limit for the conversion feature, the Commission notes the possibility that certain of these transactions, based on their particular facts and circumstances, may not require the special protections of the rules. Parties involved in such transactions may seek exemptive relief. *See* Amended Item 901(c)(3) of Regulation S–K.

[34] Amended Item 901(c)(2)(iv) of Regulation S–K

[35] 15 U.S.C. 78k–1

[36] *See* Section II.A.2, below, for a discussion of the term "regularly traded."

[37] Amended Item 901(c)(2)(v) of Regulation S–K

reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Exchange Act and such investors receive new securities or securities in another entity that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Exchange Act; except that, for purposes of this exclusion, securities that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of Exchange Act do not include securities listed on the Amex's ECM; [38]

(6) Transactions in which the investors in any of the partnerships involved in the transaction are not subject to a significant adverse change with respect to voting rights, the terms of existence of the entity, management compensation or investment objectives; [39] and

(7) Transactions in which all investors are provided an option to receive or retain a security under substantially the same terms and conditions as the original issue.[40]

The Act sets forth two exclusions for transactions where either no listed securities would be issued or where all of the partnership interests to be exchanged are listed securities at the time of filing. Rather than including these exclusions in the Amended S–K Definition, the Proposing Release solicited comment on a single exclusion for transactions in which both the securities of the subject partnerships and the surviving entity are listed securities, since the transactions encompassed by the legislative exclusions may raise the concerns (*e.g.*, significant conflicts of interest, adverse changes and differing effects for partnership investors) that led to the Commissions' roll-up disclosure and procedural rules.[41] For purposes of the Proposing Release, the term "listed securities" encompassed securities listed on the NYSE or the Amex (including those listed on the ECM) or authorized for quotation on Nasdaq/NM, or in some cases listed on regional exchanges that substantially meet the Amex listing criteria. However, comment was solicited as to whether any specified categories of securities, for example, those listed on the ECM, should be excluded.

Three commenters address the "listed securities" issue. One commenter suggests that ECM securities should not be included within the term "listed securities" because such securities fail to provide investors with predictable and ascertainable market value.[42] Two commenters suggest, however, that this exclusion be broadened to include transactions involving issuers whose securities were listed prior to the transaction, and where investors receive unlisted securities in exchange.[43]

The Commission notes that the ECM was intended to provide small companies an opportunity to list their securities that otherwise would not qualify for an exchange listing.[44] The regulatory treatment of ECM securities differs in important respects from the treatment of other listed securities. The listing standards for ECM issuers are significantly lower than those for regular Amex-listed issuers, and accordingly, the market for ECM securities may not be as liquid and deep as those for other listed securities. In addition, companies listed on the ECM are generally not marginable unless they satisfy the company specific criteria for inclusion in the Federal Reserve's OTC Margin List subject to the same maintenance margin treatment for OTC non-NMS securities, rather than the treatment accorded regular Amex companies under Federal Reserve Board Regulation T. After consideration of the foregoing, as well as the comments received,[45] the Commission has determined to adopt the "listed-to-listed" exclusion,[46] as proposed, except that securities listed on the ECM will not be encompassed within the exclusion.[47]

As noted above, unlike the legislative definition, the Amended S–K Definition of roll-up transaction is not restricted to transactions involving limited partnerships. Rather, the Amended S–K Definition applies to transactions involving all finite-life entities, whether or not organized as limited partnerships. While commenters generally support the amendments to the S–K Definition, and in particular, support efforts to conform the S–K Definition to that in the Act, two commenters object to the lack of complete conformity with the definition in the Act, and specifically question the rationale for having the definition apply to entities other than partnerships.[48] In contrast, one commenter supports the Commission's proposal in this area, noting that several abusive roll-up transactions have involved real estate investment trusts as well as limited partnerships, and that new structures are now being used by direct participation programs (*e.g.*, limited liability companies and business trusts).[49]

Based on the staff's experience of reviewing the disclosure documents filed in connection with roll-up transactions by finite-life entities, including non-partnership entities, such as finite-life trusts, it has been determined that the roll-up regulatory framework should continue to apply to all finite-life entities. Finite-life entities other than partnerships do not necessarily provide investors with any additional protections in a roll-up transaction because of their different legal structures. No distinction between the disclosure required for non-partnership finite-life entity roll-ups and partnership roll-ups appears warranted based on the technical legal structure of the entities.

[38] Amended Item 901(c)(2)(vi) of Regulation S–K. As noted above, the exclusion of the Amex's ECM from this provision is the only change from the proposals. *See* below for a more complete discussion of this exclusion.

[39] Amended Item 901(c)(2)(vii) of Regulation S–K.

[40] Amended Item 901(c)(2)(viii) of Regulation S–K. Amended Item 901(c) of Regulation S–K does not contain the exclusion contained in Section 14(h)(5)(A) of the Exchange Act [15 U.S.C. 78n(h)(5)(A)] for transactions involving non-finite-life entities, since the term "partnership" is already defined at Item 901(b)(1) of Regulation S–K [17 CFR 229.901(b)(1)] to include only "finite-life" entities.

In response to the Commission's request for comment in the Proposing Release, two commenters support retaining the sixth and seventh exclusions in the interests of certainty (NAREIT and ABA Letters), while one commentor advocates treatment of these transactions on a case-by-case basis (Letter from Philip A. Feigin, President, and Jerry Baker, Chair, Direct Participation Programs Committee, NASAA, dated November 1, 1994 ("NASAA Letter")). In the interest of more complete conformity with the legislation, the exclusions are adopted as proposed.

[41] *See* Section I.B.4 of the Proposing Release.

[42] *See* NASAA Letter.

[43] *See* NAREIT Letter and ABA Letter.

[44] Release No. 34–30445 (March 5, 1992) [57 FR 8693].

[45] One commenter notes that the ECM was established for the specific purpose of allowing exchange-type trading of securities that would otherwise fail to meet the substantive listing requirements of the Amex. *See* NASAA Letter.

[46] Amended Item 901(c)(2)(vi) of Regulation S–K.

[47] The two separate legislative exclusions are not adopted since these exclusions may raise the concerns that led to the Commission's current roll-up disclosure and procedural rules. With regard to the first exclusion, it is unlikely that a transaction would be proposed where no listed securities would be issued since roll-ups historically have been proposed principally as a means to achieve liquidity. However, such a transaction still could involve significant conflicts of interest, adverse changes and differing effects for partnership investors, which will be addressed by the Commission's roll-up disclosure rules. Further, if the securities to be issued would not be listed and the limited partnership interests were not listed securities, investors would not have the alternative of disposing of their interests rather than participating. The second exclusion, for transactions where all partnership securities were listed securities, does not assure that investors who participate would be able to sell after the roll-up since it does not require that the securities to be issued be listed securities.

[48] *See* NAREIT Letter and ABA Letter.

[49] *See* NASAA Letter.

Finally, consistent with the Act and the proposals, today's amendments to Regulation S–K provide that the Commission may exempt by rule or order any security or class of securities, any transaction or class of transactions or any person or class of persons from the definition of roll-up transaction or the requirements imposed on a roll-up transaction.[50]

2. Definition of "Regularly Traded" For Purposes of Exclusion

The Commission adopts, as proposed, solely for purposes of the fourth exclusion above, a new definition of the term "regularly traded" security as any security with a minimum closing price of $2.00 or more for a majority of the business days during the preceding three-month period and a six-month minimum average daily trading volume of 1,000 shares.[51] The Commission believes that for the purposes of the rule, a minimum average price of $2.00/share and average daily trading volume of 1,000 shares are appropriate to capture the universe of securities that are regularly traded.

The Commission solicited comment as to whether the scope of the proposed definition was appropriate or whether alternative definitions would meet the goals of the Act. Comment was specifically solicited on the appropriateness of the minimum average price and daily trading volume criteria proposed for defining "regularly traded" securities. Four commenters address the definition. One commenter opposes the definition as being unnecessary and creating artificial distinctions among exchange-listed securities.[52]

This commenter argues that the legislative history does not support the definition.[53] The commenter interprets the legislative history to refer to all national market system securities issued by any entity formed more than 12 months before the mailing of soliciting materials. The legislative history mentions only one other qualification according to this commenter-namely, the securities offered as consideration cannot exceed 20% of the total outstanding securities of the issuer.[54] The commenter states that the further reference to securities that are "widely traded and seasoned" is a reference to all national market system securities issued by any entity formed more than 12 months before the mailing of soliciting materials. This reference is not intended to further delimit the universe of securities to be covered.

The commenter notes that the Senate Report speaks in terms of securities that are "generally liquid" and that "may be sold by investors" after the roll-up.[55] The commenter asserts that all securities listed on the NYSE meet these criteria.

The Commission notes that the Senate Report does not speak explicitly in terms of all national market system securities. The Senate Report does not state that all national market system securities are widely traded and seasoned. The legislative history of the Act indicates that the House of Representatives added the term "regularly traded" to the bill passed by the Senate because it was concerned that certain national market system securities might not have a sufficiently liquid trading market.[56] Representative Markey stated that "regularly traded" securities were those securities for which there existed an active, liquid and orderly secondary trading market.[57] While the NYSE may provide a liquid and orderly trading market for all securities that it lists, the commenter has not demonstrated that there is an active trading market for all such securities.

Furthermore, the Commission believes that the term "regularly traded" should be interpreted to further qualify the type of securities eligible for the exclusion. In this regard, the Commission notes that the Act provides, in pertinent part, that a transaction does not constitute a limited partnership roll-up transaction if it is:

(F) A transaction, except as the Commission may otherwise provide by rule for the protection of investors, in which the securities offered to investors are securities of another entity that are reported under a transaction reporting plan declared effective before the date of enactment of [the Act] by the Commission under section 11A, if—

(i) Such other entity was formed, and such class of securities was *reported and regularly traded* not less than 12 months before the date on which soliciting materials is mailed to investors. (emphasis added).[58]

The Commission agrees with the commenter that a specialist's affirmative obligations provide assurance that a national market system security received as consideration "may be sold by investors." However, the Commission notes that the Senate Report also refers to securities that have a "readily ascertainable market value." The Commission believes that as a general matter, securities that have a limited trading volume also have a limited trading depth. Consequently, such securities may have a less readily ascertainable market value than do those securities with a greater trading volume. It is more difficult for investors to evaluate the consideration being offered in exchange for their interest when they are offered securities characterized by a limited trading volume.

Two other commenters also criticize the proposed definition.[59] These commenters argue that a definition is unnecessary. They also argue that the the definition does not assure that investors can adequately assess the consideration being offered for their interests, and may exclude certain securities for which investors can adequately assess the consideration being offered for their interests. The Commission believes that a definition provides useful guidance to registrants, and that the definition proposed by the Commission increases the likelihood that the securities would be regularly traded.

One commenter opposes the proposed definition because it believes that the guidelines set forth in the definition do not adequately assure that the market value of the offered securities will be readily ascertainable or that a public market will be readily available.[60] This commenter recommends that the minimum price be raised to $5/share, and that the minimum volume level be increased. This commenter argues that a higher threshold is necessary because most investors will sell their post-roll-up securities in the trading market more or less at one time—shortly after the consummation of the transaction.

The Commission agrees with the commenter that often, investors will sell their post-roll-up securities shortly after the transaction has been consummated, but believes that the proposed definition will assure that the market value of the offered securities is readily ascertainable and that sufficient liquidity will exist for investors to sell any securities received.

[50] Amended Item 901(c)(3) of Regulation S–K. Prior to these amendments, exemptive action could only be taken on a transaction-by-transaction basis.

[51] Amended Item 901(c)(2)(v)(C) of Regulation S–K.

[52] Letter from James E. Buck, Senior Vice President and Secretary, NYSE, dated October 24, 1994 ("NYSE Letter").

[53] S. Rep. No. 121, 103d Cong., 1st Sess. 15 (1993) ("Senate Report").

[54] NYSE Letter, citing Senate Report.

[55] *Id.*

[56] 139 *Cong. Rec.* H10,966 (daily ed. Nov. 22, 1993) (statement of Rep. Markey).

[57] *Id.*

[58] Exchange Act Section 14(h)(5)(F) [15 USC 78n(h)(5)(F)].

[59] ABA Letter, NAREIT Letter.

[60] NASAA Letter.

Finally, the Commission notes that adopted Item 901(c)(3) will permit the Commission to exempt by rule or order any security or class of securities from the definition of roll-up transaction or the requirements imposed on roll-up transaction by Items 902–915 of Regulation S–K if it finds such action to be consistent with the public interest and the protection of investors. The Commission today adopts a bright-line test for the active, liquid and orderly secondary trading market required by the Act. The Commission is not foreclosed from revisiting the issue at a later date. Any applicant may request an exemption for a particular security or class of security which does not satisfy the definition but for which there exists an active, liquid and orderly secondary trading market if circumstances so require.

B. Rule Defining Terms Related to Legislative Definition

The Commission adopts, as proposed, a new Exchange Act rule defining related terms used in the legislative definition for purposes of, among other things, the SRO rules.[61] The related terms addressed in the new rule are as follows:

- As provided in the Act, criteria are set forth to determine when a partnership has an operating policy or practice of retaining cash available for distribution and reinvesting proceeds from the sale, financing or refinancing of assets.[62]
- An exclusion from the roll-up definition is provided for transactions involving only entities registered under the Investment Company Act of 1940[63] or regulated as business development companies.[64] This exclusion is in the current as well as Amended S–K Definition;[65] transactions involving such entities are subject to extensive regulation, and the concerns associated with roll-ups have not been perceived in this area.
- The term "regularly traded," for purposes of the related exclusion in the Act, is defined in the same manner as the Amended S–K Definition being adopted today.[66]

[61] New Exchange Act Rule 3b–11.

[62] New Rule 3b–11(a). This is accomplished by referring to the definition of "finite-life" in Item 901(b)(2) of Regulation S–K [17 CFR 229.901(b)(2)]. If a partnership is not finite-life as defined in 901(b)(2), then it would be a reinvesting partnership for purposes of the exclusion from the Act for transactions involving only reinvesting partnerships. *See* Section 14(h)(5)(A) of the Act.

[63] 15 U.S.C. 80a–1 *et seq.*

[64] New Rule 3b–11(b).

[65] Amended Item 901(c)(3) of Regulation S–K [17 CFR 229.901(c)(3)].

[66] New Rule 3b–11(c).

C. Proxy and Tender Offer Rule Revisions

1. Exemption for Preliminary Communications

The Act requires the Commission to adopt a new proxy rule exemption to allow preliminary communications among security holders for the purpose of determining whether to solicit proxies, consents or authorizations in opposition to a proposed roll-up transaction. The Act further requires that persons relying on the exemption who are in the business of buying and selling limited partnership interests in the secondary market, and who hold 5% or more of the securities subject to the roll-up, provide specified disclosure to the security holders to whom the communication is made.

The Proposing Release proposed changes to the Commission's proxy rules in order to incorporate this exemption; the Commission adopts the changes as proposed. The new exemption exempts preliminary communications from all the proxy rules, except the anti-fraud prohibitions of Rule 14a–9.[67] This exemption is available to any roll-up transaction within the Amended S–K Definition.[68]

The new exemption contains two conditions, as proposed. First, it is available only to a holder of a security that is the subject of a proposed roll-up transaction who is not an affiliate of the registrant, general partner or sponsor. The exemption also provides that any person relying on it who owns 5% or more of any class of securities that is subject of a proposed roll-up transaction and who is engaged in the business of buying and selling limited partnership interests in the secondary market would be entitled to rely on the exemption only if specified disclosures are made. The person must disclose to any security holder solicited under this exemption that person's security ownership and any relations of the person to the parties to the transaction or to the transaction itself, as set forth in a new Notice of Exempt Preliminary Roll-up Communication, and furnish or mail the notice to the Commission within three days of the first exempt communication.[69]

[67] 17 CFR 240.14a–9. The other solicitation exemptions in the proxy rules, including the exemption afforded by Rule 14a–2(b)(1) [17 CFR 240.14a–2(b)(1)], also would be available to roll-up communications meeting the conditions of those exemptions.

[68] No exemption is needed for solicitations involving securities that are not registered under Section 12 of the Exchange Act, since they are not subject to the proxy rules.

[69] The information may be provided to the security holder orally, if the exempt communication is oral. Any written communication must contain the information set forth in the Notice. *See* New Rule 14a–6(n) and Schedule 14a–104.

Persons filing the Notice with respect to mandated electronic filers should file the Notice in paper format until the necessary form type is available through the EDGAR system. Notice will be provided in the SEC Digest and the **Federal Register** and on the EDGAR Bulletin Board when the new EDGAR form type for the Notice is available. At that time, the Notice may be filed either in paper or electronically.

The Notice, which is being adopted as proposed, requires, among other things, disclosure of the security holder's security ownership, as well as any relations of the holder to the parties to the transaction or to the transaction itself. These relations include:

- Whether the business of the holder in buying and selling of limited partnership interests would be adversely affected if the roll-up transaction was completed;
- Whether the holder is a service provider to an affected limited partnership and would suffer material financial injury if the roll-up was completed;
- Whether the holder is engaged in another transaction that may compete with the pending roll-up transaction; and
- Whether the holder has any other relations to the parties involved in the transactions, or enjoys other benefits not shared on a pro rata basis by all other security holders of the same class.[70]

Comment was solicited on the appropriateness of limiting the availability of this exemption to unaffiliated security holders.[71] Two commenters object to this limitation.[72] These commenters assert that affiliated security holders should be provided with the same rights and be subject to the same obligations as 5% holders who engage in the business of buying and selling limited partnerships in the secondary market. The Commission has determined to adopt the rule, as proposed, to provide that the exemption is not available to any person who is an affiliate of the registrant, general partner or sponsor. The Commission believes that the nature of the relationships between affiliates of the roll-up sponsor or the general partner(s) on the one hand, and unaffiliated limited partners on the other, is such that affiliates communicating with limited partners in connection with a roll-up should be subject to the Commission's proxy rules.[73] Such persons may have a strong

[70] New Schedule 14a–104.

[71] *See* Proposing Release, Section I.D.1.

[72] *See* NAREIT Letter and ABA Letter.

[73] This limitation is consistent with a similar limitation in Rule 14a–2(b)(1) of the Commission's proxy rules dealing with certain exempt communications where no proxy is solicited.

interest in the roll-up's success; in effect, their communication may be quite similar to those of the partnership or registrant, which, of course, would be subject to the proxy rules.

2. Security Holder Lists

The Act requires issuers to provide to holders of securities that are the subject of a roll-up a list of the holders of the securities of that entity in accordance with rules prescribed by the Commission.[74] As part of its proxy reform adopted in 1992, the Commission provided such rights for security holders in connection with a roll-up related proxy solicitation involving Section 12 registered securities.[75] The Commission is adopting amendments to Rule 14a–7 that extend the roll-up provisions of that rule to transactions involving legislatively defined roll-ups,[76] whether or not involving entities with securities registered pursuant to Section 12.[77] The amendment does not affect the operation of Rule 14a–7, but merely adds to the coverage of the rule legislatively defined roll-ups involving non-Section 12 limited partnerships.

Similarly, a new tender offer rule requires subject companies to provide to holders of securities that are the subject of a roll-up structured as a tender offer a list of the holders of that entity at the holder's option.[78] Both roll-ups involving Section 12 registered entities and legislatively defined roll-ups are covered by the new rule.[79]

D. Differential or Contingent Compensation

The Act prohibits the compensation of a person soliciting proxies, consents or authorizations in connection with a roll-up transaction on the basis of whether or not the solicited proxy, consent or authorization either approves or disapproves the proposed transaction, or is contingent on approval, disapproval or completion of the transaction.[80] The Commission adopts new Rule 14a–15 as proposed to incorporate this provision into its regulatory framework. This rule makes unlawful the compensation of a person soliciting proxies, consents or authorizations in connection with a roll-up transaction on the basis of whether or not the solicited proxy, consent or authorization either approves or disapproves the proposed transaction, or is contingent on approval, disapproval or completion of the transaction.[81] This proscription is limited to legislatively defined roll-ups.[82]

The Commission also adopts, as proposed, a comparable provision for legislatively defined roll-up transactions structured as tender offers.[83]

E. Disclosure Regarding Appraisals, Reports and Fairness Opinions

The Act requires the Commission to amend its roll-up disclosure rules with respect to appraisals, reports, and fairness opinions.[84] The Commission proposed, and today adopts, amendments to its disclosure rules that require specific disclosure of:

- Any compensation of the preparer of any opinion, appraisal or report (other than an opinion of counsel) that is contingent on the transaction's approval or completion and, if so, the reasons for compensating that party on a contingent basis;[85]
- Any reasons for the general partner, sponsor or affiliate placing a limitation on the scope of the outside party's investigation in connection with any opinion, appraisal, or report, including, but not limited to, access to its personnel, premises and relevant books and records;[86] and
- With respect to fairness opinions only, any reasons for the general partner or sponsor concluding that a fairness opinion was not necessary for the limited partners or shareholders to make an informed decision on the proposed transaction if such an opinion on the fairness of the proposed roll-up transaction to investors in each of the affected partnerships was not obtained.[87]

The information required by these changes is generally already required under Securities Act Rule 408[88] and Exchange Act Rule 12b–20,[89] and thus, no new burdens are imposed on registrants.

III. Effective Date

The new rules and amendments are effective on December 17, 1994, in accordance with the Administrative Procedures Act, which allows for effectiveness in less than 30 days after publication, *inter alia*, "as provided by the agency for good cause and published with the rule." 5 U.S.C. 553(d)(3). It is necessary for the amendments and new rules to become effective as of December 17, 1994 in order to comply with the Congressional mandate that the rules be in place by that date.[90]

Pending roll-up transactions, including those that have been declared effective but have not yet completed the proxy solicitation or tender offer, are subject to the new rules as of the date of the rules' effectiveness. The exempt communication, shareholder list and differential compensation provisions are applicable to roll-ups in progress, but only from the effective date onward. With respect to the amended Regulation S–K disclosure requirements, in view of the fact that the new disclosure obligations are generally required under existing rules, all pending registration statements and those transactions that have had their registration statements declared effective by the staff but have not yet been completed should already comply with these disclosure requirements and thus be unaffected by the December 17 effectiveness of the new requirements.

IV. Cost-Benefit Analysis

No empirical data was submitted in response to the Commission's invitation

[74] Section 14(h)(1)(B) of the Exchange Act [15 U.S.C. 78n(h)(1)(B)].

[75] *See* Rule 14a–7(b) [17 CFR 240.14a–7(b)]. Rule 14a–7 refers to roll-up transactions as defined in Item 901(c) of Regulation S–K. However, because Rule 14a–7 currently only applies to solicitations of shareholders of Section 12 entities, not all roll-ups as defined in Item 901(c) of Regulation S–K are subject to the rule.

[76] Legislatively defined roll-ups consist of roll-up transactions as defined in Amended Item 901(c) of Regulation S–K, except for transactions that do not involve limited partnerships, and transactions that meet one of the legislative exclusions not encompassed by the Amended S–K Definition.

[77] Today's amendments revise Rule 14a–2 [17 CFR 240.14a–2] to indicate that the proxy rules apply in some instances to roll-ups not involving Section 12 registered securities.

To the extent that the transaction involves only issuers that are not required to register or report under Section 12, both before and after the transaction, the transaction would be excluded from the definition of roll-up pursuant to Item 901(c)(2) of Regulation S–K. See Section II.A.1. above.

[78] New Rule 14e–7(b). The current tender offer rules (*i.e.*, Rule 14d–5 [17 CFR 240.14d–5]) also contain a security holder list provision but it is applicable only to bidders.

[79] The Commission received one comment on the security holder list proposal that supports the adoption of the provision as proposed. *See* NASAA Letter

[80] Section 14(h)(1)(C) of the Exchange Act [15 U.S.C. 78n(h)(1)(C)]. Since 1991, the rules of the NASD have forbidden members in connection with a roll-up transaction (whether a proxy solicitation or a tender offer) from accepting compensation based upon the result of the solicitation. *See* Article III, Section 34(b)(6) to the Rules of Fair Practice of the NASD.

[81] The rule is applicable to all solicitors regardless of NASD membership.

[82] This limitation to legislatively defined roll-ups is consistent with the NASD's rule in this area. *See* Release No. 34–34803 (October 7, 1994).

[83] New Rule 14e–7(a). The Commission received one comment on the differential compensation proposal that supports the adoption of the provision as proposed. *See* NASAA Letter.

[84] Sections 14(h)(1)(F), (G), and (H) of the Exchange Act [15 U.S.C. 78n(h)(1)(F), (G) and (H)].

[85] Amended Item 911(a)(2)(vii) of Regulation S–K.

[86] Amended Item 911(a)(2)(vi) of Regulation S–K.

[87] Amended Item 911(b)(2) of Regulation S–K.

[88] 17 CFR 230.408.

[89] 17 CFR 240.12b–20.

[90] *See* n. 17, above.

to provide information on the cost and benefits of the proposed new rules and amendments. One commenter, however, notes that the cost to issuers of the Commission's decision not to include all of the exclusions from the legislative definition of roll-up could be considerable.[91] The Commission notes, in this regard, that the overall effect of the amended definition will be to decrease costs since fewer transactions will be subject to the roll-up rules, given the number of legislative exclusions incorporated into the Amended S–K Definition.

V. Summary of the Final Regulatory Flexibility Analysis

A final regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 603 concerning the amendments and new rules. The analysis notes that the amendments and new rules are intended to comport with the requirements of the Act.

As discussed more fully in the analysis, the amendments and new rules would affect persons that are small entities, as defined by the Commission's rules, but would affect small registrants in the same manner as other registrants. The rules being adopted today, however, are designed to minimize these costs to the greatest extent possible while enhancing the ability of security holders to analyze roll-up transactions, and providing them with important protections.

A copy of the analysis may be obtained by contacting Robert B. Toomey, Office of Disclosure Policy, Division of Corporation Finance, Mail Stop 3–12, 450 Fifth Street, N.W., Washington, D.C. 20549.

VI. Statutory Basis for Rules

The amendments to Regulation S–K and Forms S–4 and F–4 are promulgated pursuant to sections 6, 7, 8, 10, and 19 of the Securities Act, as amended,[92] and Section 14 of the Exchange Act, as amended.[93]

The amendments to the proxy and tender offer rules are promulgated pursuant to Sections 14 and 23 of the Exchange Act, as amended.[94]

List of Subjects in 17 CFR Parts 229, 239 and 240

Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER THE SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for Part 229 continues to read, in part, as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78w, 78ll(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. By revising § 229.901(c) to read as follows:

§ 229.901 (Item 901) Definitions.

* * * * *

(c)(1) Except as provided in paragraph (c)(2) or (c)(3) of this Item, (§ 229.901(c)(2) or (c)(3)) *roll-up transaction* means a transaction involving the combination or reorganization of one or more partnerships, directly or indirectly, in which some or all of the investors in any of such partnerships will receive new securities, or securities in another entity.

(2) Notwithstanding paragraph (c)(1) of this Item, (§ 229.901(c)(1)) *roll-up transaction* shall not include:

(i) A transaction wherein the interests of all of the investors in each of the partnerships are repurchased, recalled, or exchanged in accordance with the terms of the preexisting partnership agreement for securities in an operating company specifically identified at the time of the formation of the original partnership;

(ii) A transaction in which the securities to be issued or exchanged are not required to be and are not registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*);

(iii) A transaction that involves only issuers that are not required to register or report under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), both before and after the transaction;

(iv) A transaction that involves the combination or reorganization of one or more partnerships in which a non-affiliated party succeeds to the interests of a general partner or sponsor, if:

(A) Such action is approved by not less than 66⅔% of the outstanding units of each of the participating partnerships; and

(B) As a result of the transaction, the existing general partners will receive only compensation to which they are entitled as expressly provided for in the preexisting partnership agreements;

(v) A transaction in which the securities offered to investors are securities of another entity that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1), if:

(A) Such other entity was formed, and such class of securities was reported and regularly traded, not less than 12 months before the date on which soliciting material is mailed to investors; and

(B) The securities of that entity issued to investors in the transaction do not exceed 20% of the total outstanding securities of the entity, exclusive of any securities of such class held by or for the account of the entity or a subsidiary of the entity; and

(C) For purposes of paragraph (c)(2)(v) of this Item (§ 229.901(c)(2)(v)), a *regularly traded* security means any security with a minimum closing price of $2.00 or more for a majority of the business days during the preceding three-month period and a six-month minimum average daily trading volume of 1,000 shares;

(vi) A transaction in which all of the investors' partnership securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1) and such investors receive new securities or securities in another entity that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1), except that, for purposes of this paragraph, securities that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 shall not include securities listed on the American Stock Exchange's Emerging Company Marketplace;

(vii) A transaction in which the investors in any of the partnerships involved in the transaction are not subject to a significant adverse change with respect to voting rights, the terms of existence of the entity, management compensation or investment objectives; or

(viii) A transaction in which all investors are provided an option to receive or retain a security under substantially the same terms and conditions as the original issue.

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[91] *See* NAREIT Letter.

[92] 15 U.S.C. 77f, 77g, 77h, 77j, 77s.

[93] 15 U.S.C. 78n.

[94] 15 U.S.C. 78n, 78w.

(3) The Commission, upon written request or upon its own motion, may exempt by rule or order any security or class of securities, any transaction or class of transactions, or any person or class of persons, in whole or in part, conditionally or unconditionally, from the definition of roll-up transaction or the requirements imposed on roll-up transactions by Items 902–915 of Regulation S–K (§§ 229.902–229.915), if it finds such action to be consistent with the public interest and the protection of investors.

* * * * *

3. By amending § 229.911 by adding a sentence to the end of paragraph (a)(2)(vi), adding paragraph (a)(2)(vii), and revising paragraph (b) to read as follows:

§ 229.911 (Item 911) Reports, opinions and appraisals.

(a) * * *

(2) * * *

(vi) * * * If any limitation was imposed by the general partner, sponsor or affiliate on the scope of the investigation, including, but not limited to, access to its personnel, premises, and relevant books and records, state the reasons therefor.

(vii) State whether any compensation paid to such outside party is contingent on the approval or completion of the roll-up transaction and, if so, the reasons for compensating such parties on a contingent basis.

* * * * *

(b) *Fairness opinions:* (1) If any report, opinion or appraisal relates to the fairness of the roll-up transaction to investors in the partnerships, state whether or not the report, opinion or appraisal addresses the fairness of:

(i) The roll-up transaction as a whole and to investors in each partnership; and

(ii) All possible combinations of partnerships in the roll-up transaction (including portions of partnerships if the transaction is structured to permit portions of partnerships to participate). If all possible combinations are not addressed:

(A) Identify the combinations that are addressed;

(B) Identify the person(s) that determined which combinations would be addressed and state the reasons for the selection of the combinations; and

(C) State that if the roll-up transaction is completed with a combination of partnerships not addressed, no report, opinion or appraisal concerning the fairness of the roll-up transaction will have been obtained.

(2) If the sponsor or the general partner has not obtained any opinion on the fairness of the proposed roll-up transaction to investors in each of the affected partnerships, state the sponsor's or general partner's reasons for concluding that such an opinion is not necessary in order to permit the limited partners or shareholders to make an informed decision on the proposed transaction.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

4. The authority citation for Part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

* * * * *

5. By amending Form S–1 (referenced in § 239.11) by adding General Instruction IV. to read as follows:

Note: The text of Form S–1 does not, and the amendment will not, appear in the Code of Federal Regulations.

Form S–1

* * * * *

General Instructions

* * * * *

IV. Roll-up Transactions

If the securities to be registered on this Form will be issued in a roll-up transaction as defined in Item 901(c) of Regulation S–K (17 CFR 229.901(c)), attention is directed to the requirements of Form S–4 applicable to roll-up transactions, including, but not limited to, General Instruction I.

* * * * *

6. By amending General Instruction I. to Form S–4 (referenced in § 239.25) by adding a sentence to paragraph 1 between the first and second sentence and adding paragraph 3. to read as follows:

Note: The text of Form S–4 does not, and the amendment will not, appear in the Code of Federal Regulations.

Form S–4

* * * * *

General Instructions

* * * * *

I. Roll-up Transactions

1. * * * A "small business issuer," defined in § 230.405, that is engaged in a roll-up transaction shall refer to the disclosure items in subpart 900 of Regulation S–K.

* * *

2. * * *

3. Attention is directed to the proxy rules (17 CFR 240.14a–1–240.14a–104) and Rule 14e–7 of the tender offer rules (17 CFR 240.14e–7) if securities to be registered on this Form will be issued in a roll-up transaction. Such rules contain provisions specifically applicable to roll-up transactions, whether or not the entities involved have securities registered pursuant to Section 12 of the Exchange Act.

* * * * *

7. By amending Form S–11 (referenced in § 239.18) by adding General Instruction F. to read as follows:

Note: The text of Form S–11 does not, and the amendment will not, appear in the Code of Federal Regulations.

Form S–11

* * * * *

General Instructions

* * * * *

F. Roll-up Transactions

If the securities to be registered on this Form will be issued in a roll-up transaction as defined in Item 901(c) of Regulation S–K (17 CFR 229.901(c)), attention is directed to the requirements of Form S–4 applicable to roll-up transactions, including, but not limited to, General Instruction I.

* * * * *

8. By amending Form F–1 (referenced in § 239.31) by adding General Instruction IV. to read as follows:

Note: The text of Form F–1 does not, and the amendment will not, appear in the Code of Federal Regulations.

Form F–1

* * * * *

General Instructions

* * * * *

IV. Roll-up Transactions

If the securities to be registered on this Form will be issued in a roll-up transaction as defined in Item 901(c) of Regulation S–K (17 CFR 229.901(c)), attention is directed to the requirements of Form S–4 applicable to roll-up transactions, including, but not limited to, General Instruction I.

* * * * *

9. By amending Form F–4 (referenced in § 239.34) by adding paragraph 3. to General Instruction G. to read as follows:

Note: The text of Form F–4 does not, and the amendment will not, appear in the Code of Federal Regulations.

Form F–4

* * * * *

General Instructions

* * * * *

G. Roll-up Transactions

* * * * *

3. Attention is directed to the proxy rules (17 CFR 240.14a–1—240.14a–104) and Rule 14e–7 of the tender offer rules (17 CFR 240.14e–7) if securities to be registered on this Form will be issued in a roll-up transaction. Such rules contain provisions specifically applicable to roll-up transactions, whether or not the entities

involved have securities registered pursuant to Section 12 of the Exchange Act.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

10. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78*ll*(d), 78q, 79t, 80a–20, 80a–23, 80a–29, 80–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

11. By reserving § 240.3b–10 and adding § 240.3b–11 to read as follows:

§ 240.3b–11 Definitions relating to limited partnership roll-up transactions for purposes of sections 6(b)(9), 14(h) and 15A(b)(12)–(13).

For purposes of Sections 6(b)(9), 14(h) and 15A(b)(12)–(13) of the Act (15 U.S.C. 78f(b)(9), 78n(h) and 78o–3(b)(12)–(13)):

(a) The term *limited partnership roll-up transaction* does not include a transaction involving only entities that are not "finite-life" as defined in Item 901(b)(2) of Regulation S–K (§ 229.901(b)(2) of this chapter).

(b) The term *limited partnership roll-up transaction* does not include a transaction involving only entities registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or any Business Development Company as defined in section 2(a)(48) of that Act (15 U.S.C. 80a–2(a)(48)).

(c) The term *regularly traded* shall be defined as in Item 901(c)(2)(v)(C) of Regulation S–K (§ 229.901(c)(2)(v)(C) of this chapter).

12. By amending § 240.14a–2 by revising the section heading, the introductory paragraph, the reference "240.14a–14" in the introductory text of paragraph (a) to read "240.14a–15" and the reference "14a–14" in the introductory text of paragraph (b) to read "240.14a–15", by removing "and" at the end of paragraph (b)(2), by removing the period at the end of paragraph (b)(3) and adding in its place "; and" and by adding paragraph (b)(4) to read as follows:

§ 240.14a–2 Solicitations to which § 240.14a–3 to § 240.14a–15 apply.

Sections 240.14a–3 to 240.14a–15, except as specified, apply to every solicitation of a proxy with respect to securities registered pursuant to Section 12 of the Act (15 U.S.C. 78*l*), whether or not trading in such securities has been suspended. To the extent specified below certain of these sections also apply to roll-up transactions that do not involve an entity with securities registered pursuant to Section 12 of the Act.

* * * * *

(b) * * *

(4) Any solicitation in connection with a roll-up transaction as defined in Item 901(c) of Regulation S–K (§ 229.901 of this chapter) in which the holder of a security that is the subject of a proposed roll-up transaction engages in preliminary communications with other holders of securities that are the subject of the same limited partnership roll-up transaction for the purpose of determining whether to solicit proxies, consents, or authorizations in opposition to the proposed limited partnership roll-up transaction; *provided, however,* that:

(i) This exemption shall not apply to a security holder who is an affiliate of the registrant or general partner or sponsor; and

(ii) This exemption shall not apply to a holder of five percent (5%) or more of the outstanding securities of a class that is the subject of the proposed roll-up transaction who engages in the business of buying and selling limited partnership interests in the secondary market unless that holder discloses to the persons to whom the communications are made such ownership interest and any relations of the holder to the parties of the transaction or to the transaction itself, as required by § 240.14a–6(n)(1) and specified in the Notice of Exempt Preliminary Roll-up Communication (§ 240.14a–104). If the communication is oral, this disclosure may be provided to the security holder orally. Whether the communication is written or oral, the notice required by § 240.14a–6(n) and § 240.14a–104 shall be furnished to the Commission.

13. By amending § 240.14a–6 by adding paragraph (n) to read as follows:

§ 240.14a–6 Filing requirements.

* * * * *

(n) *Solicitations subject to § 240.14a–2(b)(4).* Any person who:

(1) Engages in a solicitation pursuant to § 240.14a–2(b)(4); and

(2) At the commencement of that solicitation both owns five percent (5%) or more of the outstanding securities of a class that is the subject of the proposed roll-up transaction, and engages in the business of buying and selling limited partnership interests in the secondary market, shall furnish or mail to the Commission, not later than three days after the date an oral or written solicitation by that person is first made, sent or provided to any security holder, five copies of a statement containing the information specified in the Notice of Exempt Preliminary Roll-up Communication (§ 240.14a–104). Five copies of any amendment to such statement shall be furnished or mailed to the Commission not later than three days after a communication containing revised material is first made, sent or provided to any security holder.

14. By amending § 240.14a–7 by revising paragraph (b) to read as follows:

§ 240.14a–7 Obligations of registrants to provide a list of, or mail soliciting material to, security holders.

* * * * *

(b)(1) The requesting security holder shall have the options set forth in paragraph (a)(2) of this section, and the registrant shall have corresponding obligations, if the registrant or general partner or sponsor is soliciting or intends to solicit with respect to:

(i) A proposal that is subject to § 240.13e–3;

(ii) A roll-up transaction as defined in Item 901(c) of Regulation S–K (§ 229.901(c) of this chapter) that involves an entity with securities registered pursuant to Section 12 of the Act (15 U.S.C. 78*l*); or

(iii) A roll-up transaction as defined in Item 901(c) of Regulation S–K (§ 229.901(c) of this chapter) that involves a limited partnership, unless the transaction involves only:

(A) Partnerships whose investors will receive new securities or securities in another entity that are not reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Act (15 U.S.C. 78k–1); or

(B) Partnerships whose investors' securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Act (15 U.S.C. 78k–1).

(2) With respect to all other requests pursuant to this section, the registrant shall have the option to either mail the security holder's material or furnish the security holder list as set forth in this section.

* * * * *

15. By adding § 240.14a–15 to read as follows:

§ 240.14a–15 Differential and contingent compensation in connection with roll-up transactions.

(a) It shall be unlawful for any person to receive compensation for soliciting proxies, consents, or authorizations directly from security holders in connection with a roll-up transaction as

provided in paragraph (b) of this section, if the compensation is:

(1) Based on whether the solicited proxy, consent, or authorization either approves or disapproves the proposed roll-up transaction; or

(2) Contingent on the approval, disapproval, or completion of the roll-up transaction.

(b) This section is applicable to a roll-up transaction as defined in Item 901(c) of Regulation S–K (§ 229.901(c) of this chapter), except for a transaction involving only:

(1) Finite-life entities that are not limited partnerships;

(2) Partnerships whose investors will receive new securities or securities in another entity that are not reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Act (15 U.S.C. 78k–1); or

(3) Partnerships whose investors' securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Act (15 U.S.C. 78k–1).

16. By adding § 240.14a–104 to read as follows:

§ 240.14a–104 Notice of Exempt Preliminary Roll-up Communication. Information regarding ownership interests and any potential conflicts of interest to be included in statements submitted by or on behalf of a person pursuant to § 240.14a–2(b)(4) and § 240.14a–6(n).

United States Securities and Exchange Commission

Washington, D.C. 20549

Notice of Exempt Preliminary Roll-Up Communication

1. Name of registrant appearing on Securities Act of 1933 registration statement for the roll-up transaction (or, if registration statement has not been filed, name of entity into which partnerships are to be rolled up):

2. Name of partnership that is the subject of the proposed roll-up transaction:

3. Name of person relying on exemption:

4. Address of person relying on exemption:

5. Ownership interest of security holder in partnership that is the subject of the proposed roll-up transaction:

Note: To the extent that the holder owns securities in any other entities involved in this roll-up transaction, disclosure of these interests also should be made.

6. Describe any and all relations of the holder to the parties to the transaction or to the transaction itself:

a. The holder is engaged in the business of buying and selling limited partnership interests in the secondary market would be adversely affected if the roll-up transaction were completed.

b. The holder would suffer direct (or indirect) material financial injury if the roll-up transaction were completed since it is a service provider to an affected limited partnership.

c. The holder is engaged in another transaction that may be competitive with the pending roll-up transaction.

d. Any other relations to the parties involved in the transaction or to the transaction itself, or any benefits enjoyed by the holder not shared on a pro rata basis by all other holders of the same class of securities of the partnership that is the subject of the proposed roll-up transaction.

17. By adding § 240.14e–7 to read as follows:

§ 240.14e–7 Unlawful tender offer practices in connection with roll-ups.

In order to implement Section 14(h) of the Act (15 U.S.C. 78n(h)):

(a)(1) It shall be unlawful for any person to receive compensation for soliciting tenders directly from security holders in connection with a roll-up transaction as provided in paragraph (a)(2) of this section, if the compensation is:

(i) Based on whether the solicited person participates in the tender offer; or

(ii) Contingent on the success of the tender offer.

(2) Paragraph (a)(1) of this section is applicable to a roll-up transaction as defined in Item 901(c) of Regulation S–K (§ 229.901(c) of this chapter), structured as a tender offer, except for a transaction involving only:

(i) Finite-life entities that are not limited partnerships;

(ii) Partnerships whose investors will receive new securities or securities in another entity that are not reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Act (15 U.S.C. 78k–1); or

(iii) Partnerships whose investors' securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Act (15 U.S.C. 78k–1).

(b)(1) It shall be unlawful for any finite-life entity that is the subject of a roll-up transaction as provided in paragraph (b)(2) of this section to fail to provide a security holder list or mail communications related to a tender offer that is in furtherance of the roll-up transaction, at the option of a requesting security holder, pursuant to the procedures set forth in § 240.14a–7.

(2) Paragraph (b)(1) of this section is applicable to a roll-up transaction as defined in Item 901(c) of Regulation S–K (§ 229.901(c) of this chapter), structured as a tender offer, that involves:

(i) An entity with securities registered pursuant to Section 12 of the Act (15 U.S.C. 78*l*); or

(ii) A limited partnership, unless the transaction involves only:

(A) Partnerships whose investors will receive new securities or securities in another entity that are not reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Act (15 U.S.C. 78k–1); or

(B) Partnerships whose investors' securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Act (15 U.S.C. 78k–1).

Dated: December 1, 1994.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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