

an account that *currently* is portfolio margined and one that was at one time or is intended to be so in the future. Indeed, Subchapter IV of the Bankruptcy Code includes as customers entities with certain claims arising out of property that is not currently margining a commodity contract. Specifically, Section 761(9)(A)(ii) provides that an entity can qualify as a "customer" based on claims arising out of any of the following: (I) The "liquidation, or change in the value of a commodity contract;" (II) a deposit of property "for the purpose of making or margining * * * a commodity contract;" or (III) "the making or taking of delivery of a commodity contract." Accordingly, there is no requirement that the customer's assets be margining commodity contracts on the day that the bankruptcy petition is filed. Therefore, all assets contained in such an account are properly included within the customer's net equity.

Account Classes

Part 190 of the Commission's Regulations divides accounts into several classes, specifically: Futures accounts, foreign futures accounts, leverage accounts, commodity option accounts, and delivery accounts.¹²

In October 2004, the Commission issued an interpretation regarding the appropriate account class for funds attributable to contracts traded on non-domestic boards of trade, and the assets margining such contracts, that are included in accounts segregated in accordance with Section 4d of the Act pursuant to Commission Order.¹³ In that context, the Commission concluded that the claim is properly against the Section 4d account class because customers whose assets are deposited in such an account pursuant to Commission Order should benefit from that pool of assets. The same rationale supports the Commission's conclusion that a claim arising out of a cleared-only contract, or the property margining such a contract, would be includable in the futures account class where, pursuant to Commission Order, the contract or property is included in an account segregated in accordance with Section 4d of the Act.

¹² See 17 CFR 190.01.

¹³ See Interpretative Statement Regarding Funds Determined To Be Held in the Futures Account Type of Customer Account Class, 69 FR 69510 (Nov. 30, 2004).

Issued in Washington, DC, on September 26, 2008, by the Commodity Futures Trading Commission.

David Stawick,
Secretary of the Commission.

Concurrence of Commission Michael V. Dunn CBOT Request for an Order Under Section 4d of the Commodity Exchange Act Related to the Clearing of OTC Ethanol Products

I concur with granting 4d relief to the Chicago Board of Trade (CBOT) related to the clearing of OTC ethanol products while reserving judgment as to whether the Commission in the future should revisit the determination as to whether ethanol should be considered an agricultural commodity.

Ethanol markets clearly impact agricultural markets as we all realize. Even though I recognize that arguments can be made that ethanol is an energy commodity because it is primarily used as a source of energy, I don't think that should necessarily be the deciding factor.

Ethanol is clearly an important part of our agricultural economy. At some point, I think we may need to reconsider carefully whether ethanol should be considered an agricultural commodity so that it would be subject to the highest level of Commission jurisdiction rather than the lesser jurisdiction that attends energy commodities.

Despite this, I believe the order should be approved because the conditions attending the 4d order will bring greater transparency and accountability to the CBOT's ethanol swaps market than currently exist.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 229

[Release Nos. 33-8961; 34-58656]

Technical Amendment to Item 407 of Regulation S-K

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; technical amendment.

SUMMARY: The Securities and Exchange Commission ("Commission") is making a technical amendment to Item 407 of Regulation S-K. The technical amendment updates a reference to Independence Standards Board Standard No. 1 ("ISB No. 1"), which was previously adopted by the Public Company Accounting Oversight Board ("PCAOB") as an interim standard but has been superseded by the PCAOB's newly adopted Ethics and Independence Rule 3526, *Communication with Audit Committees Concerning Independence*. The

reference is being updated to refer to the "applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant's communications with the audit committee concerning independence."

DATES: *Effective Date:* September 30, 2008.

FOR FURTHER INFORMATION CONTACT:

Melanie Jacobsen, Special Counsel, at 202-551-5300, Office of the Chief Accountant, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION:

I. Background

We are amending Item 407 of Regulation S-K¹ to update a reference as a result of the adoption of a new Public Company Accounting Oversight Board ("PCAOB") rule. Item 407 is being amended to update the following reference:

Old Reference:

"Independence Standards Board Standard No. 1 (Independence Standards Board Standard No. 1, *Independence Discussions with Audit Committees*), as adopted by the Public Company Accounting Oversight Board in Rule 3600T"

New Reference:

"applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant's communications with the audit committee concerning independence"

Independence Standards Board Standard No. 1 ("ISB No. 1") was part of the interim standards previously adopted by the PCAOB on April 16, 2003.² It required an auditor annually to discuss with the audit committee its independence and to provide written disclosures of all relationships between the auditor and the company that may reasonably be thought to bear on independence and a letter confirming the auditor's independence.³

Effective on September 30, 2008, PCAOB Rule 3526 supersedes ISB No. 1 regarding the annual discussion and disclosure the auditor must make to the audit committee.⁴ Rule 3526 was adopted by the PCAOB on April 22,

¹ 17 CFR 229.407.

² PCAOB Rule 3600T.

³ ISB No. 1.

⁴ Rule 3526 also superseded ISB Interpretation 00-1, *The Applicability of ISB Standard No. 1 When "Secondary Auditors" are Involved in the Audit of a Registrant*, and ISB Interpretation 00-2, *The Applicability of ISB Standard No. 1 When "Secondary Auditors" Are Involved in the Audit of a Registrant, An Amendment of Interpretation 00-1*.

2008 and approved by the Commission on August 22, 2008.

Under existing Item 407 of Regulation S-K, an issuer's audit committee must state that it has received from the independent accountants the written disclosures and letter required by ISB No. 1. As revised, Item 407 requires the audit committee to state that it has received the disclosure and letter required by the applicable PCAOB requirements for independent accountant communications with audit committees concerning auditor independence because ISB No. 1 has been superseded by PCAOB Rule 3526. To avoid the need to update a specific reference in the future if subsequently changed, we are revising the reference in Item 407 Regulation S-K so that it refers to the written disclosures and the letter from the independent accountants required by "applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant's communications with the audit committee concerning independence."

We are not revising Item 407 of Regulation S-B in the same manner as we are revising Item 407 of Regulation S-K due to amendments that we made in December 2007 to expand the number of smaller reporting companies that qualify for our scaled disclosure requirements under the Securities Act and the Securities Exchange Act of 1934.⁵ To streamline and simplify regulation, the amendments moved the scaled disclosure requirements from Regulation S-B into Regulation S-K. While Regulation S-B will remain in effect for transition purposes until March 15, 2009, it will be removed from the Code of Federal Regulations in its entirety after that date. We therefore are not revising Regulation S-B, but we intend to interpret existing Regulation S-B Item 407 consistently with the technical changes that we are making to the comparable Regulation S-K item. Accordingly, we expect companies complying with Regulation S-B after the effective date of these amendments, but before March 15, 2009, to follow the applicable PCAOB requirements for independent accountant auditor independence.

II. Certain Findings

Under the Administrative Procedure Act, a notice of proposed rulemaking is not required when the agency, for good cause, finds that notice and public comment are impracticable, unnecessary, or contrary to the public

interest.⁶ The amendment to Item 407 of Regulation S-K is a technical change to update an outdated reference. Because no one is likely to want to comment on such a non-substantive, technical amendment, the Commission finds that it is unnecessary to publish notice of this amendment.⁷

The Administrative Procedure Act also requires publication of a rule at least 30 days before its effective date unless the agency finds otherwise for good cause.⁸ Due to the need to coordinate the effectiveness of the amendment with the effective date of the PCAOB's new Rule 3526 (which is to take effect on September 30, 2008) and for the same reasons described with respect to opportunity for notice and comment, the Commission finds there is good cause for the amendments to take effect on September 30, 2008.

III. Consideration of Competitive Effects of Amendment

Section 23(a)(2) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the competitive effects of such rules, if any, and to refrain from adopting a rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.⁹ Because this amendment merely makes technical changes to update references to applicable PCAOB requirements, we do not anticipate any competitive advantages or disadvantages would be created.

IV. Statutory Authority and Text of Amendments

We are adopting this technical amendment under the authority set forth in Section 19(a) of the Securities Act¹⁰ and Section 23(a) of the Exchange Act.¹¹

List of Subjects in 17 CFR Part 229

Reporting and recordkeeping requirements, Securities.

⁶ 5 U.S.C. 553(b).

⁷ For similar reasons, the amendment does not require analysis under the Regulatory Flexibility Act or analysis of major rule status under the Small Business Regulatory Enforcement Fairness Act. See 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analysis, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking); and 5 U.S.C. 804(3)(C) (for purposes of Congressional review of agency rulemaking, the term "rule" does not include any rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties).

⁸ See 5 U.S.C. 553(d)(3).

⁹ 15 U.S.C. 78w(a)(2).

¹⁰ 15 U.S.C. 77s(a).

¹¹ 15 U.S.C. 78w(a).

Text of Amendments

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

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

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

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80(a)-39, 80b-11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Section 229.407 is amended by revising paragraph (d)(3)(i)(C) to read as follows:

§ 229.407 (Item 407) Corporate governance.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(C) The audit committee has received the written disclosures and the letter from the independent accountant required by applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant's communications with the audit committee concerning independence, and has discussed with the independent accountant the independent accountant's independence; and

* * * * *

By the Commission.

Dated: September 26, 2008.

Florence E. Harmon,
Acting Secretary.

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