

that person's initial ownership will outweigh the marginal additional effort required to post these forms. Accordingly, we adopt this requirement as proposed.

The Web site posting requirement will become effective at the same time as the electronic filing requirement. However, we continue to encourage issuers to post section 16(a) reports on their Web sites before the implementation date.

The Commission is modifying proposed Rule 16a-3(k) with respect to investment companies.⁵⁶ One commenter noted that a Web site that contains information about an investment company typically would be maintained by a separate entity, such as its investment adviser, and recommended that we tailor the rule to reflect this. We agree that this is appropriate and are modifying Rule 16a-3(k) to clarify that the requirement to post Forms 3, 4, and 5 applies to an investment company that does not maintain its own Web site if the company's investment adviser, sponsor, depositor, trustee, administrator, principal underwriter, or any affiliated person of the investment company maintains a Web site that includes the name of the investment company. If there is more than one such Web site, the investment company would be required to post its Forms 3, 4, and 5 on one such Web site. We would expect the investment company to use the same Web site to post all of its Forms 3, 4 and 5.

C. Rule 16a-3(h)

As proposed, we are deleting as no longer necessary the deemed timely filed provision in Rule 16a-3(h) under the Exchange Act, effective at the same time the Forms 3, 4 and 5 electronic filing requirement becomes effective. Rule 16a-3(h) will continue to state that the date of filing is the date of receipt by the Commission.⁵⁷ The deletion applies only to the rule's provision that a Form 3, 4 or 5 will be deemed timely

filed if the filing person establishes that the form was timely delivered to a third party entity providing delivery services in the ordinary course of business that guaranteed delivery of the filing to the Commission no later than the required filing date. Because the "deemed timely filed" provision was designed for and applies only to paper filings, we believe it no longer will be needed once the electronic filing requirement is effective.

One commenter suggested that we retain the "deemed timely filed" provision for guaranteed electronic filings, reasoning that a filer should not be considered delinquent when a third-party service provider fails to fulfill its filing guarantee. We believe, however, that in light of the improvements to EDGAR for section 16 form filing discussed below, electronic filing can be readily accomplished and there will be no need for the "deemed timely filed" provision in the electronic context.

D. Hardship Exemptions and Adjustments of Filing Dates

Rules 201 and 202 of Regulation S-T⁵⁸ address hardship exemptions from EDGAR filing requirements and Rule 13(b) of Regulation S-T⁵⁹ addresses the related issue of filing date adjustments.

A filer may obtain a temporary hardship exemption under Rule 201 if it experiences unanticipated technical difficulties that prevent the timely preparation and submission of an electronic filing by filing a properly legended paper copy⁶⁰ of the filing under cover of Form TH.⁶¹ A filer who files in paper under the temporary hardship exemption must submit an electronic format copy of the filed paper document within six business days of the filing of the paper format document.⁶²

A filer may apply for a continuing hardship exemption under Rule 202 if it cannot file all or part of a filing without undue burden or expense.⁶³ In contrast to the self-executing temporary hardship exemption process, a filer can obtain a continuing hardship exemption only by submitting a written application, upon which the Commission staff must then act under delegated authority.

Instead of pursuing a hardship exemption, a filer may request a filing date adjustment under Rule 13(b) of Regulation S-T.⁶⁴ This rule addresses circumstances where an electronic filer

attempts in good faith to file a document with the Commission in a timely manner but the filing is delayed due to technical difficulties beyond the filer's control. In those instances, the filer may request an adjustment of the document's filing date. The staff may grant the request if it appears that the adjustment is appropriate and consistent with the public interest and the protection of investors.

In the Proposing Release, we asked questions regarding temporary hardship exemptions relating to whether to shorten electronic follow-up periods or, alternatively, eliminate the ability to use the temporary hardship exemption for section 16 filings. Three commenters addressed hardship exemptions, urging us to keep the temporary hardship exemption available for section 16 filings to accommodate the infrequent, deserving circumstances that arise or to adopt a tolerant attitude toward hardship exemption availability at least during the first 12 months of mandated electronic filing of section 16 forms.

After considering these comments, we have nonetheless decided to amend Rule 201(a) of Regulation S-T to make temporary hardship exemptions unavailable to Forms 3, 4 and 5 for the following reasons:

- The relative ease of using the new on-line filing system;
- the extended 10 p.m. Eastern time filing deadline;⁶⁵
- the limited value to the public of paper filings; and
- the availability of a filing date adjustment under the same circumstances a temporary hardship exemption would have been available.

We agree with the commenters that relief should be available when appropriate circumstances arise, no matter how infrequent. We believe, however, that this relief will be more appropriate if provided through a filing date adjustment rather than through a temporary hardship exemption. The temporary hardship exemption is best suited for use in connection with a transactional filing that must reach the Commission on a specific date in order for some action to be taken. For example, if a company must file a pre-effective amendment to a Securities Act registration statement in order to request immediate acceleration of effectiveness, technical difficulties may justify filing the registration statement in paper under a temporary hardship exemption. In contrast, when the filing is a section 16 form, the public would be better served by having the document in electronic format. We believe an

⁵⁶ Insiders of exchange-traded investment companies are subject to section 16. See section 16(a) of the Exchange Act (requiring filing of section 16 reports with respect to equity securities registered under section 12 of the Exchange Act); section 12(b) of the Exchange Act (registration of securities traded on a national securities exchange); section 12(g) of the Exchange Act and Exchange Act Rule 12g-1 [17 CFR 240.12g-1] (requirement for registration of securities of issuers held by at least 500 persons and having total assets exceeding \$10 million, with exclusion for any securities issued by a registered investment company). Further, section 30(h) of the Investment Company Act [15 U.S.C. 80a-29(h)] specifies insiders of registered closed-end funds who are subject to the same duties and liabilities as those imposed by section 16.

⁵⁷ The rule's equating date of filing with date of receipt was subject to the deemed timely filed provision before its deletion.

⁵⁸ 17 CFR 232.201 and 232.202.

⁵⁹ 17 CFR 232.13(b).

⁶⁰ See 17 CFR 232.201(a).

⁶¹ 17 CFR 239.65, 249.447, 259.604 and 269.10.

⁶² See 17 CFR 232.201(b).

⁶³ See 17 CFR 232.202(a).

⁶⁴ 17 CFR 232.13(b).

⁶⁵ See Section II.H below.