

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230 and 270

[Release No. 33-9503; IC-30845]

Securities Exempted; Distribution of Shares by Registered Open-End Management Investment Company; Applications Regarding Joint Enterprises or Arrangements and Certain Profit-Sharing Plans

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; technical amendments.

SUMMARY: The Securities and Exchange Commission (“Commission”) is correcting outdated cross-references in rule 602 under the Securities Act of 1933 (“Securities Act”) and rule 12b-1 under the Investment Company Act of 1940 (“Investment Company Act”) and correcting an inadvertent error in rule 17d-1 under the Investment Company Act as published in the Federal Register on January 22, 2003 (68 FR 3142).

EFFECTIVE DATE: [insert date of publication in Federal Register].

FOR FURTHER INFORMATION CONTACT: Daniel K. Chang, Senior Counsel, or Thoreau Bartmann, Branch Chief, at (202) 551-6792, Investment Company Rulemaking Office, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION:

I. Background

A. Rule 602

In December 1958, the Commission adopted Regulation E under the Securities Act, which exempts from registration small offerings by small business investment companies

registered under the Investment Company Act.¹ Regulation E was amended in 1984 to increase the size of offerings that may be made under the regulation, and include as exempted issuers certain investment companies who elect to be treated as business development companies under the Investment Company Act.² The purpose of the 1984 amendments was to increase the ability of small business investment companies and business development companies to raise capital.

As part of Regulation E, rule 602 establishes conditions under which securities issued by small business investment companies or business development companies may be exempt from registration under the Securities Act. Rule 602(c)(3) provides that the exemption is not available for the securities of any issuer if any of its affiliated directors, officers, principal security holders, investment advisers, or underwriters has been “subject to an order of the Commission entered pursuant to section 203(d) or (e) of the Investment Advisers Act of 1940.”³

In 1970, the Investment Company Amendments Act was enacted and, among other things, redesignated sections 203(d) and (e) of the Advisers Act as sections 203(e) and (f), respectively.⁴ To correct this cross-reference, this technical amendment to rule 602(c)(3) will

¹ Regulation E – Exemption for Securities of Small Business Investment Companies, 23 FR 10484 (Dec. 30, 1958).

² Amendments to the Offering Exemption Under Regulation E of the Securities Act of 1933, 49 FR 35342 (Sept. 7, 1984).

³ Section 203 of the Investment Advisers Act of 1940 (“Advisers Act”) requires certain investment advisers to register with the Commission, and gives the Commission broad enforcement authority over them. In particular, current section 203(e) authorizes the Commission, by order, to censure, place limitations on the activities, functions, or operations of, suspend, or revoke the registration of any investment adviser if the Commission makes certain findings with regards to that adviser. Current section 203(f) allows the Commission, by order, to censure, suspend, bar, or place limitations on the activities of any person associated or seeking to become associated with an investment adviser or certain other entities if the Commission makes certain findings with regards to that person.

⁴ Investment Company Amendments Act of 1970, Pub. L. No. 91547, 84 Stat. 1413 (Dec. 14, 1970).

replace the cross-reference to paragraphs (d) and (e) of section 203 of the Advisers Act with a cross-reference to paragraphs (e) and (f).

B. Rule 12b-1

In 1980, the Commission adopted rule 12b-1 under the Investment Company Act to permit a fund that meets certain conditions to use fund assets to pay for distribution of securities of which it is the issuer. Among other requirements, the fund must have a written plan describing all material aspects of the proposed distribution financing.

Rule 12b-1(g) provides certain conditions for plans that cover more than one series or class of shares, but further provides that paragraph (g) does not affect the rights of any purchase class under rule 18f-3(e)(2)(iii).⁵

On January 2, 2001, the Commission adopted amendments to certain exemptive rules under the Investment Company Act and, among other things, redesignated paragraph (e) of rule 18f-3 as paragraph (f). To correct this cross-reference, this technical amendment to rule 12b-1(g) will replace the cross-reference to rule 18f-3(e)(2)(iii) with a cross-reference to rule 18f-3(f)(2)(iii).

C. Rule 17d-1

In January 2003, the Commission adopted amendments to certain rules under the Investment Company Act to, among other things, expand the exemptions for investment companies (“funds”) to engage in transactions with “portfolio affiliates” – companies that are affiliated with the fund solely as the result of the fund (or an affiliated fund) controlling them or

⁵ Current rule 18f-3(f)(2)(iii) provides certain rights for shareholders of purchase classes in funds that are acquired as part of a merger.

owning more than five percent of their voting securities.⁶ The amendments were designed to permit transactions between funds and certain affiliated persons under circumstances where it was unlikely that the affiliate would be in a position to take advantage of the fund.

In implementing these amendments, the Adopting Release renumbered the paragraphs of rule 17d-1 and also added a cross-reference in paragraph (d)(6) of the rule to rule 17a-6, a related rule dealing with exemptions for transactions with portfolio affiliates that was also amended by the Adopting Release.⁷ However, the text of rule 17d-1(d)(6) as published in the “Text of Rule and Form Amendments” section of the Adopting Release, and subsequently in the Federal Register, included an incorrect cross-reference to paragraph (d)(5)(iii) of the rule instead of (d)(5)(ii). In addition, the rule as published in the Code of Federal Regulations inadvertently omitted three paragraphs (*i.e.*, (d)(6)(i)-(iii)) that should have followed immediately after paragraph (d)(6) of rule 17d-1.

This technical amendment to rule 17d-1(d)(6) corrects the internal cross-reference to paragraph (d)(5)(ii) instead of (d)(5)(iii) and restores the inadvertently omitted paragraphs of the rule text.

List of Subjects

17 CFR Parts 230 and 270

⁶ Transactions of Investment Companies With Portfolio and Subadvisory Affiliates, Investment Company Act Release No. 25888 (Jan. 14, 2003) [68 FR 3142 (Jan. 22, 2003)] (“Adopting Release”).

⁷ The cross-reference to rule 17a-6 was intended to conform provisions in paragraph (d)(6) of rule 17d-1 to similar provisions in rule 17a-6 in order to make them consistent with regards to which entities are considered prohibited participants for purposes of affiliate transactions. *See* Transactions of Investment Companies With Portfolio and Subadvisory Affiliates, Investment Company Act Release No. 25557 (April 30, 2002) [67 FR 31081 (May 8, 2002)] at n.30 and accompanying text.

The renumbering of the paragraphs of rule 17d-1 reflected the deletion of a condition in the rule that limited a fund to committing no more than five percent of its assets to a joint enterprise with a portfolio affiliate. *See* Adopting Release, *supra* note 1, at n.12.

Investment companies; Reporting and recordkeeping requirements; Securities.

TEXT OF AMENDMENT

For reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

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

1. The authority for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77d note, 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), 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

2. Section 230.602 is amended by revising paragraph (c)(3) to read as follows:

§ 230.602 Securities exempted.

(a) * * *

(c) * * *

(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));

* * * * *

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

1. The authority citation for part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a-1 *et seq.*, 80a-34(d), 80a-37, and 80a-39, unless otherwise noted.

* * * * *

2. Section 270.12b-1 is amended by revising paragraph (g) to read as follows:

§ 270.12b-1 Distribution of shares by registered open-end management investment company.

(a) * * *

(g) If a plan covers more than one series or class of shares, the provisions of the plan must be severable for each series or class, and whenever this rule provides for any action to be taken with respect to a plan, that action must be taken separately for each series or class affected by the matter. Nothing in this paragraph (g) shall affect the rights of any purchase class under § 270.18f-3(f)(2)(iii).

* * * * *

3. Section 270.17d-1 is amended by revising paragraph (d)(6) to read as follows:

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans.

(a) * * *

(d) * * *

(6) The receipt of securities and/or cash by an investment company or a controlled company thereof and an affiliated person of such investment company or an affiliated person of such person pursuant to a plan of reorganization: *Provided*, That no person identified in § 270.17a-6(a)(1) or any company in which such a person has a direct or indirect financial interest (as defined in paragraph (d)(5)(ii) of this section):

(i) Has a direct or indirect financial interest in the corporation under reorganization, except owning securities of each class or classes owned by such investment company or controlled company;

(ii) Receives pursuant to such plan any securities or other property, except securities of the same class and subject to the same terms as the securities received by such investment company or controlled company, and/or cash in the same proportion as is received by the investment company or controlled company based on securities of the company under reorganization owned by such persons; and

(iii) Is, or has a direct or indirect financial interest in any person (other than such investment company or controlled company) who is:

(A) Purchasing assets from the company under reorganization; or

(B) Exchanging shares with such person in a transaction not in compliance with the standards described in this paragraph (d)(6).

* * * * *

Elizabeth M. Murphy
Secretary

Dated: December 24, 2013