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THE SCOPE AND JURISPRUDENCE OF THE INVESTMENT MANAGEMENT REGULATION

TAMAR FRANKEL*

ABSTRACT

This Essay reviews three periods of investment company regulation by the Securities and Exchange Commission (“Commission”). It focuses on the period of 1975 to 2000 in which the Commission granted exemptions on conditions, thus deregulating and reregulating, case-by-case and finally codifying the exemptions in an exemptive rule. The Essay analyzes this form of rule-making and compares it to prosecution, settlements, and initial rule-making that typifies the recent years. The Essay concludes that the common law method of legislation, especially when it involves a “bargain” between the regulators and law-abiding regulated institutions who wish to innovate, is likely to lead to optimal rules, provided the conditions (re-regulation) are rigorously enforced.

INTRODUCTION

The recent avalanche of Securities and Exchange Commission rules is no usual initiative. Rather, it is a turning point in the history and the jurisprudence of the Securities and Exchange Commission’s regulation of investment companies. Three periods emerge in the regulation of investment companies and their advisers. The first period, from 1940 to about 1974, starts with the passage of the Investment Company Act (“1940 Act”) and Investment Advisers Act (“Advisers Act”).¹ The period can be characterized as a strict regulatory period, beginning with setting the regulatory house in order and then applying and enforcing the acts. The Commission engaged mostly in individual exemptions. On a rare occasion it passed a regulation, such as adjusting the 1940 Act to insurance companies’ separate account and variable annuities.²

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1. Investment Company Act of 1940, ch. 686, 54 Stat. 789 (1940) (codified as amended at 15 U.S.C. §§ 80a-1 to 80b-21 (2000 & Supp. II 2002)).

2. 17 C.F.R. § 270.6e-2 (2005).

The 1975 to 2000 period was a period of cooperation between the Commission and mutual fund managers (“Managers”). It was a period of encouraging innovations by deregulation coupled with re-regulation. Most individual and rule exemptions during those years adjusted the 1940 Act and the Advisers Act in response to requests by the industry to permit new arrangements, new forms of funds, and new financial offerings.³ Few Commission releases were interpretative in nature, such as Release 1092 interpreting the Advisers Act and its application to financial planners.⁴ Congress reviewed the 1940 Act and the Advisers Act periodically, and some of the Commission’s rules were incorporated and codified in these acts.⁵ During this period there developed a remarkable staff scholarship, which contained historical materials, empirical research and theoretical analysis.⁶

The period starting in 2001 marked a different approach by the Commission. The Commission did not retreat to the 1940s. Neither did it remain in the recent past. This Essay explores the nature of the new type of regulation, its origins and reasons, and its new form and approach. I conclude that, in light of the size of the mutual funds and the period of 1990s there was no escape from this new regulatory era. I also conclude that the new type of regulation, although it is likely to be more effective than that of the past, may not solve the deep-seated problem of the investment management profession unless the culture of the money Managers changes as well.⁷ Short-term, however, the new type of regulation accompanied by prosecution may follow the “common law” form of the 1975 to 2000 era, which may have been the “golden age” of mutual funds and their Managers.

3. See Appendix A.

4. Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, 52 Fed. Reg. 38,400 (Oct. 16, 1987) (codified at 17 C.F.R. pt. 276).

5. Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to -64 (2000); Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (2000).

6. DIV. OF INV. MGMT., U.S. S.E.C., PROTECTING INVESTORS: A HALF CENTURY OF INVESTMENT COMPANY REGULATION (1992).

7. The current era is sometimes coined “managerial capitalism” in which the managers assert property rights to their power to manage other people’s money. See Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 BUS. LAW. 59, 60 (1992) (noting that “the historian Alfred Chandler declared in 1977 that America had created a system of ‘Managerial Capitalism’”).

I. FROM 1940 TO 1974: ESTABLISHING THE REGULATORY SYSTEM

Throughout the thirty-five year period from 1940 to 1974 the Commission issued 113 rules. Of these rules thirteen were definitional. Thirty-five rules detailed the forms which applicants should use. Four rules dealt with books and records; three covered custody of assets (one of which contained a clarification); and the other fifty-eight provided exemptions from various sections of the 1940 Act, detailed conditions for compliance, and made adjustments of the securities acts to the special needs of mutual funds.⁸ It is important to note that during the entire period the investment management profession did not exceed 431 funds, and roughly \$60 billion under management.⁹ The rules indicate the Commission's approach. It received significant authority of a unique kind and was setting the regulatory house in order. During this period, it did not provide many permissions for innovative activities that conflicted with the provisions of the 1940 Act and the Advisers Act.¹⁰

By and large, regulation did not interfere much in market activities, and when it did, it took the form of limiting market activities and requiring strict adherence to the letter of the law. Thus, periodic payment plans—the sale of mutual fund shares by installment—died when the Commission limited the incentives of the salespersons to sell such plans to people who could not continue payments and who lost their initial payments by the sales load.¹¹ The Commission did not act to revive the number of face-amount certificate companies. Similarly, of face-amount certificate companies, the number has shrunk as other more attractive plans emerged.¹²

This does not suggest that the profession did not innovate. It suggests that the innovations were possible within the parameters of the Acts. It also suggests that the Managers were engaged in maintaining and

8. See Appendix B.

9. See Appendix A.

10. *E.g.*, Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24,816 (Jan. 2, 2001), 66 Fed. Reg. 3734 (Jan. 16, 2001) (codified in scattered sections of 17 C.F.R. pt. 270 (2005)); Investment Company Governance, Investment Company Act Release No. 26,520 (July 27, 2004), 69 Fed. Reg. 46,378 (Aug. 2, 2004) (codified in scattered sections of 17 C.F.R. pt. 270 (2005)); Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act Release No. 2333 (Dec. 2, 2004), 69 Fed. Reg. 72,054 (Dec. 10, 2004) (codified at 17 C.F.R. §§ 275.203(b)(3)-1, -2 (2005)).

11. See 4 TAMAR FRANKEL & ANN TAYLOR SCHWING, *THE REGULATION OF MONEY MANAGERS* § 28.01, at 28-5 (2001 & Supp. 2005).

12. See Larry D. Barnett, *The Regulation of Mutual Fund Names and the Societal Role of Trust: An Exploration of Section 35(d) of the Investment Company Act*, 3 DEPAUL BUS. & COMM. L.J. 345, 349 n.20 (2005) (“Few face-amount certificate companies appear to exist today.”).

strengthening their weak position as financial intermediaries. During that period advisers were engaged in protecting their turf. Through their organization, the Investment Company Institute, they fought in the courts for the maintenance of the Glass-Steagall Act, which prevented banks from advertising the services of bank trust departments as investment management entities and engaging in mutual fund-like businesses.¹³ The Commission was active as well. It asserted its jurisdiction over separate accounts, created by life insurance companies to offer variable annuities and variable life insurance policies.¹⁴

Few innovations required changes in the law and few innovators sought the Commission's exemption. One basis for this conclusion is the relatively few requests for no-action letters, especially at the beginning of the period. Not only were they few, but they were also not well publicized. The publication of no-action letters started only at the beginning of the 1970s.¹⁵ No-action letters did not gain the power of precedent until later, when lawyers and clients realized that no-action letters give the actors a partial protection for activities that would otherwise be legally too risky.¹⁶

These no-action letters provide a semi-declaratory judgment for a new venture. That protection became even stronger when the courts gave the letters credence against claims by private plaintiffs.¹⁷ The Commission announced its support for these letters and promised to avoid, as much as possible, revoking the letters even prospectively.¹⁸ The staff encouraged requests for letters as a means of learning about proposed market innovations, as a mechanism of reducing undesirable activities, and as a method of expressing the staff's interpretation about the law.¹⁹

13. See *Financial Services Industry: Hearing on H.R. 3054, H.R. 4441, and H.R. 5777 Before the Subcomm. on Telecommunications and Finance of the H. Comm. On Energy and Commerce*, 101st Comm. 589 (1990) (statement of Richard C. Breeden, Chairman, U.S. Securities and Exchange Commission).

14. See *Prudential Ins. Co. of Am. v. SEC*, 326 F.2d 383 (3d Cir. 1964) (holding that a separate account established by the insurance company to fund variable annuities was subject to the Investment Company Act of 1940).

15. Adoption of Section 200.81 (17 CFR 200.81), Concerning Public Availability of Requests for No-Action and Interpretative Letters and the Responses Thereto by the Commission's Staff, and Amendment of Section 200.80 (17 CFR 200.80) Securities Act Release No. 5098 (Oct. 29, 1970) (codified as amended at 17 C.F.R. § 200.80 (2005)).

16. See 4 TAMAR FRANKEL & ANN TAYLOR SCHWING, *THE REGULATION OF MONEY MANAGERS* § 2.12[C], at 2-78 to -80 (2001 & Supp. 2003).

17. See 1 *id.* § 2.12[D], at 2-80 to -81 (2001).

18. See Tamar Frankel, *The Internet, Securities Regulation, and Theory of Law*, 73 CHI.-KENT L. REV. 1319, 1352-53 (1998) (noting precedential value SEC and staff place on no-action letters).

19. *Id.* at 1351.

The only two path-breaking innovations that took place during that period were the introduction of variable annuities by investment companies, and the creation of money market funds. In the case of variable annuities, the Commission fought to assert its jurisdiction over the new creations.²⁰ In the case of money market funds, the Commission supported the innovation.²¹ The support was direly needed. The profession and its mutual funds were subjected to the volatile securities markets. In both cases, the model of mutual funds and the advisory profession had rubbed shoulders with the established financial intermediaries, the insurance companies and the banks. And in both cases, inflation or the concern about inflation and regulation of insurance and banking helped. The insurance companies wanted to enter the field when they were losing market share.²² The banks were losing depositors because they were not allowed to pay more than 5¹/₄% on their savings account (and the savings and loan associations were not allowed to pay more than 5¹/₂%) during a period of double digit inflation.²³ The Commission retained its jurisdiction over variable annuity contracts, and helped advisers establish and develop money market funds, alternatives to bank deposits, including shares that could be redeemed by the stroke of a pen over a bank check.²⁴

Investors were active in the courts. The issues are familiar today. The 1950s brought cases on the fees charged by advisers to mutual funds.²⁵ The 1960s brought cases on “give ups” and other pressures to enhance and finance the sale of mutual fund shares.²⁶ In the 1970s, section 36(b) of the

20. See *Prudential Ins. Co. of Am.*, 326 F.2d 383 (3d Cir. 1964).

21. TAMAR FRANKEL & CLIFFORD E. KIRSCH, *INVESTMENT MANAGEMENT REGULATION* 465 (3d ed. 2005) (“The SEC started regulating money market funds in the beginning of 1972 by imposing conditions linked to the exemptions from the market valuation requirements and [Investment Company Act] Section 19 [15 U.S.C. § 80a-19 (2000)].”); *id.* at 464 (noting necessity for funds’ exemption from sections 19(a), (b) [15 U.S.C. § 80a-19(a), (b) (2000)]. Rule 2a-7 under the Investment Company Act, adopted in 1983, codified exemptions from the market valuation requirements. Valuation of Debt Instruments and Computation of Current Price Per Share by Certain Open-End Investment Companies (Money Market Funds), Investment Company Act Release No. 13,380 (July 11, 1983), 48 Fed. Reg. 32,555 (July 18, 1983) (codified as amended at 17 C.F.R. § 270.2a-7 (2005)) (permitting money market funds to use either penny-rounding or amortized cost valuation or pricing methods).

22. Tamar Frankel, *Variable Annuities, Variable Insurance and Separate Accounts*, 51 B.U. L. REV. 173, 177–79 (1971).

23. Regulation Q, 12 C.F.R. § 217.7 (1986) (expired 1986).

24. See *supra* notes 20–21 and accompanying text; Revisions to Rules Regulating Money Market Funds, Investment Company Act Release No. 17,589 (July 17, 1990), 55 Fed. Reg. 30,239, 30,240 (July 25, 1990) (“Many money market funds allow investors to use checks to redeem shares . . .”).

25. *Saxe v. Brady*, 184 A.2d 602 (Del. 1962); see 2 TAMAR FRANKEL & ANN TAYLOR SCHWING, *THE REGULATION OF MONEY MANAGERS* § 12.03[D], at 12-76 to -97 (2001) (citing cases).

26. See 2 TAMAR FRANKEL & ANN TAYLOR SCHWING, *THE REGULATION OF MONEY MANAGERS* § 12.03[C], at 12-71 (2001) (noting give-ups).

Investment Company Act was added by Congress relating to fees.²⁷ In sum, the first thirty-five years of the Commission's reign are characterized by a weak and small management advisory profession, relatively few mutual funds, and the Commission's support of two important innovations by granting conditional exemptions.

II. FROM 1975 TO 2000: REGULATION FOR GROWTH

Some fundamental changes occurred in the mutual funds area during the 1975 to 2000 period. During that period, the Commission issued 203 rules. Fifteen rules related to definitions; forty rules covered forms and filing, four rules dealt with books and records. Twelve regulated custody of assets and 132 related to substantive exemptions.²⁸ One change in that period was the enormous increase of the number of mutual funds (and closed end-funds) and the magnitude of the assets under management.²⁹ At the end of 1974, the total net assets of mutual funds was \$46 billion; at the end of 2000 it had reached \$12 trillion.³⁰ The causes of this growth are not easy to pinpoint, or prove.

One may speculate that mutual fund growth was tied to the new resources that became available to finance the broker dealers and underwriters who sold fund shares. Former rules that limited these financing sources were changed to allow more money resources to flow to the sellers of mutual fund shares. The changed rules were based on a number of theoretical innovations. For example, the principle guiding the advisers' fee measures has changed. Before the change, advisers were viewed as professionals whose compensation reflected the value of their services. On this basis, advisers were not able to use part of their fees to pay brokers who sold fund shares.³¹ If the advisers spent part of the fees on compensating brokers who sold fund shares or on paying solicitors for business, it meant that the advisers were willing to accept a lower fee for their services. Hence, the amount of fees they were charging was considered excessive.

This view has changed. Now, the advisers are viewed as operating a business. As businesses they are entitled to profits. With their profits they can do whatever they wish, including making payments to brokers for the

27. Investment Company Act Amendments Act of 1970, Pub. L. No. 91-547, § 20, sec. 36(b), 84 Stat. 1413, 1429-30 (codified as amended at 15 U.S.C. § 80a-35(b) (2000)).

28. See Appendix C.

29. For the number of investment companies and their net assets see Appendix A.

30. For the net assets of investment companies see Appendix A.

31. Tamar Frankel, *Advisory Fees: Evolving Theories*, 10 INV. LAW. 22 (2003).

sale of fund shares. Therefore, even if they made such payments they did not necessarily charge excessive fees.³² That theory released some of the advisory fees for payment to brokers who sold fund shares. With increased financing, the funds and the assets under management grew.

In 1981, a new source of paying brokers who sold fund shares opened up: the assets of the funds themselves. Rule 12b-1 allowed the boards of fund directors to approve a program which financed the sale of the funds' shares.³³ Even if the fund is closed to new investors, it still might charge to avoid "net redemptions."³⁴ More recently there has been the change in the formula under which brokers who sold fund shares would be paid. Not only commissions, but also part of the advisory fees could, and did, pass to the salespersons.³⁵ In 1986, small brokers (who sold fund shares) could provide advisers with soft dollar benefits, which they could purchase.³⁶ Having provided the soft dollars, these brokers could receive brokerage business, which they could then farm out to other brokers who could perform the task (and show their gratitude to the small brokers by a discount). Currently, advisers pay brokers for "shelf space," a prominent space in the brokers' display of funds to their clients.³⁷ In sum, during this period, the amount of money that flowed to brokers who sold mutual fund shares increased dramatically, as did the amounts of assets under advisers' management.

A. *Deregulation and Re-Regulation by Conditions*

The exemptions during the 1975 to 2000 period contained conditions. The conditions imposed three main types of requirements. One requirement involves disclosure, such as Form N-1A under the 1940 Act and Form ADV under the Advisers Act.³⁸ On its face, the disclosure

32. See 2 TAMAR FRANKEL & ANN TAYLOR SCHWING, *THE REGULATION OF MONEY MANAGERS* § 12.03[C], at 12-71 (2001) (noting payments to brokers).

33. 17 C.F.R. § 270.12b-1 (2005).

34. See Russ Wiles, *Why Closed Portfolios Levy 12b-1 Is Open to Question*, L.A. TIMES, Feb. 8, 1998, at D3 ("There's nothing illegal about maintaining a 12b-1 fee on a fund that decides to close its doors to new money . . .").

35. Securities; Brokerage and Research Services, Exchange Act Release No. 23,170, 51 Fed. Reg. 16,004 (Apr. 30, 1986) (codified at 17 C.F.R. pt. 241 (2005)).

36. *Id.*

37. See, e.g., Point of Sale Disclosure Requirements and Confirmation Requirements for Transactions in Mutual Funds, College Savings Plans, and Certain Other Securities, and Amendments to the Registration Form for Mutual Funds, Investment Company Act Release No. 26,778 (Feb. 28, 2005), 70 Fed. Reg. 10,521, 10541 n.86 (Mar. 4, 2005) (codified at 17 C.F.R. pts. 239, 240, 274) (noting recent enforcement actions against advisers for failure to disclose shelf space arrangements).

38. Form N-1A, <http://www.sec.gov/about/forms/formn-1a.pdf> (last visited Dec. 1, 2005); Form

requirements are similar to those under the Securities Act of 1933.³⁹ Substantively, however, the disclosure follows not the model of a sales contract but the model of fiduciary law. As discussed below, the disclosure reflects the principle that Managers are fiduciaries, on whom the clients rely. Therefore Managers should offer their clients information that is relevant to the clients rather than wait for the clients to ask them for this information. Form ADV clearly reflects this approach. It requires advisers to disclose not only the fees they charge but also whether these fees are extraordinarily higher than the normal fees, setting the maximum at three percent of the managed assets.⁴⁰

The second type of condition in the exemptions is conditions that impose structural changes in the mutual funds, focused mainly on internal controls. For example, Rule 12b-1 requires the approval of the disinterested board of directors for a plan that would allow the Managers to charge funds up to a certain percentage of the fund assets for the purpose of financing the sale of funds' shares and providing services to investors.⁴¹

In addition, this rule introduces a structural change by increasing the number of disinterested directors.⁴² While the necessary approval of the board relates to the particular Rule 12b-1 plan, the requirement to increase the percentage of disinterested directors changes the structure of the board not only for the particular decision, but for all board decisions as well. The board consists of more disinterested directors in all other matters.

During the 1975 to 2000 period, the structural conditions appeared as a condition to other exemptions, including those concerning conflict of interest transactions. Unlike corporate law, which authorizes independent directors to approve conflict of interest transactions by interested directors, the 1940 Act prohibited such conflicts, subject only to exemptions by the Commission.⁴³ During the period of 1975–2000, the Commission passed a number of exemptions from the conflict of interest prohibitions in the 1940 Act, conditioned on, among other things, the approval by a large percentage of disinterested directors.⁴⁴

The 1940 Act also differs from corporate law in its definition of directors' independence. Independent directors under corporate law are

ADV, <http://www.sec.gov/about/forms/formn-1a.pdf> (last visited Dec. 1, 2005).

39. 15 U.S.C. §§ 77a–77aa (2000).

40. See Charles Meyer, SEC No-Action Letter (Sept. 4, 1975) (noting staff position).

41. 17 C.F.R. § 270.12b-1 (2005).

42. *Id.*

43. 15 U.S.C. § 80a-17(a) (2000 & Supp. II 2002).

44. See Appendix C.

directors who have no personal stake in the conflict of interest transaction at issue.⁴⁵ Under the 1940 Act, however, disinterested directors are not only independent in this sense, but must also satisfy a status requirement of independence from the Managers-Advisers and their affiliates.⁴⁶ Only recently has the New York Stock Exchange rule imposed similar “status conflict of interest prohibitions” on directors of corporations whose shares are traded on the Exchange.⁴⁷

The reason for shifting the decision from the Commission to the board is not hard to find. In the 1980s, the number of mutual funds increased significantly and with it the number of requests for exemption. The staff of the Commission did not increase sufficiently to meet the demand. The solution was to delegate the decision regarding some conflicts to the fund boards, under certain conditions. In the case of some exemptions, the delegation was accompanied by a required increase in the number of disinterested directors, as in the case of Rule 12b-1.⁴⁸

The third kind of condition that accompanied exemptions during the 1975 to 2000 period consisted of direct and specific regulation of the funds’ investments and activities. For example, Rule 2a-7⁴⁹ contains detailed limitations on permissible investments of money market funds. The conditions were based on the policy of preventing misleading impressions, not merely by disclosure, but also by ensuring that money market funds will likely be able to meet the investors’ justified expectations. If a share looked like a bank deposit, it had to be backed by conservative investments to ensure that the implied promise of low risk would in fact be met.

In addition to ensuring that money market funds will meet their implied obligations, the rule was based on a concern for systemic risk. Like bank demand deposits, money market funds offer very quick redemptions. Similar to “money in the bank,” investors could view the shares of these funds as a promise to receive on redemption at least the amount of dollars that the investors invested. Therefore, if the funds “broke the dollar,” that is, if the funds paid investors less than the amounts that the investors

45. See FRANKLIN A. GEVURTZ, CORPORATION LAW § 4.2.3, at 331 (2000) (stating that most corporate law conflict-of-interest statutes “state what transactions they cover” rather than define “disinterested director”).

46. 15 U.S.C. §§ 80a-2(a)(19)(A) (2000).

47. Self-Regulatory Organizations, Exchange Act Release No. 48,745 (Nov. 4, 2003), 68 Fed. Reg. 64,154 (Nov. 12, 2003), *codified as amended at* NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A (Westlaw through Feb. 11, 2004).

48. 17 C.F.R. § 270.12b-1 (2005).

49. 17 C.F.R. § 270.2a-7 (2005).

invested in the funds, the funds were exposed to a greater possibility of investor “runs.” Legally, investors are not entitled to receive the dollars they invested in these funds. Their investments are equity. They are shares, not bonds or notes. But because the funds look and appear to be like bank deposits, the investors’ assumption is that the funds would assure repayment of the money they put into the funds. And fund Managers are just as concerned about “runs” if the investors are disappointed on this count. Thus, the regulation of money market funds ensured that the less concerned Managers will not be permitted to compete by providing higher returns at higher risk. In such situations the developing “run” (a cascade) could contaminate not only the particular money market funds, but also other money market funds that have not broken the dollar.

B. The Open Door to Innovations

Throughout the period from 1975 to 2000, the Commission adopted 203 rules.⁵⁰ These rules relaxed the provisions of the Acts, subject to conditions, thus allowing advisers to change the sales and redemption cost allocations and payments by investors.⁵¹ In addition, the rules allowed for new investment arrangements, periodic repurchase by closed-end funds of their shares,⁵² and creating exchange-traded funds, which are a new form of fund, part open-end and part closed-end.⁵³ Strict prohibitions on fund of funds structures were relaxed,⁵⁴ as were investments that could be interpreted as leverage (prohibited in the Act).⁵⁵ Market timing was left loosely to disclosure and prohibited discrimination, and the strict prohibitions were relaxed to overcome “stale pricing” and administrative problems in collating orders of thousands of investors in 401(k) plans and others.⁵⁶ The recognition of “funds” that have no specific legal form as investment companies, as held in *Prudential Insurance Co. of America v. SEC*,⁵⁷ was expanded in a no-action letter to “tracking stocks” that may have had just the effect of informal separate accounts.⁵⁸

50. See Appendix C.

51. See Appendix C.

52. 17 C.F.R. § 270.23c-3 (2005).

53. See Appendix C.

54. See Appendix C.

55. See Appendix C.

56. See Appendix C.

57. *Prudential Ins. Co. of Am. v. SEC*, 326 F.2d 383 (3d Cir. 1964).

58. Comdisco, Inc., SEC No-Action Letter (Oct. 25, 2000) (the tracking stocks did not promise buyers much but allowed the boards to grant them more. The staff, however, increased the risk of such

The Commission recognized new entities that fell within the definition of an investment company, but were not traditional investment companies, and granted exemptions that culminated later in rules, such as Rule 3c-8 under the 1940 Act.⁵⁹ A significant number of exemptions by rules were promulgated to authorize the boards of directors to approve conflicts of interest transactions under certain circumstances.⁶⁰

A number of reasons can explain the cooperative environment between the Commission and advisers. One reason was the growing strength of the profession. Another was the deregulation of banks, the acquisition of one type of financial intermediary by another, and the competition among the various financial intermediaries (and sometimes their regulators). Yet another reason for cooperation was the general atmosphere of encouraging innovations that required freedom from constraining regulation, and the trust in market discipline to protect investors. The burden on the regulators and the regulated was shifting from “show me why an exemption should be granted” to “show me why not?”

C. Controls Over Temptation

While the amounts under management have grown enormously, and the activities of the advisory profession have become increasingly varied, the system of controlling temptations and the resources devoted to controls over the Advisers remained more or less the same. In 1996, the regulation of smaller advisers was relegated to the states, and the Commission remained mostly in charge of advisers that managed no less than \$25 million.⁶¹ The Commission’s Compliance Office (“Office”) refined its supervision by selective examinations targeted to danger signals that it developed based on statistical data. But the Office has not fundamentally changed the manner in which the examinations were carried out nor did Congress increase significantly the number of examiners. Mutual funds were required to establish a Code of Ethics that targeted mainly insider trading by employees of the mutual funds.⁶² But basically the monitoring and enforcement of the law remained the same throughout the period.

structures by announcing that it will no longer offer no-action letters on the structures).

59. See Appendix C.

60. See Appendix C.

61. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, sec. 303(a), § 203A, 110 Stat. 3416, 3437 (codified at 15 U.S.C. § 80b-3a (2000)).

62. Prevention of Certain Unlawful Activities with Respect to Registered Investment Companies, Investment Company Act Release No. 11,421, 45 Fed. Reg. 73,915, 73,919 (Nov. 7, 1980) (codified as amended at 17 C.F.R. § 270.17j-1(c) (2005)).

D. Interpretation of the Law

One of the additional changes that have occurred throughout this period is the approach to interpretation of the 1940 Act and the Advisers Act. Past interpretations followed a line of questions, such as: (1) What was the problem that the law was designed to prevent or reduce? (2) How is a “problem” defined, that is, what is bad about the certain behavior? (3) What options were open to Congress and the Commission? and (4) What option was chosen and why? New situations were interpreted in light of the answers, and the Commission attempted to allow certain activities so long as the problems which Congress envisioned were reduced or eliminated in some other way.

As I see it, since the mid-1980s and especially during the 1990s, a different approach developed in interpreting the law. The words of the Acts were interpreted sometimes by resorting to the dictionary, sometimes by seeking the interpretation in precedents. If the words did not prohibit a certain behavior, then the behavior would be permitted. The tendency was to seek specificity of rules.⁶³ Gray areas would be inefficient and create uncertainty. Gray areas may impose legal risks and thus limit the ability of the Advisers and other fiduciaries to create value for themselves. To be sure, they should not cross the line to a prohibited behavior, but anything that is not prohibited should be permitted. This approach led to the style of specific regulation. Details were increased and activities that involve discretion were addressed by regulation more specifically. Whatever was not addressed, however, would be permitted, or in the case of doubt, there was a good argument that the behavior should be permitted.⁶⁴

This approach led to efficiencies in the benefits to fiduciaries, but also to great inefficiencies in enforcing prohibitions on fraud. Indeed, when the gray areas were eliminated, the rules offered more value to the fiduciaries. But having eliminated the gray areas, the rules made enforcement enormously expensive. Market timing, which has achieved much notoriety, is a perfect example. The practice hurt the portfolio Managers by making it more difficult to plan investment policies. The practice also reduced the advisers’ fees by the funds’ less optimal performance. These considerations were sufficient to require the funds to disclose their policies

63. See, e.g., *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893 (5th Cir. 1977) (interpreting private placement in § 4(2) of 1933 Act, 15 U.S.C. § 77d (2000)); Regulation D, 17 C.F.R. § 230.501-.508 (2005).

64. See TAMAR FRANKEL, *TRUST AND HONESTY: AMERICA’S BUSINESS CULTURE AT A CROSSROAD* 146–49 (2006).

concerning market timing, and leaving the Advisers to enforce their disclosed rules.⁶⁵ But if no disclosure was made, there were lawyers and other advisers who assumed that the practice was fine. Advisers benefited from contracts offering preferred client-to-market time and causing expense to the remainder of the investors. Most importantly, some advisers also assumed that their organization and even they personally may benefit from this practice.⁶⁶

Paradoxically, the approach of specificity has blurred a fundamental and very simple principle, the principle on which all fiduciary rules are based: The money which Managers manage is other people's money. All benefits from controlling and managing the money do not belong to the Managers, except the amounts that are specifically allocated to the Managers by a specific clear agreement. If there is no such agreement, there is no benefit to the Managers. Specificity of interpretation shifted attention from the reason for the rules to the words of the rules, and from the words of the rules to the world outside the words—a vast expanse of opportunities for the advisers and fiduciaries to benefit from their managerial power.

In addition, in the corporate area the simple principle that managers are not the owners of the money they manage was turned on its head. The principle was refocused. The emphasis was no longer that the managers do not own the money they manage. The emphasis was refocused on the investors'—"other people's"—entitlement.⁶⁷ Were these other people really the owners? Or were they lenders of risk capital? When attention is focused on who owns the money instead of on the principle that managers do not own the money, a wide vista of possibilities to satisfy temptations arises.

This change was supported by an academic movement that redefined fiduciary duties as contracts.⁶⁸ The relationship between the manager and

65. See Tamar Frankel & Lawrence A. Cunningham, *The Mysterious Ways of Mutual Funds: Market Timing* (Feb. 2005) (on file with author).

66. See *In re Putnam Investment Mgmt.*, Investment Company Act Release No. 26,232 (Nov. 11, 2003); 1 TAMAR FRANKEL & ANN TAYLOR SCHWING, *THE REGULATION OF MONEY MANAGERS* § 1.02[B], at 1-82 (Supp. 2005) (discussing market timing); Tamar Frankel & Lawrence A. Cunningham, *The Mysterious Ways of Mutual Funds: Market Timing* (Feb. 2005) (on file with author).

67. See Martin Lipton & Steven A. Rosenblum, *Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come*, 59 BUS. LAW. 59, 90 (2003). See also, e.g., 15 PA. CONS. STAT. ANN. §§ 515(a)(1), 1715(a)(1) (West 1995) (in the context of takeovers) (stating that directors may consider interests not only of shareholders but also of "employees, suppliers, customers and creditors of the corporation, and . . . communities in which offices or other establishments of the corporation are located").

68. E.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993).

the investor was recast as a contract in which the manager undertakes certain duties. The duties may be described in more or less general terms. The important part is that once the money is handed over to the manager its ownership changes hands. The corporation that received the money is the owner and the manager who acts for the corporation is its controlling agent. By this metamorphosis, the managers ceased to hold the investors' money and became the holders of the corporation's money. They ceased to owe fiduciary duties to the investors. Investors became creditors with entitlement under a contract only. Managers owed duties to the corporations—that they managed. Most importantly, if the managers breached their duties to investors, the breaches were far less reprehensible. There was no accounting for profits and no stigma of abuse of trust. Besides, the managers represented the corporations that would be hurt by their own actions. Accountability for their actions was presumably left for the markets.

In sum, there were two major developments throughout this period: First, managers were liable only for violating specific rules. The principles underlying the rules were abandoned. Second, investors were no longer beneficial owners of the money they handed to the managers. They became lenders of risk capital. They were entitled to contract remedies but no trust remedies. They had to depend on the market for security of their money. In this environment and its theoretical underpinnings, Managers may indeed benefit from the money that is handed over to them so long as the investors receive something that the Seventh Circuit in one case called “market” return.⁶⁹

III. FROM 2001 TO THE PRESENT

The first scandal related to mutual funds concerned market timing.⁷⁰ But at first blush many did not consider it a “scandal.” Under some conditions market timing is permissible.⁷¹ The wrongful practices were not embezzlement or direct cheating. The problem, however, loomed large

69. *Wsol v. Fiduciary Mgmt. Assocs.*, 266 F.3d 654 (7th Cir. 2001), *cert. denied*, 535 U.S. 927 (2002). The fact that the managers benefited (for example, by receiving additional \$260 million to manage) was not enough to create a remedy under fiduciary law.

70. 1 TAMAR FRANKEL & ANN TAYLOR SCHWING, *THE REGULATION OF MONEY MANAGERS* § 1.02[B], at 1-82 (Supp. 2005) (discussing market timing).

71. *See, e.g.*, Disclosure Regarding Market Timing and Selective Disclosure of Market Holdings, Investment Company Act Release No. 26,287 (Dec. 11, 2003), 68 Fed. Reg. 70,402, 70,404 (Dec. 17, 2003) (“Market timing itself is not illegal. However, market timing may dilute the value of long-term shareholders’ interests in a mutual fund if the fund calculates NAV using closing prices that are no longer accurate.”).

when it occurred to many that what counted was not the amount that the Managers indirectly (by kickback) or directly took from their investors. It was that the Managers benefited from money that was entrusted to them. Knowing human nature, starting small is just the beginning. Started by one rogue unregulated Manager, the practice was followed by dozens of regulated fund Managers.⁷² A permissive culture in the advisers' organization can frighten some investors. It did.⁷³

Throughout the past three years the Commission has issued eighty-seven rules and is proposing more rules that address the enforcement of the law. Four rules were definitional, five related to forms and filing, three to books and records, and one to custody of assets. The remaining seventy-four rules regulated substantively by exemptions and mostly by direct imposition of new regulations.⁷⁴ The rules are structured in a number of innovative techniques, and their proposed enforcement controls offer a number of innovative approaches. The first rules addressed the issue of market timing. Internal controls requirements were tightened, including the appointment of a compliance officer who will have significant authority and direct access to the board.⁷⁵ The Commission's compliance staff encourages these internal compliance officers to keep in touch, giving them access to the Commission and perhaps increasing their prestige. Advisers must prepare and enforce a code of ethics, similar to the code required under the 1940 Act, and in both cases the coverage of the code is more extensive than the historical one.⁷⁶

Other rules aimed at changing the power balance and the structure of mutual funds. They increase the number of disinterested directors to seventy-five percent of board membership and require that the chairperson of the board be a disinterested director.⁷⁷ They increase the ability of the disinterested directors to hire their own staff and lawyers, and to caucus

72. Complaint, *State v. Canary Capital Partners, LLC* (Sept. 3, 2003), <http://news.findlaw.com/nytimes/docs/nys/nyscanary90303cmp.pdf>; 1 TAMAR FRANKEL & ANN TAYLOR SCHWING, *THE REGULATION OF MONEY MANAGERS* § 1.02[B], at 1-82.1 (Supp. 2005) (citing SEC enforcement actions).

73. See, e.g., *Quality Funds in a Post-Scandal World*, BUS. WK. ONLINE, May 18, 2004 (noting that investors are avoiding scandal-plagued funds).

74. See Appendix D.

75. Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26,299 (Dec. 17, 2003), 68 Fed. Reg. 74,714, 74,729-74,730 (Dec. 24, 2003) (codified at 17 C.F.R. §§ 270.38a-1(a)(4), 275.206(4)-7 (2005)).

76. Investment Adviser Codes of Ethics, Investment Advisers Act Release No. 2256, 69 Fed. Reg. 41,696, 41,708-41,709 (July 9, 2004) (codified at 17 C.F.R. § 275.204A-1 (2005)).

77. Investment Company Governance, Investment Company Act Release No. 26,520 (July 27, 2004), 69 Fed. Reg. 46,378, 46,389-46,390 (Aug. 2, 2004) (codified in scattered sections of 17 C.F.R. pt. 270).

among themselves. Disinterested directors have been tasked with a more active supervisory role. The balance of power has been changed between the advisers who promote and manage mutual funds and view them as their business, and the directors who have a more ambivalent role of representing and guarding the shareholders' interests. The intrusion into the advisers' management brought to the fore difficult issues that are not yet resolved.

Changes towards heightened directors' surveillance is not new. The rules have moved constantly towards greater directors' power, but never have they reached the current level of independence and power.⁷⁸ So long as the shareholders do not read the prospectuses and do not make their own minds, they must rely on advisers. If these advisers, such as financial planners, brokers, and analysts, are paid in one way or another by the funds' Managers, the advisers will tend to recommend to the investors the funds that pay them most. Thus, the successful funds are not necessarily those that are best managed but those whose Managers pay most for the recommendations and sales of these fund shares. So long as the sales pressure continues, the pressure will continue on directors to independently and objectively evaluate the performance of the fund Managers and their fees. That is not necessarily a happy result. For effective management, the Managers and the directors should cooperate.

Another important change is the manner in which the rules are fashioned. To be sure, some of the rules are detailed, as they were in the past. For example, the imposition of registration requirements on hedge fund advisers is quite detailed.⁷⁹ But with respect to controls and the establishment of honesty, the Commission's approach is somewhat different than in the past.

The rules provide advisers and directors with principles, and then require them to disclose the practices that they have established to implement these principles. Rather than micro-manage, the Commission has invited the advisers to manage controls in a way that would comply with and enforce the principles. The Commission identified the responsible parties and left to them the implementation of the principles.⁸⁰

78. Investment Company Governance, Investment Company Act Release No. 26,520, 69 Fed. Reg. 46,378 (Aug. 2, 2004) (codified in scattered sections of 17 C.F.R. pt. 270 (2005)).

79. 17 C.F.R. §§ 270.203(b)(3)-1, -2 (2005). The rule allows the advisers an escape route, such as imposing a two-year bar on investors' withdrawal of their money from the hedge fund. If their investors may withdraw their money only after two years and one day, the advisers to hedge funds might escape registration.

80. Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24,816, 66 Fed. Reg. 3734 (Jan. 16, 2001) (codified in scattered sections of 17 C.F.R. pt. 270

On its face, the fundamental principle that underlies all the laws is not complicated nor hard to understand. It can be summarized in four words: “It’s not your money.” All the rules, interpretations, and processes are aimed at enforcing this principle. The principle does not require advisers to give the investors anything that belongs to the advisers. It requires that the advisers do not succumb to the temptation to take what does not belong to them, regardless of who the owners are.

Yet, this principle is not as simple to implement as it seems. The issue involves the status of those who deal with other people’s money: brokers who advise, financial planners who plan for others, fund Managers and their compliance officers, lawyers, and accountants. In this day and age all these actors occupy a dual position. They are professionals. They operate businesses. There is a difference between the two positions. Professionals perform a public service first, and strive to make a living second. Businesses strive to make a living and maximize profits. As compared to businesses, competition among professionals used to be far more restrained. After all, all professionals had the public as their client. Self-restraint and self-regulation were more prevalent in the professional area.⁸¹

These practices and self-image have changed throughout the past thirty years. Professions have become more business-oriented and professional organizations have become more like trade organizations, fighting to protect their turf and increase their members’ profits. Prestige came with more pay and competition increased for higher profits. When the measure of professional rewards is money, and when no other reward is imagined, there is hardly any limit to the drive for more. And when public service does not bring money and requires limits on profits, it is natural to ignore it.⁸²

Professionals should not be surprised that their public service orientation is now imposed on them by the government, compliance officers, directors, and the requirements for codes of ethics. If self-restraint is abandoned, coercive restraint comes from outside.

There are those who question the value of honesty in the mutual fund business. Investors, they say, do not value honesty. Investors value the money that they receive, that is, performance, regardless of how it is

(2005)); Investment Company Governance, Investment Company Act Release No. 26,520, 69 Fed. Reg. 46,378 (Aug. 2, 2004) (codified in scattered sections of 17 C.F.R. pt. 270 (2005)); Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act Release No. 2333, 69 Fed. Reg. 72,054 (Dec. 10, 2004) (codified at 17 C.F.R. §§ 275.203(b)(3)-1, -2 (2005))

81. See TAMAR FRANKEL, TRUST AND HONESTY: AMERICA’S BUSINESS CULTURE AT A CROSSROAD 138–39 (2005).

82. See *id.* at 138.

achieved. To be sure, there are probably investors who care not about honesty. And yet, in my opinion, if they are rational, investors would like to reduce the risk of direct or indirect dishonesty. Besides, poor performance can be linked to dishonesty such as unconscionable fees and practices that benefit some shareholders and Managers unfairly at the expense of others. If the source of poor performance is unknown, it could arise from dishonest management. Therefore, at least some rational investors might value honesty even if today they benefit by dishonesty; tomorrow they might lose by dishonesty.

Not all Managers value honesty either. The following story is demonstrative. It was rumored that Securities and Exchange Commission's examiners would form monitoring groups. These groups would sit at the offices of large mutual fund Managers, and supervise their operations, the way FDIC agents sit at large bank offices. Asked for a reaction to this action, I was told in confidence how a senior Manager in one large fund complex reacted. He said something like: "That is sheer waste of money. No one would speak to these monitors and they will be put in a box and forgotten." I was astounded. Here was a golden opportunity to gain the best guarantee of honesty at no cost. It was an opportunity to show the world and the regulators that this fund complex had nothing to hide. I expected the Managers to receive the government monitors with open arms, show them around, and offer them a comfortable office from which to supervise and hopefully report and advertise the fund complex's compliance with the law. This Manager did not expect the investors to value trust.

A. The Virtue of the Common Law Approach

If investors read their prospectuses they would exert market pressure on their advisers and substitute for government interference. How can the Commission ensure that investors receive truthful information and convince investors to read it and exert market pressure on advisers? The objective, after all, is to inform investors without influencing them one way or another, and let them make up their own mind. Yet, by definition, information influences, and can be true to some readers and misleading to others. And investors do not do their homework and continue to rely on others.

How can law strengthen the directors' supervision over the advisers without harming the cooperation among them? The objective is to render the advisers accountable but also create an on-going, non-hostile, cooperative environment among the two parties for the benefit of the

investors and the advisers. Yet, by definition, supervision and cooperation are rarely fully compatible, especially when the advisers bear the cost of restrictions on their profitability.

How can internal controls be established in an environment of competition among the mutual fund advisers? The objective, after all, is not to reduce competition but to eliminate or at least restrict competition by dishonest behavior. Yet, legitimate and legal competition on one hand, and dishonest behavior on the other hand, are not always clearly distinguishable.

And how can the law and the government induce advisers not only to prepare codes of ethics but also to inculcate their organizations with a culture of self-limiting honesty? Such a culture is the most efficient, for it does not involve enforcement costs. Yet, it is the hardest to achieve and maintain.

We do not know the answers to these questions. Permissive rules or lax enforcement can fail. Strong intrusive rules and strict enforcement may not be optimal either. They can induce the advisers to “go underground,” or go abroad, or use political pressure to relax the rules. Much can depend on the particular individuals, the history of the organizations, and the talents of the Managers and actors. The same rules may be effective for some fund complexes and ineffective for others. The costs of these rules may differ. Optimal rules that apply to all may be different from custom-made rules, and less costly.

To be sure, the Commission can enact a rule and then conduct empirical studies to uncover its defects, costs and benefits, and adjust the rule accordingly. But even this method is not likely to bring the desired results. The actors are not frozen in time. Their behavior changes continually, not only by the rule but also by new events, different environments, and other internal and external conditions. Therefore, the effects and costs of new rules as compared to previous rules will be highly speculative.

Historically, the Commission used a number of mechanisms that produced results like those of the common law. The approach resulted in relatively optimal rules (even if their enforcement was not optimal). These mechanisms facilitated flexible, case-by-case experiments and decisions, which culminated in rules. The Commission’s staff issued no-action letters on a case-by-case basis.⁸³ When the no-action letters contained

83. See, e.g., Amendments to Beneficial Ownership Reporting Requirements, Exchange Act Release No. 39,538 (Jan. 12, 1998), 63 Fed. Reg. 2854, 2857 n.27 (Jan. 16, 1998) (noting that amendment codifies prior no-action position).

interpretations of the law they served as precedents and guidance to lawyers and often to judges as well. The Commission issued interpretations, or supported the staff's interpretation in most cases.⁸⁴ Exemptions by the Commission were granted to applying parties, case by case. Rules were enacted only after many, sometimes hundreds, of exemptions were granted.⁸⁵ In the years 1975 to 2000, these mechanisms allowed the Commission to test and re-test its exemptions (relief from the law) and its conditions (imposition of restrictions) and then generalize relief by rule.

Today these mechanisms are not as easy to use for a number of reasons. That is not because there are rules in place. After all, in 1940, two acts were passed that were quite detailed, and many of the details do not fit today's environment.⁸⁶ The difference between the previous regulatory environment and today's environment is in the Commission's ability to create law by exempting advisers from the acts on a case-by-case basis.

The exemptions and the rules in the 1975 to 2000 period deregulated and re-regulated. Much of the regulation in the 1975 to 2000 period was found in conditions to exemptive relief. The process reflected an exchange. Advisers received exemptions from constraints of the existing law in exchange for different legal limitations. It is not surprising that when the Commission tightened the internal controls within the advisers' organizations, it had to amend the conditions that it imposed in a number of important exemptions, especially since it did not have direct statutory power to do so.⁸⁷ It is not surprising that the advisers are challenging the amendments.⁸⁸ After all, the practice in the past was to receive something (relief from current law) in return for restrictions. None were offered in the recent amendments to the conditions that imposed stricter requirements rather than relax them. The Commission's explanations of the amended conditions emphasized the revelations of abuse and the need for stricter

84. Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Release No. 1092 (Oct. 8, 1987), 52 Fed. Reg. 58,400 (Oct. 16, 1987).

85. See, e.g., Exemption for Open-End Management Investment Companies Issuing Multiple Classes of Shares, Investment Company Act Release No. 20,915 (Feb. 23, 1995), 60 Fed. Reg. 11,876, 11,876 (Mar. 2, 1995) (noting that "[s]ince 1985, the Commission has issued approximately 200 exemptive orders allowing funds to issue multiple classes of shares in the same portfolio"); 15 U.S.C. § 80a-6(c) (2000) (allowing SEC to issue exemptions from provisions of Investment Company Act).

86. See TAMAR FRANKEL & CLIFFORD E. KIRSCH, INVESTMENT MANAGEMENT REGULATION 34-35 (3d ed. 2005) (stating that Investment Company Act is "detailed" but "does not carve the industry in granite").

87. See 15 U.S.C. § 80a-10(a) (2000).

88. See Chamber of Commerce of the United States v. SEC, 412 F.3d 133 (D.C. Cir. 2005).

regulation.⁸⁹ But it was a one-sided regulation with no de-regulation. This produces resistance, sometimes intense, to the regulation.

Further, in the 1975 to 2000 period, when the advisers sought relief from legal constraints, they provided the Commission with information about their operations, costs, and objectives. The staff of the Commission could also request (and usually receive) additional information on these items. The information was reliable. It was offered by the most knowledgeable sources and was accompanied by a sanction on inaccuracies. Inaccurate information was likely to be refuted, either before the grant of exemption or thereafter (by competitors, for example). Providing the Commission with misleading information carried with it loss of credibility (a long-term sanction). Therefore, the probabilities were very high that the information would be true and robust (either initially or after staff questioning).

In contrast, the information that accompanies investigations and prosecution is far more limited. Information that accompanies rules aimed at tightening regulation is not likely to be offered by advisers voluntarily, and comments on proposed rules could be sharply conflicting, depending on whether they are offered by the advisers or by representatives of the investors. Thus, in today's environment the Commission initiates restrictive rules, and does not have the quality information that it has historically received from the industry.

In addition, in 1975 to 2000, most of the requests for relief (combined with new regulatory conditions) came from the advisers. They sought permission for new activities or designs or transactions in which they desired to engage. The Commission's initiative was usually limited to codifying no-action letters in a release,⁹⁰ and codifying exemptions in a rule.⁹¹ In the new recent period, the initiative came from the Commission rather than from the advisers.⁹² And the regulation had to apply generally, by rules, at the outset.

The Commission does, however, have today, as it did in the past, mechanisms to test various regulatory conditions, case by case. But these mechanisms are very different from the historical ones. Today, the mechanism the Commission uses to experiment derives from the cases it

89. Investment Company Governance, Investment Company Act Release No. 26,520, 69 Fed. Reg. 46,378, 46,378-80 (Aug. 2, 2004).

90. See Appendix C.

91. See Appendix C.

92. See Appendix D.

brings against the violators of the law.⁹³ And its information is derived from the facts and arguments produced in the judicial proceedings. It also gleans information during the negotiations for settlement with the accused. Ultimately, these settlements can shape informal rules. True, the Commission prosecuted violators in the past as well. However, the balance between exemptive regulation and prosecutorial regulation has changed. There is less exemptive conditional regulation and far more prosecutorial and settlement regulation.⁹⁴

This system of rule-making highlights the difference between regulation by exemptions and regulation by prosecution. Regulation by exemption aims at all the actors in the profession. Prosecution aims at the violators. Regulation by exemption is usually affected by, and sometimes is based on, a measure of consensus by the regulated. Prosecution is usually affected by the financial constraints on the prosecutors, public pressure, negotiated settlements, or judicial decisions. To the extent that judicial decisions and settlements are used as precedents or incorporated in rules, they could then apply to the larger family of advisers. Yet, rules that have their origins in reaction to profitable violations of the law are likely to have a different orientation from the historical rules that have their origins in requests for profitable permissible innovations. The rule-makers know the actions of the violators but not their impact on other members of the adviser community. They do not know whether these actions are likely to be isolated incidents or the drivers of a cascade. In addition, the decisions to prosecute and settle are not as well known as the exemptions and no-action letters. There is little publicity about the policies that lead to the decisions to prosecute and the guidelines to settle. There are few indications of the steps which the Commission should take to tighten the application of the law in order to eliminate a widespread abuse of trust,

93. Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, Investment Company Act Release No. 26,418 (Apr. 16, 2004), 69 Fed. Reg. 22,300 (Apr. 23, 2004); Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24,816, 66 Fed. Reg. 3734 (Jan. 16, 2001) (codified in scattered sections of 17 C.F.R. pt. 270 (2005)); Investment Company Governance, Investment Company Act Release No. 26,520, 69 Fed. Reg. 46,378 (Aug. 2, 2004) (codified in scattered sections of 17 C.F.R. pt. 270 (2005)).

94. A LEXIS search on Dec. 6, 2005 suggests that there may be less exemptive conditional regulation than in the past. A search of the SEC database including no-action letters and releases, excluding no-action letters, for terms often found in releases granting exemptive relief (i.e., (1) the word "order" and (2) the word "granting" preceding the word "exemption" by one word), retrieved 385 documents for the period between Dec. 6, 2000 and Dec. 5, 2005 inclusive, and 651 documents for the period between Dec. 6, 1995 and Dec. 5, 2000 inclusive.

resurrect investors' trust, and achieve this purpose at the lowest cost to honest advisers.⁹⁵

The Chamber of Commerce has unsuccessfully attacked the Commission's authority to amend the conditions of exemptive rules (the regulatory side of the balance) without granting the industry any exemptions. Conservative academics attacked the decision as a violation of the "rule of law." Yet, in the long-term the industry is likely to remain thankful to the D.C. Circuit for its decision. Without conditions, there would be no exemptions. Without exemptions, this dynamic and creative professional industry is likely to shrivel and die.

Perhaps in this new era, the staff would start to issue no-action letters on proposed steps that the advisers are planning to take in order to implement the Commission's directives. The staff might provide comfort to advisers who are unsure about the reach of prohibiting rules. Or the Commission could approve guidelines of not-for-profit organizations, such as the Independent Directors Forum, and indirectly to directors who want to perform their job well. The new era may require the Commission to review its regulations periodically. Among others, the reviews might focus on the regulations that are either violated more often or are subject to increasing requests for exemptions.

The settlements that the Commission and the state enforcement agencies are reaching with accused organizations and persons can become a source of small "step-by-step" experiments. Contacts between the Office of Compliance at the Commission and the Chief Compliance Officers at the advisory organizations that focus on particular issues and events may be an effective preventive "common law" enforcement mechanism that can culminate in general guiding rules for the future. While the principles can be broadly announced, the details can be worked out case by case to be tested and to provide the substance of future rules and guides to implement them.

Can corporate America benefit from a case-by-case system along the same lines of this model? In fact, the Sarbanes-Oxley Act can offer a testing ground and a tentative answer. The Act has brought loud complaints by a number of large and small corporations. Since it applies to those who are guilty of fraud and those who are not, it is sometimes hard to justify a full imposition of the provisions of this Act. If the Securities

95. The Commission has also established an internal mechanism to uncover and highlight "red flags." It uses statistical data and "watchdogs" within its Divisions. When such red flags appear, steps are taken to address the problems case by case. What is unknown is how the Commission reacts to these discoveries, and the kind of internal policies it establishes for the reaction.

and Exchange Commission were granted power to exempt from the Act under certain very broad guidelines, as it was granted under the 1940 Acts, then such system may develop. This is just an idea to be pursued in another writing. But I believe that it can potentially reduce the problems of general rules imposed on business that may prove too broad or too narrow.

This current era poses great legal risk for fiduciaries. For them, the common law approach of trying and testing seems to be riskier than specifying rules. The trying and testing approach creates a gray area of uncertainty. And yet, most advisers could restrain their competitive drive, avoid the gray areas, and follow safe legal actions, especially if they knew that their competitors must self-impose similar limitations. The benefit of this common law approach is that it avoids costly and disruptive rules. Advisers could then give the Commission practical information to guide its regulatory actions. In the last analysis, the common law “legislative” approach may be the better way to go, not only for the regulators and the investors but for the advisers as well.

APPENDIX A**U.S. Mutual Funds: Number of Funds, Total Net Assets (end of year)**

INVESTMENT COMPANY INSTITUTE, 2005 INVESTMENT COMPANY FACT BOOK 59, http://www.ici.org/stats/mf/2005_factbook.pdf.

Year	Number of Funds	Total Net Assets (billions of dollars)
1940	68	\$0.45
1945	73	1.28
1950	98	2.53
1955	125	7.84
1960	161	17.03
1965	170	35.22
1970	361	47.62
1971	392	55.05
1972	410	59.83
1973	421	46.52
1974	431	35.78
1975	426	45.87
1976	452	51.28
1977	477	48.94
1978	505	55.84
1979	526	94.51
1980	564	134.76
1981	665	241.37
1982	857	296.68
1983	1,026	292.99
1984	1,243	370.68
1985	1,528	495.39
1986	1,835	715.67
1987	2,312	769.17
1988	2,737	809.37
1989	2,935	980.67
1990	3,079	1,065.19
1991	3,403	1,393.19
1992	3,824	1,642.54
1993	4,534	2,069.96
1994	5,325	2,155.32
1995	5,725	2,811.29

Year	Number of Funds	Total Net Assets (billions of dollars)
1996	6,248	3,525.80
1997	6,684	4,468.20
1998	7,314	5,525.21
1999	7,791	6,846.34
2000	8,155	6,964.67
2001	8,305	6,974.95
2002	8,244	6,390.36
2003	8,126	7,414.40
2004	8,044	8,106.81

APPENDIX B

1940–1974

DEFINITIONAL: 13

§ 270.0-1 Definition of terms used in this part. [Oct. 31, 1940]
[definitional, for purposes of Rule N-2]

§ 270.24b-1 Definitions. [June 21, 1941] [definition of terms used in
Section 24(b) of 1940 Act]

§ 270.5b-1 Definition of “total assets.” [amended] [Nov. 22, 1941]
[technical amendment to original version of Rule 5b-1]

§ 270.8b-2 Definitions. [Dec. 19, 1953] [provides definitions for
Regulation N-8B]

§ 270.8b-2 Definitions. [amended] [May 14, 1954] [amended to
accommodate revisions of forms]

§ 270.0-1 Definition of terms used in this part. [amended] [Oct. 20, 1954]
[amended to conform to Pub. L. 83-577]

§ 270.24b-1 Definitions. [amended] [Feb. 15, 1956] [amendment
conforming to amendments to Form S-1, used in connection with 1933
Act]

§ 270.2a-4 Definition of “current net asset value” for use in computing
periodically the current price of redeemable security. [Dec. 30, 1964]
[defining “current net asset value” for purpose of “uniformity”]

§ 270.0-1 Definition of terms used in this part. [amended] [Jan. 27, 1965]
[amending definition of terms “rule” and “regulations” under 1940 Act to
also include forms adopted pursuant to Act]

§ 270.11a-1 Definition of exchange for purposes of section 11 of the Act.
[July 21, 1967]

§ 270.3c-2 Definition of beneficial ownership in small business investment companies. [amended] [Aug. 13, 1968] [amended definition so as to exclude an additional situation from the definition of “investment company”]

§ 270.2a-4 Definition of “current net asset value” for use in computing periodically the current price of redeemable security. [amended] [Jan. 8, 1970] [amended definition]

§ 270.3c-3 Definition of certain terms used in section 3(c)(1) of the Act with respect to certain debt securities offered by small business investment companies. [Apr. 18, 1972] [defining “public offering” permissively to exclude certain debt securities offered by small business investment companies]

FORMS AND FILING: 35

§ 270.0-2 General requirements of papers and applications. [Oct. 31, 1940] [setting specifications for papers and applications to be filed]

§ 270.30b2-1 Filing of reports to stockholders. [Jan. 4, 1941] [requiring filing of copies of reports to stockholders to meet certain conditions]

§ 270.24b-2 Filing copies of sales literature. [June 21, 1941] [requiring that materials filed for compliance with section 24(b) make appropriate reference to the section]

§ 270.0-3 Amendments to registration statements and reports. [Aug. 8, 1941] [setting out formal standards for amendments to registration statements and reports]

§ 270.0-4 Incorporation by reference. [Jan. 8, 1944] [authorizes incorporation by reference in registration statements and reports of documents and financial statements in other statements or reports filed pursuant to securities acts]

§ 270.0-4 Incorporation by reference. [redesignated] [May 26, 1949] [redesignation]

§ 270.8b-4 Interpretation of requirements. [Dec. 18, 1953] [general interpretation of requirements for “preparation and filing of registration statements and reports pursuant to sections 8 and 30(a) of the Act.”]

§ 270.8b-1 Scope of §§ 270.8b-1 to 270.8b-32. [Dec. 19, 1953] [states scope of Regulation N-8B; i.e., that it applies to registration statements and reports pursuant to sections 8 and 30(a) of the Act.]

§ 270.8b-3 Title of securities.[Dec. 19, 1953] [specifies what information must be given if “title of securities” is required to be given]

§ 270.8b-10 Requirements as to proper form. [Dec. 19, 1953] [requires that statement or report must be made on proper form]

§ 270.8b-13 Preparation of registration statement or report. [Dec. 19, 1953] [requiring some information from form to be included on statement or report and some to be omitted]

§ 270.8b-14 Riders; inserts. [Dec. 19, 1953] [prohibiting use of riders; governing use of inserts]

§ 270.8b-15 Amendments. [Dec. 19, 1953] [governing presentation of amendments]

§ 270.8b-20 Additional information. [Dec. 19, 1953] [requiring additional information so that statements will not be misleading]

§ 270.8b-21 Information unknown or not available. [Dec. 19, 1953] [allowing information not known or reasonably available to be omitted, but requiring an appropriate statement regarding such information]

§ 270.8b-22 Disclaimer of control. [Dec. 19, 1953] [allowing a disclaimer of control if open to reasonable doubt, but requiring disclosure of pertinent material facts]

§ 270.8b-23 Incorporation by reference. [Dec. 19, 1953] [allowing incorporation of material to be incorporated by reference, subject to conditions]

§ 270.8b-24 Summaries or outlines of documents. [Dec. 19, 1953] [stating that where a summary or outline is required, “only a brief statement shall be made,” and incorporation by reference is allowed]

§ 270.8b-25 Extension of Time for Furnishing Information. [Dec. 19, 1953] [if information is not available at required time, allowing a separate document to be filed, including a separate request for an extension of time]

§ 270.8b-30 Additional exhibits. [Dec. 19, 1953] [allowing the filing of exhibits not required]

§ 270.8b-31 Omission of substantially identical documents. [Dec. 19, 1953] [allowing a copy of only one of substantially identical documents to be filed, with appropriate disclosure regarding documents not filed]

§ 270.8b-32 Incorporation of exhibits by reference. [Dec. 19, 1953] [allowing incorporation by reference as exhibit to another filed document, subject to appropriate disclosure]

§ 270.8b-5 Time of filing original registration statement. [amended] [May 14, 1954] [amended to accommodate revisions of forms]

§ 270.8b-23 Incorporation by reference. [amended] [May 14, 1954] [amended to accommodate revisions of forms]

§ 270.17d-2 Form for report by small business investment company and affiliated bank. [Nov. 29, 1961] [prescribing form for reports required by amendment to Rule 17d-1]

§ 270.0-4 Incorporation by reference. [amended] [Feb. 13, 1964] [conforms Rule to Rule 24 of Revised Rules of Practice; no substantive change]

§ 270.8b-32 Incorporation of exhibits by reference. [Feb. 13, 1964] [amended]

§ 270.0-3 Amendments to registration statements and reports. [amended] [Feb. 21, 1968] [defines term “exchange”; clarifies that certain transactions are subject to section 11(a) of 1940 Act “so as to preclude the imposition of a new sales load”]

§ 270.0-2 General requirements of papers and applications. [amended] [June 27, 1968] [amendments restrictive; (1) requiring certain filings in “quintuplicate” rather than “triplicate”; (2) prohibits statement that applicant offers application in evidence at any hearing; this change was to conform to current hearing procedures and consent is “generally of no significance”; (3) requires name and address of applicant and contact person]

§ 270.27e-1 Requirements for notice to be mailed to certain purchasers of periodic payment plan certificates sold subject to section 27(d) of the Act. [amended] [Aug. 11, 1971] [minor changes in forms which are part of Rule; at request of Association of Mutual Fund Plan Sponsors; “to facilitate the use of the forms” in some circumstances and “to account for” the occurrence of certain circumstances]

§ 270.0-8 Payment of fees. [Jan. 29, 1972] [to accommodate amendment to Rule 0-5 under 1940 Act, requiring application fee where not required before, and new Rule 8b-6, requiring fee for registration not required before; Rule 0-8 specifies form in which fees must be paid]

§ 270.8b-6 [Reserved] [Jan. 29, 1972] [requiring fee for registration]

§ 270.20a-1 Solicitation of proxies, consents and authorizations. [amended] [Jan. 29, 1972] [allowing payment of fee at time of filing preliminary solicitation material in lieu of “fees specified in Rule 14a-6 . . . under the [1934 Act]”]

§ 270.0-2 General requirements of papers and applications. [amended] [Aug. 29, 1973] [requiring submission of proposed notices for possible use by SEC in giving public notice]

§ 270.0-5 Procedure with respect to applications and other matters. [amended] [Aug. 29, 1973] [correction; changing phrase “a date to be specified in the notice” because notices contain no exact date]

BOOKS AND RECORDS: 4

§ 270.31a-1 Records to be maintained by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended]

[Dec. 5, 1962] [adds “specificity and detail” to former Rule governing records to be maintained]

§ 270.31a-2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended] [Dec. 5, 1962] [adds “specificity and detail” to former Rule governing records to be preserved]

§ 270.31a-3 Records prepared or maintained by other than person required to maintain and preserve them. [Dec. 5, 1962] [requires written agreement from another party if records are held by another party]

§ 270.31a-2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended] [Mar. 26, 1973] [permitting maintenance and preservation of records on microfilm; prior version permitted such use three years after creation of hard copy]

CUSTODY: 3

§ 270.17f-1 Custody of securities with members of national securities exchanges. [Oct. 31, 1940] [requirements for firms acting as custodian]

§ 270.17f-2 Custody of investments by registered management investment company. [amended] [Oct. 11, 1947] [“clarification” of Rule stating that in some circumstances securities are deemed to be in custody of investment company; since Rule sets conditions under which investment company may maintain securities in own custody, appears to be a restrictive amendment as a broader definition of when securities are in investment company’s custody would result in restrictions of rule being more likely to apply]

§ 270.17f-3 Free cash accounts for investment companies with bank custodians. [May 18, 1972] [“except[ing] petty cash accounts from bank custodianship [for purposes of section 17(f) of the 1940 Act] in situations where a registered investment company employs a bank custodian”]

SUBSTANTIVE EXEMPTIONS AND REGULATION: 58

§ 270.6d-1 Exemption for certain closed-end investment companies. [Nov. 2, 1940] [implementation of exemption for certain closed-end companies under section 6(d) of 1940 Act; setting requirements for application]

§ 270.30e-2 Reports to shareholders of unit investment trusts. [originally § 270.30d-2 before redesignation] [Jan. 4, 1941] [requiring reports to shareholders of unit investment trusts]

§ 270.19a-1 Written statement to accompany dividend payments by management companies. [Feb. 25, 1941] [requirements for written statement required by section 19 for management companies]

§ 270.10f-1 Conditional exemption of certain underwriting transactions. [Feb. 28, 1941] [exemption from section 10(f) of certain persons during existence of underwriting under some circumstances]

§ 270.17a-1 Exemption of certain underwriting transactions exempted by § 270.10f-1. [Feb. 28, 1941] [exemption from section 17(a)(1) of certain persons during existence of underwriting under some circumstances]

§ 270.13a-1 Exemption for change of status by temporarily diversified company. [Aug. 8, 1941] [exemption from section 13(a)(1) for change of subclassification from diversified to non-diversified company under certain circumstances]

§ 270.6b-1 Exemption of employees' securities company pending determination of application. [Dec. 2, 1941] [providing temporary exemption from Act for employees' securities company which files application for exemption under section 6(c) of Act pending final determination of application]

§ 270.32a-1 Exemption of certain companies from affiliation provisions of section 32(a). [Dec. 23, 1941] [conditional exemption of narrow class of companies from requirement in section 32(a) of Act that independent public accountants be selected by disinterested directors]

§ 270.45a-1 Confidential treatment of names and addresses of dealers of registered investment company securities. [amended] [Jan. 10, 1942]

[amended in connection with adoption of Form N-8B-2 for unit investment trusts]

§ 270.23c-2 Call and redemption of securities issued by registered closed-end companies. [Aug. 25, 1942] [allows closed-end companies to call or redeem its securities pursuant to the terms of the securities or other agreement, notwithstanding Rule N-23C1-1, provided that conditions are met]

§ 270.23c-1 Repurchase of securities by closed-end companies. [amended] [Dec. 15, 1942] [broadens scope of former Rule, permits repurchases in other situations]

§ 270.2a-1 Valuation of portfolio securities in special cases. [amended] [Mar. 24, 1943] [conforms former Rule to Internal Revenue Code]

§ 270.10f-2 Exercise of warrants or rights received on portfolio securities. [Jan. 8, 1944] [exempts from section 10(f) of Act purchase of securities pursuant to exercises of warrants or rights provided that conditions are met]

§ 270.15a-1 Exemption from stockholders' approval of certain small investment advisory contracts. [Jan. 8, 1944] [exempting investment adviser of registered investment company from sections 15(a) and 15(e) requirement if certain conditions are met]

§ 270.5b-2 Exclusion of certain guarantees as securities of the guarantor. [Jan. 16, 1945] [provides that guarantee is not considered a security of grantor for purposes of section 5 provided that conditions are met; "alleviates . . . difficulties" in meeting diversification standards]

§ 270.28b-1 Investment in loans partially or wholly guaranteed under the Servicemen's Readjustment Act of 1944, as amended. [June 13, 1946] [authorizes Servicemen's Readjustment Act loans as qualified investments for face-amount securities companies]

§ 270.17a-3 Exemption of transactions with fully owned subsidiaries. [May 28, 1947] [exempts transactions with fully-owned subsidiaries from section 17(a) of Act]

§ 270.17a-2 Exemption of certain purchase, sale, or borrowing transactions. [amended] [July 29, 1947] [amended prior Rule so that exemption from section 17(a) of Act will apply to certain transactions between banks]

§ 270.17a-4 Exemption of transactions pursuant to certain contracts. [July 29, 1947] [exempts transactions pursuant to certain contracts from section 17(a) of Act]

§ 270.7d-1 Specification of conditions and arrangements for Canadian management investment companies requesting order permitting registration. [May 5, 1954] [stating “conditions and arrangements to be entered into by a management investment company organized under the laws of Canada” to facilitate “an order permitting registration of the company under section 7(d) of the Act”]

§ 270.24e-1 Filing of certain prospectuses as post-effective amendments to registration statements under the Securities Act of 1933. [Apr. 28, 1955] [clarifying language in Pub. L. No. 83-577; a more lenient interpretation that would not “require the filing of every changed prospectus as a post-effective amendment”]

§ 270.45a-1 Confidential treatment of names and addresses of dealers of registered investment company securities. [amended] [Sept. 20, 1955] [amended to be consistent with Executive Order 10501; “to minimize any confusion between the use of the word ‘confidential’ in national defense classifications and its use elsewhere”]

§ 270.17a-5 Pro rata distribution neither “sale” nor “purchase.” [Oct. 6, 1955] [excluding pro rata distributions from prohibition in section 17(a)]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Jan. 23, 1957] [amends previous Rule so as to not require a filing for bonus or pension plans without profit-sharing characteristics, but also amends Rule to require filing for “joint enterprises or arrangements,” which may be broader]

§ 270.20a-1 Solicitation of proxies, consents and authorizations. [amended] [Mar. 3, 1960] [requiring information to be furnished when solicitation is made or on behalf of management of investment company]

§ 270.14a-1 Use of notification pursuant to Regulation E under the Securities Act of 1933. [Apr. 22, 1960] [allowing a small business investment company to comply with section 14(a) of 1940 Act by filing notification pursuant to Regulation E under 1933 Act]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Nov. 29, 1961] [exempting certain transactions involving banks and an affiliated SBIC from requirements of rule]

§ 270.18c-1 Exemption of privately held indebtedness. [Nov. 29, 1961] [exempting privately held indebtedness by small business investment company from section 18(c) of 1940 Act if conditions are met] security.]

§ 270.17a-6 Exemption for transactions with portfolio affiliates. [amended] [May 9, 1964] [expanded prior exemptive rule to provide additional exemptions]

§ 270.15a-3 Exemption for initial period of investment adviser of certain registered separate accounts from requirement of security holder approval of investment advisory contract. [Aug. 5, 1969] [exemption from section 15(a) of 1940 Act under certain conditions]

§ 270.16a-1 Exemption for initial period of directors of certain registered accounts from requirements of election by security holders. [Aug. 5, 1969] [exemption from section 16(a) of 1940 Act under certain conditions]

§ 270.22e-1 Exemption from section 22(e) of the Act during annuity payment period of variable annuity contracts participating in certain registered separate accounts. [Aug. 5, 1969] [exemption from section 22(e) of 1940 Act under certain conditions]

§ 270.32a-2 Exemption for initial period from vote of security holders on independent public accountant for certain registered separate accounts. [Aug. 5, 1969] [exemption from section 32(a)(2) of 1940 Act under certain conditions]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Aug. 18, 1970] [amended Rule to conform to simultaneous amendment to Regulation S-X; amendment to

Regulation S-X requires companies to make provision for taxes on undistributed capital gains]

§ 270.27a-1 Conditions for compliance with and exemptions from certain provisions of section 27(a)(1) and section 27(h)(1) of the Act for certain registered separate accounts. [amended] [June 17, 1971] [conforms rule to section 27(h) of 1940 Act adopted as part of 1970 Act]

§ 270.27a-2 Exemption from section 27(a)(3) and section 27(h)(3) of the Act for certain registered separate accounts. [amended] [June 17, 1971] [conforms rule to section 27(h) of 1940 Act adopted as part of 1970 Act]

§ 270.27a-3 Exemption from section 27(a)(4) and section 27(h)(5) of the Act for certain registered separate accounts. [amended] [June 17, 1971] [conforms rule to section 27(h) of 1940 Act adopted as part of 1970 Act]

§ 270.27c-1 Exemption from section 27(c)(1) and section 27(d) of the Act during annuity payment period of variable annuity contracts participating in certain registered separate accounts. [amended] [June 17, 1971] [conforms rule to section 27(h) of 1940 Act adopted as part of 1970 Act]

§ 270.18f-1 Exemption from certain requirements of section 18(f)(1) (of the Act) for registered open-end investment companies which have the right to redeem in kind. [June 23, 1971] [exemption from section 18(f)(1) of 1940 Act; noting that some states and countries require (or are considering requiring) that open-end companies require, as a condition of doing business, redemption priorities for residents of their jurisdiction, and that such priorities would otherwise violate Section 18]

§ 270.27d-1 Reserve requirements for principal underwriters and depositors to carry out the obligations to refund charges required by section 27(d) and section 27(f) of the Act. [July 15, 1971] [requires principal underwriters/depositors to deposit/maintain funds in segregated trust account to carry out these obligations]

§ 270.27d-2 Insurance company undertaking in lieu of segregated trust account. [July 15, 1971] [“permits an insurance company obligation as an optional alternative to the segregated trust account”]

§ 270.27e-1 Requirements for notice to be mailed to certain purchasers of periodic payment plan certificates sold subject to section 27(d) of the Act.

[July 15, 1971] [“specifies the method, form and contents of” the notice required by section 27(e) of the 1940 Act]

§ 270.27g-1 Election to be governed by section 27(h). [July 15, 1971] [provides that an election made under section 27(h) of the 1940 Act is to be made in as a Notice of Election filed with the 1933 Act registration statement]

§ 270.27h-1 Exemptions from section 27(h)(4) for certain payments. [July 15, 1971] [exempts certain payments from section 27(h)(4) of the 1940 Act]

§ 270.19a-1 Written statement to accompany dividend payments by management companies. [redesignated] [Dec. 2, 1971]

§ 270.19b-1 Frequency of distribution of capital gains. [Dec. 2, 1971] [limiting frequency of distribution of capital gains by registered companies]

§ 270.27a-3 Exemption from section 27(a)(4) and section 27(h)(5) of the Act for certain registered separate accounts. [amended] [Dec. 11, 1971] [correction of typographical error]

§ 270.27f-1 Notice of right of withdrawal required to be mailed to periodic payment plan certificate holders and exemption from section 27(f) for certain periodic payment plan certificates. [Dec. 18, 1971] [deleted paragraphs made “superfluous” by Pub. L. No. 92-165]

§ 270.18c-2 Exemptions of certain debentures issued by small business investment companies. [Apr. 18, 1972] [exempts certain debentures issued by small business investment companies from section 18(c) of the 1940 Act]

§ 270.27e-1 Requirements for notice to be mailed to certain purchasers of periodic payment plan certificates sold subject to section 27(d) of the Act. [amended] [May 18, 1972] [amendments requested by Association of Mutual Fund Plan Sponsors; modified introductory sentence referencing SEC to avoid implication that notice must be sent because “the [SEC] has taken action against the sponsor”]

§ 270.27f-1 Notice of right of withdrawal required to be mailed to periodic payment plan certificate holders and exemption from section 27(f) for certain periodic payment plan certificates. [amended] [May 18, 1972] [amendments requested by Association of Mutual Fund Plan Sponsors; modified introductory sentence referencing SEC to avoid implication that notice must be sent because “the [SEC] has taken action against the sponsor” and use of number of payments rather than years for periodic plans to avoid the impression that a plan purchaser must complete his payments at a particular time]

§ 270.18f-2 Fair and equitable treatment for holders of each class or series of stock of series investment companies. [Aug. 26, 1972] [implementation of section 18(f)(2) of 1940 Act; requiring that matters to be submitted to all shareholders must be approved by a majority of shareholders of each class or series]

§ 270.2a-1 Valuation of portfolio securities in special cases. [amended] [Apr. 4, 1973] [technical amendment to conform to 1970 amendments]

§ 270.2a-2 Effect of eliminations upon valuation of portfolio securities. [amended] [Apr. 4, 1973] [technical amendment to conform Rule to 1970 amendments]

§ 270.7d-1 Specification of conditions and arrangements for Canadian management investment companies requesting order permitting registration. [amended] [Apr. 4, 1973] [technical amendment to conform Rule to 1970 amendments]

§ 270.19a-1 Written statement to accompany dividend payments by management companies. [amended] [Apr. 4, 1973] [technical amendment to conform Rule to 1970 amendments]

§ 270.17g-1 Bonding of officers and employees of registered management investment companies. [amended] [Mar. 21, 1974] [(1) requires minimum coverage; (2) allows company to be named as insured under some circumstances; (3) exempts joint insured bonding arrangements under the Rule from section 17(d) of the 1940 Act and its Rules; (4) requires minimum factors to be considered by directors in approving bond; (5) provides notification and filing requirements to provide jointly insured companies the protections available for solely insured companies]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Oct. 25, 1974] [expanding subsection (d), which enumerates situations where no filing is required under the rule, to additional circumstances]

APPENDIX C**1975–2000**

[Former section § 270.30d-1 was redesignated as § 270.30e-1 on Jan. 16, 2001. It is referred to below only as § 270.30e-1; i.e., its enactment and amendments as § 270.30d-1 are not listed separately. Similarly, former section § 270.30f-1, redesignated as § 270.30h-1, is referred to only as § 270.30h-1, and former section § 270.30d-2, redesignated as § 270.30e-2, is referred to only as § 270.30e-2.]

DEFINITIONAL: 15

§ 270.3c-4 Definition of common trust fund as used in section 3(c)(3) of the Act. [Jan 17, 1978] [defining term to include multi-bank common trust funds, in effect exempting them from the 1940 Act]

§ 270.0-10 Small entities under the Investment Company Act for purposes of the Regulatory Flexibility Act. [Feb. 4, 1982] [defining “small business” or “small organization” for purposes of 1940 Act, for purposes of rulemaking in accordance with Administrative Procedure Act]

§ 270.0-1 Definition of terms used in this part. [Aug. 9, 1983] [defining “variable annuity contract” in conjunction with Rule 6c-8, below]

§ 270.0-1 Definition of terms used in this part. [Aug. 9, 1983] [technical amendment defining “separate account” and conforming Rule to Rule 11a-2, below]

§ 270.10b-1 Definition of regular broker or dealer. [Oct. 17, 1984] [providing objective definition of term for purposes of section 10(b) and Form N-1R; that subsection restricted use of directors or officers as regular broker or dealer]

§ 270.0-1 Definition of terms used in this part. [amended] [Oct. 22, 1985] [technical amendments related to amendment to Rule 22c-1]

§ 270.0-1 Definition of terms used in this part. [amended] [Mar. 18, 1993] [defines “EDGAR” and related terms; accommodates related release which requires electronic filing]

§ 270.8b-2 Definitions. [amended] [Mar. 18, 1993] [refers to sources that define “EDGAR” and related terms; accommodates related release which requires electronic filing]

§ 270.2a51-1. Definition of investments for purposes of section 2(a)(51) (definition of “qualified purchaser”); certain calculations. [Apr. 9, 1997] [“implement[ed] certain provisions of the National Securities Markets Improvement Act of 1996,” specifically new exclusion for certain privately offered companies; defines term for that purpose]

§ 270.2a51-2. Definitions of beneficial owner for certain purposes under sections 2(a)(51) and 3(c)(7) and determining indirect ownership interests. [Apr. 9, 1997] [“implement[ed] certain provisions of the National Securities Markets Improvement Act of 1996,” specifically new exclusion for certain privately offered companies; defines term for that purpose]

§ 270.2a51-3. Certain companies as qualified purchasers. [Apr. 9, 1997] [“implement[ed] certain provisions of the National Securities Markets Improvement Act of 1996,” specifically new exclusion for certain privately offered companies; partially defines term for that purpose]

§ 270.3c-1. Definition of beneficial ownership for certain section 3(c)(1) funds. [Apr. 9, 1997] [“implement[ed] certain provisions of the National Securities Markets Improvement Act of 1996,” specifically new exclusion for certain privately offered companies; defines term for that purpose]

§ 270.3c-5. Beneficial ownership by knowledgeable employees and certain other persons. [Apr. 9, 1997] [“implement[ed] certain provisions of the National Securities Markets Improvement Act of 1996,” specifically new exclusion for certain privately offered companies; defines related terms for that purpose]

§ 270.3c-6. Certain transfers of interests in section 3(c)(1) and section 3(c)(7) funds. [Apr. 9, 1997] [“implement[ed] certain provisions of the National Securities Markets Improvement Act of 1996,” specifically new exclusion for certain privately offered companies; defines related terms and partially defines “beneficial ownership” for that purpose]

§ 270.0-10. Small entities under the Investment Company Act for purposes of the Regulatory Flexibility Act. [amended] [June 30, 1998]

[makes definition of “small business” more restrictive for investment companies]

FORMS AND FILING: 40

§ 270.0-2 General requirements of papers and applications. [amended] [Jan. 23, 1979] [requiring that documents be sequentially paginated, to conform to SEC’s “Micrographic Conversion Program”]

§ 270.24f-2 Registration under the Securities Act of 1933 of certain investment company securities. [amended] [Apr. 3, 1979] [sets a minimum number of copies of notice to be filed, based on SEC’s experience that insufficient numbers of copies were being filed]

§ 270.0-2 General requirements of papers and applications. [amended] [Dec. 30, 1982] [elimination of legal size paper from filings; to accommodate SEC’s “micrographics filing program”]

§ 270.0-2 General requirements of papers and applications. [amended] [Apr. 21, 1983] [technical amendment “to provide that, when the last day for timely filing of papers required to be filed by the Act falls on a Saturday, Sunday or holiday, the time within which required papers may be filed with the Commission will be extended until the following business day”]

§ 270.0-8 Payment of fees. [amended] [July 3, 1984] [change to accommodate amendment allowing fees to be sent to lockbox]

§ 270.8b-11 Number of copies; signatures; binding. [Aug. 10, 1984] [redesignating former Rule 8b-11A; technical amendment to conform Rule to new Form N-1A]

§ 270.8b-12 Requirements as to paper, printing and language. [Aug. 10, 1984] [redesignating former Rule 8b-12A; technical amendment to conform Rule to new Form N-1A]

§ 270.8b-11 Number of copies; signatures; binding. [amended] [June 25, 1985] [“amended to add Forms N-3 and N-4 to the registration forms specified”] [50 Fed. Reg. 26,146 (1985); purpose of new forms is “to integrate and codify disclosure requirements for insurance company separate accounts that offer variable annuity contracts and to shorten and

simplify the prospectus provided to investors, while making more extensive information available for those who request it”]

§ 270.8b-12 Requirements as to paper, printing and language. [amended] [June 25, 1985] [“amended to add Forms N-3 and N-4 to the registration forms specified”; purpose of new forms is “to integrate and codify disclosure requirements for insurance company separate accounts that offer variable annuity contracts and to shorten and simplify the prospectus provided to investors, while making more extensive information available for those who request it”]

§ 270.20a-1 Solicitation of proxies, consents and authorizations. [amended] [Dec. 29, 1987] [requiring that “where preliminary material is not required to be filed, a filing fee [must] be paid when definitive material is filed”; to accommodate amendments that provide that certain preliminary material need not be filed]

§ 270.24b-3 Sales literature deemed filed. [Feb. 10, 1988] [“relieve[s] investment companies of their obligation to file sales material with the [SEC] if it is filed with the [NASD]”]

§ 270.8b-16 Amendments to registration statement. [amendment] [Mar. 13, 1989] [“to correct erroneous references”]

§ 270.17f-1 Custody of securities with members of national securities exchanges. [amended] [Aug. 4, 1989] [accommodate new form; new form requires form to be attached as cover sheet to examination certificates]

§ 270.17f-2 Custody of investments by registered management investment company. [amended] [Aug. 4, 1989] [accommodate new form; new form requires form to be attached as cover sheet to examination certificates]

§ 270.8b-11 Number of copies; signatures; binding. [amended] [Dec. 1, 1992] [accommodates amendments to Form N-2, which make a “short, simplified prospectus” available to closed-end companies]

§ 270.8b-12 Requirements as to paper, printing and language. [amended] [Dec. 1, 1992] [accommodates amendments to Form N-2, which make a “short, simplified prospectus” available to closed-end companies]

§ 270.8b-16 Amendments to registration statement. [amended] [Dec. 1, 1992] [amendment to Rule to exempt closed-end funds from its requirement if conditions are met]

§ 270.0-2 General requirements of papers and applications. [amended] [Mar. 18, 1993] [accommodates related release which requires electronic filing; clarifies that some filings must still be made in paper form unless otherwise required]

§ 270.0-4 Incorporation by reference. [amended] [Mar. 18, 1993] [accommodates related release which requires electronic filing; clarifies that incorporation by reference is not allowed if referenced document is in paper form, filer is electronic filer under temporary hardship exemption, and electronic copy is not submitted]

§ 270.8b-15 Amendments. [amended] [Mar. 18, 1993] [accommodates new “rule 102(b) of Regulation S-T (§ 232.102(b))” which requires electronic filing]

§ 270.8b-23 Incorporation by reference. [amended] [Mar. 18, 1993] [accommodates related release which requires electronic filing]

§ 270.8b-25 Extension of Time for Furnishing Information. [amended] [Mar. 18, 1993] [accommodates related release which requires electronic filing]

§ 270.8b-32 Incorporation of exhibits by reference. [amended] [Mar. 18, 1993] [accommodates related release which requires electronic filing]

§ 270.24b-2 Filing copies of sales literature. [amended] [Mar. 18, 1993] [accommodates related release which requires electronic filing; clarifies that this material must be submitted on paper even by electronic filer]

§ 270.45a-1 Confidential treatment of names and addresses of dealers of registered investment company securities. [amended] [Mar. 18, 1993] [accommodates related release which requires electronic filing; clarifies that this material must be submitted on paper even by electronic filer]

§ 270.8b-11 Number of copies; signatures; binding. [amended] [May 17, 1995] [permitting “[d]uplicated or facsimile versions of manual signatures” on statements or reports if conditions are met]

§ 270.0-4 Incorporation by Reference. [amended] [June 23, 1995] [accommodated technical change, i.e., move of former Rule 24 of Rules of Practice to Parts 228-229]

§ 270.8b-32 Incorporation of Exhibits by Reference. [amended] [June 23, 1995] [accommodated technical change, i.e., move of former Rule 24 of Rules of Practice to Parts 228-229]

§ 270.8b-12 Requirements as to paper, printing and language. [amended] [May 15, 1996] [adaptation of legibility requirements to electronic media]

§ 270.0-5 Procedure with respect to applications and other matters. [amended] [Sept. 24, 1996] [elimination of fees; one rationale was “eliminating unnecessary regulations imposed on the capital formation process”; the other rationale was that fees represented little of the SEC’s fee revenue; therefore, recordkeeping for these fees was costly; Rule 8b-6 was removed at the same time]

§ 270.0-8 Payment of fees. [amended] [Sept. 24, 1996] [accommodation to elimination of fee, above]

§ 270.24f-2 Registration under the Securities Act of 1933 of certain investment company securities. [amended] [Sept. 24, 1996] [elimination of fees, above]

§ 270.30a-1 Annual report. [amended] [Sept. 24, 1996] [elimination of fees, above]

§ 270.30b1-1 Semi-annual report. [amended] [Sept. 24, 1996] [elimination of fees, above]

§ 270.30b1-3 Transition reports. [amended] [Sept. 24, 1996] [elimination of fees, above]

§ 270.8b-11 Number of copies; signatures; binding. [amended] [Mar. 23, 1998] [“to modify signature requirements to provide more flexibility for issuers filing on paper”]

§ 270.8b-23 Incorporation by Reference. [amended] [May 21, 1999] [removal of cross-reference no longer necessary because of end of EDGAR phase-in period]

§ 270.8b-32 Incorporation of exhibits by reference. [amended] [May 21, 1999] [removal of cross-reference no longer necessary because of end of EDGAR phase-in period]

§ 270.8b-2 Definitions. [amended] [Apr. 27, 2000] [conform to removal of requirement to submit Financial Data Schedules]

§ 270.8b-32 Incorporation of exhibits by reference. [amended] [Apr. 27, 2000] [conform to removal of requirement to submit Financial Data Schedules]

BOOKS AND RECORDS: 4

§ 270.31a-2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended] [Nov. 24, 1986] [allows storage of records on computer storage media]

§ 270.31a-2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended] [Feb. 10, 1988] [“to clarify that investment companies must maintain sales material for inspection by the [SEC]”]

§ 270.31a-1 Records to be maintained by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended] [Mar. 28, 1996] [accommodation of amendments to Rule 2a-7]

§ 270.31a-1 Records to be maintained by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended] [Dec. 9, 1997] [conforming amendment to amendments to Rule 2a-7]

CUSTODY: 12

§ 270.17f-4 Custody of investment company assets with a securities depository. [Nov. 1, 1978] [allowing book-entry system as permitted securities depository, but also setting conditions for deposit in depository systems]

§ 270.17f-4 Deposits of securities in securities depositories. [amended] [Sept. 14, 1984] [conforming amendment to reflect adoption of Rule 17f-5, below]

§ 270.17f-5 Custody of investment company assets outside the United States. [Sept. 14, 1984] [“provides an exemption from the custody requirements of the Investment Company Act of 1940”]

§ 270.17f-5 Custody of investment company assets outside the United States. [amended] [Sept. 17, 1985] [clarified exemptive rule; the two modifications are less restrictive in nature]

§ 270.17f-5 Custody of investment company assets outside the United States. [amended] [Dec. 19, 1985] [correction of inadvertent error in earlier amendment]

§ 270.17f-4 Deposits of securities in securities depositories. [amended] [Sept. 24, 1993] [“The amended rules no longer require directors to review certain procedures and arrangements annually, and require instead that directors make and approve changes only when necessary. The amendments are intended to enhance the effectiveness of investment company boards by substituting more meaningful requirements for an annual review requirement, which is not necessary to protect investors.”]

§ 270.17f-6 Custody of investment company assets with Futures Commission Merchants and Commodity Clearing Organizations. [Dec. 17, 1996] [“permit[s] registered investment companies to maintain their assets with futures commission merchants and certain other entities in connection with futures contracts and commodity options traded on U.S. and foreign exchanges”]

§ 270.17f-5 Custody of investment company assets outside the United States. [amended] [May 16, 1997] [“provide[s] investment companies with greater flexibility in managing their foreign custody arrangements consistent with the safekeeping of investment company assets”; “also expand[s] the class of foreign banks and securities depositories that may serve as investment company custodians”]

§ 270.17f-5 Custody of investment company assets outside the United States. [amended] [May 6, 1999] [extension of compliance date]

§ 270.17f-4 Deposits of securities in securities depositories. [amended] [May 3, 2000] [conforming amendments to Rule 17f-7 and amendments to 17f-5]

§ 270.17f-5 Custody of investment company assets outside the United States. [amended] [May 3, 2000] [“excludes arrangements with foreign securities depositories from its scope because they are addressed by rule 17f-7”; “also reflects other clarifying changes from the previous version of the rule”; including a clarification of some circumstances governed by Rule 17f-5 and some governed by Rule 17f-7]

§ 270.17f-7 Custody of investment company assets with a foreign securities depository. [May 3, 2000] [“permits a fund to maintain assets with a foreign securities depository if certain conditions are met”]

SUBSTANTIVE EXEMPTIONS AND REGULATION: 132

§ 270.22d-2 Sales of redeemable securities without a sales load following redemption. [Aug. 13, 1975] [“allow[ing] sales of redeemable shares of a registered investment company at prices which reflect the elimination of sales load under certain enumerated circumstances”]

§ 270.27d-1 Reserve requirements for principal underwriters and depositories to carry out the obligations to refund charges required by section 27(d) and section 27(f) of the Act. [amended] [Oct. 31, 1975] [“reduc[ing] the reserve requirements for front-end load periodic payment plan certificates subject to section 27(d) of the Act . . . by approximately 50%”]

§ 270.15a-2 Annual continuance of contracts. [Sept. 24, 1976] [interpreting “annually” for purposes of section 15(a)(2) of the 1940 Act to prohibit certain inappropriate practices]

§ 270.6e-2 Exemptions for certain variable life insurance separate accounts. [Oct. 27, 1976] [“exempt[ing] separate accounts formed by life insurance companies to fund certain variable life insurance contracts from the registration requirements of the [1940] Act” if certain conditions are met]

§ 270.6e-2 Exemptions for certain variable life insurance separate accounts. [amended] [Dec. 1, 1976]

§ 270.24f-2 Registration under the Securities Act of 1933 of an indefinite number of certain investment company securities. [Nov. 9, 1977] [allowing “registration of an indefinite number of securities issued by a face-amount certificate company or redeemable securities issued by an open-end investment company or unit investment trust” provided that filing and notice requirements are met]

§ 270.14a-3 Exemption from section 14(a) of the Act for certain registered unit investment trusts and their principal underwriters. [May 22, 1979] [granting certain unit investment trusts exemption from section 14(a) of 1940 Act]

§ 270.19b-1 Frequency of distribution of capital gains. [amended] [May 22, 1979] [granting certain unit investment trusts exemption from Rule 141-3(b) under 1940 Act]

§ 270.22c-1 Pricing of redeemable securities for distribution, redemption and repurchase. [May 22, 1979] [granting certain unit investment trusts exemption from Rule 14a-3(b) under 1940 Act]

§ 270.10f-3. Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate. [June 20, 1979] [expands exemption to cover other transactions]

§ 270.17e-1 Brokerage transactions on a securities exchange. [June 26, 1979] [“provid[ing] that, for purposes of section 17(e)(2)(A) of the Act, a commission, fee or other remuneration shall be deemed as not exceeding the usual and customary broker’s commission, if certain conditions are satisfied”]

§ 270.14a-3 Exemption from section 14(a) of the Act for certain registered unit investment trusts and their principal underwriters. [amended] [July 9, 1979] [correction]

§ 270.19b-1 Frequency of distribution of capital gains. [amended] [July 9, 1979] [correction]

§ 270.17a-6 Exemption for transactions with portfolio affiliates. [amended] [Aug. 20, 1979] [amended to permit additional transactions]

§ 270.22c-1 Pricing of redeemable securities for distribution, redemption and repurchase. [amended] [Aug. 20, 1979] [“unlinks the pricing of investment company shares from the New York Stock Exchange”; proposing release noted that an “investment company’s portfolio securities might not be listed for trading on that exchange”]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Oct. 10, 1979] [exempting another type of transaction from prohibition in rule]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Oct. 12, 1979] [exempting another type of transaction from prohibition in rule]

§ 270.2a-6 Certain transactions not deemed assignments. [Jan. 9, 1980] [“deems certain transactions not to involve the assignment of a contract for purposes of sections 15(a) and 15(b) of the [1940] Act . . . that do not result in a change of actual control or management of the investment adviser or the principal underwriter, respectively”]

§ 270.15a-4 Temporary exemption for certain investment advisers. [Jan. 9, 1980] [“provides a temporary exemption, not to exceed 120 days, from the requirement of the Act that an investment advisory contract with an investment company must be approved by the investment company’s shareholders”]

§ 270.17a-8 Mergers of affiliated companies. [Feb. 26, 1980] [“permits certain affiliated investment companies to merge or consolidate”]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Feb. 26, 1980] [“allows an investment adviser to bear expenses associated with a merger or consolidation of investment companies”]

§ 270.22c-1 Pricing of redeemable securities for distribution, redemption and repurchase. [amended] [Feb. 26, 1980] [“deems certain sales of redeemable shares made in connection with specified mergers or consolidations to comply with that rule”]

§ 270.27f-1 Notice of right of withdrawal required to be mailed to periodic payment plan certificate holders and exemption from section 27(f) for

certain periodic payment plan certificates. [amended] [Mar. 20, 1980] [technical amendment; stated that form's existing language might be "confusing"]

§ 270.12b-1 Distribution of shares by registered open-end management investment company. [Nov. 7, 1980] ["permit[s] open-end management investment companies to bear expenses associated with the distribution of their shares, if such companies comply with certain conditions and procedures"]

§ 270.17d-3 Exemption relating to certain joint enterprises or arrangements concerning payment for distribution of shares of a registered open-end management investment company. [Nov. 7, 1980] ["exempt[ing] from the requirement of prior Commission approval, to the extent necessary, certain agreements between open-end management investment companies and their affiliated persons whereby investment company assets are used for distribution, if such agreements are entered into in compliance with the rule permitting such companies to bear their distribution expenses"]

§ 270.17j-1 Certain unlawful acts, practices, or courses of business and requirements relating to codes of ethics with respect to registered investment companies. [Nov. 7, 1980] ["guidance" in implementing section 17(j) of 1940 Act; provides examples of prohibited activities]

§ 270.3a-1 Certain prima facie investment companies. [Jan. 22, 1981] ["safe harbor" rule which deems certain companies having more than 40 percent of their assets invested in investment securities not to be investment companies"; codification of prior exemptive orders]

§ 270.3a-2 Transient investment companies. [Jan. 22, 1981] ["deem[s] certain issuers, which otherwise would be transient investment companies, not to be investment companies for purposes of the [1940] Act"]

§ 270.3a-3 Certain investment companies owned by companies which are not investment companies. [Jan. 22, 1981] ["safe harbor" rule under the [1940 Act] to deem certain issuers having corporate parents as not being investment companies for purposes of the Act"; reflects prior exemptive orders and no-action letters]

§ 270.57b-1 Exemption for downstream affiliates of business development companies. [Mar. 13, 1981] [“permits certain transactions between a business development company and a company controlled by it or certain affiliated persons of such controlled company without requiring prior approval of the [SEC]”; “corrects the consequence of an inadvertent drafting error in section 57(b)(2) of the [1940] Act”]

§ 270.60a-1 Exemption for certain business development companies. [Mar. 13, 1981] [“permits a business development company to acquire the securities of and operate a wholly-owned small business investment company”; “correct[s] the inadvertent result of the application of section 12(d)(1) of the [1940] Act . . . to business development companies by section 60”]

§ 270.17a-7 Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof. [Mar. 17, 1981] [exempting certain transactions from section 17(a) of 1940 Act]

§ 270.30e-1 Reports to stockholders of management companies. [July 14, 1981] [“reconcile[s] most of the differences in the financial statement requirements of prospectuses and shareholder reports”; includes special provisions for investment companies in financial statement requirements and instructions, then makes them applicable to shareholder reports, and extends time in which they must be transmitted to shareholders; also provides new options for transmitting]

§ 270.6c-6 Exemption for certain registered separate accounts and other persons. [Sept. 28, 1982] [“provides registered insurance company separate accounts and other persons with exemptive relief from certain provisions of the Act and rules thereunder to the extent necessary to permit them” to perform certain activities]

§ 270.2a-4 Definition of “current net asset value” for use in computing periodically the current price of redeemable security. [amended] [Dec. 21, 1982] [conformed Rule to amendment to “Article 6 of Regulation S-X regarding financial statements filed by registered investment companies,” which change was made to improve financial reporting]

§ 270.6c-8 Exemptions for registered separate accounts to impose a deferred sales load and to deduct certain administrative charges. [Aug. 9, 1983] [“provide[s] exemptive relief for registered insurance company

separate accounts and related persons from various provisions of the Investment Company Act of 1940 with respect to variable annuity contracts participating in such accounts”; codifies prior exemptive orders]

§ 270.11a-2 Offers of exchange by certain registered separate accounts or others the terms of which do not require prior Commission approval. [Aug. 10, 1983] [“permits a separate account designated as an ‘offering account,’ subject to certain conditions, to make an offer of exchange to securityholders of the offering account, or of other separate accounts having the same or an affiliated insurance company depositor or sponsor, without the terms of that offer first having been submitted to and approved by the [SEC]”]

§ 270.18f-1 Exemption from certain requirements of section 18(f)(1) (of the Act) for registered open-end investment companies which have the right to redeem in kind. [amended] [Aug. 22, 1983] [“permit[s] registrants filing on Form N-1A to provide the disclosure required by those rules, at their discretion, in either the prospectus or Statement of Additional Information”]

§ 270.30e-1 Reports to stockholders of management companies. [amended] [Aug. 22, 1983] [in connection with SEC adoption of Form N-1A, “amended [Rule] to permit a registrant filing on Form N-1A to transmit to shareholders a copy of its currently effective prospectus or Statement of Additional Information, or both, as the equivalent of the annual and semi-annual reports required by the rule, provided those documents contain the information specified in rule 30d-1”]

§ 270.30e-1 Reports to stockholders of management companies. [amended] [Sept. 29, 1983] [conform to new 1934 Act amendments primarily simplifying disclosure of executive compensation; changing word “remuneration” to “compensation”]

§ 270.24f-2 Registration under the Securities Act of 1933 of an indefinite number of certain investment company securities. [amended] [Nov. 18, 1983] [requiring statement for issuer who filed a Rule 24f-2 declaration; but lessening consequences for failure to file on time]

§ 270.6c-7 Exemptions from certain provisions of sections 22(e) and 27 for registered separate accounts offering variable annuity contracts to participants in the Texas Optional Retirement Program. [Jan. 12, 1984]

[“providing certain exemptions from the Investment Company Act of 1940 for registered insurance company separate accounts offering variable annuity contracts”; codifying SEC standards]

§ 270.6e-2 Exemptions for certain variable life insurance separate accounts. [amended] [Jan. 12, 1984] [expanding relief under Rule to other funds; parallel to relief given under companion release amendments to Rule 14a-2]

§ 270.14a-2 Exemption from section 14(a) of the Act for certain registered separate accounts and their principal underwriters. [Jan. 12, 1984] [“expands the availability of the exemptive relief from the minimum net worth requirement of section 14(a) of the [1940] Act . . . provided to separate accounts by that rule and the availability of related exemptive relief from certain requirements of sections 15(a), 16(a), and 32(a) of the Act . . . provided by existing Rules 15a-3, 16a-1, and 32a-2 under the Act”].

§ 270.12d3-1 Exemption of acquisitions of securities issued by persons engaged in securities related businesses. [July 20, 1984] [redesignating and revising Rule 12d-1; “permits registered investment companies, or companies controlled by registered investment companies, to acquire securities issued by persons engaged directly or indirectly in securities related businesses under certain conditions”]

§ 270.26a-1 Payment of administrative fees to the depositor or principal underwriter of a unit investment trust; exemptive relief for separate accounts. [Aug. 3, 1984] [“permit[s] the trustee of a unit investment trust to be reimbursed from trust assets for fees paid to the trust’s depositor for certain bookkeeping and other administrative services” and “provide[s] insurance company separate accounts that offer variable annuity contracts with an exemption to permit deduction of such fees from account assets”; codifies SEC’s “at cost” standard]

§ 270.26a-2 Exemptions from certain provisions of sections 26 and 27 for registered separate accounts and others regarding custodianship of and deduction of certain fees and charges from the assets of such accounts. [Aug. 3, 1984] [“exemptive rule under the Investment Company Act of 1940 for registered insurance company separate accounts offering variable annuity contracts”; codifying SEC standards]

§ 270.7d-1 Specification of conditions and arrangements for Canadian management investment companies requesting order permitting registration. [amended] [Sept. 14, 1984] [conforming amendment to reflect adoption of Rule 17f-5, below]

§ 270.2a19-1 [Reserved] [Oct. 17, 1984] [renumbering and amending Rule 2a-5; expanding the exemption from the definition of “interested person”]

§ 270.6c-3 Exemptions for certain registered variable life insurance separate accounts. [Dec. 3, 1984] [“adopting, on a temporary basis, a rule that will provide insurance company separate accounts with exemptions from the [1940 Act] to the extent necessary to permit them to offer . . . flexible premium variable life insurance”]

§ 270.3a-5 Exemption for subsidiaries organized to finance the operations of domestic or foreign companies. [Dec. 20, 1984] [“exempts finance subsidiaries of certain U.S. and foreign private issuers from the definition of investment company”]

§ 270.30a-1 Annual reports for unit investment trusts. [amended] [Jan. 11, 1985] [amendment to accommodate new Form N-SAR]

§ 270.30b1-1 Semi-annual report for registered management investment companies. [Jan. 11, 1985] [new Rule to accommodate new Form N-SAR]

§ 270.22c-1 Pricing of redeemable securities for distribution, redemption and repurchase. [amended] [Feb. 27, 1985] [deletes reference to removed Rule]

§ 270.22d-1 Exemption from section 22(d) to permit sales of redeemable securities at prices which reflect sales loads set pursuant to a schedule. [amended] [Feb. 27, 1985] [broader exemption than prior Rule]

§ 270.22d-2 Exemption from section 22(d) for certain registered separate accounts. [redesignated] [Feb. 27, 1985]

§ 270.22c-1 Pricing of redeemable securities for distribution, redemption and repurchase. [amended] [June 13, 1985] [limits days on which companies are required to price redeemable securities]

§ 270.22e-2 Pricing of redemption requests in accordance with Rule 22c-1. [June 13, 1985] “[provide[s] that an investment company will not have suspended the right of redemption if it prices a redemption request by computing net asset value under [amended Rule 22c-1]”; “clarifies” that a company is not required to price on days when pricing is not required]

§ 270.30e-1 Reports to stockholders of management companies. [amended] [June 25, 1985] [“amended to add an item of Form N-3 to the items specified”; purpose of new forms is “to integrate and codify disclosure requirements for insurance company separate accounts that offer variable annuity contracts and to shorten and simplify the prospectus provided to investors, while making more extensive information available for those who request it”]

§ 270.10f-3. Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate. [amended] [July 9, 1985] [“amended to replace references to form N-1Q with references to form N-SAR”; SEC referenced a commentator who said that “incorporation of form N-1Q into form N-SAR . . . would relieve investment companies of an unnecessary and duplicative filing requirement”]

§ 270.30b1-1 Semi-annual report for registered management investment companies. [redesignated] [July 9, 1985]

§ 270.22c-1 Pricing of redeemable securities for distribution, redemption and repurchase. [amended] [Oct. 22, 1985] [permitted use of “two day/five day” procedure”; part of SEC initiative to codify exemptive/interpretive positions]

§ 270.2a41-1 Valuation of standby commitments by registered investment companies. [Mar. 21, 1986] [“allow[s] a registered investment company to assign a fair value of zero to a standby commitment” under certain conditions]

§ 270.12d3-1 Exemption of acquisitions of securities issued by persons engaged in securities related businesses. [amended] [Mar. 21, 1986] [“allow[s] registered investment companies to acquire puts, as defined in amended Rule 2a-7, from persons engaged in securities related activities” if conditions are met]

§ 270.6e-3(T) Temporary exemptions for flexible premium variable life insurance separate accounts. [amended temporary rule] [Apr. 8, 1987] [“clarif[ies] and modif[ies]” conditions for exemption under Rule; clarifications tend to be less restrictive, as commenters mentioned by SEC are life insurance trade organization and counsel for a life insurance firm]

§ 270.19b-1 Frequency of distribution of capital gains. [amended] [Nov. 5, 1987] [“allow[s] registered investment companies to make an additional distribution of long-term capital gains for the purpose of not incurring a special excise tax”; to accommodate tax law changes that are more restrictive to investment companies and compliance with which would necessitate exemptive orders]

§ 270.34b-1 Sales literature deemed to be misleading. [Feb. 10, 1988] [“make[s] the uniform performance calculations and disclosure requirements of Rule 482 [as result of simultaneous amendment] applicable to fund sales literature”]

§ 270.30b1-2 Semi-annual report for totally-owned registered management investment company subsidiary of registered management investment company. [amendment] [Mar. 13, 1989] [“to correct erroneous references”]

§ 270.30b1-3 Transition reports. [Mar. 13, 1989] [“to govern the reporting requirements for investment companies that change their fiscal year end”; “codifies the staff practice” of requiring filing at certain points]

§ 270.32a-3 Exemption from provision of section 32(a)(1) regarding the time period during which a registered management investment company must select an independent public accountant. [July 28, 1989] [“expands the time period during which certain registered management investment companies must select an independent public accountant”]

§ 270.11a-3 Offers of exchange by open-end investment companies other than separate accounts. [Aug. 24, 1989] [“permits a mutual fund or its principal underwriter to make certain exchange offers to the fund’s shareholders or to shareholders of another fund in the same group of funds”]

§ 270.2a41-1 Valuation of standby commitments by registered investment companies. [amended] [Feb. 27, 1991] [accommodate simultaneous

amendments to Rule 2a-7 which “tighten[s] the risk-limiting conditions” of the Rule; amendments to Rule 2a-7 also require additional disclosure and restrict use of term “money market fund”]

§ 270.30h-1 Applicability of section 16 of the Exchange Act to section 30(h). [originally § 270.30f-1] [amended] [Feb. 21, 1991] [to accommodate amendments to Rules under section 16, which amendments “achieve greater clarity, rescind unnecessary requirements, streamline mandated procedures, increase compliance with the reporting provisions of the rules, and enhance consistency with the statutory purposes of section 16”]

§ 270.12d3-1 Exemption of acquisitions of securities issued by persons engaged in securities related businesses. [amended] [Feb. 27, 1991] [accommodate simultaneous amendments to Rule 2a-7 which “tighten[s] the risk-limiting conditions” of the Rule; amendments to Rule 2a-7 also require additional disclosure and restrict use of term “money market fund”]

§ 270.34b-1 Sales literature deemed to be misleading. [amended] [Feb. 27, 1991] [accommodate simultaneous amendments to Rule 2a-7 which “tighten[s] the risk-limiting conditions” of the Rule; amendments to Rule 2a-7 also require additional disclosure and restrict use of term “money market fund”]

§ 270.3a-5 Exemption for subsidiaries organized to finance the operations of domestic or foreign companies. [amended] [Nov. 4, 1991] [exempting “holding companies and finance subsidiaries of foreign banks and insurance companies” from definition of investment company]

§ 270.3a-6 Foreign banks and foreign insurance companies. [Nov. 4, 1991] [“excepting foreign banks and foreign insurance companies from the definition of the term ‘investment company’ for all purposes under the Act”]

§ 270.12d2-1 Definition of insurance company for purposes of sections 12(d)(2) and 12(g) of the Act. [Nov. 4, 1991] [Rule 12d-1 was rescinded as no longer necessary (because of adoption of Rule 3a-6), but Rule 12d-1 was adopted to maintain one restriction of Rule 12d-1 (the Rule “limits the acquisition by an investment company of securities of a United States insurance company”)]

§ 270.20a-1 Solicitation of proxies, consents and authorizations. [amended] [Jan. 10, 1992] [to accommodate revisions to the proxy and information statement rules; these revisions eliminate “regulatory gaps” (i.e., impose new requirements)]

§ 270.3a-7 Issuers of Asset-Backed Securities. [Nov. 27, 1992] [excludes structured financings from definition of investment company]

§ 270.30e-1 Reports to stockholders of management companies. [amended] [Dec. 1, 1992] [“revises the item number of Form N-2 to which the rule applies”]

§ 270.34b-1 Sales literature deemed to be misleading. [amended] [Apr. 12, 1993] [“technical amendments” that “exclude from the updating requirements performance information contained in periodic reports to shareholders”]

§ 270.23c-3 Repurchase offers by closed-end companies. [Apr. 14, 1993] [increases the ability of certain closed-end companies to repurchase stock]

§ 270.34b-1 Sales literature deemed to be misleading. [amended] [Apr. 26, 1993] [correction; material was “inadvertently omitted”]

§ 270.23c-3 Repurchase offers by closed-end companies. [amended] [May 21, 1993] [correction]

§ 270.2a3-1 Investment company limited partners not deemed affiliated persons. [Aug. 31, 1993] [“except[s] from the definition of affiliated person in section 2(a)(3) investors that are affiliated persons under section 2(a)(3)(D) solely because of their status as limited partners of a limited partnership investment company,” codifying exemptive orders]

§ 270.2a19-2 Investment company general partners not deemed interested persons. [Aug. 31, 1993] [“conditionally excepts from the definition of interested person in section 2(a)(19) . . . general partners of investment companies organized in limited partnership form,” codifying exemptive orders]

§ 270.12d3-1 Exemption of acquisitions of securities issued by persons engaged in securities related businesses. [amended] [Sept. 23, 1993] [“eliminate[s] the qualitative conditions currently imposed by the rule on

acquisitions by registered investment companies of the securities of domestic and foreign securities related businesses”; i.e., facilitates exemptive relief under the Rule]

§ 270.10f-3. Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate. [amended] [Sept. 24, 1993] [“The amended rules no longer require directors to review certain procedures and arrangements annually, and require instead that directors make and approve changes only when necessary. The amendments are intended to enhance the effectiveness of investment company boards by substituting more meaningful requirements for an annual review requirement, which is not necessary to protect investors.”]

§ 270.17a-7 Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof. [amended] [Sept. 24, 1993] [“The amended rules no longer require directors to review certain procedures and arrangements annually, and require instead that directors make and approve changes only when necessary. The amendments are intended to enhance the effectiveness of investment company boards by substituting more meaningful requirements for an annual review requirement, which is not necessary to protect investors.”]

§ 270.17e-1 Brokerage transactions on a securities exchange. [amended] [Sept. 24, 1993] [“The amended rules no longer require directors to review certain procedures and arrangements annually, and require instead that directors make and approve changes only when necessary. The amendments are intended to enhance the effectiveness of investment company boards by substituting more meaningful requirements for an annual review requirement, which is not necessary to protect investors.”]

§ 270.22c-1 Pricing of redeemable securities for distribution, redemption and repurchase. [amended] [Sept. 24, 1993] [“The amended rules no longer require directors to review certain procedures and arrangements annually, and require instead that directors make and approve changes only when necessary. The amendments are intended to enhance the effectiveness of investment company boards by substituting more meaningful requirements for an annual review requirement, which is not necessary to protect investors.”]

§ 270.2a19-2 Investment company general partners not deemed interested persons. [amended] [Dec. 6, 1993] [correction]

§ 270.2a19-2 Investment company general partners not deemed interested persons. [amended] [Apr. 1, 1994] [correction]

§ 270.6e-3(T) Temporary exemptions for flexible premium variable life insurance separate accounts. [amended] [Aug. 24, 1994] [“technical and conforming amendments”; accompanying amendments “expand the conditions under which post-effective amendments filed by investment companies are permitted to become effective automatically”]

§ 270.20a-1 Solicitation of proxies, consents and authorizations. [amended] [Oct. 19, 1994] [“minor technical amendments”; accompanying amendments “update” proxy rules applicable to funds; place greater emphasis on “directly relevant” information and eliminating disclosure of less “pertinent” information]

§ 270.30e-1 Reports to stockholders of management companies. [amended] [Oct. 19, 1994] [“require[s] a report of voting results in the annual or semi-annual report to shareholders”; other technical/conforming changes regarding the updates to proxy rules in the last entry]

§ 270.6c-10 Exemption for certain open-end management investment companies to impose deferred sales loads. [Mar. 2, 1995] [allows mutual funds to impose contingent deferred sales loads]

§ 270.12b-1 Distribution of shares by registered open-end management investment company. [amended] [Mar. 2, 1995] [[1] “provides that if a plan covers more than one class of shares, the provisions of the plan must be severable for each class, and any action taken on the plan must be taken separately for each class”; [2] “requires shareholder approval by the outstanding voting securities of each separate class when Rule 12b-1 requires that a plan for the distribution of securities be approved by a majority of the fund’s outstanding voting securities”; [3] cross-references Rule 18f-3; provides that “under § 270.18f-3(e)(2), any shareholder vote on a plan of a target class must also require a vote of any purchase class”]

§ 270.18f-3 Multiple class companies. [Mar. 2, 1995] [“permit[s] [mutual funds] to issue multiple classes of voting stock representing interests in the same portfolio”]

§ 270.24f-2 Registration under the Securities Act of 1933 of certain investment company securities. [amended] [Sept. 11, 1995] [(1) stating

that a Rule 24b-2 Notice is deemed “timely filed” if timely transmitted to an appropriate entity that guarantees delivery by the appropriate date; a more lenient standard; (2) requiring a fund to include DRIP shares in using the Rule’s netting provision; (3) “remov[ing] the requirement that a fund file its final Rule 24f-2 Notice prior to ceasing operations”; substituting a more lenient standard; (4) changing time periods for filing from being denominated in months to being denominated in days to be consistent with other timing provisions]

§ 270.2a-7 Money market funds. [amended] [Mar. 28, 1996] [additional limitations on money market funds “to tighten the risk-limiting conditions of the rule”]

§ 270.2a41-1 Valuation of standby commitments by registered investment companies. [amended] [Mar. 28, 1996] [accommodation of amendments to Rule 2a-7]

§ 270.12d3-1 Exemption of acquisitions of securities issued by persons engaged in securities related businesses. [amended] [Mar. 28, 1996] [accommodation of amendments to Rule 2a-7]

§ 270.17a-9 Purchase of certain securities from a money market fund by an affiliate, or an affiliate of an affiliate. [Mar. 28, 1996] [“exempt[s] from section 17(a) of the 1940 Act the purchase of a security that is no longer an eligible security”]

§ 270.30e-1 Reports to stockholders of management companies. [amended] [May 15, 1996] [adaptation to electronic media; substitution of word “transmitted” for “mailed”]

§ 270.30e-2 Reports to shareholders of unit investment trusts. [amended] [May 15, 1996] [adaptation to electronic media; substitution of word “transmitted” for “mailed” and similar minor changes]

§ 270.6c-10 Exemption for certain open-end management investment companies to impose deferred sales loads. [amended] [Sept. 17, 1996] [“allow[s] mutual funds to offer investors a wider variety of deferred sales loads, including installment loads, and eliminate[s] certain requirements”]

§ 270.11a-3 Offers of exchange by open-end investment companies other than separate accounts. [amended] [Sept. 17, 1996] [“conforming amendment” to amendment to Rule 6c-10]

§ 270.12b-1 Distribution of shares by registered open-end management investment company. [amended] [Sept. 17, 1996] [“technical amendment”; “[s]hareholder approval of a rule 12b-1 plan is unnecessary when the plan is adopted prior to a fund’s initial public offering”]

§ 270.3a-4 Status of investment advisory programs. [Mar. 31, 1997] [“provide[s] a nonexclusive safe harbor from the definition of investment company for certain programs under which investment advisory services are provided on a discretionary basis to a large number of advisory clients having relatively small amounts to invest”]

§ 270.10f-3. Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate. [amended] [Aug. 7, 1997] [“increase[s] the percentage of an underwriting that investment companies having the same investment adviser may purchase in reliance on the rule, and expand[s] the scope of the rule to include securities of certain foreign and domestic issuers that are not registered with the Commission under [the 1933 Act]”]

§ 270.24e-1 Filing of certain prospectuses as post-effective amendments to registration statements under the Securities Act of 1933. [amended] [Sept. 12, 1997] [deleted as unnecessary following 1996 Act amendment to section 24(f); see entry for Rule 24f-2 for the same date]

§ 270.24f-2 Registration under the Securities Act of 1933 of certain investment company securities. [amended] [Sept. 12, 1997] [implements 1996 National Securities Markets Improvement Act, specifically amendments to section 24(f), which provides a “new, simpler system” of registration: (1) eliminating advantage of registration of “prepaid shares,” therefore adopting a more lenient standard; (2) clarifying merger provision of Rule, but in the form of mandatory rules; (3) extension of an exclusion from sales to prevent “double payment,” to funds selling shares to a UIT; however, (4) the amendment required Form 24f-2 to be filed within 90 days after the end of the fiscal year, not 180 days as before; thus, the amendment provides a more restrictive rule]

§ 270.12b-1 Distribution of shares by registered open-end management investment company. [amended] [Oct. 3, 1997] [“technical amendment”; “codifies prior interpretations that a rule 12b-1 plan also may cover more than one series or portfolio under the same conditions applicable when a plan covers more than one class”; therefore, amendment provides a less restrictive rule than text of previous version]

§ 270.18f-3 Multiple class companies. [amended] [Oct. 3, 1997] [“The amendments expand the specified methods a multiple class fund may use to allocate among its classes income, gains and losses (including unrealized appreciation or depreciation), and expenses not allocated to a particular class. The amendments also permit a fund to use any other allocation method that the fund’s board of directors determines is fair to the shareholders of each class. In addition, the amendments clarify the shareholder voting rights provision of the rule.” The clarification provides that a certain restrictive provision only applies under some circumstances.]

§ 270.2a-7 Money market funds. [amended] [Dec. 9, 1997] [“[t]echnical amendments”; “revise terminology used in the rule to reflect common market usage and resolve certain interpretive issues under the rule”; clarifications appear to be to meet concerns of industry]

§ 270.17a-9 Purchase of certain securities from a money market fund by an affiliate, or an affiliate of an affiliate. [amended] [Dec. 9, 1997] [conforming amendment to amendments to Rule 2a-7]

§ 270.2a41-1 Valuation of standby commitments by registered investment companies. [amended] [Dec. 9, 1997] [conforming amendment to amendments to Rule 2a-7]

§ 270.12d3-1 Exemption of acquisitions of securities issued by persons engaged in securities related businesses. [amended] [Dec. 9, 1997] [conforming amendment to amendments to Rule 2a-7]

§ 270.34b-1 Sales literature deemed to be misleading. [amended] [Dec. 9, 1997] [clarifying rules that are more restrictive]

§ 270.34b-1 Sales literature deemed to be misleading. [amended] [Mar. 23, 1998] [conforming amendment to new rule under 1933 Act that would allow funds to offer a “profile”]

§ 270.17f-5 Custody of investment company assets outside the United States. [amended] [May 29, 1998] [extension of compliance date for 1997 amendments; although 1997 amendments were less restrictive for funds, unanticipated problems surfaced for funds attempting to comply]

§ 270.17f-5 Custody of investment company assets outside the United States. [amended] [Feb. 3, 1999] [extension of compliance date; allows companies to comply with either former or amended rule in interim]

§ 270.8f-1 Deregistration of certain registered investment companies. [amended] [Apr. 21, 1999] [“expand[s] the types of circumstances in which a fund may use Form N-8F to apply for a deregistration order”; however, accompanying amendment to corresponding form requires form to be filed electronically]

§ 270.17j-1 Personal investment activities of investment company personnel. [amended] [Aug. 27, 1999] [“The amendments will increase the oversight role of an investment company’s board of directors with respect to codes of ethics, improve the manner in which investment company personnel report their personal securities holdings, and require prior approval of investments in initial public offerings and certain limited offerings by certain investment company personnel (including portfolio managers). Related amendments to disclosure forms will require investment companies to provide information about their policies concerning personal investment activities in their registration statements.”]

§ 270.30e-1 Reports to stockholders of management companies. [amended] [Nov. 16, 1999] [allows single prospectus to be sent to two or more investors at same address; “provide[s] greater convenience for investors and cost savings for issuers by reducing the number of duplicate documents that investors receive”]

§ 270.30e-2 Reports to shareholders of unit investment trusts. [amended] [Nov. 16, 1999] [allows single prospectus to be sent to two or more investors at same address; “provide[s] greater convenience for investors and cost savings for issuers by reducing the number of duplicate documents that investors receive”]

§ 270.15a-4 Temporary exemption for certain investment advisers. [amended] [Dec. 6, 1999] [“expand[s] the circumstances in which the exemption provided by the rule is available, to include a merger or similar

business combination involving an investment company's adviser"; "also lengthen[s] the maximum duration of the temporary contract"]

§ 270.17j-1 Personal investment activities of investment company personnel. [corrected] [Mar. 10, 2000] [correction of error]

§ 270.7d-1 Specification of conditions and arrangements for Canadian management investment companies requesting order permitting registration. [amended] [May 3, 2000] [conforming amendments to Rule 17f-7 and amendments to 17f-5]

§ 270.7d-2 Definition of "public offering" as used in section 7(d) of the Act with respect to certain Canadian tax-deferred retirement savings accounts. [June 15, 2000] ["permit foreign investment companies to offer securities to those U.S. participants and sell securities to their Canadian retirement accounts without registering under the Investment Company Act of 1940"]

APPENDIX D

2001–present

DEFINITIONAL: 4

§ 270.0-1 Definition of terms used in this part. [amended] [Jan. 16, 2001] [definitions of terms from new rules]

§ 270.0-1 Definition of terms used in this part. [amended] [Aug. 2, 2004] [new definitions to accommodate other changes]

§ 270.30a-2 Certification of Form N-CSR and Form N-Q. [amended] [68 Fed. Reg. 36,671, June 18, 2003] [“[t]o coordinate [certain] rules”; definition of a term moved from this Rule to another]

§ 270.30a-3 Controls and procedures. [amended] [Mar. 9, 2004] [broadens a definition to include information required by new Form N-Q]

FORMS AND FILING: 5

§ 270.8b-11 Number of copies; signatures; binding. [amended] [Apr. 23, 2002] [“conforming amendment[.]” to form amendments which tailor disclosure to variable life insurance policies]

§ 270.8b-12 Requirements as to paper, printing and language. [amended] [Apr. 23, 2002] [“conforming amendment[.]” to form amendments which tailor disclosure to variable life insurance policies]

§ 270.8b-15 Amendments. [amended] [Feb. 3, 2003] [applying certification requirement to “amendments of certified shareholder reports on Form N-CSR”]

§ 270.8b-15 Amendments. [amended] [June 18, 2003] [requiring amendments to reports required to include the certification required by amended Rule]

§ 270.8b-15 Amendments. [amended] [Mar. 1, 2004] [extension of compliance date]

BOOKS AND RECORDS: 3

§ 270.31a-2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended] [Jan. 16, 2001] [amended to conform to above amendments]

§ 270.31a-2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended] [May 30, 2001] [“permit[ting] funds and advisers to keep all of their records in an electronic format”]

§ 270.31a-2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies. [amended] [Aug. 2, 2004] [“amending [Rule] . . . to require that funds retain copies of the written materials that directors consider in approving an advisory contract”]

CUSTODY: 1

§ 270.17f-4 Custody of investment company assets with a securities depository. [amended] [Feb. 20, 2003] [“permit[s] additional types of investment companies to rely on the rule, . . . allow[s] depositories to perform additional functions under the rule,” and eliminates certain specific requirements and replaces them with a “due care” rule]

SUBSTANTIVE EXEMPTIONS AND REGULATION: 74

§ 270.2a19-1 [Reserved] [amended] [Jan. 16, 2001] [rescinded as no longer necessary; new standards for independence in Gramm-Leach-Bliley Act eliminated need for exemptive relief of Rule]

§ 270.2a19-3 Certain investment company directors not considered interested persons because of ownership of index fund securities [Jan. 16, 2001] [“conditionally exempts an individual from being disqualified as an independent director solely because he or she owns shares of an index fund that invests in the investment adviser or underwriter of the fund, or their controlling persons”]

§ 270.10e-1 Death, disqualification, or bona fide resignation of directors. [Jan. 16, 2001] [“temporarily suspends the board composition requirements of the Act and our rules, if a fund fails to meet those requirements because of the death, disqualification, or bona fide resignation of a director”]

§ 270.10f-3. Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.12b-1 Distribution of shares by registered open-end management investment company. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.15a-4 Temporary exemption for certain investment advisers. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.17a-7 Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.17a-8 Mergers of affiliated companies. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.17e-1 Brokerage transactions on a securities exchange. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.17g-1 Bonding of officers and employees of registered management investment companies. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.18f-3 Multiple class companies. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.23c-3 Repurchase offers by closed-end companies. [amended] [Jan. 16, 2001] [amends exemptive rule to add additional requirements for funds relying on rule]

§ 270.30e-1 Reports to stockholders of management companies. [redesignated and amended] [Jan. 16, 2001] [amended to conform to amendments to exemptive rules, which amendments were adopted same day]

§ 270.30e-2 Reports to shareholders of unit investment trusts. [redesignated and amended] [Jan. 16, 2001] [amended to conform to above amendments]

§ 270.32a-4 Independent audit committees. [Jan. 16, 2001] [“exempting funds from the Act’s requirement that shareholders vote on the selection of the fund’s independent public accountant if the fund has an audit committee composed wholly of independent directors”]

§ 270.35d-1 Investment company names. [Feb. 1, 2001] [provides that certain names are “materially deceptive and misleading” for purposes of section 35(d)]

§ 270.34b-1 Sales literature deemed to be misleading. [amended] [Feb. 5, 2001] [requires disclosure of after-tax returns to investors]

§ 270.35d-1 Investment company names. [corrected] [Mar. 14, 2001] [correction of typographical error]

§ 270.2a-7 Money market funds. [amended] [July 11, 2001] [“conforming amendmen[t]” to accommodate new Rule 5b-3 below]

§ 270.5b-3 Acquisition of repurchase agreement or refunded security treated as acquisition of underlying securities. [July 11, 2001] [“permits a fund . . . to use ‘look-through treatment’ regarding certain repurchase agreements and investments in government bonds”; “codifies and updates staff interpretive and no-action letters”]

§ 270.12d3-1 Exemption of acquisitions of securities issued by persons engaged in securities related businesses. [amended] [July 11, 2001] [“conforming amendmen[t]” to accommodate new Rule 5b-3 above]

§ 270.10f-3. Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate. [amended] [May 8, 2002] [“amendments expand the exemption provided by the rule”]

§ 270.3a-1 Certain prima facie investment companies. [amended] [June 28, 2002] [“technical amendment[.]” to conform references to National Securities Markets Improvement Act of 1996 and Gramm-Leach-Bliley Act]

§ 270.3a-2 Transient investment companies. [amended] [June 28, 2002] [“technical amendment[.]” to conform references to National Securities Markets Improvement Act of 1996 and Gramm-Leach-Bliley Act]

§ 270.3a-3 Certain investment companies owned by companies which are not investment companies. [amended] [June 28, 2002] [“technical amendment[.]” to conform references to National Securities Markets Improvement Act of 1996 and Gramm-Leach-Bliley Act]

§ 270.3a-5 Exemption for subsidiaries organized to finance the operations of domestic or foreign companies. [amended] [June 28, 2002] [“technical amendment[.]” to conform references to National Securities Markets Improvement Act of 1996 and Gramm-Leach-Bliley Act]

§ 270.3a-6 Foreign banks and foreign insurance companies. [amended] [June 28, 2002] [“technical amendment[.]” to conform references to National Securities Markets Improvement Act of 1996 and Gramm-Leach-Bliley Act]

§ 270.6c-6 Exemption for certain registered separate accounts and other persons. [amended] [June 28, 2002] [“technical amendment[.]” to conform references to National Securities Markets Improvement Act of 1996 and Gramm-Leach-Bliley Act]

§ 270.6e-2 Exemptions for certain variable life insurance separate accounts. [amended] [June 28, 2002] [“technical amendment[.]” to conform references to National Securities Markets Improvement Act of 1996 and Gramm-Leach-Bliley Act]

§ 270.6e-3(T) Temporary exemptions for flexible premium variable life insurance separate accounts. [amended] [June 28, 2002] [“technical amendment[]” to conform references to National Securities Markets Improvement Act of 1996 and Gramm-Leach-Bliley Act]

§ 270.30h-1 Applicability of section 16 of the Exchange Act to section 30(h). [redesignated and amended] [June 28, 2002] [“technical amendment[]” to conform references to National Securities Markets Improvement Act of 1996 and Gramm-Leach-Bliley Act]

§ 270.17a-8 Mergers of affiliated companies. [amended] [July 24, 2002] [“amendments expand the types of business combinations permitted by the rule”]

§ 270.30a-2 Certification of Form N-CSR and Form N-Q. [Sept. 9, 2002] [requiring certification of disclosure in annual and semi-annual reports; implementation of Sarbanes-Oxley Act requirement]

§ 270.30b1-1 Semi-annual report for registered management investment companies. [amended] [Sept. 9, 2002] [renaming of Rule]

§ 270.30b1-3 Transition reports. [amended] [Sept. 9, 2002] [amending Rule to provide that transition report must include disclosure required by Rule 30a-2, adopted at the same time]

§ 270.10f-3. Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate. [amended] [Jan. 22, 2003] [expansion of exemption]

§ 270.12d3-1 Exemption of acquisitions of securities issued by persons engaged in securities related businesses. [amended] [Jan. 22, 2003] [expansion of exemption]

§ 270.17a-6 Exemption for transactions with portfolio affiliates. [amended] [Jan. 22, 2003] [expansion of exemption]

§ 270.17a-10 Exemption for transactions with certain subadvisory affiliates. [Jan. 22, 2003] [new exemption]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Jan. 22, 2003] [expansion of exemption]

§ 270.17e-1 Brokerage transactions on a securities exchange. [amended] [Jan. 22, 2003] [expansion of exemption]

§ 270.30a-1 Annual reports for unit investment trusts. [amended] [Feb. 3, 2003] [“technical conforming amendment”; “delete[s] the language . . . stating that a registered management investment company required to file an annual report pursuant to section 13(a) or 15(d) of the Exchange Act and section 30(a) of the Investment Company Act shall be deemed to have satisfied its requirement to file an annual report by the filing of semi-annual reports on Form N-SAR”]

§ 270.30a-3 Controls and procedures. [Feb. 3, 2003] [“requires registered management investment companies to maintain, and regularly evaluate the effectiveness of, controls and procedures designed to ensure that the information required in filings on Form N-CSR is recorded, processed, summarized, and reported on a timely basis”]

§ 270.30b1-3 Transition reports. [amended] [Feb. 3, 2003] [“technical conforming amendments . . . to remove the reference to Form N-SAR”]

§ 270.30b2-1 Filing of reports to stockholders. [amended] [Feb. 3, 2003] [“require[s] a registered management investment company to file a report with the Commission on new Form N-CSR (“certified shareholder report”) containing [certain information]”]

§ 270.30d-1 Filing of copies of reports to shareholders. [Feb. 3, 2003] [“designat[es] reports on Form N-CSR as periodic reports filed with the Commission under section 13(a) or 15(d) of the Exchange Act”]

§ 270.30a-2 Certification of Form N-CSR and Form N-Q. [amended] [Feb. 3, 2003] [amended “to require Form N-CSR to include the certification required by section 302 of the Sarbanes-Oxley Act”]

§ 270.30b1-4 Report of proxy voting record. [Feb. 7, 2003] [“require[s] a registered investment adviser that exercises voting authority over client proxies to adopt [certain] policies and procedures” and to make certain disclosures and maintain certain records]

§ 270.0-11 Customer identification programs. [May 9, 2003] [adopted to cross-reference a new regulation, 31 C.F.R. § 103.131, adopted jointly by the Treasury and the SEC, which in turn implements 31 U.S.C. § 5318(1), part of the USA PATRIOT Act, which requires the agencies to require customer identification programs that meet certain requirements]

§ 270.30a-3 Controls and procedures. [amended] [June 18, 2003] [“technical changes” to parallel rules for operating companies]

§ 270.3a-8 Certain research and development companies. [June 20, 2003] [“provides a nonexclusive safe harbor from the definition of investment company for certain bona fide research and development companies”]

§ 270.34b-1 Sales literature deemed to be misleading. [amended] [Oct. 6, 2003] [(1) “clarif[ies] that requirements apply to supplemental sales literature; (2) note “clarif[ies] that compliance with [Rule 34b-1] does not relieve the fund, underwriter, or dealer of any obligations with respect to the advertisement under the antifraud provisions of the federal securities laws”; however, SEC notes that it “did not intend to alter existing standards of liability”]

§ 270.23c-1 Repurchase of securities by closed-end companies. [amended] [Nov. 17, 2003] [“eliminating the current requirement for closed-end funds to disclose information regarding privately negotiated repurchases of their securities on Form N-23C-1”; also “conforming technical amendment” to conform to elimination of Form N-23C-1]

§ 270.30a-2 Certification of Form N-CSR and Form N-Q. [amended] [Nov. 28, 2003] [“conforming change” to reflect renumbering of items of Form N-CSR to accommodate a new item which requires a new disclosure]

§ 270.30a-2 Certification of Form N-CSR and Form N-Q. [corrected] [Dec. 11, 2003] [document republished because text was left out]

§ 270.38a-1 Compliance procedures and practices of certain investment companies. [Dec. 24, 2003] [requires adoption of compliance programs]

§ 270.30a-2 Certification of Form N-CSR and Form N-Q. [amended] [Mar. 1, 2004] [extension of compliance date]

§ 270.30a-2 Certification of Form N-CSR and Form N-Q. [amended] [Mar. 9, 2004] [to accommodate other amendments requiring additional disclosure]

§ 270.30b1-5 Quarterly report. [Mar. 9, 2004] [requires quarterly report disclosing portfolio holdings after first and third quarters]

§ 270.30d-1 Filing of copies of reports to shareholders. [amended] [Mar. 9, 2004] [requiring filing of new Form N-Q as requirement to meet requirements of Rule]

§ 270.17j-1 Personal investment activities of investment company personnel. [amended] [July 9, 2004] [“conform[s] certain provisions to” new Rule requiring codes of ethics]

§ 270.10f-3. Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.12b-1 Distribution of shares by registered open-end management investment company. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.15a-4 Temporary exemption for certain investment advisers. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.17a-7 Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.17a-8 Mergers of affiliated companies. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.17d-1 Applications regarding joint enterprises or arrangements and certain profit-sharing plans. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.17e-1 Brokerage transactions on a securities exchange. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.17g-1 Bonding of officers and employees of registered management investment companies. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.18f-3 Multiple class companies. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.23c-3 Repurchase offers by closed-end companies. [amended] [Aug. 2, 2004] [requiring “certain governance practices” as condition of exemption]

§ 270.30a-2 Certification of Form N-CSR and Form N-Q. [amended] [Aug. 27, 2004] [accommodates amendments to forms requiring greater disclosure regarding portfolio managers]

§ 270.12b-1 Distribution of shares by registered open-end management investment company. [amended] [Sept. 9, 2004] [“prohibits funds from paying for the distribution of their shares with brokerage commissions”]