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Title 17 - Commodity and Securities Exchanges

Chapter II - Securities and Exchange Commission

Chapter II Securities and Exchange Commission

Part 230 General Rules and Regulations, Securities Act of 1933

General

- § 230.100 Definitions of terms used in the rules and regulations.
- § 230.110 Business hours of the Commission.
- § 230.111 Payment of fees.
- § 230.120 Inspection of registration statements.
- § 230.122 Non-disclosure of information obtained in the course of examinations and investigations.
- § 230.130 Definition of “rules and regulations” as used in certain sections of the Act.
- § 230.131 Definition of security issued under governmental obligations.
- § 230.132 Definition of “common trust fund” as used in section 3(a)(2) of the Act.
- § 230.133 Definition for purposes of section 5 of the Act, of “sale”, “offer”, “offer to sell”, and “offer for sale”.
- § 230.134 Communications not deemed a prospectus.
- § 230.134a Options material not deemed a prospectus.
- § 230.134b Statements of additional information.
- § 230.135 Notice of proposed registered offerings.
- § 230.135a Generic advertising.
- § 230.135b Materials not deemed an offer to sell or offer to buy nor a prospectus.
- § 230.135c Notice of certain proposed unregistered offerings.
- § 230.135d Communications involving security-based swaps.
- § 230.135e Offshore press conferences, meetings with issuer representatives conducted offshore, and press-related materials released offshore.
- § 230.136 Definition of certain terms in relation to assessable stock.
- § 230.137 Publications or distributions of research reports by brokers or dealers that are not participating in an issuer’s registered distribution of securities.
- § 230.138 Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing.
- § 230.139 Publications or distributions of research reports by brokers or dealers distributing securities.
- § 230.139a Publications by brokers or dealers distributing asset-backed securities.
- § 230.139b Publications or distributions of covered investment fund research reports by brokers or dealers distributing securities.

- § 230.140 Definition of “distribution” in section 2(11) for certain transactions.
- § 230.141 Definition of “commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commissions” in section 2(11), for certain transactions.
- § 230.142 Definition of “participates” and “participation,” as used in section 2(11), in relation to certain transactions.
- § 230.143 Definition of “has purchased”, “sells for”, “participates”, and “participation”, as used in section 2(11), in relation to certain transactions of foreign governments for war purposes.
- § 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.
- § 230.144A Private resales of securities to institutions.
- § 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.
- § 230.146 Rules under section 18 of the Act.
- § 230.147 Intrastate offers and sales.
- § 230.147A Intrastate sales exemption.
- § 230.148 Exemption from general solicitation or general advertising.
- § 230.149 Definition of “exchanged” in section 3(a)(9), for certain transactions.
- § 230.150 Definition of “commission or other remuneration” in section 3(a)(9), for certain transactions.
- § 230.151 Safe harbor definition of certain “annuity contracts or optional annuity contracts” within the meaning of section 3(a)(8).
- § 230.152 Integration.
- § 230.152a Offer or sale of certain fractional interests.
- § 230.153 Definition of “preceded by a prospectus” as used in section 5(b)(2) of the Act, in relation to certain transactions.
- § 230.153a Definition of “preceded by a prospectus” as used in section 5(b)(2) of the Act, in relation to certain transactions requiring approval of security holders.
- § 230.153b Definition of “preceded by a prospectus”, as used in section 5(b)(2), in connection with certain transactions in standardized options.
- § 230.154 Delivery of prospectuses to investors at the same address.
- § 230.155 *[Reserved]*
- § 230.156 Investment company sales literature.
- § 230.157 Small entities under the Securities Act for purposes of the Regulatory Flexibility Act.
- § 230.158 Definitions of certain terms in the last paragraph of section 11(a).
- § 230.159 Information available to purchaser at time of contract of sale.
- § 230.159A Certain definitions for purposes of section 12(a)(2) of the Act.

- § 230.160 Registered investment company exemption from Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.
- § 230.161 Amendments to rules and regulations governing exemptions.
- § 230.162 Submission of tenders in registered exchange offers.
- § 230.163 Exemption from section 5(c) of the Act for certain communications by or on behalf of well-known seasoned issuers.
- § 230.163A Exemption from section 5(c) of the Act for certain communications made by or on behalf of issuers more than 30 days before a registration statement is filed.
- § 230.163B Exemption from section 5(b)(1) and section 5(c) of the Act for certain communications to qualified institutional buyers or institutional accredited investors.
- § 230.164 Post-filing free writing prospectuses in connection with certain registered offerings.
- § 230.165 Offers made in connection with a business combination transaction.
- § 230.166 Exemption from section 5(c) for certain communications in connection with business combination transactions.
- § 230.167 Communications in connection with certain registered offerings of asset-backed securities.
- § 230.168 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information and forward-looking information.
- § 230.169 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information.
- § 230.170 Prohibition of use of certain financial statements.
- § 230.171 Disclosure detrimental to the national defense or foreign policy.
- § 230.172 Delivery of prospectuses.
- § 230.173 Notice of registration.
- § 230.174 Delivery of prospectus by dealers; exemptions under section 4(3) of the Act.
- § 230.175 Liability for certain statements by issuers.
- § 230.176 Circumstances affecting the determination of what constitutes reasonable investigation and reasonable grounds for belief under section 11 of the Securities Act.
- § 230.180 Exemption from registration of interests and participations issued in connection with certain H.R. 10 plans.
- § 230.190 Registration of underlying securities in asset-backed securities transactions.
- § 230.191 Definition of "issuer" in section 2(a)(4) of the Act in relation to asset-backed securities.
- § 230.193 Review of underlying assets in asset-backed securities transactions.
- § 230.194 Definitions of the terms "swap" and "security-based swap" as used in the Act.
- § 230.215 Accredited investor.

Regulation A-R - Special Exemptions

- § 230.236 Exemption of shares offered in connection with certain transactions.
- § 230.237 Exemption for offers and sales to certain Canadian tax-deferred retirement savings accounts.
- § 230.238 Exemption for standardized options.
- § 230.239 Exemption for offers and sales of certain security-based swaps.
- § 230.240 Exemption for certain security-based swaps.
- § 230.241 Solicitations of interest.

Regulation a - Conditional Small Issues Exemption

- § 230.251 Scope of exemption.
- § 230.252 Offering statement.
- § 230.253 Offering circular.
- § 230.254 Preliminary offering circular.
- § 230.255 Solicitations of interest and other communications.
- § 230.256 Definition of "qualified purchaser".
- § 230.257 Periodic and current reporting; exit report.
- § 230.258 Suspension of the exemption.
- § 230.259 Withdrawal or abandonment of offering statements.
- § 230.260 Insignificant deviations from a term, condition or requirement of Regulation A.
- § 230.261 Definitions.
- § 230.262 Disqualification provisions.
- § 230.263 Consent to service of process.

§§ 230.300-230.346 [Reserved]

Regulation C - Registration

- § 230.400 Application of §§ 230.400 to 230.494, inclusive.

General Requirements

- § 230.401 Requirements as to proper form.
- § 230.401a Requirements as to proper form.
- § 230.402 Number of copies; binding; signatures.
- § 230.403 Requirements as to paper, printing, language and pagination.
- § 230.404 Preparation of registration statement.
- § 230.405 Definitions of terms.
- § 230.406 Confidential treatment of information filed with the Commission.
- § 230.408 Additional information.
- § 230.409 Information unknown or not reasonably available.
- § 230.410 Disclaimer of control.
- § 230.411 Incorporation by reference.
- § 230.412 Modified or superseded documents.
- § 230.413 Registration of additional securities and additional classes of securities.

- § 230.414 Registration by certain successor issuers.
- § 230.415 Delayed or continuous offering and sale of securities.
- § 230.416 Securities to be issued as a result of stock splits, stock dividends and anti-dilution provisions and interests to be issued pursuant to certain employee benefit plans.
- § 230.417 Date of financial statements.
- § 230.418 Supplemental information.
- § 230.419 Offerings by blank check companies.

Form and Content of Prospectuses

- § 230.420 Legibility of prospectus.
- § 230.421 Presentation of information in prospectuses.
- § 230.423 Date of prospectuses.
- § 230.424 Filing of prospectuses, number of copies.
- § 230.425 Filing of certain prospectuses and communications under § 230.135 in connection with business combination transactions.
- § 230.426 Filing of certain prospectuses under § 230.167 in connection with certain offerings of asset-backed securities.
- § 230.427 Contents of prospectus used after nine months.
- § 230.428 Documents constituting a section 10(a) prospectus for Form S-8 registration statement; requirements relating to offerings of securities registered on Form S-8.
- § 230.429 Prospectus relating to several registration statements.
- § 230.430 Prospectus for use prior to effective date.
- § 230.430A Prospectus in a registration statement at the time of effectiveness.
- § 230.430B Prospectus in a registration statement after effective date.
- § 230.430C Prospectus in a registration statement pertaining to an offering other than pursuant to Rule 430A or Rule 430B after the effective date.
- § 230.430D Prospectus in a registration statement after effective date for asset-backed securities offerings.
- § 230.431 Summary prospectuses.
- § 230.432 Additional information required to be included in prospectuses relating to tender offers.
- § 230.433 Conditions to permissible post-filing free writing prospectuses.

Written Consents

- § 230.436 Consents required in special cases.
- § 230.437 Application to dispense with consent.
- § 230.437a Written consents.
- § 230.438 Consents of persons about to become directors.
- § 230.439 Consent to use of material incorporated by reference.

§§ 230.445-230.447 [Reserved]

Filings; Fees; Effective Date

- § 230.455 Place of filing.
- § 230.456 Date of filing; timing of fee payment.
- § 230.457 Computation of fee.
- § 230.459 Calculation of effective date.
- § 230.460 Distribution of preliminary prospectus.
- § 230.461 Acceleration of effective date.
- § 230.462 Immediate effectiveness of certain registration statements and post-effective amendments.
- § 230.463 Report of offering of securities and use of proceeds therefrom.
- § 230.464 Effective date of post-effective amendments to registration statements filed on Form S-8 and on certain Forms S-3, S-4, F-2 and F-3.
- § 230.466 Effective date of certain registration statements on Form F-6.
- § 230.467 Effectiveness of registration statements and post-effective amendments thereto made on Forms F-7, F-8, F-10 and F-80.

Amendments; Withdrawals

- § 230.470 Formal requirements for amendments.
- § 230.471 Signatures to amendments.
- § 230.472 Filing of amendments; number of copies.
- § 230.473 Delaying amendments.
- § 230.474 Date of filing of amendments.
- § 230.475 Amendment filed with consent of Commission.
- § 230.475a Certain pre-effective amendments deemed filed with the consent of the Commission.
- § 230.476 Amendment filed pursuant to order of Commission.
- § 230.477 Withdrawal of registration statement or amendment.
- § 230.478 Powers to amend or withdraw registration statement.
- § 230.479 Procedure with respect to abandoned registration statements and post-effective amendments.

Investment Companies; Business Development Companies

- § 230.480 Title of securities.
- § 230.481 Information required in prospectuses.
- § 230.482 Advertising by an investment company as satisfying requirements of section 10.
- § 230.483 Exhibits for certain registration statements.
- § 230.484 Undertaking required in certain registration statements.
- § 230.485 Effective date of post-effective amendments filed by certain registered investment companies.
- § 230.486 Effective date of post-effective amendments and registration statements filed by certain closed-end management investment companies.
- § 230.487 Effectiveness of registration statements filed by certain unit investment trusts.

§ 230.488 Effective date of registration statements relating to securities to be issued in certain business combination transactions.

§ 230.489 Filing of form by foreign banks and insurance companies and certain of their holding companies and finance subsidiaries.

Registration by Foreign Governments or Political Subdivisions Thereof

§ 230.490 Information to be furnished under paragraph (3) of Schedule B.

§ 230.491 Information to be furnished under paragraph (6) of Schedule B.

§ 230.492 Omissions from prospectuses.

§ 230.493 Additional Schedule B disclosure and filing requirements.

§ 230.494 Newspaper prospectuses.

§ 230.495 Preparation of registration statement.

§ 230.496 Contents of prospectus and statement of additional information used after nine months.

§ 230.497 Filing of investment company prospectuses - number of copies.

§ 230.498 Summary Prospectuses for open-end management investment companies.

§ 230.498A Summary Prospectuses for separate accounts offering variable annuity and variable life insurance contracts.

Regulation D - Rules Governing the Limited Offer and Sale of Securities

Without Registration Under the Securities Act of 1933

§ 230.500 Use of Regulation D.

§ 230.501 Definitions and terms used in Regulation D.

§ 230.502 General conditions to be met.

§ 230.503 Filing of notice of sales.

§ 230.504 Exemption for limited offerings and sales of securities not exceeding \$10,000,000.

§ 230.505 [Reserved]

§ 230.506 Exemption for limited offers and sales without regard to dollar amount of offering.

§ 230.507 Disqualifying provision relating to exemptions under §§ 230.504 and 230.506.

§ 230.508 Insignificant deviations from a term, condition or requirement of Regulation D.

Regulation E - Exemption for Securities of Small Business Investment

Companies

§ 230.601 Definitions of terms used in §§ 230.601 to 230.610a.

§ 230.602 Securities exempted.

§ 230.603 Amount of securities exempted.

§ 230.604 Filing of notification on Form 1-E.

§ 230.605 Filing and use of the offering circular.

§ 230.606 Offering not in excess of \$100,000.

§ 230.607 Sales material to be filed.

§ 230.608 Prohibition of certain statements.

- § 230.609** Reports of sales hereunder.
- § 230.610** Suspension of exemption.
- § 230.610a** Schedule A: Contents of offering circular for small business investment companies; Schedule B: Contents of offering circular for business development companies.
- §§ 230.651-230.656 [Reserved]*
- § 230.701** Exemption for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation.
- §§ 230.702(T)-230.703(T) [Reserved]*
- Exemptions for Cross-Border Rights Offerings, Exchange Offers and Business Combinations
- § 230.800** Definitions for §§ 230.800, 230.801 and 230.802.
- § 230.801** Exemption in connection with a rights offering.
- § 230.802** Exemption for offerings in connection with an exchange offer or business combination for the securities of foreign private issuers.
- Regulation S - Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933
- § 230.901** General statement.
- § 230.902** Definitions.
- § 230.903** Offers or sales of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; conditions relating to specific securities.
- § 230.904** Offshore resales.
- § 230.905** Resale limitations.
- Regulation Ce - Coordinated Exemptions for Certain Issues of Securities Exempt Under State Law
- § 230.1001** Exemption for transactions exempt from qualification under § 25102(n) of the California Corporations Code.

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

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

Section 230.151 is also issued under 15 U.S.C. 77s(a).

Section 230.160 is also issued under Section 104(d) of the Electronic Signatures Act.

Section 230.193 is also issued under sec. 943, Pub. L. 111-203, 124 Stat. 1376.

Sections 230.400 to 230.499 issued under secs. 6, 8, 10, 19, 48 Stat. 78, 79, 81, and 85, as amended (15 U.S.C. 77f, 77h, 77j, 77s).

Sec. 230.457 also issued under secs. 6 and 7, 15 U.S.C. 77f and 77g.

Section 230.502 is also issued under 15 U.S.C. 80a-8, 80a-29, 80a-30.

ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S-T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S-T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT

GENERAL

Note:

In §§ 230.100 to 230.174, the numbers to the right of the decimal point correspond with the respective rule numbers in general rules and regulations adopted by the Securities and Exchange Commission under the Securities Act of 1933.

Cross Reference:

For regulations governing registration, see §§ 230.400-230.494.

§ 230.100 Definitions of terms used in the rules and regulations.

- (a) As used in the rules and regulations prescribed in this part by the Securities and Exchange Commission pursuant to the Securities Act of 1933, unless the context otherwise requires:
 - (1) The term *Commission* means the Securities and Exchange Commission.
 - (2) The term *Act* means the Securities Act of 1933.
 - (3) The term *rules and regulations* refers to all rules and regulations adopted by the Commission pursuant to the Act, including the forms and accompanying instructions thereto.
 - (4) The term *registrant* means the issuer of securities for which a registration statement is filed.
 - (5) The term *agent for service* means the person authorized in the registration statement to receive notices and communications from the Commission.
 - (6) The term *electronic filer* means a person or an entity that submits filings electronically pursuant to Rules 101, 901, 902 or 903 of Regulation S-T (§§ 232.101, 232.901, 232.902 or 232.903 of this chapter, respectively).
 - (7) The term *electronic filing* means a document under the federal securities laws that is transmitted or delivered to the Commission in electronic format.
- (b) Unless otherwise specifically provided, the terms used in this part shall have the meanings defined in the act.

- (c) A rule in the general rules and regulations which defines a term without express reference to the Act or to the rules and regulations or to a portion thereof defines such term for all purposes as used both in the Act and in the rules and regulations, unless the context otherwise requires.

[2 FR 1076, May 26, 1937, as amended at 21 FR 7566, Oct. 3, 1956; 58 FR 14669, Mar. 18, 1993]

§ 230.110 Business hours of the Commission.

- (a) **General.** The principal office of the Commission, at 100 F Street, NE., Washington, DC 20549, is open each day, except Saturdays, Sundays, and Federal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, *provided that* hours for the filing of documents pursuant to the Act or the rules and regulations thereunder are as set forth in paragraphs (b), (c) and (d) of this section.
- (b) **Submissions made in paper.** Paper documents filed with or otherwise furnished to the Commission may be submitted each day, except Saturdays, Sundays and federal holidays, from 8 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect.
- (c) **Filings by direct transmission.** Filings made by direct transmission may be submitted to the Commission each day, except Saturdays, Sundays and federal holidays, from 8 a.m. to 10 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect.
- (d) **Filings by facsimile.** Registration statements and post-effective amendments thereto filed by facsimile transmission pursuant to Rule 462(b) (§ 230.462(b)) and Rule 455 (§ 230.455) may be filed with the Commission each day, except Saturdays, Sundays and federal holidays, from 5:30 p.m. to 10 p.m., Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect.

[58 FR 14669, Mar. 18, 1993, as amended at 60 FR 26615, May 17, 1995; 65 FR 24799, Apr. 27, 2000; 68 FR 25798, May 13, 2003; 73 FR 967, Jan. 4, 2008]

§ 230.111 Payment of fees.

Link to an amendment published at 86 FR 70199, Dec. 9, 2021.

All payments of fees for registration statements under the Act shall be made by wire transfer, or by certified check, bank cashier's check, United States postal money order, or bank money order payable to the Securities and Exchange Commission, omitting the name or title of any official of the Commission. There will be no refunds. Payment of fees required by this section shall be made in accordance with the directions set forth in § 202.3a of this chapter.

[73 FR 6014, Feb. 1, 2008]

§ 230.120 Inspection of registration statements.

Except for material contracts or portions thereof accorded confidential treatment pursuant to § 230.406, all registration statements are available for public inspection, during business hours, at the principal office of the Commission in Washington, D.C. Electronic registration statements made through the Electronic Data Gathering, Analysis, and Retrieval system are publicly available through the Commission's Web site (<http://www.sec.gov>).

[61 FR 24654, May 15, 1996]

§ 230.122 Non-disclosure of information obtained in the course of examinations and investigations.

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 8(e) or 20(a) (48 Stat. 80, 86; 15 U.S.C. 77h(e), 77t(a)) shall, unless made a matter of public record, be deemed confidential. Except as provided by 17 CFR 203.2, officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer or employee of the Commission, unless the Commission or the General Counsel, pursuant to delegated authority, authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his or her refusal upon this section. Any officer or employee who is served with such a subpoena shall promptly advise the General Counsel of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear on the desirability of making available such information or documents.

[44 FR 50836, Aug. 30, 1979, as amended at 53 FR 17459, May 17, 1988; 54 FR 33501, Aug. 15, 1989; 76 FR 71876, Nov. 21, 2011]

§ 230.130 Definition of “rules and regulations” as used in certain sections of the Act.

The term *rules and regulations* as used in sections 7, 10 (a), (c) and (d) and 19(a) of the Act, shall include the forms for registration of securities under the Act and the related instructions thereto.

[21 FR 1046, Feb. 15, 1956]

§ 230.131 Definition of security issued under governmental obligations.

- (a) Any part of an obligation evidenced by any bond, note, debenture, or other evidence of indebtedness issued by any governmental unit specified in section 3(a)(2) of the Act which is payable from payments to be made in respect of property or money which is or will be used, under a lease, sale, or loan arrangement, by or for industrial or commercial enterprise, shall be deemed to be a separate *security* within the meaning of section 2(l) of the Act, issued by the lessee or obligor under the lease, sale or loan arrangement.
- (b) An obligation shall not be deemed a separate *security* as defined in paragraph (a) of this section if,
 - (1) the obligation is payable from the general revenues of a governmental unit, specified in section 3(a)(2) of the Act, having other resources which may be used for payment of the obligation, or
 - (2) the obligation relates to a public project or facility owned and operated by or on behalf of and under the control of a governmental unit specified in such section, or
 - (3) the obligation relates to a facility which is leased to and under the control of an industrial or commercial enterprise but is a part of a public project which, as a whole, is owned by and under the general control of a governmental unit specified in such section, or an instrumentality thereof.
- (c) This rule shall apply to transactions of the character described in paragraph (a) of this section only with respect to bonds, notes, debentures or other evidences of indebtedness sold after December 31, 1968.

(15 U.S.C. 77w)

[33 FR 12648, Sept. 6, 1968, as amended at 35 FR 6000, Apr. 11, 1970]

§ 230.132 Definition of “common trust fund” as used in section 3(a)(2) of the Act.

The term *common trust fund* as used in section 3(a)(2) of the Act (15 U.S.C. 77c(a)(2)) shall include a common trust fund which is maintained by a bank which is a member of an affiliated group, as defined in section 1504(a) of the Internal Revenue Code of 1954 (26 U.S.C. 1504(a)), and which is maintained exclusively for the collective investment and reinvestment of monies contributed thereto by one or more bank members of such affiliated group in the capacity of trustee, executor, administrator, or guardian, *Provided That*:

- (a) The common trust fund is operated in compliance with the same state and federal regulatory requirements as would apply if the bank maintaining such fund and any other contributing banks were the same entity; and
- (b) The rights of persons for whose benefit a contributing bank acts as trustee, executor, administrator, or guardian would not be diminished by reason of the maintenance of such common trust fund by another bank member of the affiliated group.

(15 U.S.C. 77s(a))

[43 FR 2392, Jan. 17, 1978]

§ 230.133 Definition for purposes of section 5 of the Act, of “sale”, “offer”, “offer to sell”, and “offer for sale”.

- (a) For purposes only of section 5 of the Act, no *sale*, *offer to sell*, or *offer for sale* shall be deemed to be involved so far as the stockholders of a corporation are concerned where, pursuant to statutory provisions in the state of incorporation or provisions contained in the certificate of incorporation, there is submitted to the vote of such stockholders a plan or agreement for a statutory merger or consolidation or reclassification of securities, or a proposal for the transfer of assets of such corporation to another person in consideration of the issuance of securities of such other person or securities of a corporation which owns stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of such person, under such circumstances that the vote of a required favorable majority
 - (1) will operate to authorize the proposed transaction as far as concerns the corporation whose stockholders are voting (except for the taking of action by the directors of the corporation involved and for compliance with such statutory provisions as the filing of the plan or agreement with the appropriate State authority), and
 - (2) will bind all stockholders of such corporation except to the extent that dissenting shareholders may be entitled, under statutory provisions or provisions contained in the certificate of incorporation, to receive the appraised or fair value of their holdings.
- (b) Any person who purchases securities of the issuer from security holders of a constituent corporation with a view to, or offers or sells such securities for such security holders in connection with, a distribution thereof pursuant to any contract or arrangement, made in connection with any transaction specified in paragraph (a) of this section, with the issuer or with any affiliate of the issuer, or with any person who in connection with such transaction is acting as an underwriter of such securities, shall be deemed to an underwriter of such securities within the meaning of section 2(11) of the Act. This paragraph does not refer to arrangements limited to provision for the matching and combination of fractional interests in

securities into whole interests, or the purchase and sale of such fractional interests, among security holders of the constituent corporation and to the sale on behalf of, and as agent for, such security holders of such number of fractional or whole interests as may be necessary to adjust for any remaining fractional interests after such matching.

- (c) Any constituent corporation, or any person who is an affiliate of a constituent corporation at the time any transaction specified in paragraph (a) of this section, is submitted to a vote of the stockholders of such corporation, who acquires securities of the issuer in connection with such transaction with a view to the distribution thereof shall be deemed to be an underwriter of such securities within the meaning of section 2(11) of the Act. A transfer by a constituent corporation to its security holders of securities of the issuer upon a complete or partial liquidation shall not be deemed a distribution for the purpose of this paragraph.
- (d) Notwithstanding the provisions of paragraph (c) of this section, a person specified therein shall not be deemed to be an underwriter nor to be engaged in a distribution with respect to securities acquired in any transaction specified in paragraph (a) of this section, which are sold by him in brokers' transactions within the meaning of section 4(4) of the Act, in accordance with the conditions and subject to the limitations specified in paragraph (e) of this section, if such person:
 - (1) Does not directly or indirectly solicit or arrange for the solicitation of orders to buy in anticipation of or in connection with such brokers' transactions;
 - (2) Makes no payment in connection with the execution of such brokers' transactions to any person other than the broker; and
 - (3) Limits such brokers' transactions to a sale or series of sales which, together with all other sales of securities of the same class by such person or on his behalf within the preceding six months, will not exceed the following:
 - (i) If the security is traded only otherwise than on a securities exchange, approximately one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions, or
 - (ii) If the security is admitted to trading on a securities exchange, the lesser of approximately (a) one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (b) the largest aggregate reported volume of trading on securities exchanges during any one week within the four calendar weeks preceding the receipt of such order.
- (e) For the purposes of paragraph (d) of this section:
 - (1) The term *brokers' transactions* in section 4(4) of the Act shall be deemed to include transactions by a broker acting as agent for the account of the seller where:
 - (i) The broker performs no more than the usual and customary broker's functions,
 - (ii) The broker does no more than execute an order or orders to sell as a broker and receives no more than the usual or customary broker's commissions,
 - (iii) The broker does not solicit or arrange for the solicitation of orders to buy in anticipation of or in connection with such transactions and
 - (iv) The broker is not aware of any circumstances indicating that his principal is failing to comply with the provisions of paragraph (d) of this section;

- (2) The term *solicitation of such orders* in section 4(4) of the Act shall be deemed to include the solicitation of an order to buy a security, but shall not be deemed to include the solicitation of an order to sell a security;
- (3) Where within the previous 60 days a dealer has made a written bid for a security or a written solicitation of an offer to sell such security, the term *solicitation* in section 4(4) shall not be deemed to include an inquiry regarding the dealer's bid or solicitation.
- (f) For the purposes of this rule, the term *constituent corporation* means any corporation, other than the issuer, which is a party to any transaction specified in paragraph (a) of this section. The term *affiliate* means a person controlling, controlled by or under common control with a specified person.

Note:

This section is rescinded effective on and after January 1, 1973, except that it shall remain in effect: (1) For transactions submitted before that date for vote or consent of security holders; (2) for transactions formally submitted before such date for approval to any governmental regulatory agency, if such approval is required by law; and (3) for resales of securities received by persons in such transactions.

(Sec. 5, 48 Stat. 77; 15 U.S.C. 77e)

[19 FR 7129, Nov. 3, 1954, as amended at 24 FR 5900, July 23, 1959; 30 FR 2022, Feb. 13, 1965; 33 FR 566, Jan. 17, 1968.
Rescinded at 37 FR 23636, Nov. 7, 1972]

§ 230.134 Communications not deemed a prospectus.

Except as provided in paragraphs (e) and (g) of this section, the terms “prospectus” as defined in section 2(a)(10) of the Act or “free writing prospectus” as defined in Rule 405 (§ 230.405) shall not include a communication limited to the statements required or permitted by this section, provided that the communication is published or transmitted to any person only after a registration statement relating to the offering that includes a prospectus satisfying the requirements of section 10 of the Act (except as otherwise permitted in paragraph (a) of this section) has been filed.

- (a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph, provided that, except as to paragraphs (a)(4) through (6) of this section, the prospectus included in the filed registration statement does not have to include a price range otherwise required by rule:
 - (1) Factual information about the legal identity and business location of the issuer limited to the following: the name of the issuer of the security, the address, phone number, and e-mail address of the issuer's principal offices and contact for investors, the issuer's country of organization, and the geographic areas in which it conducts business;
 - (2) The title of the security or securities and the amount or amounts being offered, which title may include a designation as to whether the securities are convertible, exercisable, or exchangeable, and as to the ranking of the securities;
 - (3) A brief indication of the general type of business of the issuer, limited to the following:

- (i) In the case of a manufacturing company, the general type of manufacturing, the principal products or classes of products manufactured, and the segments in which the company conducts business;
 - (ii) In the case of a public utility company, the general type of services rendered, a brief indication of the area served, and the segments in which the company conducts business;
 - (iii) In the case of an asset-backed issuer, the identity of key parties, such as sponsor, depositor, issuing entity, servicer or servicers, and trustee, the asset class of the transaction, and the identity of any credit enhancement or other support; and
 - (iv) In the case of any other type of company, a corresponding statement;
- (4) The price of the security, or if the price is not known, the method of its determination or the *bona fide* estimate of the price range as specified by the issuer or the managing underwriter or underwriters;
 - (5) In the case of a fixed income security, the final maturity and interest rate provisions or, if the final maturity or interest rate provisions are not known, the probable final maturity or interest rate provisions, as specified by the issuer or the managing underwriter or underwriters;
 - (6) In the case of a fixed income security with a fixed (non-contingent) interest rate provision, the yield or, if the yield is not known, the probable yield range, as specified by the issuer or the managing underwriter or underwriters and the yield of fixed income securities with comparable maturity and security rating;
 - (7) A brief description of the intended use of proceeds of the offering, if then disclosed in the prospectus that is part of the filed registration statement;
 - (8) The name, address, phone number, and e-mail address of the sender of the communication and the fact that it is participating, or expects to participate, in the distribution of the security;
 - (9) The type of underwriting, if then included in the disclosure in the prospectus that is part of the filed registration statement;
 - (10) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;
 - (11) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them);
 - (12) A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with the issuer or an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy), and procedures regarding directed share plans and other participation in offerings by officers, directors, and employees of the issuer;
 - (13) Whether, in the opinion of counsel, the security is a legal investment for savings banks, fiduciaries, insurance companies, or similar investors under the laws of any State or Territory or the District of Columbia, and the permissibility or status of the investment under the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1001 *et seq.*];
 - (14) Whether, in the opinion of counsel, the security is exempt from specified taxes, or the extent to which the issuer has agreed to pay any tax with respect to the security or measured by the income therefrom;

- (15) Whether the security is being offered through rights issued to security holders, and, if so, the class of securities the holders of which will be entitled to subscribe, the subscription ratio, the actual or proposed record date, the date upon which the rights were issued or are expected to be issued, the actual or anticipated date upon which they will expire, and the approximate subscription price, or any of the foregoing;
 - (16) Any statement or legend required by any state law or administrative authority;
 - (17) [Reserved]
 - (18) The names of selling security holders, if then disclosed in the prospectus that is part of the filed registration statement;
 - (19) The names of securities exchanges or other securities markets where any class of the issuer's securities are, or will be, listed;
 - (20) The ticker symbols, or proposed ticker symbols, of the issuer's securities;
 - (21) The CUSIP number as defined in Rule 17Ad-19(a)(5) of the Securities Exchange Act of 1934 (§ 240.17Ad-19(a)(5) of this chapter) assigned to the securities being offered; and
 - (22) Information disclosed in order to correct inaccuracies previously contained in a communication permissibly made pursuant to this section.
- (b) Except as provided in paragraph (c) of this section, every communication used pursuant to this section shall contain the following:
- (1) If the registration statement has not yet become effective, the following statement:

A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective; and
 - (2) The name and address of a person or persons from whom a written prospectus for the offering meeting the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405) including as to the identified paragraphs above a price range where required by rule, may be obtained.
- (c) Any of the statements or information specified in paragraph (b) of this section may, but need not, be contained in a communication which:
- (1) Does no more than state from whom and include the uniform resource locator (URL) where a written prospectus meeting the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405) may be obtained, identify the security, state the price thereof and state by whom orders will be executed; or
 - (2) Is accompanied or preceded by a prospectus or a summary prospectus, other than a free writing prospectus as defined in Rule 405, which meets the requirements of section 10 of the Act, including a price range where required by rule, at the date of such preliminary communication.
- (d) A communication sent or delivered to any person pursuant to this section which is accompanied or preceded by a prospectus which meets the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405), including a price range where required by rule, at the date of

such communication, may solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate whether he or she might be interested in the security, if the communication contains substantially the following statement:

No offer to buy the securities can be accepted and no part of the purchase price can be received until the registration statement has become effective, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time prior to notice of its acceptance given after the effective date.

Provided, that such statement need not be included in such a communication to a dealer.

- (e) A section 10 prospectus included in any communication pursuant to this section shall remain a prospectus for all purposes under the Act.
- (f) The provision in paragraphs (c)(2) and (d) of this section that a prospectus that meets the requirements of section 10 of the Act precede or accompany a communication will be satisfied if such communication is an electronic communication containing an active hyperlink to such prospectus.
- (g) This section does not apply to a communication relating to an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), other than a registered closed-end investment company.

[70 FR 44800, Aug. 3, 2005, as amended at 76 FR 46617, Aug. 3, 2011; 85 FR 33352, June 1, 2020]

§ 230.134a Options material not deemed a prospectus.

Written materials, including advertisements, relating to standardized options, as that term is defined in Rule 9b-1 under the Securities Exchange Act of 1934, shall not be deemed to be a prospectus for the purposes of section 2(10) of the Securities Act of 1933; *Provided*, That such materials are limited to explanatory information describing the general nature of the standardized options markets or one or more strategies; *And, Provided further*, That:

- (a) The potential risks related to options trading generally and to each strategy addressed are explained;
- (b) No past or projected performance figures, including annualized rates of return are used;
- (c) No recommendation to purchase or sell any option contract is made;
- (d) No specific security is identified, other than
 - (1) An option or other security exempt from registration under the Act, or
 - (2) An index option, including the component securities of the index; and
- (e) If there is a definitive options disclosure document, as defined in Rule 9b-1 under the Securities Exchange Act of 1934, the materials shall contain the name and address of a person or persons from whom a copy of such document may be obtained.

(15 U.S.C. 77a *et seq.*; secs. 2, 7, 10, 19(a), 48 Stat. 74, 78, 81, 85; secs. 201, 205, 209, 210, 48 Stat. 905, 906, 908; secs. 1-4, 8, 68 Stat. 683, 685; sec. 12(a), 73 Stat. 143; sec. 7(a), 74 Stat. 412; sec. 27(a), 84 Stat. 1433; sec. 308(a)(2), 90 Stat. 57)

[47 FR 41955, Sept. 23, 1982, as amended at 49 FR 12688, Mar. 30, 1984]

§ 230.134b Statements of additional information.

For the purpose only of Section 5(b) of the Act (15 U.S.C. 77e(b)), the term “prospectus” as defined in Section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) does not include a Statement of Additional Information filed as part of a registration statement on Form N-1A (§ 239.15A and § 274.11A of this chapter), Form N-2 (§ 239.14 and § 274.11a-1 of this chapter), Form N-3 (§§ 239.17a and 274.11b of this chapter), Form N-4 (§§ 239.17b and 274.11c of this chapter), or Form N-6 (§§ 239.17c and 274.11d of this chapter) transmitted prior to the effective date of the registration statement if it is accompanied or preceded by a preliminary prospectus meeting the requirements of § 230.430.

[67 FR 19868, Apr. 23, 2002]

§ 230.135 Notice of proposed registered offerings.

(a) **When notice is not an offer.** For purposes of section 5 of the Act (15 U.S.C. 77e) only, an issuer or a selling security holder (and any person acting on behalf of either of them) that publishes through any medium a notice of a proposed offering to be registered under the Act will not be deemed to offer its securities for sale through that notice if:

(1) **Legend.** The notice includes a statement to the effect that it does not constitute an offer of any securities for sale; and

(2) **Limited notice content.** The notice otherwise includes no more than the following information:

- (i) The name of the issuer;
- (ii) The title, amount and basic terms of the securities offered;
- (iii) The amount of the offering, if any, to be made by selling security holders;
- (iv) The anticipated timing of the offering;
- (v) A brief statement of the manner and the purpose of the offering, without naming the underwriters;
- (vi) Whether the issuer is directing its offering to only a particular class of purchasers;
- (vii) Any statements or legends required by the laws of any state or foreign country or administrative authority; and
- (viii) In the following offerings, the notice may contain additional information, as follows:

(A) **Rights offering.** In a rights offering to existing security holders:

- (1) The class of security holders eligible to subscribe;
- (2) The subscription ratio and expected subscription price;
- (3) The proposed record date;
- (4) The anticipated issuance date of the rights; and
- (5) The subscription period or expiration date of the rights offering.

(B) **Offering to employees.** In an offering to employees of the issuer or an affiliated company:

- (1) The name of the employer;

- (2) The class of employees being offered the securities;
- (3) The offering price; and
- (4) The duration of the offering period.

(C) **Exchange offer.** In an exchange offer:

- (1) The basic terms of the exchange offer;
- (2) The name of the subject company;
- (3) The subject class of securities sought in the exchange offer.

(D) **Rule 145(a) offering.** In a § 230.145(a) offering:

- (1) The name of the person whose assets are to be sold in exchange for the securities to be offered;
- (2) The names of any other parties to the transaction;
- (3) A brief description of the business of the parties to the transaction;
- (4) The date, time and place of the meeting of security holders to vote on or consent to the transaction; and
- (5) A brief description of the transaction and the basic terms of the transaction.

- (b) **Corrections of misstatements about the offering.** A person that publishes a notice in reliance on this section may issue a notice that contains no more information than is necessary to correct inaccuracies published about the proposed offering.

Note to § 230.135:

Communications under this section relating to business combination transactions must be filed as required by § 230.425(b).

[64 FR 61449, Nov. 10, 1999]

§ 230.135a Generic advertising.

- (a) For the purposes only of section 5 of the Act, a notice, circular, advertisement, letter, sign, or other communication, published or transmitted to any person which does not specifically refer by name to the securities of a particular investment company, to the investment company itself, or to any other securities not exempt under section 3(a) of the Act, will not be deemed to offer any security for sale, provided:
- (1) Such communication is limited to any one or more of the following:
 - (i) Explanatory information relating to securities of investment companies generally or to the nature of investment companies, or to services offered in connection with the ownership of such securities,
 - (ii) The mention or explanation of investment companies of different generic types or having various investment objectives, such as *balanced funds*, *growth funds*, *income funds*, *leveraged funds*, *specialty funds*, *variable annuities*, *bond funds*, and *no-load funds*,

- (iii) Offers, descriptions, and explanation of various products and services not constituting a security subject to registration under the Act: *Provided*, That such offers, descriptions, and explanations do not relate directly to the desirability of owning or purchasing a security issued by a registered investment company,
- (iv) Invitation to inquire for further information, and
- (2) Such communication contains the name and address of a registered broker or dealer or other person sponsoring the communication.
- (b) If such communication contains a solicitation of inquiries and prospectuses for investment company securities are to be sent or delivered in response to such inquiries, the number of such investment companies and, if applicable, the fact that the sponsor of the communication is the principal underwriter or investment adviser in respect to such investment companies shall be stated.
- (c) With respect to any communication describing any type of security, service, or product, the broker, dealer, or other person sponsoring such communication must offer for sale a security, service, or product of the type described in such communication.

[37 FR 10073, May 19, 1972, as amended at 37 FR 10931, June 1, 1972]

§ 230.135b Materials not deemed an offer to sell or offer to buy nor a prospectus.

Materials meeting the requirements of § 240.9b-1 of this chapter shall not be deemed an offer to sell or offer to buy a security for purposes solely of Section 5 (15 U.S.C. 77e) of the Act, nor shall such materials be deemed a prospectus for purposes of Sections 2(a)(10) and 12(a)(2) (15 U.S.C. 77b(a)(10) and 77l(a)(2)) of the Act, even if such materials are referred to in, deemed to be incorporated by reference into, or otherwise in any manner deemed to be a part of a Form S-20 prospectus.

[67 FR 228, Jan. 2, 2002]

§ 230.135c Notice of certain proposed unregistered offerings.

- (a) For the purposes only of section 5 of the Act, a notice given by an issuer required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 or a foreign issuer that is exempt from registration under the Securities Exchange Act of 1934 pursuant to § 240.12g3-2(b) of this chapter that it proposes to make, is making or has made an offering of securities not registered or required to be registered under the Act shall not be deemed to offer any securities for sale if:
 - (1) Such notice is not used for the purpose of conditioning the market in the United States for any of the securities offered;
 - (2) Such notice states that the securities offered will not be or have not been registered under the Act and may not be offered or sold in the United States absent registration or an applicable exemption from registration requirements; and
 - (3) Such notice contains no more than the following additional information:
 - (i) The name of the issuer;
 - (ii) The title, amount and basic terms of the securities offered, the amount of the offering, if any, made by selling security holders, the time of the offering and a brief statement of the manner and purpose of the offering without naming the underwriters;

- (iii) In the case of a rights offering to security holders of the issuer, the class of securities the holders of which will be or were entitled to subscribe to the securities offered, the subscription ratio, the record date, the date upon which the rights are proposed to be or were issued, the term or expiration date of the rights and the subscription price, or any of the foregoing;
 - (iv) In the case of an offering of securities in exchange for other securities of the issuer or of another issuer, the name of the issuer and the title of the securities to be surrendered in exchange for the securities offered, the basis upon which the exchange may be made, or any of the foregoing;
 - (v) In the case of an offering to employees of the issuer or to employees of any affiliate of the issuer, the name of the employer and class or classes of employees to whom the securities are offered, the offering price or basis of the offering and the period during which the offering is to be or was made or any of the foregoing; and
 - (vi) Any statement or legend required by State or foreign law or administrative authority.
- (b) Any notice contemplated by this section may take the form of a news release or a written communication directed to security holders or employees, as the case may be, or other published statements.
- (c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, in the case of a rights offering of a security listed or subject to unlisted trading privileges on a national securities exchange or quoted on the NASDAQ inter-dealer quotation system information with respect to the interest rate, conversion ratio and subscription price may be disseminated through the facilities of the exchange, the consolidated transaction reporting system, the NASDAQ system or the Dow Jones broad tape, provided such information is already disclosed in a Form 8-K (§ 249.308 of this chapter) on file with the Commission, in a Form 6-K (§ 249.306 of this chapter) furnished to the Commission or, in the case of an issuer relying on § 240.12g3-2(b) of this chapter, in a submission made pursuant to that Section to the Commission.
- (d) The issuer shall file any notice contemplated by this section with the Commission under cover of Form 8-K (§ 249.308 of this chapter) or furnish such notice under Form 6-K (§ 249.306 of this chapter), as applicable, and, if relying on § 240.12g3-2(b) of this chapter, shall furnish such notice to the Commission in accordance with the provisions of that exemptive Section.

[59 FR 21649, Apr. 26, 1994]

§ 230.135d Communications involving security-based swaps.

- (a) For the purposes only of Section 5 of the Act (15 U.S.C. 77e), the publication or distribution of quotes relating to security-based swaps that may be purchased only by persons who are eligible contract participants (as defined in Section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18))) and are traded or processed on or through a trading system or platform that either is registered as a national securities exchange under Section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)) or as a security-based swap execution facility under Section 3D(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c-4(a)), or is exempt from registration as a security-based swap execution facility under Section 3D(a) of the Securities Exchange Act of 1934 pursuant to a rule, regulation, or order of the Commission shall not be deemed to constitute an offer, an offer to sell, or a solicitation of an offer to buy or purchase any security-based swap or any guarantee of such security-based swap that is a security; and
- (b) For the purposes only of Section 5 of the Act (15 U.S.C. 77e), a broker, dealer, or security-based swap dealer's publication or distribution of a research report (as defined in § 230.139(d)) that discusses security-based swaps that may be purchased only by persons who are eligible contract participants (as

defined in Section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18))) shall not be deemed to constitute an offer, an offer to sell, or a solicitation of an offer to buy or purchase any security-based swap or any guarantee of such security-based swap that is a security, provided that the broker, dealer, or security-based swap dealer publishes or distributes research reports on the issuer underlying the security-based swap or its securities in the regular course of its business and the publication or distribution of the research report does not represent the initiation of publication of research reports about such issuer or its securities or the reinitiation of such publication following discontinuation of publication of such research reports. For purposes of this section, the term *issuer* as used in the definition of “research report” means the issuer of any security or loan referenced in the security-based swap, each issuer of a security in a narrow-based security index referenced in the security-based swap, or each issuer referenced in the security-based swap.

[83 FR 2056, Jan. 16, 2018]

§ 230.135e Offshore press conferences, meetings with issuer representatives conducted offshore, and press-related materials released offshore.

- (a) For the purposes only of Section 5 of the Act (15 U.S.C. 77e), an issuer that is a foreign private issuer (as defined in § 230.405) or a foreign government issuer, a selling security holder of the securities of such issuers, or their representatives will not be deemed to offer any security for sale by virtue of providing any journalist with access to its press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if:

- (1) The present or proposed offering is not being, or to be, conducted solely in the United States;

Note to paragraph (a)(1):

An offering will be considered not to be made solely in the United States under this paragraph (a)(1) only if there is an intent to make a bona fide offering offshore.

- (2) Access is provided to both U.S. and foreign journalists; and

- (3) Any written press-related materials pertaining to transactions in which any of the securities will be or are being offered in the United States satisfy the requirements of paragraph (b) of this section.

- (b) Any written press-related materials specified in paragraph (a)(3) of this section must:

- (1) State that the written press-related materials are not an offer of securities for sale in the United States, that securities may not be offered or sold in the United States absent registration or an exemption from registration, that any public offering of securities to be made in the United States will be made by means of a prospectus that may be obtained from the issuer or the selling security holder and that will contain detailed information about the company and management, as well as financial statements;

- (2) If the issuer or selling security holder intends to register any part of the present or proposed offering in the United States, include a statement regarding this intention; and

- (3) Not include any purchase order, or coupon that could be returned indicating interest in the offering, as part of, or attached to, the written press-related materials.

- (c) For the purposes of this section, *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

[62 FR 53954, Oct. 17, 1997]

§ 230.136 Definition of certain terms in relation to assessable stock.

- (a) An *offer*, *offer to sell*, or *offer for sale* of securities shall be deemed to be made to the holders of assessable stock of a corporation when such corporation shall give notice of an assessment to the holders of such assessable stock. A *sale* shall be deemed to occur when a stockholder shall pay or agree to pay all or any part of such an assessment.
- (b) The term *transactions by any person other than an issuer, underwriter or dealer* in section 4(1) of the Act shall not be deemed to include the offering or sale of assessable stock, at public auction or otherwise, upon the failure of the holder of such stock to pay an assessment levied thereon by the issuer, where the offer or sale is made for the purpose of realizing the amount of the assessment and any of the proceeds of such sale are to be received by the issuer. However, any person whose functions are limited to acting as auctioneer at such an auction sale shall not be deemed to be an underwriter of the securities offered or sold at the auction sale. Any person who acquires assessable stock at any such public auction or other sale with a view to the distribution thereof shall be deemed to be an underwriter of such assessable stock.
- (c) The term *assessable stock* means stock which is subject to resale by the issuer pursuant to statute or otherwise in the event of a failure of the holder of such stock to pay any assessment levied thereon.

[24 FR 6386, Aug. 8, 1959]

§ 230.137 Publications or distributions of research reports by brokers or dealers that are not participating in an issuer's registered distribution of securities.

Under the following conditions, the terms "offers," "participates," or "participation" in section 2(a)(11) of the Act shall not be deemed to apply to the publication or distribution of research reports with respect to the securities of an issuer which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective:

- (a) The broker or dealer (and any affiliate) that has distributed the report and, if different, the person (and any affiliate) that has published the report have not participated, are not participating, and do not propose to participate in the distribution of the securities that are or will be the subject of the registered offering.
- (b) In connection with the publication or distribution of the research report, the broker or dealer (and any affiliate) that has distributed the report and, if different, the person (and any affiliate) that has published the report are not receiving and have not received consideration directly or indirectly from, and are not acting under any direct or indirect arrangement or understanding with:
 - (1) The issuer of the securities;
 - (2) A selling security holder;
 - (3) Any participant in the distribution of the securities that are or will be the subject of the registration statement; or

- (4) Any other person interested in the securities that are or will be the subject of the registration statement.

Instruction to § 230.137(b). This paragraph (b) does not preclude payment of:

1. The regular price being paid by the broker or dealer for independent research, so long as the conditions of this paragraph (b) are satisfied; or
2. The regular subscription or purchase price for the research report.

- (c) The broker or dealer publishes or distributes the research report in the regular course of its business.

- (d) The issuer is not and during the past three years neither the issuer nor any of its predecessors was:

- (1) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
- (2) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405); or
- (3) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter).

- (e) **Definition of research report.** For purposes of this section, *research report* means a written communication, as defined in Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

[70 FR 44802, Aug. 3, 2005]

§ 230.138 Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing.

- (a) **Registered offerings.** Under the following conditions, a broker's or dealer's publication or distribution of research reports about securities of an issuer shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer for sale or offer to sell a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, even if the broker or dealer is participating or will participate in the registered offering of the issuer's securities:

(1)

- (i) The research report relates solely to the issuer's common stock, or debt securities or preferred stock convertible into its common stock, and the offering involves solely the issuer's non-convertible debt securities or non-convertible, non-participating preferred stock; or
- (ii) The research report relates solely to the issuer's non-convertible debt securities or non-convertible, non-participating preferred stock, and the offering involves solely the issuer's common stock, or debt securities or preferred stock convertible into its common stock.
- (iii) Note: If the issuer has filed a shelf registration statement under § 230.415(a)(1)(x) (Rule 415(a)(1)(x)) or pursuant to General Instruction I.D. of Form S-3, General Instruction I.C. of Form F-3 (§ 239.13 or § 239.33 of this chapter), or pursuant to General Instructions A.2 and B of

Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) with respect to multiple classes of securities, the conditions of paragraph (a)(1) of this section must be satisfied for the offering in which the broker or dealer is participating or will participate.

(2) The issuer as of the date of reliance on this section:

(i)

(A) Is required to file reports, and has filed all periodic reports required during the preceding 12 months (or such shorter time that the issuer was required to file such reports) on Forms 10-K (§ 249.310 of this chapter), 10-Q (§ 249.308a of this chapter), and 20-F (§ 249.220f of this chapter) pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)); or

(B)

(1) Is a registered closed-end investment company; and

(2) Is required to file reports, and has filed all periodic reports required during the preceding 12 months (or such shorter time that the issuer was required to file such reports) on Forms N-CSR (§§ 249.331 and 274.128 of this chapter), N-PORT (§ 274.150 of this chapter), and N-CEN (§§ 249.330 and 274.101 of this chapter) pursuant to Section 30 of the Investment Company Act; or

(ii) Is a foreign private issuer that:

(A) Meets all of the registrant requirements of Form F-3 other than the reporting history provisions of General Instructions I.A.1. and I.A.2(a) of Form F-3;

(B) Either:

(1) Satisfies the public float threshold in General Instruction I.B.1. of Form F-3; or

(2) Is issuing non-convertible securities, other than common equity, and the issuer meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in 17 CFR 239.33 of this chapter); and

(C) Either:

(1) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§ 230.902(b)) and has had them so traded for at least 12 months; or

(2) Has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more.

(3) The broker or dealer publishes or distributes research reports on the types of securities in question in the regular course of its business; and

(4) The issuer is not, and during the past three years neither the issuer nor any of its predecessors was:

(i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405); or

- (iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter).
- (b) **Rule 144A offerings.** If the conditions in paragraph (a) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising, in connection with an offering relying on Rule 144A (§ 230.144A).
- (c) **Regulation S offerings.** If the conditions in paragraph (a) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not:
 - (1) Constitute directed selling efforts as defined in Rule 902(c) (§ 230.902(c)) for offerings under Regulation S (§ 230.901 through § 230.905); or
 - (2) Be inconsistent with the offshore transaction requirement in Rule 902(h) (§ 230.902(h)) for offerings under Regulation S.
- (d) **Definition of research report.** For purposes of this section, research report means a written communication, as defined in Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

[70 FR 44802, Aug. 3, 2005, as amended at 73 FR 967, Jan. 4, 2008; 76 FR 46617, Aug. 3, 2011; 85 FR 33352, June 1, 2020]

§ 230.139 Publications or distributions of research reports by brokers or dealers distributing securities.

- (a) **Registered offerings.** Under the conditions of paragraph (a)(1) or (2) of this section, a broker's or dealer's publication or distribution of a research report about an issuer or any of its securities shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer for sale or offer to sell a security that is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, even if the broker or dealer is participating or will participate in the registered offering of the issuer's securities. For purposes of the Fair Access to Investment Research Act of 2017 [Pub. L. 115-66, 131 Stat. 1196 (2017)], a safe harbor has been established for covered investment fund research reports, and the specific terms of that safe harbor are set forth in § 230.139b.
- (1) **Issuer-specific research reports.**
 - (i) The issuer either:
 - (A)
 - (1) At the later of the time of filing its most recent Form S-3 (§ 239.13 of this chapter) or Form F-3 (§ 239.33 of this chapter) or the time of its most recent amendment to such registration statement for purposes of complying with section 10(a)(3) of the Act or, if no Form S-3 or Form F-3 has been filed, at the date of reliance on this section, meets the registrant requirements of such Form S-3 or Form F-3 and:
 - (i) At such date, meets the minimum float provisions of General Instruction I.B.1 of such Forms; or

- (ii) At the date of reliance on this section, is, or if a registration statement has not been filed, will be, offering non-convertible securities, other than common equity, and meets the requirements for the General Instruction I.B.2. of Form S-3 or Form F-3 (referenced in 17 CFR 239.13 and 17 CFR 239.33 of this chapter); or
 - (iii) At the date of reliance on this section is a well-known seasoned issuer as defined in Rule 405 (§ 230.405), other than a majority-owned subsidiary that is a well-known seasoned issuer by virtue of paragraph (1)(ii) of the definition of well-known seasoned issuer in Rule 405; and
 - (2) As of the date of reliance on this section, has filed all periodic reports required during the preceding 12 months on Forms 10-K (§ 249.310 of this chapter), 10-Q (§ 249.308a of this chapter), and 20-F (§ 249.220f of this chapter) pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)); or
- (B) Is a foreign private issuer that as of the date of reliance on this section:
 - (1) Meets all of the registrant requirements of Form F-3 other than the reporting history provisions of General Instructions I.A.1. and I.A.2(a) of Form F-3;
 - (2) Either:
 - (i) Satisfies the public float threshold in General Instruction I.B.1. of Form F-3; or
 - (ii) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in 17 CFR 239.33 of this chapter); and
 - (3) Either:
 - (i) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§ 230.902(b)) and has had them so traded for at least 12 months; or
 - (ii) Has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more;
- (ii) The issuer is not and during the past three years neither the issuer nor any of its predecessors was:
 - (A) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
 - (B) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405); or
 - (C) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter); and
- (iii) The broker or dealer publishes or distributes research reports in the regular course of its business and such publication or distribution does not represent the initiation of publication of research reports about such issuer or its securities or reinitiation of such publication following discontinuation of publication of such research reports.

(2) **Industry reports.**

- (i) The issuer is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 or satisfies the conditions in paragraph (a)(1)(i)(B) of this section;
- (ii) The condition in paragraph (a)(1)(ii) of this section is satisfied;
- (iii) The research report includes similar information with respect to a substantial number of issuers in the issuer's industry or sub-industry, or contains a comprehensive list of securities currently recommended by the broker or dealer;
- (iv) The analysis regarding the issuer or its securities is given no materially greater space or prominence in the publication than that given to other securities or issuers; and
- (v) The broker or dealer publishes or distributes research reports in the regular course of its business and, at the time of the publication or distribution of the research report, is including similar information about the issuer or its securities in similar reports.

(b) **Rule 144A offerings.** If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising, in connection with an offering relying on Rule 144A (§ 230.144A).

(c) **Regulation S offerings.** If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not:

- (1) Constitute directed selling efforts as defined in Rule 902(c) (§ 230.902(c)) for offerings under Regulation S (§§ 230.901 through 230.905); or
- (2) Be inconsistent with the offshore transaction requirement in Rule 902(h) (§ 230.902(h)) for offerings under Regulation S.

(d) **Definition of research report.** For purposes of this section, *research report* means a written communication, as defined in Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

Instruction to § 230.139.

Projections. A projection constitutes an analysis or information falling within the definition of research report. When a broker or dealer publishes or distributes projections of an issuer's sales or earnings in reliance on paragraph (a)(2) of this section, it must:

1. Have previously published or distributed projections on a regular basis in order to satisfy the "regular course of its business" condition;
2. At the time of publishing or disseminating a research report, be publishing or distributing projections with respect to that issuer; and
3. For purposes of paragraph (a)(2)(iii) of this section, include projections covering the same or similar periods with respect to either a substantial number of issuers in the issuer's industry or sub-industry or substantially all issuers represented in the comprehensive list of securities contained in the research report.

[70 FR 44803, Aug. 3, 2005, as amended at 71 FR 7413, Feb. 13, 2006; 73 FR 967, Jan. 4, 2008; 76 FR 46617, Aug. 3, 2011; 83 FR 64220, Dec. 13, 2018]

§ 230.139a Publications by brokers or dealers distributing asset-backed securities.

The publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to asset-backed securities meeting the criteria of Form SF-3 (§ 239.45 of this chapter) ("SF-3 ABS") shall not be deemed to constitute an offer for sale or offer to sell SF-3 ABS registered or proposed to be registered for purposes of sections 2(a)(10) and 5(c) of the Act (15 U.S.C. 77b(a)(10) and 77e(c)) (the "registered securities"), even if such broker or dealer is or will be a participant in the distribution of the registered securities, if the following conditions are met:

- (a) The broker or dealer shall have previously published or distributed with reasonable regularity information, opinions or recommendations relating to SF-3 ABS backed directly (or, with respect to securitizations of other securities, indirectly) by substantially similar collateral as that directly or indirectly backing SF-3 ABS that is the subject of the information, opinion or recommendation that is proposed to be published or distributed.
- (b) If the registered securities are proposed to be offered, offered or part of an unsold allotment or subscription, the information, opinion or recommendation shall not:
 - (1) Identify the registered securities;
 - (2) Give greater prominence to specific structural or collateral-related attributes of the registered securities than it gives to the same attributes of other asset-backed securities that it mentions; or
 - (3) Contain any *ABS informational and computational material* (as defined in § 229.1101 of this chapter) relating to the registered securities.
- (c) Sufficient information is available from one or more public sources to provide a reasonable basis for the view expressed by the broker or dealer with respect to the asset-backed securities that are the subject of the information, opinion or recommendation.
- (d) If the material published by the broker or dealer identifies asset-backed securities backed directly or indirectly by substantially similar collateral as that directly or indirectly backing the registered securities and specifically recommends that such asset-backed securities be preferred over other asset-backed securities backed by different types of collateral, then the material shall explain in reasonable detail the reasons for such preference.

[70 FR 1615, Jan. 7, 2005, as amended at 70 FR 44804, Aug. 3, 2005; 79 FR 57328, Sept. 24, 2014]

§ 230.139b Publications or distributions of covered investment fund research reports by brokers or dealers distributing securities.

- (a) **Registered offerings.** Under the conditions of paragraph (a)(1) or (2) of this section, the publication or distribution of a covered investment fund research report by a broker or dealer that is not an investment adviser to the covered investment fund and is not an affiliated person of the investment adviser to the covered investment fund shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer for sale or offer to sell a security that is the subject of an offering pursuant to a registration statement of the covered investment fund that is effective, even if the broker or dealer is

participating or may participate in the registered offering of the covered investment fund's securities. This section does not affect the availability of any other exemption or exclusion from sections 2(a)(10) or 5(c) of the Act available to the broker or dealer.

(1) **Issuer-specific research reports.**

(i) At the date of reliance on this section:

(A) The covered investment fund:

(1) Has been subject to the reporting requirements of section 30 of the Investment Company Act of 1940 (the "Investment Company Act") (15 U.S.C. 80a-29) for a period of at least 12 calendar months and has filed in a timely manner all of the reports required, as applicable, to be filed for the immediately preceding 12 calendar months on Forms N-CSR (§§ 249.331 and 274.128 of this chapter), N-PORT (§ 274.150 of this chapter), N-MFP (§ 274.201 of this chapter), and N-CEN (§§ 249.330 and 274.101 of this chapter) pursuant to section 30 of the Investment Company Act; or

(2) If the covered investment fund is not a registered investment company under the Investment Company Act, has been subject to the reporting requirements of section 13 or section 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78m or 78o(d)) for a period of at least 12 calendar months and has filed in a timely manner all of the reports required to be filed for the immediately preceding 12 calendar months on Forms 10-K (§ 249.310 of this chapter) and 10-Q (§ 249.308a of this chapter), or 20-F (§ 249.220f of this chapter) pursuant to section 13 or section 15(d) of the Exchange Act; and

(B) At the time of the broker's or dealer's initial publication or distribution of a research report on the covered investment fund (or reinitiation thereof), and at least quarterly thereafter;

(1) If the covered investment fund is of the type defined in paragraph (c)(2)(i) of this section, the aggregate market value of voting and non-voting common equity held by affiliates and non-affiliates equals or exceeds the aggregate market value specified in General Instruction I.B.1 of Form S-3 (§ 239.13 of this chapter);

(2) If the covered investment fund is of the type defined in paragraph (c)(2)(ii) of this section, the aggregate market value of voting and non-voting common equity held by non-affiliates equals or exceeds the aggregate market value specified in General Instruction I.B.1 of Form S-3 (§ 239.13 of this chapter); or

(3) If the covered investment fund is a registered open-end investment company (other than an exchange-traded fund) its net asset value (inclusive of shares held by affiliates and non-affiliates) equals or exceeds the aggregate market value specified in General Instruction I.B.1 of Form S-3 (§ 239.13 of this chapter); and

(ii) The broker or dealer publishes or distributes research reports in the regular course of its business and, in the case of a research report regarding a covered investment fund that does not have a class of securities in substantially continuous distribution, such publication or distribution does not represent the initiation of publication of research reports about such covered investment fund or its securities or reinitiation of such publication following discontinuation of publication of such research reports.

(2) **Industry reports.**

- (i) The covered investment fund is subject to the reporting requirements of section 30 of the Investment Company Act or, if the covered investment fund is not a registered investment company under the Investment Company Act, is subject to the reporting requirements of section 13 or section 15(d) of the Exchange Act;
- (ii) The covered investment fund research report:
 - (A) Includes similar information with respect to a substantial number of covered investment fund issuers of the issuer's type (e.g., money market fund, bond fund, balanced fund, etc.), or investment focus (e.g., primarily invested in the same industry or sub-industry, or the same country or geographic region); or
 - (B) Contains a comprehensive list of covered investment fund securities currently recommended by the broker or dealer (other than securities of a covered investment fund that is an affiliate of the broker or dealer, or for which the broker or dealer serves as investment adviser (or for which the broker or dealer is an affiliated person of the investment adviser));
- (iii) The analysis regarding the covered investment fund issuer or its securities is given no materially greater space or prominence in the publication than that given to other covered investment fund issuers or securities; and
- (iv) The broker or dealer publishes or distributes research reports in the regular course of its business and, at the time of the publication or distribution of the research report (in the case of a research report regarding a covered investment fund that does not have a class of securities in substantially continuous distribution), is including similar information about the issuer or its securities in similar reports.

(3) **Disclosure of standardized performance.** In the case of a research report about a covered investment fund that is a registered open-end management investment company or a trust account (or series or class thereof), any quotation of the issuer's performance must be presented in accordance with the conditions of paragraphs (d), (e), and (g) of § 230.482. In the case of a research report about a covered investment fund that is a registered closed-end investment company, any quotation of the issuer's performance must be presented in a manner that is in accordance with instructions to item 4.1(g) of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), provided, however, that other historical measures of performance may also be included if any other measurement is set out with no greater prominence than the measurement that is in accordance with the instructions to item 4.1(g) of Form N-2.

(b) **Self-regulatory organization rules.** A self-regulatory organization shall not maintain or enforce any rule that would prohibit the ability of a member to publish or distribute a covered investment fund research report solely because the member is also participating in a registered offering or other distribution of any securities of such covered investment fund; or to participate in a registered offering or other distribution of securities of a covered investment fund solely because the member has published or distributed a covered investment fund research report about such covered investment fund or its securities. For purposes of section 19(b) of the Exchange Act (15 U.S.C. 78s(b)), this paragraph (b) shall be deemed a rule under that Act.

(c) **Definitions.** For purposes of this section:

(1) **Affiliated person** has the meaning given the term in section 2(a) of the Investment Company Act.

(2) **Covered investment fund** means:

- (i) An investment company (or a series or class thereof) registered under, or that has filed an election to be treated as a business development company under, the Investment Company Act and that has filed a registration statement under the Act for the public offering of a class of its securities, which registration statement has been declared effective by the Commission; or
- (ii) A trust or other person:
 - (A) Issuing securities in an offering registered under the Act and which class of securities is listed for trading on a national securities exchange;
 - (B) The assets of which consist primarily of commodities, currencies, or derivative instruments that reference commodities or currencies, or interests in the foregoing; and
 - (C) That provides in its registration statement under the Act that a class of its securities are purchased or redeemed, subject to conditions or limitations, for a ratable share of its assets.

(3) **Covered investment fund research report** means a research report published or distributed by a broker or dealer about a covered investment fund or any securities issued by the covered investment fund, but does not include a research report to the extent that the research report is published or distributed by the covered investment fund or any affiliate of the covered investment fund, or any research report published or distributed by any broker or dealer that is an investment adviser (or any affiliated person of an investment adviser) for the covered investment fund.

(4) **Exchange-traded fund** has the meaning given the term in General Instruction A to Form N-1A (§§ 239.15A and 274.11A of this chapter).

(5) **Investment adviser** has the meaning given the term in section 2(a) of the Investment Company Act.

(6) **Research report** means a written communication, as defined in § 230.405 that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

[83 FR 64220, 64222, Dec. 13, 2018]

§ 230.140 Definition of “distribution” in section 2(11) for certain transactions.

A person, the chief part of whose business consists of the purchase of the securities of one issuer, or of two or more affiliated issuers, and the sale of its own securities, including the levying of assessments on its assessable stock and the resale of such stock upon the failure of the holder thereof to pay any assessment levied thereon, to furnish the proceeds with which to acquire the securities of such issuer or affiliated issuers, is to be regarded as engaged in the distribution of the securities of such issuer or affiliated issuers within the meaning of section 2(11) of the Act.

[24 FR 6386, Aug. 8, 1959]

§ 230.141 Definition of “commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commissions” in section 2(11), for certain transactions.

- (a) The term *commission* in section 2(11) of the Act shall include such remuneration, commonly known as a spread, as may be received by a distributor or dealer as a consequence of reselling securities bought from an underwriter or dealer at a price below the offering price of such securities, where such resales afford the distributor or dealer a margin of profit not in excess of what is usual and customary in such transactions.
- (b) The term *commission from an underwriter or dealer* in section 2(11) of the Act shall include commissions paid by an underwriter or dealer directly or indirectly controlling or controlled by, or under direct or indirect common control with the issuer.
- (c) The term *usual and customary distributors' or sellers' commission* in section 2(11) of the Act shall mean a commission or remuneration, commonly known as a spread, paid to or received by any person selling securities either for his own account or for the account of others, which is not in excess of the amount usual and customary in the distribution and sale of issues of similar type and size; and not in excess of the amount allowed to other persons, if any, for comparable service in the distribution of the particular issue; but such term shall not include amounts paid to any person whose function is the management of the distribution of all or a substantial part of the particular issue, or who performs the functions normally performed by an underwriter or underwriting syndicate.

[2 FR 1075, May 26, 1937]

§ 230.142 Definition of “participates” and “participation,” as used in section 2(11), in relation to certain transactions.

- (a) The terms *participates* and *participation* in section 2(11) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b) shall not include the interest of a person
 - (1) who is not in privity of contract with the issuer nor directly or indirectly controlling, controlled by, or under common control with, the issuer, and
 - (2) who has no association with any principal underwriter of the securities being distributed, and
 - (3) whose function in the distribution is confined to an undertaking to purchase all or some specified proportion of the securities remaining unsold after the lapse of some specified period of time, and
 - (4) who purchases such securities for investment and not with a view to distribution.
- (b) As used in this section:
 - (1) The term *issuer* shall have the meaning defined in section 2(4) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b) and in the last sentence of section 2(11).
 - (2) The term *association* shall include a relationship between two persons under which one:
 - (i) Is directly or indirectly controlling, controlled by, or under common control with, the other, or
 - (ii) Has, in common with the other, one or more partners, officers, directors, trustees, branch managers, or other persons occupying a similar status or performing similar functions, or

(iii) Has a participation, direct or indirect, in the profits of the other, or has a financial stake, by debtor-creditor relationship, stock ownership, contract or otherwise, in the income or business of the other.

(3) The term *principal underwriter* shall have the meaning defined in § 230.405.

[3 FR 3015, Dec. 16, 1938]

Cross Reference:

For interpretative release applicable to § 230.142, see No. 1862 in tabulation, part 231, of this chapter.

§ 230.143 Definition of “has purchased”, “sells for”, “participates”, and “participation”, as used in section 2(11), in relation to certain transactions of foreign governments for war purposes.

The terms *has purchased*, *sells for*, *participates*, and *participation*, in section 2(11) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b), shall not be deemed to apply to any action of a foreign government in acquiring, for war purposes and by or in anticipation of the exercise of war powers, from any person subject to its jurisdiction securities of a person organized under the laws of the United States or any State or Territory, or in disposing of such securities with a view to their distribution by underwriters in the United States, notwithstanding the fact that the price to be paid to such foreign government upon the disposition of such securities by it may be measured by or may be in direct or indirect relation to such price as may be realized by the underwriters.

[6 FR 2052, Apr. 23, 1941]

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

Preliminary Note:

Certain basic principles are essential to an understanding of the registration requirements in the Securities Act of 1933 (the Act or the Securities Act) and the purposes underlying Rule 144:

1. If any person sells a non-exempt security to any other person, the sale must be registered unless an exemption can be found for the transaction.
2. Section 4(1) of the Securities Act provides one such exemption for a transaction “by a person other than an issuer, underwriter, or dealer.” Therefore, an understanding of the term “underwriter” is important in determining whether or not the Section 4(1) exemption from registration is available for the sale of the securities.

The term “underwriter” is broadly defined in Section 2(a)(11) of the Securities Act to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates, or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The interpretation of this definition traditionally has focused on the words “with a view to” in the phrase “purchased from an issuer with a view to * * * distribution.” An investment banking firm which arranges with an issuer for the public sale of its securities is clearly an “underwriter” under that section. However, individual investors who are not professionals in the securities business also may be “underwriters” if they act as links in a chain of transactions through which securities move from an issuer to the public.

Since it is difficult to ascertain the mental state of the purchaser at the time of an acquisition of securities, prior to and since the adoption of Rule 144, subsequent acts and circumstances have been considered to determine whether the purchaser took the securities “with a view to distribution” at the time of the acquisition. Emphasis has been placed on factors such as the length of time the person held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors alone has led to uncertainty in the application of the registration provisions of the Act.

The Commission adopted Rule 144 to establish specific criteria for determining whether a person is not engaged in a distribution. Rule 144 creates a safe harbor from the Section 2(a)(11) definition of “underwriter.” A person satisfying the applicable conditions of the Rule 144 safe harbor is deemed not to be engaged in a distribution of the securities and therefore not an underwriter of the securities for purposes of Section 2(a)(11). Therefore, such a person is deemed not to be an underwriter when determining whether a sale is eligible for the Section 4(1) exemption for “transactions by any person other than an issuer, underwriter, or dealer.” If a sale of securities complies with all of the applicable conditions of Rule 144:

1. Any affiliate or other person who sells restricted securities will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction;
2. Any person who sells restricted or other securities on behalf of an affiliate of the issuer will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction; and
3. The purchaser in such transaction will receive securities that are not restricted securities.

Rule 144 is not an exclusive safe harbor. A person who does not meet all of the applicable conditions of Rule 144 still may claim any other available exemption under the Act for the sale of the securities. The Rule 144 safe harbor is not available to any person with respect to any transaction or series of transactions that, although in technical compliance with Rule 144, is part of a plan or scheme to evade the registration requirements of the Act.

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

- (1) An *affiliate* of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.
- (2) The term *person* when used with reference to a person for whose account securities are to be sold in reliance upon this section includes, in addition to such person, all of the following persons:
 - (i) Any relative or spouse of such person, or any relative of such spouse, any one of whom has the same home as such person;
 - (ii) Any trust or estate in which such person or any of the persons specified in paragraph (a)(2)(i) of this section collectively own 10 percent or more of the total beneficial interest or of which any of such persons serve as trustee, executor or in any similar capacity; and
 - (iii) Any corporation or other organization (other than the issuer) in which such person or any of the persons specified in paragraph (a)(2)(i) of this section are the beneficial owners collectively of 10 percent or more of any class of equity securities or 10 percent or more of the equity interest.
- (3) The term *restricted securities* means:

- (i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering;
- (ii) Securities acquired from the issuer that are subject to the resale limitations of § 230.502(d) under Regulation D or § 230.701(c);
- (iii) Securities acquired in a transaction or chain of transactions meeting the requirements of § 230.144A;
- (iv) Securities acquired from the issuer in a transaction subject to the conditions of Regulation CE (§ 230.1001);
- (v) Equity securities of domestic issuers acquired in a transaction or chain of transactions subject to the conditions of § 230.901 or § 230.903 under Regulation S (§ 230.901 through § 230.905, and Preliminary Notes);
- (vi) Securities acquired in a transaction made under § 230.801 to the same extent and proportion that the securities held by the security holder of the class with respect to which the rights offering was made were, as of the record date for the rights offering, "restricted securities" within the meaning of this paragraph (a)(3);
- (vii) Securities acquired in a transaction made under § 230.802 to the same extent and proportion that the securities that were tendered or exchanged in the exchange offer or business combination were "restricted securities" within the meaning of this paragraph (a)(3); and
- (viii) Securities acquired from the issuer in a transaction subject to an exemption under section 4(5) (15 U.S.C. 77d(5)) of the Act.

(4) The term *debt securities* means:

- (i) Any security other than an equity security as defined in § 230.405;
- (ii) Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; and
- (iii) Asset-backed securities, as defined in § 229.1101 of this chapter.

(b) **Conditions to be met.** Subject to paragraph (i) of this section, the following conditions must be met:

(1) **Non-affiliates.**

- (i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (the Exchange Act), any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of paragraphs (c)(1) and (d) of this section are met. The requirements of paragraph (c)(1) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of one year has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer.

- (ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if the condition of paragraph (d) of this section is met.
- (2) ***Affiliates or persons selling on behalf of affiliates.*** Any affiliate of the issuer, or any person who was an affiliate at any time during the 90 days immediately before the sale, who sells restricted securities, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, or any person who sells restricted or any other securities for the account of a person who was an affiliate at any time during the 90 days immediately before the sale, shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of this section are met.
- (c) ***Current public information.*** Adequate current public information with respect to the issuer of the securities must be available. Such information will be deemed to be available only if the applicable condition set forth in this paragraph is met:
 - (1) ***Reporting issuers.*** The issuer is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and has:
 - (i) Filed all required reports under section 13 or 15(d) of the Exchange Act, as applicable, during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§ 249.308 of this chapter); and
 - (ii) Submitted electronically every Interactive Data File (§ 232.11 of this chapter) required to be submitted pursuant to § 232.405 of this chapter, during the 12 months preceding such sale (or for such shorter period that the issuer was required to submit such files); or
 - (2) ***Non-reporting issuers.*** If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, there is publicly available the information concerning the issuer specified in paragraphs (b)(5)(i)(A) to (N), inclusive, and paragraph (b)(5)(i)(P) of § 240.15c2-11 of this chapter, or, if the issuer is an insurance company, the information specified in section 12(g)(2)(G)(i) of the Exchange Act (15 U.S.C. 78l(g)(2)(G)(i)).

Note to § 230.144(c):

With respect to paragraph (c)(1), the person can rely upon:

1. A statement in whichever is the most recent report, quarterly or annual, required to be filed and filed by the issuer that such issuer has:
 - a. Filed all reports required under section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§ 249.308 of this chapter), and has been subject to such filing requirements for the past 90 days; and
 - b. Submitted electronically every Interactive Data File (§ 232.11 of this chapter) required to be submitted pursuant to § 232.405 of this chapter, during the preceding 12 months (or for such shorter period that the issuer was required to submit such files); or

2. A written statement from the issuer that it has complied with such reporting or submission requirements.
3. Neither type of statement may be relied upon, however, if the person knows or has reason to believe that the issuer has not complied with such requirements.

(d) **Holding period for restricted securities.** If the securities sold are restricted securities, the following provisions apply:

(1) **General rule.**

- (i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of six months must elapse between the later of the date of the acquisition of the securities from the issuer, or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.
- (ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer, or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.
- (iii) If the acquiror takes the securities by purchase, the holding period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer.

(2) **Promissory notes, other obligations or installment contracts.** Giving the issuer or affiliate of the issuer from whom the securities were purchased a promissory note or other obligation to pay the purchase price, or entering into an installment purchase contract with such seller, shall not be deemed full payment of the purchase price unless the promissory note, obligation or contract:

- (i) Provides for full recourse against the purchaser of the securities;
- (ii) Is secured by collateral, other than the securities purchased, having a fair market value at least equal to the purchase price of the securities purchased; and
- (iii) Shall have been discharged by payment in full prior to the sale of the securities.

(3) **Determination of holding period.** The following provisions shall apply for the purpose of determining the period securities have been held:

- (i) **Stock dividends, splits and recapitalizations.** Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization.

- (ii) **Conversions and exchanges.** If the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms.

Note to § 230.144(d)(3)(ii):

If the surrendered securities originally did not provide for cashless conversion or exchange by their terms and the holder provided consideration, other than solely securities of the same issuer, in connection with the amendment of the surrendered securities to permit cashless conversion or exchange, then the newly acquired securities shall be deemed to have been acquired at the same time as such amendment to the surrendered securities, so long as, in the conversion or exchange, the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer.

- (iii) **Contingent issuance of securities.** Securities acquired as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer shall be deemed to have been acquired at the time of such sale if the issuer or affiliate was then committed to issue the securities subject only to conditions other than the payment of further consideration for such securities. An agreement entered into in connection with any such purchase to remain in the employment of, or not to compete with, the issuer or affiliate or the rendering of services pursuant to such agreement shall not be deemed to be the payment of further consideration for such securities.
- (iv) **Pledged securities.** Securities which are bona-fide pledged by an affiliate of the issuer when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of purchase.
- (v) **Gifts of securities.** Securities acquired from an affiliate of the issuer by gift shall be deemed to have been acquired by the donee when they were acquired by the donor.
- (vi) **Trusts.** Where a trust settlor is an affiliate of the issuer, securities acquired from the settlor by the trust, or acquired from the trust by the beneficiaries thereof, shall be deemed to have been acquired when such securities were acquired by the settlor.
- (vii) **Estates.** Where a deceased person was an affiliate of the issuer, securities held by the estate of such person or acquired from such estate by the estate beneficiaries shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

Note to § 230.144(d)(3)(vi):

While there is no holding period or amount limitation for estates and estate beneficiaries which are not affiliates of the issuer, paragraphs (c) and (h) of this section apply to securities sold by such persons in reliance upon this section.

- (viii) **Rule 145(a) transactions.** The holding period for securities acquired in a transaction specified in § 230.145(a) shall be deemed to commence on the date the securities were acquired by the purchaser in such transaction, except as otherwise provided in paragraphs (d)(3)(ii) and (ix) of this section.
- (ix) **Holding company formations.** Securities acquired from the issuer in a transaction effected solely for the purpose of forming a holding company shall be deemed to have been acquired at the same time as the securities of the predecessor issuer exchanged in the holding company formation where:
- (A) The newly formed holding company's securities were issued solely in exchange for the securities of the predecessor company as part of a reorganization of the predecessor company into a holding company structure;
 - (B) Holders received securities of the same class evidencing the same proportional interest in the holding company as they held in the predecessor, and the rights and interests of the holders of such securities are substantially the same as those they possessed as holders of the predecessor company's securities; and
 - (C) Immediately following the transaction, the holding company has no significant assets other than securities of the predecessor company and its existing subsidiaries and has substantially the same assets and liabilities on a consolidated basis as the predecessor company had before the transaction.
- (x) **Cashless exercise of options and warrants.** If the securities sold were acquired from the issuer solely upon cashless exercise of options or warrants issued by the issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the exercised options or warrants, even if the options or warrants exercised originally did not provide for cashless exercise by their terms.

Note 1 to § 230.144(d)(3)(x):

If the options or warrants originally did not provide for cashless exercise by their terms and the holder provided consideration, other than solely securities of the same issuer, in connection with the amendment of the options or warrants to permit cashless exercise, then the newly acquired securities shall be deemed to have been acquired at the same time as such amendment to the options or warrants so long as the exercise itself was cashless.

Note 2 to § 230.144(d)(3)(x):

If the options or warrants are not purchased for cash or property and do not create any investment risk to the holder, as in the case of employee stock options, the newly acquired securities shall be deemed to have been acquired at the time the options or warrants are exercised, so long as the full purchase price or other consideration for the newly acquired securities has been paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer at the time of exercise.

- (e) **Limitation on amount of securities sold.** Except as hereinafter provided, the amount of securities sold for the account of an affiliate of the issuer in reliance upon this section shall be determined as follows:

- (1) If any securities are sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, the amount of securities sold, together with all sales of securities of the same class sold for the account of such person within the preceding three months, shall not exceed the greatest of:
 - (i) One percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or
 - (ii) The average weekly reported volume of trading in such securities on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the four calendar weeks preceding the filing of notice required by paragraph (h), or if no such notice is required the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker, or
 - (iii) The average weekly volume of trading in such securities reported pursuant to an *effective transaction reporting plan* or an *effective national market system plan* as those terms are defined in § 242.600 of this chapter during the four-week period specified in paragraph (e)(1)(ii) of this section.
- (2) If the securities sold are debt securities, then the amount of debt securities sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, shall not exceed the greater of the limitation set forth in paragraph (e)(1) of this section or, together with all sales of securities of the same tranche (or class when the securities are non-participatory preferred stock) sold for the account of such person within the preceding three months, ten percent of the principal amount of the tranche (or class when the securities are non-participatory preferred stock) attributable to the securities sold.
- (3) **Determination of amount.** For the purpose of determining the amount of securities specified in paragraph (e)(1) of this section and, as applicable, paragraph (e)(2) of this section, the following provisions shall apply:
 - (i) Where both convertible securities and securities of the class into which they are convertible are sold, the amount of convertible securities sold shall be deemed to be the amount of securities of the class into which they are convertible for the purpose of determining the aggregate amount of securities of both classes sold;
 - (ii) The amount of securities sold for the account of a pledgee of those securities, or for the account of a purchaser of the pledged securities, during any period of three months within six months (or within one year if the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act) after a default in the obligation secured by the pledge, and the amount of securities sold during the same three-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

Note to § 230.144(e)(3)(ii):

Sales by a pledgee of securities pledged by a borrower will not be aggregated under paragraph (e)(3)(ii) with sales of the securities of the same issuer by other pledgees of such borrower in the absence of concerted action by such pledgees.

- (iii) The amount of securities sold for the account of a donee of those securities during any three-month period within six months (or within one year if the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act) after the donation, and the amount of securities sold during the same three-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;
- (iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any three-month period within six months (or within one year if the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act) after the acquisition of the securities by the trust, and the amount of securities sold during the same three-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;
- (v) The amount of securities sold for the account of the estate of a deceased person, or for the account of a beneficiary of such estate, during any three-month period and the amount of securities sold during the same three-month period for the account of the deceased person prior to his death shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable: *Provided*, that no limitation on amount shall apply if the estate or beneficiary of the estate is not an affiliate of the issuer;
- (vi) When two or more affiliates or other persons agree to act in concert for the purpose of selling securities of an issuer, all securities of the same class sold for the account of all such persons during any three-month period shall be aggregated for the purpose of determining the limitation on the amount of securities sold;
- (vii) The following sales of securities need not be included in determining the amount of securities to be sold in reliance upon this section:
 - (A) Securities sold pursuant to an effective registration statement under the Act;
 - (B) Securities sold pursuant to an exemption provided by Regulation A (§ 230.251 through § 230.263) under the Act;
 - (C) Securities sold in a transaction exempt pursuant to section 4 of the Act (15 U.S.C. 77d) and not involving any public offering; and
 - (D) Securities sold offshore pursuant to Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) under the Act.

(f) ***Manner of sale.***

- (1) The securities shall be sold in one of the following manners:
 - (i) ***Brokers' transactions*** within the meaning of section 4(4) of the Act;
 - (ii) Transactions directly with a *market maker*, as that term is defined in section 3(a)(38) of the Exchange Act; or
 - (iii) ***Riskless principal transactions*** where:

- (A) The offsetting trades must be executed at the same price (exclusive of an explicitly disclosed markup or markdown, commission equivalent, or other fee);
- (B) The transaction is permitted to be reported as riskless under the rules of a self-regulatory organization; and
- (C) The requirements of paragraphs (g)(2)(applicable to any markup or markdown, commission equivalent, or other fee), (g)(3), and (g)(4) of this section are met.

Note to § 230.144(f)(1):

For purposes of this paragraph, a *riskless principal transaction* means a principal transaction where, after having received from a customer an order to buy, a broker or dealer purchases the security as principal in the market to satisfy the order to buy or, after having received from a customer an order to sell, sells the security as principal to the market to satisfy the order to sell.

(2) The person selling the securities shall not:

- (i) Solicit or arrange for the solicitation of orders to buy the securities in anticipation of or in connection with such transaction, or
- (ii) Make any payment in connection with the offer or sale of the securities to any person other than the broker or dealer who executes the order to sell the securities.

(3) Paragraph (f) of this section shall not apply to:

- (i) Securities sold for the account of the estate of a deceased person or for the account of a beneficiary of such estate provided the estate or estate beneficiary is not an affiliate of the issuer; or
- (ii) Debt securities.

(g) **Brokers' transactions.** The term *brokers' transactions* in section 4(4) of the Act shall for the purposes of this rule be deemed to include transactions by a broker in which such broker:

- (1) Does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold;
- (2) Receives no more than the usual and customary broker's commission;
- (3) Neither solicits nor arranges for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transaction; *Provided*, that the foregoing shall not preclude:
 - (i) Inquiries by the broker of other brokers or dealers who have indicated an interest in the securities within the preceding 60 days;
 - (ii) Inquiries by the broker of his customers who have indicated an unsolicited bona fide interest in the securities within the preceding 10 business days;
 - (iii) The publication by the broker of bid and ask quotations for the security in an inter-dealer quotation system provided that such quotations are incident to the maintenance of a bona fide inter-dealer market for the security for the broker's own account and that the broker has

published bona fide bid and ask quotations for the security in an inter-dealer quotation system on each of at least twelve days within the preceding thirty calendar days with no more than four business days in succession without such two-way quotations; or

- (iv) The publication by the broker of bid and ask quotations for the security in an alternative trading system, as defined in § 242.300 of this chapter, provided that the broker has published bona fide bid and ask quotations for the security in the alternative trading system on each of the last twelve business days; and

Note to § 230.144(g)(3)(ii):

The broker should obtain and retain in his files written evidence of indications of bona fide unsolicited interest by his customers in the securities at the time such indications are received.

- (4) After reasonable inquiry is not aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is a part of a distribution of securities of the issuer. Without limiting the foregoing, the broker shall be deemed to be aware of any facts or statements contained in the notice required by paragraph (h) of this section.

Notes:

(i) The broker, for his own protection, should obtain and retain in his files a copy of the notice required by paragraph (h) of this section.

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

(a) The length of time the securities have been held by the person for whose account they are to be sold. If practicable, the inquiry should include physical inspection of the securities;

(b) The nature of the transaction in which the securities were acquired by such person;

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

(d) Whether such person intends to sell additional securities of the same class through any other means;

(e) Whether such person has solicited or made any arrangement for the solicitation of buy orders in connection with the proposed sale of securities;

(f) Whether such person has made any payment to any other person in connection with the proposed sale of the securities; and

(g) The number of shares or other units of the class outstanding, or the relevant trading volume.

(h) *Notice of proposed sale.*

- (1) If the amount of securities to be sold in reliance upon this rule during any period of three months exceeds 5,000 shares or other units or has an aggregate sale price in excess of \$50,000, three copies of a notice on Form 144 (§ 239.144 of this chapter) shall be filed with the Commission. If such securities are admitted to trading on any national securities exchange, one copy of such notice also shall be transmitted to the principal exchange on which such securities are admitted.
- (2) The Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon this rule or the execution directly with a market maker of such a sale. Neither the filing of such notice nor the failure of the Commission to comment on such notice shall be deemed to preclude the Commission from taking any action that it deems necessary or appropriate with respect to the sale of the securities referred to in such notice. The person filing the notice required by this paragraph shall have a bona fide intention to sell the securities referred to in the notice within a reasonable time after the filing of such notice.

(i) *Unavailability to securities of issuers with no or nominal operations and no or nominal non-cash assets.*

- (1) This section is not available for the resale of securities initially issued by an issuer defined below:
 - (i) An issuer, other than a business combination related shell company, as defined in § 230.405, or an asset-backed issuer, as defined in Item 1101(b) of Regulation AB (§ 229.1101(b) of this chapter), that has:
 - (A) No or nominal operations; and
 - (B) Either:
 - (1) No or nominal assets;
 - (2) Assets consisting solely of cash and cash equivalents; or
 - (3) Assets consisting of any amount of cash and cash equivalents and nominal other assets; or
 - (ii) An issuer that has been at any time previously an issuer described in paragraph (i)(1)(i).
- (2) Notwithstanding paragraph (i)(1), if the issuer of the securities previously had been an issuer described in paragraph (i)(1)(i) but has ceased to be an issuer described in paragraph (i)(1)(i); is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act; has filed all reports and other materials required to be filed by section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and materials), other than Form 8-K reports (§ 249.308 of this chapter); and has filed current "Form 10 information" with the Commission reflecting its status as an entity that is no longer an issuer described in paragraph (i)(1)(i), then those securities may be sold subject to the requirements of this section after one year has elapsed from the date that the issuer filed "Form 10 information" with the Commission.
- (3) The term "Form 10 information" means the information that is required by Form 10 or Form 20-F (§ 249.210 or § 249.220f of this chapter), as applicable to the issuer of the securities, to register under the Exchange Act each class of securities being sold under this rule. The issuer may provide the Form 10 information in any filing of the issuer with the Commission. The Form 10 information is deemed filed when the initial filing is made with the Commission.

[37 FR 596, Jan. 14, 1972]

Editorial Note: For FEDERAL REGISTER citations affecting § 230.144, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

§ 230.144A Private resales of securities to institutions.

Preliminary Notes:

1. This section relates solely to the application of section 5 of the Act and not to antifraud or other provisions of the federal securities laws.
2. Attempted compliance with this section does not act as an exclusive election; any seller hereunder may also claim the availability of any other applicable exemption from the registration requirements of the Act.
3. In view of the objective of this section and the policies underlying the Act, this section is not available with respect to any transaction or series of transactions that, although in technical compliance with this section, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.
4. Nothing in this section obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (the *Exchange Act*), whenever such requirements are applicable.
5. Nothing in this section obviates the need for any person to comply with any applicable state law relating to the offer or sale of securities.
6. Securities acquired in a transaction made pursuant to the provisions of this section are deemed to be *restricted securities* within the meaning of § 230.144(a)(3) of this chapter.
7. The fact that purchasers of securities from the issuer thereof may purchase such securities with a view to reselling such securities pursuant to this section will not affect the availability to such issuer of an exemption under section 4(a)(2) of the Act, or Regulation D under the Act, from the registration requirements of the Act.

(a) Definitions.

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

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

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

Note:

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

- (B) Any *investment company* registered under the Investment Company Act or any *business development company* as defined in section 2(a)(48) of that Act;
- (C) Any *Small Business Investment Company* licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958 or any *Rural Business Investment Company* as defined in section 384A of the Consolidated Farm and Rural Development Act;
- (D) Any *plan* established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees;
- (E) Any *employee benefit plan* within the meaning of title I of the Employee Retirement Income Security Act of 1974;
- (F) Any trust fund whose trustee is a bank or trust company and whose participants are exclusively plans of the types identified in paragraph (a)(1)(i) (D) or (E) of this section, except trust funds that include as participants individual retirement accounts or H.R. 10 plans.
- (G) Any *business development company* as defined in section 202(a)(22) of the Investment Advisers Act of 1940;
- (H) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation (other than a bank as defined in section 3(a)(2) of the Act or a savings and loan association or other institution referenced in section 3(a)(5)(A) of the Act or a foreign bank or savings and loan association or equivalent institution), partnership, limited liability company, or Massachusetts or similar business trust;
- (I) Any *investment adviser* registered under the Investment Advisers Act; and
- (J) Any institutional accredited investor, as defined in rule 501(a) under the Act (17 CFR 230.501(a)), of a type not listed in paragraphs (a)(1)(i)(A) through (I) or paragraphs (a)(1)(ii) through (vi).

Note 1 to paragraph (a)(1)(i)(J):

An entity seeking qualified institutional buyer status under Rule 144A(a)(1)(i)(J) may be formed for the purpose of acquiring the securities being offered under this section.

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

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

Note:

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

- (iv) Any investment company registered under the Investment Company Act, acting for its own account or for the accounts of other qualified institutional buyers, that is part of a family of investment companies which own in the aggregate at least \$100 million in securities of issuers, other than issuers that are affiliated with the investment company or are part of such family of investment companies. *Family of investment companies* means any two or more investment companies registered under the Investment Company Act, except for a unit investment trust whose assets consist solely of shares of one or more registered investment companies, that have the same investment adviser (or, in the case of unit investment trusts, the same depositor), Provided That, for purposes of this section:
 - (A) Each series of a series company (as defined in Rule 18f-2 under the Investment Company Act [17 CFR 270.18f-2]) shall be deemed to be a separate investment company; and
 - (B) Investment companies shall be deemed to have the same adviser (or depositor) if their advisers (or depositors) are majority-owned subsidiaries of the same parent, or if one investment company's adviser (or depositor) is a majority-owned subsidiary of the other investment company's adviser (or depositor);
 - (v) Any entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of other qualified institutional buyers; and
 - (vi) Any *bank* as defined in section 3(a)(2) of the Act, any savings and loan association or other institution as referenced in section 3(a)(5)(A) of the Act, or any foreign bank or savings and loan association or equivalent institution, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with it and that has an audited net worth of at least \$25 million as demonstrated in its latest annual financial statements, as of a date not more than 16 months preceding the date of sale under the Rule in the case of a U.S. bank or savings and loan association, and not more than 18 months preceding such date of sale for a foreign bank or savings and loan association or equivalent institution.
- (2) In determining the aggregate amount of securities owned and invested on a discretionary basis by an entity, the following instruments and interests shall be excluded: bank deposit notes and certificates of deposit; loan participations; repurchase agreements; securities owned but subject to a repurchase agreement; and currency, interest rate and commodity swaps.
 - (3) The aggregate value of securities owned and invested on a discretionary basis by an entity shall be the cost of such securities, except where the entity reports its securities holdings in its financial statements on the basis of their market value, and no current information with respect to the cost of those securities has been published. In the latter event, the securities may be valued at market for purposes of this section.

- (4) In determining the aggregate amount of securities owned by an entity and invested on a discretionary basis, securities owned by subsidiaries of the entity that are consolidated with the entity in its financial statements prepared in accordance with generally accepted accounting principles may be included if the investments of such subsidiaries are managed under the direction of the entity, except that, unless the entity is a reporting company under section 13 or 15(d) of the Exchange Act, securities owned by such subsidiaries may not be included if the entity itself is a majority-owned subsidiary that would be included in the consolidated financial statements of another enterprise.
- (5) For purposes of this section, *riskless principal transaction* means a transaction in which a dealer buys a security from any person and makes a simultaneous offsetting sale of such security to a qualified institutional buyer, including another dealer acting as riskless principal for a qualified institutional buyer.
- (6) For purposes of this section, *effective conversion premium* means the amount, expressed as a percentage of the security's conversion value, by which the price at issuance of a convertible security exceeds its conversion value.
- (7) For purposes of this section, *effective exercise premium* means the amount, expressed as a percentage of the warrant's exercise value, by which the sum of the price at issuance and the exercise price of a warrant exceeds its exercise value.
- (b) **Sales by persons other than issuers or dealers.** Any person, other than the issuer or a dealer, who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter of such securities within the meaning of sections 2(a)(11) and 4(a)(1) of the Act.
- (c) **Sales by dealers.** Any dealer who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be a participant in a distribution of such securities within the meaning of section 4(a)(3)(C) of the Act and not to be an underwriter of such securities within the meaning of section 2(a)(11) of the Act, and such securities shall be deemed not to have been offered to the public within the meaning of section 4(a)(3)(A) of the Act.
- (d) **Conditions to be met.** To qualify for exemption under this section, an offer or sale must meet the following conditions:
 - (1) The securities are sold only to a qualified institutional buyer or to a purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer. In determining whether a prospective purchaser is a qualified institutional buyer, the seller and any person acting on its behalf shall be entitled to rely upon the following non-exclusive methods of establishing the prospective purchaser's ownership and discretionary investments of securities:
 - (i) The prospective purchaser's most recent publicly available financial statements, *Provided That* such statements present the information as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;
 - (ii) The most recent publicly available information appearing in documents filed by the prospective purchaser with the Commission or another United States federal, state, or local governmental agency or self-regulatory organization, or with a foreign governmental agency or self-regulatory organization, *Provided That* any such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;

- (iii) The most recent publicly available information appearing in a recognized securities manual, *Provided* That such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser; or
 - (iv) A certification by the chief financial officer, a person fulfilling an equivalent function, or other executive officer of the purchaser, specifying the amount of securities owned and invested on a discretionary basis by the purchaser as of a specific date on or since the close of the purchaser's most recent fiscal year, or, in the case of a purchaser that is a member of a family of investment companies, a certification by an executive officer of the investment adviser specifying the amount of securities owned by the family of investment companies as of a specific date on or since the close of the purchaser's most recent fiscal year;
- (2) The seller and any person acting on its behalf takes reasonable steps to ensure that the purchaser is aware that the seller may rely on the exemption from the provisions of section 5 of the Act provided by this section;
- (3) The securities offered or sold:
- (i) Were not, when issued, of the same class as securities listed on a national securities exchange registered under section 6 of the Exchange Act or quoted in a U.S. automated inter-dealer quotation system; *Provided*, That securities that are convertible or exchangeable into securities so listed or quoted at the time of issuance and that had an effective conversion premium of less than 10 percent, shall be treated as securities of the class into which they are convertible or exchangeable; and that warrants that may be exercised for securities so listed or quoted at the time of issuance, for a period of less than 3 years from the date of issuance, or that had an effective exercise premium of less than 10 percent, shall be treated as securities of the class to be issued upon exercise; and *Provided further*, That the Commission may from time to time, taking into account then-existing market practices, designate additional securities and classes of securities that will not be deemed of the same class as securities listed on a national securities exchange or quoted in a U.S. automated inter-dealer quotation system; and
 - (ii) Are not securities of an open-end investment company, unit investment trust or face-amount certificate company that is or is required to be registered under section 8 of the Investment Company Act; and
- (4)
- (i) In the case of securities of an issuer that is neither subject to section 13 or 15(d) of the Exchange Act, nor exempt from reporting pursuant to Rule 12g3-2(b) (§ 240.12g3-2(b) of this chapter) under the Exchange Act, nor a foreign government as defined in Rule 405 (§ 230.405 of this chapter) eligible to register securities under Schedule B of the Act, the holder and a prospective purchaser designated by the holder have the right to obtain from the issuer, upon request of the holder, and the prospective purchaser has received from the issuer, the seller, or a person acting on either of their behalf, at or prior to the time of sale, upon such prospective purchaser's request to the holder or the issuer, the following information (which shall be reasonably current in relation to the date of resale under this section): a very brief statement of the nature of the business of the issuer and the products and services it offers; and the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available).

- (ii) The requirement that the information be *reasonably current* will be presumed to be satisfied if:
 - (A) The balance sheet is as of a date less than 16 months before the date of resale, the statements of profit and loss and retained earnings are for the 12 months preceding the date of such balance sheet, and if such balance sheet is not as of a date less than 6 months before the date of resale, it shall be accompanied by additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than 6 months before the date of resale; and
 - (B) The statement of the nature of the issuer's business and its products and services offered is as of a date within 12 months prior to the date of resale; or
 - (C) With regard to foreign private issuers, the required information meets the timing requirements of the issuer's home country or principal trading markets.
- (e) Offers and sales of securities pursuant to this section shall be deemed not to affect the availability of any exemption or safe harbor relating to any previous or subsequent offer or sale of such securities by the issuer or any prior or subsequent holder thereof.

[55 FR 17945, Apr. 30, 1990, as amended at 57 FR 48722, Oct. 28, 1992; 78 FR 44804, July 24, 2013; 85 FR 64276, Oct. 9, 2020]

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

Preliminary Note:

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

Transactions for which statutory exemptions under the Act, including those contained in sections 3(a)(9), (10), (11) and 4(2), are otherwise available are not affected by Rule 145. Reference is made to Rule 153a (§ 230.153a of this chapter) describing the prospectus delivery required in a transaction of the type referred to in Rule 145. A reclassification of securities covered by Rule 145 would be exempt from registration pursuant to section 3(a)(9) or (11) of the Act if the conditions of either of these sections are satisfied.

- (a) **Transactions within this section.** An *offer, offer to sell, offer for sale, or sale* shall be deemed to be involved, within the meaning of section 2(3) of the Act, so far as the security holders of a corporation or other person are concerned where, pursuant to statutory provisions of the jurisdiction under which such corporation or other person is organized, or pursuant to provisions contained in its certificate of incorporation or similar controlling instruments, or otherwise, there is submitted for the vote or consent of such security holders a plan or agreement for:

- (1) **Reclassifications.** A reclassification of securities of such corporation or other person, other than a stock split, reverse stock split, or change in par value, which involves the substitution of a security for another security;
- (2) **Mergers of consolidations.** A statutory merger or consolidation or similar plan or acquisition in which securities of such corporation or other person held by such security holders will become or be exchanged for securities of any person, unless the sole purpose of the transaction is to change an issuer's domicile solely within the United States; or
- (3) **Transfers of assets.** A transfer of assets of such corporation or other person, to another person in consideration of the issuance of securities of such other person or any of its affiliates, if:
 - (i) Such plan or agreement provides for dissolution of the corporation or other person whose security holders are voting or consenting; or
 - (ii) Such plan or agreement provides for a pro rata or similar distribution of such securities to the security holders voting or consenting; or
 - (iii) The board of directors or similar representatives of such corporation or other person, adopts resolutions relative to paragraph (a)(3) (i) or (ii) of this section within 1 year after the taking of such vote or consent; or
 - (iv) The transfer of assets is a part of a preexisting plan for distribution of such securities, notwithstanding paragraph (a)(3) (i), (ii), or (iii) of this section.
- (b) **Communications before a Registration Statement is filed.** Communications made in connection with or relating to a transaction described in paragraph (a) of this section that will be registered under the Act may be made under § 230.135, § 230.165 or § 230.166.
- (c) **Persons and parties deemed to be underwriters.** For purposes of this section, if any party to a transaction specified in paragraph (a) of this section is a shell company, other than a business combination related shell company, as those terms are defined in § 230.405, any party to that transaction, other than the issuer, or any person who is an affiliate of such party at the time such transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with any such transaction, shall be deemed to be engaged in a distribution and therefore to be an underwriter thereof within the meaning of Section 2(a)(11) of the Act.
- (d) **Resale provisions for persons and parties deemed underwriters.** Notwithstanding the provisions of paragraph (c), a person or party specified in that paragraph shall not be deemed to be engaged in a distribution and therefore not to be an underwriter of securities acquired in a transaction specified in paragraph (a) that was registered under the Act if:
 - (1) The issuer has met the requirements applicable to an issuer of securities in paragraph (i)(2) of § 230.144; and
 - (2) One of the following three conditions is met:
 - (i) Such securities are sold by such person or party in accordance with the provisions of paragraphs (c), (e), (f), and (g) of § 230.144 and at least 90 days have elapsed since the date the securities were acquired from the issuer in such transaction; or

- (ii) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and at least six months, as determined in accordance with paragraph (d) of § 230.144, have elapsed since the date the securities were acquired from the issuer in such transaction, and the issuer meets the requirements of paragraph (c) of § 230.144; or
- (iii) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and at least one year, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction.

Note to § 230.145(c) and (d):

Paragraph (d) is not available with respect to any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Act.

(e) Definitions.

- (1) The term *affiliate* as used in paragraphs (c) and (d) of this section shall have the same meaning as the definition of that term in § 230.144.
- (2) The term *party* as used in paragraphs (c) and (d) of this section shall mean the corporations, business entities, or other persons, other than the issuer, whose assets or capital structure are affected by the transactions specified in paragraph (a) of this section.
- (3) The term *person* as used in paragraphs (c) and (d) of this section, when used in reference to a person for whose account securities are to be sold, shall have the same meaning as the definition of that term in paragraph (a)(2) of § 230.144.

[37 FR 23636, Nov. 7, 1972, as amended at 49 FR 5921, Feb. 16, 1984; 50 FR 19016, May 6, 1985; 50 FR 48382, Nov. 25, 1985; 55 FR 17944, Apr. 30, 1990; 62 FR 9245, Feb. 28, 1997; 64 FR 61449, Nov. 10, 1999; 72 FR 71570, Dec. 17, 2007; 78 FR 44769, July 24, 2013]

§ 230.146 Rules under section 18 of the Act.

- (a) ***Prepared by or on behalf of the issuer.*** An offering document (as defined in Section 18(d)(1) of the Act [15 U.S.C. 77r(d)(1)]) is "prepared by or on behalf of the issuer" for purposes of Section 18 of the Act, if the issuer or an agent or representative:
 - (1) Authorizes the document's production, and
 - (2) Approves the document before its use.
- (b) ***Covered securities for purposes of Section 18.***
 - (1) For purposes of Section 18(b) of the Act (15 U.S.C. 77r), the Commission finds that the following national securities exchanges, or segments or tiers thereof, have listing standards that are substantially similar to those of the New York Stock Exchange ("NYSE"), the NYSE American LLC ("NYSE American"), or the National Market System of the Nasdaq Stock Market ("Nasdaq/NGM"), and that securities listed, or authorized for listing, on such exchanges shall be deemed covered securities:
 - (i) Tier I of the NYSE Arca, Inc.;
 - (ii) Tier I of the NASDAQ PHLX LLC;

- (iii) The Chicago Board Options Exchange, Incorporated;
 - (iv) Options listed on Nasdaq ISE, LLC;
 - (v) The Nasdaq Capital Market;
 - (vi) Tier I and Tier II of Bats BZX Exchange, Inc.; and
 - (vii) Investors Exchange LLC.
- (2) The designation of securities in paragraphs (b)(1)(i) through (vii) of this section as covered securities is conditioned on such exchanges' listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, NYSE American, or Nasdaq/NGM.

[62 FR 24573, May 6, 1997, as amended at 63 FR 3035, Jan. 21, 1998; 69 FR 43298, July 20, 2004; 72 FR 20414, Apr. 24, 2007; 77 FR 3597, Jan. 25, 2012; 82 FR 50069, Oct. 30, 2017]

§ 230.147 Intrastate offers and sales.

- (a) This section shall not raise any presumption that the exemption provided by section 3(a)(11) of the Act (15 U.S.C. 77c(a)(11)) is not available for transactions by an issuer which do not satisfy all of the provisions of this section.
- (b) **Manner of offers and sales.** An issuer, or any person acting on behalf of the issuer, shall be deemed to conduct an offering in compliance with section 3(a)(11) of the Act (15 U.S.C. 77c(a)(11)), where offers and sales are made only to persons resident within the same state or territory in which the issuer is resident and doing business, within the meaning of section 3(a)(11) of the Act, so long as the issuer complies with the provisions of paragraphs (c), (d), and (f) through (h) of this section.
- (c) **Nature of the issuer.** The issuer of the securities shall at the time of any offers and sales be a person resident and doing business within the state or territory in which all of the offers and sales are made.
- (1) The issuer shall be deemed to be a resident of the state or territory in which:
- (i) It is incorporated or organized, and it has its principal place of business, if a corporation, limited partnership, trust or other form of business organization that is organized under state or territorial law. The issuer shall be deemed to have its principal place of business in a state or territory in which the officers, partners or managers of the issuer primarily direct, control and coordinate the activities of the issuer;
 - (ii) It has its principal place of business, as defined in paragraph (c)(1)(i) of this section, if a general partnership or other form of business organization that is not organized under any state or territorial law;
 - (iii) Such person's principal residence is located, if an individual.

Instruction to paragraph (c)(1): An issuer that has previously conducted an intrastate offering pursuant to this section (§ 230.147) or Rule 147A (§ 230.147A) may not conduct another intrastate offering pursuant to this section (§ 230.147) in a different state or territory, until the expiration of the time period specified in paragraph (e) of this section (§ 230.147(e)) or paragraph (e) of Rule 147A (§ 230.147A(e)), calculated on the basis of the date of the last sale in such offering.

- (2) The issuer shall be deemed to be doing business within a state or territory if the issuer satisfies at least one of the following requirements:

- (i) The issuer derived at least 80% of its consolidated gross revenues from the operation of a business or of real property located in or from the rendering of services within such state or territory;

Instruction to paragraph (c)(2)(i): Revenues must be calculated based on the issuer's most recent fiscal year, if the first offer of securities pursuant to this section is made during the first six months of the issuer's current fiscal year, and based on the first six months of the issuer's current fiscal year or during the twelve-month fiscal period ending with such six-month period, if the first offer of securities pursuant to this section is made during the last six months of the issuer's current fiscal year.

- (ii) The issuer had at the end of its most recent semi-annual fiscal period prior to an initial offer of securities in any offering or subsequent offering pursuant to this section, at least 80% of its assets and those of its subsidiaries on a consolidated basis located within such state or territory;

- (iii) The issuer intends to use and uses at least 80% of the net proceeds to the issuer from sales made pursuant to this section (§ 230.147) in connection with the operation of a business or of real property, the purchase of real property located in, or the rendering of services within such state or territory; or

- (iv) A majority of the issuer's employees are based in such state or territory.

- (d) **Residence of offerees and purchasers.** Offers and sales of securities pursuant to this section (§ 230.147) shall be made only to residents of the state or territory in which the issuer is resident, as determined pursuant to paragraph (c) of this section, or who the issuer reasonably believes, at the time of the offer and sale, are residents of the state or territory in which the issuer is resident. For purposes of determining the residence of offerees and purchasers:

- (1) A corporation, partnership, limited liability company, trust or other form of business organization shall be deemed to be a resident of a state or territory if, at the time of the offer and sale to it, it has its principal place of business, as defined in paragraph (c)(1)(i) of this section, within such state or territory.

Instruction to paragraph (d)(1): A trust that is not deemed by the law of the state or territory of its creation to be a separate legal entity is deemed to be a resident of each state or territory in which its trustee is, or trustees are, resident.

- (2) Individuals shall be deemed to be residents of a state or territory if such individuals have, at the time of the offer and sale to them, their principal residence in the state or territory.
- (3) A corporation, partnership, trust or other form of business organization, which is organized for the specific purpose of acquiring securities offered pursuant to this section (§ 230.147), shall not be a resident of a state or territory unless all of the beneficial owners of such organization are residents of such state or territory.

Instruction to paragraph (d): Obtaining a written representation from purchasers of in-state residency status will not, without more, be sufficient to establish a reasonable belief that such purchasers are in-state residents.

- (e) **Limitation on resales.** For a period of six months from the date of the sale by the issuer of a security pursuant to this section (§ 230.147), any resale of such security shall be made only to persons resident within the state or territory in which the issuer was resident, as determined pursuant to paragraph (c) of this section, at the time of the sale of the security by the issuer.

Instruction to paragraph (e): In the case of convertible securities, resales of either the convertible security, or if it is converted, the underlying security, could be made during the period described in paragraph (e) only to persons resident within such state or territory. For purposes of this paragraph (e), a conversion in reliance on section 3(a)(9) of the Act (15 U.S.C. 77c(a)(9)) does not begin a new period.

- (f) **Precautions against interstate sales.**

- (1) The issuer shall, in connection with any securities sold by it pursuant to this section:
- (i) Place a prominent legend on the certificate or other document evidencing the security stating that: "Offers and sales of these securities were made under an exemption from registration and have not been registered under the Securities Act of 1933. For a period of six months from the date of the sale by the issuer of these securities, any resale of these securities (or the underlying securities in the case of convertible securities) shall be made only to persons resident within the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer].";
 - (ii) Issue stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities, make a notation in the appropriate records of the issuer; and
 - (iii) Obtain a written representation from each purchaser as to his or her residence.
- (2) The issuer shall, in connection with the issuance of new certificates for any of the securities that are sold pursuant to this section (§ 230.147) that are presented for transfer during the time period specified in paragraph (e), take the steps required by paragraphs (f)(1)(i) and (ii) of this section.
- (3) The issuer shall, at the time of any offer or sale by it of a security pursuant to this section (§ 230.147), prominently disclose to each offeree in the manner in which any such offer is communicated and to each purchaser of such security in writing a reasonable period of time before the date of sale, the following: "Sales will be made only to residents of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer]. Offers and sales of these securities are made under an exemption from registration and have not been registered under the Securities Act of 1933. For a period of six months from the date of the sale by the issuer of the securities, any resale of the securities (or the underlying securities in the case of convertible securities) shall be made only to persons resident within the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer]."

- (g) **Integration with other offerings.** To determine whether offers and sales should be integrated, refer to § 230.152.

[81 FR 83550, Nov. 21, 2016, as amended at 86 FR 3594, Jan. 14, 2021]

§ 230.147A Intrastate sales exemption.

(a) **Scope of the exemption.** Offers and sales by or on behalf of an issuer of its securities made in accordance with this section (§ 230.147A) are exempt from section 5 of the Act (15 U.S.C. 77e). This exemption is not available to an issuer that is an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

(b) **Manner of offers and sales.** An issuer, or any person acting on behalf of the issuer, may rely on this exemption to make offers and sales using any form of general solicitation and general advertising, so long as the issuer complies with the provisions of paragraphs (c), (d), and (f) through (h) of this section.

(c) **Nature of the issuer.** The issuer of the securities shall at the time of any offers and sales be a person resident and doing business within the state or territory in which all of the sales are made.

(1) The issuer shall be deemed to be a resident of the state or territory in which it has its principal place of business. The issuer shall be deemed to have its principal place of business in a state or territory in which the officers, partners or managers of the issuer primarily direct, control and coordinate the activities of the issuer.

(2) The issuer shall be deemed to be doing business within a state or territory if the issuer satisfies at least one of the following requirements:

(i) The issuer derived at least 80% of its consolidated gross revenues from the operation of a business or of real property located in or from the rendering of services within such state or territory;

Instruction to paragraph (c)(2)(i): Revenues must be calculated based on the issuer's most recent fiscal year, if the first offer of securities pursuant to this section is made during the first six months of the issuer's current fiscal year, and based on the first six months of the issuer's current fiscal year or during the twelve-month fiscal period ending with such six-month period, if the first offer of securities pursuant to this section is made during the last six months of the issuer's current fiscal year.

(ii) The issuer had at the end of its most recent semi-annual fiscal period prior to an initial offer of securities in any offering or subsequent offering pursuant to this section, at least 80% of its assets and those of its subsidiaries on a consolidated basis located within such state or territory;

(iii) The issuer intends to use and uses at least 80% of the net proceeds to the issuer from sales made pursuant to this section (§ 230.147A) in connection with the operation of a business or of real property, the purchase of real property located in, or the rendering of services within such state or territory; or

(iv) A majority of the issuer's employees are based in such state or territory.

Instruction to paragraph (c): An issuer that has previously conducted an intrastate offering pursuant to this section (§ 230.147A) or Rule 147 (§ 230.147) may not conduct another intrastate offering pursuant to this section (§ 230.147A) in a different state or territory, until the expiration of the time period specified in paragraph (e) of this section (§ 230.147A(e)) or paragraph (e) of Rule 147 (§ 230.147(e)), calculated on the basis of the date of the last sale in such offering.

(d) **Residence of purchasers.** Sales of securities pursuant to this section (§ 230.147A) shall be made only to residents of the state or territory in which the issuer is resident, as determined pursuant to paragraph (c) of this section, or who the issuer reasonably believes, at the time of sale, are residents of the state or territory in which the issuer is resident. For purposes of determining the residence of purchasers:

- (1) A corporation, partnership, limited liability company, trust or other form of business organization shall be deemed to be a resident of a state or territory if, at the time of sale to it, it has its principal place of business, as defined in paragraph (c)(1) of this section, within such state or territory.

Instruction to paragraph (d)(1): A trust that is not deemed by the law of the state or territory of its creation to be a separate legal entity is deemed to be a resident of each state or territory in which its trustee is, or trustees are, resident.

- (2) Individuals shall be deemed to be residents of a state or territory if such individuals have, at the time of sale to them, their principal residence in the state or territory.
- (3) A corporation, partnership, trust or other form of business organization, which is organized for the specific purpose of acquiring securities offered pursuant to this section (§ 230.147A), shall not be a resident of a state or territory unless all of the beneficial owners of such organization are residents of such state or territory.

Instruction to paragraph (d): Obtaining a written representation from purchasers of in-state residency status will not, without more, be sufficient to establish a reasonable belief that such purchasers are in-state residents.

(e) **Limitation on resales.** For a period of six months from the date of the sale by the issuer of a security pursuant to this section (§ 230.147A), any resale of such security shall be made only to persons resident within the state or territory in which the issuer was resident, as determined pursuant to paragraph (c) of this section, at the time of the sale of the security by the issuer.

Instruction to paragraph (e): In the case of convertible securities, resales of either the convertible security, or if it is converted, the underlying security, could be made during the period described in paragraph (e) only to persons resident within such state or territory. For purposes of this paragraph (e), a conversion in reliance on section 3(a)(9) of the Act (15 U.S.C. 77c(a)(9)) does not begin a new period.

(f) **Precautions against interstate sales.**

- (1) The issuer shall, in connection with any securities sold by it pursuant to this section:
- (i) Place a prominent legend on the certificate or other document evidencing the security stating that: "Offers and sales of these securities were made under an exemption from registration and have not been registered under the Securities Act of 1933. For a period of six months from the date of the sale by the issuer of these securities, any resale of these securities (or the underlying securities in the case of convertible securities) shall be made only to persons resident within the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer].";
- (ii) Issue stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities, make a notation in the appropriate records of the issuer; and
- (iii) Obtain a written representation from each purchaser as to his or her residence.

- (2) The issuer shall, in connection with the issuance of new certificates for any of the securities that are sold pursuant to this section (§ 230.147A) that are presented for transfer during the time period specified in paragraph (e), take the steps required by paragraphs (f)(1)(i) and (ii) of this section.
- (3) The issuer shall, at the time of any offer or sale by it of a security pursuant to this section (§ 230.147A), prominently disclose to each offeree in the manner in which any such offer is communicated and to each purchaser of such security in writing a reasonable period of time before the date of sale, the following: "Sales will be made only to residents of the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer]. Offers and sales of these securities are made under an exemption from registration and have not been registered under the Securities Act of 1933. For a period of six months from the date of the sale by the issuer of the securities, any resale of the securities (or the underlying securities in the case of convertible securities) shall be made only to persons resident within the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer]."
- (g) **Integration with other offerings.** To determine whether offers and sales should be integrated, refer to § 230.152.

[81 FR 83551, Nov. 21, 2016, as amended at 86 FR 3594, Jan. 14, 2021]

§ 230.148 Exemption from general solicitation or general advertising.

- (a) A communication will not be deemed to constitute general solicitation or general advertising if made in connection with a seminar or meeting in which more than one issuer participates that is sponsored by a college, university, or other institution of higher education, State or local government or instrumentality thereof, nonprofit organization, or angel investor group, incubator, or accelerator, provided that:
 - (1) No advertising for the seminar or meeting references a specific offering of securities by the issuer;
 - (2) The sponsor of the seminar or meeting does not:
 - (i) Make investment recommendations or provide investment advice to attendees of the event;
 - (ii) Engage in any investment negotiations between the issuer and investors attending the event;
 - (iii) Charge attendees of the event any fees, other than reasonable administrative fees;
 - (iv) Receive any compensation for making introductions between event attendees and issuers or for investment negotiations between such parties; and
 - (v) Receive any compensation with respect to the event that would require registration of the sponsor as a broker or a dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.);
 - (3) The type of information regarding an offering of securities by the issuer that is communicated or distributed by or on behalf of the issuer in connection with the event is limited to a notification that the issuer is in the process of offering or planning to offer securities, the type and amount of securities being offered, the intended use of proceeds of the offering, and the unsubscribed amount in an offering; and
 - (4) If the event allows attendees to participate virtually, rather than in person, online participation in the event is limited to:

- (i) Individuals who are members of, or otherwise associated with the sponsor organization;
- (ii) Individuals that the sponsor reasonably believes are accredited investors; or
- (iii) Individuals who have been invited to the event by the sponsor based on industry or investment-related experience reasonably selected by the sponsor in good faith and disclosed in the public communications about the event.

- (5) For purposes of this paragraph, the term “angel investor group” means a group of accredited investors that holds regular meetings and has defined processes and procedures for making investment decisions, either individually or among the membership of the group as a whole, and is neither associated nor affiliated with brokers, dealers, or investment advisers.

(b) [Reserved]

[86 FR 3594, Jan. 14, 2021]

§ 230.149 Definition of “exchanged” in section 3(a)(9), for certain transactions.

The term *exchanged* in section 3(a)(9) (sec. 202(c), 48 Stat. 906; 15 U.S.C. 77c(9)) shall be deemed to include the issuance of a security in consideration of the surrender, by the existing security holders of the issuer, of outstanding securities of the issuer, notwithstanding the fact that the surrender of the outstanding securities may be required by the terms of the plans of exchange to be accompanied by such payment in cash by the security holder as may be necessary to effect an equitable adjustment, in respect of dividends or interest paid or payable on the securities involved in the exchange, as between such security holder and other security holders of the same class accepting the offer of exchange.

[2 FR 1382, July 7, 1937]

§ 230.150 Definition of “commission or other remuneration” in section 3(a)(9), for certain transactions.

The term *commission or other remuneration* in section 3(a)(9) of the Act shall not include payments made by the issuer, directly or indirectly, to its security holders in connection with an exchange of securities for outstanding securities, when such payments are part of the terms of the offer of exchange.

[2 FR 1076, May 26, 1937]

§ 230.151 Safe harbor definition of certain “annuity contracts or optional annuity contracts” within the meaning of section 3(a)(8).

- (a) Any annuity contract or optional annuity contract (a *contract*) shall be deemed to be within the provisions of section 3(a)(8) of the Securities Act of 1933 (15 U.S.C. 77c(a)(8)), *Provided, That*
 - (1) The annuity or optional annuity contract is issued by a corporation (the *insurer*) subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;
 - (2) The insurer assumes the investment risk under the contract as prescribed in paragraph (b) of this section; and
 - (3) The contract is not marketed primarily as an investment.

- (b) The insurer shall be deemed to assume the investment risk under the contract if:
 - (1) The value of the contract does not vary according to the investment experience of a separate account;
 - (2) The insurer for the life of the contract
 - (i) Guarantees the principal amount of purchase payments and interest credited thereto, less any deduction (without regard to its timing) for sales, administrative or other expenses or charges; and
 - (ii) Credits a specified rate of interest (as defined in paragraph (c) of this section to net purchase payments and interest credited thereto; and
 - (3) The insurer guarantees that the rate of any interest to be credited in excess of that described in paragraph (b)(2)(ii) of this section will not be modified more frequently than once per year.
- (c) The term *specified rate of interest*, as used in paragraph (b)(2)(ii) of this section, means a rate of interest under the contract that is at least equal to the minimum rate required to be credited by the relevant nonforfeiture law in the jurisdiction in which the contract is issued. If that jurisdiction does not have any applicable nonforfeiture law at the time the contract is issued (or if the minimum rate applicable to an existing contract is no longer mandated in that jurisdiction), the specified rate under the contract must at least be equal to the minimum rate then required for individual annuity contracts by the NAIC Standard Nonforfeiture Law.

[51 FR 20262, June 4, 1986]

§ 230.152 Integration.

This section provides a general principle of integration and non-exclusive safe harbors from integration of registered and exempt offerings. Because of the objectives of this section and the policies underlying the Act, the provisions of this section will not have the effect of avoiding integration for any transaction or series of transactions that, although in technical compliance with the section, is part of a plan or scheme to evade the registration requirements of the Act.

- (a) **General principle of integration.** If the safe harbors in paragraph (b) of this section do not apply, in determining whether two or more offerings are to be treated as one for the purpose of registration or qualifying for an exemption from registration under the Act, offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish that each offering either complies with the registration requirements of the Act, or that an exemption from registration is available for the particular offering. In making this determination:
 - (1) For an exempt offering prohibiting general solicitation, the issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either:
 - (i) Did not solicit such purchaser through the use of general solicitation; or
 - (ii) Established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation; and

- (2) For two or more concurrent exempt offerings permitting general solicitation, in addition to satisfying the requirements of the particular exemption relied on, general solicitation offering materials for one offering that includes information about the material terms of a concurrent offering under another exemption may constitute an offer of securities in such other offering, and therefore the offer must comply with all the requirements for, and restrictions on, offers under the exemption being relied on for such other offering, including any legend requirements and communications restrictions.
- (b) **Safe harbors.** No integration analysis under paragraph (a) of this section is required, if any of the following non-exclusive safe harbors apply:
- (1) Any offering made more than 30 calendar days before the commencement of any other offering, or more than 30 calendar days after the termination or completion of any other offering, will not be integrated with such other offering, *provided that* for an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more an offering that allows general solicitation, the provisions of § 230.152(a)(1) shall apply.
 - (2) Offers and sales made in compliance with § 230.701, pursuant to an employee benefit plan, or in compliance with §§ 230.901 through 230.905 (Regulation S) will not be integrated with other offerings;
 - (3) An offering for which a registration statement under the Act has been filed will not be integrated if it is made subsequent to:
 - (i) A terminated or completed offering for which general solicitation is not permitted;
 - (ii) A terminated or completed offering for which general solicitation is permitted made only to qualified institutional buyers and institutional accredited investors; or
 - (iii) An offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the commencement of the registered offering; or
 - (4) Offers and sales made in reliance on an exemption for which general solicitation is permitted will not be integrated if made subsequent to any terminated or completed offering.
- (c) **Commencement of an offering.** For purposes of this section, an offering of securities will be deemed to be commenced at the time of the first offer of securities in the offering by the issuer or its agents. The following non-exclusive list of factors should be considered in determining when an offering is deemed to be commenced. Pursuant to the requirements for registered and exempt offerings, an issuer or its agents may commence an offering in reliance on:
- (1) Section 230.241, on the date the issuer first made a generic offer soliciting interest in a contemplated securities offering for which the issuer had not yet determined the exemption under the Act under which the offering of securities would be conducted;
 - (2) Section 15 U.S.C. 77d(a)(2) (Section 4(a)(2)), §§ 230.501 through 230.508 (Regulation D), or § 230.147, or § 230.147A (Rules 147 or 147A), on the date the issuer first made an offer of its securities in reliance on these exemptions;
 - (3) Sections 230.251 through 230.263 (Regulation A), on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on § 230.255, or the public filing of a Form 1-A offering statement;

- (4) Sections 227.100 through 227.503 of this chapter (Regulation Crowdfunding), on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on § 227.206 of this chapter, or the public filing of a Form C offering statement; and
- (5) A registration statement filed under the Act, in the case of:
 - (i) A continuous offering that will commence promptly on the date of initial effectiveness, on the date the issuer first filed its registration statement for the offering with the Commission; or
 - (ii) A delayed offering, on the earliest date on which the issuer or its agents commenced public efforts to offer and sell the securities, which could be evidenced by the earlier of:
 - (A) The first filing of a prospectus supplement with the Commission describing the delayed offering; or
 - (B) The issuance of a widely disseminated public disclosure, such as a press release, confirming the commencement of the delayed offering.

Note 1 to paragraph (c)(5):

Offers by the issuer, or persons acting on behalf of the issuer, limited exclusively to qualified institutional buyers and institutional accredited investors, including those that would qualify for the safe harbor in § 230.163B, will not be considered the commencement of a registered offering for purposes of this section.

- (d) **Termination or completion of an offering.** For purposes of this section, the termination or completion of an offering is deemed to have occurred when the issuer and its agents cease efforts to make further offers to sell the issuer's securities under such offering. The following non-exclusive list of factors should be considered in determining when an offering is deemed to be terminated or completed including for offerings made in reliance on:
 - (1) Section 4(a)(2), Regulation D, or Rules 147 or 147A, on the later of the date:
 - (i) The issuer entered into a binding commitment to sell all securities to be sold under the offering (subject only to conditions outside of the investor's control); or
 - (ii) The issuer and its agents ceased efforts to make further offers to sell the issuer's securities under such offering;
 - (2) Regulation A, on:
 - (i) The withdrawal of an offering statement under § 230.259(a);
 - (ii) The filing of a § 239.94 of this chapter (Form 1-Z) with respect to a Tier I offering under § 230.257(a);
 - (iii) The declaration by the Commission that the offering statement has been abandoned under § 230.259(b); or
 - (iv) The date, after the third anniversary of the date the offering statement was initially qualified, on which § 230.251(d)(3)(i)(F) prohibits the issuer from continuing to sell securities using the offering statement, or any earlier date on which the offering terminates by its terms;

- (3) Regulation Crowdfunding, on the deadline of the offering identified in the offering materials pursuant to § 227.201(g) of this chapter, or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under § 227.304(b) of this chapter; and
- (4) A registration statement filed under the Act:
 - (i) On the withdrawal of the registration statement after an application is granted or deemed granted under § 230.477;
 - (ii) On the filing of a prospectus supplement or amendment to the registration statement indicating that the offering, or particular delayed offering in the case of a shelf registration statement, has been terminated or completed;
 - (iii) On the entry of an order of the Commission declaring that the registration statement has been abandoned under § 230.479;
 - (iv) On the date, after the third anniversary of the initial effective date of the registration statement, on which § 230.415(a)(5) prohibits the issuer from continuing to sell securities using the registration statement, or any earlier date on which the offering terminates by its terms; or
 - (v) Any other factors that indicate that the issuer has abandoned or ceased its public selling efforts in furtherance of the offering, or particular delayed offering in the case of a shelf registration statement, which could be evidenced by:
 - (A) The filing of a Current Report on Form 8-K; or
 - (B) The issuance of a widely disseminated public disclosure by the issuer, or its agents, informing the market that the offering, or particular delayed offering, in the case of a shelf registration statement, has been terminated or completed.

Note 2 to paragraph (d)(4):

A particular delayed offering may be deemed terminated or completed, even though the issuer's shelf registration statement may still have an aggregate amount of securities available to offer and sell in a later delayed offering.

[86 FR 3595, Jan. 14, 2021]

§ 230.152a Offer or sale of certain fractional interests.

Any offer or sale of a security, evidenced by a scrip certificate, order form or similar document which represents a fractional interest in a share of stock or similar security shall be deemed a transaction by a person other than an issuer, underwriter or dealer, within the meaning of section 4(1) of the act, if the fractional interest (a) resulted from a stock dividend, stock split, reverse stock split, conversion, merger or similar transaction, and (b) is offered or sold pursuant to arrangements for the purchase and sale of fractional interests among the person entitled to such fractional interests for the purpose of combining such interests into whole shares, and for the sale of such number of whole shares as may be necessary to compensate security holders for any remaining fractional interests not so combined, notwithstanding that the issuer or an affiliate of the issuer may act on behalf of or as agent for the security holders in effecting such transactions.

(Sec. 4, 48 Stat. 77; 15 U.S.C. 77d)

[30 FR 2657, Mar. 2, 1965]

§ 230.153 Definition of “preceded by a prospectus” as used in section 5(b)(2) of the Act, in relation to certain transactions.

- (a) **Definition of preceded by a prospectus.** The term preceded by a prospectus as used in section 5(b)(2) of the Act, regarding any requirement of a broker or dealer to deliver a prospectus to a broker or dealer as a result of a transaction effected between such parties on or through a national securities exchange or facility thereof, trading facility of a national securities association, or an alternative trading system, shall mean the satisfaction of the conditions in paragraph (b) of this section.
- (b) **Conditions.** Any requirement of a broker or dealer to deliver a prospectus for transactions covered by paragraph (a) of this section will be satisfied if:
- (1) Securities of the same class as the securities that are the subject of the transaction are trading on that national securities exchange or facility thereof, trading facility of a national securities association, or alternative trading system;
 - (2) The registration statement relating to the offering is effective and is not the subject of any pending proceeding or examination under section 8(d) or 8(e) of the Act;
 - (3) Neither the issuer, nor any underwriter or participating dealer is the subject of a pending proceeding under section 8A of the Act in connection with the offering; and
 - (4) The issuer has filed or will file with the Commission a prospectus that satisfies the requirements of section 10(a) of the Act.
- (c) **Definitions.**
- (1) The term *national securities exchange*, as used in this section, shall mean a securities exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f).
 - (2) The term *trading facility*, as used in this section, shall mean a trading facility sponsored and governed by the rules of a registered securities association or a national securities exchange.
 - (3) The term *alternative trading system*, as used in this section, shall mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934 (§ 242.300(a) of this chapter) registered with the Commission pursuant to Rule 301 of Regulation ATS under the Securities Exchange Act of 1934 (§ 242.301(a) of this chapter).

[70 FR 44804, Aug. 3, 2005]

Cross References:

For the rules and regulations under the Securities Exchange Act of 1934, see part 240 of this chapter. For general requirements as to prospectuses, see §§ 230.400-230.434a.

§ 230.153a Definition of “preceded by a prospectus” as used in section 5(b)(2) of the Act, in relation to certain transactions requiring approval of security holders.

The term *preceded by a prospectus*, as used in section 5(b)(2) of the Act with respect to any requirement for the delivery of a prospectus to security holders of a corporation or other person, in connection with transactions of the character specified in paragraph (a) of § 230.145, shall mean the delivery of a prospectus:

- (a) Prior to the vote of security holders on such transactions; or,
- (b) With respect to actions taken by consent, prior to the earliest date on which the corporate action may be taken; to all security holders of record of such corporation or other person, entitled to vote on or consent to the proposed transaction, at their address of record on the transfer records of the corporation or other person.

[37 FR 23636, Nov. 7, 1972]

§ 230.153b Definition of “preceded by a prospectus”, as used in section 5(b)(2), in connection with certain transactions in standardized options.

The term *preceded by a prospectus*, as used in section 5(b)(2) of the Act with respect to any requirement for the delivery of a prospectus relating to standardized options registered on Form S-20, shall mean the delivery, prior to any transactions, of copies of such prospectus to each options market upon which the options are traded, for the purpose of redelivery to options customers upon their request, *Provided That*:

- (a) Such options market shall thereto have requested of the issuer, from time to time, such number of copies of such prospectus as may have appeared reasonably necessary to comply with the requests of options customers, and shall have delivered promptly from its supply on hand a copy to any options customer making a request thereof; and
- (b) The issuer shall have furnished such options market with such reasonable number of copies of such prospectus as may have been requested by the options market for the purpose stated above.

(15 U.S.C. 77a et seq.)

[47 FR 41955, Sept. 23, 1982]

§ 230.154 Delivery of prospectuses to investors at the same address.

- (a) **Delivery of a single prospectus.** If you must deliver a prospectus under the federal securities laws, for purposes of sections 5(b) and 2(a)(10) of the Act (15 U.S.C. 77e(b) and 77b(a)(10)) or § 240.15c2-8(b) of this chapter, you will be considered to have delivered a prospectus to investors who share an address if:
 - (1) You deliver a prospectus to the shared address;
 - (2) You address the prospectus to the investors as a group (for example, “ABC Fund [or Corporation] Shareholders,” “Jane Doe and Household,” “The Smith Family”) or to each of the investors individually (for example, “John Doe and Richard Jones”); and
 - (3) The investors consent in writing to delivery of one prospectus.
- (b) **Implied consent.** You do not need to obtain written consent from an investor under paragraph (a)(3) of this section if all of the following conditions are met:
 - (1) The investor has the same last name as the other investors, or you reasonably believe that the investors are members of the same family;
 - (2) You have sent the investor a notice at least 60 days before you begin to rely on this section concerning delivery of prospectuses to that investor. The notice must be a separate written statement and:

- (i) State that only one prospectus will be delivered to the shared address unless you receive contrary instructions;
- (ii) Include a toll-free telephone number or be accompanied by a reply form that is pre-addressed with postage provided, that the investor can use to notify you that he or she wishes to receive a separate prospectus;
- (iii) State the duration of the consent;
- (iv) Explain how an investor can revoke consent;
- (v) State that you will begin sending individual copies to an investor within 30 days after you receive revocation of the investor's consent; and
- (vi) Contain the following prominent statement, or similar clear and understandable statement, in bold-face type: "Important Notice Regarding Delivery of Shareholder Documents." This statement also must appear on the envelope in which the notice is delivered. Alternatively, if the notice is delivered separately from other communications to investors, this statement may appear either on the notice or on the envelope in which the notice is delivered;

Note to paragraph (b)(2):

The notice should be written in plain English. See § 230.421(d)(2) of this chapter for a discussion of plain English principles.

- (3) You have not received the reply form or other notification indicating that the investor wishes to continue to receive an individual copy of the prospectus, within 60 days after you sent the notice; and
 - (4) You deliver the prospectus to a post office box or to a residential street address. You can assume a street address is a residence unless you have information that indicates it is a business.
- (c) **Revocation of consent.** If an investor, orally or in writing, revokes consent to delivery of one prospectus to a shared address (provided under paragraphs (a)(3) or (b) of this section), you must begin sending individual copies to that investor within 30 days after you receive the revocation. If the individual's consent concerns delivery of the prospectus of a registered open-end management investment company, at least once a year you must explain to investors who have consented how they can revoke their consent. The explanation must be reasonably designed to reach these investors.
- (d) **Definition of address.** For purposes of this section, *address* means a street address, a post office box number, an electronic mail address, a facsimile telephone number, or other similar destination to which paper or electronic documents are delivered, unless otherwise provided in this section. If you have reason to believe that an address is the street address of a multi-unit building, the address must include the unit number.

[64 FR 62545, Nov. 16, 1999, as amended at 65 FR 65749, Nov. 2, 2000]

§ 230.155 [Reserved]

§ 230.156 Investment company sales literature.

- (a) Under the federal securities laws, including section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q(a)) and section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b-5 thereunder (17 CFR part 240), it is unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, to use sales literature which is materially misleading in connection with the offer or sale of securities issued by an investment company. Under these provisions, sales literature is materially misleading if it:
 - (1) Contains an untrue statement of a material fact or
 - (2) omits to state a material fact necessary in order to make a statement made, in the light of the circumstances of its use, not misleading.
- (b) Whether or not a particular description, representation, illustration, or other statement involving a material fact is misleading depends on evaluation of the context in which it is made. In considering whether a particular statement involving a material fact is or might be misleading, weight should be given to all pertinent factors, including, but not limited to, those listed below.
 - (1) A Statement could be misleading because of:
 - (i) Other statements being made in connection with the offer of sale or sale of the securities in question;
 - (ii) The absence of explanations, qualifications, limitations or other statements necessary or appropriate to make such statement not misleading; or
 - (iii) General economic or financial conditions or circumstances.
 - (2) Representations about past or future investment performance could be misleading because of statements or omissions made involving a material fact, including situations where:
 - (i) Portrayals of past income, gain, or growth of assets convey an impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances, including portrayals that omit explanations, qualifications, limitations, or other statements necessary or appropriate to make the portrayals not misleading; and
 - (ii) Representations, whether express or implied, about future investment performance, including:
 - (A) Representations, as to security of capital, possible future gains or income, or expenses associated with an investment;
 - (B) Representations implying that future gain or income may be inferred from or predicted based on past investment performance; or
 - (C) Portrayals of past performance, made in a manner which would imply that gains or income realized in the past would be repeated in the future.
 - (3) A statement involving a material fact about the characteristics or attributes of an investment company could be misleading because of:
 - (i) Statements about possible benefits connected with or resulting from services to be provided or methods of operation which do not give equal prominence to discussion of any risks or limitations associated therewith;

- (ii) Exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by such company, services, security of investment or funds, effects of government supervision, or other attributes; and
 - (iii) Unwarranted or incompletely explained comparisons to other investment vehicles or to indexes.
- (c) For purposes of this section, the term *sales literature* shall be deemed to include any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company. Communications between issuers, underwriters and dealers are included in this definition of sales literature if such communications, or the information contained therein, can be reasonably expected to be communicated to prospective investors in the offer or sale of securities or are designed to be employed in either written or oral form in the offer or sale of securities.
- (d) Nothing in this section may be construed to prevent a business development company or a registered closed-end investment company from qualifying for an exemption under § 230.168 or § 230.169.

[44 FR 64072, Nov. 6, 1979, as amended at 68 FR 57777, Oct. 6, 2003; 85 FR 33352, June 1, 2020]

§ 230.157 Small entities under the Securities Act for purposes of the Regulatory Flexibility Act.

For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 *et seq.*), and unless otherwise defined for purposes of a particular rulemaking proceeding, the term *small business* or *small organization* shall:

- (a) When used with reference to an issuer, other than an investment company, for purposes of the Securities Act of 1933, mean an issuer whose total assets on the last day of its most recent fiscal year were \$5 million or less and that is engaged or proposing to engage in small business financing. An issuer is considered to be engaged or proposing to engage in small business financing under this section if it is conducting or proposes to conduct an offering of securities which does not exceed the dollar limitation prescribed by section 3(b)(1) of the Securities Act.
- (b) When used with reference to an investment company that is an issuer for purposes of the Act, have the meaning ascribed to those terms by § 270.0-10 of this chapter.

[47 FR 5221, Feb. 4, 1982, as amended at 51 FR 25362, July 14, 1986; 63 FR 35514, June 30, 1998; 80 FR 21894, Apr. 20, 2015]

§ 230.158 Definitions of certain terms in the last paragraph of section 11(a).

- (a) An “earning statement” made generally available to securityholders of the registrant pursuant to the last paragraph of section 11(a) of the Act shall be sufficient for the purposes of such paragraph if:
 - (1) There is included the information required for statements of comprehensive income (as defined in § 210.1-02 of Regulation S-X of this chapter) contained either:
 - (i) In Item 8 of Form 10-K (§ 239.310 of this chapter), part I, Item 1 of Form 10-Q (§ 240.308a of this chapter), or Rule 14a-3(b) (§ 240.14a-3(b) of this chapter) under the Securities Exchange Act of 1934;
 - (ii) In Item 17 of Form 20-F (§ 249.220f of this chapter), if appropriate; or
 - (iii) In Form 40-F (§ 249.240f of this chapter); and

- (2) The information specified in the last paragraph of section 11(a) is contained in one report or any combination of reports either:
 - (i) On Form 10-K, Form 10-Q, Form 8-K (§ 249.308 of this chapter), or in the annual report to security holders pursuant to Rule 14a-3 under the Securities Exchange Act of 1934 (§ 240.14a-3 of this chapter); or
 - (ii) On Form 20-F, Form 40-F or Form 6-K (§ 249.306 of this chapter).

Note 1 to paragraph (a).

A subsidiary issuing debt securities guaranteed by its parent will be deemed to have met the requirements of this paragraph (a) if the parent's statements of comprehensive income (as defined in § 210.1-02 of Regulation S-X) satisfy the criteria of this paragraph and information respecting the subsidiary is included to the same extent as was presented in the registration statement. An "earning statement" not meeting the requirements of this paragraph (a) may otherwise be sufficient for purposes of the last paragraph of section 11(a) of the Act.

- (b) For purposes of the last paragraph of section 11(a) only, the "earning statement" contemplated by paragraph (a) of this section shall be deemed to be "made generally available to its security holders" if the registrant:

- (1) Is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 and
- (2) Has filed its report or reports on Form 10-K and Form 10-KSB, Form 10-Q and Form 10-QSB, Form 8-K, Form 20-F, Form 40-F, or Form 6-K, or has supplied to the Commission copies of the annual report sent to security holders pursuant to Rule 14a-3(c), (§ 240.14a-3(c) of this chapter) containing such information.

A registrant may use other methods to make an earning statement "generally available to its security holders" for purposes of the last paragraph of section 11(a).

- (c) For purposes of the last paragraph of section 11(a) of the Act only, the effective date of the registration statement is deemed to be the date of the latest to occur of:

- (1) The effective date of the registration statement;
- (2) The effective date of the last post-effective amendment to the registration statement next preceding a particular sale of the issuer's registered securities to the public filed for the purposes of:
 - (i) Including any prospectus required by section 10(a)(3) of the Act; or
 - (ii) Reflecting in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement;
- (3) The date of filing of the last report of the issuer incorporated by reference into the prospectus that is part of the registration statement or the date that a form of prospectus filed pursuant to Rule 424(b) or Rule 497(b), (c), (d), or (e) (§ 230.424(b) or § 230.497(b), (c), (d), or (e)) is deemed part of and included in the registration statement, and relied upon in either case in lieu of filing a post-effective amendment for purposes of paragraphs (c)(2)(i) and (ii) of this section next preceding a particular sale of the issuer's registered securities to the public; or

- (4) As to the issuer and any underwriter at that time only, the most recent effective date of the registration statement for purposes of liability under section 11 of the Act of the issuer and any such underwriter only at the time of or next preceding a particular sale of the issuer's registered securities to the public determined pursuant to Rule 430B (§ 230.430B).
- (d) If an earnings statement was made available by "other methods" than those specified in paragraphs (a) and (b) of this section, the earnings statement must be filed as exhibit 99 to the next periodic report required by section 13 or 15(d) of the Exchange Act covering the period in which the earnings statement was released.

[48 FR 44770, Sept. 30, 1983, as amended at 56 FR 30054, July 1, 1991; 58 FR 14669, Mar. 18, 1993; 70 FR 44804, Aug. 3, 2005; 73 FR 967, Jan. 4, 2008; 83 FR 50212, Oct. 4, 2018]

§ 230.159 Information available to purchaser at time of contract of sale.

- (a) For purposes of section 12(a)(2) of the Act only, and without affecting any other rights a purchaser may have, for purposes of determining whether a prospectus or oral statement included an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.
- (b) For purposes of section 17(a)(2) of the Act only, and without affecting any other rights the Commission may have to enforce that section, for purposes of determining whether a statement includes or represents any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.
- (c) For purposes of section 12(a)(2) of the Act only, knowing of such untruth or omission in respect of a sale (including, without limitation, a contract of sale), means knowing at the time of such sale (including such contract of sale).

[70 FR 44804, Aug. 3, 2005]

§ 230.159A Certain definitions for purposes of section 12(a)(2) of the Act.

- (a) **Definition of seller for purposes of section 12(a)(2) of the Act.** For purposes of section 12(a)(2) of the Act only, in a primary offering of securities of the issuer, regardless of the underwriting method used to sell the issuer's securities, *seller* shall include the issuer of the securities sold to a person as part of the initial distribution of such securities, and the issuer shall be considered to offer or sell the securities to such person, if the securities are offered or sold to such person by means of any of the following communications:
 - (1) Any preliminary prospectus or prospectus of the issuer relating to the offering required to be filed pursuant to Rule 424 (§ 230.424) or Rule 497 (§ 230.497);
 - (2) Any free writing prospectus as defined in § 230.405 (Rule 405) relating to the offering prepared by or on behalf of the issuer or used or referred to by the issuer and, in the case of an issuer that is an open-end management company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a separate account (as defined in Section 2(a)(14) of the Securities Act) (15 U.S.C.

77b(a)(14)) registered under the Investment Company Act of 1940 on §§ 239.17a and 274.11b of this chapter (Form N-3), §§ 239.17b and 274.11c of this chapter (Form N-4), or §§ 239.17c and 274.11d of this chapter (Form N-6), any summary prospectus relating to the offering provided pursuant to § 230.498 (Rule 498) or § 230.498A (Rule 498A), respectively;

- (3) The portion of any other free writing prospectus (or, in the case of an issuer that is an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)), any advertisement pursuant to Rule 482 (§ 230.482)) relating to the offering containing material information about the issuer or its securities provided by or on behalf of the issuer; and
- (4) Any other communication that is an offer in the offering made by the issuer to such person.

Notes to paragraph (a) of rule 159A.

1. For purposes of paragraph (a) of this section, information is provided or a communication is made by or on behalf of an issuer if an issuer or an agent or representative of the issuer authorizes or approves the information or communication before its provision or use. An offering participant other than the issuer shall not be an agent or representative of the issuer solely by virtue of its acting as an offering participant.
2. Paragraph (a) of this section shall not affect in any respect the determination of whether any person other than an issuer is a "seller" for purposes of section 12(a)(2) of the Act.

(b) *Definition of by means of for purposes of section 12(a)(2) of the Act.*

- (1) For purposes of section 12(a)(2) of the Act only, an offering participant other than the issuer shall not be considered to offer or sell securities that are the subject of a registration statement by means of a free writing prospectus as to a purchaser unless one or more of the following circumstances shall exist:
 - (i) The offering participant used or referred to the free writing prospectus in offering or selling the securities to the purchaser;
 - (ii) The offering participant offered or sold securities to the purchaser and participated in planning for the use of the free writing prospectus by one or more other offering participants and such free writing prospectus was used or referred to in offering or selling securities to the purchaser by one or more of such other offering participants; or
 - (iii) The offering participant was required to file the free writing prospectus pursuant to the conditions to use in Rule 433 (§ 230.433).
- (2) For purposes of section 12(a)(2) of the Act only, a person will not be considered to offer or sell securities by means of a free writing prospectus solely because another person has used or referred to the free writing prospectus or filed the free writing prospectus with the Commission pursuant to Rule 433.

[70 FR 44805, Aug. 3, 2005, as amended at 74 FR 4584, Jan. 26, 2009; 85 FR 26093, May 1, 2020]

§ 230.160 Registered investment company exemption from Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

A prospectus for an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) that is sent or given for the sole purpose of permitting a communication not to be deemed a prospectus under section 2(a)(10)(a) of the Act (15 U.S.C. 77b(a)(10)(a)) shall be exempt from the requirements of section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

[65 FR 47284, Aug. 2, 2000]

§ 230.161 Amendments to rules and regulations governing exemptions.

The rules and regulations governing the exemption of securities under section 3(b) of the Act, as in effect at the time the securities are first bona fide offered to the public in conformity therewith, shall continue to govern the exemption of such securities notwithstanding the subsequent amendment of such rules and regulations. This section shall not apply, however, to any new offering of such securities by an issuer or underwriter after the effective date of any such amendment, nor shall it apply to any offering after January 1, 1959, of securities by an issuer or underwriter pursuant to Regulation D or pursuant to Regulation A as in effect at any time prior to July 23, 1956.

[23 FR 4454, June 20, 1958]

§ 230.162 Submission of tenders in registered exchange offers.

- (a) Notwithstanding section 5(a) of the Act (15 U.S.C. 77e(a)), an offeror may solicit tenders of securities in an exchange offer before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules, and either:
 - (1) The exchange offer is subject to § 240.13e-4 or §§ 240.14d-1 through 14d-11 of this chapter; or
 - (2) The offeror provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of § 240.13e-4 or §§ 240.14d-1 through 14d-11 of this chapter; and if a material change occurs in the information published, sent or given to security holders, the offeror complies with the provisions of § 240.13e-4(e)(3) or § 240.14d-4(b) and (d) of this chapter in disseminating information about the material change to security holders, and including the minimum periods during which the offer must remain open (with withdrawal rights) after notice of the change is provided to security holders.
- (b) Notwithstanding Section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)), a prospectus that meets the requirements of Section 10(a) of the Act (15 U.S.C. 77j(a)) need not be delivered to security holders in an exchange offer that commences before the effectiveness of a registration statement in accordance with the provisions of § 230.162(a) of this section, so long as a preliminary prospectus, prospectus supplements and revised prospectuses are delivered to security holders in accordance with § 240.13e-4(e)(2) or § 240.14d-4(b) of this chapter. This applies not only to exchange offers subject to those provisions, but also to exchange offers not subject to those provisions that meet the conditions in § 230.162(a)(2) of this section.

Instruction to § 230.162 of this section:

Notwithstanding the provisions of § 230.162 of this section above, for going-private transactions (as defined by § 240.13e-3) and roll-up transactions (as described by Item 901 of Regulation S-K (§ 229.901 of this chapter)), a registration statement registering the securities to be offered must have become effective and only a prospectus that meets the requirements of Section 10(a) of the Securities Act may be delivered to security holders on the date of commencement.

[73 FR 60087, Oct. 9, 2008]

§ 230.163 Exemption from section 5(c) of the Act for certain communications by or on behalf of well-known seasoned issuers.

Preliminary Note to § 230.163.

Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

- (a) In an offering by or on behalf of a well-known seasoned issuer, as defined in Rule 405 (§ 230.405), that will be or is at the time intended to be registered under the Act, an offer by or on behalf of such issuer is exempt from the prohibitions in section 5(c) of the Act on offers to sell, offers for sale, or offers to buy its securities before a registration statement has been filed, provided that:
 - (1) Any written communication that is an offer made in reliance on this exemption will be a free writing prospectus as defined in Rule 405 and a prospectus under section 2(a)(10) of the Act relating to a public offering of securities to be covered by the registration statement to be filed; and
 - (2) The exemption from section 5(c) of the Act provided in this section for such written communication that is an offer shall be conditioned on satisfying the conditions in paragraph (b) of this section.
- (b) **Conditions -**
 - (1) **Legend.**
 - (i) Every written communication that is an offer made in reliance on this exemption shall contain substantially the following legend:

The issuer may file a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at www.sec.gov. Alternatively, the company will arrange to send you the prospectus after filing if you request it by calling toll-free 1-8[xx-xxx-xxxx].
 - (ii) The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's Web site, and provide the Internet address and the particular location of the documents on the Web site.

- (iii) An immaterial or unintentional failure to include the specified legend in a free writing prospectus required by this section will not result in a violation of section 5(c) of the Act or the loss of the ability to rely on this section so long as:
 - (A) A good faith and reasonable effort was made to comply with the specified legend condition;
 - (B) The free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend; and
 - (C) If the free writing prospectus has been transmitted without the specified legend, the free writing prospectus is retransmitted with the legend by substantially the same means as, and directed to substantially the same prospective purchasers to whom, the free writing prospectus was originally transmitted.

(2) **Filing condition.**

- (i) Subject to paragraph (b)(2)(ii) of this section, every written communication that is an offer made in reliance on this exemption shall be filed by the issuer with the Commission promptly upon the filing of the registration statement, if one is filed, or an amendment, if one is filed, covering the securities that have been offered in reliance on this exemption.
- (ii) The condition that an issuer shall file a free writing prospectus with the Commission under this section shall not apply in respect of any communication that has previously been filed with, or furnished to, the Commission or that the issuer would not be required to file with the Commission pursuant to the conditions of Rule 433 (§ 230.433) if the communication was a free writing prospectus used after the filing of the registration statement. The condition that the issuer shall file a free writing prospectus with the Commission under this section shall be satisfied if the issuer satisfies the filing conditions (other than timing of filing which is provided in this section) that would apply under Rule 433 if the communication was a free writing prospectus used after the filing of the registration statement.
- (iii) An immaterial or unintentional failure to file or delay in filing a free writing prospectus to the extent provided in this section will not result in a violation of section 5(c) of the Act or the loss of the ability to rely on this section so long as:
 - (A) A good faith and reasonable effort was made to comply with the filing condition; and
 - (B) The free writing prospectus is filed as soon as practicable after discovery of the failure to file.

(3) **Ineligible offerings.** The exemption in paragraph (a) of this section shall not be available to:

- (i) Communications relating to business combination transactions that are subject to § 230.165 (Rule 165) or § 230.166 (Rule 166); or
- (ii) Communications by an issuer that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), other than a registered closed-end investment company.

- (c) For purposes of this section, a communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made.

- (d) For purposes of this section, a communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer is deemed to be an offer by the issuer and, if a written communication, is deemed to be a free writing prospectus of the issuer.
- (e) A communication exempt from section 5(c) of the Act pursuant to this section will not be considered to be in connection with a securities offering registered under the Securities Act for purposes of Rule 100(b)(2)(iv) of Regulation FD under the Securities Exchange Act of 1934 (§ 243.100(b)(2)(iv) of this chapter).

[70 FR 44805, Aug. 3, 2005, as amended at 85 FR 33352, June 1, 2020]

§ 230.163A Exemption from section 5(c) of the Act for certain communications made by or on behalf of issuers more than 30 days before a registration statement is filed.

Preliminary Note to § 230.163A.

Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

- (a) Except as excluded pursuant to paragraph (b) of this section, in all registered offerings by issuers, any communication made by or on behalf of an issuer more than 30 days before the date of the filing of the registration statement that does not reference a securities offering that is or will be the subject of a registration statement shall not constitute an offer to sell, offer for sale, or offer to buy the securities being offered under the registration statement for purposes of section 5(c) of the Act, provided that the issuer takes reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement.
- (b) The exemption in paragraph (a) of this section shall not be available with respect to the following communications:
 - (1) Communications relating to business combination transactions that are subject to Rule 165 (§ 230.165) or Rule 166 (§ 230.166);
 - (2) Communications made in connection with offerings registered on Form S-8 (§ 239.16b of this chapter), other than by well-known seasoned issuers;
 - (3) Communications in offerings of securities of an issuer that is, or during the past three years was (or any of whose predecessors during the last three years was):
 - (i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
 - (ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405); or
 - (iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter); or
 - (4) Communications made by an issuer that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), other than a registered closed-end investment company.

- (c) For purposes of this section, a communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made.
- (d) A communication exempt from section 5(c) of the Act pursuant to this section will not be considered to be in connection with a securities offering registered under the Securities Act for purposes of Rule 100(b)(2)(iv) of Regulation FD under the Securities Exchange Act of 1934 (§ 243.100(b)(2)(iv) of this chapter).

[70 FR 44806, Aug. 3, 2005, as amended at 85 FR 33352, June 1, 2020]

§ 230.163B Exemption from section 5(b)(1) and section 5(c) of the Act for certain communications to qualified institutional buyers or institutional accredited investors.

- (a) Attempted compliance with this rule does not act as an exclusive election, and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this rule does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act (15 U.S.C. 77e).
- (b)
 - (1) An issuer, or any person authorized to act on behalf of an issuer, may engage in oral or written communications with potential investors described in paragraph (c) of this section to determine whether such investors might have an interest in a contemplated registered securities offering, either prior to or following the date of filing of a registration statement with respect to such securities with the Commission. Communications under this rule will be exempt from section 5(b)(1) (15 U.S.C. 77e(b)(1)) and section 5(c) of the Act (15 U.S.C. 77e(c)).
 - (2) Any oral or written communication by an issuer, or any person authorized to act on behalf of an issuer, made in reliance on this rule will be deemed an “offer” as defined in section 2(a)(3) of the Act (15 U.S.C. 77b(a)(3)).
 - (3) Any oral or written communication by an issuer, or any person authorized to act on behalf of an issuer, made in reliance on this rule is not required to be filed with the Commission, including pursuant to § 230.424(a) or § 230.497(a) of Regulation C under the Act or section 24(b) of the Investment Company Act of 1940 (15 U.S.C. 80a-24(b)) and the rules and regulations thereunder.
- (c) Communications under this rule may be made with potential investors that are, or that an issuer or person authorized to act on its behalf reasonably believes are:
 - (1) Qualified institutional buyers, as defined in § 230.144A; or
 - (2) Institutions that are accredited investors, as defined in §§ 230.501(a)(1), (a)(2), (a)(3), (a)(7), (a)(8), (a)(9), (a)(12), or (a)(13).

Note 1 to paragraph (c)(2):

Though the definition of “family client” from Rule 501(a)(13) includes both natural persons and institutions, only family clients that are institutions may be considered institutional accredited investors.

[84 FR 53036, Oct. 4, 2019, as amended at 85 FR 64276, Oct. 9, 2020]

§ 230.164 Post-filing free writing prospectuses in connection with certain registered offerings.

Preliminary Notes to § 230.164.

1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. Attempted compliance with this section does not act as an exclusive election and the person relying on this section also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

- (a) In connection with a registered offering of an issuer meeting the requirements of this section, a free writing prospectus, as defined in Rule 405 (§ 230.405), of the issuer or any other offering participant, including any underwriter or dealer, after the filing of the registration statement will be a section 10(b) prospectus for purposes of section 5(b)(1) of the Act provided that the conditions set forth in Rule 433 (§ 230.433) are satisfied.
- (b) An immaterial or unintentional failure to file or delay in filing a free writing prospectus as necessary to satisfy the filing conditions contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as:
 - (1) A good faith and reasonable effort was made to comply with the filing condition; and
 - (2) The free writing prospectus is filed as soon as practicable after discovery of the failure to file.
- (c) An immaterial or unintentional failure to include the specified legend in a free writing prospectus as necessary to satisfy the legend condition contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as:
 - (1) A good faith and reasonable effort was made to comply with the legend condition;
 - (2) The free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend; and
 - (3) If the free writing prospectus has been transmitted without the specified legend, the free writing prospectus must be retransmitted with the legend by substantially the same means as, and directed to substantially the same prospective purchasers to whom, the free writing prospectus was originally transmitted.
- (d) Solely for purposes of this section, an immaterial or unintentional failure to retain a free writing prospectus as necessary to satisfy the record retention condition contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as a good faith and reasonable effort was made to comply with the record retention condition. Nothing in this paragraph will affect, however, any other record retention provisions applicable to the issuer or any offering participant.
- (e) *Ineligible issuers.*

- (1) This section and Rule 433 are available only if at the eligibility determination date for the offering in question, determined pursuant to paragraph (h) of this section, the issuer is not an ineligible issuer as defined in Rule 405 (or in the case of any offering participant, other than the issuer, the participant has a reasonable belief that the issuer is not an ineligible issuer);
- (2) Notwithstanding paragraph (e)(1) of this section, this section and Rule 433 are available to an ineligible issuer with respect to a free writing prospectus that contains only descriptions of the terms of the securities in the offering or the offering (or in the case of an offering of asset-backed securities, contains only information specified in paragraphs (a)(1), (2), (3), (4), (6), (7), and (8) of the definition of ABS informational and computational materials in Item 1101 of Regulation AB (§ 229.1101 of this chapter), unless the issuer is or during the last three years the issuer or any of its predecessors was:
 - (i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
 - (ii) A shell company, other than a business combination related shell company, as defined in Rule 405; or
 - (iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter).
- (f) **Excluded issuers.** This section and Rule 433 are not available if the issuer is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), other than a registered closed-end investment company.
- (g) **Excluded offerings.** This section and Rule 433 are not available if the issuer is registering a business combination transaction as defined in Rule 165(f)(1) (§ 230.165(f)(1)) or the issuer, other than a well-known seasoned issuer, is registering an offering on Form S-8 (§ 239.16b of this chapter).
- (h) For purposes of this section and Rule 433, the determination date as to whether an issuer is an ineligible issuer in respect of an offering shall be:
 - (1) Except as provided in paragraph (h)(2) of this section, the time of filing of the registration statement covering the offering; or
 - (2) If the offering is being registered pursuant to Rule 415 (§ 230.415), the earliest time after the filing of the registration statement covering the offering at which the issuer, or in the case of an underwritten offering the issuer or another offering participant, makes a *bona fide* offer, including without limitation through the use of a free writing prospectus, in the offering.

[70 FR 44806, Aug. 3, 2005, as amended at 85 FR 33352, June 1, 2020]

§ 230.165 Offers made in connection with a business combination transaction.

Preliminary Note:

This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

- (a) **Communications before a registration statement is filed.** Notwithstanding section 5(c) of the Act (15 U.S.C. 77e(c)), the offeror of securities in a business combination transaction to be registered under the Act may make an offer to sell or solicit an offer to buy those securities from and including the first public announcement until the filing of a registration statement related to the transaction, so long as any written communication (other than non-public communications among participants) made in connection with or relating to the transaction (*i.e.*, prospectus) is filed in accordance with § 230.425 and the conditions in paragraph (c) of this section are satisfied.
- (b) **Communications after a registration statement is filed.** Notwithstanding section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), any written communication (other than non-public communications among participants) made in connection with or relating to a business combination transaction (*i.e.*, prospectus) after the filing of a registration statement related to the transaction need not satisfy the requirements of section 10 (15 U.S.C. 77j) of the Act, so long as the prospectus is filed in accordance with § 230.424 or § 230.425 and the conditions in paragraph (c) of this section are satisfied.
- (c) **Conditions.** To rely on paragraphs (a) and (b) of this section:
- (1) Each prospectus must contain a prominent legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also must explain to investors that they can get the documents for free at the Commission's web site and describe which documents are available free from the offeror; and
 - (2) In an exchange offer, the offer must be made in accordance with the applicable tender offer rules (§§ 240.14d-1 through 240.14e-8 of this chapter); and, in a transaction involving the vote of security holders, the offer must be made in accordance with the applicable proxy or information statement rules (§§ 240.14a-1 through 240.14a-101 and §§ 240.14c-1 through 240.14c-101 of this chapter).
- (d) **Applicability.** This section is applicable not only to the offeror of securities in a business combination transaction, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction.
- (e) **Failure to file or delay in filing.** An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) or (c) of the Act (15 U.S.C. 77e(b)(1) and (c)), so long as:
- (1) A good faith and reasonable effort was made to comply with the filing requirement; and
 - (2) The prospectus is filed as soon as practicable after discovery of the failure to file.
- (f) **Definitions.**
- (1) A *business combination transaction* means any transaction specified in § 230.145(a) or exchange offer;
 - (2) A *participant* is any person or entity that is a party to the business combination transaction and any persons authorized to act on their behalf; and
 - (3) **Public announcement** is any oral or written communication by a participant that is reasonably designed to, or has the effect of, informing the public or security holders in general about the business combination transaction.

[64 FR 61450, Nov. 10, 1999]

§ 230.166 Exemption from section 5(c) for certain communications in connection with business combination transactions.

Preliminary Note:

This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

- (a) **Communications.** In a registered offering involving a business combination transaction, any communication made in connection with or relating to the transaction before the first public announcement of the offering will not constitute an offer to sell or a solicitation of an offer to buy the securities offered for purposes of section 5(c) of the Act (15 U.S.C. 77e(c)), so long as the participants take all reasonable steps within their control to prevent further distribution or publication of the communication until either the first public announcement is made or the registration statement related to the transaction is filed.
- (b) **Definitions.** The terms business combination transaction, participant and public announcement have the same meaning as set forth in § 230.165(f).

[64 FR 61450, Nov. 10, 1999]

§ 230.167 Communications in connection with certain registered offerings of asset-backed securities.

Preliminary Note:

This section is available only to communications in connection with certain offerings of asset-backed securities. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction or are part of a plan or scheme to evade the requirements of section 5 of the Act (15 U.S.C. 77e).

- (a) In an offering of asset-backed securities registered on Form SF-3 (§ 239.45 of this chapter), *ABS informational and computational material* regarding such securities used after the effective date of the registration statement and before the sending or giving to investors of a final prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) regarding such offering is exempt from section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), if the conditions in paragraph (b) of this section are met.
- (b) **Conditions.** To rely on paragraph (a) of this section:
 - (1) The communications shall be filed to the extent required pursuant to § 230.426.
 - (2) Every communication used pursuant to this section shall include prominently on the cover page or otherwise at the beginning of such communication:
 - (i) The issuing entity's name and the depositor's name, if applicable;
 - (ii) The Commission file number for the related registration statement;

- (iii) A statement that such communication is *ABS informational and computational material* used in reliance on Securities Act Rule 167 (§ 230.167); and
- (iv) A legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also shall explain to investors that they can get the documents for free at the Commission's Web site and describe which documents are available free from the issuer or an underwriter.
- (c) This section is applicable not only to the offeror of the asset-backed securities, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction. A participant for purposes of this section is any person or entity that is a party to the asset-backed securities transaction and any persons authorized to act on their behalf.
- (d) Failure by a particular underwriter to cause the filing of a prospectus described in this section will not affect the ability of any other underwriter who has complied with the procedures to rely on the exemption.
- (e) An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), so long as:
 - (1) A good faith and reasonable effort was made to comply with the filing requirement; and
 - (2) The prospectus is filed as soon as practicable after discovery of the failure to file.
- (f) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

[70 FR 1615, Jan. 7, 2005, as amended at 79 FR 57328, Sept. 24, 2014]

§ 230.168 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information and forward-looking information.

Preliminary notes to § 230.168.

1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.
2. This section provides a non-exclusive safe harbor for factual business information and forward-looking information released or disseminated as provided in this section. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the definition of prospectus in section 2(a)(10) or the requirements of section 5 of the Act.
3. The availability of this section for a release or dissemination of a communication that contains or incorporates factual business information or forward-looking information will not be affected by another release or dissemination of a communication that contains all or a portion of the same factual business information or forward-looking information that does not satisfy the conditions of this section.

- (a) For purposes of sections 2(a)(10) and 5(c) of the Act, the regular release or dissemination by or on behalf of an issuer (and, in the case of an asset-backed issuer, the other persons specified in paragraph (a)(3) of this section) of communications containing factual business information or forward-looking information

shall be deemed not to constitute an offer to sell or offer for sale of a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied by any of the following:

- (1) An issuer that is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));
- (2) A foreign private issuer that:
 - (i) Meets all of the registrant requirements of Form F-3 (§ 239.33 of this chapter) other than the reporting history provisions of General Instructions I.A.1. and I.A.2.(a) of Form F-3;
 - (ii) Either:
 - (A) Satisfies the public float threshold in General Instruction I.B.1. of Form F-3; or
 - (B) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in 17 CFR 239.33 of this chapter); and
 - (iii) Either:
 - (A) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§ 230.902(b)) and has had them so traded for at least 12 months; or
 - (B) Has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; or
- (3) An asset-backed issuer or a depositor, sponsor, or servicer (as such terms are defined in Item 1101 of Regulation AB (§ 229.1101 of this chapter)) or an affiliated depositor, whether or not such other person is the issuer.

(b) **Definitions.**

- (1) **Factual business information** means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section, including, without limitation, such factual business information contained in reports or other materials filed with, furnished to, or submitted to the Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.):
 - (i) Factual information about the issuer, its business or financial developments, or other aspects of its business;
 - (ii) Advertisements of, or other information about, the issuer's products or services; and
 - (iii) Dividend notices.
- (2) **Forward-looking information** means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section, including, without limitation, such forward-looking information contained in reports or other materials filed with, furnished to, or submitted to the Commission pursuant to the Securities Exchange Act of 1934 or pursuant to the Investment Company Act of 1940:
 - (i) Projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;
 - (ii) Statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;

- (iii) Statements about the issuer's future economic performance, including statements of the type contemplated by the management's discussion and analysis of financial condition and results of operation described in Item 303 of Regulations S-B and S-K (§ 228.303 and § 229.303 of this chapter) or the operating and financial review and prospects described in Item 5 of Form 20-F (§ 249.220f of this chapter); and
 - (iv) Assumptions underlying or relating to any of the information described in paragraphs (b)(2)(i), (b)(2)(ii) and (b)(2)(iii) of this section.
- (3) For purposes of this section, the release or dissemination of a communication is by or on behalf of the issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves such release or dissemination before it is made.
- (4) For purposes of this section, in the case of communications of a person specified in paragraph (a)(3) of this section other than the asset-backed issuer, the release or dissemination of a communication is by or on behalf of such other person if such other person or its agent or representative, other than an underwriter or dealer, authorizes or approves such release or dissemination before it is made.
- (c) **Exclusion.** A communication containing information about the registered offering or released or disseminated as part of the offering activities in the registered offering is excluded from the exemption of this section.
- (d) **Conditions to exemption.** The following conditions must be satisfied:
- (1) The issuer (or in the case of an asset-backed issuer, the issuer and the other persons specified in paragraph (a)(3) of this section, taken together) has previously released or disseminated information of the type described in this section in the ordinary course of its business;
 - (2) The timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations; and
 - (3) The issuer is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), other than a registered closed-end investment company.

[70 FR 44807, Aug. 3, 2005, as amended at 76 FR 46617, Aug. 3, 2011; 85 FR 33352, June 1, 2020]

§ 230.169 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information.

Preliminary Notes to § 230.169.

1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.
2. This section provides a non-exclusive safe harbor for factual business information released or disseminated as provided in this section. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the definition of prospectus in section 2(a)(10) or the requirements of section 5 of the Act.

3. The availability of this section for a release or dissemination of a communication that contains or incorporates factual business information will not be affected by another release or dissemination of a communication that contains all or a portion of the same factual business information that does not satisfy the conditions of this section.

(a) For purposes of sections 2(a)(10) and 5(c) of the Act, the regular release or dissemination by or on behalf of an issuer of communications containing factual business information shall be deemed not to constitute an offer to sell or offer for sale of a security by an issuer which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied.

(b) **Definitions.**

(1) **Factual business information** means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section:

(i) Factual information about the issuer, its business or financial developments, or other aspects of its business; and

(ii) Advertisements of, or other information about, the issuer's products or services.

(2) For purposes of this section, the release or dissemination of a communication is by or on behalf of the issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

(c) **Exclusions.** A communication containing information about the registered offering or released or disseminated as part of the offering activities in the registered offering is excluded from the exemption of this section.

(d) **Conditions to exemption.** The following conditions must be satisfied:

(1) The issuer has previously released or disseminated information of the type described in this section in the ordinary course of its business;

(2) The timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations;

(3) The information is released or disseminated for intended use by persons, such as customers and suppliers, other than in their capacities as investors or potential investors in the issuer's securities, by the issuer's employees or agents who historically have provided such information; and

(4) The issuer is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), other than a registered closed-end investment company.

[70 FR 44808, Aug. 3, 2005, as amended at 85 FR 33353, June 1, 2020]

§ 230.170 Prohibition of use of certain financial statements.

Financial statements which purport to give effect to the receipt and application of any part of the proceeds from the sale of securities for cash shall not be used unless such securities are to be offered through underwriters and the underwriting arrangements are such that the underwriters are or will be committed to take and pay for all of the

securities, if any are taken, prior to or within a reasonable time after the commencement of the public offering, or if the securities are not so taken to refund to all subscribers the full amount of all subscription payments made for the securities. The caption of any such financial statement shall clearly set forth the assumptions upon which such statement is based. The caption shall be in type at least as large as that used generally in the body of the statement.

[21 FR 7566, Oct. 3, 1956]

§ 230.171 Disclosure detrimental to the national defense or foreign policy.

- (a) Any requirement to the contrary notwithstanding, no registration statement, prospectus, or other document filed with the Commission or used in connection with the offering or sale of any securities shall contain any document or information which, pursuant to Executive order, has been classified by an appropriate department or agency of the United States for protection in the interests of national defense or foreign policy.
- (b) Where a document or information is omitted pursuant to paragraph (a) of this section, there shall be filed, in lieu of such document or information, a statement from an appropriate department or agency of the United States to the effect that such document or information has been classified or that the status thereof is awaiting determination. Where a document is omitted pursuant to paragraph (a) of this section, but information relating to the subject matter of such document is nevertheless included in material filed with the Commission pursuant to a determination of an appropriate department or agency of the United States that disclosure of such information would not be contrary to the interests of national defense or foreign policy, a statement from such department or agency to that effect shall be submitted for the information of the Commission. A registrant may rely upon any such statement in filing or omitting any document or information to which the statement relates.
- (c) The Commission may protect any information in its possession which may require classification in the interests of national defense or foreign policy pending determination by an appropriate department or agency as to whether such information should be classified.
- (d) It shall be the duty of the registrant to submit the documents or information referred to in paragraph (a) of this section to the appropriate department or agency of the United States prior to filing them with the Commission and to obtain and submit to the Commission, at the time of filing such documents or information, or in lieu thereof, as the case may be, the statements from such department or agency required by paragraph (b) of this section. All such statements shall be in writing.

[33 FR 7682, May 24, 1968]

§ 230.172 Delivery of prospectuses.

- (a) ***Sending confirmations and notices of allocations.*** After the effective date of a registration statement, the following are exempt from the provisions of section 5(b)(1) of the Act if the conditions set forth in paragraph (c) of this section are satisfied:
 - (1) Written confirmations of sales of securities in an offering pursuant to a registration statement that contain information limited to that called for in Rule 10b-10 under the Securities Exchange Act of 1934 (§ 240.10b-10 of this chapter) and other information customarily included in written confirmations of sales of securities, which may include notices provided pursuant to Rule 173 (§ 230.173); and

- (2) Notices of allocation of securities sold or to be sold in an offering pursuant to the registration statement that may include information identifying the securities (including the CUSIP number) and otherwise may include only information regarding pricing, allocation and settlement, and information incidental thereto.
- (b) **Transfer of the security.** Any obligation under section 5(b)(2) of the Act to have a prospectus that satisfies the requirements of section 10(a) of the Act precede or accompany the carrying or delivery of a security in a registered offering is satisfied if the conditions in paragraph (c) of this section are met.
- (c) **Conditions.**
 - (1) The registration statement relating to the offering is effective and is not the subject of any pending proceeding or examination under section 8(d) or 8(e) of the Act;
 - (2) Neither the issuer, nor an underwriter or participating dealer is the subject of a pending proceeding under section 8A of the Act in connection with the offering; and
 - (3) The issuer has filed with the Commission a prospectus with respect to the offering that satisfies the requirements of section 10(a) of the Act or the issuer will make a good faith and reasonable effort to file such a prospectus within the time required under Rule 424 (§ 230.424) and, in the event that the issuer fails to file timely such a prospectus, the issuer files the prospectus as soon as practicable thereafter.
 - (4) The condition in paragraph (c)(3) of this section shall not apply to transactions by dealers requiring delivery of a final prospectus pursuant to section 4(3) of the Act.
- (d) **Exclusions.** This section shall not apply to any:
 - (1) Offering of any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), other than a registered closed-end investment company;
 - (2) A business combination transaction as defined in § 230.165(f)(1) (Rule 165(f)(1)); or
 - (3) Offering registered on Form S-8 (§ 239.16b of this chapter).

[70 FR 44808, Aug. 3, 2005, as amended at 85 FR 33353, June 1, 2020]

§ 230.173 Notice of registration.

- (a) In a transaction that represents a sale by the issuer or an underwriter, or a sale where there is not an exclusion or exemption from the requirement to deliver a final prospectus meeting the requirements of section 10(a) of the Act pursuant to section 4(3) of the Act or Rule 174 (§ 230.174), each underwriter or dealer selling in such transaction shall provide to each purchaser from it, not later than two business days following the completion of such sale, a copy of the final prospectus or, in lieu of such prospectus, a notice to the effect that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to have been delivered in the absence of Rule 172 (§ 230.172).
- (b) If the sale was by the issuer and was not effected by or through an underwriter or dealer, the responsibility to send a prospectus, or in lieu of such prospectus, such notice as set forth in paragraph (a) of this section, shall be the issuer's.
- (c) Compliance with the requirements of this section is not a condition to reliance on Rule 172.

- (d) A purchaser may request from the person responsible for sending a notice a copy of the final prospectus if one has not been sent.
- (e) After the effective date of the registration statement with respect to an offering, notices as set forth in paragraph (a) of this section, are exempt from the provisions of section 5(b)(1) of the Act.
- (f) **Exclusions.** This section shall not apply to any:
 - (1) Transaction solely between brokers or dealers in reliance on Rule 153 (§ 230.153);
 - (2) Offering of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), other than a registered closed-end investment company;
 - (3) A business combination transaction as defined in § 230.165(f)(1) (Rule 165(f)(1)); or
 - (4) Offering registered on Form S-8 (§ 239.16b of this chapter).

[70 FR 44809, Aug. 3, 2005, as amended at 85 FR 33353, June 1, 2020]

§ 230.174 Delivery of prospectus by dealers; exemptions under section 4(3) of the Act.

The obligations of a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transactions) to deliver a prospectus in transactions in a security as to which a registration statement has been filed taking place prior to the expiration of the 40- or 90-day period specified in section 4(3) of the Act after the effective date of such registration statement or prior to the expiration of such period after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later, shall be subject to the following provisions:

- (a) No prospectus need be delivered if the registration statement is on Form F-6 (§ 239.36 of this chapter).
- (b) No prospectus need be delivered if the issuer is subject, immediately prior to the time of filing the registration statement, to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934.
- (c) Where a registration statement relates to offerings to be made from time to time no prospectus need be delivered after the expiration of the initial prospectus delivery period specified in section 4(3) of the Act following the first bona fide offering of securities under such registration statement.
- (d) If
 - (1) the registration statement relates to the security of an issuer that is not subject, immediately prior to the time of filing the registration statement, to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934, and
 - (2) as of the offering date, the security is listed on a registered national securities exchange or authorized for inclusion in an electronic inter-dealer quotation system sponsored and governed by the rules of a registered securities association, no prospectus need be delivered after the expiration of twenty-five calendar days after the offering date. For purposes of this provision, the term *offering date* refers to the later of the effective date of the registration statement or the first date on which the security was bona fide offered to the public.
- (e) Notwithstanding the foregoing, the period during which a prospectus must be delivered by a dealer shall be:

- (1) As specified in section 4(3) of the Act if the registration statement was the subject of a stop order issued under section 8 of the Act; or
- (2) As the Commission may provide upon application or on its own motion in a particular case.
- (f) Nothing in this section shall affect the obligation to deliver a prospectus pursuant to the provisions of section 5 of the Act by a dealer who is acting as an underwriter with respect to the securities involved or who is engaged in a transaction as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.
- (g) If the registration statement relates to an offering of securities of a “blank check company,” as defined in Rule 419 under the Act (17 CFR 230.419), the statutory period for prospectus delivery specified in section 4(3) of the Act shall not terminate until 90 days after the date funds and securities are released from the escrow or trust account pursuant to Rule 419 under the Act.
- (h) Any obligation pursuant to Section 4(3) of the Act and this section to deliver a prospectus, other than pursuant to paragraph (g) of this section, may be satisfied by compliance with the provisions of Rule 172 (§ 230.172).

[35 FR 18457, Dec. 4, 1970, as amended at 48 FR 12347, Mar. 24, 1983; 53 FR 11845, Apr. 11, 1988; 57 FR 18043, Apr. 28, 1992; 70 FR 44809, Aug. 3, 2005]

§ 230.175 Liability for certain statements by issuers.

- (a) A statement within the coverage of paragraph (b) of this section which is made by or on behalf of an issuer or by an outside reviewer retained by the issuer shall be deemed not to be a fraudulent statement (as defined in paragraph (d) of this section), unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.
- (b) This rule applies to the following statements:
 - (1) A forward-looking statement (as defined in paragraph (c) of this section) made in a document filed with the Commission, in Part I of a quarterly report on Form 10-Q, (§ 249.308a of this chapter), or in an annual report to security holders meeting the requirements of Rule 14a-3(b) and (c) or 14c-3(a) and (b) under the Securities Exchange Act of 1934 (§§ 240.14a-3(b) and (c) or 240.14c-3(a) and (b) of this chapter), a statement reaffirming such forward-looking statement after the date the document was filed or the annual report was made publicly available, or a forward-looking statement made before the date the document was filed or the date the annual report was publicly available if such statement is reaffirmed in a filed document, in Part I of a quarterly report on Form 10-Q, or in an annual report made publicly available within a reasonable time after the making of such forward-looking statement; *Provided*, that
 - (i) At the time such statements are made or reaffirmed, either the issuer is subject to the reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 and has complied with the requirements of Rule 13a-1 or 15d-1 (§§ 239.13a-1 or 239.15d-1 of this chapter) thereunder, if applicable, to file its most recent annual report on Form 10-K, Form 20-F, or Form 40-F; or if the issuer is not subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, the statements are made in a registration statement filed under the Act, offering statement or solicitation of interest, written document or broadcast script under Regulation A or pursuant to sections 12(b) or (g) of the Securities Exchange Act of 1934; and

- (ii) The statements are not made by or on behalf of an issuer that is an investment company registered under the Investment Company Act of 1940; and
- (2) Information that is disclosed in a document filed with the Commission, in Part I of a quarterly report on Form 10-Q (§ 249.308a of this chapter) or in an annual report to shareholders meeting the requirements of Rules 14a-3 (b) and (c) or 14c-3 (a) and (b) under the Securities Exchange Act of 1934 (§§ 240.14a-3(b) and (c) or 240.14c-3(a) and (b) of this chapter) and that relates to:
 - (i) The effects of changing prices on the business enterprise, presented voluntarily or pursuant to Item 303 of Regulation S-K (§ 229.303 of this chapter), "Management's Discussion and Analysis of Financial Condition and Results of Operations," Item 5 of Form 20-F (§ 249.220(f) of this chapter), "Operating and Financial Review and Prospects," Item 302 of Regulation S-K (§ 229.302 of this chapter), "Supplementary Financial Information," or Rule 3-20(c) of Regulation S-X (§ 210.3-20(c) of this chapter); or
 - (ii) The value of proved oil and gas reserves (such as a standardized measure of discounted future net cash flows relating to proved oil and gas reserves as set forth in FASB ASC paragraphs 932-235-50-29 through 932-235-50-36 (Extractive Activities - Oil and Gas Topic) presented voluntarily or pursuant to Item 302 of Regulation S-K (§ 229.302 of this chapter).
- (c) For the purpose of this rule, the term *forward-looking statement* shall mean and shall be limited to:
 - (1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;
 - (2) A statement of management's plans and objectives for future operations;
 - (3) A statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations included pursuant to Item 303 of Regulation S-K (§ 229.303 of this chapter) or Item 9 of Form 20-F; or Item 5 of Form 20-F.
 - (4) Disclosed statements of the assumptions underlying or relating to any of the statements described in paragraphs (c) (1), (2), or (3) of this section.
- (d) For the purpose of this rule the term *fraudulent statement* shall mean a statement which is an untrue statement of a material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or which constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud, as those terms are used in the Securities Act of 1933 or the rules or regulations promulgated thereunder.

[46 FR 13990, Feb. 25, 1981, as amended at 46 FR 19457, Mar. 31, 1981; 47 FR 54770, Dec. 6, 1982; 48 FR 19875, May 3, 1983; 56 FR 30054, July 1, 1991; 57 FR 36468, Aug. 13, 1992; 64 FR 53909, Oct. 5, 1999; 73 FR 967, Jan. 4, 2008; 76 FR 50121, Aug. 12, 2011]

§ 230.176 Circumstances affecting the determination of what constitutes reasonable investigation and reasonable grounds for belief under section 11 of the Securities Act.

In determining whether or not the conduct of a person constitutes a reasonable investigation or a reasonable ground for belief meeting the standard set forth in section 11(c), relevant circumstances include, with respect to a person other than the issuer.

- (a) The type of issuer;

- (b) The type of security;
- (c) The type of person;
- (d) The office held when the person is an officer;
- (e) The presence or absence of another relationship to the issuer when the person is a director or proposed director;
- (f) Reasonable reliance on officers, employees, and others whose duties should have given them knowledge of the particular facts (in the light of the functions and responsibilities of the particular person with respect to the issuer and the filing);
- (g) When the person is an underwriter, the type of underwriting arrangement, the role of the particular person as an underwriter and the availability of information with respect to the registrant; and
- (h) Whether, with respect to a fact or document incorporated by reference, the particular person had any responsibility for the fact or document at the time of the filing from which it was incorporated.

[47 FR 11433, Mar. 16, 1982, as amended at 76 FR 71876, Nov. 21, 2011]

§ 230.180 Exemption from registration of interests and participations issued in connection with certain H.R. 10 plans.

- (a) Any interest or participation in a single trust fund or in a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, issued to an employee benefit plan shall be exempt from the provisions of section 5 of the Act if the following terms and conditions are met:
 - (1) The plan covers employees, some or all of whom are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954, and is either:
 - (i) A pension or profit-sharing plan which meets the requirements for qualification under section 401 of such Code, or
 - (ii) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code;
 - (2) The plan covers only employees of a single employer or employees of interrelated partnerships; and
 - (3) The issuer of such interest, participation or security shall have reasonable grounds to believe and, after making reasonable inquiry, shall believe immediately prior to any issuance that:
 - (i) The employer is a law firm, accounting firm, investment banking firm, pension consulting firm or investment advisory firm that is engaged in furnishing services of a type that involve such knowledge and experience in financial and business matters that the employer is able to represent adequately its interests and those of its employees; or
 - (ii) In connection with the plan, the employer prior to adopting the plan obtains the advice of a person or entity that
 - (A) is not a financial institution providing any funding vehicle for the plan, and is neither an affiliated person as defined in section 2(a)(3) of the Investment Company Act of 1940 of, nor a person who has a material business relationship with, a financial institution providing a funding vehicle for the plan; and

(B) is, by virtue of knowledge and experience in financial and business matters, able to represent adequately the interests of the employer and its employees.

- (b) Any interest or participation issued to a participant in either a pension or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954 or an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code, and which covers employees, some or all of whom are employees within the meaning of section 401(c)(1) of such Code, shall be exempt from the provisions of section 5 of the Act.

[46 FR 58291, Dec. 1, 1981]

§ 230.190 Registration of underlying securities in asset-backed securities transactions.

- (a) In an offering of asset-backed securities where the asset pool includes securities of another issuer ("underlying securities"), unless the underlying securities are themselves exempt from registration under section 3 of the Act (15 U.S.C. 77c), the offering of the relevant underlying securities itself must be registered as a primary offering of such securities in accordance with paragraph (b) of this section unless all of the following are true. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).
- (1) Neither the issuer of the underlying securities nor any of its affiliates has a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the underlying securities and the asset-backed securities transaction;
 - (2) Neither the issuer of the underlying securities nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction;
 - (3) If the underlying securities are restricted securities, as defined in § 230.144(a)(3), § 230.144 must be available for the sale of the securities, provided however, that notwithstanding any other provision of § 230.144, § 230.144 shall only be so available if at least two years have elapsed since the later of the date the securities were acquired from the issuer of the underlying securities or from an affiliate of the issuer of the underlying securities; and
 - (4) The depositor would be free to publicly resell the underlying securities without registration under the Act. For example, the offering of the asset-backed security does not constitute part of a distribution of the underlying securities. An offering of asset-backed securities with an asset pool containing underlying securities that at the time of the purchase for the asset pool are part of a subscription or unsold allotment would be a distribution of the underlying securities. For purposes of this section, in an offering of asset-backed securities involving a sponsor, depositor or underwriter that was an underwriter or an affiliate of an underwriter in a registered offering of the underlying securities, the distribution of the asset-backed securities will not constitute part of a distribution of the underlying securities if the underlying securities were purchased at arm's length in the secondary market at least three months after the last sale of any unsold allotment or subscription by the affiliated underwriter that participated in the registered offering of the underlying securities.
- (b) If all of the conditions in paragraph (a) of this section are not met, the offering of the relevant underlying securities itself must be registered as a primary offering of such securities in accordance with the following:

- (1) If the offering of asset-backed securities is registered on Form SF-3 (§ 239.45 of this chapter), the offering of the underlying securities itself must be eligible to be registered under Form SF-3, Form S-3 (§ 239.13 of this chapter), or F-3 (§ 239.33 of this chapter) as a primary offering of such securities;
 - (2) The plan of distribution in the registration statement for the offering of the underlying securities contemplates this type of distribution at the time of the commencement of the offering of the asset-backed securities;
 - (3) The prospectus for the asset-backed securities offering describes the plan of distribution for both the underlying securities and the asset-backed securities;
 - (4) The prospectus relating to the offering of the underlying securities is delivered simultaneously with the delivery of the prospectus relating to the offering of the asset-backed securities, and the prospectus for the asset-backed securities includes disclosure that the prospectus for the offering of the underlying securities will be delivered along with, or is combined with, the prospectus for the offering of the asset-backed securities;
 - (5) The prospectus for the asset-backed securities offering identifies the issuing entity, depositor, sponsor and each underwriter for the offering of the asset-backed securities as an underwriter for the offering of the underlying securities; and
 - (6) Neither prospectus disclaims or limits responsibility by the issuing entity, sponsor, depositor, trustee or any underwriter for information regarding the underlying securities.
- (c) Notwithstanding paragraphs (a) and (b) of this section, if the asset pool for the asset-backed securities includes a pool asset representing an interest in or the right to the payments or cash flows of another asset pool, then that pool asset is not considered an “underlying security” for purposes of this section (although its distribution in connection with the asset-backed securities transaction may need to be separately registered) if the following conditions are met:
- (1) Both the issuing entity for the asset-backed securities and the entity issuing the pool asset were established under the direction of the same sponsor and depositor;
 - (2) The pool asset is created solely to satisfy legal requirements or otherwise facilitate the structuring of the asset-backed securities transaction;
 - (3) The pool asset is not part of a scheme to avoid registration or the requirements of this section; and
 - (4) The pool asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities.
- (d) Notwithstanding paragraph (c) of this section (that is, although the pool asset described in paragraph (c) of this section is an not an “underlying security” for purposes of this section), if the pool assets for the asset-backed securities are collateral certificates or special units of beneficial interest, those collateral certificates or special units of beneficial interest must be registered concurrently with the registration of the asset-backed securities. However, pursuant to § 230.457(t) no separate registration fee for the certificates or special units of beneficial interest is required to be paid.

[70 FR 1615, Jan. 7, 2005, as amended at 72 FR 71571, Dec. 17, 2007; 79 FR 57328, Sept. 24, 2014; 80 FR 6652, Feb. 6, 2015]

§ 230.191 Definition of “issuer” in section 2(a)(4) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

- (a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the “issuer” for purposes of the asset-backed securities of that issuing entity.
- (b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different “issuer” from that same person acting as a depositor for another issuing entity or for purposes of that person's own securities.

[70 FR 1615, Jan. 7, 2005]

§ 230.193 Review of underlying assets in asset-backed securities transactions.

An issuer of an “asset-backed security,” as that term is defined in Section 3(a)(79) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(79)), offering and selling such a security pursuant to a registration statement shall perform a review of the pool assets underlying the asset-backed security. At a minimum, such review must be designed and effected to provide reasonable assurance that the disclosure regarding the pool assets in the form of prospectus filed pursuant to § 230.424 of this chapter is accurate in all material respects. The issuer may conduct the review or an issuer may employ a third party engaged for purposes of performing the review. If the findings and conclusions of the review are attributed to the third party, the third party must be named in the registration statement and consent to being named as an expert in accordance with § 230.436 of this chapter.

Instruction to § 230.193: An issuer of an “asset-backed security” may rely on one or more third parties to fulfill its obligation to perform a review under this section, provided that the reviews performed by the third parties and the issuer, in the aggregate, comply with the minimum standard in this section. The issuer must comply with the requirements of this section for each third party engaged by the issuer to perform the review for purposes of this section. An issuer may not rely on a review performed by an unaffiliated originator for purposes of performing the review required under this section.

[76 FR 4244, Jan. 25, 2011, as amended at 79 FR 57329, Sept. 24, 2014]

§ 230.194 Definitions of the terms “swap” and “security-based swap” as used in the Act.

- (a) The term *swap* as used in section 2(a)(17) of the Act (15 U.S.C. 77b(a)(17)) has the same meaning as provided in section 3(a)(69) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(69)) and 17 CFR 240.3a69-1 through 240.3a69-3.
- (b) The term *security-based swap* as used in section 2(a)(17) of the Act (15 U.S.C. 77b(a)(17)) has the same meaning as provided in section 3(a)(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)) and 17 CFR 240.3a68-1a through 240.3a68-5.

[77 FR 48356, Aug. 13, 2012]

§ 230.215 Accredited investor.

The term *accredited investor* as used in section 2(a)(15)(ii) of the Securities Act of 1933 (15 U.S.C. 77b(a)(15)(ii)) shall have the same meaning as the definition of that term in rule 501(a) under the Act (17 CFR 230.501(a)).

[85 FR 64276, Oct. 9, 2020]

REGULATION A-R - SPECIAL EXEMPTIONS

§ 230.236 Exemption of shares offered in connection with certain transactions.

Shares of stock or similar security offered to provide funds to be distributed to shareholders of the issuer of such securities in lieu of issuing fractional shares, script certificates or order forms, in connection with a stock dividend, stock split, reverse stock split, conversion, merger or similar transaction, shall be exempt from registration under the Act if the following conditions are met:

- (a) The issuer of such shares is required to file and has filed reports with the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934.
- (b) The aggregate gross proceeds from the sale of all shares offered in connection with the transaction for the purpose of providing such funds does not exceed \$300,000.
- (c) At least ten days prior to the offering of the shares, the issuer shall furnish to the Commission in writing the following information:
 - (1) That it proposes to offer shares in reliance upon the exemption provided by this rule;
 - (2) the estimated number of shares to be so offered;
 - (3) the aggregate market value of such shares as of the latest practicable date; and
 - (4) a brief description of the transaction in connection with which the shares are to be offered.

(Secs. 3, 4, and 19, 48 Stat. 75, 77, 85, as amended; 15 U.S.C. 77c, 77d, 77s; secs. 3(b), 4(l), 19(a), 48 Stat. 75, 77, 85; secs. 209, 48 Stat. 908; 59 Stat. 167; sec. 12, 78 Stat. 580; 84 Stat. 1480; sec. 308(a)(2), 90 Stat. 57; sec. 18, 92 Stat. 275; sec. 2, 92 Stat. 962; sec. 301, 94 Stat. 2291, 2294; secs. 12(a), 12(h), 12(i), 16(a), 23(a), 48 Stat. 892, 896, 901; sec. 203a, 49 Stat. 704; sec. 8, 49 Stat. 1379, secs. 3, 8, 78 Stat. 565-568, 579; sec. 1, 82 Stat. 454; sec. 105(b), 88 Stat. 1503; sec. 18, 89 Stat. 155; 15 U.S.C. 77c(b), 77d(l), 77s(a), 78l(a), 78l(h), 78l(i), 78p(a), 78w(a))

[27 FR 3289, Apr. 6, 1962, as amended at 37 FR 22978, Oct. 27, 1972; 47 FR 29652, July 8, 1982; 61 FR 49959, Sept. 24, 1996]

§ 230.237 Exemption for offers and sales to certain Canadian tax-deferred retirement savings accounts.

- (a) **Definitions.** As used in this section:
 - (1) **Canadian law** means the federal laws of Canada, the laws of any province or territory of Canada, and the rules or regulations of any federal, provincial, or territorial regulatory authority, or any self-regulatory authority, of Canada.
 - (2) **Canadian Retirement Account** means a trust or other arrangement, including, but not limited to, a "Registered Retirement Savings Plan" or "Registered Retirement Income Fund" administered under Canadian law, that is managed by the Participant and:
 - (i) Operated to provide retirement benefits to a Participant; and
 - (ii) Established in Canada, administered under Canadian law, and qualified for tax-deferred treatment under Canadian law.

- (3) **Eligible Security** means a security issued by a Qualified Company that:
 - (i) Is offered to a Participant, or sold to his or her Canadian Retirement Account, in reliance on this section; and
 - (ii) May also be purchased by Canadians other than Participants.
- (4) **Foreign Government** means the government of any foreign country or of any political subdivision of a foreign country.
- (5) **Foreign Issuer** means any issuer that is a Foreign Government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country, except an issuer meeting the following conditions:
 - (i) More than 50 percent of the outstanding voting securities of the issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States; and
 - (ii) Any of the following:
 - (A) The majority of the executive officers or directors are United States citizens or residents;
 - (B) More than 50 percent of the assets of the issuer are located in the United States; or
 - (C) The business of the issuer is administered principally in the United States.
 - (iii) For purposes of this definition, the term *resident*, as applied to security holders, means any person whose address appears on the records of the issuer, the voting trustee, or the depositary as being located in the United States.
- (6) **Participant** means a natural person who is a resident of the United States, or is temporarily present in the United States, and who contributes to, or is or will be entitled to receive the income and assets from, a Canadian Retirement Account.
- (7) **Qualified Company** means a Foreign Issuer whose securities are qualified for investment on a tax-deferred basis by a Canadian Retirement Account under Canadian law.
- (8) **United States** means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.
- (b) **Exemption.** The offer to a Participant, or the sale to his or her Canadian Retirement Account, of Eligible Securities by any person is exempt from Section 5 of the Act (15 U.S.C. 77e) if the person:
 - (1) Includes in any written offering materials delivered to a Participant, or to his or her Canadian Retirement Account, a prominent statement that the Eligible Security is not registered with the U.S. Securities and Exchange Commission and the Eligible Security is being offered or sold in the United States under an exemption from registration.
 - (2) Has not asserted that Canadian law, or the jurisdiction of the courts of Canada, does not apply in a proceeding involving an Eligible Security.

[65 FR 37676, June 15, 2000]

§ 230.238 Exemption for standardized options.

- (a) **Exemption.** Except as expressly provided in paragraphs (b) and (c) of this section, the Act does not apply to any standardized option, as that term is defined by section 240.9b-1(a)(4) of this chapter, that is:
 - (1) Issued by a clearing agency registered under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1); and
 - (2) Traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)) or on a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 780-3(a)).
- (b) **Limitation.** The exemption provided in paragraph (a) of this section does not apply to the provisions of section 17 of the Act (15 U.S.C. 77q).
- (c) **Offers and sales.** Any offer or sale of a standardized option by or on behalf of the issuer of the securities underlying the standardized option, an affiliate of the issuer, or an underwriter, will constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities as defined in section 2(a)(3) of the Act (15 U.S.C. 77b(a)(3)).

[68 FR 192, Jan. 2, 2003]

§ 230.239 Exemption for offers and sales of certain security-based swaps.

- (a) Provided that the conditions of paragraph (b) of this section are satisfied and except as expressly provided in paragraph (c) of this section, the Act does not apply to any offer or sale of a security-based swap that:
 - (1) Is issued or will be issued by a clearing agency that is either registered as a clearing agency under Section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1) or exempt from registration under Section 17A of the Securities Exchange Act of 1934 pursuant to a rule, regulation, or order of the Commission ("eligible clearing agency"), and
 - (2) The Commission has determined is required to be cleared or that is permitted to be cleared pursuant to the eligible clearing agency's rules.
- (b) The exemption provided in paragraph (a) of this section applies only to an offer or sale of a security-based swap described in paragraph (a) of this section if the following conditions are satisfied:
 - (1) The security-based swap is offered or sold in a transaction involving the eligible clearing agency in its function as a central counterparty with respect to such security-based swap;
 - (2) The security-based swap is sold only to an eligible contract participant (as defined in Section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18))); and
 - (3) The eligible clearing agency posts on its publicly available Web site at a specified Internet address or includes in its agreement covering the security-based swap that the eligible clearing agency provides or makes available to its counterparty the following:
 - (i) A statement identifying any security, issuer, loan, or narrow-based security index underlying the security-based swap;

- (ii) A statement indicating the security or loan to be delivered (or class of securities or loans), or if cash settled, the security, loan, or narrow-based security index (or class of securities or loans) whose value is to be used to determine the amount of the settlement obligation under the security-based swap; and
 - (iii) A statement of whether the issuer of any security or loan, each issuer of a security in a narrow-based security index, or each referenced issuer underlying the security-based swap is subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78o) and, if not subject to such reporting requirements, whether public information, including financial information, about any such issuer is available and where the information is available.
- (c) The exemption provided in paragraph (a) of this section does not apply to the provisions of Section 17(a) of the Act (15 U.S.C. 77q(a)).

[77 FR 20549, Apr. 5, 2012]

§ 230.240 Exemption for certain security-based swaps.

- (a) Except as expressly provided in paragraph (b) of this section, the Act does not apply to the offer or sale of any security-based swap that is:
- (1) A *security-based swap agreement*, as defined in Section 2A of the Act (15 U.S.C. 77b(b)-1) as in effect prior to July 16, 2011; and
 - (2) Entered into between eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act (7 U.S.C. 1a(12)) as in effect prior to July 16, 2011, other than a person who is an eligible contract participant under Section 1a(12)(C) of the Commodity Exchange Act as in effect prior to July 16, 2011).
- (b) The exemption provided in paragraph (a) of this section does not apply to the provisions of Section 17(a) of the Act (15 U.S.C. 77q(a)).
- (c) This section will expire on February 11, 2018.

[82 FR 10707, Feb. 15, 2017]

§ 230.241 Solicitations of interest.

- (a) **Solicitation of interest.** At any time before making a determination as to the exemption from registration under the Act under which an offering of securities will be conducted, an issuer or any person authorized to act on behalf of an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated offering of securities exempt from registration under the Act. Such communications are deemed to be an offer of a security for sale for purposes of the antifraud provisions of the Federal securities laws. No solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until the issuer makes a determination as to the exemption to be relied on and the offering, meeting the requirements of the exemption, is commenced.
- (b) **Conditions.** The communications must state that:

- (1) The issuer is considering an offering of securities exempt from registration under the Act, but has not determined a specific exemption from registration the issuer intends to rely on for the subsequent offer and sale of the securities;
 - (2) No money or other consideration is being solicited, and if sent in response, will not be accepted;
 - (3) No offer to buy the securities can be accepted and no part of the purchase price can be received until the issuer determines the exemption under which the offering is intended to be conducted and, where applicable, the filing, disclosure, or qualification requirements of such exemption are met; and
 - (4) A person's indication of interest involves no obligation or commitment of any kind.
- (c) **Indications of interest.** Any written communication under this section may include a means by which a person may indicate to the issuer that such person is interested in a potential offering. The issuer may require the name, address, telephone number, and/or email address in any response form included pursuant to this paragraph (c).

[86 FR 3596, Jan. 14, 2021]

REGULATION A - CONDITIONAL SMALL ISSUES EXEMPTION

Authority: Secs. 230.251 to 230.263 issued under 15 U.S.C. 77c, 77s.

Source: 57 FR 36468, Aug. 13, 1992, unless otherwise noted.

§ 230.251 Scope of exemption.

- (a) **Tier 1 and Tier 2.** A public offer or sale of eligible securities, as defined in Rule 261 (§ 230.261), pursuant to Regulation A shall be exempt under section 3(b) from the registration requirements of the Securities Act of 1933 (the "Securities Act") (15 U.S.C. 77a *et seq.*).
- (1) **Tier 1.** Offerings pursuant to Regulation A in which the sum of all cash and other consideration to be received for the securities being offered ("aggregate offering price") plus the gross proceeds for all securities sold pursuant to other offering statements within the 12 months before the start of and during the current offering of securities ("aggregate sales") does not exceed \$20,000,000, including not more than \$6,000,000 offered by all selling securityholders that are affiliates of the issuer ("Tier 1 offerings").
 - (2) **Tier 2.** Offerings pursuant to §§ 230.251 through 230.263 (Regulation A) in which the sum of the aggregate offering price and aggregate sales does not exceed \$75,000,000, including not more than \$22,500,000 offered by all selling securityholders that are affiliates of the issuer ("Tier 2 offerings").
 - (3) **Additional limitation on secondary sales in first year.** The portion of the aggregate offering price attributable to the securities of selling securityholders shall not exceed 30% of the aggregate offering price of a particular offering in:
 - (i) The issuer's first offering pursuant to Regulation A; or
 - (ii) Any subsequent Regulation A offering that is qualified within one year of the qualification date of the issuer's first offering.

Note to paragraph (a).

Where a mixture of cash and non-cash consideration is to be received, the aggregate offering price must be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price or aggregate sales attributable to cash received in a foreign currency must be translated into United States currency at a currency exchange rate in effect on, or at a reasonable time before, the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price or aggregate sales must be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Valuations of non-cash consideration must be reasonable at the time made. If convertible securities or warrants are being offered and such securities are convertible, exercisable, or exchangeable within one year of the offering statement's qualification or at the discretion of the issuer, the underlying securities must also be qualified and the aggregate offering price must include the actual or maximum estimated conversion, exercise, or exchange price of such securities.

(b) **Issuer.** The issuer of the securities:

- (1) Is an entity organized under the laws of the United States or Canada, or any State, Province, Territory or possession thereof, or the District of Columbia, with its principal place of business in the United States or Canada;
- (2) [Reserved]
- (3) Is not a development stage company that either has no specific business plan or purpose, or has indicated that its business plan is to merge with or acquire an unidentified company or companies;
- (4) Is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48));
- (5) Is not issuing fractional undivided interests in oil or gas rights, or a similar interest in other mineral rights;
- (6) Is not, and has not been, subject to any order of the Commission entered pursuant to Section 12(j) (15 U.S.C. 78l(j)) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78a *et seq.*) within five years before the filing of the offering statement;
- (7) Has filed with the Commission all reports required to be filed, if any, pursuant to § 230.257 or pursuant to section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 78o) during the two years before the filing of the offering statement (or for such shorter period that the issuer was required to file such reports); and
- (8) Is not disqualified under Rule 262 (§ 230.262).

(c) **Integration with other offerings.** To determine whether offers and sales should be integrated, see § 230.152.

(d) **Offering conditions -**

(1) **Offers.**

- (i) Except as allowed by Rule 255 (§ 230.255), no offer of securities may be made unless an offering statement has been filed with the Commission.

- (ii) After the offering statement has been filed, but before it is qualified:
 - (A) Oral offers may be made;
 - (B) Written offers pursuant to Rule 254 (§ 230.254) may be made; and
 - (C) Solicitations of interest and other communications pursuant to Rule 255 (§ 230.255) may be made.
- (iii) Offers may be made after the offering statement has been qualified, but any written offers must be accompanied with or preceded by the most recent offering circular filed with the Commission for such offering.

(2) **Sales.**

- (i) No sale of securities may be made:
 - (A) Until the offering statement has been qualified;
 - (B) By issuers that are not currently required to file reports pursuant to Rule 257(b) (§ 230.257(b)), until a Preliminary Offering Circular is delivered at least 48 hours before the sale to any person that before qualification of the offering statement had indicated an interest in purchasing securities in the offering, including those persons that responded to an issuer's solicitation of interest materials; and
 - (C) In a Tier 2 offering of securities that are not listed on a registered national securities exchange upon qualification, unless the purchaser is either an accredited investor (as defined in Rule 501 (§ 230.501)) or the aggregate purchase price to be paid by the purchaser for the securities (including the actual or maximum estimated conversion, exercise, or exchange price for any underlying securities that have been qualified) is no more than ten percent (10%) of the greater of such purchaser's:
 - (1) Annual income or net worth if a natural person (with annual income and net worth for such natural person purchasers determined as provided in Rule 501 (§ 230.501)); or
 - (2) Revenue or net assets for such purchaser's most recently completed fiscal year end if a non-natural person.

Note to paragraph (d)(2)(i)(C).

When securities underlying warrants or convertible securities are being qualified pursuant to Tier 2 of Regulation A one year or more after the qualification of an offering for which investment limitations previously applied, purchasers of the underlying securities for which investment limitations would apply at that later date may determine compliance with the ten percent (10%) investment limitation using the conversion, exercise, or exchange price to acquire the underlying securities at that later time without aggregating such price with the price of the overlying warrants or convertible securities.

- (D) The issuer may rely on a representation of the purchaser when determining compliance with the ten percent (10%) investment limitation in this paragraph (d)(2)(i)(C), provided that the issuer does not know at the time of sale that any such representation is untrue.

- (ii) In a transaction that represents a sale by the issuer or an underwriter, or a sale by a dealer within 90 calendar days after qualification of the offering statement, each underwriter or dealer selling in such transaction must deliver to each purchaser from it, not later than two business days following the completion of such sale, a copy of the Final Offering Circular, subject to the following provisions:
 - (A) If the sale was by the issuer and was not effected by or through an underwriter or dealer, the issuer is responsible for delivering the Final Offering Circular as if the issuer were an underwriter;
 - (B) For continuous or delayed offerings pursuant to paragraph (d)(3) of this section, the 90 calendar day period for dealers shall commence on the day of the first bona fide offering of securities under such offering statement;
 - (C) If the security is listed on a registered national securities exchange, no offering circular need be delivered by a dealer more than 25 calendar days after the later of the qualification date of the offering statement or the first date on which the security was bona fide offered to the public;
 - (D) No offering circular need be delivered by a dealer if the issuer is subject, immediately prior to the time of the filing of the offering statement, to the reporting requirements of Rule 257(b) (§ 230.257(b)); and
 - (E) The Final Offering Circular delivery requirements set forth in paragraph (d)(2)(ii) of this section may be satisfied by delivering a notice to the effect that the sale was made pursuant to a qualified offering statement that includes the uniform resource locator ("URL"), which, in the case of an electronic-only offering, must be an active hyperlink, where the Final Offering Circular, or the offering statement of which such Final Offering Circular is part, may be obtained on the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") and contact information sufficient to notify a purchaser where a request for a Final Offering Circular can be sent and received in response.

(3) ***Continuous or delayed offerings.***

- (i) Continuous or delayed offerings may be made under this Regulation A, so long as the offering statement pertains only to:
 - (A) Securities that are to be offered or sold solely by or on behalf of a person or persons other than the issuer, a subsidiary of the issuer, or a person of which the issuer is a subsidiary;
 - (B) Securities that are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the issuer;
 - (C) Securities that are to be issued upon the exercise of outstanding options, warrants, or rights;
 - (D) Securities that are to be issued upon conversion of other outstanding securities;
 - (E) Securities that are pledged as collateral; or
 - (F) Securities the offering of which will be commenced within two calendar days after the qualification date, will be made on a continuous basis, may continue for a period in excess of 30 calendar days from the date of initial qualification, and will be offered in an amount that, at the time the offering statement is qualified, is reasonably expected to be offered

and sold within two years from the initial qualification date. These securities may be offered and sold only if not more than three years have elapsed since the initial qualification date of the offering statement under which they are being offered and sold; provided, however, that if a new offering statement has been filed pursuant to this paragraph (d)(3)(i)(F), securities covered by the prior offering statement may continue to be offered and sold until the earlier of the qualification date of the new offering statement or 180 calendar days after the third anniversary of the initial qualification date of the prior offering statement. Before the end of such three-year period, an issuer may file a new offering statement covering the securities. The new offering statement must include all the information that would be required at that time in an offering statement relating to all offerings that it covers. Before the qualification date of the new offering statement, the issuer may include as part of such new offering statement any unsold securities covered by the earlier offering statement by identifying on the cover page of the new offering circular, or the latest amendment, the amount of such unsold securities being included. The offering of securities on the earlier offering statement will be deemed terminated as of the date of qualification of the new offering statement. Securities may be sold pursuant to this paragraph (d)(3)(i)(F) only if the issuer is current in its annual and semiannual filings pursuant to Rule 257(b) (§ 230.257(b)), at the time of such sale.

(ii) At the market offerings, by or on behalf of the issuer or otherwise, are not permitted under this Regulation A. As used in this paragraph (d)(3)(ii), the term *at the market offering* means an offering of equity securities into an existing trading market for outstanding shares of the same class at other than a fixed price.

(e) **Confidential treatment.** A request for confidential treatment may be made under Rule 406 (§ 230.406) for information required to be filed, and Rule 83 (§ 200.83) for information not required to be filed.

(f) **Electronic filing.** Documents filed or otherwise provided to the Commission pursuant to this Regulation A must be submitted in electronic format by means of EDGAR in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR part 232).

[80 FR 21895, Apr. 20, 2015, as amended at 84 FR 529, Jan. 31, 2019; 86 FR 3596, Jan. 14, 2021]

§ 230.252 Offering statement.

(a) **Documents to be included.** The offering statement consists of the contents required by Form 1-A (§ 239.90 of this chapter) and any other material information necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

(b) **Paper, printing, language and pagination.** Except as otherwise specified in this rule, the requirements for offering statements are the same as those specified in Rule 403 (§ 230.403) for registration statements under the Act. No fee is payable to the Commission upon either the submission or filing of an offering statement on Form 1-A, or any amendment to an offering statement.

(c) **Signatures.** The issuer, its principal executive officer, principal financial officer, principal accounting officer, and a majority of the members of its board of directors or other governing body, must sign the offering statement in the manner prescribed by Form 1-A. If a signature is by a person on behalf of any other person, evidence of authority to sign must be filed, except where an executive officer signs for the issuer.

- (d) **Non-public submission.** An issuer whose securities have not been previously sold pursuant to a qualified offering statement under this Regulation A or an effective registration statement under the Securities Act may submit a draft offering statement to the Commission for non-public review by the staff of the Commission before public filing, provided that the offering statement shall not be qualified less than 21 calendar days after the public filing with the Commission of:
 - (1) The initial non-public submission;
 - (2) All non-public amendments; and
 - (3) All non-public correspondence submitted by or on behalf of the issuer to the Commission staff regarding such submissions (subject to any separately approved confidential treatment request under Rule 251(e) (§ 230.251(e))).
- (e) **Qualification.** An offering statement and any amendment thereto can be qualified only at such date and time as the Commission may determine.
- (f) **Amendments.**
 - (1)
 - (i) Amendments to an offering statement must be signed and filed with the Commission in the same manner as the initial filing. Amendments to an offering statement must be filed under cover of Form 1-A and must be numbered consecutively in the order in which filed.
 - (ii) Every amendment that includes amended audited financial statements must include the consent of the certifying accountant to the use of such accountant's certification in connection with the amended financial statements in the offering statement or offering circular and to being named as having audited such financial statements.
 - (iii) Amendments solely relating to Part III of Form 1-A must comply with the requirements of paragraph (f)(1)(i) of this section, except that such amendments may be limited to Part I of Form 1-A, an explanatory note, and all of the information required by Part III of Form 1-A.
 - (2) Post-qualification amendments must be filed in the following circumstances for ongoing offerings:
 - (i) At least every 12 months after the qualification date to include the financial statements that would be required by Form 1-A as of such date; or
 - (ii) To reflect any facts or events arising after the qualification date of the offering statement (or the most recent post-qualification amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the offering statement.

[80 FR 21895, Apr. 20, 2015]

§ 230.253 Offering circular.

- (a) **Contents.** An offering circular must include the information required by Form 1-A for offering circulars.
- (b) **Information that may be omitted.** Notwithstanding paragraph (a) of this section, a qualified offering circular may omit information with respect to the public offering price, underwriting syndicate (including any material relationships between the issuer or selling securityholders and the unnamed underwriters, brokers or dealers), underwriting discounts or commissions, discounts or commissions to dealers,

amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date; provided, that the following conditions are met:

- (1) The securities to be qualified are offered for cash.
- (2) The outside front cover page of the offering circular includes a bona fide estimate of the range of the maximum offering price and the maximum number of shares or other units of securities to be offered or a bona fide estimate of the principal amount of debt securities offered, subject to the following conditions:
 - (i) The range must not exceed \$2 for offerings where the upper end of the range is \$10 or less or 20% if the upper end of the price range is over \$10; and
 - (ii) The upper end of the range must be used in determining the aggregate offering price under Rule 251(a) (§ 230.251(a)).
- (3) The offering statement does not relate to securities to be offered by competitive bidding.
- (4) The volume of securities (the number of equity securities or aggregate principal amount of debt securities) to be offered may not be omitted in reliance on this paragraph (b).

Note to paragraph (b).

A decrease in the volume of securities offered or a change in the bona fide estimate of the offering price range from that indicated in the offering circular filed as part of a qualified offering statement may be disclosed in the offering circular filed with the Commission pursuant to Rule 253(g) (§ 230.253(g)), so long as the decrease in the volume of securities offered or change in the price range would not materially change the disclosure contained in the offering statement at qualification. Notwithstanding the foregoing, any decrease in the volume of securities offered and any deviation from the low or high end of the price range may be reflected in the offering circular supplement filed with the Commission pursuant to Rule 253(g)(1) or (3) (§ 230.253(g)(1) or (3)) if, in the aggregate, the decrease in volume and/or change in price represent no more than a 20% change from the maximum aggregate offering price calculable using the information in the qualified offering statement. In no circumstances may this paragraph be used to offer securities where the maximum aggregate offering price would result in the offering exceeding the limit set forth in Rule 251(a) (§ 230.251(a)) or if the change would result in a Tier 1 offering becoming a Tier 2 offering. An offering circular supplement may not be used to increase the volume of securities being offered. Additional securities may only be offered pursuant to a new offering statement or post-qualification amendment qualified by the Commission.

(c) **Filing of omitted information.** The information omitted from the offering circular in reliance upon paragraph (b) of this section must be contained in an offering circular filed with the Commission pursuant to paragraph (g) of this section; except that if such offering circular is not so filed by the later of 15 business days after the qualification date of the offering statement or 15 business days after the qualification of a post-qualification amendment thereto that contains an offering circular, the information omitted in reliance upon paragraph (b) of this section must be contained in a qualified post-qualification amendment to the offering statement.

(d) **Presentation of information.**

- (1) Information in the offering circular must be presented in a clear, concise and understandable manner and in a type size that is easily readable. Repetition of information should be avoided; cross-referencing of information within the document is permitted.

(2) Where an offering circular is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents by presenting all required information in a format readily communicated to investors.

(e) **Date.** An offering circular must be dated approximately as of the date it was filed with the Commission.

(f) **Cover page legend.** The cover page of every offering circular must display the following statement highlighted by prominent type or in another manner:

The United States Securities and Exchange Commission does not pass upon the merits of or give its approval to any securities offered or the terms of the offering, nor does it pass upon the accuracy or completeness of any offering circular or other solicitation materials. These securities are offered pursuant to an exemption from registration with the Commission; however, the Commission has not made an independent determination that the securities offered are exempt from registration.

(g) **Offering circular supplements.**

(1) An offering circular that discloses information previously omitted from the offering circular in reliance upon Rule 253(b) (§ 230.253(b)) must be filed with the Commission no later than two business days following the earlier of the date of determination of the offering price or the date such offering circular is first used after qualification in connection with a public offering or sale.

(2) An offering circular that reflects information other than that covered in paragraph (g)(1) of this section that constitutes a substantive change from or addition to the information set forth in the last offering circular filed with the Commission must be filed with the Commission no later than five business days after the date it is first used after qualification in connection with a public offering or sale. If an offering circular filed pursuant to this paragraph (g)(2) consists of an offering circular supplement attached to an offering circular that previously had been filed or was not required to be filed pursuant to paragraph (g) of this section because it did not contain substantive changes from an offering circular that previously was filed, only the offering circular supplement need be filed under paragraph (g) of this section, provided that the cover page of the offering circular supplement identifies the date(s) of the related offering circular and any offering circular supplements thereto that together constitute the offering circular with respect to the securities currently being offered or sold.

(3) An offering circular that discloses information, facts or events covered in both paragraphs (g)(1) and (2) of this section must be filed with the Commission no later than two business days following the earlier of the date of the determination of the offering price or the date it is first used after qualification in connection with a public offering or sale.

(4) An offering circular required to be filed pursuant to paragraph (g) of this section that is not filed within the time frames specified in paragraphs (g)(1) through (3) of this section, as applicable, must be filed pursuant to this paragraph (g)(4) as soon as practicable after the discovery of such failure to file.

(5) Each offering circular filed under this section must contain in the upper right corner of the cover page the paragraphs of paragraphs (g)(1) through (4) of this section under which the filing is made, and the file number of the offering statement to which the offering circular relates.

[80 FR 21895, Apr. 20, 2015]

§ 230.254 Preliminary offering circular.

After the filing of an offering statement, but before its qualification, written offers of securities may be made if they meet the following requirements:

- (a) **Outside front cover page.** The outside front cover page of the material bears the caption *Preliminary Offering Circular*, the date of issuance, and the following legend, which must be highlighted by prominent type or in another manner:

An offering statement pursuant to Regulation A relating to these securities has been filed with the Securities and Exchange Commission. Information contained in this Preliminary Offering Circular is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted before the offering statement filed with the Commission is qualified. This Preliminary Offering Circular shall not constitute an offer to sell or the solicitation of an offer to buy nor may there be any sales of these securities in any state in which such offer, solicitation or sale would be unlawful before registration or qualification under the laws of any such state. We may elect to satisfy our obligation to deliver a Final Offering Circular by sending you a notice within two business days after the completion of our sale to you that contains the URL where the Final Offering Circular or the offering statement in which such Final Offering Circular was filed may be obtained.

- (b) **Other contents.** The Preliminary Offering Circular contains substantially the information required to be in an offering circular by Form 1-A (§ 239.90 of this chapter), except that certain information may be omitted under Rule 253(b) (§ 230.253(b)) subject to the conditions set forth in such rule.
- (c) **Filing.** The Preliminary Offering Circular is filed as a part of the offering statement.

[80 FR 21895, Apr. 20, 2015]

§ 230.255 Solicitations of interest and other communications.

- (a) **Solicitation of interest.** At any time before the qualification of an offering statement, including before the non-public submission or public filing of such offering statement, an issuer or any person authorized to act on behalf of an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated securities offering. Such communications are deemed to be an offer of a security for sale for purposes of the antifraud provisions of the federal securities laws. No solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until qualification of the offering statement.
- (b) **Conditions.** The communications must:
 - (1) State that no money or other consideration is being solicited, and if sent in response, will not be accepted;
 - (2) State that no offer to buy the securities can be accepted and no part of the purchase price can be received until the offering statement is qualified, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time before notice of its acceptance given after the qualification date;
 - (3) State that a person's indication of interest involves no obligation or commitment of any kind; and
 - (4) After the public filing of the offering statement:

- (i) State from whom a copy of the most recent version of the Preliminary Offering Circular may be obtained, including a phone number and address of such person;
 - (ii) Provide the URL where such Preliminary Offering Circular, or the offering statement in which such Preliminary Offering Circular was filed, may be obtained; or
 - (iii) Include a complete copy of the Preliminary Offering Circular.
- (c) **Indications of interest.** Any written communication under this rule may include a means by which a person may indicate to the issuer that such person is interested in a potential offering. This issuer may require the name, address, telephone number, and/or email address in any response form included pursuant to this paragraph (c).
- (d) **Revised solicitations of interest.** If solicitation of interest materials are used after the public filing of the offering statement and such solicitation of interest materials contain information that is inaccurate or inadequate in any material respect, revised solicitation of interest materials must be redistributed in a substantially similar manner as such materials were originally distributed. Notwithstanding the foregoing in this paragraph (d), if the only information that is inaccurate or inadequate is contained in a Preliminary Offering Circular provided with the solicitation of interest materials pursuant to paragraphs (b)(4)(i) or (ii) of this section, no such redistribution is required in the following circumstances:
- (1) in the case of paragraph (b)(4)(i) of this section, the revised Preliminary Offering Circular will be provided to any persons making new inquiries and will be recirculated to any persons making any previous inquiries; or
 - (2) in the case of paragraph (b)(4)(ii) of this section, the URL continues to link directly to the most recent Preliminary Offering Circular or to the offering statement in which such revised Preliminary Offering Circular was filed.

[80 FR 21895, Apr. 20, 2015, as amended at 86 FR 3596, Jan. 14, 2021]

§ 230.256 Definition of “qualified purchaser”.

For purposes of Section 18(b)(3) of the Securities Act [15 U.S.C. 77r(b)(3)], a “qualified purchaser” means any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A.

[80 FR 21895, Apr. 20, 2015]

§ 230.257 Periodic and current reporting; exit report.

- (a) **Tier 1: Exit report.** Each issuer that has filed an offering statement for a Tier 1 offering that has been qualified pursuant to this Regulation A must file an exit report on Form 1-Z (§ 239.94 of this chapter) not later than 30 calendar days after the termination or completion of the offering.
- (b) **Tier 2: Periodic and current reporting.** Each issuer that has filed an offering statement for a Tier 2 offering that has been qualified pursuant to this Regulation A must file with the Commission the following periodic and current reports:
 - (1) **Annual reports.** An annual report on Form 1-K (§ 239.91 of this chapter) for the fiscal year in which the offering statement became qualified and for any fiscal year thereafter, unless the issuer's obligation to file such annual report is suspended under paragraph (d) of this section. Annual reports must be filed within the period specified in Form 1-K.

(2) **Special financial report.**

- (i) A special financial report on Form 1-K or Form 1-SA if the offering statement did not contain the following:
 - (A) Audited financial statements for the issuer's most recent fiscal year (or for the life of the issuer if less than a full fiscal year) preceding the fiscal year in which the issuer's offering statement became qualified; or
 - (B) unaudited financial statements covering the first six months of the issuer's current fiscal year if the offering statement was qualified during the last six months of that fiscal year.
- (ii) The special financial report described in paragraph (b)(2)(i)(A) of this section must be filed under cover of Form 1-K within 120 calendar days after the qualification date of the offering statement and must include audited financial statements for such fiscal year or other period specified in that paragraph, as the case may be. The special financial report described in paragraph (b)(2)(i)(B) of this section must be filed under cover of Form 1-SA within 90 calendar days after the qualification date of the offering statement and must include the semiannual financial statements for the first six months of the issuer's fiscal year, which may be unaudited.
- (iii) A special financial report must be signed in accordance with the requirements of the form on which it is filed.

(3) **Semiannual report.** A semiannual report on Form 1-SA (§ 239.92 of this chapter) within the period specified in Form 1-SA. Semiannual reports must cover the first six months of each fiscal year of the issuer, commencing with the first six months of the fiscal year immediately following the most recent fiscal year for which full financial statements were included in the offering statement, or, if the offering statement included financial statements for the first six months of the fiscal year following the most recent full fiscal year, for the first six months of the following fiscal year.

(4) **Current reports.** Current reports on Form 1-U (§ 239.93 of this chapter) with respect to the matters and within the period specified in that form, unless substantially the same information has been previously reported to the Commission by the issuer under cover of Form 1-K or Form 1-SA.

(5) **Reporting by successor issuers.** Where in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets or otherwise, securities of any issuer that is not required to file reports pursuant to paragraph (b) of this section are issued to the holders of any class of securities of another issuer that is required to file such reports, the duty to file reports pursuant to paragraph (b) of this section shall be deemed to have been assumed by the issuer of the class of securities so issued. The successor issuer must, after the consummation of the succession, file reports in accordance with paragraph (b) of this section, unless that issuer is exempt from filing such reports or the duty to file such reports is terminated or suspended under paragraph (d) of this section.

(6) **Exchange Act reporting requirements.** The duty to file reports under this rule shall be deemed to have been met if the issuer is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 78o) and, as of each Form 1-K and Form 1-SA due date, has filed all reports required to be filed by Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 78o) during the 12 months (or such shorter period that the registrant was required to file such reports) preceding such due date.

- (7) **Exemption for subsidiary issuers of guaranteed securities and subsidiary guarantors.** Any issuer of a guaranteed security, or guarantor of a security, that is permitted to omit financial statements by Item (b)(7)(i) of Part F/S of Form 1-A (referenced in § 239.90), Item 7(g)(1) of Part II of Form 1-K (referenced in § 239.91), and Item 3(e) of Form 1-SA (referenced in § 239.92), is exempt from the requirements of this paragraph (b).
- (c) **Amendments.** All amendments to the reports described in paragraphs (a) and (b) of this section must be filed under cover of the form amended, marked with the letter A to designate the document as an amendment, e.g., "1-K/A," and in compliance with pertinent requirements applicable to such reports. Amendments filed pursuant to this paragraph (c) must set forth the complete text of each item as amended, but need not include any items that were not amended. Amendments must be numbered sequentially and be filed separately for each report amended. Amendments must be signed on behalf of the issuer by a duly authorized representative of the issuer. An amendment to any report required to include certifications as specified in the applicable form must include new certifications by the appropriate persons.
- (d) **Suspension of duty to file reports.**
- (1) [Reserved]
- (2) The duty to file reports under paragraph (b) of this section with respect to a class of securities held of record (as defined in Rule 12g5-1 (§ 240.12g5-1 of this chapter)) by less than 300 persons, or less than 1,200 persons for a bank (as defined in Section 3(a)(6) of the Exchange Act (15 U.S.C. 78c(a)(6))), or a bank holding company (as defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841)), shall be suspended for such class of securities immediately upon filing with the Commission an exit report on Form 1-Z (§ 239.94 of this chapter) if the issuer of such class has filed all reports due pursuant to this rule before the date of such Form 1-Z filing for the shorter of:
- (i) The period since the issuer became subject to such reporting obligation; or
- (ii) Its most recent three fiscal years and the portion of the current year preceding the date of filing Form 1-Z.
- (3) For the purposes of paragraph (d)(2) of this section, the term *class* shall be construed to include all securities of an issuer that are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. If the Form 1-Z is subsequently withdrawn or if it is denied because the issuer was ineligible to use the form, the issuer must, within 60 calendar days, file with the Commission all reports which would have been required if such exit report had not been filed. If the suspension resulted from the issuer's merger into, or consolidation with, another issuer or issuers, the notice must be filed by the successor issuer.
- (4) The ability to suspend reporting, as described in paragraph (d)(2) of this section, is not available for any class of securities if:
- (i) During that fiscal year a Tier 2 offering statement was qualified;
- (ii) The issuer has not filed an annual report under this rule or the Exchange Act for the fiscal year in which a Tier 2 offering statement was qualified; or
- (iii) Offers or sales of securities of that class are being made pursuant to a Tier 2 Regulation A offering.

(e) **Termination of duty to file reports.** If the duty to file reports is deemed to have been met pursuant to paragraph (b)(6) of this section and such status ends because the issuer terminates or suspends its duty to file reports under the Exchange Act, the issuer's obligation to file reports under paragraph (b) of this section shall:

- (1) Automatically terminate if the issuer is eligible to suspend its duty to file reports under paragraphs (d)(2) and (3) of this section; or
- (2) Recomence with the report covering the most recent financial period after that included in any effective registration statement or filed Exchange Act report.

[80 FR 21895, Apr. 20, 2015, as amended at 82 FR 45725, Oct. 2, 2017; 83 FR 47836, Sept. 21, 2018; 83 FR 52964, Oct. 19, 2018; 84 FR 529, Jan. 31, 2019; 85 FR 17751, Mar. 31, 2020; 85 FR 22004, Apr. 20, 2020]

§ 230.258 Suspension of the exemption.

(a) **Suspension.** The Commission may at any time enter an order temporarily suspending a Regulation A exemption if it has reason to believe that:

- (1) No exemption is available or any of the terms, conditions or requirements of Regulation A have not been complied with;
- (2) The offering statement, any sales or solicitation of interest material, or any report filed pursuant to Rule 257 (§ 230.257) contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading;
- (3) The offering is being made or would be made in violation of section 17 of the Securities Act;
- (4) An event has occurred after the filing of the offering statement that would have rendered the exemption hereunder unavailable if it had occurred before such filing;
- (5) Any person specified in Rule 262(a) (§ 230.262(a)) has been indicted for any crime or offense of the character specified in Rule 262(a)(1) (§ 230.262(a)(1)), or any proceeding has been initiated for the purpose of enjoining any such person from engaging in or continuing any conduct or practice of the character specified in Rule 262(a)(2) (§ 230.262(a)(2)), or any proceeding has been initiated for the purposes of Rule 262(a)(3)-(8) (§ 230.262(a)(3) through (8)); or
- (6) The issuer or any promoter, officer, director, or underwriter has failed to cooperate, or has obstructed or refused to permit the making of an investigation by the Commission in connection with any offering made or proposed to be made in reliance on Regulation A.

(b) **Notice and hearing.** Upon the entry of an order under paragraph (a) of this section, the Commission will promptly give notice to the issuer, any underwriter, and any selling securityholder:

- (1) That such order has been entered, together with a brief statement of the reasons for the entry of the order; and
- (2) That the Commission, upon receipt of a written request within 30 calendar days after the entry of the order, will, within 20 calendar days after receiving the request, order a hearing at a place to be designated by the Commission.

- (c) **Suspension order** . If no hearing is requested and none is ordered by the Commission, an order entered under paragraph (a) of this section shall become permanent on the 30th calendar day after its entry and shall remain in effect unless or until it is modified or vacated by the Commission. Where a hearing is requested or is ordered by the Commission, the Commission will, after notice of and opportunity for such hearing, either vacate the order or enter an order permanently suspending the exemption.
- (d) **Permanent suspension** . The Commission may, at any time after notice of and opportunity for hearing, enter an order permanently suspending the exemption for any reason upon which it could have entered a temporary suspension order under paragraph (a) of this section. Any such order shall remain in effect until vacated by the Commission.
- (e) **Notice procedures** . All notices required by this rule must be given by personal service, registered or certified mail to the addresses given by the issuer, any underwriter and any selling securityholder in the offering statement.

[80 FR 21895, Apr. 20, 2015]

§ 230.259 Withdrawal or abandonment of offering statements.

- (a) **Withdrawal** . If none of the securities that are the subject of an offering statement has been sold and such offering statement is not the subject of a proceeding under Rule 258 (§ 230.258), the offering statement may be withdrawn with the Commission's consent. The application for withdrawal must state the reason the offering statement is to be withdrawn and must be signed by an authorized representative of the issuer. Any withdrawn document will remain in the Commission's files, as well as the related request for withdrawal.
- (b) **Abandonment** . When an offering statement, or a post-qualification amendment to such statement, has been on file with the Commission for nine months without amendment and has not become qualified, the Commission may, in its discretion, declare the offering statement or post-qualification amendment abandoned. If the offering statement has been amended, or if the post-qualification amendment has been amended, the nine-month period shall be computed from the date of the latest amendment.

[80 FR 21895, Apr. 20, 2015, as amended at 86 FR 3596, Jan. 14, 2021]

§ 230.260 Insignificant deviations from a term, condition or requirement of Regulation A.

- (a) **Failure to comply** . A failure to comply with a term, condition or requirement of Regulation A will not result in the loss of the exemption from the requirements of section 5 of the Securities Act for any offer or sale to a particular individual or entity, if the person relying on the exemption establishes that:
 - (1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity;
 - (2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with Rule 251(a), (b), and (d)(1) and (3) (§ 230.251(a), (b), and (d)(1) and (3)) shall be deemed to be significant to the offering as a whole; and
 - (3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Regulation A.

- (b) **Action by Commission** . A transaction made in reliance upon Regulation A must comply with all applicable terms, conditions and requirements of the regulation. Where an exemption is established only through reliance upon paragraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Securities Act.
- (c) **Suspension** . This provision provides no relief or protection from a proceeding under Rule 258 (§ 230.258).

[80 FR 21895, Apr. 20, 2015]

§ 230.261 Definitions.

As used in this Regulation A, all terms have the same meanings as in Rule 405 (§ 230.405), except that all references to *registrant* in those definitions shall refer to the issuer of the securities to be offered and sold under Regulation A. In addition, these terms have the following meanings:

- (a) **Affiliated issuer** . An affiliate (as defined in Rule 501 (§ 230.501)) of the issuer that is issuing securities in the same offering.
- (b) **Business day** . Any day except Saturdays, Sundays or United States federal holidays.
- (c) **Eligible securities** . Equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities, but not including asset-backed securities as such term is defined in Item 1101(c) of Regulation AB.
- (d) **Final order** . A written directive or declaratory statement issued by a federal or state agency described in Rule 262(a)(3) (§ 230.262(a)(3)) under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that federal or state agency.
- (e) **Final offering circular** . The more recent of: the current offering circular contained in a qualified offering statement; and any offering circular filed pursuant to Rule 253(g) (§ 230.253(g)). If, however, the issuer is relying on Rule 253(b) (§ 230.253(b)), the Final Offering Circular is the most recent of the offering circular filed pursuant to Rule 253(g)(1) or (3) (§ 230.253(g)(1) or (3)) and any subsequent offering circular filed pursuant to Rule 253(g) (§ 230.253(g)).
- (f) **Offering statement** . An offering statement prepared pursuant to Regulation A.
- (g) **Preliminary offering circular** . The offering circular described in Rule 254 (§ 230.254).

[80 FR 21895, Apr. 20, 2015]

§ 230.262 Disqualification provisions.

- (a) **Disqualification events**. No exemption under §§ 230.251 through 230.263 (Regulation A) shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of filing, any offer after qualification, or such sale; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of

securities; any general partner or managing member of any such solicitor; or any director, executive officer or other officer participating in the offering of any such solicitor or general partner or managing member of such solicitor:

- (1) Has been convicted, within 10 years before the filing of the offering statement or such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:
 - (i) In connection with the purchase or sale of any security;
 - (ii) Involving the making of any false filing with the Commission; or
 - (iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;
- (2) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before the filing of the offering statement or such sale that, at the time of such filing or such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:
 - (i) In connection with the purchase or sale of any security;
 - (ii) Involving the making of any false filing with the Commission; or
 - (iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;
- (3) Is subject to a final order (as defined in § 230.261) of a State securities commission (or an agency or officer of a State performing like functions); a State authority that supervises or examines banks, savings associations, or credit unions; a State insurance commission (or an agency or officer of a State performing like functions); an appropriate Federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:
 - (i) At the time of the filing of the offering statement or such sale, bars the person from:
 - (A) Association with an entity regulated by such commission, authority, agency, or officer;
 - (B) Engaging in the business of securities, insurance or banking; or
 - (C) Engaging in savings association or credit union activities; or
 - (ii) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such filing of the offering statement or such sale;
- (4) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b) or 78o-4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(e) or (f)) that, at the time of the filing of the offering statement or such sale:
 - (i) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;
 - (ii) Places limitations on the activities, functions or operations of such person; or
 - (iii) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

- (5) Is subject to any order of the Commission entered within five years before the filing of the offering statement or such sale that, at the time of such filing or sale, orders the person to cease and desist from committing or causing a violation or future violation of:
 - (i) Any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or
 - (ii) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).
- (6) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;
- (7) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or offering statement filed with the Commission that, within five years before the filing of the offering statement or such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such filing or such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or
- (8) Is subject to a United States Postal Service false representation order entered within five years before the filing of the offering statement or such sale, or is, at the time of such filing or such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

Instruction to paragraph (a): With respect to any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, the issuer is required to determine whether a disqualifying event has occurred only as of the time of filing of the offering statement and not from the time of such sale.

- (b) **Transition, waivers, reasonable care exception** . Paragraph (a) of this section shall not apply:
 - (1) With respect to any order under § 230.262(a)(3) or (5) that occurred or was issued before June 19, 2015;
 - (2) Upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied;
 - (3) If, before the filing of the offering statement or the relevant sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (a) of this section should not arise as a consequence of such order, judgment or decree; or
 - (4) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (a) of this section.

Note to paragraph (b)(4).

An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

- (c) **Affiliated issuers** . For purposes of paragraph (a) of this section, events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:
 - (1) In control of the issuer; or
 - (2) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.
- (d) **Disclosure of prior “bad actor” events** . The issuer must include in the offering circular a description of any matters that would have triggered disqualification under paragraphs (a)(3) and (5) of this section but occurred before June 19, 2015. The failure to provide such information shall not prevent an issuer from relying on Regulation A if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed matter or matters.

[80 FR 21895, Apr. 20, 2015, as amended at 86 FR 3597, Jan. 14, 2021]

§ 230.263 Consent to service of process.

- (a) If the issuer is not organized under the laws of any of the states or territories of the United States of America, it shall furnish to the Commission a written irrevocable consent and power of attorney on Form F-X (§ 239.42 of this chapter) at the time of filing the offering statement required by Rule 252 (§ 230.252).
- (b) Any change to the name or address of the agent for service of the issuer shall be communicated promptly to the Commission through amendment of the requisite form and referencing the file number of the relevant offering statement.

[80 FR 21895, Apr. 20, 2015]

§§ 230.300-230.346 [Reserved]

ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S-T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S-T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

REGULATION C - REGISTRATION

Note:

In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the respective rule number in Regulation C, under the Securities Act of 1933.

§ 230.400 Application of §§ 230.400 to 230.494, inclusive.

Sections 230.400 to 230.494 shall govern every registration of securities under the Act, except that any provision in a form, or an item of Regulation S-K (17 CFR 229.001 *et seq.*) referred to in such form, covering the same subject matter as any such rule shall be controlling unless otherwise specifically provided in §§ 230.400 to 230.494.

[47 FR 11434, Mar. 16, 1982, as amended at 76 FR 71876, Nov. 21, 2011]

GENERAL REQUIREMENTS

§ 230.401 Requirements as to proper form.

- (a) The form and contents of a registration statement and prospectus shall conform to the applicable rules and forms as in effect on the initial filing date of such registration statement and prospectus.
- (b) If an amendment to a registration statement and prospectus is filed for the purpose of meeting the requirements of section 10(a)(3) of the Act or pursuant to the provisions of section 24(e) or 24(f) of the Investment Company Act of 1940, the form and contents of such an amendment shall conform to the applicable rules and forms as in effect on the filing date of such amendment.
- (c) An amendment to a registration statement and prospectus, other than an amendment described in paragraph (b) of this section, may be filed on any shorter Securities Act registration form for which it is eligible on the filing date of the amendment. At the issuer's option, the amendment also may be filed on the same Securities Act registration form used for the most recent amendment described in paragraph (b) of this section or, if no such amendment has been filed, the initial registration statement and prospectus.
- (d) The form and contents of a prospectus forming part of a registration statement which is the subject of a stop order entered under section 8(d) of the Act, if used after the date such stop order ceases to be effective, shall conform to the applicable rules and forms as in effect on the date such stop order ceases to be effective.
- (e) A prospectus filed as part of an amendment to an effective registration statement, or other amendment to such registration statement, on any form may be prepared in accordance with the requirements of any other form which would then be appropriate for the registration of securities to which the prospectus or other amendment relates, provided that all of the other requirements of such other form and applicable rules (including any required undertakings) are met.
- (f) Notwithstanding the provisions of this section, a registrant
 - (1) shall comply with the rules and forms as in effect at a date different from those specified in paragraphs (a), (b), (c) and (d) of this section if the rules or forms or amendments thereto specifically so provide; and
 - (2) may comply voluntarily with the rules and forms as in effect at dates subsequent to those specified in paragraphs (a), (b), (c) and (d) of this section, provided that all of the requirements of the particular rules and forms in effect at such dates (including any required undertakings) are met.

(g)

- (1) Subject to paragraphs (g)(2), (g)(3), and (g)(4) of this section, except for registration statements and post-effective amendments that become effective immediately pursuant to Rule 462 and Rule 464 (§ 230.462 and § 230.464), a registration statement or any amendment thereto is deemed filed on the proper registration form unless the Commission objects to the registration form before the effective date.
- (2) An automatic shelf registration statement as defined in Rule 405 (§ 230.405) and any post-effective amendment thereto are deemed filed on the proper registration form unless and until the Commission notifies the issuer of its objection to the use of such form. Following any such notification, the issuer must amend its automatic shelf registration statement onto the registration form it is then eligible to use, *provided, however*, that any continuous offering of securities pursuant to Rule 415 (§ 230.415) that the issuer has commenced pursuant to the registration statement before the Commission has notified the issuer of its objection to the use of such form may continue until the effective date of a new registration statement or post-effective amendment to the registration statement that the issuer has filed on the proper registration form, if the issuer files promptly after notification the new registration statement or post-effective amendment and if the offering is permitted to be made under the new registration statement or post-effective amendment.
- (3) Violations of General Instruction I.B.6. of Form S-3 or General Instruction I.B.5. of Form F-3 will also violate the requirements as to proper form under this section notwithstanding that the registration statement may have been declared effective previously.
- (4) Notwithstanding that the registration statement may have become effective previously, requirements as to proper form under this section will have been violated for any offering of securities where the requirements of General Instruction I.A. of Form SF-3 (§ 239.45 of this chapter) have not been met as of ninety days after the end of the depositor's fiscal year end prior to such offering.

[47 FR 11434, Mar. 16, 1982, as amended at 62 FR 39762, July 24, 1997; 64 FR 11116, Mar. 8, 1999; 70 FR 44809, Aug. 3, 2005; 72 FR 73551, Dec. 27, 2007; 79 FR 57329, Sept. 24, 2014]

§ 230.401a Requirements as to proper form.

With regard to issuers eligible to rely on Release No. 34-45589 (March 18, 2002) (which may be viewed on the Commission's website at www.sec.gov), the filing of reports in accordance with the provisions of that Release shall result in those reports being "timely filed" for purposes of all form eligibility standards in registration statement forms under the Securities Act of 1933 (15 U.S.C. 77a et seq.).

[67 FR 13536, Mar. 22, 2002]

§ 230.402 Number of copies; binding; signatures.

- (a) Three copies of the complete registration statement, including exhibits and all other papers and documents filed as a part of the statement, shall be filed with the Commission. Each copy shall be bound, in one or more parts, without stiff covers. The binding shall be made on the side or stitching margin in such manner as to leave the reading matter legible. At least one such copy of every registration shall be signed by the persons specified in section 6(a) of the Act. Unsigned copies shall be conformed.
- (b) Ten additional copies of the registration statement, similarly bound, shall be furnished for use in the examination of the registration statement, public inspection, copying and other purposes. Where a registration statement incorporates into the prospectus documents which are required to be delivered

with the prospectus in lieu of prospectus presentation, the ten additional copies of the registration statement shall be accompanied by ten copies of such documents. No other exhibits are required to accompany such additional copies.

- (c) Notwithstanding any other provision of this section, if a registration statement is filed on Form S-8 (§ 239.16b of this chapter), three copies of the complete registration statement, including exhibits and all other papers and documents filed as a part of the statement, shall be filed with the Commission. Each copy shall be bound, in one or more parts, without stiff covers. The binding shall be made on the side or stitching margin in such manner as to leave the reading matter legible. At least one such copy shall be signed by the persons specified in section 6(a) of the Act. Unsigned copies shall be conformed. Three additional copies of the registration statement, similarly bound, also shall be furnished to the Commission for use in the examination of the registration statement, public inspection, copying and other purposes. No exhibits are required to accompany the additional copies of registration statements filed on Form S-8.
- (d) Notwithstanding any other provision of this section, if a registration statement is filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)), one copy of the complete registration statement, including exhibits and all other papers and documents filed as a part thereof shall be filed with the Commission. Such copy should not be bound and may contain facsimile versions of manual signatures in accordance with paragraph (e) of this section.
- (e) **Signatures.** Where the Act or the rules thereunder, including paragraphs (a) and (c) of this section, require a document filed with or furnished to the Commission to be signed, such document shall be manually signed, or signed using either typed signatures or duplicated or facsimile versions of manual signatures. Where typed, duplicated, or facsimile signatures are used, each signatory to the filing shall manually or electronically sign a signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in the filing ("authentication document"). Such authentication document shall be executed before or at the time the filing is made and shall be retained by the registrant for a period of five years. The requirements set forth in § 232.302(b) must be met with regards to the use of an electronically signed authentication document pursuant to this paragraph (e). Upon request, the registrant shall furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

[47 FR 11434, Mar. 16, 1982, as amended at 55 FR 23922, June 13, 1990; 60 FR 26615, May 17, 1995; 61 FR 30402, June 14, 1996; 85 FR 78228, Dec. 4, 2020]

§ 230.403 Requirements as to paper, printing, language and pagination.

- (a) Registration statements, applications and reports shall be filed on good quality, unglazed, white paper no larger than 8¹/₂ × 11 inches in size, insofar as practicable. To the extent that the reduction of larger documents would render them illegible, such documents may be filed on paper larger than 8¹/₂ × 11 inches in size.
- (b) The registration statement and, insofar as practicable, all papers and documents filed as a part thereof shall be printed, lithographed, mimeographed or typewritten. However, the statement or any portion thereof may be prepared by any similar process which, in the opinion of the Commission, produces copies suitable for a permanent record. Irrespective of the process used, all copies of any such material shall be clear, easily readable and suitable for repeated photocopying. Debits in credit categories and credits in debit categories shall be designated so as to be clearly distinguishable as such on photocopies.
- (c)

- (1) All Securities Act filings and submissions must be in the English language, except as otherwise provided by this section. If a registration statement or other filing requires the inclusion of a document that is in a foreign language, the filer must submit instead a fair and accurate English translation of the entire foreign language document, except as provided by paragraph (c)(3) of this section.
- (2) If a registration statement or other filing or submission subject to review by the Division of Corporation Finance requires the inclusion of a foreign language document as an exhibit or attachment, the filer must submit a fair and accurate English translation of the foreign language document if consisting of any of the following, or an amendment of any of the following:
 - (i) Articles of incorporation, memoranda of association, bylaws, and other comparable documents, whether original or restated;
 - (ii) Instruments defining the rights of security holders, including indentures qualified or to be qualified under the Trust Indenture Act of 1939;
 - (iii) Voting agreements, including voting trust agreements;
 - (iv) Contracts to which directors, officers, promoters, voting trustees or security holders named in a registration statement are parties;
 - (v) Contracts upon which a filer's business is substantially dependent;
 - (vi) Audited annual and interim consolidated financial information; and
 - (vii) Any document that is or will be the subject of a confidential treatment request under § 230.406 or § 240.24b-2 of this chapter.
- (3)
 - (i) A filer may submit an English summary instead of an English translation of a foreign language document as an exhibit or attachment to a filing subject to review by the Division of Corporation Finance as long as:
 - (A) The foreign language document does not consist of any of the subject matter enumerated in paragraph (c)(2) of this section; or
 - (B) The applicable form permits the use of an English summary.
 - (ii) Any English summary submitted under paragraph (c)(3) of this section must:
 - (A) Fairly and accurately summarize the terms of each material provision of the foreign language document; and
 - (B) Fairly and accurately describe the terms that have been omitted or abridged.
- (4) When submitting an English summary or English translation of a foreign language document under this section, a filer must identify the submission as either an English summary or English translation. A filer may submit a copy of the unabridged foreign language document when including an English summary or English translation of a foreign language document in a filing. A filer must provide a copy of any foreign language document upon the request of Commission staff.

- (5) A Canadian issuer may file an exhibit or other part of a registration statement on Form F-7, F-8, F-9, F-10, or F-80 (§§ 239.37, 239.38, 239.39, 239.40, or 239.41 of this chapter), that contains text in both French and English if the issuer included the French text to comply with the requirements of the Canadian securities administrator or other Canadian authority and, for an electronic filing, if the filing is an HTML document, as defined in Regulation S-T Rule 11 (§ 232.11).
- (d) The manually signed original (or in the case of duplicate originals, one duplicate original) of all registrations, applications, statements, reports or other documents filed under the Act shall be numbered sequentially (in addition to any internal numbering which otherwise may be present) by handwritten, typed, printed or other legible form of notation from the first page of the document through the last page of that document and any exhibits or attachments thereto. Further, the total number of pages contained in a numbered original shall be set forth on the first page of the document.

[47 FR 11434, Mar. 16, 1982, as amended at 47 FR 58238, Dec. 30, 1982; 67 FR 36698, May 24, 2002]

§ 230.404 Preparation of registration statement.

- (a) A registration statement shall consist of the facing sheet of the applicable form; a prospectus containing the information called for by Part I of such form; the information, list of exhibits, undertakings and signatures required to be set forth in Part II of such form; financial statements and schedules; exhibits; any other information or documents filed as part of the registration statement; and all documents or information incorporated by reference in the foregoing (whether or not required to be filed).
- (b) All general instructions, instructions to items of the form, and instructions as to financial statements, exhibits, or prospectuses are to be omitted from the registration statement in all cases.
- (c) The prospectus shall contain the information called for by all of the items of Part I of the applicable form, except that unless otherwise specified, no reference need be made to inapplicable items, and negative answers to any item in Part I may be omitted. A copy of the prospectus may be filed as a part of the registration statement in lieu of furnishing the information in item-and-answer form. Wherever a copy of the prospectus is filed in lieu of information in item-and-answer form, the text of the items of the form is to be omitted from the registration statement, as well as from the prospectus, except to the extent provided in paragraph (d) of this rule.
- (d) Where any items of a form call for information not required to be included in the prospectus, generally Part II of such form, the text of such items, including the numbers and captions thereof, together with the answers thereto shall be filed with the prospectus under cover of the facing sheet of the form as a part of the registration statement. However, the text of such items may be omitted provided the answers are so prepared as to indicate the coverage of the item without the necessity of reference to the text of the item. If any such item is inapplicable, or the answer thereto is in the negative, a statement to that effect shall be made. Any financial statements not required to be included in the prospectus shall also be filed as a part of the registration statement proper, unless incorporated by reference pursuant to Rule 411 (§ 230.411).

[47 FR 11435, Mar. 16, 1982, as amended at 62 FR 39763, July 24, 1997; 76 FR 71876, Nov. 21, 2011]

§ 230.405 Definitions of terms.

Unless the context otherwise requires, all terms used in §§ 230.400 to 230.494, inclusive, or in the forms for registration have the same meanings as in the Act and in the general rules and regulations. In addition, the following definitions apply, unless the context otherwise requires:

Affiliate. An *affiliate* of, or person *affiliated* with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

Amount. The term *amount*, when used in regard to securities, means the principal amount if relating to evidences of indebtedness, the number of shares if relating to shares, and the number of units if relating to any other kind of security.

Associate. The term *associate*, when used to indicate a relationship with any person, means

- (1) a corporation or organization (other than the registrant or a majority-owned subsidiary of the registrant) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities,
- (2) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity, and
- (3) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of the registrant or any of its parents or subsidiaries.

Automatic shelf registration statement. The term *automatic shelf registration statement* means a registration statement filed on Form S-3, Form F-3, or Form N-2 (§ 239.13, § 239.33, or §§ 239.14 and 274.11a-1 of this chapter) by a well-known seasoned issuer pursuant to General Instruction I.D. of Form S-3, General Instruction I.C. of Form F-3, or General Instruction B of Form N-2.

Business combination related shell company. The term *business combination related shell company* means a shell company (as defined in § 230.405) that is:

- (1) Formed by an entity that is not a shell company solely for the purpose of changing the corporate domicile of that entity solely within the United States; or
- (2) Formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in § 230.165(f)) among one or more entities other than the shell company, none of which is a shell company.

Business development company. The term *business development company* refers to a company which has elected to be regulated as a business development company under sections 55 through 65 of the Investment Company Act of 1940.

Certified. The term *certified*, when used in regard to financial statements, means examined and reported upon with an opinion expressed by an independent public or certified public accountant.

Charter. The term *charter* includes articles of incorporation, declarations of trust, articles of association or partnership, or any similar instrument, as amended, affecting (either with or without filing with any governmental agency) the organization or creation of an incorporated or unincorporated person.

Common equity. The term *common equity* means any class of common stock or an equivalent interest, including but not limited to a unit of beneficial interest in a trust or a limited partnership interest.

Commission. The term *Commission* means the Securities and Exchange Commission.

Control. The term *control* (including the terms *controlling*, *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

Depository share. The term *depository share* means a security, evidenced by an American Depositary Receipt, that represents a foreign security or a multiple of or fraction thereof deposited with a depository.

Director. The term *director* means any director of a corporation or any person performing similar functions with respect to any organization whether incorporated or unincorporated.

Dividend or interest reinvestment plan. The term *dividend or interest reinvestment plan* means a plan which is offered solely to the existing security holders of the registrant, which allows such persons to reinvest dividends or interest paid to them on securities issued by the registrant, and also may allow additional cash amounts to be contributed by the participants in the plan, provided the securities to be registered are newly issued, or are purchased for the account of plan participants, at prices not in excess of current market prices at the time of purchase, or at prices not in excess of an amount determined in accordance with a pricing formula specified in the plan and based upon average or current market prices at the time of purchase.

Electronic filer. The term *electronic filer* means a person or an entity that submits filings electronically pursuant to Rules 100 and 101 of Regulation S-T (§§ 232.100 and 232.101 of this chapter, respectively).

Electronic filing. The term *electronic filing* means a document under the federal securities laws that is transmitted or delivered to the Commission in electronic format.

Emerging growth company.

- (1) The term *emerging growth company* means an issuer that had total annual gross revenues of less than \$1,070,000,000 during its most recently completed fiscal year.
- (2) An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of:
 - (i) The last day of the fiscal year of the issuer during which it had total annual gross revenues of \$1,070,000,000 or more;
 - (ii) The last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933;
 - (iii) The date on which such issuer has, during the previous three year period, issued more than \$1,000,000,000 in non-convertible debt; or
 - (iv) The date on which such issuer is deemed to be a large accelerated filer, as defined in Rule 12b-2 of the Exchange Act (§ 240.12b-2 of this chapter).

Employee. The term *employee* does not include a director, trustee, or officer.

Employee benefit plan. The term *employee benefit plan* means any written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan or written compensation contract solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors. However, consultants or advisors may participate in an employee benefit plan only if:

- (1) They are natural persons;
- (2) They provide *bona fide* services to the registrant; and
- (3) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

Equity security. The term *equity security* means any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.

Exchange-traded vehicle security. The term *exchange-traded vehicle security* means a security:

- (1) Of an issuer:
 - (i) That is not a registered investment company under the Investment Company Act of 1940; and
 - (ii) The assets of which consist primarily of commodities, currencies, or derivative instruments that reference commodities or currencies, or interests in the foregoing;
- (2) Offered or sold in a registered offering on a continuous basis pursuant to § 230.415 (Rule 415) by or on behalf of the issuer;
- (3) Of a class of securities that is listed for trading on a national securities exchange at or immediately after the time of effectiveness of the registration statement; and
- (4) Which is able to be purchased or redeemed, subject to conditions or limitations as described in the registration statement for the offering of such security, by the issuer for a ratable share of the issuer's assets (or the cash equivalent thereof) at their net asset value each business day.

Executive officer. The term *executive officer*, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant.

Fiscal year. The term *fiscal year* means the annual accounting period or, if no closing date has been adopted, the calendar year ending on December 31.

Foreign government. The term *foreign government* means the government of any foreign country or of any political subdivision of a foreign country.

Foreign issuer. The term *foreign issuer* means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

Foreign private issuer.

- (1) The term *foreign private issuer* means any foreign issuer other than a foreign government except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:
 - (i) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and
 - (ii) Any of the following:
 - (A) The majority of the executive officers or directors are United States citizens or residents;

- (B) More than 50 percent of the assets of the issuer are located in the United States; or
- (C) The business of the issuer is administered principally in the United States.

Note to paragraph (1) of the definition of *Foreign private issuer*:

To determine the percentage of outstanding voting securities held by U.S. residents:

A. Use the method of calculating record ownership in § 240.12g3-2(a) of this chapter, except that:

(1) The inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in:

(i) The United States,

(ii) The issuer's jurisdiction of incorporation, and

(iii) The jurisdiction that is the primary trading market for the issuer's voting securities, if different than the issuer's jurisdiction of incorporation; and

(2) Notwithstanding § 240.12g5-1(a)(8) of this chapter, the issuer shall not exclude securities held by persons who received the securities pursuant to an employee compensation plan.

B. If, after reasonable inquiry, the issuer is unable to obtain information about the amount of shares represented by accounts of customers resident in the United States, the issuer may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

C. Count shares of voting securities beneficially owned by residents of the United States as reported on reports of beneficial ownership provided to the issuer or filed publicly and based on information otherwise provided to the issuer.

- (2) In the case of a new registrant with the Commission, the determination of whether an issuer is a foreign private issuer shall be made as of a date within 30 days prior to the issuer's filing of an initial registration statement under either the Act or the Securities Exchange Act of 1934.
- (3) Once an issuer qualifies as a foreign private issuer, it will immediately be able to use the forms and rules designated for foreign private issuers until it fails to qualify for this status at the end of its most recently completed second fiscal quarter. An issuer's determination that it fails to qualify as a foreign private issuer governs its eligibility to use the forms and rules designated for foreign private issuers beginning on the first day of the fiscal year following the determination date. Once an issuer fails to qualify for foreign private issuer status, it will remain unqualified unless it meets the requirements for foreign private issuer status as of the last business day of its second fiscal quarter.

Free writing prospectus. Except as otherwise specifically provided or the context otherwise requires, a *free writing prospectus* is any written communication as defined in this section that constitutes an offer to sell or a solicitation of an offer to buy the securities relating to a registered offering that is used after the registration statement in respect of the offering is filed (or, in the case of a well-known seasoned issuer, whether or not such registration statement is filed) and is made by means other than:

- (1) A prospectus satisfying the requirements of section 10(a) of the Act, Rule 430 (§ 230.430), Rule 430A (§ 230.430A), Rule 430B (§ 230.430B), Rule 430C (§ 230.430C), Rule 430D (§ 230.430D), or Rule 431 (§ 230.431);
- (2) A written communication used in reliance on Rule 167 and Rule 426 (§ 230.167 and § 230.426);
- (3) A written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in clause (a) of section 2(a)(10) of the Act; or
- (4) A written communication used in reliance on Rule 163B (§ 230.163B) or on section 5(d) of the Act.

Graphic communication. The term *graphic communication*, which appears in the definition of "write, written" in section 2(a)(9) of the Act and in the definition of written communication in this section, shall include all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation. Graphic communication shall not include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means.

Ineligible issuer.

- (1) An *ineligible issuer* is an issuer with respect to which any of the following is true as of the relevant date of determination:
 - (i) Any issuer that is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) or section 30 of the Investment Company Act of 1940 (15 U.S.C. 80a-29) that has not filed all reports and other materials required to be filed during the preceding 12 months (or for such shorter period that the issuer was required to file such reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934 or section 30 of the Investment Company Act of 1940), other than reports on Form 8-K (§ 249.308 of this chapter) required solely pursuant to an item specified in General Instruction I.A.3(b) of Form S-3 (§ 239.13 of this chapter) or General Instruction A.2.a of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) (or in the case of an asset-backed issuer, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor (as such terms are defined in § 229.1101 of this chapter (Item 1101 of Regulation AB) are or were at any time during the preceding 12 calendar months required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all reports and other material required to be filed for such period (or such shorter period that each such entity was required to file such reports), other than reports on Form 8-K required solely pursuant to an item specified in General Instruction I.A.2 of Form SF-3);
 - (ii) The issuer is, or during the past three years the issuer or any of its predecessors was:
 - (A) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
 - (B) A shell company, other than a business combination related shell company, each as defined in this section;

- (C) An issuer in an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter);
- (iii) The issuer is a limited partnership that is offering and selling its securities other than through a firm commitment underwriting;
- (iv) Within the past three years, a petition under the federal bankruptcy laws or any state insolvency law was filed by or against the issuer, or a court appointed a receiver, fiscal agent or similar officer with respect to the business or property of the issuer subject to the following:
 - (A) In the case of an involuntary bankruptcy in which a petition was filed against the issuer, ineligibility will occur upon the earlier to occur of:
 - (1) 90 days following the date of the filing of the involuntary petition (if the case has not been earlier dismissed); or
 - (2) The conversion of the case to a voluntary proceeding under federal bankruptcy or state insolvency laws; and
 - (B) Ineligibility will terminate under this paragraph (1)(iv) if an issuer has filed an annual report with audited financial statements subsequent to its emergence from that bankruptcy, insolvency, or receivership process;
- (v) Within the past three years, the issuer or any entity that at the time was a subsidiary of the issuer was convicted of any felony or misdemeanor described in paragraphs (i) through (iv) of section 15(b)(4)(B) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(4)(B)(i) through (iv));
- (vi) Within the past three years (but in the case of a decree or order agreed to in a settlement, not before December 1, 2005), the issuer or any entity that at the time was a subsidiary of the issuer was made the subject of any judicial or administrative decree or order arising out of a governmental action that:
 - (A) Prohibits certain conduct or activities regarding, including future violations of, the anti-fraud provisions of the federal securities laws;
 - (B) Requires that the person cease and desist from violating the anti-fraud provisions of the federal securities laws; or
 - (C) Determines that the person violated the anti-fraud provisions of the federal securities laws;
- (vii) The issuer has filed a registration statement that is the subject of any pending proceeding or examination under section 8 of the Act or has been the subject of any refusal order or stop order under section 8 of the Act within the past three years;
- (viii) The issuer is the subject of any pending proceeding under section 8A of the Act in connection with an offering; or
- (ix) In the case of an issuer that is a registered closed-end investment company or a business development company, within the past three years any person or entity that at the time was an investment adviser to the issuer, including any sub-adviser, was made the subject of any judicial or administrative decree or order arising out of a governmental action that determines that the investment adviser aided, abetted or caused the issuer to have violated the anti-fraud provisions of the Federal securities laws.

- (2) An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.
- (3) The date of determination of whether an issuer is an ineligible issuer is as follows:
 - (i) For purposes of determining whether an issuer is a well-known seasoned issuer, at the date specified for purposes of such determination in paragraph (2) of the definition of well-known seasoned issuer in this section; and
 - (ii) For purposes of determining whether an issuer or offering participant may use free writing prospectuses in respect of an offering in accordance with the provisions of Rules 164 and 433 (§ 230.164 and § 230.433), at the date in respect of the offering specified in paragraph (h) of Rule 164.

Majority-owned subsidiary. The term *majority-owned subsidiary* means a subsidiary more than 50 percent of whose outstanding securities representing the right, other than as affected by events of default, to vote for the election of directors, is owned by the subsidiary's parent and/or one or more of the parent's other majority-owned subsidiaries.

Material. The term *material*, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.

Officer. The term *officer* means a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.

Parent. A *parent* of a specified person is an affiliate controlling such person directly, or indirectly through one or more intermediaries.

Predecessor. The term *predecessor* means a person the major portion of the business and assets of which another person acquired in a single succession, or in a series of related successions in each of which the acquiring person acquired the major portion of the business and assets of the acquired person.

Principal underwriter. The term *principal underwriter* means an underwriter in privity of contract with the issuer of the securities as to which he is underwriter, the term *issuer* having the meaning given in sections 2(4) and 2(11) of the Act.

Promoter.

- (1) The term *promoter* includes:
 - (i) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer; or
 - (ii) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

- (2) All persons coming within the definition of *promoter* in paragraph (1) of this definition may be referred to as *founders* or *organizers* or by another term provided that such term is reasonably descriptive of those persons' activities with respect to the issuer.

Prospectus. Unless otherwise specified or the context otherwise requires, the term *prospectus* means a prospectus meeting the requirements of section 10(a) of the Act.

Registered closed-end investment company. The term *registered closed-end investment company* means a closed-end company, as defined in section 5(a)(2) of the Investment Company Act of 1940 (15 U.S.C. 80a-5(a)(2)), that is registered under the Investment Company Act.

Registrant. The term *registrant* means the issuer of the securities for which the registration statement is filed.

Share. The term *share* means a share of stock in a corporation or unit of interest in an unincorporated person.

Shell company. The term *shell company* means a registrant, other than an asset-backed issuer as defined in Item 1101(b) of Regulation AB (§ 229.1101(b) of this chapter), that has:

- (1) No or nominal operations; and
- (2) Either:
 - (i) No or nominal assets;
 - (ii) Assets consisting solely of cash and cash equivalents; or
 - (iii) Assets consisting of any amount of cash and cash equivalents and nominal other assets.

Note:

For purposes of this definition, the determination of a registrant's assets (including cash and cash equivalents) is based solely on the amount of assets that would be reflected on the registrant's balance sheet prepared in accordance with generally accepted accounting principles on the date of that determination.

Significant subsidiary. The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the conditions in paragraph (1), (2), or (3) of this definition; however, if the registrant is a registered investment company or a business development company, the tested subsidiary meets any of the conditions in paragraph (4) of this definition instead of any of the conditions in paragraph (1), (2), or (3) of this definition. A registrant that files its financial statements in accordance with or provides a reconciliation to U.S. Generally Accepted Accounting Principles (U.S. GAAP) must use amounts determined under U.S. GAAP. A foreign private issuer that files its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB) must use amounts determined under IFRS-IASB.

- (1) **Investment test.**
 - (i) For acquisitions, other than those described in paragraph (1)(ii) of this definition, and dispositions this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the aggregate worldwide market value of the registrant's voting and non-voting common equity, or if the registrant has no such aggregate worldwide market value, the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

- (A) For acquisitions, the "investments in" the tested subsidiary is the consideration transferred, adjusted to exclude the registrant's and its subsidiaries' proportionate interest in the carrying value of assets transferred by the registrant and its subsidiaries consolidated to the tested subsidiary that will remain with the combined entity after the acquisition. It must include the fair value of contingent consideration if required to be recognized at fair value by the registrant at the acquisition date under U.S. GAAP or IFRS-IASB, as applicable; however if recognition at fair value is not required, it must include all contingent consideration, except contingent consideration for which the likelihood of payment is remote.
 - (B) For dispositions, the "investments in" the tested subsidiary is the fair value of the consideration, including contingent consideration, for the disposed subsidiary when comparing to the aggregate worldwide market value of the registrant's voting and non-voting common equity, or, when the registrant has no such aggregate worldwide market value, the carrying value of the disposed subsidiary when comparing to total assets of the registrant.
 - (C) When determining the aggregate worldwide market value of the registrant's voting and non-voting common equity, use the average of such aggregate worldwide market value calculated daily for the last five trading days of the registrant's most recently completed month ending prior to the earlier of the registrant's announcement date or agreement date of the acquisition or disposition.
- (ii) For a combination between entities or businesses under common control, this test is met when either the net book value of the tested subsidiary exceeds 10 percent of the registrant's and its subsidiaries' consolidated total assets or the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated.
 - (iii) In all other cases, this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.
- (2) **Asset test.** This test is met when the registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total assets (after intercompany eliminations) exceeds 10 percent of such total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.
 - (3) **Income test.**
 - (i) This test is met when:
 - (A) The absolute value of the registrant's and its other subsidiaries' equity in the tested subsidiary's consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests exceeds 10 percent of the absolute value of such income or loss of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; and
 - (B) The registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenue from continuing operations (after intercompany eliminations) exceeds 10 percent of such total revenue of the registrant and its subsidiaries

consolidated for the most recently completed fiscal year. This paragraph (3)(i)(B) does not apply if either the registrant and its subsidiaries consolidated or the tested subsidiary did not have material revenue in each of the two most recently completed fiscal years.

(ii) When determining the income component in paragraph (3)(i)(A) of this definition:

(A) If a net loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interest has been incurred by either the registrant and its subsidiaries consolidated or the tested subsidiary, but not both, exclude the equity in the income or loss from continuing operations before income taxes (after intercompany eliminations) of the tested subsidiary attributable to the controlling interest from such income or loss of the registrant and its subsidiaries consolidated for purposes of the computation;

(B) Compute the test using the average described in this paragraph (3)(ii)(B) if the revenue component in paragraph (3)(i)(B) in this definition does not apply and the absolute value of the registrant's and its subsidiaries' consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests for the most recent fiscal year is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years; and

(C) Entities reporting losses must not be aggregated with entities reporting income where the test involves combined entities, as in the case of determining whether summarized financial data must be presented or whether the aggregate impact specified in §§ 210.3-05(b)(2)(iv) and 210.3-14(b)(2)(i)(C) of this chapter is met, except when determining whether related businesses meet this test for purposes of §§ 210.3-05 and 210.8-04 of this chapter.

(4) **Registered investment company or business development company.** For a registrant that is a registered investment company or a business development company, the term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the following conditions using amounts determined under U.S. GAAP and, if applicable, section 2(a)(41) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(41)):

(i) **Investment test.** The value of the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the value of the total investments of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(ii) **Income test.** The absolute value of the sum of combined investment income from dividends, interest, and other income, the net realized gains and losses on investments, and the net change in unrealized gains and losses on investments from the tested subsidiary (except, for purposes of § 210.6-11 of this chapter, the absolute value of the change in net assets resulting from operations of the tested subsidiary), for the most recently completed fiscal year exceeds:

(A) 80 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; or

(B) 10 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year and the investment test (paragraph (4)(i) of this definition) condition exceeds 5 percent. However, if the absolute value of the change in net assets resulting from operations of the

registrant and its subsidiaries consolidated is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years, then the registrant may compute both conditions of the income test using the average of the absolute value of such amounts for the registrant and its subsidiaries consolidated for each of its last five fiscal years.

Smaller reporting company. As used in this part, the term *smaller reporting company* means an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101 of this chapter), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that:

- (1) Had a public float of less than \$250 million; or
- (2) Had annual revenues of less than \$100 million and either:
 - (i) No public float; or
 - (ii) A public float of less than \$700 million.
- (3) Whether an issuer is a smaller reporting company is determined on an annual basis.
 - (i) For issuers that are required to file reports under section 13(a) or 15(d) of the Exchange Act:
 - (A) Public float is measured as of the last business day of the issuer's most recently completed second fiscal quarter and computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity;
 - (B) Annual revenues are as of the most recently completed fiscal year for which audited financial statements are available; and
 - (C) An issuer must reflect the determination of whether it came within the definition of smaller reporting company in its quarterly report on Form 10-Q for the first fiscal quarter of the next year, indicating on the cover page of that filing, and in subsequent filings for that fiscal year, whether it is a smaller reporting company, except that, if a determination based on public float indicates that the issuer is newly eligible to be a smaller reporting company, the issuer may choose to reflect this determination beginning with its first quarterly report on Form 10-Q following the determination, rather than waiting until the first fiscal quarter of the next year.
 - (ii) For determinations based on an initial registration statement under the Securities Act or Exchange Act for shares of its common equity:
 - (A) Public float is measured as of a date within 30 days of the date of the filing of the registration statement and computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of shares of its voting and non-voting common equity included in the registration statement by the estimated public offering price of the shares;
 - (B) Annual revenues are as of the most recently completed fiscal year for which audited financial statements are available; and

- (C) The issuer must reflect the determination of whether it came within the definition of smaller reporting company in the registration statement and must appropriately indicate on the cover page of the filing, and subsequent filings for the fiscal year in which the filing is made, whether it is a smaller reporting company. The issuer must re-determine its status at the end of its second fiscal quarter and then reflect any change in status as provided in paragraph (3)(i)(C) of this definition. In the case of a determination based on an initial Securities Act registration statement, an issuer that was not determined to be a smaller reporting company has the option to re-determine its status at the conclusion of the offering covered by the registration statement based on the actual offering price and number of shares sold.
- (iii) Once an issuer determines that it does not qualify for smaller reporting company status because it exceeded one or more of the current thresholds, it will remain unqualified unless when making its annual determination either:
- (A) It determines that its public float was less than \$200 million; or
- (B) It determines that its public float and its annual revenues meet the requirements for subsequent qualification included in the following chart:

Prior annual revenues	Prior public float	
	None or less than \$700 million	\$700 million or more
Less than \$100 million	Neither threshold exceeded	Public float - Less than \$560 million; and
		Revenues - Less than \$100 million.
\$100 million or more	Public float - None or less than \$700 million; and	Public float - Less than \$560 million; and
	Revenues - Less than \$80 million	Revenues - Less than \$80 million.

INSTRUCTION 1 TO DEFINITION OF “SMALLER REPORTING COMPANY”: A registrant that qualifies as a smaller reporting company under the public float thresholds identified in paragraphs (1) and (3)(iii)(A) of this definition will qualify as a smaller reporting company regardless of its revenues.

INSTRUCTION 2 TO DEFINITION OF “SMALLER REPORTING COMPANY”: A foreign private issuer is not eligible to use the requirements for smaller reporting companies unless it uses the forms and rules designated for domestic issuers and provides financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles.

Subsidiary. A subsidiary of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries. (See also *majority owned subsidiary*, *significant subsidiary*, *totally held subsidiary*, and *wholly owned subsidiary*.)

Sub-underwriter. The term *sub-underwriter* means a dealer that is participating as an underwriter in an offering by committing to purchase securities from a principal underwriter for the securities but is not itself in privity of contract with the issuer of the securities.

Succession. The term *succession* means the direct acquisition of the assets comprising a going business, whether by merger, consolidation, purchase, or other direct transfer. The term does not include the acquisition of control of a business unless followed by the direct acquisition of its assets. The terms *succeed* and *successor* have meanings correlative to the foregoing.

Totally held subsidiary. The term *totally held subsidiary* means a subsidiary

- (1) substantially all of whose outstanding securities are owned by its parent and/or the parent's other totally held subsidiaries, and
- (2) which is not indebted to any person other than its parent and/or the parent's other totally held subsidiaries in an amount which is material in relation to the particular subsidiary, excepting indebtedness incurred in the ordinary course of business which is not overdue and which matures within one year from the date of its creation, whether evidenced by securities or not.

Voting securities. The term *voting securities* means securities the holders of which are presently entitled to vote for the election of directors.

Well-known seasoned issuer. A *well-known seasoned issuer* is an issuer that, as of the most recent determination date determined pursuant to paragraph (2) of this definition:

- (1)
 - (i) Meets all the registrant requirements of General Instruction I.A. of Form S-3 or Form F-3 (§ 239.13 or § 239.33 of this chapter), or General Instructions A.2.a and A.2.b of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) and either:
 - (A) As of a date within 60 days of the determination date, has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of \$700 million or more; or
 - (B)
 - (1) As of a date within 60 days of the determination date, has issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Act; and
 - (2) Will register only non-convertible securities, other than common equity, and full and unconditional guarantees permitted pursuant to paragraph (1)(ii) of this definition unless, at the determination date, the issuer also is eligible to register a primary offering of its securities relying on General Instruction I.B.1. of Form S-3 or Form F-3 or is eligible to register a primary offering described in General Instruction I.B.1. of Form S-3 relying on General Instruction A.2 of Form N-2.
 - (3) Provided that as to a parent issuer only, for purposes of calculating the aggregate principal amount of outstanding non-convertible securities under paragraph (1)(i)(B)(1) of this definition, the parent issuer may include the aggregate principal amount of non-convertible securities, other than common equity, of its majority-owned subsidiaries issued in registered primary offerings for cash, not exchange, that it has fully and unconditionally guaranteed, within the meaning of Rule 3-10 of Regulation S-X (§ 210.3-10 of this chapter) in the last three years; or

- (ii) Is a majority-owned subsidiary of a parent that is a well-known seasoned issuer pursuant to paragraph (1)(i) of this definition and, as to the subsidiaries' securities that are being or may be offered on that parent's registration statement:
 - (A) The parent has provided a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on the subsidiary's securities and the securities are non-convertible securities, other than common equity;
 - (B) The securities are guarantees of:
 - (1) Non-convertible securities, other than common equity, of its parent being registered; or
 - (2) Non-convertible securities, other than common equity, of another majority-owned subsidiary being registered where there is a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of such non-convertible securities by the parent; or
 - (C) The securities of the majority-owned subsidiary meet the conditions of General Instruction I.B.2 of Form S-3 or Form F-3.
- (iii) Is not an ineligible issuer as defined in this section.
- (iv) Is not an asset-backed issuer as defined in Item 1101 of Regulation AB (§ 229.1101(b) of this chapter).
- (v) Is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), other than a registered closed-end investment company.
- (2) For purposes of this definition, the determination date as to whether an issuer is a well-known seasoned issuer shall be the latest of:
 - (i) The time of filing of its most recent shelf registration statement; or
 - (ii) The time of its most recent amendment (by post-effective amendment, incorporated report filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d) of this chapter), or form of prospectus) to a shelf registration statement for purposes of complying with section 10(a)(3) of the Act (or if such amendment has not been made within the time period required by section 10(a)(3) of the Act, the date on which such amendment is required); or
 - (iii) In the event that the issuer has not filed a shelf registration statement or amended a shelf registration statement for purposes of complying with section 10(a)(3) of the Act for sixteen months, the time of filing of the issuer's most recent annual report on Form 10-K (§ 249.310 of this chapter), Form 20-F (§ 249.220f of this chapter), or Form N-CSR (§§ 249.331 and 274.128 of this chapter) (or if such report has not been filed by its due date, such due date).

Wholly owned subsidiary. The term *wholly owned subsidiary* means a subsidiary substantially all of whose outstanding voting securities are owned by its parent and/or the parent's other wholly owned subsidiaries.

Written communication. Except as otherwise specifically provided or the context otherwise requires, a *written communication* is any communication that is written, printed, a radio or television broadcast, or a graphic communication as defined in this section.

Note:

Note to definition of “written communication.”

A communication that is a radio or television broadcast is a written communication regardless of the means of transmission of the broadcast.

[47 FR 11435, Mar. 16, 1982]

Editorial Note: For FEDERAL REGISTER citations affecting § 230.405, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

§ 230.406 Confidential treatment of information filed with the Commission.

Confidential treatment of supplemental information or other information not required to be filed under the Act should be requested under 17 CFR 200.83 and not under this rule. All confidential treatment requests shall be submitted in paper format only, whether or not the filer is an electronic filer. See Rule 101(c)(1)(i) of Regulation S-T (§ 232.101(c)(1)(i) of this chapter).

- (a) Any person submitting any information in a document required to be filed under the Act may make written objection to its public disclosure by following the procedure in paragraph (b) of this section, which shall be the exclusive means of requesting confidential treatment of information included in any document (hereinafter referred to as the *material filed*) required to be filed under the Act, except that if the material filed is a registration statement on Form S-8 (§ 239.16b of this chapter) or on Form S-3, F-2, F-3 (§ 239.13, § 239.32 or § 239.33 of this chapter) relating to a dividend or interest reinvestment plan, or on Form S-4 (§ 239.25 of this chapter) complying with General Instruction G of that Form or if the material filed is a registration statement that does not contain a delaying amendment pursuant to Rule 473 (§ 230.473 of this chapter), the person shall comply with the procedure in paragraph (b) prior to the filing of a registration statement.
- (b) The person shall omit from the material filed the portion thereof which it desires to keep undisclosed (hereinafter called the *confidential portion*). In lieu thereof, the person shall indicate at the appropriate place in the material filed that the confidential portion has been so omitted and filed separately with the Commission. The person shall file with the material filed:
 - (1) One copy of the confidential portion, marked “Confidential Treatment,” of the material filed with the Commission. The copy shall contain an appropriate identification of the item or other requirement involved and, notwithstanding that the confidential portion does not constitute the whole of the answer or required disclosure, the entire answer or required disclosure, except that in the case where the confidential portion is part of a financial statement or schedule, only the particular financial statement or schedule need be included. The copy of the confidential portion shall be in the same form as the remainder of the material filed;
 - (2) An application making objection to the disclosure of the confidential portion. Such application shall be on a sheet or sheets separate from the confidential portion, and shall contain:
 - (i) An identification of the portion;

- (ii) A statement of the grounds of the objection referring to and analyzing the applicable exemption(s) from disclosure under the Freedom of Information Act (5 U.S.C. 552) and a justification of the period of time for which confidential treatment is sought;
 - (iii) A detailed explanation of why, based on the facts and circumstances of the particular case, disclosure of the information is unnecessary for the protection of investors;
 - (iv) A written consent to the furnishing of the confidential portion to other government agencies, offices, or bodies and to the Congress; and
 - (v) The name, address and telephone number of the person to whom all notices and orders issued under this rule at any time should be directed.
- (3) The copy of the confidential portion and the application filed in accordance with this paragraph (b) shall be enclosed in a separate envelope marked "Confidential Treatment" and addressed to The Secretary, Securities and Exchange Commission, Washington, DC 20549.
- (c) Pending a determination as to the objection, the material for which confidential treatment has been applied will not be made available to the public.
 - (d) If it is determined by the Division, acting pursuant to delegated authority, that the application should be granted, an order to that effect will be entered, and a notation to that effect will be made at the appropriate place in the material filed. Such a determination will not preclude reconsideration whenever appropriate, such as upon receipt of any subsequent request under the Freedom of Information Act and, if appropriate, revocation of the confidential status of all or a portion of the information in question.
 - (e) If the Commission denies the application, or the Division, acting pursuant to delegated authority, denies the application and Commission review is not sought pursuant to § 201.431 of this chapter, confirmed telegraphic notice of the order of denial will be sent to the person named in the application pursuant to paragraph (b)(2)(v) of this section. In such case, if the material filed may be withdrawn pursuant to an applicable statute, rule, or regulation, the registrant shall have the right to withdraw the material filed in accordance with the terms of the applicable statute, rule, or regulation, but without the necessity of stating any grounds for the withdrawal or of obtaining the further assent of the Commission. In the event of such withdrawal, the confidential portion will be returned to the registrant. If the material filed may not be so withdrawn, the confidential portion will be made available for public inspection in the same manner as if confidential treatment had been revoked under paragraph (h) of this section.
 - (f) If a right of withdrawal pursuant to paragraph (e) of this section is not exercised, the confidential portion will be made available for public inspection as part of the material filed, and the registrant shall amend the material filed to include all information required to be set forth in regard to such confidential portion.
 - (g) In any case where a prior grant of confidential treatment has been revoked, the person named in the application pursuant to paragraph (b)(2)(v) of this section will be so informed by registered or certified mail. Pursuant to § 201.431 of this chapter, persons making objection to disclosure may petition the Commission for review of a determination by the Division revoking confidential treatment.
 - (h) Upon revocation of confidential treatment, the confidential portion shall be made available to the public at the time and according to the conditions specified in paragraphs (h) (1)-(2):
 - (1) Upon the lapse of five days after the dispatch of notice by registered or certified mail of a determination disallowing an objection, if prior to the lapse of such five days the person shall not have communicated to the Secretary of the Commission his intention to seek review by the Commission under § 201.431 of this chapter of the determination made by the Division; or

(2) If such a petition for review shall have been filed under § 201.431 of this chapter, upon final disposition adverse to the petitioner.

(i) If the confidential portion is made available to the public, one copy thereof shall be attached to each copy of the material filed with the Commission.

[49 FR 13336, Apr. 4, 1984, as amended at 50 FR 19000, May 6, 1985; 58 FR 14669, 14670, Mar. 18, 1993; 60 FR 32824, June 23, 1995; 60 FR 47692, Sept. 14, 1995; 61 FR 30402, June 14, 1996; 84 FR 50739, Sept. 26, 2019]

§ 230.408 Additional information.

(a) In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

(b) Notwithstanding paragraph (a) of this section, unless otherwise required to be included in the registration statement, the failure to include in a registration statement information included in a free writing prospectus will not, solely by virtue of inclusion of the information in a free writing prospectus (as defined in Rule 405 (§ 230.405)), be considered an omission of material information required to be included in the registration statement.

[Reg. C, 12 FR 4072, June 24, 1947, as amended at 70 FR 44811, Aug. 3, 2005]

§ 230.409 Information unknown or not reasonably available.

Information required need be given only insofar as it is known or reasonably available to the registrant. If any required information is unknown and not reasonably available to the registrant, either because the obtaining thereof could involve unreasonable effort or expense, or because it rests peculiarly within the knowledge of another person not affiliated with the registrant, the information may be omitted, subject to the following conditions:

(a) The registrant shall give such information on the subject as it possesses or can acquire without unreasonable effort or expense, together with the sources thereof.

(b) The registrant shall include a statement either showing that unreasonable effort or expense would be involved or indicating the absence of any affiliation with the person within whose knowledge the information rests and stating the result of a request made to such person for the information.

[Reg. C, 12 FR 4072, June 24, 1947, as amended at 14 FR 91, Jan. 7, 1949]

§ 230.410 Disclaimer of control.

If the existence of control is open to reasonable doubt in any instance, the registrant may disclaim the existence of control and any admission thereof; in such case, however, the registrant shall state the material facts pertinent to the possible existence of control.

[Reg. C, 12 FR 4073, June 24, 1947]

§ 230.411 Incorporation by reference.

- (a) **Prospectus.** Except as provided by this section, Item 1100(c) of Regulation AB (§ 229.1100(c) of this chapter) for registered offerings of asset-backed securities, or unless otherwise provided in the appropriate form, information must not be incorporated by reference into the prospectus. Where a summary or outline of the provisions of any document is required in the prospectus, the summary or outline may incorporate by reference particular items, sections or paragraphs of any exhibit and may be qualified in its entirety by such reference. In any financial statements, incorporating by reference, or cross-referencing to, information outside of the financial statements is not permitted unless otherwise specifically permitted or required by the Commission's rules or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.
- (b) **Information not required in a prospectus.** Information may be incorporated by reference in answer, or partial answer, to any item of a registration statement that calls for information not required to be included in a prospectus. Except as provided in the Commission's rules or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable, financial information required to be given in comparative form for two or more fiscal years or periods must not be incorporated by reference unless the information incorporated by reference includes the entire period for which the comparative data is given. In any financial statements, incorporating by reference, or cross-referencing to, information outside of the financial statements is not permitted unless otherwise specifically permitted or required by the Commission's rules or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.
- (c) **Exhibits.** Any document or part thereof filed with the Commission pursuant to any Act administered by the Commission may be incorporated by reference as an exhibit to any registration statement filed with the Commission by the same or any other person. If any modification has occurred in the text of any document incorporated by reference since the filing thereof, the registrant must file with the reference a statement containing the text of such modification and the date thereof.
- (d) **Hyperlinks.** Include an active hyperlink to information incorporated into a registration statement or prospectus by reference if such information is publicly available on the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") at the time the registration statement or prospectus is filed. For hyperlinking to exhibits, please refer to Item 601 of Regulation S-K (§ 229.601 of this chapter) or the appropriate form.
- (e) **General.** Include an express statement clearly describing the specific location of the information you are incorporating by reference. The statement must identify the document where the information was originally filed or submitted and the location of the information within that document. The statement must be made at the particular place where the information is required, if applicable. Information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing. For example, unless expressly permitted or required, disclosure must not be incorporated by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document.

[84 FR 12721, Apr. 2, 2019]

§ 230.412 Modified or superseded documents.

- (a) Any statement contained in a document incorporated or deemed to be incorporated by reference or deemed to be part of a registration statement or the prospectus that is part of the registration statement shall be deemed to be modified or superseded for purposes of the registration statement or the prospectus that is part of the registration statement to the extent that a statement contained in the prospectus that is part of the registration statement or in any other subsequently filed document which also is or is deemed to be incorporated by reference or deemed to be part of the registration statement or prospectus that is part of the registration statement modifies or replaces such statement. Any statement contained in a document that is deemed to be incorporated by reference or deemed to be part of a registration statement or the prospectus that is part of the registration statement after the most recent effective date or after the date of the most recent prospectus that is part of the registration statement may modify or replace existing statements contained in the registration statement or the prospectus that is part of the registration statement.
- (b) The modifying or superseding statement may, but need not, state that it has modified or superseded a prior statement or include any other information set forth in the document which is not so modified or superseded. The making of a modifying or superseding statement shall not be deemed an admission that the modified or superseded statement, when made, constituted an untrue statement of a material fact, an omission to state a material fact necessary to make a statement not misleading, or the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business or artifice to defraud, as those terms are used in the Act, the Securities Exchange Act of 1934, the Investment Company Act of 1940, or the rules and regulations thereunder.
- (c) Any statement so modified shall not be deemed in its unmodified form to constitute part of the registration statement or prospectus for purpose of the Act. Any statement so superseded shall not be deemed to constitute a part of the registration statement or the prospectus for purposes of the Act.

[47 FR 11438, Mar. 16, 1982, as amended at 70 FR 44811, Aug. 3, 2005; 76 FR 71876, Nov. 21, 2011]

§ 230.413 Registration of additional securities and additional classes of securities.

- (a) Except as provided in section 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a-24(f)) and in paragraph (b) of this section, where a registration statement is already in effect, the registration of additional securities shall only be effected through a separate registration statement relating to the additional securities.
- (b) Notwithstanding paragraph (a) of this section, the following additional securities or additional classes of securities may be added to an automatic shelf registration statement already in effect by filing a post-effective amendment to that automatic shelf registration statement:
 - (1) Securities of a class different than those registered on the effective automatic shelf registration statement identified as provided in Rule 430B(a) (§ 230.430B(a)); or
 - (2) Securities of a majority-owned subsidiary that are permitted to be included in an automatic shelf registration statement, provided that the subsidiary and the securities are identified as provided in Rule 430B and the subsidiary satisfies the signature requirements of an issuer in the post-effective amendment.

[70 FR 44811, Aug. 3, 2005]

§ 230.414 Registration by certain successor issuers.

If any issuer, except a foreign issuer exempted by Rule 3a12-3 (17 CFR 240.3a12-3), incorporated under the laws of any State or foreign government and having securities registered under the Act has been succeeded by an issuer incorporated under the laws of another State or foreign government for the purpose of changing the State or country of incorporation of the enterprises, or if any issuer has been succeeded by an issuer for the purpose of changing its form of organization, the registration statement of the predecessor issuer shall be deemed the registration statement of the successor issuer for the purpose of continuing the offering provided:

- (a) Immediately prior to the succession the successor issuer had no assets or liabilities other than nominal assets or liabilities;
- (b) The succession was effected by a merger or similar succession pursuant to statutory provisions or the terms of the organic instruments under which the successor issuer acquired all of the assets and assumed all of the liabilities and obligations of the predecessor issuer;
- (c) The succession was approved by security holders of the predecessor issuer at a meeting for which proxies were solicited pursuant to section 14(a) of the Securities Exchange Act of 1934 or section 20(a) of the Investment Company Act of 1940 or information was furnished to security holders pursuant to section 14(c) of the Securities Exchange Act of 1934; and
- (d) The successor issuer has filed an amendment to the registration statement of the predecessor issuer expressly adopting such statements as its own registration statement for all purposes of the Act and the Securities Exchange Act of 1934 and setting forth any additional information necessary to reflect any material changes made in connection with or resulting from the succession, or necessary to keep the registration statement from being misleading in any material respect, and such amendment has become effective.

[47 FR 11438, Mar. 16, 1982, as amended at 76 FR 71876, Nov. 21, 2011]

§ 230.415 Delayed or continuous offering and sale of securities.

- (a) Securities may be registered for an offering to be made on a continuous or delayed basis in the future, *Provided, That:*
 - (1) The registration statement pertains only to:
 - (i) Securities which are to be offered or sold solely by or on behalf of a person or persons other than the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary;
 - (ii) Securities which are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the registrant;
 - (iii) Securities which are to be issued upon the exercise of outstanding options, warrants or rights;
 - (iv) Securities which are to be issued upon conversion of other outstanding securities;
 - (v) Securities which are pledged as collateral;
 - (vi) Securities which are registered on Form F-6 (§ 239.36 of this chapter);

- (vii) Asset-backed securities (as defined in 17 CFR 229.1101(c)) registered (or qualified to be registered) on Form SF-3 (§ 239.45 of this chapter) which are to be offered and sold on an immediate or delayed basis by or on behalf of the registrant;

Instruction to paragraph (a)(1)(vii): The requirements of General Instruction I.B.1 of Form SF-3 (§ 239.45 of this chapter) must be met for any offerings of an asset-backed security (as defined in 17 CFR 229.1101(c)) registered in reliance on this paragraph (a)(1)(vii).

- (viii) Securities which are to be issued in connection with business combination transactions;
 - (ix) Securities, other than asset-backed securities (as defined in 17 CFR 229.1101(c)), the offering of which will be commenced promptly, will be made on a continuous basis and may continue for a period in excess of 30 days from the date of initial effectiveness;
 - (x) Securities registered (or qualified to be registered) on Form S-3 or Form F-3 (§ 239.13 or § 239.33 of this chapter), or on Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) pursuant to General Instruction A.2 of that form, which are to be offered and sold on an immediate, continuous or delayed basis by or on behalf of the registrant, a majority-owned subsidiary of the registrant or a person of which the registrant is a majority-owned subsidiary; or
 - (xi) Shares of common stock which are to be offered and sold on a delayed or continuous basis by or on behalf of a registered closed-end investment company or business development company that makes periodic repurchase offers pursuant to § 270.23c-3 of this chapter.
 - (xii) Asset-backed securities (as defined in 17 CFR 229.1101(c)) that are to be offered and sold on a continuous basis if the offering is commenced promptly and being conducted on the condition that the consideration paid for such securities will be promptly refunded to the purchaser unless:
 - (A) All of the securities being offered are sold at a specified price within a specified time; and
 - (B) The total amount due to the seller is received by him by a specified date.
 - (xiii) Exchange-traded vehicle securities which are to be offered and sold on a continuous basis by or on behalf of the registrant in accordance with § 230.456(d) (Rule 456(d)).
- (2) Securities in paragraphs (a)(1)(viii) and (ix) of this section that are not registered on Form S-3 or Form F-3 (§ 239.13 or § 239.33 of this chapter), or on Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) pursuant to General Instruction A.2 of that form, may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration.
 - (3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S-K (§ 229.512(a) of this chapter), except that a registrant that is an investment company filing on Form N-2 must furnish the undertakings required by Item 34.4 of Form N-2 (§ 239.14 and § 274.11a-1 of this chapter).
 - (4) In the case of a registration statement pertaining to an at the market offering of equity securities by or on behalf of the registrant, the offering must come within paragraph (a)(1)(x) of this section. As used in this paragraph, the term "at the market offering" means an offering of equity securities into an existing trading market for outstanding shares of the same class at other than a fixed price.

- (5) Securities registered on an automatic shelf registration statement and securities described in paragraphs (a)(1)(vii), (ix), and (x) of this section may be offered and sold only if not more than three years have elapsed since the initial effective date of the registration statement under which they are being offered and sold, *provided, however*, that if a new registration statement has been filed pursuant to paragraph (a)(6) of this section:
- (i) If the new registration statement is an automatic shelf registration statement, it shall be immediately effective pursuant to Rule 462(e) (§ 230.462(e)); or
 - (ii) If the new registration statement is not an automatic shelf registration statement:
 - (A) Securities covered by the prior registration statement may continue to be offered and sold until the earlier of the effective date of the new registration statement or 180 days after the third anniversary of the initial effective date of the prior registration statement; and
 - (B) A continuous offering of securities covered by the prior registration statement that commenced within three years of the initial effective date may continue until the effective date of the new registration statement if such offering is permitted under the new registration statement.
- (6) Prior to the end of the three-year period described in paragraph (a)(5) of this section, an issuer may file a new registration statement covering securities described in such paragraph (a)(5) of this section, which may, if permitted, be an automatic shelf registration statement. The new registration statement and prospectus included therein must include all the information that would be required at that time in a prospectus relating to all offering(s) that it covers. Prior to the effective date of the new registration statement (including at the time of filing in the case of an automatic shelf registration statement), the issuer may include on such new registration statement any unsold securities covered by the earlier registration statement by identifying on the bottom of the facing page of the new registration statement or latest amendment thereto, unless expressly required in another part of the registration statement, the amount of such unsold securities being included and any filing fee paid in connection with such unsold securities, which will continue to be applied to such unsold securities. The offering of securities on the earlier registration statement will be deemed terminated as of the date of effectiveness of the new registration statement.
- (b) This section shall not apply to any registration statement pertaining to securities issued by a face-amount certificate company or redeemable securities issued by an open-end management company or unit investment trust under the Investment Company Act of 1940 or any registration statement filed by any foreign government or political subdivision thereof.

[48 FR 52896, Nov. 23, 1983, as amended at 59 FR 43470, Aug. 24, 1994; 70 FR 44812, Aug. 3, 2005; 73 FR 968, Jan. 4, 2008; 79 FR 57329, Sept. 24, 2014; 85 FR 33354, June 1, 2020; 87 FR 70199, Dec. 9, 2021]

§ 230.416 Securities to be issued as a result of stock splits, stock dividends and anti-dilution provisions and interests to be issued pursuant to certain employee benefit plans.

- (a) If a registration statement purports to register securities to be offered pursuant to terms which provide for a change in the amount of securities being offered or issued to prevent dilution resulting from stock splits, stock dividends, or similar transactions, such registration statement shall, unless otherwise expressly provided, be deemed to cover the additional securities to be offered or issued in connection with any such provision.

- (b) If prior to completion of the distribution of the securities covered by a registration statement, additional securities of the same class are issued or issuable as a result of a stock split or stock dividend, the registration statement shall, unless otherwise expressly provided therein, be deemed to cover such additional securities resulting from the split of, or the stock dividend on, the registered securities. If prior to completion of the distribution of the securities covered by a registration statement, all the securities of a class which includes the registered securities are combined by a reverse split into a lesser amount of securities of the same class, the amount of undistributed securities of such class deemed to be covered by the registration statement shall be proportionately reduced. If paragraph (a) of this section is not applicable, the registration statement shall be amended prior to the offering of such additional or lesser amount of securities to reflect the change in the amount of securities registered.
- (c) Where a registration statement on Form S-8 relates to securities to be offered pursuant to an employee benefit plan, including interests in such plan that constitute separate securities required to be registered under the Act, such registration statement shall be deemed to register an indeterminate amount of such plan interests.

[30 FR 13824, Oct. 30, 1965, as amended at 55 FR 23923, June 13, 1990]

§ 230.417 Date of financial statements.

Whenever financial statements of any person are required to be furnished as of a date within a specified period prior to the date of filing the registration statement and the last day of such period falls on a Saturday, Sunday, or holiday, such registration statement may be filed on the first business day following the last day of the specified period.

[22 FR 2328, Apr. 9, 1957]

§ 230.418 Supplemental information.

- (a) The Commission or its staff may, where it is deemed appropriate, request supplemental information concerning the registrant, the registration statement, the distribution of the securities, market activities and underwriters' activities. Such information includes, but is not limited to, the following items which the registrant should be prepared to furnish promptly upon request:
 - (1)
 - (i) Any reports or memoranda which have been prepared for external use by the registrant or a principal underwriter, as defined in Rule 405 (§ 230.405), in connection with the proposed offering;
 - (ii) A statement as to the actual or proposed use and distribution of the reports or memoranda specified in paragraph (a)(1)(i) of this section, identifying each class of persons who have received or will receive such reports or memoranda and the number of copies distributed to each such class;
 - (2) In the case of a registration statement relating to a business combination as defined in Rule 145(a) (17 CFR 230.145(a)), exchange offer, tender offer or similar transaction, any feasibility studies, management analyses, fairness opinions or similar reports prepared by or for any of the parties to the subject transaction in connection with such transaction;
 - (3) Except in the case of a registrant eligible to use Form S-3 (§ 239.13 of this chapter), or Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) under General Instruction A.2 of that form, any engineering, management or similar reports or memoranda relating to broad aspects of the business, operations

or products of the registrant, which have been prepared within the past twelve months for or by the registrant and any affiliate of the registrant or any principal underwriter, as defined in § 230.405 (Rule 405), of the securities being registered except for:

- (i) Reports solely comprised of recommendations to buy, sell or hold the securities of the registrant, unless such recommendations have changed within the past six months; and
- (ii) Any information contained in documents already filed with the Commission.

(4) Where there is a registration of an at-the-market offering, as defined in § 242.100 of this chapter, of more than 10 percent of the securities outstanding, where the offering includes securities owned by officers, directors or affiliates of the registrant and where there is no underwriting agreement, information

- (i) concerning contractual arrangements between selling security holders of a limited group or of several groups of related shareholders to comply with the anti-manipulation rules until the offering by all members of the group is completed and to inform the exchange, brokers and selling security holders when the distribution by the members of the group is over; or
- (ii) concerning the registrant's efforts to notify members of a large group of unrelated sellers of the applicable Commission rules and regulations;

(5) Where the registrant recently has introduced a new product or has begun to do business in a new industry segment or has made public its intentions to introduce a new product or to do business in a new industry segment, and this action requires the investment of a material amount of the assets of the registrant or otherwise is material, copies of any studies prepared for the registrant by outside persons or any internal studies, documents, reports or memoranda the contents of which were material to the decision to develop the product or to do business in the new segment including, but not limited to, documents relating to financial requirements and engineering, competitive, environmental and other considerations, but excluding technical documents;

(6) Where reserve estimates are referred to in a document, a copy of the full report of the engineer or other expert who estimated the reserves;

(7) With respect to the extent of the distribution of a preliminary prospectus, information concerning:

- (i) The date of the preliminary prospectus distributed;
- (ii) The dates or approximate dates of distribution;
- (iii) The number of prospective underwriters and dealers to whom the preliminary prospectus was furnished;
- (iv) The number of prospectuses so distributed;
- (v) The number of prospectuses distributed to others, identifying them in general terms; and
- (vi) The steps taken by such underwriters and dealers to comply with the provisions of Rule 15c2-8 under the Securities Exchange Act of 1934 (§ 240.15c2-8 of this chapter); and

(8) Any free writing prospectuses used in connection with the offering.

- (b) Supplemental information described in paragraph (a) of this section shall not be required to be filed with or deemed part of and included in the registration statement, unless otherwise required. The information shall be returned to the registrant upon request, provided that:

- (1) Such request is made at the time such information is furnished to the staff;
- (2) The return of such information is consistent with the protection of investors;
- (3) The return of such information is consistent with the provisions of the Freedom of Information Act [5 U.S.C. 552]; and
- (4) The information was not filed in electronic format.

[47 FR 11439, Mar. 16, 1982, as amended at 58 FR 14669, 14670, Mar. 18, 1993; 62 FR 543, Jan. 3, 1997; 70 FR 44812, Aug. 3, 2005; 85 FR 33354, June 1, 2020]

§ 230.419 Offerings by blank check companies.

(a) *Scope of the rule and definitions.*

- (1) The provisions of this section shall apply to every registration statement filed under the Act relating to an offering by a blank check company.
- (2) For purposes of this section, the term “blank check company” shall mean a company that:
 - (i) Is a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person; and
 - (ii) Is issuing “penny stock,” as defined in Rule 3a51-1 (17 CFR 240.3a51-1) under the Securities Exchange Act of 1934 (“Exchange Act”).
- (3) For purposes of this section, the term “purchaser” shall mean any person acquiring securities directly or indirectly in the offering, for cash or otherwise, including promoters or others receiving securities as compensation in connection with the offering.

(b) *Deposit of securities and proceeds in escrow or trust account -*

(1) *General.*

- (i) Except as otherwise provided in this section or prohibited by other applicable law, all securities issued in connection with an offering by a blank check company and the gross proceeds from the offering shall be deposited promptly into:
 - (A) An escrow account maintained by an “insured depository institution,” as that term is defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(C)(2)); or
 - (B) A separate bank account established by a broker or dealer registered under the Exchange Act maintaining net capital equal to or exceeding \$25,000 (as calculated pursuant to Exchange Act Rule 15c3-1 (17 CFR 240.15c3-1), in which the broker or dealer acts as trustee for persons having the beneficial interests in the account.
- (ii) If funds and securities are deposited into an escrow account maintained by an insured depository institution, the deposit account records of the insured depository institution must provide that funds in the escrow account are held for the benefit of the purchasers named and identified in accordance with 12 CFR 330.1 of the regulations of the Federal Deposit Insurance Corporation, and the records of the escrow agent, maintained in good faith and in the regular course of business, must show the name and interest of each party to the account. If funds and

securities are deposited in a separate bank account established by a broker or dealer acting as a trustee, the books and records of the broker-dealer must indicate the name, address, and interest of each person for whom the account is held.

(2) *Deposit and investment of proceeds.*

- (i) All offering proceeds, after deduction of cash paid for underwriting commissions, underwriting expenses and dealer allowances, and amounts permitted to be released to the registrant pursuant to paragraph (b)(2)(vi) of this section, shall be deposited promptly into the escrow or trust account; *provided, however*, that no deduction may be made for underwriting commissions, underwriting expenses or dealer allowances payable to an affiliate of the registrant.
- (ii) Deposited proceeds shall be in the form of checks, drafts, or money orders payable to the order of the escrow agent or trustee.
- (iii) Deposited proceeds and interest or dividends thereon, if any, shall be held for the sole benefit of the purchasers of the securities.
- (iv) Deposited proceeds shall be invested in one of the following:
 - (A) An obligation that constitutes a “deposit,” as that term is defined in section 3(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813 (1));
 - (B) Securities of any open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) that holds itself out as a money market fund meeting the conditions of paragraph (d) of 17 CFR 270.2a-7 (Rule 2a-7) under the Investment Company Act; or
 - (C) Securities that are direct obligations of, or obligations guaranteed as to principal or interest by, the United States.

Note to § 230.419(b)(2)(iv):

Issuers are cautioned that investments in government securities are inappropriate unless such securities can be readily sold or otherwise disposed of for cash at the time required without any dissipation of offering proceeds invested.

- (v) Interest or dividends earned on the funds, if any, shall be held in the escrow or trust account until the funds are released in accordance with the provisions of this section. If funds held in the escrow or trust account are released to a purchaser of the securities, the purchasers shall receive interest or dividends earned, if any, on such funds up to the date of release. If funds held in the escrow or trust account are released to the registrant, interest or dividends earned on such funds up to the date of release may be released to the registrant.
- (vi) The registrant may receive up to 10 percent of the proceeds remaining after payment of underwriting commissions, underwriting expenses and dealer allowances permitted by paragraph (b)(2)(i) of this section, exclusive of interest or dividends, as those proceeds are deposited into the escrow or trust account.

(3) *Deposit of securities.*

- (i) All securities issued in connection with the offering, whether or not for cash consideration, and any other securities issued with respect to such securities, including securities issued with respect to stock splits, stock dividends, or similar rights, shall be deposited directly into the escrow or trust account promptly upon issuance. The identity of the purchaser of the securities shall be included on the stock certificates or other documents evidencing such securities. See also 17 CFR 240.15g-8 regarding restrictions on sales of, or offers to sell, securities deposited in the escrow or trust account.
 - (ii) Securities held in the escrow or trust account are to remain as issued and deposited and shall be held for the sole benefit of the purchasers, who shall have voting rights, if any, with respect to securities held in their names, as provided by applicable state law. No transfer or other disposition of securities held in the escrow or trust account or any interest related to such securities shall be permitted other than by will or the laws of descent and distribution, or pursuant to a qualified domestic relations order as defined by the Internal Revenue Code of 1986 as amended (26 U.S.C. 1 *et seq.*), or Title 1 of the Employee Retirement Income Security Act (29 U.S.C. 1001 *et seq.*), or the rules thereunder.
 - (iii) Warrants, convertible securities or other derivative securities relating to securities held in the escrow or trust account may be exercised or converted in accordance with their terms; *provided, however*, that securities received upon exercise or conversion, together with any cash or other consideration paid in connection with the exercise or conversion, are promptly deposited into the escrow or trust account.
- (4) **Escrow or trust agreement.** A copy of the executed escrow or trust agreement shall be filed as an exhibit to the registration statement and shall contain the provisions of paragraphs (b)(2), (b)(3), and (e)(3) of this section.
- (5) Request for supplemental information. Upon request by the Commission or the staff, the registrant shall furnish as supplemental information the names and addresses of persons for whom securities are held in the escrow or trust account.

Note to § 230.419(b):

With respect to a blank check offering subject to both Rule 419 and Exchange Act Rule 15c2-4 (17 CFR 240.15c2-4, the requirements of Rule 15c2-4 are applicable only until the conditions of the offering governed by that Rule are met (e.g., reaching the minimum in a “part-or-none” offering). When those conditions are satisfied, Rule 419 continues to govern the use of offering proceeds.

- (c) **Disclosure of offering terms.** The initial registration statement shall disclose the specific terms of the offering, including, but not limited to:
- (1) The terms and provisions of the escrow or trust agreement and the effect thereof upon the registrant's right to receive funds and the effect of the escrow or trust agreement upon the purchaser's funds and securities required to be deposited into the escrow or trust account, including, if applicable, any material risk of non-insurance of purchasers' funds resulting from deposits in excess of the insured amounts; and
 - (2) The obligation of the registrant to provide, and the right of the purchaser to receive, information regarding an acquisition, including the requirement that pursuant to this section, purchasers confirm in writing their investment in the registrant's securities as specified in paragraph (e) of this section.

(d) **Probable acquisition post-effective amendment requirement.** If, during any period in which offers or sales are being made, a significant acquisition becomes probable, the registrant shall file promptly a post-effective amendment disclosing the information specified by the applicable registration statement form and Industry Guides, including financial statements of the registrant and the company to be acquired as well as pro forma financial information required by the form and applicable rules and regulations. Where warrants, rights or other derivative securities issued in the initial offering are exercisable, there is a continuous offering of the underlying security.

(e) **Release of deposited and funds securities -**

(1) **Post-effective amendment for acquisition agreement.** Upon execution of an agreement(s) for the acquisition(s) of a business(es) or assets that will constitute the business (or a line of business) of the registrant and for which the fair value of the business(es) or net assets to be acquired represents at least 80 percent of the maximum offering proceeds, including proceeds received or to be received upon the exercise or conversion of any securities offered, but excluding amounts payable to non-affiliates for underwriting commissions, underwriting expenses, and dealer allowances, the registrant shall file a post-effective amendment that:

(i) Discloses the information specified by the applicable registration statement form and Industry Guides, including financial statements of the registrant and the company acquired or to be acquired and pro forma financial information required by the form and applicable rules and regulations;

(ii) Discloses the results of the initial offering, including but not limited to:

(A) The gross offering proceeds received to date, specifying the amounts paid for underwriter commissions, underwriting expenses and dealer allowances, amounts disbursed to the registrant, and amounts remaining in the escrow or trust account; and

(B) The specific amount, use and application of funds disbursed to the registrant to date, including, but not limited to, the amounts paid to officers, directors, promoters, controlling shareholders or affiliates, either directly or indirectly, specifying the amounts and purposes of such payments; and

(iii) Discloses the terms of the offering as described pursuant to paragraph (e)(2) of this section.

(2) **Terms of the offering.** The terms of the offering must provide, and the registrant must satisfy, the following conditions.

(i) Within five business days after the effective date of the post-effective amendment(s), the registrant shall send by first class mail or other equally prompt means, to each purchaser of securities held in escrow or trust, a copy of the prospectus contained in the post-effective amendment and any amendment or supplement thereto;

(ii) Each purchaser shall have no fewer than 20 business days and no more than 45 business days from the effective date of the post-effective amendment to notify the registrant in writing that the purchaser elects to remain an investor. If the registrant has not received such written notification by the 45th business day following the effective date of the post-effective amendment, funds and interest or dividends, if any, held in the escrow or trust account shall be sent by first class mail or other equally prompt means to the purchaser within five business days;

- (iii) The acquisition(s) meeting the criteria set forth in paragraph (e)(1) of this section will be consummated if a sufficient number of purchasers confirm their investments; and
 - (iv) If a consummated acquisition(s) meeting the requirements of this section has not occurred by a date 18 months after the effective date of the initial registration statement, funds held in the escrow or trust account shall be returned by first class mail or equally prompt means to the purchaser within five business days following that date.
- (3) **Conditions for release of deposited securities and funds.** Funds held in the escrow or trust account may be released to the registrant and securities may be delivered to the purchaser or other registered holder identified on the deposited securities only at the same time as or after:
- (i) The escrow agent or trustee has received a signed representation from the registrant, together with other evidence acceptable to the escrow agent or trustee, that the requirements of paragraphs (e)(1) and (e)(2) of this section have been met; and
 - (ii) Consummation of an acquisition(s) meeting the requirements of paragraph (e)(2)(iii) of this section.
- (4) **Prospectus supplement.** If funds and securities are released from the escrow or trust account to the registrant pursuant to this paragraph, the prospectus shall be supplemented to indicate the amount of funds and securities released and the date of release.

Notes to § 230.419(e):

1. With respect to a blank check offering subject to both Rule 419 and Exchange Act Rule 10b-9 (17 CFR 240.10b-9), the requirements of Rule 10b-9 are applicable only until the conditions of the offering governed by that Rule are met (e.g., reaching the minimum in a “part-or-none” offering). When those conditions are satisfied, Rule 419 continues to govern the use of offering proceeds.

2. If the business(es) or assets are acquired for cash, the fair value shall be presumed to be equal to the cash paid. If all or part of the consideration paid consists of securities or other non-cash consideration, the fair value shall be determined by an accepted standard, such as bona fide sales of the assets or similar assets made within a reasonable time, forecasts of expected cash flows, independent appraisals, etc. Such valuation must be reasonable at the time made.

(f) **Financial statements.** The registrant shall:

- (1) Furnish to security holders audited financial statements for the first full fiscal year of operations following consummation of an acquisition pursuant to paragraph (e) of this section, together with the information required by § 229.303(b) of this chapter (Item 303(b) of Regulation S-K), no later than 90 days after the end of such fiscal year; and
- (2) File the financial statements and additional information with the Commission under cover of Form 8-K (17 CFR 249.308); *provided, however*, that such financial statements and related information need not be filed separately if the registrant is filing reports pursuant to Section 13(a) or 15(d) of the Exchange Act.

[57 FR 18043, Apr. 28, 1992, as amended at 79 FR 47957, Aug. 14, 2014; 86 FR 2129, Jan. 11, 2021]

§ 230.420 Legibility of prospectus.

- (a) The body of all printed prospectuses and all notes to financial statements and other tabular data included therein shall be in roman type at least as large and as legible as 10-point modern type. However, (a) to the extent necessary for convenient presentation, financial statements and other tabular data, including tabular data in notes, and (b) prospectuses deemed to be omitting prospectuses under rule 482 (17 CFR 230.482) may be in roman type at least as large and as legible as 8-point modern type. All such type shall be leaded at least 2 points.
- (b) Where a prospectus is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents, such as paper size, type size and font, bold-face type, italics and red ink, by presenting all required information in a format readily communicated to investors, and where indicated, in a manner reasonably calculated to draw investor attention to specific information.

[53 FR 3878, Feb. 10, 1988, as amended at 61 FR 24655, May 15, 1996]

§ 230.421 Presentation of information in prospectuses.

- (a) The information required in a prospectus need not follow the order of the items or other requirements in the form. Such information shall not, however, be set forth in such fashion as to obscure any of the required information or any information necessary to keep the required information from being incomplete or misleading. Where an item requires information to be given in a prospectus in tabular form it shall be given in substantially the tabular form specified in the item.
- (b) You must present the information in a prospectus in a clear, concise and understandable manner. You must prepare the prospectus using the following standards:
 - (1) Present information in clear, concise sections, paragraphs, and sentences. Whenever possible, use short, explanatory sentences and bullet lists;
 - (2) Use descriptive headings and subheadings;
 - (3) Avoid frequent reliance on glossaries or defined terms as the primary means of explaining information in the prospectus. Define terms in a glossary or other section of the document only if the meaning is unclear from the context. Use a glossary only if it facilitates understanding of the disclosure; and
 - (4) Avoid legal and highly technical business terminology.

Note to § 230.421(b):

In drafting the disclosure to comply with this section, you should avoid the following:

1. Legalistic or overly complex presentations that make the substance of the disclosure difficult to understand;
2. Vague “boilerplate” explanations that are imprecise and readily subject to different interpretations;
3. Complex information copied directly from legal documents without any clear and concise explanation of the provision(s); and

4. Disclosure repeated in different sections of the document that increases the size of the document but does not enhance the quality of the information.

(c) All information required to be included in a prospectus shall be clearly understandable without the necessity of referring to the particular form or to the general rules and regulations. Except as to financial statements and information required in a tabular form, the information set forth in a prospectus may be expressed in condensed or summarized form. In lieu of repeating information in the form of notes to financial statements, references may be made to other parts of the prospectus where such information is set forth.

(d)

(1) To enhance the readability of the prospectus, you must use plain English principles in the organization, language, and design of the front and back cover pages, the summary, and the risk factors section.

(2) You must draft the language in these sections so that at a minimum it substantially complies with each of the following plain English writing principles:

(i) Short sentences;

(ii) Definite, concrete, everyday words;

(iii) Active voice;

(iv) Tabular presentation or bullet lists for complex material, whenever possible;

(v) No legal jargon or highly technical business terms; and

(vi) No multiple negatives.

(3) In designing these sections or other sections of the prospectus, you may include pictures, logos, charts, graphs, or other design elements so long as the design is not misleading and the required information is clear. You are encouraged to use tables, schedules, charts and graphic illustrations of the results of operations, balance sheet, or other financial data that present the data in an understandable manner. Any presentation must be consistent with the financial statements and non-financial information in the prospectus. You must draw the graphs and charts to scale. Any information you provide must not be misleading.

Instruction to § 230.421: You should read Securities Act Release No. 33-7497 (January 28, 1998) for information on plain English principles.

[47 FR 11439, Mar. 16, 1982, as amended at 63 FR 6384, Feb. 6, 1998; 76 FR 71876, Nov. 21, 2011]

§ 230.423 Date of prospectuses.

Except for a form of prospectus used after the effective date of the registration statement and before the determination of the offering price as permitted by Rule 430A(c) under the Securities Act (§ 230.430A(c) of this chapter) or before the opening of bids as permitted by Rule 445(c) under the Securities Act (§ 230.445(c) of this chapter), each prospectus used after the effective date of the registration statement shall be dated approximately

as of such effective date; provided, however, that a revised or amended prospectus used thereafter need only bear the approximate date of its issuance. Each supplement to a prospectus shall be dated separately the approximate date of its issuance.

[47 FR 11440, Mar. 16, 1982, as amended at 52 FR 21260, June 5, 1987; 76 FR 71876, Nov. 21, 2011]

§ 230.424 Filing of prospectuses, number of copies.

- (a) Except as provided in paragraph (f) of this section, five copies of every form of prospectus sent or given to any person prior to the effective date of the registration statement which varies from the form or forms of prospectus included in the registration statement as filed pursuant to § 230.402(a) of this chapter shall be filed as a part of the registration statement not later than the date such form of prospectus is first sent or given to any person: *Provided, however,* That only a form of prospectus that contains substantive changes from or additions to a prospectus previously filed with the Commission as part of a registration statement need be filed pursuant to this paragraph (a).
- (b) Ten copies of each form of prospectus purporting to comply with section 10 of the Act, except for documents constituting a prospectus pursuant to Rule 428(a) (§ 230.428(a)) or free writing prospectuses pursuant to Rule 164 and Rule 433 (§ 230.164 and § 230.433), shall be filed with the Commission in the form in which it is used after the effectiveness of the registration statement and identified as required by paragraph (e) of this section; *provided, however,* that only a form of prospectus that contains substantive changes from or additions to a previously filed prospectus is required to be filed; *Provided, further,* that this paragraph (b) shall not apply in respect of a form of prospectus contained in a registration statement and relating solely to securities offered at competitive bidding, which prospectus is intended for use prior to the opening of bids. Ten copies of the form of prospectus shall be filed or transmitted for filing as follows:
 - (1) A form of prospectus that discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance upon Rule 430A under the Securities Act (§ 230.430A of this chapter) shall be filed with the commission no later than the second business day following the earlier of the date of determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.
 - (2) A form of prospectus that is used in connection with a primary offering of securities pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)) or a primary offering of securities registered for issuance on a delayed basis pursuant to Rule 415(a)(1)(vii) or (viii) (§ 230.415(a)(1)(vii) or (viii)) and that, in the case of Rule 415(a)(1)(viii) discloses the public offering price, description of securities or similar matters, and in the case of Rule 415(a)(1)(vii) and (x) discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance on Rule 430B (§ 230.430B), or, in the case of asset-backed securities, Rule 430D (§ 230.430D) shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.
 - (3) A form of prospectus that reflects facts or events other than those covered in paragraphs (b) (1), (2) and (6) of this section that constitute a substantive change from or addition to the information set forth in the last form of prospectus filed with the Commission under this section or as part of a registration statement under the Securities Act shall be filed with the Commission no later than the

fifth business day after the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

- (4) A form of prospectus that discloses information, facts or events covered in both paragraphs (b) (1) and (3) shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.
- (5) A form of prospectus that discloses information, facts or events covered in both paragraphs (b) (2) and (3) shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.
- (6) A form of prospectus used in connection with an offering of securities under Canada's National Policy Statement No. 45 pursuant to rule 415 under the Securities Act (§ 230.415 of this chapter) that is not made in the United States shall be filed with the Commission no later than the date it is first used in Canada, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.
- (7) A form of prospectus that identifies selling security holders and the amounts to be sold by them that was previously omitted from the registration statement and the prospectus in reliance upon Rule 430B (§ 230.430B) shall be filed with the Commission no later than the second business day following the earlier of the date of sale or the date of first use or transmitted by a means reasonably calculated to result in filing with the Commission by that date.
- (8) A form of prospectus otherwise required to be filed pursuant to paragraph (b) of this section that is not filed within the time frames specified in paragraph (b) of this section must be filed pursuant to this paragraph as soon as practicable after the discovery of such failure to file.

Note to paragraph (b)(8) of Rule 424.

A form of prospectus required to be filed pursuant to another paragraph of Rule 424(b) that is filed under Rule 424(b)(8) shall nonetheless be "required to be filed" under such other paragraph.

Instruction to paragraph (b): Notwithstanding § 230.424 (b)(2) and (b)(5) above, a form of prospectus or prospectus supplement relating to an offering of asset-backed securities under § 230.415(a)(1)(vii) or 230.415(a)(1)(xii) that is required to be filed pursuant to paragraph (b) of this section shall be filed with the Commission no later than the second business day following the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

- (c) If a form of prospectus, other than one filed pursuant to paragraph (b)(1) or (b)(4) of this Rule, consists of a prospectus supplement attached to a form of prospectus that
 - (1) previously had been filed or

- (2) was not required to be filed pursuant to paragraph (b) because it did not contain substantive changes from a prospectus that previously was filed, only the prospectus supplement need be filed under paragraph (b) of this rule, provided that the first page of each prospectus supplement includes a cross reference to the date(s) of the related prospectus and any prospectus supplements thereto that together constitute the prospectus required to be delivered by Section 5(b) of the Securities Act (15 U.S.C. 77e(b)) with respect to the securities currently being offered or sold. The cross reference may be set forth in longhand, provided it is legible.

Note:

Any prospectus supplement being filed separately that is smaller than a prospectus page should be attached to an 8¹/₂" x 11" sheet of paper.

- (d) Every prospectus consisting of a radio or television broadcast shall be reduced to writing. Five copies of every such prospectus shall be filed with the Commission in accordance with the requirements of this section.
- (e) Each copy of a form of prospectus filed under this rule shall contain in the upper right corner of the cover page the paragraph of this rule, including the subparagraph if applicable, under which the filing is made, and the file number of the registration statement to which the prospectus relates. The information required by this paragraph may be set forth in longhand, provided it is legible.
- (f) This section shall not apply with respect to prospectuses of an investment company registered under the Investment Company Act of 1940, other than a registered closed-end investment company. References to "form of prospectus" in paragraphs (a), (b), and (c) of this section shall be deemed also to refer to the form of Statement of Additional Information.
- (g) A form of prospectus filed pursuant to this section must include the following information, as applicable, in a single exhibit submitted as required by § 232.408 of this chapter (Rule 408 of Regulation S-T), provided, however, that if the exhibit is submitted in connection with Form SF-1 (§ 239.44 of this chapter) or Form SF-3 (§ 239.45 of this chapter), it is permitted but not required to be submitted as otherwise required by Rule 408.
- (1) If the form of prospectus operates to reflect the payment of filing fees for an offering or offerings pursuant to § 230.456(b) or (c) (Rule 456(b) or (c)), the calculation of filing fee table immediately followed by the information required by the form instructions to the registration fee table reflecting the payment of such filing fees for the securities that are the subject of the payment; and
- (2) The maximum aggregate amount or maximum aggregate offering price of the securities to which the final prospectus relates and indication that the final prospectus is a final prospectus for the related offering, as applicable, as required by General Instruction II.F of Form S-3 (§ 239.13 of this chapter), General Instruction II.G of Form F-3 (§ 239.33 of this chapter), General Instruction II.D of Form SF-3 (§ 239.45 of this chapter), General Instruction H of Form S-4 (§ 239.25 of this chapter), and General Instruction C.2 of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter).
- (h)

- (1) Three copies of a form of prospectus relating to an offering of asset-backed securities pursuant to § 230.415(a)(1)(vii) or § 230.415(a)(1)(xii) disclosing information previously omitted from the prospectus filed as part of an effective registration statement in reliance on § 230.430D shall be filed with the Commission at least three business days before the date of the first sale in the offering, or if used earlier, the earlier of:
 - (i) The applicable number of business days before the date of the first sale; or
 - (ii) The second business day after first use.
- (2) Three copies of a prospectus supplement relating to an offering of asset-backed securities pursuant to § 230.415(a)(1)(vii) or § 230.415(a)(1)(xii) that reflects any material change from the information contained in a prospectus filed in accordance with § 230.424(h)(1) shall be filed with the Commission at least forty-eight hours before the date and time of the first sale in the offering. The prospectus supplement must clearly delineate what material information has changed and how the information has changed from the prospectus filed in accordance with paragraph (h)(1) of this section.

Instruction to paragraph (h): The filing requirements of this paragraph (h) do not apply if a filing is made solely to add fees pursuant to § 230.457 and for no other purpose.

(i)

- (1) A form of prospectus filed pursuant to this section that operates to reflect the payment of filing fees for an offering of an indeterminate amount of exchange-traded vehicle securities pursuant to §§ 230.456(d) and 230.457(u) (Rule 456(d) and Rule 457(u)) shall be filed with the Commission within the time period set forth in Rule 456(d). The form of prospectus must be accompanied by the appropriate registration fee.
- (2) The form of prospectus must include the following information in an exhibit submitted as required by Rule 408 of Regulation S-T:
 - (i) The name and address of issuer;
 - (ii) The name of the securities for which the prospectus is filed;
 - (iii) The Securities Act file number(s) of the registration statement(s) associated with the offering;
 - (iv) The last day of the fiscal year for the issuer for which the prospectus is filed;
 - (v) The calculation of registration fee information calculated pursuant to Rule 457(u); and
 - (vi) The total interest due pursuant to Rule 456(d)(5) and the total amount of registration fee due including any such interest, if the prospectus is being filed more than 90 days after the end of the issuer's fiscal year.

[14 FR 202, Jan. 14, 1949, as amended at 16 FR 8736, Aug. 29, 1951; 19 FR 400, Jan. 22, 1954; 19 FR 6728, Oct. 20, 1954; 21 FR 1046, Feb. 15, 1956; 52 FR 21260, June 5, 1987; 53 FR 3878, Feb. 10, 1988; 55 FR 23923, June 13, 1990; 56 FR 30054, July 1, 1991; 57 FR 48975, Oct. 29, 1992; 60 FR 26615, May 17, 1995; 62 FR 39763, July 24, 1997; 70 FR 44812, Aug. 3, 2005; 79 FR 57329, Sept. 24, 2014; 85 FR 33354, June 1, 2020; 87 FR 70199, Dec. 9, 2021]

§ 230.425 Filing of certain prospectuses and communications under § 230.135 in connection with business combination transactions.

- (a) All written communications made in reliance on § 230.165 are prospectuses that must be filed with the Commission under this section on the date of first use.
- (b) All written communications that contain no more information than that specified in § 230.135 must be filed with the Commission on or before the date of first use except as provided in paragraph (d)(1) of this section. A communication limited to the information specified in § 230.135 will not be deemed an offer in accordance with § 230.135 even though it is filed under this section.
- (c) Each prospectus or § 230.135 communication filed under this section must identify the filer, the company that is the subject of the offering and the Commission file number for the related registration statement or, if that file number is unknown, the subject company's Exchange Act or Investment Company Act file number, in the upper right corner of the cover page.
- (d) Notwithstanding paragraph (a) of this section, the following need not be filed under this section:
 - (1) Any written communication that is limited to the information specified in § 230.135 and does not contain new or different information from that which was previously publicly disclosed and filed under this section.
 - (2) Any research report used in reliance on § 230.137, § 230.138 and § 230.139;
 - (3) Any confirmation described in § 240.10b-10 of this chapter; and
 - (4) Any prospectus filed under § 230.424.

Notes to § 230.425:

1. File five copies of the prospectus or § 230.135 communication if paper filing is permitted.
2. No filing is required under § 240.13e-4(c), § 240.14a-12(b), § 240.14d-2(b), or § 240.14d-9(a), if the communication is filed under this section. Communications filed under this section also are deemed filed under the other applicable sections.

[64 FR 61450, Nov. 10, 1999]

§ 230.426 Filing of certain prospectuses under § 230.167 in connection with certain offerings of asset-backed securities.

- (a) All written communications made in reliance on § 230.167 are prospectuses that must be filed with the Commission in accordance with paragraphs (b) and (c) of this section on Form 8-K (§ 249.308 of this chapter) and incorporated by reference to the related registration statement for the offering of asset-backed securities. Each prospectus filed under this section must identify the Commission file number of the related registration statement on the cover page of the related Form 8-K in addition to any other information required by that form. The information contained in any such prospectus shall be deemed to be a part of the registration statement as of the earlier of the time of filing of such information or the time of the filing of the final prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) relating to such offering pursuant to § 230.424(b).

(b) Except as specified in paragraph (c) of this section, *ABS informational and computational material* made in reliance on § 230.167 that meet the conditions in paragraph (b)(1) of this section must be filed within the time frame specified in paragraph (b)(2) of this section.

(1) **Conditions for which materials must be filed.** The materials are provided to prospective investors under the following conditions:

- (i) If a prospective investor has indicated to the issuer or an underwriter that it will purchase all or a portion of the class of asset-backed securities to which such materials relate, all materials relating to such class that are or have been provided to such prospective investor; and
- (ii) For any other prospective investor, all materials provided to such prospective investor after the final terms have been established for all classes of the offering.

(2) **Time frame to file the materials.** The materials must be filed by the later of:

- (i) The due date for filing the final prospectus relating to such offering that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) pursuant to § 230.424(b); or
- (ii) Two business days after first use.

(c) Notwithstanding paragraphs (a) and (b) of this section, the following need not be filed under this section:

- (1) *ABS informational and computational material* that relate to abandoned structures or that are furnished to a prospective investor prior to the time the final terms have been established for all classes of the offering where such prospective investor has not indicated to the issuer or an underwriter its intention to purchase the asset-backed securities.
- (2) Any *ABS informational and computational material* if a prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) relating to the offering of such asset-backed securities accompanies or precedes the use of such material.
- (3) Any *ABS informational and computational material* that does not contain new or different information from that which was previously disclosed and filed under this section.
- (4) Any written communication that is limited to the information specified in § 230.134, 230.135 or 230.135c.
- (5) Any research report used in reliance on § 230.137, 230.138, 230.139 or 230.139a.
- (6) Any confirmation described in § 240.10b-10 of this chapter.
- (7) Any prospectus filed under § 230.424.
- (8) Any free writing prospectus used in reliance on Rule 164 and Rule 433 (§ 230.164 and § 230.433).

(d) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

Instruction to § 230.426. The issuer may aggregate data presented in *ABS informational and computational material* that are to be filed and file such data in consolidated form. Any such aggregation, however, must not result in either the omission of any information contained in such material otherwise to be filed, or a presentation that makes the information misleading.

[70 FR 1616, Jan. 7, 2005, as amended at 70 FR 44813, Aug. 3, 2005]

§ 230.427 Contents of prospectus used after nine months.

There may be omitted from any prospectus used more than 9 months after the effective date of the registration statement any information previously required to be contained in the prospectus insofar as later information covering the same subjects, including the latest available certified financial statement, as of a date not more than 16 months prior to the use of the prospectus is contained therein.

[47 FR 11440, Mar. 16, 1982, as amended at 76 FR 71876, Nov. 21, 2011]

§ 230.428 Documents constituting a section 10(a) prospectus for Form S-8 registration statement; requirements relating to offerings of securities registered on Form S-8.

(a)

- (1) Where securities are to be offered pursuant to a registration statement on Form S-8 (§ 239.16b of this chapter), the following, taken together, shall constitute a prospectus that meets the requirements of section 10(a) of the Act:
 - (i) The document(s), or portions thereof as permitted by paragraph (b)(1)(ii) of this section, containing the employee benefit plan information required by Item 1 of the Form;
 - (ii) The statement of availability of registrant information, employee benefit plan annual reports and other information required by Item 2; and
 - (iii) The documents containing registrant information and employee benefit plan annual reports that are incorporated by reference in the registration statement pursuant to Item 3.
- (2) The registrant shall maintain a file of the documents that, pursuant to paragraph (a) of this section, at any time are part of the section 10(a) prospectus, except for documents required to be incorporated by reference in the registration statement pursuant to Item 3 of Form S-8. Each such document shall be included in the file until five years after it is last used as part of the Section 10(a) prospectus to offer or sell securities pursuant to the plan. With respect to documents containing specifically designated portions that constitute part of the section 10(a) prospectus pursuant to paragraph (b)(1)(ii) of this section, the entire document shall be maintained in the file. Upon request, the registrant shall furnish to the Commission or its staff a copy of any or all of the documents included in the file.

(b) Where securities are offered pursuant to a registration statement on Form S-8:

(1)

- (i) The registrant shall deliver or cause to be delivered, to each employee who is eligible to participate (or selected by the registrant to participate, in the case of a stock option or other plan with selective participation) in an employee benefit plan to which the registration statement relates, the information required by Part I of Form S-8. The information shall be in written form and shall be updated in writing in a timely manner to reflect any material changes during any period in which offers or sales are being made. When updating information is furnished, documents previously furnished need not be re-delivered, but the registrant shall furnish promptly without charge to each employee, upon written or oral request, a copy of all documents containing the plan information required by Part I that then constitute part of the section 10(a) prospectus.

- (ii) The registrant may designate an entire document or only portions of a document as constituting part of the section 10(a) prospectus. If the registrant designates only portions of a document as constituting part of the prospectus, rather than the entire document, a statement clearly identifying such portions, for example, by reference to section headings, section numbers, paragraphs or page numbers within the document must be included in a conspicuous place in the forepart of the document, or such portions must be specifically designated throughout the text of the document. Registrants shall not designate only words or sentences within a paragraph as part of a prospectus. Unless the portions of a document constituting part of the section 10(a) prospectus are clearly identified, the entire document shall constitute part of the prospectus.
 - (iii) The registrant shall date any document constituting part of the section 10(a) prospectus or containing portions constituting part of the prospectus and shall include the following printed, stamped or typed legend in a conspicuous place in the forepart of the document, substituting the bracketed language as appropriate: "This document [Specifically designated portions of this document] constitutes [constitute] part of a prospectus covering securities that have been registered under the Securities Act of 1933."
 - (iv) The registrant shall revise the document(s) containing the plan information sent or given to newly eligible participants pursuant to paragraph (b)(1)(i) of this section, if documents containing updating information would obscure the readability of the plan information.
- (2) The registrant shall deliver or cause to be delivered with the document(s) containing the information required by Part I of Form S-8, to each employee to whom such information is sent or given, a copy of any one of the following:
- (i) The registrant's annual report to security holders containing the information required by Rule 14a-3(b) (§ 240.14a-3(b) of this chapter) under the Securities Exchange Act of 1934 (*Exchange Act*) for its latest fiscal year;
 - (ii) The registrant's annual report on Form 10-K (§ 249.310 of this chapter), 20-F (§ 249.220f of this chapter) or, in the case of registrants described in General Instruction A.(2) of Form 40-F (§ 249.240f of this chapter), for its latest fiscal year;
 - (iii) The latest prospectus filed pursuant to Rule 424(b) (§ 230.424(b)) under the Act that contains audited financial statements for the registrant's latest fiscal year, *Provided* that the financial statements are not incorporated by reference from another filing, and *Provided* further that such prospectus contains substantially the information required by Rule 14a-3(b) (§ 240.14a-3(b) of this chapter) or the registration statement was on Form S-1 (§ 239.11 of this chapter) or F-1 (§ 239.31 of this chapter); or
 - (iv) The registrant's effective Exchange Act registration statement on Form 10 (§ 249.210 of this chapter), 20-F or, in the case of registrants described in General Instruction A.(2) of Form 40-F, containing audited financial statements for the registrant's latest fiscal year.

Instructions. 1. If a registrant has previously sent or given an employee a copy of any document specified in clauses (i)-(iv) of paragraph (b)(2) for the latest fiscal year, it need not be re-delivered, but the registrant shall furnish promptly, without charge, a copy of such document upon written or oral request of the employee.

2. If the latest fiscal year of the registrant has ended within 120 days (or 190 days with respect to foreign private issuers) prior to the delivery of the documents containing the information specified by Part I of Form S-8, the registrant may deliver a document containing financial statements for the fiscal year preceding the last fiscal year, *Provided that* within the 120 or 190 day period a document containing financial statements for the latest fiscal year is furnished to each employee.

- (3) The registrant shall deliver or cause to be delivered promptly, without charge, to each employee to whom information is required to be delivered, upon written or oral request, a copy of the information that has been incorporated by reference pursuant to Item 3 of Form S-8 (not including exhibits to the information that is incorporated by reference unless such exhibits are specifically incorporated by reference into the information that the registration statement incorporates).
- (4) Where interests in a plan are registered, the registrant shall deliver or cause to be delivered promptly, without charge, to each employee to whom information is required to be delivered, upon written or oral request, a copy of the then latest annual report of the plan filed pursuant to section 15(d) of the Exchange Act, whether on Form 11-K (§ 249.311 of this chapter) or included as part of the registrant's annual report on Form 10-K.
- (5) The registrant shall deliver or cause to be delivered to all employees participating in a stock option plan or plan fund that invests in registrant securities (and other plan participants who request such information orally or in writing) who do not otherwise receive such material, copies of all reports, proxy statements and other communications distributed to its security holders generally, provided that such material is sent or delivered no later than the time it is sent to security holders.
- (c) As used in this Rule, the term *employee benefit plan* is defined in Rule 405 of Regulation C (§ 230.405 of this chapter) and the term *employee* is defined in General Instruction A.1 of Form S-8.

[55 FR 23923, June 13, 1990, as amended at 57 FR 10614, Mar. 27, 1992; 73 FR 969, Jan. 4, 2008]

§ 230.429 Prospectus relating to several registration statements.

- (a) Where a registrant has filed two or more registration statements, it may file a single prospectus in the latest registration statement in order to satisfy the requirements of the Act and the rules and regulations thereunder for that offering and any other offering(s) registered on the earlier registration statement(s). The combined prospectus in the latest registration statement must include all of the information that currently would be required in a prospectus relating to all offering(s) that it covers. The combined prospectus may be filed as part of the initial filing of the latest registration statement, in a pre-effective amendment to it or in a post-effective amendment to it.
- (b) Where a registrant relies on paragraph (a) of this section, the registration statement containing the combined prospectus shall act, upon effectiveness, as a post-effective amendment to any earlier registration statement whose prospectus has been combined in the latest registration statement. The registrant must identify any earlier registration statement to which the combined prospectus relates by setting forth the Commission file number at the bottom of the facing page of the latest registration statement.

[66 FR 8896, Feb. 5, 2001]

§ 230.430 Prospectus for use prior to effective date.

- (a) A form of prospectus filed as a part of the registration statement shall be deemed to meet the requirements of section 10 of the Act for the purpose of section 5(b)(1) thereof prior to the effective date of the registration statement, provided such form of prospectus contains substantially the information required by the Act and the rules and regulations thereunder to be included in a prospectus meeting the requirements of section 10(a) of the Act for the securities being registered, or contains substantially that information except for the omission of information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price. Every such form of prospectus shall be deemed to have been filed as a part of the registration statement for the purpose of section 7 of the Act.
- (b) A form of prospectus filed as part of a registration statement on Form N-1A (§ 239.15A and § 274.11A of this chapter), Form N-2 (§ 239.14 and § 274.11a-1 of this chapter), Form N-3 (§ 239.17a and § 274.11b of this chapter), Form N-4 (§ 239.17b and § 274.11c of this chapter), or Form N-6 (§ 239.17c and § 274.11d of this chapter) shall be deemed to meet the requirements of Section 10 of the Act (15 U.S.C. 77j) for the purpose of Section 5(b)(1) thereof (15 U.S.C. 77e(b)(1)) prior to the effective date of the registration statement, provided that:
 - (1) Such form of prospectus meets the requirements of paragraph (a) of this section; and
 - (2) Such registration statement contains a form of Statement of Additional Information that is made available to persons receiving such prospectus upon written or oral request, and without charge, unless the form of prospectus contains the information otherwise required to be disclosed in the form of Statement of Additional Information. Every such form of prospectus shall be deemed to have been filed as part of the registration statement for the purpose of section 7 of the Act.

[47 FR 11440, Mar. 16, 1982, as amended at 57 FR 56834, Dec. 1, 1992; 67 FR 19868, Apr. 23, 2002; 76 FR 71876, Nov. 21, 2011]

§ 230.430A Prospectus in a registration statement at the time of effectiveness.

- (a) The form of prospectus filed as part of a registration statement that is declared effective may omit information with respect to the public offering price, underwriting syndicate (including any material relationships between the registrant and underwriters not named therein), underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date; and such form of prospectus need not contain such information in order for the registration statement to meet the requirements of Section 7 of the Securities Act (15 U.S.C. 77g) for the purposes of Section 5 thereof (15 U.S.C. 77e), *Provided, That*:
 - (1) The securities to be registered are offered for cash;
 - (2) The registrant furnishes the undertakings required by § 229.512(i) of this chapter (Item 512(i) of Regulation S-K), or the undertakings required by Item 34.4 of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter); and
 - (3) The information omitted in reliance upon paragraph (a) from the form of prospectus filed as part of a registration statement that is declared effective is contained in a form of prospectus filed with the Commission pursuant to Rule 424(b) or Rule 497(h) under the Securities Act (§§ 230.424(b) or 230.497(h) of this chapter); except that if such form of prospectus is not so filed by the later of fifteen business days after the effective date of the registration statement or fifteen business days after the effectiveness of a post-effective amendment thereto that contains a form of prospectus, or

transmitted by a means reasonably calculated to result in filing with the Commission by that date, the information omitted in reliance upon paragraph (a) must be contained in an effective post-effective amendment to the registration statement.

Instruction to paragraph (a): A decrease in the volume of securities offered or change in the bona fide estimate of the maximum offering price range from that indicated in the form of prospectus filed as part of a registration statement that is declared effective may be disclosed in the form of prospectus filed with the Commission pursuant to § 230.424(b) or § 230.497(h) under the Securities Act so long as the decrease in the volume or change in the price range would not materially change the disclosure contained in the registration statement at effectiveness. Notwithstanding the foregoing, any increase or decrease in volume (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b)(1) (§ 230.424(b)(1)) or Rule 497(h) (§ 230.497(h)) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement.

- (b) The information omitted in reliance upon paragraph (a) from the form of prospectus filed as part of an effective registration statement, and contained in the form of prospectus filed with the Commission pursuant to Rule 424(b) or Rule 497(h) under the Securities Act (§§ 230.424(b) or 230.497(h) of this chapter), shall be deemed to be a part of the registration statement as of the time it was declared effective.
- (c) When used prior to determination of the offering price of the securities, a form of prospectus relating to the securities offered pursuant to a registration statement that is declared effective with information omitted from the form of prospectus filed as part of such effective registration statement in reliance upon this Rule 430A need not contain information omitted pursuant to paragraph (a), in order to meet the requirements of Section 10 of the Securities Act (15 U.S.C. 77j) for the purpose of section 5(b)(1) (15 U.S.C. 77e(b)(1)) thereof. This provision shall not limit the information required to be contained in a form of prospectus meeting the requirements of section 10(a) of the Act for the purposes of section 5(b)(2) thereof or exception (a) of Section 2(10) (15 U.S.C. 77b(10)) thereof.
- (d) This rule shall not apply to registration statements for securities to be offered by competitive bidding.
- (e) In the case of a registration statement filed on Form N-1A (§ 239.15A and § 274.11A of this chapter), Form N-2 (§ 239.14 and § 274.11a-1 of this chapter), Form N-3 (§ 239.17a and § 274.11b of this chapter), Form N-4 (§ 239.17b and § 274.11c of this chapter), or Form N-6 (§ 239.17c and § 274.11d of this chapter), the references to "form of prospectus" in paragraphs (a) and (b) of this section and the accompanying Note shall be deemed also to refer to the form of Statement of Additional Information filed as part of such a registration statement.
- (f) This section may apply to registration statements that are immediately effective pursuant to Rule 462(e) and (f) (§ 230.462(e) and (f)).

Note:

If information is omitted in reliance upon paragraph (a) from the form of prospectus filed as part of an effective registration statement, or effective post-effective amendment thereto, the registrant must ascertain promptly whether a form of prospectus transmitted for filing under Rule 424(b) of Rule 497(h) under the Securities Act actually was received for filing by the Commission and, in the event that it was not, promptly file such prospectus.

[52 FR 21261, June 5, 1987, as amended at 56 FR 48103, Sept. 24, 1991; 57 FR 48976, Oct. 29, 1992; 57 FR 56834, Dec. 1, 1992; 60 FR 26616, May 17, 1995; 67 FR 19869, Apr. 23, 2002; 70 FR 44813, Aug. 3, 2005; 85 FR 33354, June 1, 2020]

§ 230.430B Prospectus in a registration statement after effective date.

- (a) A form of prospectus filed as part of a registration statement for offerings pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)) may omit from the information required by the form to be in the prospectus information that is unknown or not reasonably available to the issuer pursuant to Rule 409 (§ 230.409). In addition, a form of prospectus filed as part of an automatic shelf registration statement for offerings pursuant to Rule 415(a) (§ 230.415(a)), other than Rule 415(a)(1)(viii), also may omit information as to whether the offering is a primary offering or an offering on behalf of persons other than the issuer, or a combination thereof, the plan of distribution for the securities, a description of the securities registered other than an identification of the name or class of such securities, and the identification of other issuers. Each such form of prospectus shall be deemed to have been filed as part of the registration statement for the purpose of section 7 of the Act.
- (b) A form of prospectus filed as part of a registration statement for offerings pursuant to Rule 415(a)(1)(i) by an issuer eligible to use Form S-3 or Form F-3 (§ 239.13 or § 239.33 of this chapter) for primary offerings pursuant to General Instruction I.B.1 of such forms, or an issuer eligible to register such a primary offering under General Instruction A.2 of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), may omit the information specified in paragraph (a) of this section, and may also omit the identities of selling security holders and amounts of securities to be registered on their behalf if:
 - (1) The registration statement is an automatic shelf registration statement as defined in Rule 405 (§ 230.405); or
 - (2) All of the following conditions are satisfied:
 - (i) The initial offering transaction of the securities (or securities convertible into such securities) the resale of which are being registered on behalf of each of the selling security holders, was completed;
 - (ii) The securities (or securities convertible into such securities) were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities;
 - (iii) The registration statement refers to any unnamed selling security holders in a generic manner by identifying the initial offering transaction in which the securities were sold; and
 - (iv) The issuer is not and during the past three years neither the issuer nor any of its predecessors was:
 - (A) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
 - (B) A shell company, other than a business combination related shell company, each as defined in Rule 405; or

(C) An issuer in an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter).

- (c) A form of prospectus that is part of a registration statement that omits information in reliance upon paragraph (a) or (b) of this section meets the requirements of section 10 of the Act for the purpose of section 5(b)(1) thereof. This provision shall not limit the information required to be contained in a form of prospectus in order to meet the requirements of section 10(a) of the Act for the purposes of section 5(b)(2) thereof or exception (a) of section 2(a)(10) thereof.
- (d) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) or (b) of this section may be included subsequently in the prospectus that is part of a registration statement by:
 - (1) A post-effective amendment to the registration statement;
 - (2) A prospectus filed pursuant to Rule 424(b) (§ 230.424(b)); or
 - (3) If the applicable form permits, including the information in the issuer's periodic or current reports filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement in accordance with applicable requirements, subject to the provisions of paragraph (h) of this section.
- (e) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) or (b) of this section and contained in a form of prospectus required to be filed with the Commission pursuant to Rule 424(b), other than as provided in paragraph (f) of this section, shall be deemed part of and included in the registration statement as of the date such form of filed prospectus is first used after effectiveness.
- (f)
 - (1) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) or (b) of this section and is contained in a form of prospectus required to be filed with the Commission pursuant to Rule 424(b)(2), (b)(5), or (b)(7), shall be deemed to be part of and included in the registration statement on the earlier of the date such subsequent form of prospectus is first used or the date and time of the first contract of sale of securities in the offering to which such subsequent form of prospectus relates.
 - (2) The date on which a form of prospectus is deemed to be part of and included in the registration statement pursuant to paragraph (f)(1) of this section shall be deemed, for purposes of liability under section 11 of the Act of the issuer and any underwriter at the time only, to be a new effective date of the part of such registration statement relating to the securities to which such form of prospectus relates, such part of the registration statement consisting of all information included in the registration statement and any prospectus relating to the offering of such securities (including information relating to the offering in a prospectus already included in the registration statement) as of such date and all information relating to the offering included in reports and materials incorporated by reference into such registration statement and prospectus as of such date, and in each case not modified or superseded pursuant to Rule 412 (§ 230.412). The offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.
 - (3) If a registration statement is amended to include or is deemed to include, through incorporation by reference or otherwise, except as otherwise provided in Rule 436 (§ 230.436), a report or opinion of any person made on such person's authority as an expert whose consent would be required under

section 7 of the Act because of being named as having prepared or certified part of the registration statement, then for purposes of this section and for liability purposes under section 11 of the Act, the part of the registration statement for which liability against such person is asserted shall be considered as having become effective with respect to such person as of the time the report or opinion is deemed to be part of the registration statement and a consent required pursuant to section 7 of the Act has been provided as contemplated by section 11 of the Act.

(4) Except for an effective date resulting from the filing of a form of prospectus filed for purposes of including information required by section 10(a)(3) of the Act or pursuant to § 229.512(a)(1)(ii) of this chapter (Item 512(a)(1)(ii) of Regulation S-K) or Item 34.3.a(2) of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), the date a form of prospectus is deemed part of and included in the registration statement pursuant to this paragraph (f)(4) shall not be an effective date established pursuant to paragraph (f)(2) of this section as to:

- (i) Any director (or person acting in such capacity) of the issuer;
- (ii) Any person signing any report or document incorporated by reference into the registration statement, except for such a report or document incorporated by reference for purposes of including information required by section 10(a)(3) of the Act or pursuant to Item 512(a)(1)(ii) of Regulation S-K or Item 34.3.a(2) of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) (such person except for such reports being deemed not to be a person who signed the registration statement within the meaning of section 11(a) of the Act).

(5) The date a form of prospectus is deemed part of and included in the registration statement pursuant to paragraph (f)(2) of this section shall not be an effective date established pursuant to paragraph (f)(2) of this section as to:

- (i) Any accountant with respect to financial statements or other financial information contained in the registration statement as of a prior effective date and for which the accountant previously provided a consent to be named as required by section 7 of the Act, unless the form of prospectus contains new audited financial statements or other financial information as to which the accountant is an expert and for which a new consent is required pursuant to section 7 of the Act or Rule 436; and
- (ii) Any other person whose report or opinion as an expert or counsel has, with their consent, previously been included in the registration statement as of a prior effective date, unless the form of prospectus contains a new report or opinion for which a new consent is required pursuant to section 7 of the Act or Rule 436.

(g) Notwithstanding paragraph (e) or (f) of this section or paragraph (a) of Rule 412, no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement after the effective date of such registration statement or portion thereof in respect of an offering determined pursuant to this section will, as to a purchaser with a time of contract of sale prior to such effective date, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such effective date.

(h) Where a form of prospectus filed pursuant to Rule 424(b) relating to an offering does not include disclosure of omitted information regarding the terms of the offering, the securities, or the plan of distribution, or selling security holders for the securities that are the subject of the form of prospectus, because such omitted information has been included in periodic or current reports filed pursuant to

section 13 or 15(d) of the Securities Exchange Act of 1934 incorporated or deemed incorporated by reference into the prospectus, the issuer shall file a form of prospectus identifying the periodic or current reports that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement that contain such omitted information. Such form of prospectus shall be required to be filed, depending on the nature of the incorporated information, pursuant to Rule 424(b)(2), (b)(5), or (b)(7).

- (i) Issuers relying on this section shall furnish the undertakings required by Item 512(a) of Regulation S-K or Item 34.3 of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) as applicable.

Note to Rule 430B:

The provisions of paragraph (b) of Rule 401 (§ 230.401(b)) shall apply to any prospectus filed for purposes of including information required by section 10(a)(3) of the Act.

[70 FR 44813, Aug. 3, 2005, as amended at 73 FR 969, Jan. 4, 2008; 79 FR 57329, Sept. 24, 2014; 85 FR 33354, June 1, 2020]

§ 230.430C Prospectus in a registration statement pertaining to an offering other than pursuant to Rule 430A or Rule 430B after the effective date.

- (a) In offerings made other than in reliance on Rule 430B (§ 230.430B) or Rule 430D (§ 230.430D) and other than for prospectuses filed in reliance on Rule 430A (§ 230.430A), information contained in a form of prospectus required to be filed with the Commission pursuant to Rule 424(b) (§ 230.424(b)) or Rule 497(b), (c), (d), or (e) (§ 230.497(b), (c), (d) or (e)), shall be deemed to be part of and included in the registration statement on the date it is first used after effectiveness.
- (b) Notwithstanding paragraph (a) of this section or paragraph (a) of Rule 412 (§ 230.412), no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such first use, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such date of first use.
- (c) Nothing in this section shall affect the information required to be included in an issuer's registration statement and prospectus.
- (d) Issuers subject to paragraph (a) of this section shall furnish the undertakings required by Item 512(a) of Regulation S-K (§ 229.512(a) of this chapter) or Item 34.4 of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), as applicable.

[70 FR 44815, Aug. 3, 2005, as amended at 73 FR 969, Jan. 4, 2008; 79 FR 57329, Sept. 24, 2014]

§ 230.430D Prospectus in a registration statement after effective date for asset-backed securities offerings.

- (a) A form of prospectus filed as part of a registration statement for primary offerings of asset-backed securities pursuant to § 230.415(a)(1)(vii) or § 230.415(a)(1)(xii) may omit from the information required by the form to be in the prospectus information that is unknown or not reasonably available to the issuer pursuant to § 230.409.

- (b) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) of this section (other than information with respect to offering price, underwriting syndicate (including any material relationships between the registrant and underwriters not named therein), underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds or other matters dependent upon the offering price to the extent such information is unknown or not reasonably available to the issuer pursuant to § 230.409) shall be disclosed in a form of prospectus required to be filed with the Commission pursuant to § 230.424(h). Each such form of prospectus shall be deemed to have been filed as part of the registration statement for the purpose of section 7 of the Act (15 U.S.C. 77g).
- (c) A form of prospectus filed as part of a registration statement that omits information in reliance upon paragraph (a) of this section meets the requirements of section 10 of the Act (15 U.S.C. 77j) for the purpose of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)). This provision shall not limit the information required to be contained in a form of prospectus in order to meet the requirements of section 10(a) of the Act for the purposes of section 5(b)(2) (15 U.S.C. 77e(b)(2)) or exception (a) of section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)(a)).
- (d)
 - (1) Except as provided in paragraph (b) or (d)(2) of this section, information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) of this section may be included subsequently in the prospectus that is part of a registration statement by:
 - (i) A post-effective amendment to the registration statement;
 - (ii) A prospectus filed pursuant to § 230.424(b); or
 - (iii) If the applicable form permits, including the information in the issuer's periodic or current reports filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement in accordance with the applicable requirements, subject to the provisions of paragraph (h) of this section.
 - (2) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) of this section that adds a new structural feature or credit enhancement must be included subsequently in the prospectus that is part of a registration statement by a post-effective amendment to the registration statement.
- (e)
 - (1) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) of this section and contained in a form of prospectus required to be filed with the Commission pursuant to § 230.424(b), other than as provided in paragraph (f) of this section, shall be deemed part of and included in the registration statement as of the date such form of filed prospectus is first used after effectiveness.
 - (2) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) of this section and contained in a form of prospectus required to be filed with the Commission pursuant to § 230.424(h) shall be deemed part of and included in the registration statement the earlier of the date such form of filed prospectus is filed with the Commission pursuant to § 230.424(h) or, if used earlier than the date of filing, the date it is first used after effectiveness.

(f)

- (1) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) of this section, and is contained in a form of prospectus required to be filed with the Commission pursuant to § 230.424(b)(2) or (b)(5), shall be deemed to be part of and included in the registration statement on the earlier of the date such subsequent form of prospectus is first used or the date and time of the first contract of sale of securities in the offering to which such subsequent form of prospectus relates.
- (2) The date on which a form of prospectus is deemed to be part of and included in the registration statement pursuant to paragraph (f)(1) of this section shall be deemed, for purposes of liability under section 11 of the Act (15 U.S.C. 77k) of the issuer and any underwriter at the time only, to be a new effective date of the part of such registration statement relating to the securities to which such form of prospectus relates, such part of the registration statement consisting of all information included in the registration statement and any prospectus relating to the offering of such securities (including information relating to the offering in a prospectus already included in the registration statement) as of such date and all information relating to the offering included in reports and materials incorporated by reference into such registration statement and prospectus as of such date, and in each case not modified or superseded pursuant to § 230.412. The offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.
- (3) If a registration statement is amended to include or is deemed to include, through incorporation by reference or otherwise, except as otherwise provided in § 230.436, a report or opinion of any person made on such person's authority as an expert whose consent would be required under section 7 of the Act (15 U.S.C. 77g) because of being named as having prepared or certified part of the registration statement, then for purposes of this section and for liability purposes under section 11 of the Act (15 U.S.C. 77k), the part of the registration statement for which liability against such person is asserted shall be considered as having become effective with respect to such person as of the time the report or opinion is deemed to be part of the registration statement and a consent required pursuant to section 7 of the Act has been provided as contemplated by section 11 of the Act.
- (4) Except for an effective date resulting from the filing of a form of prospectus filed for purposes of including information required by section 10(a)(3) of the Act (15 U.S.C. 77j(a)(3)) or pursuant to Item 512(a)(1)(ii) of Regulation S-K (§ 229.512(a)(1)(ii) of this chapter), the date a form of prospectus is deemed part of and included in the registration statement pursuant to this paragraph shall not be an effective date established pursuant to paragraph (f)(2) of this section as to:
 - (i) Any director (or person acting in such capacity) of the issuer;
 - (ii) Any person signing any report or document incorporated by reference into the registration statement, except for such a report or document incorporated by reference for purposes of including information required by section 10(a)(3) of the Act (15 U.S.C. 77j(a)(3)) or pursuant to Item 512(a)(1)(ii) of Regulation S-K (§ 229.512(a)(1)(ii) of this chapter) (such person except for such reports being deemed not to be a person who signed the registration statement within the meaning of section 11(a) of the Act (15 U.S.C. 77k(a)).
- (5) The date a form of prospectus is deemed part of and included in the registration statement pursuant to paragraph (f)(2) of this section shall not be an effective date established pursuant to paragraph (f)(2) of this section as to:

- (i) Any accountant with respect to financial statements or other financial information contained in the registration statement as of a prior effective date and for which the accountant previously provided a consent to be named as required by section 7 of the Act (15 U.S.C. 77g), unless the form of prospectus contains new audited financial statements or other financial information as to which the accountant is an expert and for which a new consent is required pursuant to section 7 of the Act or § 230.436; and
 - (ii) Any other person whose report or opinion as an expert or counsel has, with their consent, previously been included in the registration statement as of a prior effective date, unless the form of prospectus contains a new report or opinion for which a new consent is required pursuant to section 7 of the Act (15 U.S.C. 77g) or § 230.436.
- (g) Notwithstanding paragraph (e) or (f) of this section or § 230.412(a), no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement after the effective date of such registration statement or portion thereof in respect of an offering determined pursuant to this section will, as to a purchaser with a time of contract of sale prior to such effective date, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such effective date.
- (h) Where a form of prospectus filed pursuant to § 230.424(b) relating to an offering does not include disclosure of omitted information regarding the terms of the offering, the securities or the plan of distribution for the securities that are the subject of the form of prospectus, because such omitted information has been included in periodic or current reports filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) incorporated or deemed incorporated by reference into the prospectus, the issuer shall file a form of prospectus identifying the periodic or current reports that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement that contain such omitted information. Such form of prospectus shall be required to be filed, depending on the nature of the incorporated information, pursuant to § 230.424(b)(2) or (b)(5).
- (i) Issuers relying on this section shall furnish the undertakings required by Item 512(a) of Regulation S-K (§ 229.512(a) of this chapter).

[79 FR 57329, Sept. 24, 2014]

§ 230.431 Summary prospectuses.

- (a) A summary prospectus prepared and filed (except a summary prospectus filed by an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a separate account (as defined in section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940 on §§ 239.17a and 274.11b of this chapter (Form N-3), §§ 239.17b and 274.11c of this chapter (Form N-4), or §§ 239.17c and 274.11d of this chapter (Form N-6) as part of a registration statement in accordance with this section shall be deemed to be a prospectus permitted under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)) if the form used for registration of the securities to be offered provides for the use of a summary prospectus and the following conditions are met:

(1)

- (i) The registrant is organized under the laws of the United States or any State or Territory or the District of Columbia and has its principal business operations in the United States or its territories; or
 - (ii) The registrant is a foreign private issuer eligible to use Form F-2 (§ 239.32 of this chapter);
- (2) The registrant has a class of securities registered pursuant to section 12(b) of the Securities Exchange Act of 1934 or has a class of equity securities registered pursuant to section 12(g) of that Act or is required to file reports pursuant to section 15(d) of that Act;
- (3) The registrant:
 - (i) Has been subject to the requirements of section 12 or 15(d) of the Securities Exchange Act of 1934 and has filed all the material required to be filed pursuant to sections 13, 14 or 15(d) of that Act for a period of at least thirty-six calendar months immediately preceding the filing of the registration statement; and
 - (ii) has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement and, if the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b-25(b) under the Securities Exchange Act of 1934 (§ 240.12b-25 of this chapter) with respect to a report or portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that Rule; and
- (4) Neither the registrant nor any of its consolidated or unconsolidated subsidiaries has, since the end of its last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934:
 - (i) failed to pay any dividend or sinking fund installment on preferred stock; or
 - (ii) defaulted on any installment or installments on indebtedness for borrowed money, or on any rental on one or more long term leases, which defaults in the aggregate are material to the financial position of the registrant and its consolidated and unconsolidated subsidiaries, taken as a whole.
- (b) A summary prospectus shall contain the information specified in the instructions as to summary prospectuses in the form used for registration of the securities to be offered. Such prospectus may include any other information the substance of which is contained in the registration statement except as otherwise specifically provided in the instructions as to summary prospectuses in the form used for registration. It shall not include any information the substance of which is not contained in the registration statement except that a summary prospectus may contain any information specified in Rule 134(a) (§ 230.134(a)). No reference need be made to inapplicable terms and negative answers to any item of the form may be omitted.
- (c) All information included in a summary prospectus, other than the statement required by paragraph (e) of this section, may be expressed in such condensed or summarized form as may be appropriate in the light of the circumstances under which the prospectus is to be used. The information need not follow the numerical sequence of the items of the form used for registration. Every summary prospectus shall be dated approximately as of the date of its first use.

- (d) When used prior to the effective date of the registration statement, a summary prospectus shall be captioned a "Preliminary Summary Prospectus" and shall comply with the applicable requirements relating to a preliminary prospectus.
- (e) A statement to the following effect shall be prominently set forth in conspicuous print at the beginning or at the end of every summary prospectus:

"Copies of a more complete prospectus may be obtained from" (Insert name(s), address(es) and telephone number(s)).

Copies of a summary prospectus filed with the Commission pursuant to paragraph (g) of this section may omit the names of persons from whom the complete prospectus may be obtained.

- (f) Any summary prospectus published in a newspaper, magazine or other periodical need only be set in type at least as large as 7 point modern type. Nothing in this rule shall prevent the use of reprints of a summary prospectus published in a newspaper, magazine, or other periodical, if such reprints are clearly legible.
- (g) Eight copies of every proposed summary prospectus shall be filed as a part of the registration statement, or as an amendment thereto, at least 5 days (exclusive of Saturdays, Sundays and holidays) prior to the use thereof, or prior to the release for publication by any newspaper, magazine or other person, whichever is earlier. The Commission may, however, in its discretion, authorize such use or publication prior to the expiration of the 5-day period upon a written request for such authorization. Within 7 days after the first use or publication thereof, 5 additional copies shall be filed in the exact form in which it was used or published.

[47 FR 11440, Mar. 16, 1982, as amended at 47 FR 54770, Dec. 6, 1982; 63 FR 13984, Mar. 23, 1998; 76 FR 71876, Nov. 21, 2011; 85 FR 26093, May 1, 2020]

§ 230.432 Additional information required to be included in prospectuses relating to tender offers.

Notwithstanding the provisions of any form for the registration of securities under the Act, any prospectus relating to securities to be offered in connection with a tender offer for, or a request or invitation for tenders of, securities subject to either § 240.13e-4 or section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d)) must include the information required by § 240.13e-4(d)(1) or § 240.14d-6(d)(1) of this chapter, as applicable, in all tender offers, requests or invitations that are published, sent or given to security holders.

[64 FR 61451, Nov. 10, 1999]

§ 230.433 Conditions to permissible post-filing free writing prospectuses.

- (a) **Scope of section.** This section applies to any free writing prospectus with respect to securities of any issuer (except as set forth in Rule 164 (§ 230.164)) that are the subject of a registration statement that has been filed under the Act. Such a free writing prospectus that satisfies the conditions of this section may include information the substance of which is not included in the registration statement. Such a free writing prospectus that satisfies the conditions of this section will be a prospectus permitted under section 10(b) of the Act for purposes of sections 2(a)(10), 5(b)(1), and 5(b)(2) of the Act and will, for purposes of considering it a prospectus, be deemed to be public, without regard to its method of use or distribution, because it is related to the public offering of securities that are the subject of a filed registration statement.

- (b) **Permitted use of free writing prospectus.** Subject to the conditions of this paragraph (b) and satisfaction of the conditions set forth in paragraphs (c) through (g) of this section, a free writing prospectus may be used under this section and Rule 164 in connection with a registered offering of securities:
- (1) **Eligibility and prospectus conditions for seasoned issuers and well-known seasoned issuers.** Subject to the provisions of Rule 164(e), (f), and (g), the issuer or any other offering participant may use a free writing prospectus in the following offerings after a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act:
- (i) Offerings of securities registered on Form S-3 (§ 239.33 of this chapter) pursuant to General Instruction I.B.1, I.B.2, I.C., or I.D. thereof or on Form SF-3 (§ 239.45 of this chapter) or on Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) pursuant to General Instruction A.2 with respect to the same transactions;
 - (ii) Offerings of securities registered on Form F-3 (§ 239.13 of this chapter) pursuant to General Instruction I.A.5, I.B.1, I.B.2, or I.C. thereof;
 - (iii) Any other offering not excluded from reliance on this section and Rule 164 of securities of a well-known seasoned issuer; and
 - (iv) Any other offering not excluded from reliance on this section and Rule 164 of securities of an issuer eligible to use Form S-3 or Form F-3 for primary offerings pursuant to General Instruction I.B.1 of such Forms or an issuer eligible to use General Instruction A.2 of Form N-2 to register a primary offering described in General Instruction I.B.1 of Form S-3.
- (2) **Eligibility and prospectus conditions for non-reporting and unseasoned issuers.** If the issuer does not fall within the provisions of paragraph (b)(1) of this section, then, subject to the provisions of Rule 164(e), (f), and (g), any person participating in the offer or sale of the securities may use a free writing prospectus as follows:
- (i) If the free writing prospectus is or was prepared by or on behalf of or used or referred to by an issuer or any other offering participant, if consideration has been or will be given by the issuer or other offering participant for the dissemination (in any format) of any free writing prospectus (including any published article, publication, or advertisement), or if section 17(b) of the Act requires disclosure that consideration has been or will be given by the issuer or other offering participant for any activity described therein in connection with the free writing prospectus, then a registration statement relating to the offering must have been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act, including a price range where required by rule, and the free writing prospectus shall be accompanied or preceded by the most recent such prospectus; *provided, however, that use of the free writing prospectus is not conditioned on providing the most recent such prospectus if a prior such prospectus has been provided and there is no material change from the prior prospectus reflected in the most recent prospectus; provided further, that after effectiveness and availability of a final prospectus meeting the requirements of section 10(a) of the Act, no such earlier prospectus may be provided in satisfaction of this condition, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier prospectus had been previously provided.*

Notes to paragraph (b)(2)(i) of Rule 433.

1. The condition that a free writing prospectus shall be accompanied or preceded by the most recent prospectus satisfying the requirements of section 10 of the Act would be satisfied if a free writing prospectus that is an electronic communication contained an active hyperlink to such most recent prospectus; and
2. A communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer or other offering participant is an offer by the issuer or such other offering participant as the case may be and is, if written, a free writing prospectus of the issuer or other offering participant.

(ii) Where paragraph (b)(2)(i) of this section does not apply, a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431 satisfies the requirements of section 10 of the Act, including a price range where required by rule. For purposes of paragraph (f) of this section, the prospectus included in the registration statement relating to the offering that has been filed does not have to include a price range otherwise required by rule.

(3) **Successors.** A successor issuer will be considered to satisfy the applicable provisions of this paragraph (b) if:

- (i) Its predecessor and it, taken together, satisfy the conditions, provided that the succession was primarily for the purpose of changing the state or other jurisdiction of incorporation of the predecessor or forming a holding company and the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or
- (ii) All predecessors met the conditions at the time of succession and the issuer has continued to do so since the succession.

(c) **Information in a free writing prospectus.**

(1) A free writing prospectus used in reliance on this section may include information the substance of which is not included in the registration statement but such information shall not conflict with:

- (i) Information contained in the filed registration statement, including any prospectus or prospectus supplement that is part of the registration statement (including pursuant to Rule 430B (§ 230.430B), Rule 430C (§ 230.430C) or Rule 430D (§ 230.430D) and not superseded or modified; or
- (ii) Information contained in the issuer's periodic and current reports filed or furnished to the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated by reference into the registration statement and not superseded or modified, or pursuant to section 30 of the Investment Company Act of 1940 (15 U.S.C. 80a-29).

(2)

(i) A free writing prospectus used in reliance on this section shall contain substantially the following legend:

The issuer has filed a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the

SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at www.sec.gov. Alternatively, the issuer, any underwriter or any dealer participating in the offering will arrange to send you the prospectus if you request it by calling toll-free 1-8[xx-xxx-xxxx].

- (ii) The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's Web site and provide the Internet address and the particular location of the documents on the Web site.

(d) **Filing conditions.**

- (1) Except as provided in paragraphs (d)(3), (d)(4), (d)(5), (d)(6), (d)(7), (d)(8), and (f) of this section, the following shall be filed with the Commission under this section by a means reasonably calculated to result in filing no later than the date of first use. The free writing prospectus filed for purposes of this section will not be filed as part of the registration statement:

- (i) The issuer shall file:

- (A) Any issuer free writing prospectus, as defined in paragraph (h) of this section;
- (B) Any issuer information that is contained in a free writing prospectus prepared by or on behalf of or used by any other offering participant (but not information prepared by or on behalf of a person other than the issuer on the basis of or derived from that issuer information); and
- (C) A description of the final terms of the issuer's securities in the offering or of the offering contained in a free writing prospectus or portion thereof prepared by or on behalf of the issuer or any offering participant, after such terms have been established for all classes in the offering; and

- (ii) Any offering participant, other than the issuer, shall file any free writing prospectus that is used or referred to by such offering participant and distributed by or on behalf of such person in a manner reasonably designed to lead to its broad unrestricted dissemination.

- (2) Each free writing prospectus or issuer information contained in a free writing prospectus filed under this section shall identify in the filing the Commission file number for the related registration statement or, if that file number is unknown, a description sufficient to identify the related registration statement.

- (3) The condition to file a free writing prospectus under paragraph (d)(1) of this section shall not apply if the free writing prospectus does not contain substantive changes from or additions to a free writing prospectus previously filed with the Commission.

- (4) The condition to file issuer information contained in a free writing prospectus of an offering participant other than the issuer shall not apply if such information is included (including through incorporation by reference) in a prospectus or free writing prospectus previously filed that relates to the offering.

- (5) Notwithstanding the provisions of paragraph (d)(1) of this section:

- (i) To the extent a free writing prospectus or portion thereof otherwise required to be filed contains a description of terms of the issuer's securities in the offering or of the offering that does not reflect the final terms, such free writing prospectus or portion thereof is not required to be filed; and

- (ii) A free writing prospectus or portion thereof that contains only a description of the final terms of the issuer's securities in the offering or of the offerings shall be filed by the issuer within two days of the later of the date such final terms have been established for all classes of the offering and the date of first use.
- (6)
- (i) Notwithstanding the provisions of paragraph (d) of this section, in an offering of asset-backed securities, a free writing prospectus or portion thereof required to be filed that contains only ABS informational and computational materials as defined in Item 1101(a) of Regulation AB (§ 229.1101 of this chapter), may be filed under this section within the timeframe permitted by Rule 426(b) (§ 230.426(b)) and such filing will satisfy the filing conditions under this section.
 - (ii) In the event that a free writing prospectus is used in reliance on this section and Rule 164 and the conditions of this section and Rule 164 (which may include the conditions of paragraph (d)(6)(i) of this section) are satisfied with respect thereto, then the use of that free writing prospectus shall not be conditioned on satisfaction of the provisions, including without limitation the filing conditions, of Rule 167 and Rule 426 (§§ 230.167 and 230.426). In the event that ABS informational and computational materials are used in reliance on Rule 167 and Rule 426 and the conditions of those rules are satisfied with respect thereto, then the use of those materials shall not be conditioned on the satisfaction of the conditions of Rule 164 and this section.
- (7) The condition to file a free writing prospectus or issuer information pursuant to this paragraph (d) for a free writing prospectus used at the same time as a communication in a business combination transaction subject to Rule 425 (§ 230.425) shall be satisfied if:
- (i) The free writing prospectus or issuer information is filed in accordance with the provisions of Rule 425, including the filing timeframe of Rule 425;
 - (ii) The filed material pursuant to Rule 425 indicates on the cover page that it also is being filed pursuant to Rule 433; and
 - (iii) The filed material pursuant to Rule 425 contains the information specified in paragraph (c)(2) of this section.
- (8) Notwithstanding any other provision of this paragraph (d):
- (i) A road show for an offering that is a written communication is a free writing prospectus, provided that, except as provided in paragraph (d)(8)(ii) of this section, a written communication that is a road show shall not be required to be filed; and
 - (ii) In the case of a road show that is a written communication for an offering of common equity or convertible equity securities by an issuer that is, at the time of the filing of the registration statement for the offering, not required to file reports with the Commission pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934, such a road show is required to be filed pursuant to this section unless the issuer of the securities makes at least one version of a *bona fide* electronic road show available without restriction by means of graphic communication to any person, including any potential investor in the securities (and if there is more than one version of a road show for the offering that is a written communication, the version available without restriction is made available no later than the other versions).

Note to paragraph (d)(8):

A communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not separately is deemed to be part of the road show. Therefore, if the road show is not a written communication, such a simultaneous communication (even if it would otherwise be a graphic communication or other written communication) is also deemed not to be written. If the road show is written and not required to be filed, such a simultaneous communication is also not required to be filed. Otherwise, a written communication that is an offer contained in a separate file from a road show, whether or not the road show is a written communication, or otherwise transmitted separately from a road show, will be a free writing prospectus subject to any applicable filing conditions of paragraph (d) of this section.

(e) *Treatment of information on, or hyperlinked from, an issuer's Web site.*

- (1)** An offer of an issuer's securities that is contained on an issuer's Web site or hyperlinked by the issuer from the issuer's Web site to a third party's Web site is a written offer of such securities by the issuer and, unless otherwise exempt or excluded from the requirements of section 5(b)(1) of the Act, the filing conditions of paragraph (d) of this section apply to such offer.
- (2)** Notwithstanding paragraph (e)(1) of this section, historical issuer information that is identified as such and located in a separate section of the issuer's Web site containing historical issuer information, that has not been incorporated by reference into or otherwise included in a prospectus of the issuer for the offering and that has not otherwise been used or referred to in connection with the offering, will not be considered a current offer of the issuer's securities and therefore will not be a free writing prospectus.

(f) *Free writing prospectuses published or distributed by media.* Any written offer for which an issuer or any other offering participant or any person acting on its behalf provided, authorized, or approved information that is prepared and published or disseminated by a person unaffiliated with the issuer or any other offering participant that is in the business of publishing, radio or television broadcasting or otherwise disseminating written communications would be considered at the time of publication or dissemination to be a free writing prospectus prepared by or on behalf of the issuer or such other offering participant for purposes of this section subject to the following:

- (1)** The conditions of paragraph (b)(2)(i) of this section will not apply and the conditions of paragraphs (c)(2) and (d) of this section will be deemed to be satisfied if:
 - (i)** No payment is made or consideration given by or on behalf of the issuer or other offering participant for the written communication or its dissemination; and
 - (ii)** The issuer or other offering participant in question files the written communication with the Commission, and includes in the filing the legend required by paragraph (c)(2) of this section, within four business days after the issuer or other offering participant becomes aware of the publication, radio or television broadcast, or other dissemination of the written communication.
- (2)** The filing obligation under paragraph (f)(1)(ii) of this section shall be subject to the following:
 - (i)** The issuer or other offering participant shall not be required to file a free writing prospectus if the substance of that free writing prospectus has previously been filed with the Commission;

- (ii) Any filing made pursuant to paragraph (f)(1)(ii) of this section may include information that the issuer or offering participant in question reasonably believes is necessary or appropriate to correct information included in the communication; and
 - (iii) In lieu of filing the actual written communication as published or disseminated as required by paragraph (f)(1)(ii) of this section, the issuer or offering participant in question may file a copy of the materials provided to the media, including transcripts of interviews or similar materials, provided the copy or transcripts contain all the information provided to the media.
- (3) For purposes of this paragraph (f) of this section, an issuer that is in the business of publishing or radio or television broadcasting may rely on this paragraph (f) as to any publication or radio or television broadcast that is a free writing prospectus in respect of an offering of securities of the issuer if the issuer or an affiliate:
- (i) Is the publisher of a *bona fide* newspaper, magazine, or business or financial publication of general and regular circulation or *bona fide* broadcaster of news including business and financial news;
 - (ii) Has established policies and procedures for the independence of the content of the publications or broadcasts from the offering activities of the issuer; and
 - (iii) Publishes or broadcasts the communication in the ordinary course.
- (g) **Record retention.** Issuers and offering participants shall retain all free writing prospectuses they have used, and that have not been filed pursuant to paragraph (d) or (f) of this section, for 3 years following the initial *bona fide* offering of the securities in question.

Note to paragraph (g) of § 230.433.

To the extent that the record retention requirements of Rule 17a-4 of the Securities Exchange Act of 1934 (§ 240.17a-4 of this chapter) apply to free writing prospectuses required to be retained by a broker-dealer under this section, such free writing prospectuses are required to be retained in accordance with such requirements.

- (h) **Definitions.** For purposes of this section:
- (1) An *issuer free writing prospectus* means a free writing prospectus prepared by or on behalf of the issuer or used or referred to by the issuer and, in the case of an asset-backed issuer, prepared by or on behalf of a depositor, sponsor, or servicer (as defined in Item 1101 of Regulation AB) or affiliated depositor or used or referred to by any such person.
 - (2) **Issuer information** means material information about the issuer or its securities that has been provided by or on behalf of the issuer.
 - (3) A written communication or information is prepared or provided by or on behalf of a person if the person or an agent or representative of the person authorizes the communication or information or approves the communication or information before it is used. An offering participant other than the issuer shall not be an agent or representative of the issuer solely by virtue of its acting as an offering participant.
 - (4) A *road show* means an offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or

more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and includes discussion of one or more of the issuer, such management, and the securities being offered; and

- (5) *A bona fide electronic road show* means a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and, if more than one road show that is a written communication is being used, includes discussion of the same general areas of information regarding the issuer, such management, and the securities being offered as such other issuer road show or shows for the same offering that are written communications.

Note to § 230.433.

This section does not affect the operation of the provisions of clause (a) of section 2(a)(10) of the Act providing an exception from the definition of "prospectus."

[70 FR 44815, Aug. 3, 2005, as amended at 71 FR 7413, Feb. 13, 2006; 79 FR 57331, Sept. 24, 2014; 85 FR 33355, June 1, 2020]

WRITTEN CONSENTS

§ 230.436 Consents required in special cases.

- (a) If any portion of the report or opinion of an expert or counsel is quoted or summarized as such in the registration statement or in a prospectus, the written consent of the expert or counsel shall be filed as an exhibit to the registration statement and shall expressly state that the expert or counsel consents to such quotation or summarization.
- (b) If it is stated that any information contained in the registration statement has been reviewed or passed upon by any persons and that such information is set forth in the registration statement upon the authority of or in reliance upon such persons as experts, the written consents of such persons shall be filed as exhibits to the registration statement.
- (c) Notwithstanding the provisions of paragraph (b) of this section, a report on unaudited interim financial information (as defined in paragraph (d) of this section) by an independent accountant who has conducted a review of such interim financial information shall not be considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of the Act.
- (d) The term *report on unaudited interim financial information* shall mean a report which consists of the following:
- (1) A statement that the review of interim financial information was made in accordance with established professional standards for such reviews;
 - (2) An identification of the interim financial information reviewed;
 - (3) A description of the procedures for a review of interim financial information;

- (4) A statement that a review of interim financial information is substantially less in scope than an audit conducted in accordance with the standards of the Public Company Accounting Oversight Board (United States) ("PCAOB"), the objective of which is an expression of an opinion regarding the financial statements taken as a whole, and, accordingly, no such opinion is expressed; and
- (5) A statement about whether the accountant is aware of any material modifications that should be made to the accompanying financial information so that it conforms with generally accepted accounting principles.
- (e) Where a counsel is named as having acted for the underwriters or selling security holders, no consent will be required by reason of his being named as having acted in such capacity.
- (f) Where the opinion of one counsel relies upon the opinion of another counsel, the consent of the counsel whose prepared opinion is relied upon need not be furnished.

(g)

- (1) Notwithstanding the provisions of paragraphs (a) and (b) of this section, the security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock by a nationally recognized statistical rating organization, or with respect to registration statements on Form F-9 (§ 239.39 of this chapter) by any other rating organization specified in the Instruction to paragraph (a)(2) of General Instruction I of Form F-9, shall not be considered a part of the registration statement prepared or certified by a person within the meaning of sections 7 and 11 of the Act.
- (2) For the purpose of paragraph (g)(1) of this section, the term *nationally recognized statistical rating organization* shall have the same meaning as used in Rule 15c3-1(c)(2)(vi)(F) (17 CFR 240.15c3-1(c)(2)(vi)(F)).
- (h) Notwithstanding the provisions of paragraphs (a) and (b) of this section, any description about matters identified by a qualified person pursuant to § 229.1302(f) of this chapter shall not be considered a part of the registration statement prepared or certified by the qualified person within the meaning of Sections 7 and 11 of the Securities Act.

[47 FR 11441, Mar. 16, 1982, as amended at 58 FR 62030, Nov. 23, 1993; 76 FR 71876, Nov. 21, 2011; 83 FR 50212, Oct. 4, 2018; 83 FR 66461, Dec. 26, 2018]

§ 230.437 Application to dispense with consent.

An application to the Commission to dispense with any written consent of an expert pursuant to section 7 of the act shall be made by the registrant and shall be supported by an affidavit or affidavits establishing that the obtaining of such consent is impracticable or involves undue hardship on the registrant. Such application shall be filed and the consent of the Commission shall be obtained prior to the effective date of the registration statement.

[Reg. C, 12 FR 4074, June 24, 1947]

§ 230.437a Written consents.

- (a) This section applies only to registrants that:
 - (1) Are not a "blank check company" as defined in § 230.419(a)(2); and

- (2) Are filing a registration statement containing financial statements in which Arthur Andersen LLP (or a foreign affiliate of Arthur Andersen LLP) had been acting as the independent public accountant.
- (b) Notwithstanding any other Commission rule or regulation, every registrant eligible to rely on this section may dispense with the requirement for the registrant to file the written consent of Arthur Andersen LLP (or a foreign affiliate of Arthur Andersen LLP) as required by Section 7 of the Act (15 U.S.C. 77g) where:
 - (1) The registrant has not already obtained the written consent that would be required if not for this section;
 - (2) The registrant is not able to obtain the written consent after reasonable efforts; and
 - (3) The registrant discloses clearly any limitations on recovery by investors posed by the lack of consent.

[67 FR 13537, Mar. 22, 2002]

§ 230.438 Consents of persons about to become directors.

If any person who has not signed the registration statement is named therein as about to become a director, the written consent of such person shall be filed with the registration statement. Any such consent, however, may be omitted if there is filed with the registration statement a statement by the registrant, supported by an affidavit or affidavits, setting forth the reasons for such omission and establishing that the obtaining of such consent is impracticable or involves undue hardship on the registrant.

[Reg. C, 12 FR 4074, June 24, 1947]

§ 230.439 Consent to use of material incorporated by reference.

- (a) If the Act or the rules and regulations of the Commission require the filing of a written consent to the use of any material in connection with the registration statement, such consent shall be filed as an exhibit to the registration statement even though the material is incorporated therein by reference. Where the filing of a written consent is required with respect to material incorporated in the registration statement by reference, which is to be filed subsequent to the effective date of the registration statement, such consent shall be filed as an amendment to the registration statement no later than the date on which such material is filed with the Commission, unless express consent to incorporation by reference is contained in the material to be incorporated by reference.
- (b) Notwithstanding paragraph (a) of this section, any required consent may be incorporated by reference into a registration statement filed pursuant to Rule 462(b) (§ 230.462(b)) or a post-effective amendment filed pursuant to Rule 462(e) (§ 230.462(e)) from a previously filed registration statement relating to that offering, provided that the consent contained in the previously filed registration statement expressly provides for such incorporation.

[47 FR 11441, Mar. 16, 1982, as amended at 60 FR 26615, 26617, May 17, 1995; 70 FR 44818, Aug. 3, 2005]

§§ 230.445-230.447 [Reserved]

FILINGS; FEES; EFFECTIVE DATE

§ 230.455 Place of filing.

All registration statements and other papers filed with the Commission shall be filed at its principal office. Such material may be filed by delivery to the Commission; provided, however, that only registration statements and post-effective amendments thereto filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)) may be filed by means of facsimile transmission.

[73 FR 969, Jan. 4, 2008]

§ 230.456 Date of filing; timing of fee payment.

- (a) The date on which any papers are actually received by the Commission shall be the date of filing thereof, if all the requirements of the act and the rules with respect to such filing have been complied with and the required fee paid. The failure to pay an insignificant amount of the required fee at the time of filing, as the result of a bona fide error, shall not be deemed to affect the date of filing.
- (b)
 - (1) Notwithstanding paragraph (a) of this section, a well-known seasoned issuer that registers securities offerings on an automatic shelf registration statement, or registers additional securities or classes of securities thereon pursuant to Rule 413(b) (§ 230.413(b)), may, but is not required to, defer payment of all or any part of the registration fee to the Commission required by section 6(b)(2) of the Act on the following conditions:
 - (i) If the issuer elects to defer payment of the registration fee, it shall pay the registration fees (pay-as-you-go registration fees) calculated in accordance with Rule 457(r) (§ 230.457(r)) in advance of or in connection with an offering of securities from the registration statement within the time required to file the prospectus supplement pursuant to Rule 424(b) (§ 230.424(b)) for the offering, *provided, however*, that if the issuer fails, after a good faith effort to pay the filing fee within the time required by this section, the issuer may still be considered to have paid the fee in a timely manner if it is paid within four business days of its original due date; and
 - (ii) The issuer reflects the amount of the pay-as-you-go registration fee paid or to be paid in accordance with paragraph (b)(1)(i) of this section by updating the "Calculation of Filing Fee Tables" to indicate the class and aggregate offering price of securities offered and the amount of registration fee paid or to be paid in connection with the offering or offerings either in a post-effective amendment filed at the time of the fee payment or in the manner specified by § 230.424(g) (Rule 424(g)) in a prospectus filed pursuant to Rule 424(b).
 - (2) A registration statement filed relying on the pay-as-you-go registration fee payment provisions of paragraph (b)(1) of this section will be considered filed as to the securities or classes of securities identified in the registration statement for purposes of this section and section 5 of the Act when it is received by the Commission, if it complies with all other requirements of the Act and the rules with respect to it.
 - (3) The securities sold pursuant to a registration statement will be considered registered, for purposes of section 6(a) of the Act, if the pay-as-you-go registration fee has been paid and the post-effective amendment or prospectus including the amended "Calculation of Registration Fee" table is filed pursuant to paragraph (b)(1) of this section.

(c)

- (1) Notwithstanding paragraph (a) of this section, an asset-backed issuer that registers asset-backed securities offerings on Form SF-3 (§ 239.45 of this chapter), may, but is not required to, defer payment of all or any part of the registration fee to the Commission required by section 6(b)(1) of the Act (15 U.S.C. 77f(b)(1)) on the following conditions:
 - (i) If the issuer elects to defer payment of the registration fee, it shall pay the registration fees (pay-as-you-go registration fees) calculated in accordance with § 230.457(s) in advance of or in connection with an offering of securities from the registration statement at the time of filing the prospectus pursuant to § 230.424(h) for the offering; and
 - (ii) The issuer reflects the amount of the pay-as-you-go registration fee paid or to be paid in accordance with paragraph (c)(1)(i) of this section by updating the “Calculation of Registration Fee” table to indicate the class and aggregate offering price of securities offered and the amount of registration fee paid or to be paid in connection with the offering or offerings in the manner specified by Rule 424(g) in a prospectus filed pursuant to § 230.424(h) (Rule 424(h)).
- (2) A registration statement filed relying on the pay-as-you-go registration fee payment provisions of paragraph (c)(1) of this section will be considered filed as to the securities or classes of securities identified in the registration statement for purposes of this section and section 5 of the Act (15 U.S.C. 77e) when it is received by the Commission, if it complies with all other requirements of the Act and the rules with respect to it.
- (3) The securities sold pursuant to a registration statement will be considered registered, for purpose of section 6(a) of the Act (15 U.S.C. 77f(a)), if the pay-as-you-go registration fee has been paid and the prospectus including the amended “Calculation of Registration Fee” table is filed pursuant to paragraph (c)(1) of this section.

(d)

- (1) Notwithstanding paragraph (a) of this section, where a registration statement relates to an offering of exchange-traded vehicle securities, an issuer may elect to register an offering of an indeterminate amount of such securities if it meets the following conditions:
 - (i) The issuer must state in the “Calculation of Registration Fee” table that it is offering an indeterminate amount of such securities; and
 - (ii) The issuer must, not later than 90 days after the end of any fiscal year during which it has publicly offered such securities, pay a registration fee to the Commission calculated in accordance with § 230.457(u) (Rule 457(u)) and file a prospectus in accordance with § 230.424(i) (Rule 424(i)).

Instruction 1 to paragraph (d)(1)(ii): To determine the date on which the registration fee must be paid, the first day of the 90-day period is the first calendar day of the fiscal year following the fiscal year for which the registration fee is to be paid. If the last day of the 90-day period falls on a Saturday, Sunday, or Federal holiday, the registration fee is due on the first business day thereafter.

- (2) If a registrant elects to register an offering of an indeterminate amount of exchange-traded vehicle securities pursuant to paragraph (d)(1) of this section, the securities sold will be considered registered, for purposes of section 6(a) of the Act, if the registration fee has been paid and a prospectus is filed pursuant to paragraph (d)(1) not later than the end of the 90-day period.

- (3) A registration statement filed relying on the registration fee payment provisions of paragraph (d)(1) of this section will be considered filed as to the securities identified in the registration statement for purposes of this section and section 5 of the Act when it is received by the Commission, if it complies with all other requirements under the Act, including this part.
- (4) For purposes of this section, if an issuer ceases operations, the date the issuer ceases operations will be deemed to be the end of its fiscal year. In the case of a liquidation, merger, or sale of all or substantially all of the assets ("merger") of the issuer, the issuer will be deemed to have ceased operations for the purposes of this section on the date the merger is consummated; provided, however, that in the case of a merger of an issuer or a series of an issuer ("Predecessor Issuer") with another issuer or a series of an issuer ("Successor Issuer"), the Predecessor Issuer will not be deemed to have ceased operations and the Successor Issuer will assume the obligations, fees, and redemption credits of the Predecessor Issuer incurred pursuant to this section if the Successor Issuer:
 - (i) Had no assets or liabilities, other than nominal assets or liabilities, and no operating history immediately prior to the merger;
 - (ii) Acquired substantially all of the assets and assumed substantially all of the liabilities and obligations of the Predecessor Issuer; and
 - (iii) The merger is not designed to result in the Predecessor Issuer merging with, or substantially all of its assets being acquired by, an issuer (or a series of an issuer) that would not meet the conditions of paragraph (d)(4)(i) of this section.
- (5) An issuer paying the fee required by paragraph (d)(1) of this section or any portion thereof more than 90 days after the end of the fiscal year of the issuer shall pay to the Commission interest on unpaid amounts, calculated based on the interest rate in effect at the time of the interest payment by reference to the "current value of funds rate" on the Treasury Department's Financial Management Service internet site at <http://www.fms.treas.gov>, or by calling (202) 874-6995, and using the following formula: $I = (X) (Y) (Z/365)$, where: I = Amount of interest due; X = Amount of registration fee due; Y = Applicable interest rate, expressed as a fraction; Z = Number of days by which the registration fee payment is late. The payment of interest pursuant to this paragraph (d)(5) shall not preclude the Commission from bringing an action to enforce the requirements of this paragraph (d).
- (6) An immaterial or unintentional failure to comply with a requirement of this paragraph (d) will not result in a violation of section 6(a) of the Act (15 U.S.C. 77f(a)), so long as:
 - (i) A good faith and reasonable effort was made to comply with the requirement; and
 - (ii) In the case of a late payment of a registration fee, the issuer pays the registration fee and any interest due thereon as soon as practicable after discovery of the failure to pay the registration fee.

[16 FR 8737, Aug. 29, 1951, as amended at 70 FR 44818, Aug. 3, 2005; 79 FR 57331, Sept. 24, 2014; 81 FR 40512, June 22, 2016; 85 FR 33355, June 1, 2020; 86 FR 70199, Dec. 9, 2021]

§ 230.457 Computation of fee.

- (a) If a filing fee based on a bona fide estimate of the maximum offering price, computed in accordance with this rule where applicable, has been paid, no additional filing fee shall be required as a result of changes in the proposed offering price. If the number of shares or other units of securities, or the principal amount of

debt securities to be offered is increased by an amendment filed prior to the effective date of the registration statement, an additional filing fee, computed on the basis of the offering price of the additional securities, shall be paid. There will be no refund once the statement is filed.

- (b) A required fee shall be reduced in an amount equal to any fee paid with respect to such transaction pursuant to sections 13(e) and 14(g) of the Securities Exchange Act of 1934 or any applicable provision of this section; the fee requirements under sections 13(e) and 14(g) shall be reduced in an amount equal to the fee paid the Commission with respect to a transaction under this section. No part of a filing fee is refundable.
- (c) Where securities are to be offered at prices computed upon the basis of fluctuating market prices, the registration fee is to be calculated upon the basis of the price of securities of the same class, as follows: either the average of the high and low prices reported in the consolidated reporting system (for exchange traded securities and last sale reported over-the-counter securities) or the average of the bid and asked price (for other over-the-counter securities) as of a specified date within 5 business days prior to the date of filing the registration statement.
- (d) Where securities are to be offered at varying prices based upon fluctuating values of underlying assets, the registration fee is to be calculated upon the basis of the market value of such assets as of a specified date within fifteen days prior to the date of filing, in accordance with the method to be used in calculating the daily offering price.
- (e) Where securities are to be offered to existing security holders and the portion, if any, not taken by such security holders is to be reoffered to the general public, the registration fee is to be calculated upon the basis of the proposed offering price to such security holders or the proposed reoffering price to the general public, whichever is higher.
- (f) Where securities are to be offered in exchange for other securities (except where such exchange results from the exercise of a conversion privilege) or in a reclassification or recapitalization which involves the substitution of a security for another security, a merger, a consolidation, or a similar plan of acquisition, the registration fee is to be calculated as follows:
 - (1) Upon the basis of the market value of the securities to be received by the registrant or canceled in the exchange or transaction as established by the price of securities of the same class, as determined in accordance with paragraph (c) of this section.
 - (2) If there is no market for the securities to be received by the registrant or cancelled in the exchange or transaction, the book value of such securities computed as of the latest practicable date prior to the date of filing the registration statement shall be used, unless the issuer of such securities is in bankruptcy or receivership, or has an accumulated capital deficit, in which case one-third of the principal amount, par value or stated value of such securities shall be used.
 - (3) If any cash is to be received by the registrant in connection with the exchange or transaction, the amount thereof shall be added to the value of the securities to be received by the registrant or cancelled as computed in accordance with (e) (1) or (2) of this section. If any cash is to be paid by the registrant in connection with the exchange or transaction, the amount thereof shall be deducted from the value of the securities to be received by the registrant in exchange as computed in accordance with (e) (1) or (2) of this section.
 - (4) Securities to be offered directly or indirectly for certificates of deposit shall be deemed to be offered for the securities represented by the certificates of deposit.

- (5) If a filing fee is paid under this paragraph for the registration of an offering and the registration statement also covers the resale of such securities, no additional filing fee is required to be paid for the resale transaction.
- (g) Where securities are to be offered pursuant to warrants or other rights to purchase such securities and the holders of such warrants or rights may be deemed to be underwriters, as defined in section 2(11) of the Act, with respect to the warrants or rights or the securities subject thereto, the registration fee is to be calculated upon the basis of the price at which the warrants or rights or securities subject thereto are to be offered to the public. If such offering price cannot be determined at the time of filing the registration statement, the registration fee is to be calculated upon the basis of the highest of the following:
 - (1) the price at which the warrants or rights may be exercised, if known at the time of filing the registration statement;
 - (2) the offering price of securities of the same class included in the registration statement; or
 - (3) the price of securities of the same class, as determined in accordance with paragraph (c) of this section. If the fee is to be calculated upon the basis of the price at which the warrants or rights may be exercised and they are exercisable over a period of time at progressively higher prices, the fee shall be calculated on the basis of the highest price at which they may be exercised. If the warrants or rights are to be registered for distribution in the same registration statement as the securities to be offered pursuant thereto, no separate registration fee shall be required.
- (h)
 - (1) Where securities are to be offered pursuant to an employee benefit plan, the aggregate offering price and the amount of the registration fee shall be computed with respect to the maximum number of the registrant's securities issuable under the plan that are covered by the registration statement. If the offering price is not known, the fee shall be computed upon the basis of the price of securities of the same class, as determined in accordance with paragraph (c) of this section. In the case of an employee stock option plan, the aggregate offering price and the fee shall be computed upon the basis of the price at which the options may be exercised, or, if such price is not known, upon the basis of the price of securities of the same class, as determined in accordance with paragraph (c) of this section. If there is no market for the securities to be offered, the book value of such securities computed as of the latest practicable date prior to the date of filing the registration statement shall be used.
 - (2) If the registration statement registers securities of the registrant and also registers interests in the plan constituting separate securities, no separate fee is required with respect to the plan interests.
 - (3) Where a registration statement includes securities to be offered pursuant to an employee benefit plan and covers the resale of the same securities, no additional filing fee shall be paid with respect to the securities to be offered for resale. A filing fee determined in accordance with paragraph (c) of this section shall be paid with respect to any additional securities to be offered for resale.
- (i) Where convertible securities and the securities into which conversion is offered are registered at the same time, the registration fee is to be calculated on the basis of the proposed offering price of the convertible securities alone, except that if any additional consideration is to be received in connection with the exercise of the conversion privilege the maximum amount which may be received shall be added to the proposed offering price of the convertible securities.

- (j) Where securities are sold prior to the registration thereof and are subsequently registered for the purpose of making an offer of rescission of such sale or sales, the registration fee is to be calculated on the basis of the amount at which such securities were sold, except that where securities repurchased pursuant to such offer of rescission are to be reoffered to the general public at a price in excess of such amount the registration fee is to be calculated on the basis of the proposed reoffering price.
- (k) Notwithstanding the other provisions of this rule, the proposed maximum aggregate offering price of Depositary Shares evidenced by American Depositary Receipts shall, only for the purpose of calculating the registration fee, be computed upon the basis of the maximum aggregate fees or charges to be imposed in connection with the issuance of such receipts.
- (l) Notwithstanding the other provisions of this rule, the proposed maximum aggregate offering price of any put or call option which is traded on an exchange and registered by such exchange or a facility thereof or which is traded over the counter shall, for the purpose of calculating the registration fee, be computed upon the basis of the maximum aggregate fees or charges to be imposed by such registrant in connection with the issuance of such option.
- (m) Notwithstanding the other provisions of this rule, where the securities to be registered include
 - (1) any note, draft, bill of exchange, or bankers' acceptance which meets all the conditions of section 3(a)(3) hereof, and
 - (2) any note, draft, bill of exchange or bankers' acceptance which has a maturity at the time of issuance of not exceeding nine months exclusive of days of grace, or any renewal thereof the maturity date of which is likewise limited, but which otherwise does not meet the conditions of section 3(a)(3), the registration fee shall be calculated by taking one-fiftieth of 1 per centum of the maximum principal amount of only those securities not meeting the conditions of section 3(a)(3).
- (n) Where the securities to be offered are guarantees of other securities which are being registered concurrently, no separate fee for the guarantees shall be payable.
- (o) Where an issuer registers an offering of securities, the registration fee may be calculated on the basis of the maximum aggregate offering price of all the securities listed in the "Calculation of Registration Fee" table. The number of shares or units of securities need not be included in the "Calculation of Registration Fee" Table. If the maximum aggregate offering price increases prior to the effective date of the registration statement, a pre-effective amendment must be filed to increase the maximum dollar value being registered and the additional filing fee shall be paid.
- (p) Where all or a portion of the securities offered under a registration statement remain unsold after the offering's completion or termination, or withdrawal of the registration statement, the aggregate total dollar amount of the filing fee associated with those unsold securities (whether computed under paragraph (a) or (o) of this section) may be offset against the total filing fee due for a subsequent registration statement or registration statements. The subsequent registration statement(s) must be filed within five years of the initial filing date of the earlier registration statement, and must be filed by the same registrant (including a successor within the meaning of § 230.405), a majority-owned subsidiary of that registrant, or a parent that owns more than 50 percent of the registrant's outstanding voting securities. A note should be added to the "Calculation of Registration Fee" table in the subsequent registration statement(s) providing the following information unless expressly required in another part of the registration statement:
 - (1) The dollar amount of the previously paid filing fee to be offset against the currently due filing fee;

- (2) The amount of unsold securities or unsold aggregate offering amount from the prior registration statement associated with the claimed offset;
- (3) The file number of, and the name of the registrant that filed, the earlier registration statement from which the filing fee is offset;
- (4) The initial filing date of the earlier registration statement; and
- (5) A statement that the registrant has:
 - (i) Withdrawn the prior registration statement; or
 - (ii) Terminated or completed any offering that included the unsold securities associated with the claimed offset under the prior registration statement.
- (q) Notwithstanding any other provisions of this section, no filing fee is required for the registration of an indeterminate amount of securities to be offered solely for market-making purposes by an affiliate of the registrant.
- (r) Where securities are to be offered pursuant to an automatic shelf registration statement, the registration fee is to be calculated in accordance with this section. When the issuer elects to defer payment of the fees pursuant to Rule 456(b) (§ 230.456(b)), the “Calculation of Registration Fee” table in the registration statement must indicate that the issuer is relying on Rule 456(b) but does not need to include the number of shares or units of securities or the maximum aggregate offering price of any securities until the issuer updates the “Calculation of Registration Fee” table to reflect payment of the registration fee, including a pay-as-you-go registration fee in accordance with Rule 456(b). The registration fee shall be calculated based on the fee payment rate in effect on the date of the fee payment.
- (s) Where securities are asset-backed securities being offered pursuant to a registration statement on Form SF-3 (§ 239.45 of this chapter), the registration fee is to be calculated in accordance with this section. When the issuer elects to defer payment of the fees pursuant to § 230.456(c), the “Calculation of Registration Fee” table in the registration statement must indicate that the issuer is relying on § 230.456(c) but does not need to include the number of units of securities or the maximum aggregate offering price of any securities until the issuer updates the “Calculation of Registration Fee” table to reflect payment of the registration fee, including a pay-as-you-go registration fee in accordance with § 230.456(c). The registration fee shall be calculated based on the fee payment rate in effect on the date of the fee payment.
- (t) Where the security to be offered is a collateral certificate or is a special unit of beneficial interest, underlying asset-backed securities (as defined in § 229.1101(c) of this chapter) which are being registered concurrently, no separate fee for the certificate or the special unit of beneficial interest shall be payable.
- (u) Where an issuer elects to register an offering of an indeterminate amount of exchange-traded vehicle securities in accordance with § 230.456(d) (Rule 456(d)), the registration fee is to be calculated in the following manner:
 - (1) Determine the aggregate sale price of securities sold during the fiscal year.
 - (2) Determine the sum of:
 - (i) The aggregate redemption or repurchase price of securities redeemed or repurchased during the fiscal year; and

- (ii) The aggregate redemption or repurchase price of securities redeemed or repurchased during any prior fiscal year ending no earlier than August 1, 2021, that were not used previously to reduce registration fees payable to the Commission.
- (3) Subtract the amount in paragraph (u)(2) of this section from the amount in paragraph (u)(1) of this section. If the resulting amount is positive, the amount is the net sales amount. If the resulting amount is negative, it is the amount of redemption credits available for use in future years to offset sales.
- (4) The registration fee is calculated by multiplying the net sales amount by the fee payment rate in effect on the date of the fee payment. If the issuer determines that it had net redemptions or repurchases for the fiscal year, no registration fee is due.

[47 FR 11442, Mar. 16, 1982, as amended at 48 FR 12347, Mar. 24, 1983; 51 FR 2475, Jan. 17, 1986; 55 FR 23924, June 13, 1990; 57 FR 48976, Oct. 29, 1992; 59 FR 21650, Apr. 26, 1994; 60 FR 26617, May 17, 1995; 66 FR 8896, Feb. 5, 2001; 70 FR 44818, Aug. 3, 2005; 79 FR 57331, Sept. 24, 2014; 86 FR 33356, June 1, 2020; 87 FR 70199, Dec. 9, 2021]

§ 230.459 Calculation of effective date.

Saturdays, Sundays and holidays shall be counted in computing the effective date of registration statements under section 8(a) of the act. In the case of statements which become effective on the twentieth day after filing, the twentieth day shall be deemed to begin at the expiration of nineteen periods of 24 hours each from 5:30 p.m. eastern standard time or eastern daylight-saving time, whichever is in effect at the principal office of the Commission on the date of filing.

[Reg. C, 12 FR 4075, June 24, 1947]

§ 230.460 Distribution of preliminary prospectus.

- (a) Pursuant to the statutory requirement that the Commission in ruling upon requests for acceleration of the effective date of a registration statement shall have due regard to the adequacy of the information respecting the issuer theretofore available to the public, the Commission may consider whether the persons making the offering have taken reasonable steps to make the information contained in the registration statement conveniently available to underwriters and dealers who it is reasonably anticipated will be invited to participate in the distribution of the security to be offered or sold.
- (b)
 - (1) As a minimum, reasonable steps to make the information conveniently available would involve the distribution, to each underwriter and dealer who it is reasonably anticipated will be invited to participate in the distribution of the security, a reasonable time in advance of the anticipated effective date of the registration statement, of as many copies of the proposed form of preliminary prospectus permitted by Rule 430 (§ 230.430) as appears to be reasonable to secure adequate distribution of the preliminary prospectus.
 - (2) In the case of a registration statement filed by a closed-end investment company on Form N-2 (§ 239.14 and § 274.11a-1 of this chapter), reasonable steps to make information conveniently available would involve distribution of a sufficient number of copies of the Statement of Additional Information required by § 230.430(b) as it appears to be reasonable to secure their adequate distribution either to each underwriter or dealer who it is reasonably anticipated will be invited to

participate in the distribution of the security, or to the underwriter, dealer or other source named on the cover page of the preliminary prospectus as being the person investors should contact in order to obtain the Statement of Additional Information.

(c) The granting of acceleration will not be conditioned upon

(1) The distribution of a preliminary prospectus in any state where such distribution would be illegal; or

(2) The distribution of a preliminary prospectus

(i) in the case of a registration statement relating solely to securities to be offered at competitive bidding, provided the undertaking in Item 512(d)(1) of Regulation S-K (§ 229.512(d)(2) of this chapter) is included in the registration statement and distribution of prospectuses pursuant to such undertaking is made prior to the publication or distribution of the invitation for bids, or

(ii) In the case of a registration statement relating to a security issued by a face-amount certificate company or a redeemable security issued by an open-end management company or unit investment trust if any other security of the same class is currently being offered or sold, pursuant to an effective registration statement by the issuer or by or through an underwriter, or

(iii) In the case of an offering of subscription rights unless it is contemplated that the distribution will be made through dealers and the underwriters intend to make the offering during the stockholders' subscription period, in which case copies of the preliminary prospectus must be distributed to dealers prior to the effective date of the registration statement in the same fashion as is required in the case of other offerings through underwriters, or

(iv) In the case of a registration statement pertaining to a security to be offered pursuant to an exchange offer or transaction described in Rule 145 (§ 230.145).

[47 FR 11443, Mar. 16, 1982, as amended at 57 FR 56834, Dec. 1, 1992; 76 FR 71876, Nov. 21, 2011]

§ 230.461 Acceleration of effective date.

(a) Requests for acceleration of the effective date of a registration statement shall be made by the registrant and the managing underwriters of the proposed issue, or, if there are no managing underwriters, by the principal underwriters of the proposed issue, and shall state the date upon which it is desired that the registration statement shall become effective. Such requests may be made in writing or orally, provided that, if an oral request is to be made, a letter indicating that fact and stating that the registrant and the managing or principal underwriters are aware of their obligations under the Act must accompany the registration statement for a pre-effective amendment thereto) at the time of filing with the Commission. Written requests may be sent to the Commission by facsimile transmission. If, by reason of the expected arrangement in connection with the offering, it is to be requested that the registration statement shall become effective at a particular hour of the day, the Commission must be advised to that effect not later than the second business day before the day which it is desired that the registration statement shall become effective. A person's request for acceleration will be considered confirmation of such person's awareness of the person's obligations under the Act. Not later than the time of filing the last amendment prior to the effective date of the registration statement, the registrant shall inform the Commission as to whether or not the amount of compensation to be allowed or paid to the underwriters and any other arrangements among the registrant, the underwriters and other broker dealers participating in the distribution, as described in the registration statement, have been reviewed to the extent required by the National Association of Securities Dealers, Inc. and such Association has issued a statement expressing no objections to the compensation and other arrangements.

- (b) Having due regard to the adequacy of information respecting the registrant theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital structure of the registrant issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors, as provided in section 8(a) of the Act, it is the general policy of the Commission, upon request, as provided in paragraph (a) of this section, to permit acceleration of the effective date of the registration statement as soon as possible after the filing of appropriate amendments, if any. In determining the date on which a registration statement shall become effective, the following are included in the situations in which the Commission considers that the statutory standards of section 8(a) may not be met and may refuse to accelerate the effective date:
- (1) Where there has not been a bona fide effort to make the prospectus reasonably concise, readable, and in compliance with the plain English requirements of Rule 421(d) of Regulation C (17 CFR 230.421(d)) in order to facilitate an understanding of the information in the prospectus.
 - (2) Where the form of preliminary prospectus, which has been distributed by the issuer or underwriter, is found to be inaccurate or inadequate in any material respect, until the Commission has received satisfactory assurance that appropriate correcting material has been sent to all underwriters and dealers who received such preliminary prospectus or prospectuses in quantity sufficient for their information and the information of others to whom the inaccurate or inadequate material was sent.
 - (3) Where the Commission is currently making an investigation of the issuer, a person controlling the issuer, or one of the underwriters, if any, of the securities to be offered, pursuant to any of the Acts administered by the Commission.
 - (4) Where one or more of the underwriters, although firmly committed to purchase securities covered by the registration statement, is subject to and does not meet the financial responsibility requirements of Rule 15c3-1 under the Securities Exchange Act of 1934 (§ 240.15c3-1 of this chapter). For the purposes of this paragraph underwriters will be deemed to be firmly committed even though the obligation to purchase is subject to the usual conditions as to receipt of opinions of counsel, accountants, etc., the accuracy of warranties or representations, the happening of calamities or the occurrence of other events the determination of which is not expressed to be in the sole or absolute discretion of the underwriters.
 - (5) Where there have been transactions in securities of the registrant by persons connected with or proposed to be connected with the offering which may have artificially affected or may artificially affect the market price of the security being offered.
 - (6) Where the amount of compensation to be allowed or paid to the underwriters and any other arrangements among the registrant, the underwriters and other broker dealers participating in the distribution, as described in the registration statement, if required to be reviewed by the National Association of Securities Dealers, Inc. (NASD), have been reviewed by the NASD and the NASD has not issued a statement expressing no objections to the compensation and other arrangements.
 - (7) Where, in the case of a significant secondary offering at the market, the registrant, selling security holders and underwriters have not taken sufficient measures to insure compliance with Regulation M (§ § 242.100 through 242.105 of this chapter).
- (c) Insurance against liabilities arising under the Act, whether the cost of insurance is borne by the registrant, the insured or some other person, will not be considered a bar to acceleration, unless the registrant is a registered investment company or a business development company and the cost of such insurance is borne by other than an insured officer or director of the registrant. In the case of such a registrant, the Commission may refuse to accelerate the effective date of the registration statement when the registrant

is organized or administered pursuant to any instrument (including a contract for insurance against liabilities arising under the Act) that protects or purports to protect any director or officer of the company against any liability to the company or its security holders to which he or she would otherwise be subject by reason of willful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his or her office.

[47 FR 11444, Mar. 16, 1982, as amended at 58 FR 18146, Apr. 8, 1993; 60 FR 26615, 26617, May 17, 1995; 62 FR 543, Jan. 3, 1997; 63 FR 6385, Feb. 6, 1998]

§ 230.462 Immediate effectiveness of certain registration statements and post-effective amendments.

- (a) A registration statement on Form S-8 (§ 239.16b of this chapter) and a registration statement on Form S-3 (§ 239.13 of this chapter) or on Form F-3 (§ 239.33 of this chapter) for a dividend or interest reinvestment plan shall become effective upon filing with the Commission.
- (b) A registration statement and any post-effective amendment thereto shall become effective upon filing with the Commission if:
 - (1) The registration statement is for registering additional securities of the same class(es) as were included in an earlier registration statement for the same offering and declared effective by the Commission;
 - (2) The new registration statement is filed prior to the time confirmations are sent or given; and
 - (3) The new registration statement registers additional securities in an amount and at a price that together represent no more than 20% of the maximum aggregate offering price set forth for each class of securities in the "Calculation of Registration Fee" table contained in such earlier registration statement.
- (c) If the prospectus contained in a post-effective amendment filed prior to the time confirmations are sent or given contains no substantive changes from or additions to the prospectus previously filed as part of the effective registration statement, other than price-related information omitted from the registration statement in reliance on Rule 430A of the Act (§ 230.430A), such post-effective amendment shall become effective upon filing with the Commission.
- (d) A post-effective amendment filed solely to add exhibits to a registration statement shall become effective upon filing with the Commission.
- (e) An automatic shelf registration statement, including an automatic shelf registration statement filed in accordance with Rule 415(a)(6) (§ 230.415(a)(6)), and any post-effective amendment thereto, including a post-effective amendment filed to register additional classes of securities pursuant to Rule 413(b) (§ 230.413(b)), shall become effective upon filing with the Commission.
- (f) A post-effective amendment filed pursuant to paragraph (e) of this section for purposes of adding a new issuer and its securities as permitted by § 230.413(b) (Rule 413(b)) that satisfies the requirements of Form S-3, Form F-3, or General Instruction A.2 of Form N-2 (§ 239.13, § 239.33, or §§ 239.14 and 274.11a-1 of this chapter), as applicable, including the signatures required by § 230.402(e) (Rule 402(e)), and contains a prospectus satisfying the requirements of § 230.430B (Rule 430B), shall become effective upon filing with the Commission.

[59 FR 21650, Apr. 26, 1994, as amended at 60 FR 26617, May 17, 1995; 62 FR 39763, July 24, 1997; 70 FR 44818, Aug. 3, 2005; 85 FR 33356, June 1, 2020]

§ 230.463 Report of offering of securities and use of proceeds therefrom.

- (a) Except as provided in this section, following the effective date of the first registration statement filed under the Act by an issuer, the issuer or successor issuer shall report the use of proceeds pursuant to Item 701 of Regulation D-B or S-K or Item 14(e) of Form 20-F, as applicable, on its first periodic report filed pursuant to Sections 13(a) and 15(d) (15 U.S.C. 78m(a) and 78o(d)) of the Securities Exchange Act of 1934 after effectiveness, and thereafter on each of its subsequent periodic reports filed pursuant to Sections 13(a) and 15(d) of the Securities Exchange Act of 1934 through the later of disclosure of the application of all the offering proceeds or disclosure of the termination of the offering.
- (b) A successor issuer shall comply with paragraph (a) of this section only if a report of the use of proceeds is required with respect to the first effective registration statement of the predecessor issuer.
- (c) For purposes of this section:
 - (1) The term *offering proceeds* shall not include any amount(s) received for the account(s) of any selling security holder(s).
 - (2) The term *application* shall not include the temporary investment of proceeds by the issuer pending final application.
- (d) This section shall not apply to any effective registration statement for securities to be issued:
 - (1) In a business combination described in Rule 145(a) (§ 230.145(a));
 - (2) By an issuer which pursuant to a business combination described in Rule 145(a) has succeeded to another issuer that prior to such business combination had a registration statement become effective under the Act and on the date of such business combination was not subject to paragraph (a) of this section;
 - (3) Pursuant to an employee benefit plan;
 - (4) Pursuant to a dividend or interest reinvestment plan;
 - (5) As American depository receipts for foreign securities;
 - (6) By any investment company registered under the Investment Company Act of 1940 and any issuer that has elected to be regulated as a business development company under sections 54 through 65 of the Investment Company Act of 1940 (15 U.S.C. 80a-53 through 80a-64);
 - (7) By any public utility company or public utility holding company required to file reports with any State or Federal authority.
 - (8) In a merger in which a vote or consent of the security holders of the company being acquired is not required pursuant to applicable state law; or
 - (9) In an exchange offer for the securities of the issuer or another entity.

[46 FR 48142, Oct. 1, 1981, as amended at 50 FR 19001, May 6, 1985; 57 FR 56834, Dec. 1, 1992; 62 FR 39763, July 24, 1997; 64 FR 53910, Oct. 5, 1999]

§ 230.464 Effective date of post-effective amendments to registration statements filed on Form S-8 and on certain Forms S-3, S-4, F-2 and F-3.

Provided. That, at the time of filing of each post-effective amendment with the Commission, the issuer continues to meet the requirements of filing on Form S-8 (§ 239.16b of this chapter); or on Form S-3, F-2 or F-3 (§§ 239.13, 239.32 or 239.33 of this chapter) for a registration statement relating to a dividend or interest reinvestment plan; or in the case of a registration statement on Form S-4 (§ 239.25 of this chapter) that there is continued compliance with General Instruction G of that Form:

- (a) The post-effective amendment shall become effective upon filing with the Commission: and
- (b) With respect to securities sold on or after the filing date pursuant to a prospectus which forms a part of a Form S-8 registration statement; or a Form S-3, F-2, or F-3 registration statement relating to a dividend or interest reinvestment plan; or a Form S-4 registration statement complying with General Instruction G of that Form and which has been amended to include or incorporate new full year financial statements or to comply with the provisions of section 10(a)(3) of the Act, the effective date of the registration statement shall be deemed to be the filing date of the post-effective amendment.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565-568, 569, 570-574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78o(d), 78w(a), 80a-8, 80a-29, 80a-30(c), 80a-37(a))

[47 FR 54770, Dec. 6, 1982, as amended at 50 FR 19001, May 6, 1985; 61 FR 30402, June 14, 1996]

§ 230.466 Effective date of certain registration statements on Form F-6.

- (a) A depositary that previously has filed a registration statement on Form F-6 (§ 239.36 of this chapter) may designate a date and time for a registration statement (including post-effective amendments) on Form F-6 to become effective and such registration statement shall become effective in accordance with such designation if the following conditions are met:

- (1) The depositary previously has filed a registration statement on Form F-6 (§ 239.36 of this chapter), which the Commission has declared effective, with identical terms of deposit, except for the number of foreign securities a Depositary Share represents, and the depositary so certifies; and
- (2) The designation of the effective date and time is set forth on the facing-page of the registration statement, or in any pre-effective amendment thereto. A pre-effective amendment containing such a designation properly made shall be deemed to have been filed with the consent of the Commission.

(b)

- (1) The Commission may, in the manner and under the circumstances set forth in paragraph (b)(2) of this section, suspend the ability of a depositary to designate the date and time of effectiveness of a registration statement, and such suspension shall remain in effect until the Commission furnishes written notice to the depositary that the suspension has been terminated. Any suspension, so long as it is in effect, shall apply to any registration statement that has been filed but has not, at the time of such suspension, become effective and to any registration statement the depositary files after

such suspension. Any such suspension applies only to the ability to designate the date and time of effectiveness under paragraph (a) of this section and does not otherwise affect the registration statement.

- (2) Any suspension under paragraph (b)(1) of this section becomes effective when the Commission furnishes written notice thereof to the depositary. The Commission may issue a suspension if it appears to the Commission:
- (i) That any registration statement containing a designation under this section is incomplete or inaccurate in any material respect, whether or not such registration has become effective, or
 - (ii) That the depositary has not complied with any of the conditions of this section. The depositary may petition the Commission to review the suspension. The Commission will order a hearing on the matter if a request for such a hearing is included in the petition.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565-568, 569, 570-574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78o(d), 78w(a))

[48 FR 12347, Mar. 24, 1983]

§ 230.467 Effectiveness of registration statements and post-effective amendments thereto made on Forms F-7, F-8, F-10 and F-80.

- (a) A registration statement on Form F-7, Form F-8 or Form F-80 (§ 239.37, § 239.38 or § 239.41 of this chapter), and any amendment thereto, shall become effective upon filing with the Commission. A registration statement on Form F-10 (§ 239.40 of this chapter), and any amendment thereto, relating to an offering being made contemporaneously in the United States and Canada shall become effective upon filing with the Commission, unless designated as preliminary material on the Form.
- (b) Where no contemporaneous offering is being made in Canada, a registrant filing on Form F-10 may designate on the facing page of the registration statement, or any amendment thereto, a date and time for such filing to become effective that is not earlier than seven calendar days after the date of filing with the Commission, and such registration statement or amendment shall become effective in accordance with such designation; *provided, however*, That such registration statement or amendment may become effective prior to seven calendar days after the date of filing with the Commission if the securities regulatory authority in the review jurisdiction issues a receipt or notification of clearance with respect thereto before such time elapses, in which case the registration statement or amendment shall become effective by order of the Commission as soon as practicable after receipt of written notification by the Commission from the registrant or the applicable Canadian securities regulatory authority of the issuance of such receipt or notification of clearance.

[56 FR 30054, July 1, 1991, as amended at 76 FR 46617, Aug. 3, 2011]

AMENDMENTS; WITHDRAWALS

§ 230.470 Formal requirements for amendments.

Except for telegraphic amendments filed pursuant to Rule 473 (§ 230.473), amendments to a registration statement shall be filed under cover of an appropriate facing sheet, shall be numbered consecutively in the order in which filed, and shall indicate on the facing sheet the applicable registration form on which the amendment is prepared and the file number of the registration statement.

[47 FR 11445, Mar. 16, 1982, as amended at 76 FR 71876, Nov. 21, 2011]

§ 230.471 Signatures to amendments.

- (a) Except as provided in Rule 447 (§ 230.447) and in Rule 478 (§ 230.478), every amendment to a registration statement shall be signed by the persons specified in section 6(a) of the Act. At least one copy of every amendment filed with the Commission shall be signed. Unsigned copies shall be conformed.
- (b) Where the Act or the rules thereunder require a document filed with or furnished to the Commission to be signed, such document shall be manually signed, or signed using either typed signatures or duplicated or facsimile versions of manual signatures. Where typed, duplicated, or facsimile signatures are used, each signatory to the filing shall manually or electronically sign a signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in the filing ("authentication document"). Such authentication document shall be executed before or at the time the filing is made and shall be retained by the registrant for a period of five years. The requirements set forth in § 232.302(b) must be met with regards to the use of an electronically signed authentication document pursuant to this paragraph (b). Upon request, the registrant shall furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

[47 FR 11445, Mar. 16, 1982, as amended at 61 FR 30402, June 14, 1996; 76 FR 71876, Nov. 21, 2011; 85 FR 78228, Dec. 4, 2020]

§ 230.472 Filing of amendments; number of copies.

- (a) Except for telegraphic amendments filed pursuant to Rule 473 (§ 230.473), there shall be filed with the Commission three complete, unmarked copies of every amendment, including exhibits and all other papers and documents filed as part of the amendment, and eight additional copies of such amendment at least five of which shall be marked to indicate clearly and precisely, by underlining or in some other appropriate manner, the changes effected in the registration statement by the amendment. Where the amendment to the registration statement incorporates into the prospectus documents which are required to be delivered with the prospectus in lieu of prospectus presentation, the eight additional copies shall be accompanied by eight copies of such documents. No other exhibits are required to accompany such additional copies.
- (b) Every amendment which relates to a prospectus shall include copies of the prospectus as amended. Each such copy of the amended prospectus shall be accompanied by a copy of the cross reference sheet required by Rule 481(a) (§ 230.481(a)), where applicable, if the amendment of the prospectus resulted in any change in the accuracy of the cross reference sheet previously filed. Notwithstanding the foregoing provisions of this paragraph, only copies of the changed pages of the prospectus, and the cross reference sheet if amended, need be included in an amendment filed pursuant to an undertaking referred to in Item 512(d) of Regulation S-K (§ 229.512(d) of this chapter).

- (c) Every amendment of a financial statement which is not included in the prospectus shall include copies of the financial statement as amended. Every amendment relating to a certified financial statement shall include the consent of the certifying accountant to the use of his certificate in connection with the amended financial statement in the registration statement or prospectus and to being named as having certified such financial statement.
- (d) Notwithstanding any other provision of this section, if a registration statement filed on Form S-8 (§ 239.16b of this chapter) is amended, there shall be filed with the Commission three complete, unmarked copies of every amendment, including exhibits and all other papers and documents filed as part of the amendment. Three additional, unmarked copies of such amendments shall be furnished to the Commission. No exhibits are required to accompany the additional copies of amendments to registration statements filed on Form S-8.
- (e) Notwithstanding any other provision of this section, if a post-effective amendment is filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)), one copy of the complete post-effective amendment, including exhibits and all other papers and documents filed as a part thereof shall be filed with the Commission. Such copy should not be bound and may contain facsimile versions of manual signatures in accordance with Rule 402(e) (§ 230.402(e)).

[47 FR 11445, Mar. 16, 1982, as amended at 55 FR 23924, June 13, 1990; 60 FR 26618, May 17, 1995; 61 FR 30402, June 14, 1996]

§ 230.473 Delaying amendments.

- (a) An amendment in the following form filed with a registration statement, or as an amendment to a registration statement which has not become effective, shall be deemed, for the purpose of section 8(a) of the Act, to be filed on such date or dates as may be necessary to delay the effective date of such registration statement
 - (1) until the registrant shall file a further amendment which specifically states as provided in paragraph (b) of this section that such registration statement shall thereafter become effective in accordance with section 8(a) of the Act, or
 - (2) until the registration statement shall become effective on such date as the Commission, acting pursuant to section 8(a), may determine:

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with section 8(a) of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Commission acting pursuant to said section 8(a), may determine.

- (b) An amendment which for the purpose of paragraph (a)(1) of this section specifically states that a registration statement shall thereafter become effective in accordance with section 8(a) of the Act, shall be in the following form:

This registration statement shall hereafter become effective in accordance with the provisions of section 8(a) of the Securities Act of 1933.

- (c) An amendment pursuant to paragraph (a) of this section which is filed with a registration statement shall be set forth on the facing page thereof. Any such amendment filed after the filing of the registration statement, any amendment altering the proposed date of public sale of the securities being registered, or any amendment filed pursuant to paragraph (b) of this section may be made by telegram, letter, or facsimile transmission. Each such telegraphic amendment shall be confirmed in writing within a reasonable time by the filing of a signed copy of the amendment. Such confirmation shall not be deemed an amendment.
- (d) No amendments pursuant to paragraph (a) of this section may be filed with a registration statement on Form F-7, F-8 or F-80 (§ 239.37, § 239.38 or § 239.41 of this chapter); on F-10 (§ 239.40 of this chapter) relating to an offering being made contemporaneously in the United States and the issuer's home jurisdiction; on Form S-8 (§ 239.16b of this chapter); on Form S-3 or F-3 (§ 239.13 or § 239.33 of this chapter) relating to a dividend or interest reinvestment plan; on Form S-3 or Form F-3 relating to an automatic shelf registration statement; or on Form S-4 (§ 239.25 of this chapter) complying with General Instruction G of that Form.

[47 FR 11445, Mar. 16, 1982, as amended at 56 FR 30054, 30055, July 1, 1991; 61 FR 30402, June 14, 1996; 70 FR 44819, Aug. 3, 2005; 76 FR 46617, Aug. 3, 2011; 86 FR 70200, Dec. 9, 2021]

§ 230.474 Date of filing of amendments.

The date on which amendments are actually received by the Commission shall be the date of filing thereof, if all of the requirements of the act and the rules with respect to such filing have been complied with.

[16 FR 8737, Aug. 29, 1951]

§ 230.475 Amendment filed with consent of Commission.

An application for the Commission's consent to the filing of an amendment with the effect provided in section 8(a) of the Act may be filed before or after or concurrently with the filing of the amendment. The application shall be signed and shall state fully the grounds upon which it is made. The Commission's consent shall be deemed to have been given and the amendment shall be treated as a part of the registration statement only when the Commission shall after the filing of such amendment enter an order to that effect.

[Reg. C, 12 FR 4075, June 24, 1947]

§ 230.475a Certain pre-effective amendments deemed filed with the consent of the Commission.

Amendments to a registration statement on Form F-2 (§ 239.32 of this chapter) relating to a dividend or interest reinvestment plan, or on Form S-4 (§ 239.25 of this chapter) complying with General Instruction G of that Form, filed prior to the effectiveness of such registration statement shall be deemed to have been filed with a consent of the Commission and shall accordingly be treated as part of the registration statement.

[59 FR 21650, Apr. 26, 1994]

§ 230.476 Amendment filed pursuant to order of Commission.

An amendment filed prior to the effective date of a registration statement shall be deemed to have been filed pursuant to an order of the Commission within the meaning of section 8(a) of the act so as to be treated as a part of the registration statement only when the Commission shall after the filing of such amendment enter an order declaring that it has been filed pursuant to the Commission's previous order.

[Reg. C, 12 FR 4075, June 24, 1947]

§ 230.477 Withdrawal of registration statement or amendment.

- (a) Except as provided in paragraph (b) of this section, any registration statement or any amendment or exhibit thereto may be withdrawn upon application if the Commission, finding such withdrawal consistent with the public interest and the protection of investors, consents thereto.
- (b) Any application for withdrawal of a registration statement filed on Form F-2 (§ 239.32 of this chapter) relating to a dividend or interest reinvestment plan, or on Form S-4 (§ 239.25 of this chapter) complying with General Instruction G of that Form, and/or any pre-effective amendment thereto, will be deemed granted upon filing if such filing is made prior to the effective date. Any other application for withdrawal of an entire registration statement made before the effective date of the registration statement will be deemed granted at the time the application is filed with the Commission unless, within 15 calendar days after the registrant files the application, the Commission notifies the registrant that the application for withdrawal will not be granted.
- (c) The registrant must sign any application for withdrawal and must state fully in it the grounds on which the registrant makes the application. The fee paid upon the filing of the registration statement will not be refunded to the registrant. The registrant must state in the application that no securities were sold in connection with the offering. If the registrant applies for withdrawal in anticipation of reliance on § 230.155(c), the registrant must, without discussing any terms of the private offering, state in the application that the registrant may undertake a subsequent private offering in reliance on § 230.155(c).
- (d) Any withdrawn document will remain in the Commission's public files, as well as the related request for withdrawal.

[47 FR 11445, Mar. 16, 1982, as amended at 47 FR 54770, Dec. 6, 1982; 50 FR 19001, May 6, 1985; 59 FR 21650, Apr. 26, 1994; 66 FR 8897, Feb. 5, 2001]

§ 230.478 Powers to amend or withdraw registration statement.

All persons signing a registration statement shall be deemed, in the absence of a statement to the contrary, to confer upon the registrant, and upon the agent for service named in the registration statement, the following powers:

- (a) A power to amend the registration statement
 - (1) by filing an amendment as provided in § 230.473;
 - (2) by filing any written consent;
 - (3) by correcting typographical errors;
 - (4) by reducing the amount of securities registered, pursuant to an undertaking contained in the registration statement.

- (b) A power to make application pursuant to § 230.475 for the Commission's consent to the filing of an amendment.
- (c) A power to withdraw the registration statement or any amendment or exhibit thereto.
- (d) A power to consent to the entry of an order under section 8(b) of the act, waiving notice and hearing, such order being entered without prejudice to the right of the registrant thereafter to have the order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate on its face in any material respect.

[Reg. C, 12 FR 4076, June 24, 1947, as amended at 16 FR 8737, Aug. 29, 1951]

§ 230.479 Procedure with respect to abandoned registration statements and post-effective amendments.

When a registration statement, or a post-effective amendment to such a statement, has been on file with the Commission for a period of nine months and has not become effective the Commission may, in its discretion, proceed in the following manner to determine whether such registration statement or amendment has been abandoned by the registrant. If the registration statement has been amended, otherwise than for the purpose of delaying the effective date thereof, or if the post-effective amendment has been amended, the nine-month period shall be computed from the date of the latest such amendment.

- (a) A notice will be sent to the registrant, and to the agent for service named in the registration statement, by registered or certified mail, return receipt requested, addressed to the most recent addresses for the registrant and the agent for service reflected in the registration statement. Such notice will inform the registrant and the agent for service that the registration statement or amendment is out of date and must be either amended to comply with the applicable requirements of the Act and the rules and regulations thereunder or be withdrawn within 30 days after the date of such notice.
- (b) If the registrant or the agent for service fails to respond to such notice by filing a substantive amendment or withdrawing the registration statement and does not furnish a satisfactory explanation as to why it has not done so within such 30 days, the Commission may, where consistent with the public interest and the protection of investors, enter an order declaring the registration statement or amendment abandoned.
- (c) When such an order is entered by the Commission the papers comprising the registration statement or amendment will not be removed from the files of the Commission but an order shall be included in the file for the registration statement in the following manner: "Declared abandoned by order dated ____" ____

[47 FR 11446, Mar. 16, 1982, as amended at 76 FR 71876, Nov. 21, 2011]

INVESTMENT COMPANIES; BUSINESS DEVELOPMENT COMPANIES

Source: Sections 230.480 through 230.485 appear at 47 FR 11446, Mar. 16, 1982, unless otherwise noted.

Note:

The rules in this section of regulation C (§§ 230.480 to 230.488 and §§ 230.495 to 230.498) apply only to investment companies and business development companies. Section 230.489 applies to certain entities excepted from the definition of investment company by rules under the Investment Company Act of 1940. The

rules in the rest of Regulation C (§§ 230.400 to 230.479 and §§ 230.490 to 230.494), unless the context specifically indicates otherwise, also apply to investment companies and business development companies. See § 230.400.

§ 230.480 Title of securities.

If a registration statement is prepared on a form available solely to investment companies registered under the Investment Company Act of 1940, or a business development company which is selling or proposing to sell its securities pursuant to a registration statement which has been filed under the Act, wherever the title of securities is required to be stated there shall be given such information as will indicate the type and general character of the securities, including the following:

- (a) In the case of shares, the par or stated value, if any; the rate of dividends, if fixed, and whether cumulative or non-cumulative; a brief indication of the preference, if any; and, if convertible, a statement to that effect.
- (b) In the case of funded debt, the rate of interest; the date of maturity, or, if the issue matures serially, a brief indication of the serial maturities, such as "maturing serially from 1950 to 1960"; if the payment of principal or interest is contingent, an appropriate indication of such contingency; a brief indication of the priority of the issue; and, if convertible, a statement to that effect.
- (c) In the case of any other kind of security, appropriate information of comparable character.

§ 230.481 Information required in prospectuses.

Disclose the following in registration statements prepared on a form available solely to investment companies registered under the Investment Company Act of 1940 or in registration statements filed under the Act for a company that has elected to be regulated as a business development company under Sections 55 through 65 of the Investment Company Act (15 U.S.C. 80a-54 - 80a-64):

- (a) **Facing page.** Indicate the approximate date of the proposed sale of the securities to the public.
- (b) **Outside front cover page.** If applicable, include the following in plain English as required by § 230.421(d):
 - (1) **Commission legend.** Provide a legend that indicates that the Securities and Exchange Commission has not approved or disapproved of the securities or passed upon the accuracy or adequacy of the disclosure in the prospectus and that any contrary representation is a criminal offense. The legend may be in one of the following or other clear and concise language:

Example A: The Securities and Exchange Commission has not approved or disapproved these securities or passed upon the adequacy of this prospectus. Any representation to the contrary is a criminal offense.

Example B: The Securities and Exchange Commission has not approved or disapproved these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

(2) ***"Subject to Completion" legend.***

- (i) If a prospectus or Statement of Additional Information will be used before the effective date of the registration statement, include on the outside front cover page of the prospectus or Statement of Additional Information, a prominent statement that:
 - (A) The information in the prospectus or Statement of Additional Information will be amended or completed;
 - (B) A registration statement relating to these securities has been filed with the Securities and Exchange Commission;
 - (C) The securities may not be sold until the registration statement becomes effective; and
 - (D) In a prospectus, that the prospectus is not an offer to sell the securities and it is not soliciting an offer to buy the securities in any state where offers or sales are not permitted, or in a Statement of Additional Information, that the Statement of Additional Information is not a prospectus.

- (ii) The legend may be in the following language or other clear and understandable language:

The information in this prospectus (or Statement of Additional Information) is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus (or Statement of Additional Information) is not an offer to sell these securities and is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.

- (iii) In the case of a prospectus that omits pricing information under § 230.430A, provide the information and legend in paragraph (b)(2) of this section if the prospectus or Statement of Additional Information is used before the initial public offering price is determined.

- (c) ***Table of contents.*** Include on either the outside front, inside front, or outside back cover page of the prospectus, a reasonably detailed table of contents. It must show the page number of the various sections or subdivisions of the prospectus. Include this table of contents immediately following the cover page in any prospectus delivered electronically.

- (d) ***Stabilization and other transactions.***

- (1) Indicate on the front cover page of the prospectus if the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may purchase additional shares in connection with the offering, and state the amount of additional shares the underwriter may purchase under the arrangement. Provide disclosure in the prospectus that briefly describes any transaction that the underwriter intends to conduct during the offering that stabilizes, maintains, or otherwise affects the market price of the offered securities. Include information on stabilizing transactions, syndicate short covering transactions, penalty bids, or any other transactions that affect the offered security's price. Describe the nature of the transactions clearly and explain how the transactions affect the offered security's price. Identify the exchange or other market on which these transactions may occur. If true, disclose that the underwriter may discontinue these transactions at any time;
- (2) If the stabilizing began before the effective date of the registration statement, disclose in the prospectus the amount of securities bought, the prices at which they were bought and the period within which they were bought. In the event that § 230.430A of this chapter is used, the prospectus

filed under § 230.497(h) or included in a post-effective amendment must contain information on the stabilizing transactions that took place before the determination of the public offering price shown in the prospectus; and

- (3) If you are making a warrant or rights offering of securities to existing security holders and the securities not purchased by existing security holders are to be reoffered to the public, disclose in the prospectus used in connection with the reoffering:
- (i) The amount of securities bought in stabilization activities during the offering period and the price or range of prices at which the securities were bought;
 - (ii) The amount of the offered securities subscribed for during the offering period;
 - (iii) The amount of the offered securities subscribed for by the underwriters during the offering period;
 - (iv) The amount of the offered securities sold during the offering period by the underwriters and the price or range of prices at which the securities were sold; and
 - (v) The amount of the offered securities to be reoffered to the public and the public offering price.

- (e) **Dealer prospectus delivery obligations.** On the outside back cover page of the prospectus, advise dealers of their prospectus delivery obligation, including the expiration date specified by Section 4(3) of the Act (15 U.S.C. 77d(3)) and § 230.174. If the expiration date is not known on the effective date of the registration statement, include the expiration date in the copy of the prospectus filed under § 230.497. This information need not be included if dealers are not required to deliver a prospectus under § 230.174 or Section 24(d) of the Investment Company Act of 1940 (15 U.S.C. 80a-24). Use the following or other clear, plain language:

Dealer Prospectus Delivery Obligation

Until (insert date), all dealers that effect transactions in these securities, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealers' obligation to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

- (f) **Electronic distribution.** Where a prospectus is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents, such as paper size, type size and font, bold-face type, italics and red ink, by presenting all required information in a format readily communicated to investors, and where indicated, in a manner reasonably calculated to draw investor attention to specific information.

[63 FR 6385, Feb. 6, 1998]

§ 230.482 Advertising by an investment company as satisfying requirements of section 10.

- (a) **Scope of rule.** This section applies to an advertisement or other sales material (*advertisement*) with respect to securities of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) (1940 Act), or a business development company, that is selling or proposing to sell its securities pursuant to a registration statement that has been filed under the Act. This section does not apply to an advertisement that is excepted from the definition of prospectus by section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)), § 230.498(d), or § 230.498A(g) or (j)(2), or to a summary prospectus under §

230.498 or § 230.498A. An advertisement that complies with this section, which may include information the substance of which is not included in the prospectus specified in section 10(a) of the Act (15 U.S.C. 77j(a)), will be deemed to be a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

Note 1 to paragraph (a):

The fact that an advertisement complies with this section does not relieve the investment company, underwriter, or dealer of any obligations with respect to the advertisement under the antifraud provisions of the Federal securities laws. For guidance about factors to be weighed in determining whether statements, representations, illustrations, and descriptions contained in investment company advertisements are misleading, see § 230.156. In addition, an advertisement that complies with this section is subject to the legibility requirements of § 230.420.

Note to paragraph (a):

The fact that an advertisement complies with this section does not relieve the investment company, underwriter, or dealer of any obligations with respect to the advertisement under the antifraud provisions of the federal securities laws. For guidance about factors to be weighed in determining whether statements, representations, illustrations, and descriptions contained in investment company advertisements are misleading, see § 230.156. In addition, an advertisement that complies with this section is subject to the legibility requirements of § 230.420.

(b) **Required disclosure.** This paragraph describes information that is required to be included in an advertisement in order to comply with this section.

- (1) **Availability of additional information.** An advertisement must include a statement that advises an investor to consider the investment objectives, risks, and charges and expenses of the investment company carefully before investing; explains that the prospectus and, if available, the summary prospectus contain this and other information about the investment company; identifies a source from which an investor may obtain a prospectus and, if available, a summary prospectus; and states that the prospectus and, if available, the summary prospectus should be read carefully before investing.
- (2) **Advertisements used prior to effectiveness of registration statement.** An advertisement that is used prior to effectiveness of the investment company's registration statement or the determination of the public offering price (in the case of a registration statement that becomes effective omitting information from the prospectus contained in the registration statement in reliance upon § 230.430A) must include the "Subject to Completion" legend required by § 230.481(b)(2).
- (3) **Advertisements including performance data.** An advertisement that includes performance data of an open-end management investment company or a separate account registered under the 1940 Act as a unit investment trust offering variable annuity contracts (*trust account*) must include the following
 - (i) A legend disclosing that the performance data quoted represents past performance; that past performance does not guarantee future results; that the investment return and principal value of an investment will fluctuate so that an investor's shares, when redeemed, may be worth more or less than their original cost; and that current performance may be lower or higher than the performance data quoted. The legend should also identify either a toll-free (or collect)

telephone number or a Web site where an investor may obtain performance data current to the most recent month-end unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use. An advertisement for a money market fund that is a government money market fund, as defined in § 270.2a-7(a)(16) of this chapter, or a retail money market fund, as defined in § 270.2a-7(a)(25) of this chapter may omit the disclosure about principal value fluctuation; and

Note to paragraph (b)(3)(i):

The date of use refers to the date or dates when an advertisement is used by investors, not the date on which an advertisement is published or submitted for publication. The date of use refers to the entire period of use by investors and not simply the first date on which an advertisement is used.

- (ii) If a sales load or any other nonrecurring fee is charged, the maximum amount of the load or fee, and if the sales load or fee is not reflected, a statement that the performance data does not reflect the deduction of the sales load or fee, and that, if reflected, the load or fee would reduce the performance quoted.

(4) Money market funds.

- (i) An advertisement for an investment company that holds itself out to be a money market fund, that is not a government money market fund, as defined in § 270.2a-7(a)(16) of this chapter, or a retail money market fund, as defined in § 270.2a-7(a)(25) of this chapter, must include the following statement:

You could lose money by investing in the Fund. Because the share price of the Fund will fluctuate, when you sell your shares they may be worth more or less than what you originally paid for them. The Fund may impose a fee upon sale of your shares or may temporarily suspend your ability to sell shares if the Fund's liquidity falls below required minimums because of market conditions or other factors. An investment in the Fund is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. The Fund's sponsor has no legal obligation to provide financial support to the Fund, and you should not expect that the sponsor will provide financial support to the Fund at any time.

- (ii) An advertisement for an investment company that holds itself out to be a money market fund, that is a government money market fund, as defined in § 270.2a-7(a)(16) of this chapter or a retail money market fund, as defined in § 270.2a-7(a)(25) of this chapter, and that is subject to the requirements of § 270.2a-7(c)(2)(i) and/or (ii) of this chapter (or is not subject to the requirements of § 270.2a-7(c)(2)(i) and/or (ii) of this chapter pursuant to § 270.2a-7(c)(2)(iii) of this chapter, but has chosen to rely on the ability to impose liquidity fees and suspend redemptions consistent with the requirements of § 270.2a-7(c)(2)(i) and/or (ii)), must include the following statement:

You could lose money by investing in the Fund. Although the Fund seeks to preserve the value of your investment at \$1.00 per share, it cannot guarantee it will do so. The Fund may impose a fee upon sale of your shares or may temporarily suspend your ability to sell shares if the Fund's liquidity falls below required minimums because of market conditions or other factors. An investment in the Fund is not insured or guaranteed by the Federal Deposit Insurance

Corporation or any other government agency. The Fund's sponsor has no legal obligation to provide financial support to the Fund, and you should not expect that the sponsor will provide financial support to the Fund at any time.

- (iii) An advertisement for an investment company that holds itself out to be a money market fund, that is a government money market fund, as defined in § 270.2a-7(a)(16) of this chapter, that is not subject to the requirements of § 270.2a-7(c)(2)(i) and/or (ii) of this chapter pursuant to § 270.2a-7(c)(2)(iii) of this chapter, and that has not chosen to rely on the ability to impose liquidity fees and suspend redemptions consistent with the requirements of § 270.2a-7(c)(2)(i) and/or (ii), must include the following statement:

You could lose money by investing in the Fund. Although the Fund seeks to preserve the value of your investment at \$1.00 per share, it cannot guarantee it will do so. An investment in the Fund is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. The Fund's sponsor has no legal obligation to provide financial support to the Fund, and you should not expect that the sponsor will provide financial support to the Fund at any time.

Note to paragraph (b)(4).

If an affiliated person, promoter, or principal underwriter of the Fund, or an affiliated person of such a person, has contractually committed to provide financial support to the Fund, the statement may omit the last sentence ("The Fund's sponsor has no legal obligation to provide financial support to the Fund, and you should not expect that the sponsor will provide financial support to the Fund at any time.") for the term of the agreement. For purposes of this Note, the term "financial support" includes any capital contribution, purchase of a security from the Fund in reliance on § 270.17a-9 of this chapter, purchase of any defaulted or devalued security at par, execution of letter of credit or letter of indemnity, capital support agreement (whether or not the Fund ultimately received support), performance guarantee, or any other similar action reasonably intended to increase or stabilize the value or liquidity of the fund's portfolio; however, the term "financial support" excludes any routine waiver of fees or reimbursement of fund expenses, routine inter-fund lending, routine inter-fund purchases of fund shares, or any action that would qualify as financial support as defined above, that the board of directors has otherwise determined not to be reasonably intended to increase or stabilize the value or liquidity of the fund's portfolio.

- (5) **Presentation.** In a print advertisement, the statements required by paragraphs (b)(1) through (b)(4) of this section must be presented in a type size at least as large as and of a style different from, but at least as prominent as, that used in the major portion of the advertisement, provided that when performance data is presented in a type size smaller than that of the major portion of the advertisement, the statements required by paragraph (b)(3) of this section may appear in a type size no smaller than that of the performance data. If an advertisement is delivered through an electronic medium, the legibility requirements for the statements required by paragraph (b)(1) through (b)(4) of this section relating to type size and style may be satisfied by presenting the statements in any manner reasonably calculated to draw investor attention to them. In a radio or television advertisement, the statements required by paragraph (b)(1) through (b)(4) of this section must be given emphasis equal to that used in the major portion of the advertisement. The statements required by paragraph (b)(3) of this section must be presented in close proximity to the performance data, and, in a print advertisement, must be presented in the body of the advertisement and not in a footnote.

- (6) **Commission legend.** An advertisement that complies with this section need not contain the Commission legend required by § 230.481(b)(1).
- (c) **Use of applications.** An advertisement that complies with this section may not contain or be accompanied by any application by which a prospective investor may invest in the investment company, except that a prospectus meeting the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) by which a unit investment trust offers variable annuity or variable life insurance contracts may contain a contract application although the prospectus includes, or is accompanied by, information about an investment company in which the unit investment trust invests that, pursuant to this section, is deemed a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)).
- (d) **Performance data for non-money market funds.** In the case of an open-end management investment company or a trust account (other than a money market fund referred to in paragraph (e) of this section), any quotation of the company's performance contained in an advertisement shall be limited to quotations of:
 - (1) **Current yield.** A current yield that:
 - (i) Is based on the methods of computation prescribed in Form N-1A (§§ 239.15A and 274.11A of this chapter), N-3 (§§ 239.17a and 274.11b of this chapter), or N-4 (§§ 239.17b and 274.11c of this chapter);
 - (ii) Is accompanied by quotations of total return as provided for in paragraph (d)(3) of this section;
 - (iii) Is set out in no greater prominence than the required quotations of total return; and
 - (iv) Adjacent to the quotation and with no less prominence than the quotation, identifies the length of and the date of the last day in the base period used in computing the quotation.
 - (2) **Tax-equivalent yield.** A tax-equivalent yield that:
 - (i) Is based on the methods of computation prescribed in Form N-1A (§§ 239.15A and 274.11A of this chapter), N-3 (§§ 239.17a and 274.11b of this chapter), or N-4 (§§ 239.17b and 274.11c of this chapter);
 - (ii) Is accompanied by quotations of yield as provided for in paragraph (d)(1) of this section and total return as provided for in paragraph (d)(3) of this section;
 - (iii) Is set out in no greater prominence than the required quotations of yield and total return;
 - (iv) Relates to the same base period as the required quotation of yield; and
 - (v) Adjacent to the quotation and with no less prominence than the quotation, identifies the length of and the date of the last day in the base period used in computing the quotation.
 - (3) **Average annual total return.** Average annual total return for one, five, and ten year periods, except that if the company's registration statement under the Act (15 U.S.C. 77a et seq.) has been in effect for less than one, five, or ten years, the time period during which the registration statement was in effect is substituted for the period(s) otherwise prescribed. The quotations must:
 - (i) Be based on the methods of computation prescribed in Form N-1A (§§ 239.15A and 274.11A of this chapter), N-3 (§§ 239.17a and 274.11b of this chapter), or N-4 (§§ 239.17b and 274.11c of this chapter);
 - (ii) Be current to the most recent calendar quarter ended prior to the submission of the advertisement for publication;

- (iii) Be set out with equal prominence; and
- (iv) Adjacent to the quotation and with no less prominence than the quotation, identify the length of and the last day of the one, five, and ten year periods.

(4) **After-tax return.** For an open-end management investment company, average annual total return (after taxes on distributions) and average annual total return (after taxes on distributions and redemption) for one, five, and ten year periods, except that if the company's registration statement under the Act (15 U.S.C. 77a *et seq.*) has been in effect for less than one, five, or ten years, the time period during which the registration statement was in effect is substituted for the period(s) otherwise prescribed. The quotations must:

- (i) Be based on the methods of computation prescribed in Form N-1A (§§ 239.15A and 274.11A of this chapter);
- (ii) Be current to the most recent calendar quarter ended prior to the submission of the advertisement for publication;
- (iii) Be accompanied by quotations of total return as provided for in paragraph (d)(3) of this section;
- (iv) Include both average annual total return (after taxes on distributions) and average annual total return (after taxes on distributions and redemption);
- (v) Be set out with equal prominence and be set out in no greater prominence than the required quotations of total return; and
- (vi) Adjacent to the quotations and with no less prominence than the quotations, identify the length of and the last day of the one, five, and ten year periods.

(5) **Other performance measures.** Any other historical measure of company performance (not subject to any prescribed method of computation) if such measurement:

- (i) Reflects all elements of return;
- (ii) Is accompanied by quotations of total return as provided for in paragraph (d)(3) of this section;
- (iii) In the case of any measure of performance adjusted to reflect the effect of taxes, is accompanied by quotations of total return as provided for in paragraph (d)(4) of this section;
- (iv) Is set out in no greater prominence than the required quotations of total return; and
- (v) Adjacent to the measurement and with no less prominence than the measurement, identifies the length of and the last day of the period for which performance is measured.

(e) **Performance data for money market funds.** In the case of a money market fund:

- (1) **Yield.** Any quotation of the money market fund's yield in an advertisement shall be based on the methods of computation prescribed in Form N-1A (§§ 239.15A and 274.11A of this chapter), N-3 (§§ 239.17a and 274.11b of this chapter), or N-4 (§§ 239.17b and 274.11c of this chapter) and may include:
 - (i) A quotation of current yield that, adjacent to the quotation and with no less prominence than the quotation, identifies the length of and the date of the last day in the base period used in computing that quotation;

- (ii) A quotation of effective yield if it appears in the same advertisement as a quotation of current yield and each quotation relates to an identical base period and is presented with equal prominence; or
 - (iii) A quotation or quotations of tax-equivalent yield or tax-equivalent effective yield if it appears in the same advertisement as a quotation of current yield and each quotation relates to the same base period as the quotation of current yield, is presented with equal prominence, and states the income tax rate used in the calculation.
- (2) **Total return.** Accompany any quotation of the money market fund's total return in an advertisement with a quotation of the money market fund's current yield under paragraph (e)(1)(i) of this section. Place the quotations of total return and current yield next to each other, in the same size print, and if there is a material difference between the quoted total return and the quoted current yield, include a statement that the yield quotation more closely reflects the current earnings of the money market fund than the total return quotation.
- (f) **Advertisements that make tax representations.** An advertisement for an open-end management investment company (other than a company that is permitted under § 270.35d-1(a)(4) of this chapter to use a name suggesting that the company's distributions are exempt from federal income tax or from both federal and state income tax) that represents or implies that the company is managed to limit or control the effect of taxes on company performance must accompany any quotation of the company's performance permitted by paragraph (d) of this section with quotations of total return as provided for in paragraph (d)(4) of this section.
- (g) **Timeliness of performance data.** All performance data contained in any advertisement must be as of the most recent practicable date considering the type of investment company and the media through which the data will be conveyed, except that any advertisement containing total return quotations will be considered to have complied with this paragraph provided that:
- (1)
 - (i) The total return quotations are current to the most recent calendar quarter ended prior to the submission of the advertisement for publication; and
 - (ii) Total return quotations current to the most recent month ended seven business days prior to the date of use are provided at the toll-free (or collect) telephone number or Web site identified pursuant to paragraph (b)(3)(i) of this section; or
 - (2) The total return quotations are current to the most recent month ended seven business days prior to the date of use of the advertisement.

Note to paragraph (g):

The date of use refers to the date or dates when an advertisement is used by investors, not the date on which an advertisement is published or submitted for publication. The date of use refers to the entire period of use by investors and not simply the first date on which an advertisement is used.

- (h) **Filing.** An advertisement that complies with this section need not be filed as part of the registration statement filed under the Act.

Note to paragraph (h):

These advertisements, unless filed with NASD Regulation, Inc., are required to be filed in accordance with the requirements of § 230.497.

[68 FR 57777, Oct. 6, 2003, as amended at 74 FR 4584, Jan. 26, 2009; 79 FR 47957, Aug. 14, 2014; 85 FR 26093, May 1, 2020]

§ 230.483 Exhibits for certain registration statements.

If a registration statement is prepared on a form available solely to investment companies registered under the Investment Company Act of 1940, or a business development company which is selling or proposing to sell its securities pursuant to a registration statement which has been filed under the Act, the following provisions apply:

- (a) Such registration statement shall contain an exhibit index, which should immediately precede the exhibits filed with such registration statement. The exhibit index shall indicate by handwritten, typed, printed or other legible form of notation in the manually signed original registration statement the page number in the sequential numbering system where such exhibit can be found. Where exhibits are incorporated by reference, this fact shall be noted in the exhibit index referred to in the preceding sentence. Further, the first page of the manually signed registration statement shall list the page in the filing where the exhibit index is located.
- (b) If any name is signed to the registration statement pursuant to a power of attorney, copies of such powers of attorney shall be filed as an exhibit to the registration statement. In addition, if the name of any officer signing on behalf of the registrant, or attesting the registrant's seal, is signed pursuant to a power of attorney, certified copies of a resolution of the registrant's board of directors authorizing such signature shall also be filed as an exhibit to the registration statement. A power of attorney that is filed with the Commission shall relate to a specific filing, an amendment thereto, or a related registration statement that is to be effective upon filing pursuant to Rule 462(b) (§ 230.462(b)) under the Act.
- (c)
 - (1) All written consents are required to be filed as an exhibit to the registration statement, together with a list thereof. Such consents shall be dated and manually signed. Where the consent of an expert or counsel is contained in his report or opinion, a reference shall be made in the list to the report or opinion containing the consent.
 - (2) In a registration statement filed pursuant to Rule 462(b) (§ 230.462(b)) by a closed-end company, any required consent may be incorporated by reference into the registration statement from a previously filed registration statement related to the offering, provided that the consent contained in the previously filed registration statement expressly provides for such incorporation. Any consent filed in a Rule 462(b) (§ 230.462(b)) registration statement may contain duplicated or facsimile versions of required signatures, and such signatures shall be considered manually filed for the purposes of the Act and the rules thereunder.
- (d) The registrant:
 - (1) May file such exhibits as it may desire in addition to those required by the appropriate form. Such exhibits shall be so marked as to indicate clearly the subject matters to which they refer;
 - (2) In any case where two or more indentures, contracts, franchises, or other documents required to be filed as exhibits are substantially identical in all material respects except as to the parties thereto, the dates of execution, or other details, need file a copy of only one of such documents, with a

schedule identifying the other documents omitted and setting forth the material details in which such documents differ from the document of which a copy is filed. The Commission may at any time in its discretion require filing of copies of any documents so omitted; and

- (3) If an exhibit to a registration statement (other than an opinion or consent), filed in preliminary form, has been changed only
 - (i) to insert information as to interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters' or dealers' commission, names, addresses or participation of underwriters or similar matters, which information appears elsewhere in an amendment to the registration statement, or
 - (ii) to correct typographical errors, insert signatures or make other similar immaterial changes, then, notwithstanding any contrary requirement of any rule or form, need not refile such exhibit as so amended; provided the registrant states in the amendment to the registration statement the basis provided by this rule for not refiling such exhibit. Any such incomplete exhibit may not, however, be incorporated by reference in any subsequent filing under any Act administered by the Commission.

[47 FR 11446, Mar. 16, 1982, as amended at 58 FR 14857, Mar. 18, 1993; 59 FR 36261, July 15, 1994; 59 FR 67761, Dec. 30, 1994; 60 FR 26618, May 17, 1995; 63 FR 13943, Mar. 23, 1998; 65 FR 24799, Apr. 27, 2000]

§ 230.484 Undertaking required in certain registration statements.

If a registration statement is prepared on a form available solely to investment companies registered under the investment Company Act of 1940, or a business development company which is selling or proposing to sell its securities pursuant to a registration statement which has been filed under the Act, if

- (a) Any acceleration is requested of the effective date of the registration statement pursuant to Rule 461 (§ 230.461), and
- (b)
 - (1) Any provision or arrangement exists whereby the registrant may indemnify a director, officer or controlling person of the registrant against liabilities arising under the Act, or
 - (2) The underwriting agreement contains provisions by which indemnification against such liabilities is given by the registrant to the underwriter or controlling persons of the underwriter and the director, officer or controlling person of the registrant is such an underwriter or controlling person thereof or a member of any firm which is an underwriter, and
 - (3) The benefits of such indemnification are not waived by such persons; the registration statement shall include a brief description of the indemnification provisions and an undertaking in substantially the following form:

Insofar as indemnification for liability arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will,

unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

§ 230.485 Effective date of post-effective amendments filed by certain registered investment companies.

(a) *Automatic effectiveness.*

- (1) Except as otherwise provided in this section, a post-effective amendment to a registration statement filed by a registered open-end management investment company, unit investment trust or separate account as defined in section 2(a)(37) of the Investment Company Act of 1940 [15 U.S.C. 80a-2(a)(37)] shall become effective on the sixtieth day after the filing thereof, or a later date designated by the registrant on the facing sheet of the amendment, which date shall be no later than eighty days after the date on which the amendment is filed.
- (2) A post-effective amendment filed by a registered open-end management investment company for the purpose of adding a series shall become effective on the seventy-fifth day after the filing thereof or a later date designated by the registrant on the facing sheet of the amendment, which date shall be no later than ninety-five days after the date on which the amendment is filed.
- (3) The Commission, having due regard to the public interest and the protection of investors, may declare an amendment filed under this paragraph (a) effective on an earlier date.

(b) *Immediate effectiveness.* Except as otherwise provided in this section, a post-effective amendment to a registration statement filed by a registered open-end management investment company, unit investment trust or separate account as defined in section 2(a)(37) of the Investment Company Act of 1940 [15 U.S.C. 80a-2(a)(37)] shall become effective on the date upon which it is filed with the Commission, or a later date designated by the registrant on the facing sheet of the amendment, which date shall be not later than thirty days after the date on which the amendment is filed, except that a post-effective amendment including a designation of a new effective date pursuant to paragraph (b)(1)(iii) of this section shall become effective on the new effective date designated therein, *Provided*, that the following conditions are met:

- (1) It is filed for no purpose other than one or more of the following:
 - (i) Bringing the financial statements up to date under section 10(a)(3) of the Securities Act of 1933 [15 U.S.C. 77j(a)(3)] or Rules 3-12 or 3-18 of Regulation S-X [17 CFR 210.3-12 and 210.3-18];
 - (ii) Complying with an undertaking to file an amendment containing financial statements, which may be unaudited, within four to six months after the effective date of the registrant's registration statement under the Securities Act of 1933 [15 U.S.C. 77a et seq.];
 - (iii) Designating a new effective date for a previously filed post-effective amendment pursuant to paragraph (a) of this section, which has not yet become effective, *Provided*, that the new effective date shall be no earlier than the effective date designated in the previously filed amendment under paragraph (a) of this section and no later than thirty days after that date;
 - (iv) Disclosing or updating the information required by Item 5(b) or 10(a)(2) of Form N-1A [17 CFR 239.15A and 274.11A];
 - (v) Making any non-material changes which the registrant deems appropriate;

- (vi) In the case of a separate account registered as a unit investment trust, to make changes in the disclosure in the unit investment trust's registration statement to reflect changes to disclosure in the registration statement of the investment company in which the unit investment trust invests all of its assets; and
 - (vii) Any other purpose which the Commission shall approve.
- (2) The registrant represents that the amendment is filed solely for one or more of the purposes specified in paragraph (b)(1) of this section and that no material event requiring disclosure in the prospectus, other than one listed in paragraph (b)(1) of this section or one for which the Commission has approved a filing under paragraph (b)(1)(vii) of this section, has occurred since the latest of the following three dates:
- (i) The effective date of the registrant's registration statement;
 - (ii) The effective date of its most recent post-effective amendment to its registration statement which included a prospectus; or
 - (iii) The filing date of a post-effective amendment filed under paragraph (a) of this section which has not become effective.
- (3) The amendment recites on its facing sheet that the registrant proposes that the amendment will become effective under paragraph (b) of this section.
- (4) The representations of the registrant referred to in paragraph (b)(2) of this section shall be made by certification on the signature page of the post-effective amendment that the amendment meets all the requirements for effectiveness under paragraph (b) of this section. If counsel prepared or reviewed the post-effective amendment filed under paragraph (b) of this section, counsel shall furnish to the Commission at the time the amendment is filed a written representation that the amendment does not contain disclosures that would render it ineligible to become effective under paragraph (b) of this section.
- (c) ***Incomplete or inaccurate amendments; suspension of use of paragraph (b) of this section.***
- (1) No amendment shall become effective under paragraph (a) of this section if, prior to the effective date of the amendment, it should appear to the Commission that the amendment may be incomplete or inaccurate in any material respect, and the Commission furnishes to the registrant written notice that the effective date of the amendment is to be suspended. Following such action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for such a hearing is included in the petition. If the Commission has suspended the effective date of an amendment, the amendment shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.
 - (2) The Commission may, in the manner and under the circumstances set forth in this paragraph (c)(2), suspend the ability of registrant to file a post-effective amendment under paragraph (b) of this section. The notice of such suspension shall be in writing and shall specify the period for which such suspension shall remain in effect. The Commission may issue a suspension if it appears to the Commission that a registrant which files a post-effective amendment under paragraph (b) of this section has not complied with the conditions of that paragraph. Any suspension under this paragraph (c)(2) shall become effective at such time as the Commission furnishes written notice thereof to the registrant. Any such suspension, so long as it is in effect, shall apply to any post-effective amendment that has been filed but has not, at the time of such suspension, become

effective, and to any post-effective amendment that may be filed after the suspension. Any suspension shall apply only to the ability to file a post-effective amendment pursuant to paragraph (b) of this section and shall not otherwise affect any post-effective amendment. Following this action by the Commission the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for a hearing is included in the petition.

- (3) A registrant's ability to file a post-effective amendment, other than an amendment filed solely for purposes of submitting an Interactive Data File, under paragraph (b) of this section is automatically suspended if a registrant fails to submit any Interactive Data File as required by General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N-1A), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N-3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N-4), or General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N-6). A suspension under this paragraph (c)(3) shall become effective at such time as the registrant fails to submit an Interactive Data File as required by General Instruction C.3.(g) of Form N-1A, or General Instruction C.3.(h) of Form N-3, General Instruction C.3.(h) of Form N-4, or General Instruction C.3.(h) of Form N-6. Any such suspension, so long as it is in effect, shall apply to any post-effective amendment that is filed after the suspension becomes effective, but shall not apply to any post-effective amendment that was filed before the suspension became effective. Any suspension shall apply only to the ability to file a post-effective amendment pursuant to paragraph (b) of this section and shall not otherwise affect any post-effective amendment. Any suspension under this paragraph (c)(3) shall terminate as soon as a registrant has submitted the Interactive Data File as required by General Instruction C.3.(g) of Form N-1A, General Instruction C.3.(h) of Form N-3, General Instruction C.3.(h) of Form N-4, or General Instruction C.3.(h) of Form N-6.

(d) **Subsequent amendments.**

- (1) Except as provided in paragraph (d)(2) of this section, a post-effective amendment that includes a prospectus shall not become effective under paragraph (a) of this section if a subsequent post-effective amendment relating to the prospectus is filed before such amendment becomes effective.
- (2) A post-effective amendment that includes a prospectus shall become effective under paragraph (a) of this section notwithstanding the filing of a subsequent post-effective amendment relating to the prospectus, *Provided*, that the following conditions are met:
- (i) the subsequent amendment is filed under paragraph (b) of this section; and
 - (ii) the subsequent amendment designates as its effective date either:
 - (A) the date on which the prior post-effective amendment was to become effective under paragraph (a) of this section; or
 - (B) a new effective date designated under paragraph (b)(1)(iii) of this section.

In this case the prior post-effective amendment filed under paragraph (a) of this section and any prior post-effective amendment filed under paragraph (b) of this section shall also become effective on the new effective date designated under paragraph (b)(1)(iii) of this section.

- (3) Notwithstanding paragraphs (d)(1) and (d)(2) of this section, if another post-effective amendment relating to the same prospectus is filed under paragraph (a) of this section before the prior amendments filed pursuant to paragraphs (a) and (b) of this section have become effective, none of such prior amendments shall become effective under this section.

- (e) **Certain separate accounts.** For purposes of this section, a post-effective amendment to a registration statement for an offering of securities by a registered open-end management investment company or unit investment trust as those terms are used in paragraphs (a), (b), and (e) of this section and as such amendments are referred to in paragraphs (c) and (d) of this section, shall include a post-effective amendment to an offering of securities by an insurance company funded through a separate account, as defined in section 2(a)(37) of the Investment Company Act of 1940 [15 U.S.C. 80a-2(a)(37)], where the separate account need not register under the Investment Company Act of 1940 under section 3(c)(11) thereof [15 U.S.C. 80a-3(c)(11)].
- (f) **Electronic filers.** When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted until notice of acceptance has been received from the Commission.

Note:

To determine the date of automatic effectiveness, the day following the filing date is the first day of the time period. For example, a post-effective amendment filed under paragraph (a) of this section on November 1 would become effective on December 31.

[59 FR 43464, Aug. 24, 1994, as amended at 62 FR 47938, Sept. 12, 1997; 63 FR 13943, Mar. 23, 1998; 64 FR 27894, May 21, 1999; 74 FR 4584, Jan. 26, 2009; 74 FR 7774, Feb. 19, 2009; 83 FR 40873, Aug. 16, 2018; 85 FR 26093, May 1, 2020]

§ 230.486 Effective date of post-effective amendments and registration statements filed by certain closed-end management investment companies.

- (a) **Automatic effectiveness.** Except as otherwise provided in this section, a post-effective amendment to a registration statement, or a registration statement described in paragraph (g) of this section, filed by a registered closed-end management investment company or business development company which makes periodic repurchase offers under § 270.23c-3 of this chapter or which offers securities under § 230.415(a)(1)(ix), shall become effective on the sixtieth day after the filing thereof, or a later date designated by the registrant on the facing sheet of the amendment or registration statement, which date shall not be later than eighty days after the date on which the amendment or registration statement is filed, *Provided*, that the Commission, having due regard to the public interest and the protection of investors, may declare an amendment or registration statement filed under this paragraph (a) effective on an earlier date.
- (b) **Immediate effectiveness.** Except as otherwise provided in this section, a post-effective amendment to a registration statement, or a registration statement, filed by a registered closed-end management investment company or business development company which makes periodic repurchase offers under § 270.23c-3 of this chapter or which offers securities under § 230.415(a)(1)(ix), shall become effective on the date on which it is filed with the Commission, or a later date designated by the registrant on the facing sheet of the amendment or registration statement, which date shall be not later than thirty days after the date on which the amendment or registration statement is filed, except that a post-effective amendment including a designation of a new effective date under paragraph (b)(1)(iii) of this section shall become effective on the new effective date designated therein, *Provided*, that the following conditions are met:
- (1) It is filed for no purpose other than one or more of the following:
- (i) Registering additional shares of common stock for which a registration statement filed on Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) is effective;

- (ii) Bringing the financial statements up to date under section 10(a)(3) of the Act [15 U.S.C. 77j(a)(3)] or rule 3-18 of Regulation S-X [17 CFR 210.3-18];
 - (iii) Designating a new effective date for a previously filed post-effective amendment or registration statement for additional shares under paragraph (a) of this section, which has not yet become effective, *Provided*, that the new effective date shall be no earlier than the effective date designated in the previously filed amendment or registration statement under paragraph (a) of this section and no later than thirty days after that date;
 - (iv) Disclosing or updating the information required by Item 9.1.c of Form N-2 [17 CFR 239.14 and 274.11a-1];
 - (v) Making any non-material changes which the registrant deems appropriate;
 - (vi) Complying with § 230.415(a)(5) and (6); and
 - (vii) Any other purpose which the Commission shall approve.
- (2) The registrant represents that the amendment is filed solely for one or more of the purposes specified in paragraph (b)(1) of this section and that no material event requiring disclosure in the prospectus, other than one listed in paragraph (b)(1) or one for which the Commission has approved a filing under paragraph (b)(1)(vii) of this section, has occurred since the latest of the following three dates:
- (i) The effective date of the registrant's registration statement;
 - (ii) The effective date of its most recent post-effective amendment to its registration statement which included a prospectus; or
 - (iii) The filing date of a post-effective amendment or registration statement filed under paragraph (a) of this section which has not become effective; and
- (3) The amendment or registration statement recites on the facing sheet thereof that the registrant proposes that the amendment or registration statement will become effective under paragraph (b) of this section.
- (4) The representations of the registrant referred to in paragraph (b)(2) of this section shall be made by certification on the signature page of the post-effective amendment or registration statement that the amendment or registration statement meets all of the requirements for effectiveness under paragraph (b) of this section. If counsel prepared or reviewed the post-effective amendment or registration statement filed under paragraph (b) of this section, counsel shall furnish to the Commission at the time the amendment or registration statement is filed a written representation that the amendment or registration statement does not contain disclosure which would render it ineligible to become effective under paragraph (b) of this section.
- (c) ***Incomplete or inaccurate amendments; suspension of use of paragraph (b) of this section.***
- (1) No amendment or registration statement shall become effective under paragraph (a) of this section if, prior to the effective date of the amendment or registration statement, it should appear to the Commission that the amendment or registration statement may be incomplete or inaccurate in any material respect, and the Commission furnishes to the registrant written notice that the effective date of the amendment or registration statement is to be suspended. Following such action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for such a hearing is

included in the petition. If the Commission has suspended the effective date of an amendment or registration statement, the amendment or registration statement shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

- (2) The Commission may, in the manner and under the circumstances set forth in this paragraph (c)(2), suspend the ability of a registrant to file a post-effective amendment or registration statement under paragraph (b) of this section. The notice of such suspension shall be in writing and shall specify the period for which such suspension shall remain in effect. The Commission may issue a suspension if it appears to the Commission that a registrant which files a post-effective amendment under paragraph (b) of this section has not complied with the conditions of that paragraph. Any suspension under this paragraph shall become effective at such time as the Commission furnishes written notice thereof to the company. Any such suspension, so long as it is in effect, shall apply to any post-effective amendment or registration statement that has been filed but has not, at the time of such suspension, become effective, and to any post-effective amendment or registration statement that may be filed after the suspension. Any suspension shall apply only to the ability to file a post-effective amendment or registration statement under paragraph (b) of this section and shall not otherwise affect any post-effective amendment or registration statement. Following this action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for a hearing is included in the petition.

(d) **Subsequent amendments.**

- (1) Except as provided in paragraph (d)(2) of this section, a post-effective amendment or registration statement which includes a prospectus shall not become effective under paragraph (a) of this section if a subsequent post-effective amendment or registration statement relating to the prospectus is filed before such amendment or registration statement becomes effective.

- (2) A post-effective amendment or registration statement which includes a prospectus shall become effective under paragraph (a) of this section notwithstanding the filing of a subsequent post-effective amendment or registration statement relating to the prospectus, *Provided*, that the following conditions are met:

- (i) The subsequent amendment or registration statement is filed under paragraph (b) of this section; and

- (ii) The subsequent amendment or registration statement designates as its effective date either:

- (A) The date on which the prior post-effective amendment or registration statement was to become effective under paragraph (a) of this section or

- (B) A new effective date designated under paragraph (b)(1)(iii) of this section.

In this case the prior post-effective amendment or registration statement filed under paragraph (a) of this section and any prior post-effective amendment or registration statement filed under paragraph (b) of this section shall also become effective on the new effective date designated under paragraph (b)(1)(iii) of this section.

- (3) Notwithstanding paragraphs (d)(1) and (d)(2) of this section, if another post-effective amendment or registration statement relating to the same prospectus is filed under paragraph (a) of this section before the prior amendments or registration statements filed under paragraphs (a) and (b) of this section have become effective, none of such prior amendments or registration statements shall become effective under this section.
- (e) **Condition to use of paragraphs (a) or (b).** A post-effective amendment or new registration statement shall not become effective under paragraphs (a) or (b) of this section unless within two years prior to the filing thereof a post-effective amendment or registration statement relating to the common stock of the registrant has become effective.
- (f) **Electronic filers.** When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted until notice of acceptance has been received from the Commission.

Note:

To determine the date of automatic effectiveness, the day following the filing date is the first day of the time period. For example, a post-effective amendment filed under paragraph (a) of this section on November 1 would become effective on December 31.

- (g) **Registration statements.** A registration statement can become effective under paragraph (a) of this section if it is filed for the purpose of:
 - (1) Registering additional shares of common stock for which a registration statement filed on Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) is effective; or
 - (2) Complying with § 230.415(a)(5) and (6).

[59 FR 43466, Aug. 24, 1994, as amended at 64 FR 27894, May 21, 1999; 85 FR 33356, June 1, 2020]

§ 230.487 Effectiveness of registration statements filed by certain unit investment trusts.

- (a)
 - (1) A unit investment trust registered under the Investment Company Act of 1940 that files a registration statement pursuant to the Act in connection with the offering of the securities of a series of the unit investment trust, except the first series of such trust, may designate a date and time for such registration statement to become effective. If the registrant complies with the conditions set forth in paragraph (b) of this section, the registration statement shall become effective in accordance with such designation.
 - (2) The registrant may designate the date and time of effectiveness in the registration statement or in any pre-effective amendment thereto. A pre-effective amendment to a registration statement with respect to which such a designation is properly made shall be deemed to have been filed with the consent of the Commission and shall accordingly be treated as part of the registration statement.
- (b) Availability of effectiveness of a registration statement in accordance with paragraph (a) of this section is conditioned upon compliance with the following:
 - (1) The registrant is not engaged in the business of investing in securities issued by one or more open-end management investment companies;

- (2) The designation provided for in paragraph (a) of this section is set forth on the facing sheet of such registration statement or a pre-effective amendment thereto;
- (3) The registrant identifies one or more previous series of the trust for which the effective date of the registration statement was determined by the Commission or its staff, and makes the following representations:
 - (i) That the portfolio securities deposited in the series with respect to which the registration statement or pre-effective amendment is being filed do not differ materially in type or quality from those deposited in such previous series identified by the registrant; and
 - (ii) That, except to the extent necessary to identify the specific portfolio securities deposited in, and to provide essential financial information for, the series with respect to which the registration statement or pre-effective amendment thereto is being filed, the registration statement or pre-effective amendment thereto does not contain disclosures that differ in any material respect from those contained in the registration statement of such previous series identified by the registrant;
- (4) The registrant represents that it has complied with rule 460 under the Act (17 CFR 230.460);
- (5) The identification and representations provided for in paragraphs (b)(3) and (b)(4) of this section are made on the signature page of the registration statement or a pre-effective amendment thereto; and
- (6) If counsel prepared or reviewed such registration statement or a pre-effective amendment thereto, such counsel shall furnish to the Commission at the time the registration statement or pre-effective amendment thereto is filed a written representation that such registration statement or pre-effective amendment does not contain disclosures which would render such registration statement ineligible to become effective pursuant to paragraph (a) of this section.

(c)

- (1) The Commission may, in the manner and under the circumstances set forth in paragraph (c)(2) of this section, suspend the ability of a unit investment trust to designate the date and time of effectiveness of a series of such trust. Any such suspension, so long as it is in effect, shall apply to any registration statement that has been filed but has not, at the time of such suspension, become effective, and to any registration statement with respect to any series of such trust that may be filed after such suspension. Any suspension shall apply only to the ability to designate the date and time of effectiveness pursuant to paragraph (a) of this section and shall not otherwise affect any registration statement.
- (2) Any suspension pursuant to paragraph (c)(1) of this section shall become effective at such time as the Commission furnishes written notice thereof to the company or the sponsor of the unit investment trust. The notice of such suspension shall be in writing and shall specify the period for which such suspension shall remain in effect. The Commission may issue such suspension if it appears to the Commission that any registration statement containing a designation pursuant to this section is incomplete or inaccurate in any material respect, whether or not such registration statement has become effective, or that the registrant has not complied with the conditions of this section. Following such action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for a hearing is included in the petition.

- (d) When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted until notice of acceptance has been received from the Commission.

[47 FR 20294, May 12, 1982, as amended at 58 FR 14858, Mar. 18, 1993; 59 FR 43467, Aug. 24, 1994; 64 FR 27894, May 21, 1999]

§ 230.488 Effective date of registration statements relating to securities to be issued in certain business combination transactions.

- (a) A registration statement filed on Form N-14 by a registered open-end management investment company for the purpose of registering securities to be issued in an exchange offer or other business combination transaction pursuant to Rule 145 under the Securities Act of 1933 (15 U.S.C. 77a et seq.) shall become effective on the thirtieth day after the date upon which it is filed with the Commission, or such later date designated by the registrant on the facing sheet of the registration statement, which date shall be not later than fifty days after the date on which the registration statement is filed, unless the Commission having due regard to the public interest and the protection of investors declares such amendment effective on an earlier date, provided the following conditions are met:
 - (1) Any prospectus filed as a part of the registration statement does not include disclosure relating to any other proposal to be acted on at a meeting of the shareholders of either company other than proposals related to an exchange offer, or a business combination transaction pursuant to Rule 145(a), and any other proposal relating to:
 - (i) Uncontested election of directors,
 - (ii) Ratification of the selection of accountants,
 - (iii) The continuation of a current advisory contract,
 - (iv) Increases in the number or amount of shares authorized to be issued by the registrant; and
 - (v) Continuation of any current contract relating to the distribution of shares issued by the registrant; and
 - (2) The registration statement recites on the facing sheet that the registrant proposes that the filing become effective pursuant to this rule.
- (b) No registration statement shall become effective pursuant to paragraph (a) of this section if, prior to the effective date of the registration statement, it should appear to the Commission that the registration statement may be incomplete or inaccurate in any material respect and the Commission furnishes to the registrant written notice that the effective date is to be suspended. Following such action by the Commission, the registrant may file with the Commission at any time a petition for review of the suspension. The Commission will order a hearing on the matter if a request for such a hearing is included in the petition. If the Commission has suspended the effective date of the registration statement, it shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.
- (c) When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted until notice of acceptance has been received from the Commission.

[50 FR 48383, Nov. 25, 1985, as amended at 58 FR 14858, Mar. 18, 1993; 59 FR 67761, Dec. 30, 1994]

§ 230.489 Filing of form by foreign banks and insurance companies and certain of their holding companies and finance subsidiaries.

- (a) The following foreign issuers shall file Form F-N [17 CFR 239.43] under the Act appointing an agent for service of process when filing a registration statement under the Act:

- (1) A foreign issuer that is a foreign bank or foreign insurance company excepted from the definition of investment company by rule 3a-6 (17 CFR 270.3a-6) under the Investment Company Act of 1940 (the "1940 Act");
 - (2) A foreign issuer that is a finance subsidiary of a foreign bank or foreign insurance company, as those terms are defined in rule 3a-6 under the 1940 Act, if the finance subsidiary is excepted from the definition of investment company by rule 3a-5 [17 CFR 270.3a-5] under the 1940 Act; or
 - (3) A foreign issuer that is excepted from the definition of investment company by rule 3a-1 (17 CFR 270.3a-1) under the 1940 Act because some or all of its majority-owned subsidiaries are foreign banks or insurance companies excepted from the definition of investment company by rule 3a-6 under the 1940 Act.
- (b) The requirements of paragraph (a) of this section shall not apply to:
- (1) A foreign issuer that has filed Form F-X (17 CFR 239.42) under the Securities Act of 1933 with respect to the securities being offered; and
 - (2) A foreign issuer filing a registration statement relating to debt securities or non-voting preferred stock that has on file with the Commission a currently accurate Form N-6C9 (17 CFR 274.304, rescinded) under the 1940 Act.
- (c) Six copies of Form F-N, one of which shall be manually signed, shall be filed with the Commission at its principal office.

[56 FR 56299, Nov. 4, 1991]

REGISTRATION BY FOREIGN GOVERNMENTS OR POLITICAL SUBDIVISIONS THEREOF

Source: Sections 230.490 through 230.494 appear at 12 FR 4076, June 24, 1947, unless otherwise noted.

§ 230.490 Information to be furnished under paragraph (3) of Schedule B.

Any issuer filing a registration statement pursuant to Schedule B of the act need not furnish the detailed information specified in paragraph (3) as to issues of outstanding funded debt the aggregate amount of which outstanding is less than 5 percent of the total funded debt outstanding and to be created by the security to be offered, provided the amount thereof is included in the statement of the total amount of funded debt outstanding and a statement is made as to the title, amount outstanding, rate of interest, and date of maturity of each such issue.

§ 230.491 Information to be furnished under paragraph (6) of Schedule B.

Any foreign government filing a registration statement pursuant to Schedule B of the act need state, in furnishing the information required by paragraph (6), the names and addresses only of principal underwriters, namely, underwriters in privity of contract with the registrant, provided they are designated as principal underwriters and a brief statement is made as to the discounts and commissions to be received by sub-underwriters or dealers.

[84 FR 12721, Apr. 2, 2019]

§ 230.492 Omissions from prospectuses.

In the case of a security for which a registration statement conforming to Schedule B is in effect, the following information, contained in the registration statement, may be omitted from any prospectus: Information in answer to paragraph (3) of the Schedule with respect to the amortization and retirement provisions for debt not being registered, and with respect to the provisions for the substitution of security for such debt; the addresses of underwriters in answer to paragraph (6); information in answer to paragraph (11); the addresses of counsel in answer to paragraph (12); the copy of any agreement or agreements required by paragraph (13); the agreement required by paragraph (14); and all information, whether contained in the registration statement itself or in any exhibit thereto, not required by Schedule B.

(Secs. 10(a)(4), 19(a), 48 Stat. 81, 85; sec. 209, 48 Stat. 908; 15 U.S.C. 77(j)(a)(4), 77(s)(a))

[41 FR 12010, Mar. 23, 1976]

§ 230.493 Additional Schedule B disclosure and filing requirements.

- (a) The copy of the opinion or opinions of counsel required by paragraph (14) of Schedule B shall be filed either as a part of the registration statement as originally filed, or as an amendment to the registration statement.
- (b) A foreign government or political subdivision of a foreign government must file a registration statement submitted under Schedule B of the Act on the Commission's Electronic Data Gathering and Retrieval System (EDGAR) unless it has obtained a hardship exemption under § 232.201 or § 232.202 of this chapter (Regulation S-T).
- (c) A foreign government or political subdivision must disclose in its Schedule B registration statement:
 - (1) That the Commission maintains an Internet site that contains reports and other information regarding issuers that file electronically with the Commission; and
 - (2) The address for the Commission Internet site (<http://www.sec.gov>). A foreign government or political subdivision filing on EDGAR is further encouraged to give its Internet address, if available.

[67 FR 36699, May 24, 2002]

§ 230.494 Newspaper prospectuses.

- (a) This section shall apply only to newspaper prospectuses relating to securities, as to which a registration statement has become effective, issued by a foreign national government with which the United States maintains diplomatic relations. The term *newspaper prospectus* means an advertisement of securities in newspapers, magazines or other periodicals which are admitted to the mails as second-class matter and which are not distributed by the advertiser. The term does not include reprints, reproductions or detached copies of such advertisements. A newspaper prospectus shall not be deemed a prospectus meeting the requirements of section 10 for the purpose of section 2(10)(a) or 5(b)(2) of the Act.
- (b) All information included in a newspaper prospectus may be expressed in such condensed or summarized form as may be necessary in the light of the circumstances under which newspaper prospectuses are authorized to be used. The information need not follow the order in which the information is set forth in the registration statement or in the full prospectus. No information need be set forth in tabular form.

- (c) The following statement shall be set forth at the head of every newspaper prospectus in conspicuous print:
- These securities, though registered, have not been approved or disapproved by the Securities and Exchange Commission, which does not pass on the merits of any registered securities.
- (d) There shall be set forth at the foot of every newspaper prospectus in conspicuous print a statement to the following effect:
- Further information, particularly financial information, is contained in the registration statement filed with the Commission and in a more complete prospectus which must be furnished to each purchaser and is obtainable from the following persons:
- (Insert names.)
- (e) If the registrant or any of the underwriters knows or has reasonable grounds to believe that it is intended to stabilize the price of any security to facilitate the offering of the registered security, there shall be placed in the newspaper prospectus, in capital letters, the statement required by Item 502(d) of Regulation S-K (§ 229.502(d) of this chapter) to be included in the full prospectus.
- (f) A newspaper prospectus shall contain the information specified in paragraphs (f) (1) to (9) of this section. All other information and documents contained in the registration statement may be omitted. The following information shall be included:
- (1) The name of the borrowing government;
 - (2) A brief description of the securities to be offered;
 - (3) The price at which it is proposed to offer the security to the public in the United States;
 - (4) The purpose and approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds; and if funds for such purposes are to be raised in part from other sources, the amounts and the sources thereof;
 - (5) A brief statement as to the amount of funded and floating debt outstanding and to be created, excluding inter-governmental debt;
 - (6) A condensed or summarized statement of receipt and expenditures for the last three fiscal years for which data are available;
 - (7) A condensed or summarized statement of the balance of international payments for the last three fiscal years for which data are available;
 - (8) If the issuer or its predecessor has defaulted on the principal or interest of any external debt, excluding intergovernmental debt, during the last twenty years, the date, amount and circumstances of such default and the general effect of any succeeding arrangement;
 - (9) Underwriting discounts and commissions per unit and in the aggregate.
- (g) A newspaper prospectus may also include, in condensed, summarized or graphic form, additional information the substance of which is contained in the registration statement. A newspaper prospectus shall not contain any information the substance of which is not set forth in the registration statement.

- (h) All information included in a newspaper prospectus shall be set forth in type at least as large as seven-point modern type: *Provided, however,* That such information shall not be so arranged as to be misleading or obscure the information required to be included in such a prospectus.
- (i) Five copies of every proposed newspaper prospectus, in the size and form in which it is intended to be published shall be filed with the Commission at least three business days before definitive copies thereof are submitted to the newspaper, magazine or other periodical for publication. Within seven days after publication, five additional copies shall be filed in the exact form in which it was published and shall be accompanied by a statement of the date and manner of its publication.

(Interprets or applies sec. 7, 48 Stat. 78, as amended; 15 U.S.C. 77g; secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85, secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 14, 15(d), 23(a), 48 Stat. 892, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 5, 6, 78 Stat. 565-568, 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3-5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 81 Stat. 1494, 1498, 1499, 1500; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78n, 78o(d), 78w(a))

[16 FR 8820 Aug. 31, 1951, as amended at 19 FR 6729, Oct. 20, 1954; 48 FR 19875, May 3, 1983]

§ 230.495 Preparation of registration statement.

- (a) A registration statement on Form N-1A (§ 239.15A and § 274.11A of this chapter), Form N-2 (§ 239.14 and § 274.11a-1 of this chapter), Form N-3 (§ 239.17a and § 274.11b of this chapter), Form N-4 (§ 239.17b and § 274.11c of this chapter), or Form N-6 (§ 239.17c and § 274.11d of this chapter), shall consist of the facing sheet of the applicable form; a prospectus containing the information called for by such form; the information, list of exhibits, undertakings and signatures required to be set forth in such form; financial statements and schedules; exhibits; and other information or documents filed as part of the registration statement; and all documents or information incorporated by reference in the foregoing (whether or not required to be filed).
- (b) All general instructions, instructions to items of the form, and instructions as to financial statements, exhibits, or prospectuses are to be omitted from the registration statement in all cases.
- (c) In the case of a registration statement filed on Form N-1A (§§ 239.15A and 274.11A of this chapter), Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), Form N-3 (§§ 239.17a and 274.11b of this chapter), Form N-4 (§§ 239.17b and 274.11c of this chapter), or Form N-6 (§§ 239.17c and 274.11d of this chapter), Parts A and B shall contain the information called for by each of the items of the applicable Part, except that unless otherwise specified, no reference need be made to inapplicable items, and negative answers to any item may be omitted. Copies of Parts A and B may be filed as part of the registration statement in lieu of furnishing the information in item-and-answer form. Wherever such copies are filed in lieu of information in item-and-answer form, the text of the items of the form is to be omitted from the registration statement, as well as from Parts A and B, except to the extent provided in paragraph (d) of the section.
- (d) In the case of a registration statement filed on Form N-1A (§§ 239.15A and 274.11A of this chapter), Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), Form N-3 (§§ 239.17a and 274.11b of this chapter), Form N-4 (§§ 239.17b and 274.11c of this chapter), or Form N-6 (§§ 239.17c and 274.11d of this chapter), where any item of those forms calls for information not required to be included in Parts A and B (generally Part C of such form), the text of such items, including the numbers and captions thereof, together with the answers thereto, shall be filed with Parts A or B under cover of the facing sheet of the

form as part of the registration statement. However, the text of such items may be omitted, provided the answers are so prepared as to indicate the coverage of the item without the necessity of reference to the text of the item. If any such item is inapplicable, or the answer thereto is in the negative, a statement to that effect shall be made. Any financial statements not required to be included in Parts A and B shall also be filed as part of the registration statement proper, unless incorporated by reference pursuant to § 230.411.

- (e) **Electronic filings.** When ascertaining the date of filing, electronic filers should not presume a registration statement has been accepted until notice of acceptance has been received from the Commission.

(Securities Act of 1933)

[48 FR 37938, Aug. 22, 1983, as amended at 50 FR 26159, June 25, 1985; 57 FR 56834, Dec. 1, 1992; 58 FR 14859, Mar. 18, 1993; 63 FR 13943, Mar. 23, 1998; 64 FR 27894, May 21, 1999; 67 FR 19869, Apr. 23, 2002]

§ 230.496 Contents of prospectus and statement of additional information used after nine months.

In the case of a registration statement filed on Form N-1A (§§ 239.15A and 274.11A of this chapter), Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), Form N-3 (§§ 239.17a and 274.11b of this chapter), Form N-4 (§§ 239.17b and 274.11c of this chapter), or Form N-6 (§§ 239.17c and 274.11d of this chapter), there may be omitted from any prospectus or Statement of Additional Information used more than nine months after the effective date of the registration statement any information previously required to be contained in the prospectus or the Statement of Additional Information insofar as later information covering the same subjects, including the latest available certified financial statements, as of a date not more than 16 months prior to the use of the prospectus or the Statement of Additional Information is contained therein.

Note 1 to § 230.496:

For a discussion of the effectiveness of a registration statement relating to certain discontinued contracts subject to a Commission position as of July 1, 2020, see Investment Company Release No. 33814 (March 11, 2020).

[85 FR 26093, May 1, 2020]

§ 230.497 Filing of investment company prospectuses - number of copies.

- (a) Five copies of every form of prospectus sent or given to any person prior to the effective date of the registration statement that varies from the form or forms of prospectus included in the registration statement filed pursuant to § 230.402(a) shall be filed as part of the registration statement not later than the date that form of prospectus is first sent or given to any person, except that an investment company advertisement under § 230.482 shall be filed under this paragraph (a) (but not as part of the registration statement) unless filed under paragraph (i) of this section.
- (b) Within 5 days after the effective date of a registration statement or the commencement of a public offering after the effective date of a registration statement, whichever occurs later, 10 copies of each form of prospectus used after the effective date in connection with such offering shall be filed with the Commission in the exact form in which it was used.

- (c) For investment companies filing on §§ 239.15A and 274.11A of this chapter (Form N-1A), §§ 239.17a and 274.11b of this chapter (Form N-3), §§ 239.17b and 274.11c of this chapter (Form N-4), or §§ 239.17c and 274.11d of this chapter (Form N-6), within five days after the effective date of a registration statement or the commencement of a public offering after the effective date of a registration statement, whichever occurs later, 10 copies of each form of prospectus and form of Statement of Additional Information used after the effective date in connection with such offering shall be filed with the Commission in the exact form in which it was used. Investment companies filing on Forms N-1A, N-3, N-4, or N-6 must, if applicable pursuant to General Instruction C.3.(g) of Form N-1A, General Instruction C.3.(h) of Form N-3, General Instruction C.3.(h) of Form N-4, or General Instruction C.3.(h) of Form N-6, submit an Interactive Data File (as defined in § 232.11 of this chapter).
- (d) After the effective date of a registration statement no prospectus which purports to comply with section 10 of the Act and which varies from any form of prospectus filed pursuant to paragraph (b) or (c) of this rule shall be used until 10 copies thereof have been filed with, or mailed for filing to, the Commission.
- (e) For investment companies filing on §§ 239.15A and 274.11A of this chapter (Form N-1A), §§ 239.17a and 274.11b of this chapter (Form N-3), §§ 239.17b and 274.11c of this chapter (Form N-4), or §§ 239.17c and 274.11d of this chapter (Form N-6), after the effective date of a registration statement, no prospectus that purports to comply with Section 10 of the Act (15 U.S.C. 77j) or Statement of Additional Information that varies from any form of prospectus or form of Statement of Additional Information filed pursuant to paragraph (c) of this section shall be used until five copies thereof have been filed with, or mailed for filing to the Commission. Investment companies filing on Forms N-1A, N-3, N-4, or N-6 must, if applicable pursuant to General Instruction C.3.(g) of Form N-1A, General Instruction C.3.(h) of Form N-3, General Instruction C.3.(h) of Form N-4, or General Instruction C.3.(h) of Form N-6, submit an Interactive Data File (as defined in § 232.11 of this chapter).
- (f) Every prospectus consisting of a radio or television broadcast shall be reduced in writing. Five copies of every such prospectus shall be filed with the Commission in accordance with the requirements of this section.
- (g) Each copy of a prospectus under this rule shall contain in the upper right hand corner of the cover page the paragraph of this rule under which the filing is made and the file number of the registration statement to which the prospectus relates. In addition, each investment company advertisement deemed to be a section 10(b) prospectus pursuant to § 230.482 of this chapter shall contain in the upper right hand corner of the cover page the legend "Rule 482 ad." The information required by this paragraph may be set forth in longhand, provided it is legible.
- (h) No later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, ten copies of every form of prospectus and Statement of Additional Information, where applicable, that discloses the information previously omitted from the prospectus filed as part of an effective registration statement in reliance upon Rule 430A under the Securities Act (§ 230.430A of this chapter) shall be filed with the Commission in the exact form in which it is used, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.
- (i) An investment company advertisement deemed to be a section 10(b) prospectus pursuant to § 230.482 of this chapter shall be considered to be filed with the Commission upon filing with a national securities association registered under Section 15A of the Securities Exchange Act of 1934 (15 U.S.C. 78o) that has adopted rules providing standards for the investment company advertising practices of its members and has established and implemented procedures to review that advertising.
- (j) In lieu of filing under paragraph (b) or (c) of this section, a registrant may file a certification that:

- (1) The form of prospectus and Statement of Additional Information that would have been filed under paragraph (b) or (c) of this section would not have differed from that contained in the most recent registration statement or amendment, and
- (2) The text of the most recent registration statement or amendment has been filed electronically.
- (k) **Summary prospectus filing requirements** . This paragraph (k), and not the other provisions of this section, shall govern the filing of summary prospectuses under §§ 230.498 and 230.498A. Each definitive form of a summary prospectus under §§ 230.498 and 230.498A shall be filed with the Commission no later than the date that it is first used.
- (l) Except for an investment company advertisement deemed to be a section 10(b) prospectus pursuant to § 230.482, this section shall not apply with respect to prospectuses of a registered closed-end investment company, or a business development company.

[48 FR 37939, Aug. 22, 1983]

Editorial Note: For FEDERAL REGISTER citations affecting § 230.497, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

§ 230.498 Summary Prospectuses for open-end management investment companies.

- (a) **Definitions.** For purposes of this section:
 - (1) **Class** means a class of shares issued by a Fund that has more than one class that represent interests in the same portfolio of securities under § 270.18f-3 of this chapter or under an order exempting the Fund from sections 18(f), 18(g), and 18(i) of the Investment Company Act (15 U.S.C. 80a-18(f), 80a-18(g), and 80a-18(i)).
 - (2) **Exchange-Traded Fund** means a Fund or a Class, the shares of which are traded on a national securities exchange, and that has formed and operates pursuant to an exemptive order granted by the Commission or in reliance on an exemptive rule adopted by the Commission.
 - (3) **Fund** means an open-end management investment company, or any Series of such a company, that has, or is included in, an effective registration statement on Form N-1A (§§ 239.15A and 274.11A of this chapter) and that has a current prospectus that satisfies the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)).
 - (4) **Series** means shares offered by a Fund that represent undivided interests in a portfolio of investments and that are preferred over all other series of shares for assets specifically allocated to that series in accordance with § 270.18f-2(a) of this chapter.
 - (5) **Statement of Additional Information** means the statement of additional information required by Part B of Form N-1A.
 - (6) **Statutory Prospectus** means a prospectus that satisfies the requirements of section 10(a) of the Act.
 - (7) **Summary Prospectus** means the summary prospectus described in paragraph (b) of this section.

(b) **General requirements for Summary Prospectus.** This paragraph describes the requirements for a Fund's Summary Prospectus. A Summary Prospectus that complies with this paragraph (b) will be deemed to be a prospectus that is authorized under section 10(b) of the Act (15 U.S.C. 77j(b)) and section 24(g) of the Investment Company Act (15 U.S.C. 80a-24(g)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

(1) **Cover page or beginning of Summary Prospectus.** Include on the cover page of the Summary Prospectus or at the beginning of the Summary Prospectus:

- (i) The Fund's name and the Class or Classes, if any, to which the Summary Prospectus relates.
- (ii) The exchange ticker symbol of the Fund's shares or, if the Summary Prospectus relates to one or more Classes of the Fund's shares, adjacent to each such Class, the exchange ticker symbol of such Class of the Fund's shares. If the Fund is an Exchange-Traded Fund, also identify the principal U.S. market or markets on which the Fund shares are traded.
- (iii) A statement identifying the document as a "Summary Prospectus."
- (iv) The approximate date of the Summary Prospectus's first use.
- (v) The following legend:

Before you invest, you may want to review the Fund's prospectus, which contains more information about the Fund and its risks. You can find the Fund's prospectus, reports to shareholders, and other information about the Fund online at _____. You can also get this information at no cost by calling _____ or by sending an email request to _____.

(A) The legend must provide a website address, other than the address of the Commission's electronic filing system; toll free (or collect) telephone number; and email address that investors can use to obtain the Statutory Prospectus and other information. The website address must be specific enough to lead investors directly to the Statutory Prospectus and other materials that are required to be accessible under paragraph (e)(1) of this section, rather than to the home page or other section of the website on which the materials are posted. The website could be a central site with prominent links to each document. The legend may indicate, if applicable, that the Statutory Prospectus and other information are available from a financial intermediary (such as a broker-dealer or bank) through which shares of the Fund may be purchased or sold. If a Fund relies on § 270.30e-3 of this chapter to transmit a report, the legend must also include the website address required by § 270.30e-3(c)(1)(iii) of this chapter if different from the website address required by this paragraph (b)(1)(v)(A).

(B) If a Fund incorporates any information by reference into the Summary Prospectus, the legend must identify the type of document (e.g., Statutory Prospectus) from which the information is incorporated and the date of the document. If a Fund incorporates by reference a part of a document, the legend must clearly identify the part by page, paragraph, caption, or otherwise. If information is incorporated from a source other than the Statutory Prospectus, the legend must explain that the incorporated information may be obtained, free of charge, in the same manner as the Statutory Prospectus. A Fund may modify the legend to include a statement to the effect that the Summary Prospectus is intended for use in connection with a defined contribution plan that meets the requirements for qualification under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), a tax-deferred arrangement under section 403(b) or 457 of the Internal

Revenue Code (26 U.S.C. 403(b) or 457), or a variable contract as defined in section 817(d) of the Internal Revenue Code (26 U.S.C. 817(d)), as applicable, and is not intended for use by other investors.

(vi) The Summary Prospectus may provide instructions describing how a shareholder can elect to receive prospectuses or other documents and communications by electronic delivery.

(2) **Contents of the Summary Prospectus.** Except as otherwise provided in this paragraph (b), provide the information required or permitted by Items 2 through 8 of Form N-1A, and only that information, in the order required by the form. A Summary Prospectus may omit the explanation and information required by Instruction 2(c) to Item 4(b)(2) of Form N-1A.

(3) **Incorporation by reference.**

(i) Except as provided by paragraph (b)(3)(ii) of this section, information may not be incorporated by reference into a Summary Prospectus. Information that is incorporated by reference into a Summary Prospectus in accordance with paragraph (b)(3)(ii) of this section need not be sent or given with the Summary Prospectus.

(ii) A Fund may incorporate by reference into a Summary Prospectus any or all of the information contained in the Fund's Statutory Prospectus and Statement of Additional Information, and any information from the Fund's reports to shareholders under § 270.30e-1 that the Fund has incorporated by reference into the Fund's Statutory Prospectus, provided that:

(A) The conditions of paragraphs (b)(1)(v)(B) and (e) of this section are met;

(B) A Fund may not incorporate by reference into a Summary Prospectus information that paragraphs (b)(1) and (2) of this section require to be included in the Summary Prospectus; and

(C) Information that is permitted to be incorporated by reference into the Summary Prospectus may be incorporated by reference into the Summary Prospectus only by reference to the specific document that contains the information, not by reference to another document that incorporates such information by reference.

(iii) For purposes of § 230.159, information is conveyed to a person not later than the time that a Summary Prospectus is received by the person if the information is incorporated by reference into the Summary Prospectus in accordance with paragraph (b)(3)(ii) of this section.

(4) **Multiple Funds and Classes.** A Summary Prospectus may describe only one Fund, but may describe more than one Class of a Fund.

(c) **Transfer of the security.** Any obligation under section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)) to have a Statutory Prospectus precede or accompany the carrying or delivery of a Fund security in an offering registered on Form N-1A is satisfied if:

(1) A Summary Prospectus is sent or given no later than the time of the carrying or delivery of the Fund security;

(2) The Summary Prospectus is not bound together with any materials, except that a Summary Prospectus for a Fund that is available as an investment option in a variable annuity or variable life insurance contract may be bound together with the Statutory Prospectus for the contract (or a summary prospectus for the contract provided under § 230.498A) and Summary Prospectuses and Statutory Prospectuses for other investment options available in the contract, provided that:

- (i) All of the Funds to which the Summary Prospectuses and Statutory Prospectuses that are bound together relate are available to the person to whom such documents are sent or given; and
- (ii) A table of contents identifying each Summary Prospectus, Statutory Prospectus, and summary prospectus under § 230.498A that is bound together, and the page number on which it is found, is included at the beginning or immediately following a cover page of the bound materials;
- (3) The Summary Prospectus that is sent or given satisfies the requirements of paragraph (b) of this section at the time of the carrying or delivery of the Fund security; and
- (4) The conditions set forth in paragraph (e) of this section are satisfied.
- (d) ***Sending communications.*** A communication relating to an offering registered on Form N-1A sent or given after the effective date of a Fund's registration statement (other than a prospectus permitted or required under section 10 of the Act) shall not be deemed a prospectus under section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) if:
 - (1) It is proved that prior to or at the same time with such communication a Summary Prospectus was sent or given to the person to whom the communication was made;
 - (2) The Summary Prospectus is not bound together with any materials, except as permitted by paragraph (c)(2) of this section;
 - (3) The Summary Prospectus that was sent or given satisfies the requirements of paragraph (b) of this section at the time of such communication; and
 - (4) The conditions set forth in paragraph (e) of this section are satisfied.
- (e) ***Availability of Fund's Statutory Prospectus and certain other Fund documents.***
 - (1) The Fund's current Summary Prospectus, Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders under § 270.30e-1 are publicly accessible, free of charge, at the Web site address specified on the cover page or at the beginning of the Summary Prospectus on or before the time that the Summary Prospectus is sent or given and current versions of those documents remain on the Web site through the date that is at least 90 days after:
 - (i) In the case of reliance on paragraph (c) of this section, the date that the Fund security is carried or delivered; or
 - (ii) In the case of reliance on paragraph (d) of this section, the date that the communication is sent or given.
 - (2) The materials that are accessible in accordance with paragraph (e)(1) of this section must be presented on the Web site in a format, or formats, that:
 - (i) Are human-readable and capable of being printed on paper in human-readable format;
 - (ii) Permit persons accessing the Statutory Prospectus or Statement of Additional Information to move directly back and forth between each section heading in a table of contents of such document and the section of the document referenced in that section heading; provided that, in the case of the Statutory Prospectus, the table of contents is either required by § 230.481(c) or contains the same section headings as the table of contents required by § 230.481(c); and
 - (iii) Permit persons accessing the Summary Prospectus to move directly back and forth between:

- (A) Each section of the Summary Prospectus and any section of the Statutory Prospectus and Statement of Additional Information that provides additional detail concerning that section of the Summary Prospectus; or
 - (B) Links located at both the beginning and end of the Summary Prospectus, or that remain continuously visible to persons accessing the Summary Prospectus, and tables of contents of both the Statutory Prospectus and the Statement of Additional Information that meet the requirements of paragraph (e)(2)(ii) of this section.
- (3) Persons accessing the materials specified in paragraph (e)(1) of this section must be able to permanently retain, free of charge, an electronic version of such materials in a format, or formats, that meet each of the requirements of paragraphs (e)(2)(i) and (ii) of this section.
- (4) The conditions set forth in paragraphs (e)(1), (e)(2), and (e)(3) of this section shall be deemed to be met, notwithstanding the fact that the materials specified in paragraph (e)(1) of this section are not available for a time in the manner required by paragraphs (e)(1), (e)(2), and (e)(3) of this section, provided that:
- (i) The Fund has reasonable procedures in place to ensure that the specified materials are available in the manner required by paragraphs (e)(1), (e)(2), and (e)(3) of this section; and
 - (ii) The Fund takes prompt action to ensure that the specified documents become available in the manner required by paragraphs (e)(1), (e)(2), and (e)(3) of this section, as soon as practicable following the earlier of the time at which it knows or reasonably should have known that the documents are not available in the manner required by paragraphs (e)(1), (e)(2), and (e)(3) of this section.
- (f) **Other requirements -**
- (1) **Delivery upon request.** If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund (or a financial intermediary through which shares of the Fund may be purchased or sold) must send, at no cost to the requestor and by U.S. first class mail or other reasonably prompt means, a paper copy of the Fund's Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders to any person requesting such a copy within three business days after receiving a request for a paper copy. If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund (or a financial intermediary through which shares of the Fund may be purchased or sold) must send, at no cost to the requestor and by e-mail, an electronic copy of the Fund's Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders to any person requesting such a copy within three business days after receiving a request for an electronic copy. The requirement to send an electronic copy of a document by e-mail may be satisfied by sending a direct link to the document on the Internet; provided that a current version of the document is directly accessible through the link from the time that the e-mail is sent through the date that is six months after the date that the e-mail is sent and the e-mail explains both how long the link will remain useable and that, if the recipient desires to retain a copy of the document, he or she should access and save the document.
- (2) **Greater prominence.** If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund's Summary Prospectus shall be given greater prominence than any materials that accompany the Fund's Summary Prospectus, a Notice under § 270.30e-3 of this chapter, with the exception of other Summary Prospectuses, Statutory Prospectuses, or a Notice of Internet Availability of Proxy Materials under § 240.14a-16 of this chapter.

- (3) **Convenient for reading and printing.** If paragraph (c) or (d) of this section is relied on with respect to a Fund:
- (i) The materials that are accessible in accordance with paragraph (e)(1) of this section must be presented on the Web site in a format, or formats, that are convenient for both reading online and printing on paper; and
 - (ii) Persons accessing the materials that are accessible in accordance with paragraph (e)(1) of this section must be able to permanently retain, free of charge, an electronic version of such materials in a format, or formats, that are convenient for both reading online and printing on paper.
- (4) **Information in Summary Prospectus must be the same as information in Statutory Prospectus.** If paragraph (c) or (d) of this section is relied on with respect to a Fund, the information provided in response to Items 2 through 8 of Form N-1A in the Fund's Summary Prospectus must be the same as the information provided in response to Items 2 through 8 of Form N-1A in the Fund's Statutory Prospectus except as expressly permitted by paragraph (b)(2) of this section.
- (5) **Compliance with paragraph (f) not a condition to reliance on paragraphs (c) and (d).** Compliance with this paragraph (f) is not a condition to the ability to rely on paragraph (c) or (d) of this section with respect to a Fund, and failure to comply with paragraph (f) does not negate the ability to rely on paragraph (c) or (d).

[74 FR 4585, Jan. 26, 2009, as amended at 75 FR 9081, Feb. 26, 2010; 83 FR 29204, June 22, 2018; 85 FR 26094, May 1, 2020]

§ 230.498A Summary Prospectuses for separate accounts offering variable annuity and variable life insurance contracts.

- (a) **Definitions.** For purposes of this section:

Class means a class of a Contract that varies principally with respect to distribution-related fees and expenses.

Contract means a Variable Annuity Contract or a Variable Life Insurance Contract as defined in this section, respectively.

Depositor means the person primarily responsible for the organization of the Registrant and the person, other than the trustee or custodian, who has continuing functions or responsibilities with respect to the administration of the affairs of the Registrant. "Depositor" includes the sponsoring insurance company that establishes and maintains the Registrant.

Initial Summary Prospectus means the initial summary prospectus described in paragraph (b) of this section.

Investment Option means any portfolio of investments in which a Registrant on Form N-3 invests and which may be selected as an option by the investor.

Portfolio Company means any company in which a Registrant on Form N-4 or Form N-6 invests and which may be selected as an option by the investor.

Portfolio Company Prospectus means the Statutory Prospectus of a Portfolio Company and a summary prospectus of a Portfolio Company permitted by § 230.498.

Registrant means a separate account (as defined in section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) that has an effective registration statement on §§ 239.17a and 274.11b of this chapter (Form N-3), §§ 239.17b and 274.11c of this chapter (Form N-4), or §§ 239.17c and 274.11d of this chapter (Form N-6) and that has a current prospectus that satisfies the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)).

Statement of Additional Information means the statement of additional information required by Part B of Form N-1A, Form N-3, Form N-4, or Form N-6.

Statutory Prospectus means a prospectus that satisfies the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)).

Summary Prospectus refers to both the Initial Summary Prospectus and the Updating Summary Prospectus.

Updating Summary Prospectus means the updating summary prospectus described in paragraph (c) of this section.

Variable Annuity Contract means any accumulation contract or annuity contract, any portion thereof, or any unit of interest or participation therein pursuant to which the value of the contract, either during an accumulation period or after annuitization, or both, may vary with the investment performance of any separate account.

Variable Life Insurance Contract means a life insurance contract that provides for death benefits and cash values that may vary with the investment performance of any separate account.

(b) **General requirements for Initial Summary Prospectus.** An Initial Summary Prospectus that complies with this paragraph (b) will be deemed to be a prospectus that is authorized under section 10(b) of the Act (15 U.S.C. 77j(b)) and section 24(g) of the Investment Company Act (15 U.S.C. 80a-24(g)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

(1) **Scope of Initial Summary Prospectus.** An Initial Summary Prospectus may only describe a single Contract (but may describe more than one Class of the Contract) currently offered by the Registrant under the Statutory Prospectus to which the Initial Summary Prospectus relates.

(2) **Cover page or beginning of Initial Summary Prospectus.** Include on the front cover page or the beginning of the Initial Summary Prospectus:

- (i) The Depositor's name;
- (ii) The name of the Contract, and the Class or Classes if any, to which the Initial Summary Prospectus relates;
- (iii) A statement identifying the document as a "Summary Prospectus for New Investors";
- (iv) The approximate date of the first use of the Initial Summary Prospectus;
- (v) The following legend:

This Summary Prospectus summarizes key features of the [Contract].

Before you invest, you should also review the prospectus for the [Contract], which contains more information about the [Contract's] features, benefits, and risks. You can find this document and other information about the [Contract] online at _____. You can also obtain this information at no cost by calling _____ or by sending an email request to _____.

You may cancel your [Contract] within 10 days of receiving it without paying fees or penalties. In some states, this cancellation period may be longer. Upon cancellation, you will receive either a full refund of the amount you paid with your application or your total contract value. You should review the prospectus, or consult with your investment professional, for additional information about the specific cancellation terms that apply.

Additional information about certain investment products, including [variable annuities/variable life insurance contracts], has been prepared by the Securities and Exchange Commission's staff and is available at *Investor.gov*.

(A) A Registrant may modify the legend so long as the modified legend contains comparable information.

(B) The legend must provide a website address, other than the address of the Commission's electronic filing system; toll-free telephone number; and email address that investors can use to obtain the Statutory Prospectus and other materials, request other information about the Contract, and make investor inquiries. The website address must be specific enough to lead investors directly to the Statutory Prospectus and other materials that are required to be accessible under paragraph (h)(1) of this section, rather than to the home page or other section of the website on which the materials are posted. The website could be a central site with prominent links to each document. The legend may indicate, if applicable, that the Statutory Prospectus and other information are available from a financial intermediary (such as a broker-dealer) through which the Contract may be purchased or sold. If a Fund relies on § 270.30e-3 of this chapter to transmit a report, the legend must also include the website address required by § 270.30e-3(c)(1)(iii) of this chapter if different from the website address required by this paragraph (b)(2)(v)(B).

(C) The paragraph of the legend regarding cancellation of the Contract may be omitted if not applicable. If this paragraph is included in the legend, the paragraph must be presented in a manner reasonably calculated to draw investor attention to that paragraph.

(D) The legend may include instructions describing how a shareholder can elect to receive prospectuses or other documents and communications by electronic delivery.

(3) ***Back cover page or last page of Initial Summary Prospectus.***

(i) If a Registrant incorporates any information by reference into the Summary Prospectus, include a legend identifying the type of document (e.g., Statutory Prospectus) from which the information is incorporated and the date of the document. If a Registrant incorporates by reference a part of a document, the legend must clearly identify the part by page, paragraph, caption, or otherwise. If information is incorporated from a source other than the Statutory Prospectus, the legend must explain that the incorporated information may be obtained, free of charge, in the same manner as the Statutory Prospectus.

(ii) Include on the bottom of the back cover page or the last page of the Initial Summary Prospectus the EDGAR contract identifier for the contract in type size smaller than that generally used in the prospectus (e.g., 8-point modern type).

(4) ***Table of contents.*** An Initial Summary Prospectus may include a table of contents meeting the requirements of § 230.481(c).

- (5) **Contents of Initial Summary Prospectus.** An Initial Summary Prospectus must contain the information required by this paragraph (b)(5) with respect to the applicable registration form, and only the information required by this paragraph (b)(5), in the order provided in paragraphs (b)(5)(i) through (ix) of this section.
- (i) Under the heading "Important Information You Should Consider About the [Contract]," the information required by Item 2 of Form N-3, Item 2 of Form N-4, or Item 2 of Form N-6.
 - (ii) Under the heading "Overview of the [Contract]," the information required by Item 3 of Form N-3, Item 3 of Form N-4, or Item 3 of Form N-6.
 - (iii) Under the heading "Standard Death Benefits," the information required by Item 10(a) of Form N-6.
 - (iv) Under the heading "Benefits Available Under the [Contract]," the information required by Item 11(a) of Form N-3 or Item 10(a) of Form N-4. Under the heading "Other Benefits Available Under the [Contract]," the information required by Item 11(a) of Form N-6.
 - (v) Under the heading "Buying the [Contract]," the information required by Item 12(a) of Form N-3, Item 11(a) of Form N-4, or Item 9(a) through (c) of Form N-6.
 - (vi) Under the heading "How Your [Contract] Can Lapse," the information required by Item 14(a) through (c) of Form N-6.
 - (vii) Under the heading "Making Withdrawals: Accessing the Money in Your [Contract]," the information required by Item 13(a) of Form N-3, Item 12(a) of Form N-4, or Item 12(a) of Form N-6.
 - (viii) Under the heading "Additional Information About Fees," the information required by Item 4 of Form N-3, Item 4 of Form N-4, or Item 4 of Form N-6.
 - (ix) Under the heading "Appendix: [Portfolio Companies] Available Under the Contract," include as an appendix the information required by Item 18 of Form N-3, Item 17 of Form N-4, or Item 18 of Form N-6. Alternatively, an Initial Summary Prospectus for a Contract registered on Form N-3 may include the information required by Item 19 of Form N-3 under the heading "Additional Information About Investment Options Available Under the Contract."

(c) **General requirements for Updating Summary Prospectus.** An Updating Summary Prospectus that complies with this paragraph (c) will be deemed to be a prospectus that is authorized under section 10(b) of the Act (15 U.S.C. 77j(b)) and section 24(g) of the Investment Company Act (15 U.S.C. 80a-24(g)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

- (1) **Use of Updating Summary Prospectus.** A Registrant may only use an Updating Summary Prospectus if the Registrant uses an Initial Summary Prospectus for each currently offered Contract described under the Statutory Prospectus to which the Updating Summary Prospectus relates.
- (2) **Scope of Updating Summary Prospectus.** An Updating Summary Prospectus may describe one or more Contracts (and more than one Class) described under the Statutory Prospectus to which the Updating Summary Prospectus relates.
- (3) **Cover page or beginning of Updating Summary Prospectus.** Include on the front cover page or at the beginning of the Updating Summary Prospectus:
 - (i) The Depositor's name;

- (ii) The name of the Contract(s) and the Class or Classes, if any, to which the Updating Summary Prospectus relates;
- (iii) A statement identifying the document as an "Updating Summary Prospectus";
- (iv) The approximate date of the first use of the Updating Summary Prospectus; and
- (v)

- (A) The following legend, which must meet the requirements of paragraphs (b)(2)(v)(A), (B), and (D) of this section, as applicable:

The prospectus for the [Contract] contains more information about the [Contract], including its features, benefits, and risks. You can find the current prospectus and other information about the [Contract] online at _____. You can also obtain this information at no cost by calling _____ or by sending an email request to _____.

Additional information about certain investment products, including [variable annuities/ variable life insurance contracts], has been prepared by the Securities and Exchange Commission's staff and is available at *Investor.gov*.

- (B) [Reserved]

- (4) **Back cover page or last page of Updating Summary Prospectus.** Include on the bottom of the back cover page or the last page of the Updating Summary Prospectus:

- (i) The legend required by paragraph (b)(3)(i) of this section; and
- (ii) The EDGAR contract identifier(s) for each contract in type size smaller than that generally used in the prospectus (e.g., 8-point modern type).

- (5) **Table of contents.** An Updating Summary Prospectus may include a table of contents meeting the requirements of § 230.481(c).

- (6) **Contents of Updating Summary Prospectus.** An Updating Summary Prospectus must contain the information required by this paragraph (c)(6) with respect to the applicable registration form, in the order provided in paragraphs (c)(6)(i) through (iv) of this section.

- (i) If any changes have been made with respect to the Contract after the date of the most recent Updating Summary Prospectus or Statutory Prospectus that was sent or given to investors with respect to the availability of Investment Options (for Registrants on Form N-3) or Portfolio Companies (for Registrants on Forms N-4 and N-6) under the Contract, or the disclosure that the Registrant included in response to Item 2 (Key Information), Item 3 (Overview of the Contract), Item 4 (Fee Table), Item 11 (Benefits Available Under the Contract), Item 12 (Purchases and Contract Value), or Item 13 (Surrenders and Withdrawals) of Form N-3; Item 2 (Key Information), Item 3 (Overview of the Contract), Item 4 (Fee Table), Item 10 (Benefits Available Under the Contract), Item 11 (Purchases and Contract Value), or Item 12 (Surrenders and Withdrawals) of Form N-4; and Item 2 (Key Information), Item 3 (Overview of the Contract), Item 4 (Fee Table), Item 9 (Premiums), Item 10 (Standard Death Benefits), Item 11 (Other Benefits Available Under the Contract), Item 12 (Surrenders and Withdrawals), or Item 14 (Lapse and Reinstatement) of Form N-6, include the following as applicable, under the heading "Updated Information About Your [Contract]":

- (A) The following legend: "The information in this Updating Summary Prospectus is a summary of certain [Contract] features that have changed since the Updating Summary Prospectus dated [date]. This may not reflect all of the changes that have occurred since you entered into your [Contract]."
 - (B) As applicable, provide a concise description of each change specified in paragraph (c)(6)(i) of this section. Provide enough detail to allow investors to understand the change and how it will affect investors, including indicating whether the change only applies to certain Contracts described in the Updating Summary Prospectus.
 - (ii) In addition to the changes specified in paragraph (c)(6)(i) of this section, a Registrant may provide a concise description of any other information relevant to the Contract within the time period that paragraph (c)(6)(i) of this section specifies, under the heading "Updated Information About Your [Contract]." Any additional information included pursuant to this paragraph (c)(6)(ii) should not, by its nature, quantity, or manner of presentation, obscure or impede understanding of the information that paragraph (c)(6)(i) of this section requires.
 - (iii) Under the heading "Important Information You Should Consider About the [Contract]," provide the information required by Item 2 of Form N-3, Item 2 of Form N-4, or Item 2 of Form N-6.
 - (iv) Under the heading "Appendix: [Portfolio Companies/Investment Options] Available Under the [Contract]," include as an appendix the information required by Item 18 of Form N-3, Item 17 of Form N-4, or Item 18 of Form N-6. Alternatively, an Updating Summary Prospectus for a Contract registered on Form N-3 may include, under the heading "Additional Information About [Investment Options] Available Under the [Contract]," the information required by Item 19 of Form N-3.
- (d) ***Incorporation by reference into a Summary Prospectus.***
- (1) Except as provided by paragraph (d)(2) of this section, information may not be incorporated by reference into a Summary Prospectus. Information that is incorporated by reference into a Summary Prospectus in accordance with paragraph (d)(2) of this section need not be sent or given with the Summary Prospectus.
 - (2) A Registrant may incorporate by reference into a Summary Prospectus any or all of the information contained in the Registrant's Statutory Prospectus and Statement of Additional Information, and any information from the Registrant's reports under § 270.30e-1 of this chapter that the Registrant has incorporated by reference into the Registrant's Statutory Prospectus, provided that:
 - (i) The conditions of paragraphs (b)(2)(v)(B), (c)(3)(v), and (h) of this section are met;
 - (ii) A Registrant may not incorporate by reference into a Summary Prospectus information that paragraphs (b) and (c) of this section require to be included in an Initial Summary Prospectus or Updating Summary Prospectus, respectively; and
 - (iii) Information that is permitted to be incorporated by reference into the Summary Prospectus may be incorporated by reference into the Summary Prospectus only by reference to the specific document that contains the information, not by reference to another document that incorporates such information by reference.
 - (3) For purposes of § 230.159 of this chapter, information is conveyed to a person not later than the time that a Summary Prospectus is received by the person if the information is incorporated by reference into the Summary Prospectus in accordance with paragraph (d)(2) of this section.

- (e) **Terms used in the Summary Prospectus.** Define special terms used in the Initial Summary Prospectus and Updating Summary Prospectus using any presentation style that clearly conveys their meaning to investors, such as the use of a glossary or list of definitions.
- (f) **Transfer of the Contract security.** Any obligation under section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)) to have a Statutory Prospectus precede or accompany the carrying or delivery of a Contract security in an offering registered on Form N-3, Form N-4, or Form N-6 is satisfied if:
 - (1) A Summary Prospectus is sent or given no later than the time of the carrying or delivery of the Contract security (an Initial Summary Prospectus in the case of a purchase of a new Contract, or an Updating Summary Prospectus in the case of additional purchase payments in an existing Contract);
 - (2) The Summary Prospectus is not bound together with any materials except Portfolio Company Prospectuses for Portfolio Companies available as investment options under the Contract, provided that:
 - (i) All of the Portfolio Companies are available as investment options to the person to whom such documents are sent or given; and
 - (ii) A table of contents identifying each Portfolio Company Prospectus that is bound together, and the page number on which each document is found, is included at the beginning or immediately following a cover page of the bound materials.
 - (3) The Summary Prospectus that is sent or given satisfies the requirements of paragraph (b) or (c) of this section, as applicable, at the time of the carrying or delivery of the Contract security; and
 - (4) The conditions set forth in paragraph (h) of this section are satisfied.
- (g) **Sending communications.** A communication relating to an offering registered on Form N-3, Form N-4, or Form N-6 sent or given after the effective date of a Contract's registration statement (other than a prospectus permitted or required under section 10 of the Act) shall not be deemed a prospectus under section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) if:
 - (1) It is proved that prior to or at the same time with such communication a Summary Prospectus was sent or given to the person to whom the communication was made;
 - (2) The Summary Prospectus is not bound together with any materials, except as permitted by paragraph (f)(2) of this section;
 - (3) The Summary Prospectus that was sent or given satisfies the requirements of paragraph (b) or (c) of this section, as applicable, at the time of such communication; and
 - (4) The conditions set forth in paragraph (h) of this section are satisfied.
- (h) **Availability of the Statutory Prospectus and certain other documents.**
 - (1) The current Initial Summary Prospectus, Updating Summary Prospectus, Statutory Prospectus, Statement of Additional Information, and in the case of a Registrant on Form N-3, the Registrant's most recent annual and semi-annual reports to shareholders under § 270.30e-1, are publicly accessible, free of charge, at the website address specified on the cover page or beginning of the Summary Prospectuses, on or before the time that the Summary Prospectuses are sent or given and current versions of those documents remain on the website through the date that is at least 90 days after:

- (i) In the case of reliance on paragraph (f) of this section, the date that the Contract security is carried or delivered; or
 - (ii) In the case of reliance on paragraph (g) of this section, the date that the communication is sent or given.
- (2) The materials that are accessible in accordance with paragraph (h)(1) of this section must be presented on the website in a format, or formats, that:
- (i) Are human-readable and capable of being printed on paper in human-readable format;
 - (ii) Permit persons accessing the Statutory Prospectus or Statement of Additional Information for the Contract to move directly back and forth between each section heading in a table of contents of such document and the section of the document referenced in that section heading; provided that, in the case of the Statutory Prospectus, the table of contents is either required by § 230.481(c) or contains the same section headings as the table of contents required by § 230.481(c); and
 - (iii) Permit persons accessing a Summary Prospectus to move directly back and forth between:
 - (A) Each section of the Summary Prospectus and any section of the Statutory Prospectus and Contract Statement of Additional Information that provides additional detail concerning that section of the Summary Prospectus; or
 - (B) Links located at both the beginning and end of the Summary Prospectus, or that remain continuously visible to persons accessing the Summary Prospectus, and tables of contents of both the Statutory Prospectus and the Contract Statement of Additional Information that meet the requirements of paragraph (h)(2)(ii) of this section.
 - (iv) Permit persons accessing the Summary Prospectus to view the definition of each special term used in the Summary Prospectus (as required by paragraph (e) of this section) upon command (e.g., by moving or “hovering” the computer's pointer or mouse over the term, or selecting the term on a mobile device); or permits persons accessing the Contract Summary Prospectus to move directly back and forth between each special term and the corresponding entry in any glossary or list of definitions in the Contract Summary Prospectus (as described in paragraph (e) of this section).
- (3) Persons accessing the materials specified in paragraph (h)(1) of this section must be able to permanently retain, free of charge, an electronic version of such materials in a format, or formats, that meet each of the requirements of paragraphs (h)(2)(i) and (ii) of this section.
- (4) The conditions set forth in paragraphs (h)(1) through (3) of this section shall be deemed to be met, notwithstanding the fact that the materials specified in paragraph (h)(1) of this section are not available for a time in the manner required by paragraphs (h)(1) through (3) of this section, provided that:
- (i) The Registrant has reasonable procedures in place to ensure that the specified materials are available in the manner required by paragraphs (h)(1) through (3) of this section; and
 - (ii) The Registrant takes prompt action to ensure that the specified documents become available in the manner required by paragraphs (h) through (3) of this section, as soon as practicable following the earlier of the time at which it knows or reasonably should have known that the documents are not available in the manner required by paragraphs (h)(1) through (3) of this section.

(i) **Other requirements -**

- (1) **Delivery upon request.** If paragraph (f) or (g) of this section is relied on with respect to a Contract, the Registrant (or a financial intermediary through which the Contract may be purchased) must send, at no cost to the requestor and by U.S. first class mail or other reasonably prompt means, a paper copy of the Contract Statutory Prospectus, Contract Statement of Additional Information, and in the case of a Registrant on Form N-3, the Registrant's most recent annual and semi-annual reports to shareholders under § 270.30e-1 of this chapter, to any person requesting such a copy within three business days after receiving a request for a paper copy. If paragraph (f) or (g) of this section is relied on with respect to a Contract, the Registrant (or a financial intermediary through which Contract may be purchased) must send, at no cost to the requestor, and by email, an electronic copy of any of the documents listed in this paragraph (i)(1) to any person requesting a copy of such document within three business days after receiving a request for an electronic copy. The requirement to send an electronic copy of a document may be satisfied by sending a direct link to the online document; provided that a current version of the document is directly accessible through the link from the time that the email is sent through the date that is six months after the date that the email is sent and the email explains both how long the link will remain useable and that, if the recipient desires to retain a copy of the document, he or she should access and save the document.
- (2) **Greater prominence.** If paragraph (f) or (g) of this section is relied on with respect to a Contract, the Summary Prospectus shall be given greater prominence than any materials that accompany the Summary Prospectus.
- (3) **Convenient for reading and printing.** If paragraph (f) or (g) of this section is relied on with respect to a Contract:
 - (i) The materials that are accessible in accordance with paragraph (h)(1) of this section must be presented on the website in a format, or formats, that are convenient for both reading online and printing on paper; and
 - (ii) Persons accessing the materials that are accessible in accordance with paragraph (h)(1) of this section must be able to permanently retain, free of charge, an electronic version of such materials in a format, or formats, that are convenient for both reading online and printing on paper.
- (4) **Website addresses.** If paragraph (f) or (g) of this section is relied on with respect to a Contract, any website address that is included in an electronic version of the Summary Prospectus must include an active hyperlink or provide another means of facilitating access through equivalent methods or technologies that lead directly to the relevant website address. This paragraph (i)(4) does not apply to electronic versions of a Summary Prospectus that are filed on the EDGAR system.
- (5) **Compliance with this paragraph (i) not a condition to reliance on paragraph (f) or (g) of this section.** Compliance with this paragraph (i) is not a condition to the ability to rely on paragraph (f) or (g) of this section with respect to a Contract, and failure to comply with this paragraph (i) does not negate the ability to rely on paragraph (f) or (g) of this section.

(j) **Portfolio Company Prospectuses -**

- (1) **Transfer of the Portfolio Company security.** Any obligation under section 5(b)(2) of the Act to have a Statutory Prospectus precede or accompany the carrying or delivery of a Portfolio Company security is satisfied if, and information contained in the documents referenced in paragraph (j)(1)(ii) of this section is conveyed for purposes of § 230.159 when:

- (i) An Initial Summary Prospectus is used for each currently offered Contract described under the related registration statement;
 - (ii) A summary prospectus is used for the Portfolio Company (if the Portfolio Company is registered on Form N-1A); and
 - (iii) The current summary prospectus, Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders under § 270.30e-1 of this chapter for the Portfolio Company are publicly accessible, free of charge, at the same website address referenced in paragraph (h)(1) of this section, and are accessible under the conditions set forth in paragraphs (h)(1), (h)(2)(i) and (ii), and (h)(3) and (4) of this section, with respect to the availability of documents relating to the Contract.
- (2) **Communications.** Any communication relating to a Portfolio Company (other than a prospectus permitted or required under section 10 of the Act) shall not be deemed a prospectus under section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) if the conditions set forth in paragraph (j)(1) of this section are satisfied.
- (3) **Other requirements.** The materials referenced in paragraph (j)(1)(iii) of this section must be delivered upon request, presented, and able to be retained under the conditions set forth in paragraphs (i)(1) and (3) of this section. Compliance with this paragraph (j)(3) is not a condition to the ability to rely on paragraph (j)(1) or (2) of this section, and failure to comply with this paragraph (j)(3) does not negate the ability to rely on paragraph (j)(1) or (2) of this section.

[85 FR 26094, 26099, May 1, 2020]

REGULATION D - RULES GOVERNING THE LIMITED OFFER AND SALE OF SECURITIES WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933

Source: Sections 230.501 through 230.506 appear at 47 FR 11262, Mar. 16, 1982, unless otherwise noted.

§ 230.500 Use of Regulation D.

Users of Regulation D (§§ 230.500 *et seq.*) should note the following:

- (a) Regulation D relates to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the Act) (15 U.S.C. 77a *et seq.*, as amended). Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required under Regulation D, in light of the circumstances under which it is furnished, not misleading.
- (b) Nothing in Regulation D obviates the need to comply with any applicable state law relating to the offer and sale of securities. Regulation D is intended to be a basic element in a uniform system of federal-state limited offering exemptions consistent with the provisions of sections 18 and 19(c) of the Act (15 U.S.C. 77r and 77(s)(c)). In those states that have adopted Regulation D, or any version of Regulation D, special attention should be directed to the applicable state laws and regulations, including those relating to

registration of persons who receive remuneration in connection with the offer and sale of securities, to disqualification of issuers and other persons associated with offerings based on state administrative orders or judgments, and to requirements for filings of notices of sales.

- (c) Attempted compliance with any rule in Regulation D does not act as an exclusive election; the issuer can also claim the availability of any other applicable exemption. For instance, an issuer's failure to satisfy all the terms and conditions of rule 506(b) (§ 230.506(b)) shall not raise any presumption that the exemption provided by section 4(a)(2) of the Act (15 U.S.C. 77d(2)) is not available.
- (d) Regulation D is available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resales of the issuer's securities. Regulation D provides an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.
- (e) Regulation D may be used for business combinations that involve sales by virtue of rule 145(a) (§ 230.145(a)) or otherwise.
- (f) In view of the objectives of Regulation D and the policies underlying the Act, Regulation D is not available to any issuer for any transaction or chain of transactions that, although in technical compliance with Regulation D, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.
- (g) Securities offered and sold outside the United States in accordance with §§ 230.901 through 230.905 (Regulation S) need not be registered under the Act. See Release No. 33-6863. Regulation S may be relied on for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. See § 230.152(b)(2). Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this paragraph (g), however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States. See §§ 230.502(a) and 230.152.

[77 FR 18684, Mar. 28, 2012, as amended at 78 FR 44804, July 24, 2013; 86 FR 3597, Jan. 14, 2021]

§ 230.501 Definitions and terms used in Regulation D.

As used in Regulation D (§ 230.500 *et seq.* of this chapter), the following terms shall have the meaning indicated:

- (a) **Accredited investor.** *Accredited investor* shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:
 - (1) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any investment adviser registered pursuant to section 203 of the Investment Advisers Act of 1940 or registered pursuant to the laws of a state; any investment adviser relying on the exemption from registering with the Commission under section 203(l) or (m) of the Investment Advisers Act of 1940; any insurance company as defined in section 2(a)(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of

1958; any Rural Business Investment Company as defined in section 384A of the Consolidated Farm and Rural Development Act; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

- (2) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;
- (3) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, partnership, or limited liability company, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000;
- (4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;
- (5) Any natural person whose individual net worth, or joint net worth with that person's spouse or spousal equivalent, exceeds \$1,000,000;
 - (i) Except as provided in paragraph (a)(5)(ii) of this section, for purposes of calculating net worth under this paragraph (a)(5):
 - (A) The person's primary residence shall not be included as an asset;
 - (B) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and
 - (C) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability;
 - (ii) Paragraph (a)(5)(i) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:
 - (A) Such right was held by the person on July 20, 2010;
 - (B) The person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and
 - (C) The person held securities of the same issuer, other than such right, on July 20, 2010.

Note 1 to paragraph (a)(5):

For the purposes of calculating joint net worth in this paragraph (a)(5): Joint net worth can be the aggregate net worth of the investor and spouse or spousal equivalent; assets need not be held jointly to be included in the calculation. Reliance on the joint net worth standard of this paragraph (a)(5) does not require that the securities be purchased jointly.

- (6) Any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse or spousal equivalent in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;
- (7) Any trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in § 230.506(b)(2)(ii);
- (8) Any entity in which all of the equity owners are accredited investors;

Note 1 to paragraph (a)(8):

It is permissible to look through various forms of equity ownership to natural persons in determining the accredited investor status of entities under this paragraph (a)(8). If those natural persons are themselves accredited investors, and if all other equity owners of the entity seeking accredited investor status are accredited investors, then this paragraph (a)(8) may be available.

- (9) Any entity, of a type not listed in paragraph (a)(1), (2), (3), (7), or (8), not formed for the specific purpose of acquiring the securities offered, owning investments in excess of \$5,000,000;

Note 1 to paragraph (a)(9):

For the purposes this paragraph (a)(9), "investments" is defined in rule 2a51-1(b) under the Investment Company Act of 1940 (17 CFR 270.2a51-1(b)).

- (10) Any natural person holding in good standing one or more professional certifications or designations or credentials from an accredited educational institution that the Commission has designated as qualifying an individual for accredited investor status. In determining whether to designate a professional certification or designation or credential from an accredited educational institution for purposes of this paragraph (a)(10), the Commission will consider, among others, the following attributes:
 - (i) The certification, designation, or credential arises out of an examination or series of examinations administered by a self-regulatory organization or other industry body or is issued by an accredited educational institution;
 - (ii) The examination or series of examinations is designed to reliably and validly demonstrate an individual's comprehension and sophistication in the areas of securities and investing;
 - (iii) Persons obtaining such certification, designation, or credential can reasonably be expected to have sufficient knowledge and experience in financial and business matters to evaluate the merits and risks of a prospective investment; and

- (iv) An indication that an individual holds the certification or designation is either made publicly available by the relevant self-regulatory organization or other industry body or is otherwise independently verifiable;

Note 1 to paragraph (a)(10):

The Commission will designate professional certifications or designations or credentials for purposes of this paragraph (a)(10), by order, after notice and an opportunity for public comment. The professional certifications or designations or credentials currently recognized by the Commission as satisfying the above criteria will be posted on the Commission's website.

- (11) Any natural person who is a "knowledgeable employee," as defined in rule 3c-5(a)(4) under the Investment Company Act of 1940 (17 CFR 270.3c-5(a)(4)), of the issuer of the securities being offered or sold where the issuer would be an investment company, as defined in section 3 of such act, but for the exclusion provided by either section 3(c)(1) or section 3(c)(7) of such act;
- (12) Any "family office," as defined in rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)-1):
 - (i) With assets under management in excess of \$5,000,000,
 - (ii) That is not formed for the specific purpose of acquiring the securities offered, and
 - (iii) Whose prospective investment is directed by a person who has such knowledge and experience in financial and business matters that such family office is capable of evaluating the merits and risks of the prospective investment; and
- (13) Any "family client," as defined in rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)-1)), of a family office meeting the requirements in paragraph (a)(12) of this section and whose prospective investment in the issuer is directed by such family office pursuant to paragraph (a)(12)(iii).
- (b) **Affiliate.** An *affiliate* of, or person *affiliated* with, a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.
- (c) **Aggregate offering price.** *Aggregate offering price* shall mean the sum of all cash, services, property, notes, cancellation of debt, or other consideration to be received by an issuer for issuance of its securities. Where securities are being offered for both cash and non-cash consideration, the aggregate offering price shall be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency shall be translated into United States currency at the currency exchange rate in effect at a reasonable time prior to or on the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price shall be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Such valuations of non-cash consideration must be reasonable at the time made.
- (d) **Business combination.** *Business combination* shall mean any transaction of the type specified in paragraph (a) of Rule 145 under the Act (17 CFR 230.145) and any transaction involving the acquisition by one issuer, in exchange for all or a part of its own or its parent's stock, of stock of another issuer if, immediately after the acquisition, the acquiring issuer has control of the other issuer (whether or not it had control before the acquisition).

- (e) **Calculation of number of purchasers.** For purposes of calculating the number of purchasers under § 230.506(b) only, the following shall apply:
- (1) The following purchasers shall be excluded:
 - (i) Any relative, spouse or relative of the spouse of a purchaser who has the same primary residence as the purchaser;
 - (ii) Any trust or estate in which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(iii) of this section collectively have more than 50 percent of the beneficial interest (excluding contingent interests);
 - (iii) Any corporation or other organization of which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(ii) of this section collectively are beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests; and
 - (iv) Any accredited investor.
 - (2) A corporation, partnership or other entity shall be counted as one purchaser. If, however, that entity is organized for the specific purpose of acquiring the securities offered and is not an accredited investor under paragraph (a)(8) of this section, then each beneficial owner of equity securities or equity interests in the entity shall count as a separate purchaser for all provisions of Regulation D (§§ 230.501-230.508), except to the extent provided in paragraph (e)(1) of this section.
 - (3) A non-contributory employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 shall be counted as one purchaser where the trustee makes all investment decisions for the plan.

Note:

The issuer must satisfy all the other provisions of Regulation D for all purchasers whether or not they are included in calculating the number of purchasers. Clients of an investment adviser or customers of a broker or dealer shall be considered the "purchasers" under Regulation D regardless of the amount of discretion given to the investment adviser or broker or dealer to act on behalf of the client or customer.

- (f) **Executive officer.** *Executive officer* shall mean the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the issuer. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform such policy making functions for the issuer.
- (g) **Final order.** *Final order* shall mean a written directive or declaratory statement issued by a federal or state agency described in § 230.506(d)(1)(iii) under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that federal or state agency.
- (h) **Issuer.** The definition of the term *issuer* in section 2(a)(4) of the Act shall apply, except that in the case of a proceeding under the Federal Bankruptcy Code (11 U.S.C. 101 et seq.), the trustee or debtor in possession shall be considered the issuer in an offering under a plan or reorganization, if the securities are to be issued under the plan.
- (i) **Purchaser representative.** *Purchaser representative* shall mean any person who satisfies all of the following conditions or who the issuer reasonably believes satisfies all of the following conditions:

- (1) Is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer, except where the purchaser is:
 - (i) A relative of the purchaser representative by blood, marriage or adoption and not more remote than a first cousin;
 - (ii) A trust or estate in which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(iii) of this section collectively have more than 50 percent of the beneficial interest (excluding contingent interest) or of which the purchaser representative serves as trustee, executor, or in any similar capacity; or
 - (iii) A corporation or other organization of which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(ii) of this section collectively are the beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests;
 - (2) Has such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment;
 - (3) Is acknowledged by the purchaser in writing, during the course of the transaction, to be his purchaser representative in connection with evaluating the merits and risks of the prospective investment; and
 - (4) Discloses to the purchaser in writing a reasonable time prior to the sale of securities to that purchaser any material relationship between himself or his affiliates and the issuer or its affiliates that then exists, that is mutually understood to be contemplated, or that has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.
- (j) **Spousal equivalent.** The term *spousal equivalent* shall mean a cohabitant occupying a relationship generally equivalent to that of a spouse.

Note 1 to § 230.501:

A person acting as a purchaser representative should consider the applicability of the registration and antifraud provisions relating to brokers and dealers under the Securities Exchange Act of 1934 (*Exchange Act*) (15 U.S.C. 78a *et seq.*, as amended) and relating to investment advisers under the Investment Advisers Act of 1940.

Note 2 to § 230.501:

The acknowledgment required by paragraph (h)(3) and the disclosure required by paragraph (h)(4) of this section must be made with specific reference to each prospective investment. Advance blanket acknowledgment, such as for *all securities transactions* or *all private placements*, is not sufficient.

Note 3 to § 230.501:

Disclosure of any material relationships between the purchaser representative or his affiliates and the issuer or its affiliates does not relieve the purchaser representative of his obligation to act in the interest of the purchaser.

[47 FR 11262, Mar. 16, 1982, as amended at 53 FR 7868, Mar. 10, 1988; 54 FR 11372, Mar. 20, 1989; 76 FR 81806, Dec. 29, 2011; 77 FR 18685, Mar. 28, 2012; 78 FR 44770, 44804, July 24, 2013; 81 FR 83553, Nov. 21, 2016; 85 FR 64277, Oct. 9, 2020]

§ 230.502 General conditions to be met.

The following conditions shall be applicable to offers and sales made under Regulation D (§ 230.500 et seq. of this chapter):

(a) **Integration.** To determine whether offers and sales should be integrated, see § 230.152.

(b) **Information requirements -**

(1) **When information must be furnished.** If the issuer sells securities under § 230.506(b) to any purchaser that is not an accredited investor, the issuer shall furnish the information specified in paragraph (b)(2) of this section to such purchaser a reasonable time prior to sale. The issuer is not required to furnish the specified information to purchasers when it sells securities under § 230.504, or to any accredited investor.

Note:

When an issuer provides information to investors pursuant to paragraph (b)(1), it should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.

(2) **Type of information to be furnished.**

(i) If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser, to the extent material to an understanding of the issuer, its business and the securities being offered:

(A) **Non-financial statement information.** If the issuer is eligible to use Regulation A (§ 230.251-263), the same kind of information as would be required in Part II of Form 1-A (§ 239.90 of this chapter). If the issuer is not eligible to use Regulation A, the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.

(B) **Financial statement information -**

(1) **Offerings up to \$20,000,000.** The financial statement information required by paragraph (b) of Part F/S of Form 1-A. Such financial statement information must be prepared in accordance with generally accepted accounting principles in the United States (US GAAP). If the issuer is a foreign private issuer, such financial statements must be prepared in accordance with either US GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). If the financial statements comply with IFRS, such compliance must be

explicitly and unreservedly stated in the notes to the financial statements and if the financial statements are audited, the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB.

- (2) **Offerings over \$20,000,000.** The financial statement information required by paragraph (c) of Part F/S of Form 1-A (referenced in § 239.90 of this chapter). If the issuer is a foreign private issuer, such financial statements must be prepared in accordance with either US GAAP or IFRS as issued by the IASB. If the financial statements comply with IFRS, such compliance must be explicitly and unreservedly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB.
- (C) If the issuer is a foreign private issuer eligible to use Form 20-F (§ 249.220f of this chapter), the issuer shall disclose the same kind of information required to be included in a registration statement filed under the Act on the form that the issuer would be entitled to use. The financial statements need be certified only to the extent required by paragraph (b)(2)(i)(B) (1), (2) or (3) of this section, as appropriate.
- (ii) If the issuer is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser the information specified in paragraph (b)(2)(ii)(A) or (B) of this section, and in either event the information specified in paragraph (b)(2)(ii)(C) of this section:
 - (A) The issuer's annual report to shareholders for the most recent fiscal year, if such annual report meets the requirements of Rules 14a-3 or 14c-3 under the Exchange Act (§ 240.14a-3 or § 240.14c-3 of this chapter), the definitive proxy statement filed in connection with that annual report, and if requested by the purchaser in writing, a copy of the issuer's most recent Form 10-K (§ 249.310 of this chapter) under the Exchange Act.
 - (B) The information contained in an annual report on Form 10-K (§ 249.310 of this chapter) under the Exchange Act or in a registration statement on Form S-1 (§ 239.11 of this chapter) or S-11 (§ 239.18 of this chapter) under the Act or on Form 10 (§ 249.210 of this chapter) under the Exchange Act, whichever filing is the most recent required to be filed.
 - (C) The information contained in any reports or documents required to be filed by the issuer under sections 13(a), 14(a), 14(c), and 15(d) of the Exchange Act since the distribution or filing of the report or registration statement specified in paragraphs (b)(2)(ii)(A) or (B), and a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished.
 - (D) If the issuer is a foreign private issuer, the issuer may provide in lieu of the information specified in paragraph (b)(2)(ii)(A) or (B) of this section, the information contained in its most recent filing on Form 20-F or Form F-1 (§ 239.31 of the chapter).
- (iii) Exhibits required to be filed with the Commission as part of a registration statement or report, other than an annual report to shareholders or parts of that report incorporated by reference in a Form 10-K report, need not be furnished to each purchaser that is not an accredited investor if the contents of material exhibits are identified and such exhibits are made available to a purchaser, upon his or her written request, a reasonable time before his or her purchase.

- (iv) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.506(b), the issuer shall furnish to the purchaser a brief description in writing of any material written information concerning the offering that has been provided by the issuer to any accredited investor but not previously delivered to such unaccredited purchaser. The issuer shall furnish any portion or all of this information to the purchaser, upon his written request a reasonable time prior to his purchase.
 - (v) The issuer shall also make available to each purchaser at a reasonable time prior to his purchase of securities in a transaction under § 230.506(b) the opportunity to ask questions and receive answers concerning the terms and conditions of the offering and to obtain any additional information which the issuer possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of information furnished under paragraph (b)(2) (i) or (ii) of this section.
 - (vi) For business combinations or exchange offers, in addition to information required by Form S-4 (17 CFR 239.25), the issuer shall provide to each purchaser at the time the plan is submitted to security holders, or, with an exchange, during the course of the transaction and prior to sale, written information about any terms or arrangements of the proposed transactions that are materially different from those for all other security holders. For purposes of this subsection, an issuer which is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act may satisfy the requirements of Part I.B. or C. of Form S-4 by compliance with paragraph (b)(2)(i) of this § 230.502.
 - (vii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.506(b), the issuer shall advise the purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of this section. Such disclosure may be contained in other materials required to be provided by this paragraph.
 - (viii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.506(b), the issuer shall provide the purchaser with any written communication or broadcast script used under the authorization of § 230.241 within 30 days prior to such sale.
- (c) **Limitation on manner of offering.** Except as provided in § 230.504(b)(1) or § 230.506(c), neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:
- (1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and
 - (2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising; *Provided, however,* that publication by an issuer of a notice in accordance with § 230.135c or filing with the Commission by an issuer of a notice of sales on Form D (17 CFR 239.500) in which the issuer has made a good faith and reasonable attempt to comply with the requirements of such form, shall not be deemed to constitute general solicitation or general advertising for purposes of this section; *Provided further,* that, if the requirements of § 230.135e are satisfied, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed to constitute general solicitation or general advertising for purposes of this section.

- (d) **Limitations on resale.** Except as provided in § 230.504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(a)(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom. The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of section 2(a)(11) of the Act, which reasonable care may be demonstrated by the following:
- (1) Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;
 - (2) Written disclosure to each purchaser prior to sale that the securities have not been registered under the Act and, therefore, cannot be resold unless they are registered under the Act or unless an exemption from registration is available; and
 - (3) Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, it is not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision. In addition, § 230.502(b)(2)(vii) requires the delivery of written disclosure of the limitations on resale to investors in certain instances.

[47 FR 11262, Mar. 16, 1982, as amended at 47 FR 54771, Dec. 6, 1982; 53 FR 7869, Mar. 11, 1988; 54 FR 11372, Mar. 20, 1989; 55 FR 18322, May 2, 1990; 56 FR 30054, 30055, July 1, 1991; 57 FR 47409, Oct. 16, 1992; 58 FR 26514, May 4, 1993; 59 FR 21650, Apr. 26, 1994; 62 FR 53954, Oct. 17, 1997; 73 FR 969, Jan. 4, 2008; 73 FR 10615, Feb. 27, 2008; 77 FR 18685, Mar. 28, 2012; 78 FR 44804, July 24, 2013; 81 FR 83553, Nov. 21, 2016; 86 FR 3598, Jan. 14, 2021]

§ 230.503 Filing of notice of sales.

- (a) **When notice of sales on Form D is required and permitted to be filed.**
- (1) An issuer offering or selling securities in reliance on § 230.504 or § 230.506 must file with the Commission a notice of sales containing the information required by Form D (17 CFR 239.500) for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering, unless the end of that period falls on a Saturday, Sunday or holiday, in which case the due date would be the first business day following.
 - (2) An issuer may file an amendment to a previously filed notice of sales on Form D at any time.
 - (3) An issuer must file an amendment to a previously filed notice of sales on Form D for an offering:
 - (i) To correct a material mistake of fact or error in the previously filed notice of sales on Form D, as soon as practicable after discovery of the mistake or error;
 - (ii) To reflect a change in the information provided in the previously filed notice of sales on Form D, as soon as practicable after the change, except that no amendment is required to reflect a change that occurs after the offering terminates or a change that occurs solely in the following information:
 - (A) The address or relationship to the issuer of a related person identified in response to Item 3 of the notice of sales on Form D;
 - (B) An issuer's revenues or aggregate net asset value;

- (C) The minimum investment amount, if the change is an increase, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in a decrease of more than 10%;
 - (D) Any address or state(s) of solicitation shown in response to Item 12 of the notice of sales on Form D;
 - (E) The total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%;
 - (F) The amount of securities sold in the offering or the amount remaining to be sold;
 - (G) The number of non-accredited investors who have invested in the offering, as long as the change does not increase the number to more than 35;
 - (H) The total number of investors who have invested in the offering; or
 - (I) The amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%; and
- (iii) Annually, on or before the first anniversary of the filing of the notice of sales on Form D or the filing of the most recent amendment to the notice of sales on Form D, if the offering is continuing at that time.
- (4) An issuer that files an amendment to a previously filed notice of sales on Form D must provide current information in response to all requirements of the notice of sales on Form D regardless of why the amendment is filed.

(b) ***How notice of sales on Form D must be filed and signed.***

- (1) A notice of sales on Form D must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) in accordance with EDGAR rules set forth in Regulation S-T (17 CFR Part 232).
- (2) Every notice of sales on Form D must be signed by a person duly authorized by the issuer.

[73 FR 10615, Feb. 27, 2008, as amended at 81 FR 83553, Nov. 21, 2016]

§ 230.504 Exemption for limited offerings and sales of securities not exceeding \$10,000,000.

- (a) **Exemption.** Offers and sales of securities that satisfy the conditions in paragraph (b) of this § 230.504 by an issuer that is not:
- (1) Subject to the reporting requirements of section 13 or 15(d) of the Exchange Act,;
 - (2) An investment company; or
 - (3) A development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person, shall be exempt from the provision of section 5 of the Act under section 3(b) of the Act.

(b) **Conditions to be met -**

- (1) **General conditions.** To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502 (a), (c) and (d), except that the provisions of § 230.502 (c) and (d) will not apply to offers and sales of securities under this § 230.504 that are made:
- (i) Exclusively in one or more states that provide for the registration of the securities, and require the public filing and delivery to investors of a substantive disclosure document before sale, and are made in accordance with those state provisions;
 - (ii) In one or more states that have no provision for the registration of the securities or the public filing or delivery of a disclosure document before sale, if the securities have been registered in at least one state that provides for such registration, public filing and delivery before sale, offers and sales are made in that state in accordance with such provisions, and the disclosure document is delivered before sale to all purchasers (including those in the states that have no such procedure); or
 - (iii) Exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to “accredited investors” as defined in § 230.501(a).
- (2) **Offering limit.** The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed \$10,000,000, less the aggregate offering price for all securities sold within the 12 months before the start of and during the offering of securities under this § 230.504 or in violation of section 5(a) of the Securities Act.

Instruction to paragraph (b)(2): If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold \$10,000,000 of its securities on June 1, 2021, under this § 230.504 and an additional \$500,000 of its securities on December 1, 2021, this § 230.504 would not be available for the later sale, but would still be applicable to the June 1, 2021, sale.

- (3) **Disqualifications.** No exemption under this section shall be available for the securities of any issuer if such issuer would be subject to disqualification under § 230.506(d) on or after January 20, 2017; provided that disclosure of prior “bad actor” events shall be required in accordance with § 230.506(e).

Instruction to paragraph (b)(3): For purposes of disclosure of prior “bad actor” events pursuant to § 230.506(e), an issuer shall furnish to each purchaser, a reasonable time prior to sale, a description in writing of any matters that would have triggered disqualification under this paragraph (b)(3) but occurred before January 20, 2017.

[57 FR 36473, Aug. 13, 1992, as amended at 61 FR 30402, June 14, 1996; 64 FR 11094, Mar. 8, 1999; 81 FR 83553, Nov. 21, 2016; 82 FR 12067, Feb. 28, 2017; 86 FR 3598, Jan. 14, 2021]

§ 230.505 [Reserved]

§ 230.506 Exemption for limited offers and sales without regard to dollar amount of offering.

- (a) **Exemption.** Offers and sales of securities by an issuer that satisfy the conditions in paragraph (b) or (c) of this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(a)(2) of the Act.
- (b) **Conditions to be met in offerings subject to limitation on manner of offering -**

- (1) **General conditions.** To qualify for an exemption under this section, offers and sales must satisfy all the terms and conditions of §§ 230.501 and 230.502.
- (2) **Specific conditions -**
 - (i) **Limitation on number of purchasers.** There are no more than, or the issuer reasonably believes that there are no more than, 35 purchasers of securities from the issuer in offerings under this section in any 90-calendar-day period.

Note 1 to paragraph (b)(2)(i):

See § 230.501(e) for the calculation of the number of purchasers and § 230.502(a) for what may or may not constitute an offering under paragraph (b) of this section.

- (ii) **Nature of purchasers.** Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.
- (c) **Conditions to be met in offerings not subject to limitation on manner of offering -**
- (1) **General conditions.** To qualify for exemption under this section, sales must satisfy all the terms and conditions of §§ 230.501 and 230.502(a) and (d).
 - (2) **Specific conditions -**
 - (i) **Nature of purchasers.** All purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors.
 - (ii) **Verification of accredited investor status.** The issuer shall take reasonable steps to verify that purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors. The issuer shall be deemed to take reasonable steps to verify if the issuer uses, at its option, one of the following non-exclusive and non-mandatory methods of verifying that a natural person who purchases securities in such offering is an accredited investor; provided, however, that the issuer does not have knowledge that such person is not an accredited investor:
 - (A) In regard to whether the purchaser is an accredited investor on the basis of income, reviewing any Internal Revenue Service form that reports the purchaser's income for the two most recent years (including, but not limited to, Form W-2, Form 1099, Schedule K-1 to Form 1065, and Form 1040) and obtaining a written representation from the purchaser that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year;
 - (B) In regard to whether the purchaser is an accredited investor on the basis of net worth, reviewing one or more of the following types of documentation dated within the prior three months and obtaining a written representation from the purchaser that all liabilities necessary to make a determination of net worth have been disclosed:
 - (1) With respect to assets: Bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments, and appraisal reports issued by independent third parties; and

- (2) With respect to liabilities: A consumer report from at least one of the nationwide consumer reporting agencies;
- (C) Obtaining a written confirmation from one of the following persons or entities that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor:
 - (1) A registered broker-dealer;
 - (2) An investment adviser registered with the Securities and Exchange Commission;
 - (3) A licensed attorney who is in good standing under the laws of the jurisdictions in which he or she is admitted to practice law; or
 - (4) A certified public accountant who is duly registered and in good standing under the laws of the place of his or her residence or principal office;
- (D) In regard to any person who purchased securities in an issuer's Rule 506(b) offering as an accredited investor prior to September 23, 2013 and continues to hold such securities, for the same issuer's Rule 506(c) offering, obtaining a certification by such person at the time of sale that he or she qualifies as an accredited investor; or
- (E) In regard to any person that the issuer previously took reasonable steps to verify as an accredited investor in accordance with this paragraph (c)(2)(ii), so long as the issuer is not aware of information to the contrary, obtaining a written representation from such person at the time of sale that he or she qualifies as an accredited investor. A written representation under this method of verification will satisfy the issuer's obligation to verify the person's accredited investor status for a period of five years from the date the person was previously verified as an accredited investor.

Instructions to paragraph (c)(2)(ii): of this section.

1. The issuer is not required to use any of these methods in verifying the accredited investor status of natural persons who are purchasers. These methods are examples of the types of non-exclusive and non-mandatory methods that satisfy the verification requirement in § 230.506(c)(2)(ii).
2. In the case of a person who qualifies as an accredited investor based on joint income with that person's spouse, the issuer would be deemed to satisfy the verification requirement in § 230.506(c)(2)(ii)(A) by reviewing copies of Internal Revenue Service forms that report income for the two most recent years in regard to, and obtaining written representations from, both the person and the spouse.
3. In the case of a person who qualifies as an accredited investor based on joint net worth with that person's spouse, the issuer would be deemed to satisfy the verification requirement in § 230.506(c)(2)(ii)(B) by reviewing such documentation in regard to, and obtaining written representations from, both the person and the spouse.

(d) *"Bad Actor" disqualification.*

- (1) No exemption under this section shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of such sale; any investment manager of an issuer that is a pooled investment fund; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such investment manager or solicitor; or any director, executive officer or other officer participating in the offering of any such investment manager or solicitor or general partner or managing member of such investment manager or solicitor:
- (i) Has been convicted, within ten years before such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:
 - (A) In connection with the purchase or sale of any security;
 - (B) Involving the making of any false filing with the Commission; or
 - (C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;
 - (ii) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before such sale, that, at the time of such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:
 - (A) In connection with the purchase or sale of any security;
 - (B) Involving the making of any false filing with the Commission; or
 - (C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;
 - (iii) Is subject to a final order of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:
 - (A) At the time of such sale, bars the person from:
 - (1) Association with an entity regulated by such commission, authority, agency, or officer;
 - (2) Engaging in the business of securities, insurance or banking; or
 - (3) Engaging in savings association or credit union activities; or
 - (B) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale;
 - (iv) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b) or 78o-4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(e) or (f)) that, at the time of such sale:

- (A) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;
 - (B) Places limitations on the activities, functions or operations of such person; or
 - (C) Bars such person from being associated with any entity or from participating in the offering of any penny stock;
- (v) Is subject to any order of the Commission entered within five years before such sale that, at the time of such sale, orders the person to cease and desist from committing or causing a violation or future violation of:
- (A) Any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or
 - (B) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).
- (vi) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;
- (vii) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the Commission that, within five years before such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or
- (viii) Is subject to a United States Postal Service false representation order entered within five years before such sale, or is, at the time of such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.
- (2) Paragraph (d)(1) of this section shall not apply:
- (i) With respect to any conviction, order, judgment, decree, suspension, expulsion or bar that occurred or was issued before September 23, 2013;
 - (ii) Upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied;
 - (iii) If, before the relevant sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (d)(1) of this section should not arise as a consequence of such order, judgment or decree; or
 - (iv) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (d)(1) of this section.

Instruction to paragraph (d)(2)(iv). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

(3) For purposes of paragraph (d)(1) of this section, events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:

(i) In control of the issuer; or

(ii) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(e) *Disclosure of prior "bad actor" events.* The issuer shall furnish to each purchaser, a reasonable time prior to sale, a description in writing of any matters that would have triggered disqualification under paragraph (d)(1) of this section but occurred before September 23, 2013. The failure to furnish such information timely shall not prevent an issuer from relying on this section if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed matter or matters.

Instruction to paragraph (e). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

[47 FR 11262, Mar. 6, 1982, as amended at 54 FR 11373, Mar. 20, 1989; 78 FR 44770, 44804, July 24, 2013; 86 FR 3598, Jan. 14, 2021]

§ 230.507 Disqualifying provision relating to exemptions under §§ 230.504 and 230.506.

(a) No exemption under § 230.504 or § 230.506 shall be available for an issuer if such issuer, any of its predecessors or affiliates have been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with § 230.503.

(b) Paragraph (a) of this section shall not apply if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied.

[54 FR 11374, Mar. 20, 1989, as amended at 81 FR 83553, Nov. 21, 2016]

§ 230.508 Insignificant deviations from a term, condition or requirement of Regulation D.

(a) A failure to comply with a term, condition or requirement of § 230.504 or § 230.506 will not result in the loss of the exemption from the requirements of section 5 of the Act for any offer or sale to a particular individual or entity, if the person relying on the exemption shows:

(1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; and

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraph (c) of § 230.502, paragraph (b)(2) of § 230.504 and paragraph (b)(2)(i) of § 230.506 shall be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of § 230.504 or § 230.506.

(b) A transaction made in reliance on § 230.504 or § 230.506 shall comply with all applicable terms, conditions and requirements of Regulation D. Where an exemption is established only through reliance upon paragraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Act.

[54 FR 11374, Mar. 20, 1989, as amended at 57 FR 36473, Aug. 13, 1992; 81 FR 83553, Nov. 21, 2016]

REGULATION E - EXEMPTION FOR SECURITIES OF SMALL BUSINESS INVESTMENT COMPANIES

Authority: Sections 230.601 to 230.610a issued under sec. 19, 48 Stat. 85, as amended; 15 U.S.C. 77s.

Source: Sections 230.601 through 230.610a appear at 23 FR 10484, Dec. 30, 1958, unless otherwise noted.

Cross Reference:

For regulations of Small Business Administration under the Small Business Investment Act of 1958, see 13 CFR, Chapter I.

§ 230.601 Definitions of terms used in §§ 230.601 to 230.610a.

As used in §§ 230.601 to 230.610a, the following terms shall have the meaning indicated:

Act. The term *Act* refers to the Securities Act of 1933 unless specifically stated otherwise.

Affiliate. An *affiliate* of an issuer is a person controlling, controlled by or under common control with such issuer. An individual who controls an issuer is also an affiliate of such issuer.

Notification. The term *notification* means the notification required by § 230.604.

Offering circular. The term *offering circular* means the offering circular required by § 230.605.

State. A *State* is any State, Territory or insular possession of the United States, or the District of Columbia.

Underwriter. The term *underwriter* shall have the meaning given in section 2(11) of the Act.

§ 230.602 Securities exempted.

(a) Except as hereinafter provided in this rule, securities issued by any small business investment company which is registered under the Investment Company Act of 1940, or any closed-end investment company that has elected to be regulated as a business development company under the Investment Company Act of 1940 or has notified the Commission that it intends to elect to be regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940, will be exempt from registration under the Securities Act of 1933, subject to the terms and conditions of §§ 230.601 to 230.610a. As used in this paragraph, the term *small business investment company* means any company which is licensed as a small business investment company under the Small Business Investment Act of 1958 or which has received the preliminary approval of the Small Business Administration and has been notified by the

Administration that it may submit a license application. As used in this paragraph, the term *business development company* means any closed-end investment company which meets the definitional requirements of section 2(a)(48) (A) and (B) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

- (b) No exemption under §§ 230.601 to 230.610a shall be available for the securities of any issuer if such issuer or any of its affiliates:
 - (1) Has filed a registration statement which is the subject of any proceeding or examination under section 8 of the Act, or is the subject of any refusal order or stop order entered thereunder within five years prior to the filing of the notification;
 - (2) Is subject to pending proceedings under § 230.610 or any similar rule adopted under section 3(b) of the Act, or to an order entered thereunder within five years prior to the filing of such notification;
 - (3) Has been convicted within five years prior to the filing of such notification of any crime or offense involving the purchase or sale of securities;
 - (4) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years prior to the filing of such notification, temporarily or permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of securities;
 - (5) Is subject to pending proceedings under section 8(e) of the Investment Company Act of 1940 or to any suspension or revocation order issued thereunder;
 - (6) Is subject to an injunction issued pursuant to section 35(d) of the Investment Company Act of 1940; or
 - (7) Is subject to a U.S. Post Office fraud order.
- (c) No exemption under §§ 230.601 to 230.610a shall be available for the securities of any issuer, if any of its directors, officers or principal security holders, any investment adviser or any underwriter of the securities to be offered, or any partner, director or officer of any such investment advisor or underwriter:
 - (1) Has been convicted within ten years prior to the filing of the notification of any crime or offense involving the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser;
 - (2) Is temporarily or permanently restrained or enjoined by any court from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser;
 - (3) Is subject to an order of the Commission entered pursuant to section 15(b) or 15A(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b) or 78o-3(1)); has been found by the Commission to be a cause of any such order which is still in effect; or is subject to an order of the Commission entered pursuant to section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(e) or (f));
 - (4) Is suspended or has been expelled from membership in a national securities dealers association or a national securities exchange for conduct inconsistent with just and equitable principles of trade; or
 - (5) Is subject to a U.S. Post Office fraud order.

- (d) No exemption under §§ 230.601 to 230.610a shall be available for the securities of any issuer if any underwriter of such securities, or any director, officer or partner of any such underwriter was, or was named as, an underwriter of any securities:
 - (1) Covered by any registration statement which is the subject of any proceeding or examination under section 8 of the Act, or is the subject of any refusal order or stop order entered thereunder within five years prior to the filing of the notification; or
 - (2) Covered by any filing which is subject to pending proceedings under § 230.610 or any similar rule adopted under section 3(b) of the Act, or to an order entered thereunder within five years prior to the filing of such notification.
- (e) Paragraph (b), (c) or (d) of this section shall not apply to the securities of any issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied. Any such determination by the Commission shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

(Secs. 3(b) and 3(c) Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a-37))

[23 FR 10484, Dec. 30, 1958, as amended at 49 FR 35344, Sept. 7, 1984; 78 FR 79299, Dec. 30, 2013]

§ 230.603 Amount of securities exempted.

- (a) The aggregate offering price of all of the following securities of the issuer shall not exceed \$5,000,000:
 - (1) All securities presently being offered under §§ 230.601 to 230.610a, or specified in the notification as proposed to be so offered;
 - (2) All securities previously sold pursuant to an offering under §§ 230.601 to 230.610a, commenced within one year prior to the commencement of the proposed offering; and
 - (3) All securities sold in violation of section 5(a) of the Act within one year prior to the commencement of the proposed offering.

Notwithstanding the foregoing, the aggregate offering price of all securities so offered or sold on behalf of any one person other than the issuer shall not exceed \$100,000, except that this limitation shall not apply if the securities are to be offered on behalf of the estate of a deceased person within two years after the death of such person.

- (b) The aggregate offering price of securities, which have a determinable market value shall be computed upon the basis of such market value as determined from transactions or quotations on a specified date within 15 days prior to the date of filing the notification, or the offering price to the public, whichever is higher: *Provided*, That the aggregate gross proceeds actually received from the public shall not exceed the maximum aggregate offering price permitted in the particular case by paragraph (a) of this section.
- (c) In computing the amount of securities which may be offered under §§ 230.601 to 230.610a, there need not be included unsold securities the offering of which has been withdrawn with the consent of the Commission by amending the pertinent notification to reduce the amount stated therein as proposed to be offered.

(15 U.S.C. 77c; secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a-37))

[23 FR 10484, Dec. 30, 1958, as amended at 36 FR 7050, Apr. 14, 1971; 49 FR 35344, Sept. 7, 1984]

§ 230.604 Filing of notification on Form 1-E.

- (a) At least 10 days (Saturdays, Sundays and holidays excluded) prior to the date on which the initial offering or sale of any securities is to be made under §§ 230.601 to 230.610a, there shall be filed with the Commission four copies of a notification on Form 1-E. The Commission may, however, in its discretion, authorize the commencement of the offering or sale prior to the expiration of such 10-day period upon a written request for such authorization.
- (b) The notification shall be signed by the issuer and each person, other than the issuer, for whose account any of the securities are to be offered. If the notification is signed by any person on behalf of any other person, evidence of authority to sign on behalf of such other person shall be filed with the notification, except where an officer of the issuer signs on behalf of the issuer.
- (c) Any amendment to the notification shall be signed in the same manner as the original notification. Four copies of such amendment shall be filed with the Commission at least 10 days prior to any offering or sale of the securities subsequent to the filing of such amendment, or such shorter period as the Commission, in its discretion, may authorize upon a written request for such authorization.
- (d) A notification or any exhibit or other document filed as a part thereof may be withdrawn upon application unless the notification is subject to an order under § 230.610 at the time the application is filed or becomes subject to such an order within 15 days (Saturdays, Sundays and holidays excluded) thereafter: *Provided*, That a notification may not be withdrawn after any of the securities proposed to be offered thereunder have been sold. Any such application shall be signed in the same manner as the notification.

(Secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a-37))

[23 FR 10484, Dec. 30, 1958, as amended at 37 FR 1471, Jan. 29, 1972; 49 FR 35344, Sept. 7, 1984; 61 FR 49959, Sept. 24, 1996]

§ 230.605 Filing and use of the offering circular.

- (a) Except as provided in paragraphs (b) or (f) of this rule and in § 230.606:
 - (1) No written offer of securities of any issuer shall be made under §§ 230.601 to 230.610a unless an offering circular containing the information specified in Schedule A or Schedule B, as appropriate, is concurrently given or has previously been given to the person to whom the offer is made, or has been sent to such person under such circumstances that it would normally have been received by him at or prior to the time of such written offer; and
 - (2) No securities of such issuer shall be sold under §§ 230.601 to 230.610a unless such an offering circular is given to the person to whom the securities were sold, or is sent to such person under such circumstances that it would normally be received by him, with or prior to any confirmation of the sale, or prior to the payment by him of all or any part of the purchase price of the securities, whichever first occurs.
- (b) Any written advertisement or other written communication, or any radio or television broadcast, which states from whom an offering circular may be obtained and in addition contains no more than the following information may be published, distributed or broadcast at or after the commencement of the public offering to any person prior to sending or giving such person a copy of such circular:

- (1) The name of the issuer of such security;

- (2) The title of the security, the amount being offered, and the per-unit offering price to the public; and
- (3) The identity of the general type of business of the issuer.

(c)

- (1) The offering circular may be printed, mimeographed, lithographed or typewritten, or prepared by any similar process which will result in clearly legible copies. If printed, it shall be set in roman type at least as large as ten-point modern type, except that financial statements and other statistical or tabular matter may be set in roman type at least as large as eight-point modern type. All type shall be leaded at least two points.
- (2) Where an offering circular is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents by presenting all required information in a format readily communicated to investors.

(d) If the offering is not completed within nine months from the date of the offering circular, a revised offering circular shall be prepared, filed and used in accordance with §§ 230.601 to 230.610a as for an original offering circular. In no event shall an offering circular be used which is false or misleading in light of the circumstances then existing.

(e) Four copies of the offering circular required by this section, which is to be used at the commencement of the offering, shall be filed with the notification at the time such notification is filed and shall be deemed a part thereof. If the offering circular is thereafter revised or amended, four copies of such revised or amended circular shall be filed as an amendment to the notification at least 10 days prior to its use, or such shorter period as the Commission may, in its discretion, authorize upon a written request for such authorization.

(f) An offering circular filed pursuant to paragraph (e) may be distributed prior to the expiration of the 10-day waiting periods for offerings provided for in § 230.604 (a) and (c) and paragraph (e) of this section and such distribution may be accompanied or followed by oral offers related thereto, provided the conditions in paragraphs (f)(1) through (f)(4) are met. For the purposes of this section, any offering circular distributed prior to the expiration of the ten day waiting period is called a Preliminary Offering Circular. Such Preliminary Offering Circular may be used to meet the requirements of paragraph (a)(2) of this section, provided that if a Preliminary Offering Circular is inaccurate or inadequate in any material respect, a revised Preliminary Offering Circular or an offering circular of the type referred to in paragraph (f)(4) shall be furnished to all persons to whom the securities are to be sold at least 48 hours prior to the mailing of any confirmation of sale to such persons, or shall be sent to such persons under such circumstances that it would normally be received by them 48 hours prior to their receipt of confirmation of the sale.

- (1) Such Preliminary Offering Circular contains substantially the information required by this section to be included in an offering circular, or contains substantially that information except for the omission of information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price.
- (2) The outside front cover page of the Preliminary Offering Circular shall bear the caption "Preliminary Offering Circular," the date of its issuance, and the following statement which shall run along the left hand margin of the page and printed perpendicular to the text, in boldface type at least as large as that used generally in the body of such offering circular:

A notification pursuant to Regulation E relating to these securities has been filed with the Securities and Exchange Commission. Information contained in this Preliminary Offering Circular is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted prior to the time an offering circular which is not designated as a Preliminary Offering Circular is delivered. This Preliminary Offering Circular shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sales of these securities in any state in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state.

- (3) The Preliminary Offering Circular relates to a proposed public offering of securities that is to be sold by or through one or more underwriters which are broker-dealers registered under section 15 of the Securities Exchange Act of 1934, each of which has furnished a signed Consent and Certification in the form prescribed as a condition to the use of such offering circular;
- (4) An offering circular contains all of the information specified in Schedule A or Schedule B (17 CFR 230.610a) and which is not designated as a Preliminary Offering Circular is furnished with or prior to delivery of the confirmation of sale to any person who has been furnished with a Preliminary Offering Circular pursuant to this paragraph.

(Secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a-37))

[23 FR 10484, Dec. 30, 1958, as amended at 49 FR 35344, Sept. 7, 1984; 61 FR 24655, May 15, 1996]

§ 230.606 Offering not in excess of \$100,000.

No offering circular need be filed or used in connection with an offering of securities under §§ 230.601 to 230.610a if the aggregate offering price of all securities of the issuer offered or sold without the use of such an offering circular does not exceed \$100,000 computed in accordance with § 230.603, *Provided*, The following conditions are met:

- (a) There shall be filed as an exhibit to the notification four copies of a statement setting forth the information (other than financial statements) required by Schedule A or Schedule B to be set forth in an offering circular.
- (b) No advertisement, article or other communication published in any newspaper, magazine or other periodical and no radio or television broadcast in regard to the offering shall contain more than the following information:
 - (1) The name of the issuer of such security;
 - (2) The title of the security, amount offered, and the per-unit offering price to the public;
 - (3) The identity of the general type of business of the issuer; and
 - (4) By whom orders will be filled or from whom further information may be obtained.

(Secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a-37))

[23 FR 10484, Dec. 30, 1958, as amended at 49 FR 35344, Sept. 7, 1984]

§ 230.607 Sales material to be filed.

Four copies of each of the following communications prepared or authorized by the issuer or anyone associated with the issuer, any of its affiliates or any principal underwriter for use in connection with the offering of any securities under §§ 230.601 to 230.610a shall be filed with the Commission at least five days (exclusive of Saturdays, Sundays and holidays) prior to any use thereof, or such shorter period as the Commission, in its discretion, may authorize:

- (a) Every advertisement, article or other communication proposed to be published in any newspaper, magazine or other periodical;
- (b) The script of every radio or television broadcast; and
- (c) Every letter, circular or other written communication proposed to be sent, given or otherwise communicated to more than ten persons.

§ 230.608 Prohibition of certain statements.

No offering circular or other written or oral communication used in connection with any offering under §§ 230.601 to 230.610a shall contain any language stating or implying that the Commission has in any way passed upon the merits of, or given approval to, guaranteed or recommended the securities offered or the terms of the offering or has determined that the securities are exempt from registration, or has made any finding that the statements in any such offering circular or other communication are accurate or complete.

§ 230.609 Reports of sales hereunder.

Within 30 days after the end of each six-month period following the date of the original offering circular, or of the statement required by § 230.606, the issuer or other person for whose account the securities are offered shall file with the Commission four copies of a report on Form 2-E^[1] containing the information called for by that form. A final report shall be made upon completion or termination of the offering and may be made prior to the end of the six-month period in which the last sale is made.

§ 230.610 Suspension of exemption.

- (a) The Commission may, at any time after the filing of a notification, enter an order temporarily suspending the exemption, if it has reason to believe that:
 - (1) No exemption is available under §§ 230.601 to 230.610a for the securities purported to be offered hereunder or any of the terms or conditions of §§ 230.601 to 230.610a have not been complied with, including failure to file any report as required by § 230.609.
 - (2) The notification, the offering circular or any other sales literature contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;
 - (3) The offering is being made or would be made in violation of section 17 of the Act;

^[1] Filed as part of original document.

- (4) Any event has occurred after the filing of the notification which would have rendered the exemption hereunder unavailable if it has occurred prior to such filing;
 - (5) Any person specified in paragraph (b) of § 230.602 has been indicted for any crime or offense of the character specified in paragraph (b)(3) thereof, or any proceeding has been initiated for the purpose of enjoining any such person from engaging in or continuing any conduct or practice of the character specified in paragraph (b)(4);
 - (6) Any person specified in paragraph (c) of § 230.602 has been indicted for any crime or offense of the character specified in paragraph (c)(1) thereof, or any proceeding has been initiated for the purpose of enjoining any such person from engaging in or continuing any conduct or practice of the character specified in paragraph (c)(2); or
 - (7) The issuer or any officer, director or underwriter has failed to cooperate, or has obstructed or refused to permit the making of an investigation by the Commission in connection with any offering made or proposed to be made hereunder.
- (b) Upon the entry of an order under paragraph (a) of this section, the Commission will promptly give notice to the persons on whose behalf the notification was filed
- (1) that such order has been entered, together with a brief statement of the reasons for the entry of the order, and
 - (2) that the Commission, upon receipt of a written request within 30 days after the entry of such order, will, within 20 days after the receipt of such request, set the matter down for hearing at a place to be designated by the Commission. If no hearing is requested and none is ordered by the Commission, the order shall become permanent on the thirtieth day after its entry and shall remain in effect unless or until it is modified or vacated by the Commission. Where a hearing is requested or is ordered by the Commission, the Commission will, after notice of an opportunity for such hearing, either vacate the order or enter an order permanently suspending the exemption.
- (c) The Commission may at any time after notice of and opportunity for hearing, enter an order permanently suspending the exemption for any reason upon which it could have entered a temporary suspension order under paragraph (a) of this section. Any such order shall remain in effect until vacated by the Commission.
- (d) All notices required by this part shall be given to the person or persons on whose behalf the notification was filed by personal service, registered or certified mail or confirmed telegraphic notice at the addresses of such persons given in the notification.

[23 FR 10484, Dec. 30, 1958, as amended at 29 FR 16982, Dec. 11, 1964]

**§ 230.610a Schedule A: Contents of offering circular for small business investment companies;
Schedule B: Contents of offering circular for business development companies.**

Schedule A - Contents of Offering Circular for Small Business Investment Companies

General Instructions

1. The information in the offering circular should be organized to make it easier to understand the organization and operation of the company. The required information need not be in any particular order, except that Items 1 and 2 must be the first and second items in the offering circular.
2. The offering circular, including the cover page, may contain more information than is called for by this Schedule, provided that it is not incomplete, inaccurate, or misleading. Also, the additional information should not, by its nature, quantity, or manner of presentation, obscure or impede understanding of required information.

Item 1. Cover Page

The cover page of the offering circular shall include the following information:

- (a) The name of the issuer;
- (b) The mailing address of the issuer's principal executive offices including the zip code and the issuer's telephone number;
- (c) The date of the offering circular;
- (d) A list of the type and amount of securities offered (e.g., if the securities offered include redemption or conversion features, so state);
- (e) The following statement in capital letters printed in boldface roman type at least as large as ten-point modern type and at least two points leaded:

"THESE SECURITIES ARE OFFERED PURSUANT TO AN EXEMPTION FROM REGISTRATION WITH THE SECURITIES AND EXCHANGE COMMISSION; HOWEVER, THE COMMISSION HAS NOT MADE AN INDEPENDENT DETERMINATION THAT THE SECURITIES BEING OFFERED ARE EXEMPT FROM REGISTRATION. THE SECURITIES AND EXCHANGE COMMISSION DOES NOT PASS UPON THE MERITS OF OR GIVE ITS APPROVAL TO ANY SECURITIES OFFERED OR THE TERMS OF THE OFFERING, NOR DOES IT PASS UPON THE ACCURACY OR COMPLETENESS OF ANY OFFERING CIRCULAR OR OTHER SELLING LITERATURE."
- (f) The name of the underwriter or underwriters, if applicable;
- (g) A cross-reference to the place in the offering circular discussing the material risks involved in purchasing the securities, printed in bold-face roman type at least as high as ten-point modern type and at least two points leaded;
- (h) The approximate date when the proposed sale to the public will begin; and

(i) The information called for by the following table shall be given, in substantially the tabular form indicated, on the outside front cover page of the offering circular as to all securities being offered (estimate, if necessary):

	Offering price to public	Underwriting discounts and commissions	Proceeds to issuer or other persons
Per share or other unit basis			
Total			

If the securities are to be offered on a best efforts basis, the cover page should set forth the termination date, if any, of the offering, any minimum required sale, and any arrangements to place the funds received in an escrow, trust, or similar arrangement. The following tabular presentation of the total maximum and minimum securities to be offered should be combined with the table required above:

	Offering price to public	Underwriting discounts and commissions	Proceeds to issuer or other persons
Total Minimum			
Total Maximum			

Instructions

1. The term *commissions* shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made in connection with the sale of such security.

2. Only commissions paid by the issuer in cash are to be indicated in the table. Commissions paid by other persons or any form of non-cash compensation shall be briefly identified in a note to the table with a cross-reference to a more complete description elsewhere in the offering circular.

3. If the securities are not to be offered for cash, state the basis upon which the offering is to be made.

4. (a) If it is impracticable to state the price to the public, briefly state the method by which the price is to be determined.

(b) Any *finder's fees* or similar payments must be disclosed in a note to the table with a reference to a more complete discussion in the offering circular.

(c) The amount of the expenses of the offering borne by the issuer, including underwriting expenses to be borne by the issuer, should be disclosed in a note to the table.

5. If any of the securities are to be offered for the account of any security holder, state the identity of each selling security holder, the amount owned by him, the amount offered for his account and the amount to be owned after the offering.

Item 2. General Description of Issuer

(a) Concisely discuss the organization and operation or proposed operation of the issuer. Include the following:

(i) Basic identifying information, including:

(A) The date and form of organization of the issuer and the name of the state under whose laws it is organized;

(B) A brief description of the nature of a small business investment company; and

(C) The classification and subclassification of the issuer as specified in sections 4 and 5 of the Investment Company Act of 1940.

(ii) A concise description of the investment objectives and policies of the issuer, including:

(A) If those objectives may be changed without a vote of the holders of the majority of the voting securities, a brief statement to that effect; and

(B) A brief discussion of how the issuer proposes to achieve its objectives, including:

(1) The types of securities (for example, bonds, convertible debentures, preferred stocks, common stocks) in which it may invest, and the proportion of the assets which may be invested in each such type of security;

(2) If the issuer proposes to have a policy of concentrating in a particular industry or group of industries, identification of such industry or industries. (Concentration, for purposes of this item, is deemed to be 25% or more of the value of the issuer's total assets invested or proposed to be invested in a particular industry or group of industries).

(C) A concise description of any other policies of the issuer that may not be changed without the vote of the majority of the outstanding voting securities, including those policies which the issuer deems to be fundamental within the meaning of Section 8(b) of the Investment Company Act of 1940.

(D) A concise description of those significant investment policies or techniques (such as investing for control or management or investing in other investment companies) that are not described pursuant to subparagraphs (B) or (C) above that issuer employs or has the current intention of employing in the foreseeable future.

Note:

If the effect of a policy is to prohibit a particular practice, or, if the policy permits a particular practice but the issuer has not employed that practice within the past year and has no current intention of doing so in the foreseeable future, do not include disclosure as to that policy.

(b) Discuss briefly the principal risk factors associated with investment in the issuer, including factors peculiar to the issuer as well as those generally attendant to investment in a small business investment company with investment policies and objectives similar to the issuer.

Item 3. Plan of Distribution

(a) If the securities are to be offered through underwriters, give the names of the principal underwriters, and state the amounts underwritten by each. Identify each underwriter having a material relationship to the issuer and state the nature of the relationship. State briefly the nature of the underwriters' obligation to take the securities.

(b) State briefly the discounts and commissions to be allowed or paid to dealers, including all cash, securities, contracts or other consideration to be received by any dealer in connection with the sale of the securities.

(c) If *finder's fees* are to be paid, identify the *finder*, the nature of the services rendered and the nature of any relationship between the *finder* and the issuer, its officers, directors, promoters, principal stockholders and underwriters (including any affiliates thereof). If a *finder* is not registered with the Commission as a broker or dealer, disclose that fact.

(d) Outline briefly the plan of distribution of any securities being issued which are to be offered through the selling efforts of brokers or dealers or otherwise than through underwriters.

(e)(1) Describe any arrangements for the return of funds to subscribers if all of the securities to be offered are not sold; if there are no such arrangements, so state.

(2) If there will be material delay in the payment of the proceeds of the offering by the underwriter to the issuer, the nature of the delay and the effects on the issuer should be briefly described.

Item 4. Management and Certain Security Holders of the Issuer

(a) Give the full names and complete addresses of all directors, officers, members of any advisory board of the issuer and any person who owns more than 5 percent of any class of securities of the issuer (other than the Small Business Administration if the issuer is a small business investment company as defined in § 230.602(a) of this chapter).

(b) Identify each person who as of a specified date no more than 30 days prior to the date of filing of this registration statement, controls the issuer as specified in section 2(a)(9) of the Investment Company Act of 1940.

(c) Give the business experience over the last five years of any person named in (a) above who is or is expected to be significantly involved in the investment decisions of the issuer or in providing advisory services, direction or control of portfolio companies of the issuer.

(d) State the aggregate annual remuneration of each of the three highest-paid persons who are officers or directors of the issuer and all officers and directors as a group during the issuer's last fiscal year. State the number of persons in the group referred to above without naming them.

(e) Describe all direct and indirect interests (by security holdings or otherwise) of each person named in (a) above (i) in the issuer and (ii) in any material transactions within the past two years or in any material proposed transaction to which the issuer was or is to be a party. Include the cost to such persons of any assets or services for which any payment by or for the account of the issuer has been or is to be made.

(f) Provide, if applicable, for each investment adviser of the issuer as defined in section 2(a)(20) of the Investment Company Act of 1940:

(i) The name and address of the investment adviser and a brief description of its experience as an investment adviser, and, if the investment adviser is controlled by another person, the name of that person and the general nature of its business. (If the investment adviser is subject to more than one level of control, it is sufficient to give the name of the ultimate control person.)

(ii) A brief description of the services provided by the investment adviser. (If, in addition to providing investment advice, the investment adviser or persons employed by or associated with the investment adviser are, subject to the authority of the board of directors, responsible for overall management of issuer's business affairs, it is sufficient to state that fact in lieu of listing all services provided.)

(iii) A brief description of the investment adviser's compensation. (If the issuer has been in operation for a full fiscal year, provide the compensation paid to the adviser for the most recent fiscal year as a percentage of average net assets. No further information is required in response to this Item if the adviser is paid on the basis of a percentage of net assets and if the issuer has neither changed investment advisers nor changed the basis on which the adviser was compensated during the most recent fiscal year. If the fee is paid in some manner other than on the basis of average net assets, briefly describe the basis of payment. If the registrant has not been in operation for a full fiscal year, state generally what the investment adviser's fee will be as a percentage of average net assets, including any breakpoints, but it is not necessary to include precise details as to how the fee is computed or paid.)

Item 5. Portfolio Companies

Furnish the following information, in the tabular form indicated, with respect to the portfolio companies of the issuer, as of a specified date within 90 days prior to the date of filing the notification with the Commission pursuant to an offering of securities under Regulation E.

Name and address of portfolio companies	Nature of its principal business	Title of securities owned, controlled or held by issuer	Number of shares or amount of loan to portfolio companies
Percentage of class of securities owned, controlled or held by issuer		Value	Percentage of total value of portfolio companies

Instructions

1. Provide the city and state for address of portfolio companies.
2. State the value as of date of balance sheet required under Item 7.

Item 6. Capital Stock and Other Securities

(a) Describe concisely the nature and most significant attributes of the security being offered, including: (i) a brief discussion of voting rights; (ii) restrictions, if any, on the right freely to retain or dispose of such security; (iii) conversion rights, if applicable; and (iv) any material obligations or potential liability associated with ownership of such security (not including risks).

(b) If the rights of holders of such security may be modified otherwise than by a vote of majority or more of the shares outstanding, voting as a class, so state and explain briefly.

(c) If issuer has any other classes of securities outstanding (other than bank borrowings or borrowings that are not senior securities under Section 18(g) of the Investment Company Act of 1940 identify them and state whether they have any preference over the security being offered.

(d) Describe briefly the issuer's policy with respect to dividends and distributions, including any options shareholders may have as to the receipt of such dividends and distributions.

(e) Describe briefly the tax consequences to investors of an investment in the securities being offered. Such description should not include detailed discussions of applicable law. If the issuer intends to qualify for treatment under Subchapter M, it is sufficient, in the absence of special circumstances, to state briefly that in that case: (1) the issuer will distribute all of its net income and gains to shareholders and that such distributions are taxable income or capital gains; (ii) shareholders may be proportionately liable for taxes on income and gains of the issuer but that shareholders not subject to tax on their income will not be required to pay tax on amounts distributed to them; and that (iii) the issuer will inform shareholders of the amount and nature of such income or gains.

(f) Where there is a material disparity between the public offering price and the effective cash cost to officers, directors, promoters and affiliated persons for shares acquired by them in a transaction during the past three years, or which they have a right to acquire, there should be included a comparison of the public contribution under the proposed public offering and the effective cash contribution of such persons. In such cases, and in other instances where the extent of the dilution makes it appropriate, the following shall be given: (1) the net tangible book value per share before and after the distribution; (2) the amount of the increase in such net tangible book value per share attributable to the cash payment made by purchasers of the shares being offered; and (3) the amount of the immediate dilution from the public offering price which will be absorbed by such purchasers.

Item 7. Financial Statements

Furnish appropriate financial statements of the issuer as required below. Such statements shall be prepared in accordance with generally accepted accounting principles and practices. The statements required for the issuer's latest fiscal year shall be certified by an independent public accountant or certified public accountant in accordance with Regulation S-X if the issuer has filed or is required to file with the Commission certified financial statements for such fiscal year; the statements filed for the period or periods preceding such latest year need not be certified.

(a) A balance sheet as of a date within 90 days prior to the date of filing the notification with the Commission.

(b) A profit and loss or income statement for each of the last two fiscal years and for any subsequent period up to the date of the balance sheet furnished pursuant to (a) above.

Schedule B: Contents of Offering Circular for Business Development Companies

General Instructions.

Same as General Instructions to Schedule A.

Item 1. Same as Item 1 of Schedule A.

Item 2. General Description of Issuer

(a) Concisely discuss the organization and operation or proposed operation of the issuer. Include the following:

(i) Basic identifying information, including:

(A) The date and form of organization of the issuer and the name of the state under the laws of which it is organized; and

(B) A brief description of the nature of a business development company.

Note:

A business development company having a wholly-owned small business investment company subsidiary should disclose how the subsidiary is regulated, e.g., as an investment company registered under the Investment Company Act of 1940, and what percentage of the parent company's assets are, or are expected to be, invested in the subsidiary. The business development company should also describe the small business investment company's operations, including any material difference in investment policies between the business development company and its small business investment company subsidiary.

(ii) A concise description of the investment objectives and policies of the issuer, including:

(A) If those objectives may be changed without a vote of the holders of the majority of the voting securities, a brief statement to that effect; and

(B) A brief discussion of how the issuer proposes to achieve such objectives, including:

(1) The types of securities (for example, bonds, convertible debentures, preferred stocks, common stock) in which it may invest, indicating the proportion of the assets which may be invested in each such type of security;

(2) The issuer proposes to have a policy of concentrating in a particular industry or group of industries, identification of such industry or industries. (Concentration, for purposes of this item, is deemed to be 25% or more of the value of the issuer's total assets invested or proposed to be invested in a particular industry or group of industries).

(3) In companies for the purpose of exercising control or management;

(4) The policy with respect to any assets that are not required to be invested in eligible portfolio companies or other companies qualifying under section 55 of the Investment Company Act of 1940;

(5) The policy with respect to rendering significant managerial assistance to eligible portfolio companies or other companies qualifying under section 55 of the Investment Company Act of 1940;

(6) The policy with respect to investing as part of a group.

(C) Identification of any other policies of the issuer that may not be changed without the vote of the majority of the outstanding voting securities, including the policy not to withdraw its election as a business development company without approval by the majority of the outstanding voting securities.

(D) A concise description of those significant investment policies or techniques (such as investing for control or management) that are not described pursuant to subparagraphs (B) or (C) above that the issuer employs or has the current intention of employing in the foreseeable future.

(b) Discuss briefly the principal risk factors associated with investment in the issuer, including factors peculiar to the issuer as well as those generally attendant to investment in a business development company with investment policies and objectives similar to the issuer.

Item 3. Same as Item 3 of Schedule A.

Item 4. Same as Item 4 of Schedule A.

Item 5. Same as Item 5 of Schedule A.

Item 6. Same as Item 6 of Schedule A.

Item 7. Same as Item 7 of Schedule A.

(Secs. 3(b) and 3(c), Securities Act of 1933 (15 U.S.C. 77c (b) and (c)); sec. 38, Investment Company Act of 1940 (15 U.S.C. 80a-37))

[49 FR 35345, Sept. 7, 1984]

§§ 230.651-230.656 [Reserved]

§ 230.701 Exemption for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation.

Preliminary Notes:

1. This section relates to transactions exempted from the registration requirements of section 5 of the Act (15 U.S.C. 77e). These transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers and persons acting on their behalf have an obligation to provide investors with disclosure adequate to satisfy the antifraud provisions of the federal securities laws.
2. In addition to complying with this section, the issuer also must comply with any applicable state law relating to the offer and sale of securities.
3. An issuer that attempts to comply with this section, but fails to do so, may claim any other exemption that is available.

4. This section is available only to the issuer of the securities. Affiliates of the issuer may not use this section to offer or sell securities. This section also does not cover resales of securities by any person. This section provides an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.

5. The purpose of this section is to provide an exemption from the registration requirements of the Act for securities issued in compensatory circumstances. This section is not available for plans or schemes to circumvent this purpose, such as to raise capital. This section also is not available to exempt any transaction that is in technical compliance with this section but is part of a plan or scheme to evade the registration provisions of the Act. In any of these cases, registration under the Act is required unless another exemption is available.

(a) **Exemption.** Offers and sales made in compliance with all of the conditions of this section are exempt from section 5 of the Act (15 U.S.C. 77e).

(b) **Issuers eligible to use this section -**

(1) **General.** This section is available to any issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78m or 78o(d)) and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

(2) **Issuers that become subject to reporting.** If an issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)) after it has made offers complying with this section, the issuer may nevertheless rely on this section to sell the securities previously offered to the persons to whom those offers were made.

(3) **Guarantees by reporting companies.** An issuer subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78o(d)) may rely on this section if it is merely guaranteeing the payment of a subsidiary's securities that are sold under this section.

(c) **Transactions exempted by this section.** This section exempts offers and sales of securities (including plan interests and guarantees pursuant to paragraph (d)(2)(ii) of this section) under a written compensatory benefit plan (or written compensation contract) established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. This section exempts offers and sales to former employees, directors, general partners, trustees, officers, consultants and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered. In addition, the term "employee" includes insurance agents who are exclusive agents of the issuer, its subsidiaries or parents, or derive more than 50% of their annual income from those entities.

(1) **Special requirements for consultants and advisors.** This section is available to consultants and advisors only if:

(i) They are natural persons;

(ii) They provide *bona fide* services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent; and

(iii) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.

(2) **Definition of "compensatory benefit plan."** For purposes of this section, a *compensatory benefit plan* is any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan.

(3) **Definition of "family member."** For purposes of this section, *family member* includes any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, former spouse, sibling, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships, any person sharing the employee's household (other than a tenant or employee), a trust in which these persons have more than fifty percent of the beneficial interest, a foundation in which these persons (or the employee) control the management of assets, and any other entity in which these persons (or the employee) own more than fifty percent of the voting interests.

(d) **Amounts that may be sold -**

(1) **Offers.** Any amount of securities may be offered in reliance on this section. However, for purposes of this section, sales of securities underlying options must be counted as sales on the date of the option grant.

(2) **Sales.** The aggregate sales price or amount of securities sold in reliance on this section during any consecutive 12-month period must not exceed the greatest of the following:

(i) \$1,000,000;

(ii) 15% of the total assets of the issuer (or of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees), measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end); or

(iii) 15% of the outstanding amount of the class of securities being offered and sold in reliance on this section, measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end).

(3) **Rules for calculating prices and amounts -**

(i) **Aggregate sales price.** The term *aggregate sales price* means the sum of all cash, property, notes, cancellation of debt or other consideration received or to be received by the issuer for the sale of the securities. Non-cash consideration must be valued by reference to *bona fide* sales of that consideration made within a reasonable time or, in the absence of such sales, on the fair value as determined by an accepted standard. The value of services exchanged for securities issued must be measured by reference to the value of the securities issued. Options must be valued based on the exercise price of the option.

(ii) **Time of the calculation.** With respect to options to purchase securities, the aggregate sales price is determined when an option grant is made (without regard to when the option becomes exercisable). With respect to other securities, the calculation is made on the date of sale. With respect to deferred compensation or similar plans, the calculation is made when the irrevocable election to defer is made.

- (iii) **Derivative securities.** In calculating outstanding securities for purposes of paragraph (d)(2)(iii) of this section, treat the securities underlying all currently exercisable or convertible options, warrants, rights or other securities, other than those issued under this exemption, as outstanding. In calculating the amount of securities sold for other purposes of paragraph (d)(2) of this section, count the amount of securities that would be acquired upon exercise or conversion in connection with sales of options, warrants, rights or other exercisable or convertible securities, including those to be issued under this exemption.
- (iv) **Other exemptions.** Amounts of securities sold in reliance on this section do not affect “aggregate offering prices” in other exemptions, and amounts of securities sold in reliance on other exemptions do not affect the amount that may be sold in reliance on this section.
- (e) **Disclosure that must be provided.** The issuer must deliver to investors a copy of the compensatory benefit plan or the contract, as applicable. In addition, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds \$10 million, the issuer must deliver the following disclosure to investors a reasonable period of time before the date of sale:
 - (1) If the plan is subject to the Employee Retirement Income Security Act of 1974 (“ERISA”) (29 U.S.C. 1104-1107), a copy of the summary plan description required by ERISA;
 - (2) If the plan is not subject to ERISA, a summary of the material terms of the plan;
 - (3) Information about the risks associated with investment in the securities sold pursuant to the compensatory benefit plan or compensation contract; and
 - (4) Financial statements required to be furnished by Part F/S of Form 1-A (Regulation A Offering Statement) (§ 239.90 of this chapter) under Regulation A (§§ 230.251 through 230.263). Foreign private issuers as defined in Rule 405 must provide a reconciliation to generally accepted accounting principles in the United States (U.S. GAAP) if their financial statements are not prepared in accordance with U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (Item 17 of Form 20-F (§ 249.220f of this chapter)). The financial statements required by this section must be as of a date no more than 180 days before the sale of securities in reliance on this exemption.
 - (5) If the issuer is relying on paragraph (d)(2)(ii) of this section to use its parent's total assets to determine the amount of securities that may be sold, the parent's financial statements must be delivered. If the parent is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), the financial statements of the parent required by Rule 10-01 of Regulation S-X (§ 210.10-01 of this chapter) and Item 310 of Regulation D-B (§ 228.310 of this chapter), as applicable, must be delivered.
 - (6) If the sale involves a stock option or other derivative security, the issuer must deliver disclosure a reasonable period of time before the date of exercise or conversion. For deferred compensation or similar plans, the issuer must deliver disclosure to investors a reasonable period of time before the date the irrevocable election to defer is made.
- (f) **No integration with other offerings.** Offers and sales exempt under this section are deemed to be a part of a single, discrete offering and are not subject to integration with any other offers or sales, whether registered under the Act or otherwise exempt from the registration requirements of the Act.
- (g) **Resale limitations.**
 - (1) Securities issued under this section are deemed to be “restricted securities” as defined in § 230.144.

- (2) Resales of securities issued pursuant to this section must be in compliance with the registration requirements of the Act or an exemption from those requirements.
- (3) Ninety days after the issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), securities issued under this section may be resold by persons who are not affiliates (as defined in § 230.144) in reliance on § 230.144, without compliance with paragraphs (c) and (d) of § 230.144, and by affiliates without compliance with paragraph (d) of § 230.144.

[64 FR 11101, Mar. 8, 1999, as amended at 64 FR 61498, Nov. 12, 1999; 72 FR 71571, Dec. 17, 2007; 73 FR 1009, Jan. 4, 2008; 83 FR 34944, July 24, 2018]

§§ 230.702(T)-230.703(T) [Reserved]

EXEMPTIONS FOR CROSS-BORDER RIGHTS OFFERINGS, EXCHANGE OFFERS AND BUSINESS COMBINATIONS

Source: Sections 230.800 through 230.802 appear at 64 FR 61400, Nov. 10, 1999, unless otherwise noted.

General Notes to §§ 230.800, 230.801 and 230.802

1. Sections 230.801 and 230.802 relate only to the applicability of the registration provisions of the Act (15 U.S.C. 77e) and not to the applicability of the anti-fraud, civil liability or other provisions of the federal securities laws.
2. The exemptions provided by § 230.801 and § 230.802 are not available for any securities transaction or series of transactions that technically complies with § 230.801 and § 230.802 but are part of a plan or scheme to evade the registration provisions of the Act.
3. An issuer who relies on § 230.801 or an offeror who relies on § 230.802 must still comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) and any other applicable provisions of the federal securities laws.
4. An issuer who relies on § 230.801 or an offeror who relies on § 230.802 must still comply with any applicable state laws relating to the offer and sale of securities.
5. Attempted compliance with § 230.801 or § 230.802 does not act as an exclusive election; an issuer making an offer or sale of securities in reliance on § 230.801 or § 230.802 may also rely on any other applicable exemption from the registration requirements of the Act.
6. Section 230.801 and § 230.802 provide exemptions only for the issuer of the securities and not for any affiliate of that issuer or for any other person for resales of the issuer's securities. These sections provide exemptions only for the transaction in which the issuer or other person offers or sells the securities, not for the securities themselves. Securities acquired in a § 230.801 or § 230.802 transaction may be resold in the United States only if they are registered under the Act or an exemption from registration is available.
7. Unregistered offers and sales made outside the United States will not affect contemporaneous offers and sales made in compliance with § 230.801 or § 230.802. A transaction that complies with § 230.801 or § 230.802 will not be integrated with offerings exempt under other provisions of the Act, even if both transactions occur at the same time.

8. Securities acquired in a rights offering under § 230.801 are “restricted securities” within the meaning of § 230.144(a)(3) to the same extent and proportion that the securities held by the security holder as of the record date for the rights offering were restricted securities. Likewise, securities acquired in an exchange offer or business combination subject to § 230.802 are “restricted securities” within the meaning of § 230.144(a)(3) to the same extent and proportion that the securities tendered or exchanged by the security holder in that transaction were restricted securities.

9. Section 230.801 does not apply to a rights offering by an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), other than a registered closed-end investment company. Section 230.802 does not apply to exchange offers or business combinations by an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), other than a registered closed-end investment company.

§ 230.800 Definitions for §§ 230.800, 230.801 and 230.802.

The following definitions apply in §§ 230.800, 230.801 and 230.802.

- (a) **Business combination.** *Business combination* means a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of security holders of one or more of the participating companies. It also includes a statutory short form merger that does not require a vote of security holders.
- (b) **Equity security.** *Equity security* means the same as in § 240.3a11-1 of this chapter, but for purposes of this section only does not include:
 - (1) Any debt security that is convertible into an equity security, with or without consideration;
 - (2) Any debt security that includes a warrant or right to subscribe to or purchase an equity security;
 - (3) Any such warrant or right; or
 - (4) Any put, call, straddle, or other option or privilege that gives the holder the option of buying or selling a security but does not require the holder to do so.
- (c) **Exchange offer.** *Exchange offer* means a tender offer in which securities are issued as consideration.
- (d) **Foreign private issuer.** *Foreign private issuer* means the same as in § 230.405 of Regulation C.
- (e) **Foreign subject company.** *Foreign subject company* means any foreign private issuer whose securities are the subject of the exchange offer or business combination.
- (f) **Home jurisdiction.** *Home jurisdiction* means both the jurisdiction of the foreign subject company's (or in the case of a rights offering, the foreign private issuer's) incorporation, organization or chartering and the principal foreign market where the foreign subject company's (or in the case of a rights offering, the issuer's) securities are listed or quoted.
- (g) **Rights offering.** *Rights offering* means offers and sales for cash of equity securities where:
 - (1) The issuer grants the existing security holders of a particular class of equity securities (including holders of depositary receipts evidencing those securities) the right to purchase or subscribe for additional securities of that class; and

(2) The number of additional shares an existing security holder may purchase initially is in proportion to the number of securities he or she holds of record on the record date for the rights offering. If an existing security holder holds depositary receipts, the proportion must be calculated as if the underlying securities were held directly.

(h) **U.S. holder. U.S. holder** means any security holder resident in the United States. To determine the percentage of outstanding securities held by U.S. holders:

- (1) Calculate the percentage of outstanding securities held by U.S. holders as of a date no more than 60 days before or 30 days after the public announcement of a business combination conducted under § 230.802 under the Act or of the record date in a rights offering conducted under § 230.801 under the Act. For a business combination conducted under § 230.802, if you are unable to calculate as of a date within these time frames, the calculation may be made as of the most recent practicable date before public announcement, but in no event earlier than 120 days before public announcement.
- (2) Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculation other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by the acquiror in an exchange offer or business combination;
- (3) Use the method of calculating record ownership in Rule 12g3-2(a) under the Exchange Act (§ 240.12g3-2(a) of this chapter), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company's jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different from the subject company's jurisdiction of incorporation;
- (4) If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this provision, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.
- (5) Count securities as owned by U.S. holders when publicly filed reports of beneficial ownership or information that is otherwise provided to you indicates that the securities are held by U.S. residents.
- (6) For exchange offers conducted pursuant to § 230.802 under the Act by persons other than the issuer of the subject securities or its affiliates that are not made pursuant to an agreement with the issuer of the subject securities, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities, unless paragraphs (h)(7)(i), (ii) or (iii) of this section indicate otherwise.
- (7) For rights offerings and business combinations, including exchange offers conducted pursuant to § 230.802 under the Act, where the offeror is unable to conduct the analysis of U.S. ownership set forth in paragraph (h)(3) of this section, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities so long as there is a primary trading market for the subject securities outside the United States, as defined in § 240.12h-6(f)(5) of this chapter, unless:

- (i) Average daily trading volume of the subject securities in the United States for a recent twelve-month period ending on a date no more than 60 days before the public announcement of the business combination or of the record date for a rights offering exceeds 10 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or
- (ii) The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission or any jurisdiction in which the subject securities trade before the public announcement of the offer indicates that U.S. holders hold more than 10 percent of the outstanding subject class of securities; or
- (iii) The acquiror or issuer knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent of such securities. As an example, an acquiror or issuer is deemed to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. The acquiror in a business combination is deemed to know information about U.S. ownership available from the issuer. The acquiror or issuer is deemed to know information obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers. These examples are not intended to be exclusive.

- (i) **United States.** *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

[64 FR 61400, Nov. 10, 1999, as amended at 73 FR 60087, Oct. 9, 2008]

§ 230.801 Exemption in connection with a rights offering.

A rights offering is exempt from the provisions of Section 5 of the Act (15 U.S.C. 77e), so long as the following conditions are satisfied:

(a) **Conditions -**

- (1) **Eligibility of issuer.** The issuer is a foreign private issuer on the date the securities are first offered to U.S. holders.
- (2) **Limitation on U.S. ownership.** U.S. holders hold no more than 10 percent of the outstanding class of securities that is the subject of the rights offering (as determined under the definition of "U.S. holder" in § 230.800(h)).
- (3) **Equal treatment.** The issuer permits U.S. holders to participate in the rights offering on terms at least as favorable as those offered the other holders of the securities that are the subject of the offer. The issuer need not, however, extend the rights offering to security holders in those states or jurisdictions that require registration or qualification.
- (4) **Informational documents.**
 - (i) If the issuer publishes or otherwise disseminates an informational document to the holders of the securities in connection with the rights offering, the issuer must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§

239.800 of this chapter) by the first business day after publication or dissemination. If the issuer is a foreign company, it must also file a Form F-X (§ 239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

- (ii) The issuer must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction.
- (iii) If the issuer disseminates by publication in its home jurisdiction, the issuer must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(5) **Eligibility of securities.** The securities offered in the rights offering are equity securities of the same class as the securities held by the offerees in the United States directly or through American Depositary Receipts.

(6) **Limitation on transferability of rights.** The terms of the rights prohibit transfers of the rights by U.S. holders except in accordance with Regulation S (§ 230.901 through § 230.905).

- (b) **Legends.** The following legend or an equivalent statement in clear, plain language, to the extent applicable, appears on the cover page or other prominent portion of any informational document the issuer disseminates to U.S. holders:

This rights offering is made for the securities of a foreign company. The offer is subject to the disclosure requirements of a foreign country that are different from those of the United States. Financial statements included in the document, if any, have been prepared in accordance with foreign accounting standards that may not be comparable to the financial statements of United States companies.

It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue the foreign company or its officers or directors in a foreign court for violations of the U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment.

§ 230.802 Exemption for offerings in connection with an exchange offer or business combination for the securities of foreign private issuers.

Offers and sales in any exchange offer for a class of securities of a foreign private issuer, or in any exchange of securities for the securities of a foreign private issuer in any business combination, are exempt from the provisions of section 5 of the Act (15 U.S.C. 77e), if they satisfy the following conditions:

(a) **Conditions to be met -**

- (1) **Limitation on U.S. ownership.** Except in the case of an exchange offer or business combination that is commenced during the pendency of a prior exchange offer or business combination made in reliance on this paragraph, U.S. holders of the foreign subject company must hold no more than 10 percent of the securities that are the subject of the exchange offer or business combination (as determined under the definition of "U.S. holder" in § 230.800(h)). In the case of a business combination in which the securities are to be issued by a successor registrant, U.S. holders may hold no more than 10 percent of the class of securities of the successor registrant, as if measured immediately after completion of the business combination.

(2) **Equal treatment.** The offeror must permit U.S. holders to participate in the exchange offer or business combination on terms at least as favorable as those offered any other holder of the subject securities. The offeror, however, need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the offeror must offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction.

(3) **Informational documents.**

(i) If the offeror publishes or otherwise disseminates an informational document to the holders of the subject securities in connection with the exchange offer or business combination, the offeror must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination. If the offeror is a foreign company, it must also file a Form F-X (§ 239.42 of this chapter) with the Commission at the same time as the submission of the Form CB to appoint an agent for service of process in the United States.

(ii) The offeror must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the foreign subject company's home jurisdiction.

(iii) If the offeror disseminates by publication in its home jurisdiction, the offeror must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(b) **Legends.** The following legend or an equivalent statement in clear, plain language, to the extent applicable, must be included on the cover page or other prominent portion of any informational document the offeror publishes or disseminates to U.S. holders:

This exchange offer or business combination is made for the securities of a foreign company. The offer is subject to disclosure requirements of a foreign country that are different from those of the United States. Financial statements included in the document, if any, have been prepared in accordance with foreign accounting standards that may not be comparable to the financial statements of United States companies.

It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue a foreign company or its officers or directors in a foreign court for violations of the U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment.

You should be aware that the issuer may purchase securities otherwise than under the exchange offer, such as in open market or privately negotiated purchases.

[64 FR 61400, Nov. 10, 1999, as amended at 73 FR 60088, Oct. 9, 2008]

REGULATION S - RULES GOVERNING OFFERS AND SALES MADE OUTSIDE THE UNITED STATES WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933

Source: Sections 230.901 through 230.904 appear at 55 FR 18322, May 2, 1990, unless otherwise noted.

Preliminary Notes:

1. The following rules relate solely to the application of Section 5 of the Securities Act of 1933 (the Act) [15 U.S.C. 77e] and not to antifraud or other provisions of the federal securities laws.
2. In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.
3. Nothing in these rules obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act (the *Exchange Act*), whenever such requirements are applicable.
4. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities.
5. Attempted compliance with any rule in Regulation S does not act as an exclusive election; a person making an offer or sale of securities may also claim the availability of any applicable exemption from the registration requirements of the Act. The availability of the Regulation S safe harbor to offers and sales that occur outside of the United States will not be affected by the subsequent offer and sale of these securities into the United States or to U.S. persons during the distribution compliance period, as long as the subsequent offer and sale are made pursuant to registration or an exemption therefrom under the Act.
6. Regulation S is available only for offers and sales of securities outside the United States. Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the Act or an exemption from registration is available.
7. Nothing in these rules precludes access by journalists for publications with a general circulation in the United States to offshore press conferences, press releases and meetings with company press spokespersons in which an offshore offering or tender offer is discussed, provided that the information is made available to the foreign and United States press generally and is not intended to induce purchases of securities by persons in the United States or tenders of securities by United States holders in the case of exchange offers. Where applicable, issuers and bidders may also look to § 230.135e and § 240.14d-1(c) of this chapter.
8. The provisions of this Regulation S shall not apply to offers and sales of securities issued by open-end investment companies or unit investment trusts registered or required to be registered or closed-end investment companies required to be registered, but not registered, under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.] (the *1940 Act*).

[55 FR 18322, May 2, 1990, as amended at 62 FR 53954, Oct. 17, 1997; 63 FR 9642, Feb. 25, 1998]

§ 230.901 General statement.

For the purposes only of section 5 of the Act (15 U.S.C. § 77e), the terms *offer*, *offer to sell*, *sell*, *sale*, and *offer to buy* shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.

§ 230.902 Definitions.

As used in Regulation S, the following terms shall have the meanings indicated.

(a) **Debt securities.** “Debt securities” of an issuer is defined to mean any security other than an equity security as defined in § 230.405, as well as the following:

- (1) Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; and
- (2) Asset-backed securities, which are securities of a type that either:
 - (i) Represent an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its affiliates; or
 - (ii) Are secured by one or more assets or certificates of interest or participation in such assets, and the securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of paragraph (a)(2)(i) of this section, or certificates of interest or participations in assets meeting such requirements.
 - (iii) For purposes of paragraph (a)(2) of this section, the term “assets” means securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time.

(b) **Designated offshore securities market.** “Designated offshore securities market” means:

- (1) The Eurobond market, as regulated by the International Securities Market Association; the Alberta Stock Exchange; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bermuda Stock Exchange; the Bourse de Bruxelles; the Copenhagen Stock Exchange; the European Association of Securities Dealers Automated Quotation; the Frankfurt Stock Exchange; the Helsinki Stock Exchange; The Stock Exchange of Hong Kong Limited; the Irish Stock Exchange; the Istanbul Stock Exchange; the Johannesburg Stock Exchange; the London Stock Exchange; the Bourse de Luxembourg; the Mexico Stock Exchange; the Borsa Valori di Milan; the Montreal Stock Exchange; the Oslo Stock Exchange; the Bourse de Paris; the Stock Exchange of Singapore Ltd.; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; the Warsaw Stock Exchange and the Zurich Stock Exchange; and
- (2) Any foreign securities exchange or non-exchange market designated by the Commission. Attributes to be considered in determining whether to designate an offshore securities market, among others, include:
 - (i) Organization under foreign law;
 - (ii) Association with a generally recognized community of brokers, dealers, banks, or other professional intermediaries with an established operating history;
 - (iii) Oversight by a governmental or self-regulatory body;

- (iv) Oversight standards set by an existing body of law;
- (v) Reporting of securities transactions on a regular basis to a governmental or self-regulatory body;
- (vi) A system for exchange of price quotations through common communications media; and
- (vii) An organized clearance and settlement system.

(c) **Directed selling efforts.**

- (1) "Directed selling efforts" means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes). Such activity includes placing an advertisement in a publication "with a general circulation in the United States" that refers to the offering of securities being made in reliance upon this Regulation S.
- (2) Publication "with a general circulation in the United States":
 - (i) Is defined as any publication that is printed primarily for distribution in the United States, or has had, during the preceding twelve months, an average circulation in the United States of 15,000 or more copies per issue; and
 - (ii) Will encompass only the U.S. edition of any publication printing a separate U.S. edition if the publication, without considering its U.S. edition, would not constitute a publication with a general circulation in the United States.
- (3) The following are not "directed selling efforts":
 - (i) Placing an advertisement required to be published under U.S. or foreign law, or under rules or regulations of a U.S. or foreign regulatory or self-regulatory authority, provided the advertisement contains no more information than legally required and includes a statement to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903) absent registration or an applicable exemption from the registration requirements;
 - (ii) Contact with persons excluded from the definition of "U.S. person" pursuant to paragraph (k)(2)(vi) of this section or persons holding accounts excluded from the definition of "U.S. person" pursuant to paragraph (k)(2)(i) of this section, solely in their capacities as holders of such accounts;
 - (iii) A tombstone advertisement in any publication with a general circulation in the United States, provided:
 - (A) The publication has less than 20% of its circulation, calculated by aggregating the circulation of its U.S. and comparable non-U.S. editions, in the United States;
 - (B) Such advertisement contains a legend to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903) absent registration or an applicable exemption from the registration requirements; and

- (C) Such advertisement contains no more information than:
 - (1) The issuer's name;
 - (2) The amount and title of the securities being sold;
 - (3) A brief indication of the issuer's general type of business;
 - (4) The price of the securities;
 - (5) The yield of the securities, if debt securities with a fixed (non-contingent) interest provision;
 - (6) The name and address of the person placing the advertisement, and whether such person is participating in the distribution;
 - (7) The names of the managing underwriters;
 - (8) The dates, if any, upon which the sales commenced and concluded;
 - (9) Whether the securities are offered or were offered by rights issued to security holders and, if so, the class of securities that are entitled or were entitled to subscribe, the subscription ratio, the record date, the dates (if any) upon which the rights were issued and expired, and the subscription price; and
 - (10) Any legend required by law or any foreign or U.S. regulatory or self-regulatory authority;
 - (iv) Bona fide visits to real estate, plants or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer, a distributor, any of their respective affiliates or a person acting on behalf of any of the foregoing;
 - (v) Distribution in the United States of a foreign broker-dealer's quotations by a third-party system that distributes such quotations primarily in foreign countries if:
 - (A) Securities transactions cannot be executed between foreign broker-dealers and persons in the United States through the system; and
 - (B) The issuer, distributors, their respective affiliates, persons acting on behalf of any of the foregoing, foreign broker-dealers and other participants in the system do not initiate contacts with U.S. persons or persons within the United States, beyond those contacts exempted under § 240.15a-6 of this chapter;
 - (vi) Publication by an issuer of a notice in accordance with § 230.135 or § 230.135c;
 - (vii) Providing any journalist with access to press conferences held outside of the United States, to meetings with the issuer or selling security holder representatives conducted outside the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if the requirements of § 230.135e are satisfied; and
 - (viii) Publication or distribution of a research report by a broker or dealer in accordance with Rule 138(c) (§ 230.138(c)) or Rule 139(b) (§ 230.139(b)).
- (d) **Distributor.** "Distributor" means any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes).

(e) **Domestic issuer/Foreign issuer.** “Domestic issuer” means any issuer other than a “foreign government” or “foreign private issuer” (both as defined in § 230.405). “Foreign issuer” means any issuer other than a “domestic issuer.”

(f) **Distribution compliance period.** “Distribution compliance period” means a period that begins when the securities were first offered to persons other than distributors in reliance upon this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) or the date of closing of the offering, whichever is later, and continues until the end of the period of time specified in the relevant provision of § 230.903, except that:

- (1) All offers and sales by a distributor of an unsold allotment or subscription shall be deemed to be made during the distribution compliance period;
- (2) In a continuous offering, the distribution compliance period shall commence upon completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions;
- (3) In a continuous offering of non-convertible debt securities offered and sold in identifiable tranches, the distribution compliance period for securities in a tranche shall commence upon completion of the distribution of such tranche, as determined and certified by the managing underwriter or person performing similar functions; and
- (4) That in a continuous offering of securities to be acquired upon the exercise of warrants, the distribution compliance period shall commence upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person performing similar functions, if requirements of § 230.903(b)(5) are satisfied.

(g) **Offering restrictions.** “Offering restrictions” means:

- (1) Each distributor agrees in writing:
 - (i) That all offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903, as applicable, shall be made only in accordance with the provisions of § 230.903 or § 230.904; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act; and
 - (ii) For offers and sales of equity securities of domestic issuers, not to engage in hedging transactions with regard to such securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903, as applicable, unless in compliance with the Act; and
- (2) All offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903, as applicable, shall include statements to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are registered under the Act, or an exemption from the registration requirements of the Act is available. For offers and sales of equity securities of domestic issuers, such offering materials and documents also must state that hedging transactions involving those securities may not be conducted unless in compliance with the Act. Such statements shall appear:

- (i) On the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;
- (ii) In the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and
- (iii) In any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in advertisements.

(h) **Offshore transaction.**

- (1) An offer or sale of securities is made in an "offshore transaction" if:
 - (i) The offer is not made to a person in the United States; and
 - (ii) Either:
 - (A) At the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States; or
 - (B) For purposes of:
 - (1) Section 230.903, the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States; or
 - (2) Section 230.904, the transaction is executed in, on or through the facilities of a designated offshore securities market described in paragraph (b) of this section, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.
 - (2) Notwithstanding paragraph (h)(1) of this section, offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, shall not be deemed to be made in "offshore transactions."
 - (3) Notwithstanding paragraph (h)(1) of this section, offers and sales of securities to persons excluded from the definition of "U.S. person" pursuant to paragraph (k)(2)(vi) of this section or persons holding accounts excluded from the definition of "U.S. person" pursuant to paragraph (k)(2)(i) of this section, solely in their capacities as holders of such accounts, shall be deemed to be made in "offshore transactions."
 - (4) Notwithstanding paragraph (h)(1) of this section, publication or distribution of a research report in accordance with Rule 138(c) (§ 230.138(c)) or Rule 139(b) (§ 230.139(b)) by a broker or dealer at or around the time of an offering in reliance on Regulation S (§§ 230.901 through 230.905) will not cause the transaction to fail to be an offshore transaction as defined in this section.
- (i) **Reporting issuer.** "Reporting issuer" means an issuer other than an investment company registered or required to register under the 1940 Act that:
- (1) Has a class of securities registered pursuant to Section 12(b) or 12(g) of the Exchange Act (15 U.S.C. 78l(b) or 78l(g)) or is required to file reports pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)); and

- (2) Has filed all the material required to be filed pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) for a period of at least twelve months immediately preceding the offer or sale of securities made in reliance upon this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) (or for such shorter period that the issuer was required to file such material).

(j) **Substantial U.S. market interest.**

- (1) "Substantial U.S. market interest" with respect to a class of an issuer's equity securities means:
 - (i) The securities exchanges and inter-dealer quotation systems in the United States in the aggregate constituted the single largest market for such class of securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation; or
 - (ii) 20 percent or more of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States and less than 55 percent of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.
- (2) "Substantial U.S. market interest" with respect to an issuer's debt securities means:
 - (i) Its debt securities, in the aggregate, are held of record (as that term is defined in § 240.12g5-1 of this chapter and used for purposes of paragraph (j)(2) of this section) by 300 or more U.S. persons;
 - (ii) \$1 billion or more of: The principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons; and
 - (iii) 20 percent or more of: The principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons.
- (3) Notwithstanding paragraph (j)(2) of this section, substantial U.S. market interest with respect to an issuer's debt securities is calculated without reference to securities that qualify for the exemption provided by Section 3(a)(3) of the Act (15 U.S.C. 77c(a)(3)).

(k) **U.S. person.**

- (1) "U.S. person" means:
 - (i) Any natural person resident in the United States;
 - (ii) Any partnership or corporation organized or incorporated under the laws of the United States;
 - (iii) Any estate of which any executor or administrator is a U.S. person;
 - (iv) Any trust of which any trustee is a U.S. person;
 - (v) Any agency or branch of a foreign entity located in the United States;
 - (vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;

(vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) Any partnership or corporation if:

(A) Organized or incorporated under the laws of any foreign jurisdiction; and

(B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in § 230.501(a)) who are not natural persons, estates or trusts.

(2) The following are not "U.S. persons":

(i) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(ii) Any estate of which any professional fiduciary acting as executor or administrator is a U.S. person if:

(A) An executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and

(B) The estate is governed by foreign law;

(iii) Any trust of which any professional fiduciary acting as trustee is a U.S. person, if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

(iv) An employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country;

(v) Any agency or branch of a U.S. person located outside the United States if:

(A) The agency or branch operates for valid business reasons; and

(B) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located; and

(vi) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(l) **United States.** "United States" means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

[63 FR 9642, Feb. 25, 1998, as amended at 70 FR 44819, Aug. 3, 2005]

§ 230.903 Offers or sales of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; conditions relating to specific securities.

- (a) An offer or sale of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if:
 - (1) The offer or sale is made in an offshore transaction;
 - (2) No directed selling efforts are made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; and
 - (3) The conditions of paragraph (b) of this section, as applicable, are satisfied.
- (b) **Additional conditions** -
 - (1) **Category 1.** No conditions other than those set forth in § 230.903(a) apply to securities in this category. Securities are eligible for this category if:
 - (i) The securities are issued by a foreign issuer that reasonably believes at the commencement of the offering that:
 - (A) There is no substantial U.S. market interest in the class of securities to be offered or sold (if equity securities are offered or sold);
 - (B) There is no substantial U.S. market interest in its debt securities (if debt securities are offered or sold);
 - (C) There is no substantial U.S. market interest in the securities to be purchased upon exercise (if warrants are offered or sold); and
 - (D) There is no substantial U.S. market interest in either the convertible securities or the underlying securities (if convertible securities are offered or sold);
 - (ii) The securities are offered and sold in an overseas directed offering, which means:
 - (A) An offering of securities of a foreign issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country; or
 - (B) An offering of non-convertible debt securities of a domestic issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country, provided that the principal and interest of the securities (or par value, as applicable) are denominated in a currency other than U.S. dollars and such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner that in effect converts the securities to U.S. dollar-denominated securities.
 - (iii) The securities are backed by the full faith and credit of a foreign government; or

- (iv) The securities are offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States, and customary practices and documentation of such country, provided that:
 - (A) The securities are issued in compensatory circumstances for bona fide services rendered to the issuer or its affiliates in connection with their businesses and such services are not rendered in connection with the offer or sale of securities in a capital-raising transaction;
 - (B) Any interests in the plan are not transferable other than by will or the laws of descent or distribution;
 - (C) The issuer takes reasonable steps to preclude the offer and sale of interests in the plan or securities under the plan to U.S. residents other than employees on temporary assignment in the United States; and
 - (D) Documentation used in connection with any offer pursuant to the plan contains a statement that the securities have not been registered under the Act and may not be offered or sold in the United States unless registered or an exemption from registration is available.
- (2) **Category 2.** The following conditions apply to securities that are not eligible for Category 1 (paragraph (b)(1)) of this section and that are equity securities of a reporting foreign issuer, or debt securities of a reporting issuer or of a non-reporting foreign issuer.
 - (i) Offering restrictions are implemented;
 - (ii) The offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and
 - (iii) Each distributor selling securities to a distributor, a dealer, as defined in section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of a 40-day distribution compliance period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.
- (3) **Category 3.** The following conditions apply to securities that are not eligible for Category 1 or 2 (paragraph (b)(1) or (b)(2)) of this section:
 - (i) Offering restrictions are implemented;
 - (ii) In the case of debt securities:
 - (A) The offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and
 - (B) The securities are represented upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day distribution compliance period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Act;
 - (iii) In the case of equity securities:

- (A) The offer or sale, if made prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and
- (B) The offer or sale, if made prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), is made pursuant to the following conditions:
 - (1) The purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Act;
 - (2) The purchaser of the securities agrees to resell such securities only in accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the Act;
 - (3) The securities of a domestic issuer contain a legend to the effect that transfer is prohibited except in accordance with the provisions of this Regulation S (§§ 230.901 through 230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and that hedging transactions involving those securities may not be conducted unless in compliance with the Act;
 - (4) The issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of this Regulation S (§§ 230.901 through 230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; *provided, however*, that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend described in paragraph (b)(3)(iii)(B)(3) of this section) are implemented to prevent any transfer of the securities not made in accordance with the provisions of this Regulation S; and
- (iv) Each distributor selling securities to a distributor, a dealer (as defined in section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day distribution compliance period in the case of debt securities, or a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer) in the case of equity securities, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.
- (4) **Guaranteed securities.** Notwithstanding paragraphs (b)(1) through (b)(3) of this section, in offerings of debt securities fully and unconditionally guaranteed as to principal and interest by the parent of the issuer of the debt securities, only the requirements of paragraph (b) of this section that are applicable to the offer and sale of the guarantee must be satisfied with respect to the offer and sale of the guaranteed debt securities.

- (5) **Warrants.** An offer or sale of warrants under Category 2 or 3 (paragraph (b)(2) or (b)(3)) of this section also must comply with the following requirements:
- (i) Each warrant must bear a legend stating that the warrant and the securities to be issued upon its exercise have not been registered under the Act and that the warrant may not be exercised by or on behalf of any U.S. person unless registered under the Act or an exemption from such registration is available;
 - (ii) Each person exercising a warrant is required to give:
 - (A) Written certification that it is not a U.S. person and the warrant is not being exercised on behalf of a U.S. person; or
 - (B) A written opinion of counsel to the effect that the warrant and the securities delivered upon exercise thereof have been registered under the Act or are exempt from registration thereunder; and
 - (iii) Procedures are implemented to ensure that the warrant may not be exercised within the United States, and that the securities may not be delivered within the United States upon exercise, other than in offerings deemed to meet the definition of “offshore transaction” pursuant to § 230.902(h), unless registered under the Act or an exemption from such registration is available.

[63 FR 9645, Feb. 25, 1998, as amended at 72 FR 71571, Dec. 17, 2007]

§ 230.904 Offshore resales.

- (a) An offer or sale of securities by any person other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if:
- (1) The offer or sale are made in an offshore transaction;
 - (2) No directed selling efforts are made in the United States by the seller, an affiliate, or any person acting on their behalf; and
 - (3) The conditions of paragraph (b) of this section, if applicable, are satisfied.
- (b) **Additional conditions -**
- (1) **Resales by dealers and persons receiving selling concessions.** In the case of an offer or sale of securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) of § 230.903, as applicable, by a dealer, as defined in Section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold:
 - (i) Neither the seller nor any person acting on its behalf knows that the offeree or buyer of the securities is a U.S. person; and
 - (ii) If the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, as defined in Section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the distribution compliance period only in

accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes); pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act.

- (2) **Resales by certain affiliates.** In the case of an offer or sale of securities by an officer or director of the issuer or a distributor, who is an affiliate of the issuer or distributor solely by virtue of holding such position, no selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

[63 FR 9646, Feb. 25, 1998]

§ 230.905 Resale limitations.

Equity securities of domestic issuers acquired from the issuer, a distributor, or any of their respective affiliates in a transaction subject to the conditions of § 230.901 or § 230.903 are deemed to be "restricted securities" as defined in § 230.144. Resales of any of such restricted securities by the offshore purchaser must be made in accordance with this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), the registration requirements of the Act or an exemption therefrom. Any "restricted securities," as defined in § 230.144, that are equity securities of a domestic issuer will continue to be deemed to be restricted securities, notwithstanding that they were acquired in a resale transaction made pursuant to § 230.901 or § 230.904.

[63 FR 9647, Feb. 25, 1998]

REGULATION CE - COORDINATED EXEMPTIONS FOR CERTAIN ISSUES OF SECURITIES EXEMPT UNDER STATE LAW

§ 230.1001 Exemption for transactions exempt from qualification under § 25102(n) of the California Corporations Code.

Preliminary Notes:

- (1) Nothing in this section is intended to be or should be construed as in any way relieving issuers or persons acting on behalf of issuers from providing disclosure to prospective investors necessary to satisfy the antifraud provisions of the federal securities laws. This section only provides an exemption from the registration requirements of the Securities Act of 1933 ("the Act") [15 U.S.C. 77a et seq.].
- (2) Nothing in this section obviates the need to comply with any applicable state law relating to the offer and sales of securities.
- (3) Attempted compliance with this section does not act as an exclusive election; the issuer also can claim the availability of any other applicable exemption.
- (4) This exemption is not available to any issuer for any transaction which, while in technical compliance with the provision of this section, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

- (a) **Exemption.** Offers and sales of securities that satisfy the conditions of paragraph (n) of § 25102 of the California Corporations Code, and paragraph (b) of this section, shall be exempt from the provisions of Section 5 of the Securities Act of 1933 by virtue of Section 3(b) of that Act.
- (b) **Limitation on and computation of offering price.** The sum of all cash and other consideration to be received for the securities shall not exceed \$5,000,000, less the aggregate offering price for all other securities sold in the same offering of securities, whether pursuant to this or another exemption.
- (c) **Resale limitations.** Securities issued pursuant to this § 230.1001 are deemed to be “restricted securities” as defined in Securities Act Rule 144 [§ 230.144]. Resales of such securities must be made in compliance with the registration requirements of the Act or an exemption therefrom.

[61 FR 21359, May 9, 1996]