

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 210

[Release Nos. 33–8180; 34–47241; IC–25911; FR–66; File No. S7–46–02]

RIN 3235–A174

### Retention of Records Relevant to Audits and Reviews

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting rules requiring accounting firms to retain for seven years certain records relevant to their audits and reviews of issuers' financial statements. Records to be retained include an accounting firm's workpapers and certain other documents that contain conclusions, opinions, analyses, or financial data related to the audit or review.

**DATES:** Effective Date: March 3, 2003. Compliance Date: Compliance is required for audits and reviews completed on or after October 31, 2003.

**FOR FURTHER INFORMATION CONTACT:** Samuel L. Burke, Associate Chief Accountant, D. Douglas Alkema, Professional Accounting Fellow, or Robert E. Burns, Chief Counsel, at (202) 942–4400, Office of the Chief Accountant, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1103.

**SUPPLEMENTARY INFORMATION:** We are adding rule 2–06 to Regulation S–X.

### I. Executive Summary

As mandated by section 802 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act" or "the Act"),<sup>1</sup> we are amending Regulation S–X to require accountants who audit or review an issuer's financial statements to retain certain records relevant to that audit or review. These records include workpapers and other documents that form the basis of the audit or review, and memoranda, correspondence, communications, other documents, and records (including electronic records), which are created, sent or received in connection with the audit or review, and contain conclusions, opinions, analyses, or financial data related to the audit or review. To coordinate with forthcoming auditing standards concerning the retention of audit documentation, the rule requires that these records be retained for seven years after the auditor concludes the audit or review of the financial statements,

rather than the proposed period of five years from the end of the fiscal period in which an audit or review was concluded. As proposed,<sup>2</sup> the rule addresses the retention of records related to the audits and reviews of not only issuers' financial statements but also the financial statements of registered investment companies.

### II. Discussion of Final Rule

Section 802 of the Sarbanes-Oxley Act<sup>3</sup> is intended to address the destruction or fabrication of evidence and the preservation of "financial and audit records."<sup>4</sup> We are directed under that section to promulgate rules related to the retention of records relevant to the audits and reviews of financial

<sup>2</sup> These amendments were proposed in Securities Act Release No. 8151 (November 21, 2002) (the "Proposing Release") [67 FR 71017 (November 27, 2002)].

<sup>3</sup> Section 802 of the Sarbanes-Oxley Act, among other things, adds sections 1519 and 1520 to Chapter 73 of Title 18 of the United States Code. Section 1519 states, among other things, that anyone who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under the bankruptcy code, or in relation to or contemplation of any such matter or case, may be fined, imprisoned for not more than 20 years, or both.

Section 1520(a)(1) specifies that: "Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded." Section 1520(a)(2) directs the Commission to promulgate, by January 26, 2003:

\* \* \* such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by an accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.

Section 1520 also provides that any person who knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), may be fined, imprisoned for not more than 10 years, or both. It further provides that nothing in section 1520 shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.

<sup>4</sup> Floor statement by Senator Leahy, 148 Cong. Rec. S7418 (July 26, 2002).

statements that issuers file with the Commission.

Section 802 states that the record retention requirements should apply to audits of issuers of securities to which section 10A(a) of the Securities Exchange Act of 1934 ("Exchange Act") applies. The term "issuer" in this context is defined in section 10A(f) of the Exchange Act to include certain entities filing reports under that Act and entities that have filed and not withdrawn registration statements to sell securities under the Securities Act of 1933.<sup>5</sup> As adopted, the record retention requirements also apply to any audit or review of the financial statements of any registered investment company.<sup>6</sup> We believe that it is important for these record retention requirements, like our other record retention requirements, to apply consistently with respect to all registered investment companies, regardless of whether they fall within the periodic reporting requirements of the Exchange Act.<sup>7</sup>

Neither section 802 nor the final rule exempts auditors of foreign issuers'

<sup>5</sup> Section 802 states that the record retention requirement applies to "an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies." Section 10A(a) of the Securities Exchange Act of 1934 ("Exchange Act") states, "Each audit required pursuant to this title of the financial statements of an issuer by an independent public accountant shall include" designated procedures. Section 10A(f), which has been added to the Exchange Act by section 205(d) of the Sarbanes-Oxley Act, states: "As used in this section the term 'issuer' means an issuer (as defined in section 3 [of the Exchange Act]), the securities of which are registered under section 12, or that is required to file reports pursuant to section 15(d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn." Section 3(a)(8) of the Exchange Act, 15 U.S.C. 78c(a)(8), states that, with certain exceptions, an "issuer" is "any person who issues or proposes to issue any security. \* \* \* Accordingly, the definition of 'issuer' includes entities that have filed and not withdrawn a registration statement for an initial public offering."

Because investment advisers and broker-dealers are not necessarily issuers, audits of their financial statements required for regulatory purposes are not subject to the rule. In other words, only the audits of the financial statements of investment advisers and broker-dealers meeting the definition of "issuer" in section 10A(f) are subject to the retention requirements in rule 2–06. One commenter suggested that investment advisers and broker-dealers be included within the scope of the rule. Letter from Lynette Downing, HLB Tautges Redpath, Ltd., dated December 27, 2002. Another commenter noted, however, that broadening some but not all rules under the Sarbanes-Oxley Act beyond "issuers" as defined in the Act would be confusing. Letter from Grant Thornton LLP dated December 27, 2002.

<sup>6</sup> See section 8 of the Investment Company Act of 1940, 15 U.S.C. 80a–8.

<sup>7</sup> Cf. rules 31a–1 and 31a–2 under the Investment Company Act of 1940, 17 CFR 270.31a–1 and 31a–2 (record-keeping and record-retention requirements for registered investment companies).

<sup>1</sup> Pub. L. 107–204, 116 Stat. 745 (2002).