

**SECURITIES AND EXCHANGE COMMISSION****17 CFR Parts 200, 239 and 270**

[Release No. IC-22201; File No. S7-2-96]

RIN 3235-AG59

**Technical Amendments to Rule Relating to Payments for the Distribution of Shares by a Registered Open-End Management Investment Company****AGENCY:** Securities and Exchange Commission.**ACTION:** Final rule.

**SUMMARY:** The Commission is adopting a technical amendment to the rule under the Investment Company Act of 1940 that governs the use of assets of registered open-end management investment companies ("funds") to pay for the distribution of fund shares. The amendment provides that a plan to use fund assets to pay for the distribution of fund shares adopted prior to a fund's initial public offering does not have to be approved by shareholders. Because the fund's directors must approve the plan, and investors that buy their shares in the fund's public offering, in effect, "vote with their dollars" to accept the plan, shareholder approval of the plan prior to the fund's public offering is not necessary.

**EFFECTIVE DATE:** The rule amendments will become effective October 17, 1996.

**FOR FURTHER INFORMATION CONTACT:** Marilyn K. Mann, Senior Counsel, or Kenneth J. Berman, Assistant Director, at (202) 942-0690, Office of Regulatory Policy, Division of Investment Management, 450 Fifth Street, NW., Mail Stop 10-2, Washington, DC 20549. Requests for formal interpretive advice should be directed to the Office of Chief Counsel at (202) 942-0659, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 10-6, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The Commission is adopting a technical amendment to rule 12b-1 [17 CFR 270.12b-1] under the Investment Company Act of 1940 [15 U.S.C. 80a] (the "Investment Company Act"). The Commission also is making technical corrections to rule 30-5 [17 CFR 200.30-5] and Form N-14 [17 CFR 239.23].

**I. Discussion**

The Commission is adopting a technical amendment to rule 12b-1 under the Investment Company Act, which governs the use of fund assets to

pay for the distribution of fund shares.<sup>1</sup> The amendment provides that a plan to use fund assets to pay for the distribution of fund shares (a "rule 12b-1 plan") adopted prior to a fund's initial public offering does not have to be approved by the fund's shareholders. The Commission received four comments in response to the proposal, all supporting the amendment.<sup>2</sup>

Shareholder approval of a rule 12b-1 plan is unnecessary when the plan is adopted prior to a fund's initial public offering. Under these circumstances, the shareholders voting typically are comprised of persons involved in organizing the fund (*i.e.*, the fund's investment adviser or its affiliates). Shareholder approval, therefore, is virtually automatic, mechanical, and offers no significant protection to the fund's shareholders. Rule 12b-1 requires a rule 12b-1 plan to be approved by a majority of the fund's board of directors, including a majority of the independent directors, prior to the plan's implementation.<sup>3</sup> In addition, investors purchasing shares in a fund's initial public offering, in effect, "vote with their dollars" to accept the fund's rule 12b-1 plan since the terms of the plan, and its effects on fund expenses, are disclosed in the fund's prospectus.<sup>4</sup>

The amended rule requires shareholder approval of a rule 12b-1 plan that is adopted after a fund's initial public offering. Shareholder approval also is required for a rule 12b-1 plan adopted prior to a public offering when fund shares have been sold to persons other than those involved in organizing the fund.<sup>5</sup> Two commenters requested

<sup>1</sup> The Commission proposed this amendment on January 5, 1996. Distribution of Shares by Registered Open-End Management Investment Company, Investment Company Act Release No. 21660 (Jan. 5, 1996) [61 FR 1313 (Jan. 19, 1996)] [hereinafter *Proposing Release*].

<sup>2</sup> The commenters were the Subcommittee on Investment Companies and Investment Advisers, Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association; the Investment Company Institute; Bank One Corporation; and Capital Research and Management Company.

<sup>3</sup> Rule 12b-1(b)(2) [17 CFR 270.12b-1(b)(2)]. The fund's board also must approve the continuation of the plan at least annually. Rule 12b-1(b)(3)(i) [17 CFR 270.12b-1(b)(3)(i)].

<sup>4</sup> Items 2 and 7 of Form N-1A under the Securities Act of 1933 and the Investment Company Act [17 CFR 239.15A and 274.11A]. In addition, rule 12b-1 requires fund shareholders to approve any changes in the rule 12b-1 plan that would materially increase the amount of the asset-based sales load and gives shareholders the right to terminate the plan at any time. Rule 12b-1(b)(3)(iii) and (4) [17 CFR 270.12b-1(b)(3)(iii) and (4)].

<sup>5</sup> This provision addresses funds that adopt a rule 12b-1 plan following the sale of shares to persons other than affiliates of the fund or its promoter without engaging in a public offering. The proposed amendment referred only to affiliates of the fund

the Commission to clarify how the amended rule would apply to a newly created series or class of shares of an existing fund.<sup>6</sup> The commenters suggested that a series or class that had not been publicly offered should be treated in the same manner as a fund that had not been publicly offered. The Commission agrees. If an existing fund that already offers its shares to the public adds a new series or class subject to a rule 12b-1 plan, approval of the plan by shareholders of the new series or class is not required prior to any public offering of the shares of that series or class. This interpretation is consistent with the approach that the Commission has taken with respect to series funds.<sup>7</sup> In addition, rule 12b-1 specifically provides that a plan that covers more than one class of shares must be severable for each class, and that whenever action is required to be taken with respect to a class, that action must be taken separately for each class.<sup>8</sup>

**II. Technical Corrections**

The Commission is making a technical correction to paragraph (a)(8)(ii)(B) of rule 30-5, Delegation of Authority to Director of Division of Investment Management.<sup>9</sup> That paragraph currently contains a reference to paragraphs (a)(9)(i) (A) and (C) of rule 30-5. There are no such paragraphs in the rule. The reference instead should be to paragraphs (a)(8)(i) (A) and (C) of

and their affiliated persons. See *Proposing Release*, *supra* note 1, at n.6. Consistent with the intent of the amendment and a commenter's recommendation, the adopted amendment also refers to the fund's promoter and its affiliated persons. See Section 2(a)(30) of the Investment Company Act [15 U.S.C. 80a-2(a)(30)] (defining promoter as a person who, alone or acting in concert, initiates or directs the organization of a fund).

<sup>6</sup> Funds often organize themselves as series funds and offer investors an opportunity to invest in one or more "portfolios" each of which has a specific investment objective. The fund will offer a series of shares that represents an interest in the portfolio in which the investor desires to participate. A fund, or a portfolio of a fund, also may offer different classes of shares that have different distribution and shareholder service arrangements. See rule 18f-3 under the Investment Company Act [17 CFR 270.18f-3].

<sup>7</sup> See *Exemption for Open-End Management Investment Companies Issuing Multiple Classes of Shares; Disclosure by Multiple Class and Master-Feeder Funds*, Investment Company Act Release No. 19955 (Dec. 15, 1993) [58 FR 68074 (Dec. 23, 1993)] at n.53 (rule 12b-1 has been interpreted to treat each series of a fund as a separate fund). See also rule 18f-2 under the Investment Company Act [17 CFR 270.18f-2] (requiring the shareholders of the series affected by the matter to vote on that matter); Item 22 of Schedule 14A under the Securities Exchange Act of 1934 [17 CFR 240.14a-101] (defining a fund for purposes of the Commission's proxy rules as a registrant or a separate series of a registrant).

<sup>8</sup> Rule 12b-1(g) [17 CFR 270.12b-1(g)].

<sup>9</sup> 17 CFR 200.30-5(a)(8)(ii)(B).

rule 30-5. The Commission also is making a technical correction to Item 16(10) of Form N-14.<sup>10</sup> The last clause of Item 16(10) currently includes the phrase "a meeting of the minutes." That phrase should be "the minutes of the meeting."

### III. Cost/Benefit Analysis

The amendment provides that a rule 12b-1 plan adopted prior to a fund's initial public offering does not have to be approved by shareholders. Shareholder approval in these circumstances is unnecessary since the fund's board of directors must approve the rule 12b-1 plan, and investors participating in the fund's initial public offering effectively "vote with their dollars" to accept the plan. Under the amended rule, funds are no longer required to undergo the perfunctory exercise of obtaining approval from persons who have supplied the fund with its initial capital prior to the fund's initial public offering.

### IV. Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act [5 U.S.C. 605(b)], the Chairman of the Commission certified, at the time that the proposed technical amendment to rule 12b-1 was published for public comment, that the amendment would not, if adopted, have a significant economic impact on a substantial number of small entities. No comments were received regarding the certification. The amendment enables funds, including small entities, to forgo the minimal time and expense associated with obtaining shareholder approval of rule 12b-1 plans from persons who have supplied the fund with its initial capital prior to the fund's initial public offering.

### V. Statutory Authority

The Commission is amending rule 12b-1 pursuant to the authority set forth in sections 12(b) and 38(a) of the Investment Company Act [15 U.S.C. 12(b), 37(a)]. The Commission is making technical corrections to rule 30-5 pursuant to section 4A of the Securities Exchange Act of 1934 [15 U.S.C. 78d-1] ("Exchange Act"), and Form N-14 pursuant to sections 6, 7, 8, 10 and 19(a) of the Securities Act of 1933 [15 U.S.C. 77f, 77h, 77j and 77s(a)] and sections 14(a), 14(c) and 23(a) of the Exchange Act [15 U.S.C. 78n(a), 78n(c) and 78w].

List of Subjects in 17 CFR Parts 200, 239 and 270

Authority delegations (Government agencies), Investment companies, Reporting and recordkeeping requirements, Securities.

### Text of Rule and Form Amendments

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

#### **PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION REQUESTS**

1. The authority citation for part 200, subpart A continues to read in part as follows:

Authority: 15 U.S.C. 77s, 78d-1, 78d-2, 78w, 78ll(d), 79t, 77sss, 80a-37, 80b-11, unless otherwise noted.

\* \* \* \* \*

2. Section 200.30-5 is amended in paragraph (a)(8)(ii)(B) by removing the cite "(a)(9)(i) (A) and (C)" and adding "(a)(8)(i) (A) and (C)".

#### **PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

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

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

\* \* \* \* \*

4. Form N-14 [referenced in 17 CFR 239.23] is amended in the last clause of Item 16(10) by removing the phrase "a meeting of the minutes" and adding in its place "the minutes of the meeting".

Note: Form N-14 does not, and the amendment to Form N-14 will not, appear in the Code of Federal Regulations.

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

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

Authority: 15 U.S.C. 80a-1 *et seq.*, 80a-37, 80a-39 unless otherwise noted;

\* \* \* \* \*

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

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

\* \* \* \* \*

(b) \* \* \*

(1) Such plan has been approved by a vote of at least a majority of the outstanding voting securities of such

company, if adopted after any public offering of the company's voting securities or the sale of such securities to persons who are not affiliated persons of the company, affiliated persons of such persons, promoters of the company, or affiliated persons of such promoters;

\* \* \* \* \*

By the Commission.

Dated: September 9, 1996.

Margaret H. McFarland,

*Deputy Secretary.*

[FR Doc. 96-23439 Filed 9-16-96; 8:45 am]

BILLING CODE 8010-01-P

### **SECURITIES AND EXCHANGE COMMISSION**

#### **17 CFR Parts 239, 270, and 274**

[Release Nos. 33-7328; IC-22202; File No. S7-8-95]

RIN 3235-AD18

#### **Exemption for Certain Open-End Management Investment Companies to Impose Deferred Sales Loads**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is adopting amendments to the rule under the Investment Company Act of 1940 that permits contingent deferred sales loads to be imposed on the shares of certain registered open-end management investment companies ("mutual funds" or "funds"). The Commission also is adopting amendments to the registration form for mutual funds, and publishing a staff guide to the registration form. The rule amendments allow mutual funds to offer investors a wider variety of deferred sales loads, including installment loads, and eliminate certain requirements in the rule. The form amendments modify the requirements for disclosing deferred sales loads in mutual fund prospectuses to reflect the changes made by the rule amendments.

**EFFECTIVE DATE:** The rule and form amendments will become effective October 17, 1996.

#### **FOR FURTHER INFORMATION CONTACT:**

Nadya B. Roytblat, Assistant Chief, or Kenneth J. Berman, Assistant Director, at (202) 942-0690, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 10-2, Washington, D.C. 20549. Requests for formal interpretive advice should be directed to the Office of Chief Counsel at (202) 942-0659,

<sup>10</sup> 17 CFR 239.23.