

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33-7550; File No. S7-19-98]

RIN 3235-AH31

Options Disclosure Document

AGENCY: Securities and Exchange Commission.

ACTION: Proposed Rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing to revise Rule 135b under the Securities Act of 1933 to provide that an options disclosure document prepared in accordance with Rule 9b-1 under the Securities Exchange Act of 1934 is not a prospectus and, accordingly, is not subject to civil liability under Section 12(a)(2) of the Securities Act. This proposal is intended to codify a long-standing interpretive position that was issued immediately after the Commission adopted the current registration and disclosure system applicable to standardized options. The proposal also is intended to eliminate any legal uncertainty in this area.

DATES: Comments should be received on or before July 31, 1998.

ADDRESSES: Comment letters should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Mail Stop 6-9, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7-19-98; this file number should be included on the subject line if e-mail is used. All comments received will be available for public inspection and copying in the Commission's Public Reference Room at the same address. Electronically submitted comment letters will be posted on the Commission's Internet web site (<http://www.sec.gov>).

FOR FURTHER INFORMATION CONTACT: David Lavan, at (202) 942-1840, Office of Chief Counsel, Division of Corporation Finance, U.S. Securities and Exchange Commission, Mail Stop 3-3, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: In order to clarify that an options disclosure document prepared in accordance with Rule 9b-1¹ under the Securities Exchange Act of 1934 ("Exchange Act")² is not a prospectus for purposes

of Section 12(a)(2)³ of the Securities Act of 1933 ("Securities Act"),⁴ the Commission is proposing to revise Rule 135b⁵ under the Securities Act.

I. Proposed Amendment

The Commission has a simplified registration and disclosure system for investors in standardized options⁶, which the Commission adopted in 1982.⁷ Under this system, the issuer of the standardized options (generally a clearing corporation) may register the options under the Securities Act on Form S-20.⁸ This form is quite streamlined. It requires limited information about the clearing corporation issuer and the options it issues in a prospectus filed as Part I of the registration statement, and more detailed information (including the issuer's financial statements) in Part II of the registration statement.⁹ The options issuer may satisfy its prospectus delivery requirement by delivering the prospectus to each options market on which the options are traded, for the purpose of redelivery to options customers on request.¹⁰

The disclosure document used to inform investors generally about options is the "options disclosure document" ("ODD"). The ODD is prepared by the exchange on which the registered option trades and must meet the requirements of Rule 9b-1 under the Exchange Act. The ODD provides a general description of standardized options and the rules of options trading. The ODD must be delivered to a customer at or before the time that a broker or dealer approves the customer's account for options trading. Typically, the exchanges work closely

³ 15 U.S.C. 771(a)(2) (renumbered). Before the Securities Litigation Reform Act of 1995, Public Law No. 104-67, 109 Stat. 737, this provision was contained in Section 12(2) of the Securities Act.

⁴ 15 U.S.C. 77a *et seq.*

⁵ 17 CFR 230.135b.

⁶ Standardized options are "options contracts trading on a national securities exchange, an automated quotations system of a registered securities association, or a foreign securities exchange which relate to options classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate." Rule 9b-1(a)(4) under the Exchange Act [17 CFR 240.9b-1(a)(4)].

⁷ Securities Act Release No. 6426 (Sept. 16, 1982) [47 FR 41950] ("Adopting Release").

⁸ 17 CFR 239.20.

⁹ Information about the companies whose shares underlie the options is not required. Instead, information about these companies is available because these companies are generally required to be reporting companies before options on the shares can be approved for trading on U. S. options markets.

¹⁰ Rule 153b under the Securities Act [17 CFR 230.153b].

with the clearing corporation in preparing the ODD.¹¹

The Commission adopted this simplified registration and disclosure system in part to reduce the expense of preparing and updating a detailed prospectus, and to provide investors with a document that is easier to read than the options prospectus that investors received before adoption of these rules.¹² Rule 135b under the Securities Act is one rule of this system. This rule provides that an ODD prepared in accordance with Rule 9b-1 under the Exchange Act "shall not be deemed to constitute an offer to sell or offer to buy any security"¹³ for purposes of Section 5 of the Securities Act.¹⁴ In the Adopting Release, the Commission stated that "if the disclosure document is deemed not to be an offer to sell or buy, it cannot be deemed to be a prospectus."¹⁵ In addition, the Commission stated that Rule 135b "is intended to relieve the preparers of the disclosure document from liability under Section [12(a)(1)] of the Act for distributing a disclosure document to investors which might, absent such relief, violate Section 5 of the Act."¹⁶

However, Rule 135b and the Adopting Release both are silent as to whether Rule 135b was intended to address liability under Section 12(a)(2) of the Securities Act. Section 12(a)(2) generally imposes civil liability for a prospectus that contains material misstatements or omissions.¹⁷

Shortly after the Commission adopted the rule, the Options Clearing Corporation ("OCC") requested interpretive advice from the Division of Corporation Finance ("Division") regarding the applicability of liability under Section 12(a)(2) of the Securities Act to an ODD. After considering the Adopting Release, the Division advised the OCC that in its view, an ODD "is not a prospectus within the meaning of

¹¹ See Adopting Release.

¹² *Id.*; see also Securities Act Release No. 6494, n.2 (Oct. 27, 1983) [48 FR 51328] (discussing the Commission's 1979 Special Study of the Options Market, which suggested the simplified registration and disclosure scheme).

¹³ Securities Act Rule 135b.

¹⁴ 15 U.S.C. 77e. However, as stated in the release that proposed Rule 135b, the ODD is subject to liability under the anti-fraud provisions. Securities Act Release No. 6411 (June 24, 1982) [47 FR 28688] ("Proposing Release").

¹⁵ Adopting Release at § I.C.

¹⁶ Adopting Release. Because Rule 135b states that Section 5 does not apply to distribution of the ODD, it is clear that Section 12(a)(1) liability is inapplicable because that section provides recourse only for offers or sales made in violation of Section 5. See 15 U.S.C. 771(a)(1).

¹⁷ Section 12(a)(2) also imposes civil liability for oral communications containing material misstatements or omissions. 15 U.S.C. 771(a)(2).

¹ 17 CFR 240.9b-1.

² 15 U.S.C. 78a *et seq.*

Section [2(a)(10)] of the Securities Act and, thus, is not subject to liability under Section [12(a)(2)] of the Securities Act.”¹⁸

Despite this long-standing interpretive position, uncertainty exists about the applicability of Section 12(a)(2) liability to an ODD.¹⁹ In response to informal requests from the Chicago Board Options Exchange and the OCC, the Commission believes that it is appropriate and in the public interest to eliminate any uncertainty in this area. Accordingly, the Commission proposes to modify Rule 135b to codify the Division's position that an ODD prepared in accordance with Rule 9b-1 under the Exchange Act is not subject to liability under Section 12(a)(2) because it is not a prospectus.²⁰

II. Request for Comment

The Commission seeks comments on any aspect of the proposed amendment to Rule 135b. Any interested persons wishing to submit written comments relating to the rule proposal are invited to do so by submitting them in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Mail Stop 6-9, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. Comments will be considered by the Commission in complying with its responsibilities under Section 19(a) of the Securities Act.²¹ Commentators should refer to File No. S7-19-98; this file number should be included on the subject line if E-mail is used.

¹⁸ Letter dated September 23, 1982, from then Division of Corporation Finance Director, Lee B. Spencer, Jr. to Mr. Marc L. Berman, then Senior Vice President and General Counsel, of the Options Clearing Corporation. On its face, the text of Rule 135b does not address the applicability of Section 12 liability. In its interpretive letter, the Division noted that the limiting language “for purposes only of Section 5 of the Act” appearing in Rule 135b is intended to clarify that the ODD would be subject to the antifraud provisions of Section 17(a) of the Securities Act [15 U.S.C. 77q(a)] and Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)], but is not intended to suggest that the ODD remains subject to Section 12(a)(2) liability.

¹⁹ See, e.g., *Spicer v. Chicago Board Options Exchange*, No. 88 C 2139 (N.D. Ill. Oct. 24, 1990), motion to reconsider denied (Jan. 24, 1991) (holding that an ODD that is incorporated by reference as a matter of law into the prospectus could be subject to Section 12(2) [now Section 12(a)(2)] liability).

²⁰ Of course, the document would continue to be subject to the anti-fraud liability provisions of Section 17(a) of the Securities Act [15 U.S.C. 77q(a)], Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)], and Rule 10b-5 under the Exchange Act [17 CFR 240.10b-5]. Thus, the Commission believes that the rule, if amended as proposed, would continue to be consistent with protection of investors.

²¹ 15 U.S.C. 77s(a).

III. Costs and Benefits of the Proposed Rule Change and its effects on Efficiency, Competition and Capital Formation

The Commission does not anticipate that the proposed amendment will, in and of itself, result in any economic costs. The rule proposal is not intended to change current practice under the federal securities laws. Rather, the proposal is intended to make it clear that an ODD prepared in accordance with Exchange Act Rule 9b-1 is not a prospectus and thus is not subject to liability under Section 12(a)(2) of the Securities Act. By eliminating any uncertainty over the applicability of Section 12(a)(2) liability to an ODD, it is anticipated that the proposal will result in some unquantifiable economic benefits.

However, commentators are encouraged to provide views and data relating to any costs or benefits associated with the rule proposal. In particular, please identify any costs or benefits associated with the rule proposal relating to the preparation of the disclosure document. Will the proposal have no substantial effect as anticipated, or will the proposal result in additional costs and/or benefits? Please describe, and quantify where possible, any foreseeable significant effects. In addition, address whether the proposal will affect the current compliance burden of exchanges or options issuers.

Because the proposed amendment is intended to codify long-standing Commission interpretations, the Commission does not currently believe that the proposed amendments to Rule 135b will impose any additional burdens on competition. Nevertheless, the Commission seeks comments on any anti-competitive effects the rule, as amended, may have.

In addition, by eliminating any uncertainty in this area, the Commission currently believes that the proposed rule amendments will have a positive, but unquantifiable, effect on efficiency, competition and capital formation. The Commission seeks comments on this preliminary view.

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission is also requesting information regarding the potential impact of the proposals on the economy on an annual basis. The Commission does not currently believe that the amendments, if adopted, would result or be likely to result in (i) an annual effect on the economy of \$100 million or more; (ii) a major increase in costs or prices for consumers or individual

industries; or (iii) significant adverse effects on competition, investment, or innovation. Nevertheless, the Commission solicits comment on this preliminary view. Commentators should provide empirical data to support their views.

IV. Regulatory Flexibility Act Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b), the Chairman of the Commission has certified that the proposal would not, if adopted, have a significant economic impact on a substantial number of small entities. This certification, including the reasons therefore, is attached to this release as Appendix A. We encourage written comments on the Certification. Commentators are asked to describe the nature of any impact on small business entities and provide empirical data to support the extent of the impact.

V. Paperwork Reduction Act

Certain sections of Rule 135b contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”) (44 U.S.C. 3501 *et seq.*). The Commission has previously submitted the rule to the Office of Management and Budget (“OMB”) for review in accordance with 44 U.S.C. 3507(d), and OMB has assigned the rule OMB control number 3235-0200. Because the proposed rule changes should not materially affect the collection of information obligations under the rule, there is no requirement that the Commission resubmit the rule with the proposed amendment to OMB for review under the PRA.

VI. Statutory Bases

The amendment to Securities Act Rule 135b is being proposed pursuant to Sections 2(a)(10),²² 7,²³ 10,²⁴ 12,²⁵ and 19(a)²⁶ of the Securities Act, as amended.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

Text of the Proposal

In accordance with the foregoing, Title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

²² 15 U.S.C. 77b(10).

²³ 15 U.S.C. 77g.

²⁴ 15 U.S.C. 77j.

²⁵ 15 U.S.C. 77l.

²⁶ 15 U.S.C. 77s(a).

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77r, 77s, 77sss, 78c, 78d, 78l, 78m, 78n, 78o, 78w, 78ll(d), 79t, 80a-8, 80a-24, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

2. Section § 230.135b is revised to read as follows:

§ 230.135b Materials not deemed an offer to sell or offer to buy nor a prospectus.

Materials meeting the requirements of § 240.9b-1 of this chapter shall not be deemed an offer to sell or offer to buy a security for purposes solely of Section 5²⁷ of the Act, nor shall such materials be deemed a prospectus for purposes of Sections 2(a)(10)²⁸ and 12(a)(2)²⁹ of the Act.

By the Commission.

Dated: June 25, 1998.

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Margaret H. McFarland,
Deputy Secretary.

Appendix A

[Note: This Appendix A to the preamble will not appear in the Code of Federal Regulations]

Regulatory Flexibility Act Certification

I, Arthur Levitt, Chairman of the Securities and Exchange Commission, hereby certify, pursuant to 5 U.S.C. 605(b), that the proposed amendment to Rule 135b under the Securities Act, as set forth in Securities Act Release No. 33-7550, would not, if adopted, impose additional disclosure or delivery requirements or otherwise alter current requirements, and therefore would not have a significant economic impact on a substantial number of small entities.

The amendment proposed in Securities Act Release No. 33-7550 is intended to codify a long standing interpretive position by clarifying that an Options Disclosure Document complying with the requirements of Exchange Act Rule 9b-1 is not subject to liability under Section 12(a)(2) of the Securities Act. No new disclosure or delivery obligations are proposed, nor are old methods of disclosure or delivery being terminated. Because the proposed amendment is consistent with the current interpretive position, no new liability would be imposed and the current liability system would not be altered. Since no changes to substantive disclosure or delivery requirements are being proposed, the proposal will not have a significant economic impact on businesses, large or small.

Economic benefits resulting from the proposed amendment are anticipated. In particular, the proposed amendment would

eliminate uncertainty over the applicability of Section 12(a)(2) liability to an Options Disclosure Document.

Dated: June 24, 1998.

Arthur Levitt,
Chairman.

[FR Doc. 98-17438 Filed 6-30-98; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-40129, File No. S7-18-98]

RIN 3235-AH30

Amendment to Rule 9b-1 Under the Securities Exchange Act Relating to the Options Disclosure Document

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is proposing an amendment to Rule 9b-1 ("Rule") that would refine certain language of the Rule so that it more clearly reflects the regulatory standards it was designed to establish. The amendment is intended to strengthen Rule 9b-1 while continuing to ensure a regulatory scheme that fosters investors' understanding of the characteristics and risks of standardized options.

DATES: Comments should be submitted by July 31, 1998.

ADDRESSES: All comments should be submitted in triplicate and addressed to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Mail Stop 6-9, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments may also be submitted electronically at the following E-Mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-18-98; this file number should be included on the subject line if E-mail is used. Comment letters will be available for inspection and copying at the Commission's Public Reference Room at the same address. Electronically submitted comment letters will be posted at the Commission's Internet web site (<http://www.sec.gov>).

FOR FURTHER INFORMATION CONTACT: For further information regarding this proposal, contact: Michael Walinskas, Deputy Associate Director, at (202) 942-0090 or Kevin Ehrlich, Attorney, at (202) 942-0778.

SUPPLEMENTARY INFORMATION:

I. Introduction

In general, Rule 9b-1:¹ (i) dictates when a self-regulatory organization is required to file an options disclosure document ("ODD") with the Commission; (ii) itemizes the information required to be contained in the ODD; (iii) specifies the Commission's process of reviewing a preliminary ODD; and (iv) establishes the obligations of broker-dealers to furnish the ODD prior to approving a customer's account for trading in options. In light of the evolving nature of the standardized options² markets, the Commission is soliciting comments on a proposal to amend Rule 9b-1 to ensure that the requirements of the Rule continue to reflect the underlying objective of adequate disclosure regarding standardized options.

II. Background

Rule 9b-1 provides that an options disclosure document containing the information specified in paragraph (c) of the Rule must be filed with the Commission by an options market³ at least 60 days prior to the date definitive copies of the document are furnished to customers. Paragraph (c) of the Rule currently specifies that, with respect to the options classes covered by the document, the document must contain, among other things, a discussion of the mechanics of buying, writing, and exercising the options; the risks of trading the options; the market for the option; and a brief reference to the transaction costs, margin requirements, and tax consequences of options trading. Paragraph (d) of the Rule further provides that no broker or dealer shall accept an options order from a customer, or approve the customer's account for the trading of options, "unless the broker or dealer furnishes or has furnished to the customer the options disclosure document."

The Commission adopted the Rule on September 16, 1982, in an effort to foster better investor understanding of standardized options trading and to reduce the costs of issuer compliance

¹ 17 CFR 240.9b-1.

² Paragraph (a)(4) of the Rule defines standardized options to mean "options contracts trading on a national securities exchange, an automated quotation system of a registered securities association, or a foreign securities exchange which relate to options classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate."

³ Paragraph (a)(1) of the Rule defines an options market to mean "a national securities exchange, an automated quotation system of a registered securities association or a foreign securities exchange on which standardized options are traded."

²⁷ 15 U.S.C. 77e.

²⁸ 15 U.S.C. 77b(10).

²⁹ 15 U.S.C. 77l(a)(2).