

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 230, 239, 270, and 274

[Release Nos. 33–8294; 34–48558; IC–26195; File No. S7–17–02]

RIN 3235–AH19

### Amendments to Investment Company Advertising Rules

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission is adopting rule and form amendments under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 that require enhanced disclosure in investment company advertisements and that are designed to encourage advertisements that convey balanced information to prospective investors, particularly with respect to past performance. The amendments also implement section 24(g) of the Investment Company Act by permitting the use of a prospectus under section 10(b) of the Securities Act with respect to securities issued by an investment company that includes information the substance of which is not included in the investment company's statutory prospectus.

**DATES:** *Effective Date:* November 15, 2003.

*Compliance Dates:* See section II.F. of this release for information on compliance dates.

**FOR FURTHER INFORMATION CONTACT:** Christopher P. Kaiser, Special Counsel, David S. Schwartz, Senior Counsel, or Keith E. Carpenter, Senior Special Counsel, at (202) 942–0721, Office of Disclosure Regulation, Division of Investment Management, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0506.

**SUPPLEMENTARY INFORMATION:** The Securities and Exchange Commission ("Commission") is adopting amendments to rule 134 [17 CFR 230.134], rule 156 [17 CFR 230.156], and rule 482 [17 CFR 230.482] under the Securities Act of 1933 [15 U.S.C. 77a *et seq.*] ("Securities Act") and rule 34b–1 [17 CFR 270.34b–1] under the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*] ("Investment Company Act"). The Commission also is adopting technical amendments to Form N–1A [17 CFR 239.15A and 274.11A], Form N–3 [17 CFR 239.17a and 274.11b], Form N–4 [17 CFR 239.17b and 274.11c], and Form N–6 [17 CFR 239.17c and 274.11d], registration forms

used by investment companies to register under the Investment Company Act and to offer their securities under the Securities Act.

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### I. Introduction and Background

Like most issuers of securities, when an investment company ("fund") offers its shares to the public, its promotional efforts become subject to the advertising restrictions of the Securities Act. Congress imposed these restrictions so that investors would base their investment decisions on the full disclosures contained in the "statutory prospectus," which Congress intended to be the primary selling document.<sup>1</sup> The advertising restrictions of the Securities Act cause special problems for many investment companies, particularly for open-end management investment companies ("mutual funds") and other investment companies that continuously offer and sell their shares.<sup>2</sup>

<sup>1</sup> "Statutory prospectus" refers to the full prospectus required by section 10(a) of the Securities Act. 15 U.S.C. 77j(a).

<sup>2</sup> An open-end management investment company is an investment company, other than a unit investment trust or face-amount certificate company, that offers for sale or has outstanding any redeemable security of which it is the issuer. Sections 4 and 5(a)(1) of the Investment Company Act [15 U.S.C. 80a–4 and 80a–5(a)(1)]. Mutual funds typically offer and sell their shares continuously to provide an ongoing flow of capital into their portfolios and to enable them to meet redemption requests from their shareholders.

A unit investment trust ("UIT") is "an investment company which (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument, (B) does not have a board of directors, and (C) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities, but does not include a voting trust." Section 4(2) of the Investment Company Act [15 U.S.C. 80a–4(2)]. UITs typically have active secondary markets in which the trusts' sponsors are continuously purchasing and selling the trusts' units.

A face-amount certificate is a security that obligates the issuer to pay a stated (or determinable) amount on a fixed (or determinable) date or series

of dates more than twenty-four months after the date of issuance. Section 2(a)(15) of the Investment Company Act [15 U.S.C. 80a–2(a)(15)]. A face-amount certificate company is an investment company that engages or proposes to engage in the business of issuing certain face-amount certificates. Section 4(1) of the Investment Company Act [15 U.S.C. 80a–4(1)].

For these funds, the advertising restrictions apply continuously because the offering process, in effect, is continuous. In recognition of these problems, the Commission has adopted special advertising rules for investment companies. The most important of these is rule 482 under the Securities Act, which permits investment companies to advertise investment performance data, as well as other information.<sup>3</sup> Rule 482 advertisements are "prospectuses" under section 10(b) of the Securities Act (so-called "omitting prospectuses"),<sup>4</sup> which means that, historically, they could only contain information the "substance of which" is included in the statutory prospectus.<sup>5</sup>

In the National Securities Markets Improvement Act of 1996 ("NSMIA"), Congress amended the Investment Company Act to permit, subject to rules adopted by the Commission, the use of prospectuses under section 10(b) of the Securities Act that include information the substance of which is not included in the statutory prospectus.<sup>6</sup> In May 2002, we issued a release proposing to amend rule 482 and make other related rule and form changes to implement this provision of the legislation (the "Proposing Release").<sup>7</sup>

At the same time, we proposed other amendments to the fund advertising rules to reinforce antifraud protections and encourage the provision of information to investors that is more balanced and informative, particularly in the area of investment performance. These proposed amendments addressed our concern that some funds, when advertising their performance, may resort to techniques that create unrealistic investor expectations or may mislead potential investors. These concerns arose during 1999 and 2000 when many funds experienced extraordinary performance and engaged in advertising campaigns focusing on past performance.<sup>8</sup> In recent months,

of dates more than twenty-four months after the date of issuance. Section 2(a)(15) of the Investment Company Act [15 U.S.C. 80a–2(a)(15)]. A face-amount certificate company is an investment company that engages or proposes to engage in the business of issuing certain face-amount certificates. Section 4(1) of the Investment Company Act [15 U.S.C. 80a–4(1)].

<sup>3</sup> 17 CFR 230.482.

<sup>4</sup> 15 U.S.C. 77j(b).

<sup>5</sup> Current 17 CFR 230.482(a)(2).

<sup>6</sup> National Securities Markets Improvement Act of 1996, Pub. L. No. 104–290, 110 Stat. 3416, 3428, Section 204.

<sup>7</sup> Investment Company Act Release No. 25575 (May 17, 2002) [67 FR 36712 (May 24, 2002)] ("Proposing Release").

<sup>8</sup> See Proposing Release, *supra* note 7, 67 FR at 36713 nn. 8 and 9 and accompanying text (discussion regarding funds' advertising during