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Amendments to Investment Company Advertising Rules; Final Rule

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]

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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.

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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.[1] 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.[2] 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.[3] Rule 482 advertisements are ''prospectuses'' under section 10(b) of the Securities Act (so-called ''omitting prospectuses''),[4] which means that, historically, they could only contain information the ''substance of which'' is included in the statutory prospectus.[5]

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.[6] 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'').[7]

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.[8] In recent months,

[1] ''Statutory prospectus'' refers to the full prospectus required by section 10(a) of the Securities Act. 15 U.S.C. 77j(a).

[2] 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)].

[3] 17 CFR 230.482.

[4] 15 U.S.C. 77j(b).

[5] Current 17 CFR 230.482(a)(2).

[6] National Securities Markets Improvement Act of 1996, Pub. L. No. 104–290, 110 Stat. 3416, 3428, Section 204.

[7] Investment Company Act Release No. 25575 (May 17, 2002) [67 FR 36712 (May 24, 2002)] (''Proposing Release'').

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

following improved market performance, commentators have already noted an increase in advertisements highlighting favorable short-term performance and have expressed concern about this practice.[9] The Commission received 29 comment letters on the proposal. Commenters generally supported the proposal, but also suggested revisions in certain areas.[10] Today, the Commission is adopting these proposed amendments, with certain modifications as described below to address the suggestions of the commenters.

II. Discussion

A. Eliminating the ''Substance of Which'' Requirement From Rule 482 and Rescinding Rule 134 for Funds

We are adopting, as proposed, the amendment removing the requirement that a rule 482 advertisement contain only information the ''substance of which'' is included in the statutory prospectus.[11] This amendment implements section 24(g) of the Investment Company Act, added by NSMIA, which directs the Commission to adopt rules or regulations that permit registered investment companies to use prospectuses that (i) include information the substance of which is not included in the statutory prospectus, and (ii) are deemed to be permitted by section 10(b) of the Securities Act.[12] Eliminating this requirement will permit investment companies to include up-to-date information in rule 482 advertisements, such as information about current economic conditions that normally would not be included in a fund's prospectus. The amendment also will permit funds to eliminate certain information from the statutory prospectus, such as boilerplate disclosure about the methods used to calculate performance in fund advertising, that clutters the statutory prospectus and obscures other important information. As a result, investors should receive better, more understandable, and more timely information in both the statutory prospectus and fund advertisements. In addition, the costs of regulatory compliance should be reduced for funds and, ultimately, for investors.

Elimination of the ''substance of which'' requirement from rule 482 should not diminish investor protection. The ''substance of which'' requirement is a technical requirement that does not, in itself, prevent misleading statements because it does not require an advertisement to use the same words as the statutory prospectus or prohibit the use of advertising techniques that are not included in the statutory prospectus.[13] Importantly, rule 482 advertisements, as ''prospectuses,'' will remain subject to liability under section 12(a)(2) of the Securities Act and the antifraud provisions of the federal securities laws. Also, rule 482 advertisements, as section 10(b) prospectuses under the Securities Act, are subject to the summary suspension provisions of section 10(b), which permit the Commission to suspend the use of a materially false or misleading prospectus.[14] In addition, fund advertising materials must continue to be filed with NASD Regulation, Inc. (''NASDR'') or the Commission, and NASDR rules relating to fund advertising will continue to apply.[15] Finally, we are adopting additional amendments to rule 482 to reinforce antifraud protections, particularly in the area of fund performance.[16]

We are using our exemptive authority under the Securities Act to eliminate the ''substance of which'' requirement from rule 482 for the securities of business development companies (''BDCs'') as well as registered investment companies.[17] Currently, BDCs and registered investment companies are treated similarly under rule 482. We believe that it is appropriate to extend the benefits that would result from elimination of the ''substance of which'' requirement to BDCs, given that elimination of this requirement should not diminish investor protection. We note, however, that BDCs, unlike mutual funds, do not continuously offer and sell their shares and do not make extensive use of advertisements.

We are also adopting amendments removing the provisions of rule 134 that apply specifically to funds and are excluding both registered investment companies and business development companies from relying on rule 134.[18] We believe that, with the elimination of the ''substance of which'' requirement from rule 482, funds will no longer need to rely on rule 134. Rule 134 will remain available to other issuers. We have made technical modifications to our proposed amendments to rule 134 in order to retain the existing introductory text of rule 134 for these issuers.[19] Rule 482, as amended, will provide funds with sufficient flexibility to discuss topics, such as current economic conditions, that are currently discussed in rule 134 advertisements but generally not in the statutory prospectus. We believe that investor protection will be increased if fund advertisements including this

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1999 and 2000 focused on extraordinary performance).

[9] *See* Kimberly Weisul, *Mutual Fund Ads: Reader Beware,* Business Week, September 15, 2003, at 44; Suzanne McCoy, *Performance Ads Return in Q2 as Spending Drops* (August 12, 2003) *http://www.ignites.com;* Gregg Wolper, *Buy this Fund—It's Had a Great Week!,* Morningstar Online, July 15, 2003, available at *http://news.morningstar.com/doc/document/print/1,3651,93809,00.html.*

[10] The comment letters and a summary of the comments are available for public inspection and copying in the Commission's Public Reference Room, 450 5th Street, NW., Washington, DC 20549–0102. Public comments submitted electronically and the comment summary are also available on the Commission's Internet Web site (*http://www.sec.gov*).

[11] The ''substance of which'' requirement is presently contained in current rule 482(a)(2) [17 CFR 230.482(a)(2)]. We are also revising the language in the note to current paragraph (a)(3) of rule 482, which states that ''[t]he fact that the statements included in the advertisement are included in the section 10(a) prospectus does not relieve the issuer, underwriter, or dealer of the obligation to ensure that the advertisement is not false or misleading.'' [17 CFR 230.482(a)(3)]. The removal of the ''substance of which'' requirement makes the reference to the section 10(a) prospectus unnecessary. The revised language of this note is incorporated into the note to newly adopted paragraph (a) of rule 482 [17 CFR 230.482(a)]. *See* Section II.B., ''Applicability of Antifraud Provisions to Fund Advertising,'' *infra.*

[12] 15 U.S.C. 80a–24(g). *See also* S. Rep. No. 293, 104th Cong., 2d Sess. 8 (1996) (stating that the ''bill improves fund advertising by giving the Commission express authority to create a new investment company 'advertising prospectus' '').

[13] *See* Investment Company Act Release No. 9811 (June 8, 1977) [42 FR 30379, 30380 (June 14, 1977)] (''1977 Advertising Proposing Release'') (proposing rule 434d, subsequently renumbered as rule 482).

[14] 15 U.S.C. 77j(b).

[15] Section 24(b) of the Investment Company Act [15 U.S.C. 80a–24(b)] requires the filing with the Commission of ''any advertisement, pamphlet, circular, form letter, or other sales literature'' for any registered investment company other than a closed-end fund. Rule 24b–3 under the Investment Company Act [17 CFR 270.24b–3] relieves funds of the obligation to file advertisements and other sales materials with the Commission if those materials are filed with NASDR.

Members of the National Association of Securities Dealers, Inc. (''NASD'') also must comply with rule 2210 of the NASD Conduct Rules when sponsoring fund advertisements. Rule 2210 outlines general standards for what may constitute misleading fund advertising and specific requirements for advertising communications. Rules 2210(d)(1) and (2) of the NASD Conduct Rules.

[16] *See* discussion in Section II.B., ''Applicability of Antifraud Provisions to Fund Advertising,'' and Section II.C., ''Enhanced Disclosure Under Rule 482,'' *infra.*

[17] Section 28 of the Securities Act [15 U.S.C. 77z–3]. Business development companies are a category of closed-end investment companies that are not required to register under the Investment Company Act. *See* section 2(a)(48) of the Investment Company Act [15 U.S.C. 80a–2(a)(48)] (defining ''business development company'').

[18] 17 CFR 230.134. Rule 134, in contrast to rule 482, is a content-based rule that specifies certain categories of information that a fund may advertise. Currently, funds may advertise a broad range of information under rule 134, other than performance information. *See* Proposing Release, *supra* note 7, 67 FR at 36714.

[19] *See* 17 CFR 230.134(e) (registered investment companies and business development companies excluded from rule 134).

information are subject to rule 482 and, as a result, to liability under section 12(a)(2) of the Securities Act.[20]

A number of commenters opposed the elimination of funds' ability to rely on rule 134, objecting to the application of the more stringent liability standard under section 12(a)(2) of the Securities Act to fund advertisements that have in the past fallen within the scope of rule 134. Commenters argued that the limitations on the type of information that may be included in rule 134 advertisements provide sufficient protection against fraud or misleading statements so that the more rigorous liability standard under section 12(a)(2) is not necessary. In addition, they argued that, in the absence of evidence of significant abuse, there is no reason to eliminate funds' ability to rely on rule 134 and impose the burden of increased liability.

We are not persuaded by these comments because we believe that the standard of liability that attaches to a fund advertisement should not depend on the content of the advertisement. Nor do we believe that exactly the same content should be subject to different liability standards depending on whether that content is included in a rule 134 advertisement or a rule 482 advertisement. Assuming that commenters are correct that the limitations on the type of information that may be included in rule 134 advertisements provide protection against fraud, then it should not be problematic to apply a more rigorous liability standard to this information. Further, our elimination of funds' ability to rely on rule 134 is not intended to address significant past abuses, but to help to prevent false and misleading advertisements in the future. Finally, excluding investment companies from rule 134 is consistent with the goal of regulatory simplification. With the elimination of the ''substance of which'' requirement from rule 482, any advertisement that could be presented under rule 134 may also be presented under rule 482. The elimination of funds' ability to rely on rule 134 will eliminate unnecessary complexity in the regulation of fund advertising.

B. Applicability of Antifraud Provisions to Fund Advertising

We are adopting, with modifications suggested by the commenters, amendments to the fund advertising rules that are intended to reemphasize that fund advertisements are subject to the antifraud provisions of the federal securities laws. When we initially proposed rule 482 in 1977, we indicated that rule 482 advertisements would be subject to section 12(a)(2) of the Securities Act and the antifraud provisions of the federal securities laws.[21] Since then, we have reiterated that compliance with the ''four corners'' of rule 482 does not alter the fact that funds, underwriters, and dealers are subject to the antifraud provisions of the federal securities laws with respect to fund advertisements.[22]

To emphasize this principle, we are adding a note to newly adopted paragraph (a) of rule 482 that states that an advertisement that complies with rule 482 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. We also are adding a similar note to the introductory paragraph of rule 34b–1 under the Investment Company Act with respect to supplemental sales literature. These notes include cross-references to rule 156 under the Securities Act, which provides guidance about the factors to be weighed in determining whether statements, representations, illustrations, and descriptions contained in fund advertisements and sales literature are misleading.[23]

As proposed, the language of the notes to rules 482 and 34b–1 would have stated that compliance with the rules does not relieve the fund, underwriter, or dealer of the obligation to ''ensure'' that the advertisement is not false or misleading. One commenter objected to the use of the term ''ensure,'' stating that it could potentially expand the responsibility of funds, underwriters, and dealers because it might imply that they are guarantors of the accuracy of statements contained in advertisements. Our proposal incorporated language, including the term ''ensure,'' similar to that used in an existing note to paragraph (a)(3) of rule 482, and we did not intend to alter existing standards of liability.[24] In order to address the commenter's concern, however, we have revised the language of the note to remove the term ''ensure'' and clarify that compliance with rules 482 and 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. This change is intended to clarify that the scope of a fund's, underwriter's, or dealer's obligations under the antifraud provisions is drawn from the federal securities laws and relevant precedents and not from the language of rule 482 or 34b–1 itself.

Two commenters urged the Commission to confirm in the adopting release that, notwithstanding the note to rule 482(a), performance information in a rule 482 advertisement (as opposed to other disclosures included in the advertisement) will not be deemed to be false or misleading if it (i) is computed in accordance with the methodology required by the rule; and (ii) complies with the currentness requirements of the rule. We disagree with this position. An advertisement that complies with rule

[20] Because a rule 482 advertisement is a prospectus under section 10(b) of the Securities Act, a rule 482 advertisement is subject to section 12(a)(2) of the Securities Act [15 U.S.C. 77l(a)(2)], which imposes liability for materially false or misleading statements in a prospectus or oral communication, subject to a reasonable care defense. An action under section 12(a)(2) does not require proof of scienter (*i.e.*, an intent to defraud investors), *e.g., Wigand* v. *Flo-Tek, Inc.,* 609 F.2d 1028, 1034 (2d Cir. 1979), or investor reliance on a misleading statement or omission, *e.g., MidAmerica Fed. S. & L. Assoc.* v. *Shearson/American Express, Inc.,* 886 F.2d 1249, 1256 (10th Cir. 1989); *Sanders* v. *John Nuveen & Co.,* 619 F.2d 1222, 1225 (7th Cir. 1980), *cert. denied,* 450 U.S. 1005 (1981). In contrast, antifraud claims by investors under section 10(b) of the Securities Exchange Act of 1934 (''Exchange Act'') [15 U.S.C. 78j(b)] require proof of scienter and investor reliance. Under either type of claim, however, the plaintiff must establish that the misrepresentation or omission is material. Rule 134 advertisements are subject to the antifraud provisions under the Federal securities laws but do not create liability under section 12(a)(2) of the Securities Act because rule 134 advertisements are not considered ''prospectuses.'' Rule 134 was adopted under section 2(a)(10)(b) of the Securities Act [15 U.S.C. 77b(a)(10)(b)], which excepts certain communications from the definition of ''prospectus.''

[21] 1977 Advertising Proposing Release, *supra* note, 42 FR at 30380.

[22] Investment Company Act Release No. 16245 (Feb. 2, 1988) [53 FR 3868, 3878 n. 51 (Feb. 10, 1988)]. *See also* Investment Company Act Release No. 24832 (Jan. 18, 2001) [66 FR 9002, 9008 (Feb. 5, 2001)] (compliance with rule 482 is not a safe harbor from antifraud liability); Investment Company Act Release No. 15315 (Sept. 17, 1986) [51 FR 34384, 34391 (Sept. 26, 1986)] (in proposing amendments to rule 482 to require the inclusion of a legend on advertisements, Commission stated that it was ''not suggesting that the legend information contains all the material information necessary to prevent an ad from being misleading . . . [and] that whoever sponsors the ad, be it the fund, the underwriter, or the dealer, bears the primary responsibility for assuring that the ad is not false or misleading''); 1977 Advertising Proposing Release, *supra* note, 42 FR at 30380 (advertisements made pursuant to rule 434d (subsequently renumbered as rule 482) would be subject to the antifraud provisions of the securities laws); *In the Matter of The Dreyfus Corporation and Michael L. Schonberg,* Investment Advisers Act Release No. 1870 (May 10, 2000) (advertisements that comply with rule 482 are subject to the general antifraud provisions of the securities laws).

[23] 17 CFR 230.156.

[24] Note to current rule 482(a)(3) [17 CFR 230.482(a)(3)] (''The fact that the statements included in the advertisement are included in the section 10(a) prospectus does not relieve the issuer, underwriter, or dealer of the obligation to ensure that the advertisement is not false or misleading.'')

482 will be deemed to be an ''omitting prospectus'' under section 10(b) of the Securities Act for the purposes of section 5(b)(1) of the Securities Act.[25] Rule 482, however, is not a safe harbor from antifraud liability for any information included in a rule 482 advertisement, including performance information complying with the requirements of the rule.

In addition, we are amending rule 156 to provide further guidance regarding the factors to be weighed in considering whether a statement involving a material fact in investment company sales materials is or might be misleading. As discussed in the Proposing Release, we are concerned that the advertisement of past performance without an adequate explanation of other facts may create unrealistic investor expectations or even mislead potential investors.[26] For that reason, we are modifying the language of rule 156 to state more explicitly that portrayals of past income, gain, or growth of assets may be misleading where the portrayals omit explanations, qualifications, limitations, or other statements necessary or appropriate to make these portrayals of past performance not misleading.[27] This language is intended to address our concerns with fund performance advertisements that do not provide adequate disclosure: (i) Of unusual circumstances that have contributed to fund performance; (ii) that more current performance may be lower than advertised performance; or (iii) that would permit an investor to evaluate the significance of performance that is based on selective dates.[28] We remind funds and their underwriters and dealers, however, that this language would address other circumstances that we have not specifically enumerated and that each fund, and its underwriters and dealers, is responsible for analyzing the facts and circumstances concerning its advertisements and determining whether its advertisements may be misleading.

C. Enhanced Disclosure Under Rule 482

We are adopting, with modifications to address commenters' concerns, additional amendments to rule 482 that will require enhanced disclosure of certain information designed to encourage advertisements that convey balanced information to prospective investors. Our amendments require that funds that advertise performance information make available to investors total returns that are current to the most recent month-end. They also require that fund advertisements include improved narrative information and present explanatory information more prominently.

Availability of Month-End Performance Information

Currently, rule 482(g) requires all performance data contained in any mutual fund advertisement to be as of the most recent practicable date, provided that any advertisement containing total return quotations is considered to have complied with the requirement if the total return quotations are current to the most recent calendar quarter ended prior to submission of the advertisement for publication.[29] We are adopting a second condition for a fund advertisement to be considered to have complied with the requirement of rule 482 that performance be as of the most recent practicable date. Specifically, total return quotations current to the most recent month-end, and available to investors within seven business days of the most recent month-end, must be provided at a toll-free or collect telephone number or on a Web site, unless the advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date of use of the advertisement.[30] As a result, investors who are provided advertisements highlighting a fund's performance should have ready access to performance data that is current to the most recent month-end and will not be forced to rely on performance data that may be more than three months old at the time of use by the investor.

We have modified the proposed new condition to require that month-end performance information be available to investors within seven business days, rather than three calendar days, of the most recent month-end. A number of commenters objected to the three calendar-day timeframe as too short to gather the necessary information, particularly in cases in which funds are sold through intermediaries such as insurance companies and fund supermarkets, which sell funds from multiple complexes.[31] Some commenters suggested longer timeframes ranging up to seven business days. Other commenters indicated that it could take ten business days or more to gather all of the necessary information and that the Commission should adopt a standard permitting month-end performance information to be provided ''as soon as reasonably practicable'' or within a ''reasonable time.''

We are persuaded by the comments that the proposed timeframe should be extended to seven business days. Particularly in the case of intermediary-sold funds, it could be difficult to gather, format, and make available the necessary information in three calendar days. Based on the comments, we believe that seven business days typically will provide sufficient time for making month-end performance data available. We recognize that there may be circumstances where more time is needed. We note, however, that if a fund exceeds the seven business-day timeframe in making month-end performance data available, it may nonetheless be in compliance with the currentness provisions of rule 482, as long as the performance data contained in an advertisement is ''as of the most recent practicable date considering the type of investment company and the media through which the data will be conveyed.'' [32]

We are also modifying the proposed condition in order to permit month-end performance information to be made available either at a toll-free or collect telephone number or on a Web site. The proposed rules would have required funds to make the information available by toll-free or collect telephone number. A number of commenters argued that funds should be permitted to make the information available through the Internet. They argued that telephone access to month-end information could be unnecessarily burdensome for both investors and funds. They argued that

[25] Section 5(b)(1) of the Securities Act [15 U.S.C. 77e(b)(1)] makes it unlawful to use interstate commerce to transmit any prospectus relating to a security with respect to which a registration statement has been filed unless the prospectus meets the requirements of section 10 of the Securities Act. Section 10(b) of the Securities Act [15 U.S.C. 77j(b)] permits the Commission to adopt rules that provide for a prospectus that ''omits in part'' or ''summarizes'' information contained in the statutory prospectus. Rule 482 was adopted under the authority of section 10(b) of the Securities Act.

[26] *See* Proposing Release, *supra* note 7, at Section I.B., ''Performance Advertising Practices,'' 67 FR at 36715–16.

[27] 17 CFR 230.156(b)(2)(i); *Cf.* 17 CFR 230.156(b)(1)(ii) (''A statement could be misleading because of * * * [t]he absence of explanations, qualifications, limitations or other statements necessary or appropriate to make such statement not misleading * * * '').

[28] *See* Proposing Release, *supra* note 7, 67 FR at 36715–16 (discussing concerns about lack of disclosure relating to unusual circumstances contributing to fund performance, currentness of performance information, and selective use of performance figures).

[29] Current 17 CFR 230.482(g).

[30] 17 CFR 230.482(g)(1)(ii) and (g)(2).

[31] A fund supermarket is a program offered by a broker-dealer or other financial institution through which its customers may purchase and redeem shares of a variety of funds from different fund complexes.

[32] 17 CFR 230.482(g).

an automated system could be unwieldy, requiring the investor to navigate through several series of menus and numerous prompts to retrieve the requested information when, for example, an intermediary offers numerous funds or a variable insurance contract issuer offers multiple contracts with multiple underlying investment options. They also argued that funds would incur significant expense in setting up automated telephone systems or in using live telephone operators to provide updated information, whereas most funds could use existing Web sites as an efficient means of communicating month-end performance data.

We are persuaded by these comments and are revising the proposal to permit funds to make month-end data available at a toll-free or collect telephone number or at a Web site.[33] We were particularly concerned that investors could become frustrated with navigating through multiple telephone prompts to obtain information about the particular fund in which they are interested. We were persuaded that funds should be permitted to determine whether this information could be provided in a more accessible, user-friendly format on a Web site. A single table could, for example, contain performance information for multiple funds, enabling an investor to find the relevant information at a glance. We encourage funds and their intermediaries to take advantage of the rule's flexibility to present month-end performance information through a medium and in a format that is readily accessed and understood by investors.

We remind funds that the availability of month-end performance information by telephone or Web site does not alter the application of the antifraud provisions of the federal securities laws to an advertisement. The month-end information obtained through a telephone call or Web site would not be considered part of the advertisement itself and would not cure any materially misleading statement or omission in the advertisement.

We wish to clarify that a fund advertisement may provide the telephone number or Web site of a third-party intermediary as the source for obtaining month-end performance information. The Proposing Release stated that updated performance information should be available from the fund itself and that other forms of distribution of this information should supplement availability from the fund itself.[34] We recognize, however, that, in some cases, it may not be practical for month-end performance information to be available from the fund itself. For example, when a fund is sold through and advertised by a fund supermarket, it may be most practical for the fund supermarket to provide updated performance information to its customers. In the case of a variable annuity contract, fund performance net of contract charges is typically calculated by the insurance company sponsor rather than the fund and updated contract performance may perhaps be most appropriately provided by the insurance company.

Several commenters asked us to clarify whether the narrative disclosures that would normally be required in a rule 482 advertisement would be required when updated month-end performance information is provided through a toll-free or collect telephone number. These disclosures include statements regarding factors that investors should consider before investing, prospectus availability, limitations of past performance information, and sales loads.[35] These disclosures need not be provided on a toll-free or collect telephone line that is dedicated exclusively to providing updated month-end performance information to investors calling in response to a rule 482 performance advertisement because the investors would have received those disclosures in the original advertisement. If, however, the telephone number is used more broadly (*e.g.*, for all incoming calls to a fund group), the toll-free or collect telephone number should include the narrative disclosures required by rule 482 because a caller may not have seen the original advertisement with the required disclosures. Similarly, if updated month-end performance information is provided on a Web site, all of the narrative disclosures required by rule 482 should be included because the Web site is broadly accessible to the public.

We are modifying the proposal to address the concerns of several commenters who suggested that the Commission not require a fund that advertises performance current to the most recent month-end also to provide that information by toll-free or collect telephone number. The commenters argued that, in such cases, providing a telephone number for obtaining this information would confuse investors. Investors would call the telephone number, only to be given the same information that already appears in the advertisement. Accordingly, we are modifying the proposal to provide that an advertisement containing total return quotations is considered to have complied with the requirement that all performance data be as of the most recent practicable date if the total return quotations are current to the most recent month ended seven business days prior to the date of use of the advertisement.[36] A fund advertisement including information meeting this standard need not identify a toll-free or collect telephone number or a Web site where an investor may obtain performance data current to the most recent month-end.[37]

We note that the exception from the requirement to provide month-end performance information by toll-free or collect telephone number or Web site applies only to advertisements that contain total return quotations that are current to the most recent month ended seven business days prior to the date of *use* of the advertisement. It is not sufficient if the advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date of *publication or submission for publication* of the advertisement if that standard is no longer met when the advertisement is used. It also is not sufficient if the advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date of *first use* of the advertisement if that standard is not met throughout the entire period of use of the advertisement.[38] Our intent is that an investor have access to current month-end information at the time he or she reviews an advertisement, either in the advertisement itself or through a toll-free or collect telephone number or Web site.

Thus, a Web site that is continuously updated so that it always contains total return quotations that are current to the most recent month ended seven business days earlier need not identify a toll-free or collect telephone number or a Web site where an investor may obtain month-end performance data. Similarly, an advertisement in a daily newspaper that appears on one particular day and contains total return quotations that are current to the most recent month ended seven business days prior to the date that the

[33] 17 CFR 230.482(g)(1)(ii); 17 CFR 230.482(b)(3)(i).

[34] *See* Proposing Release, *supra* note , 67 FR at 36719.

[35] 17 CFR 230.482(b)(1)(i), (b)(3)(i), and (b)(3)(ii).

[36] 17 CFR 230.482(g)(2).

[37] 17 CFR 230.482(b)(3)(i).

[38] Note to rule 482(b)(3)(i) [17 CFR 230.482(b)(3)(i)]; note to rule 482(g) [17 CFR 230.482(g)].

advertisement appears need not identify a source where an investor may obtain month-end performance data. By contrast, an advertisement containing performance information for a group of funds that is intended to be distributed to investors for an extended period (*e.g.*, throughout a quarter) would be required to identify a toll-free or collect telephone number or a Web site where an investor may obtain month-end performance data even if the advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date on which the advertisement is first distributed to investors.

In determining the date of use of an advertisement, consideration should be given to all the facts and circumstances, such as the dates on which the advertisement is first published and distributed, the last date on which the advertisement is distributed, and, in the case of an advertisement appearing in a periodical, the dates on which the next issue of the periodical is first published and distributed. We would encourage funds to provide month-end performance information by toll-free or collect telephone number or Web site in any case where a question about the date of use results in a question as to whether an advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date of use.

Two commenters stated that an advertisement that includes performance information that is more current than the most recent month-end also should not be required to provide a source for month-end information. We disagree. When a fund chooses a date other than a quarter or month-end for presenting performance, there is potential for ''cherry picking'' the date to provide particularly favorable information. In such a case, we believe that month-end performance information should be made available to investors as a check on any such ''cherry picking'' and to provide investors with information from different funds for comparable periods.

Improved Narrative Disclosure

Advertising that focused on extraordinary fund performance during 1999–2000 led to increasing concerns that some funds, when advertising their performance, may resort to techniques that create unrealistic investor expectations or may mislead potential investors. These concerns have arisen again with the recent improvement in market performance, as commentators have noted an increase in advertisements highlighting favorable short-term performance.[39] To address these concerns, we are adopting, with modifications to address concerns raised by commenters, changes to the narrative disclosure that is required to accompany performance advertisements. These changes are intended to help investors understand the limitations of past performance data and enhance their ability to obtain updated performance information. In particular, these amendments will require funds to include the following information in rule 482 advertisements that contain performance data: (i) A statement that past performance does not guarantee future results; (ii) a statement that current performance may be lower or higher than the performance data quoted; and (iii) a toll-free or collect telephone number or a website where an investor may obtain performance data current to the most recent month-end, unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use.[40] An advertisement may combine two or more of these required statements in a single sentence, provided that each of the required disclosures is clear and easy to understand. Similarly, an advertisement may use any language that clearly communicates the information required to be disclosed.

We have modified the proposed required disclosure regarding the availability of month-end performance data in two ways that parallel modifications that we have made to the proposed requirements regarding availability of month-end performance data. First, the rule as adopted will permit identification of *either* a Web site *or* a toll-free or collect telephone number where an investor may obtain current month-end information. Second, an advertisement containing total return quotations current to the most recent month ended seven business days prior to the date of use would not be required to identify a toll-free or collect telephone number or a Web site where an investor may obtain performance data current to the most recent month end.[41]

We are also adopting, with modifications suggested by a commenter, an amendment to rule 482 that would direct prospective investors' attention to a fund's charges and expenses. As proposed, the amendment would have required a fund to note in its rule 482 advertisement that information about charges and expenses is included in the statutory prospectus. As adopted, the rule would require rule 482 advertisements to include a statement that advises an investor to consider the fund's investment objectives, risks, and charges and expenses carefully before investing; explains that the prospectus contains this and other information about the investment company; identifies a source from which an investor may obtain a prospectus; and states that the prospectus should be read carefully before investing.[42] We were persuaded by a commenter's argument that the proposed required disclosures, while helpful, would not adequately direct investors' attention to the important factors that they should consider. We agree with the commenter that investors should consider a fund's objectives and risks, and its charges and expenses, before investing because these factors will directly affect future returns. We are concerned that the many fund advertisements highlighting performance have focused investors' attention on fund returns and that investors may be overlooking other important fund features, particularly charges and expenses, that may diminish a fund's returns.[43]

One commenter sought clarification as to how this provision would apply in the context of variable insurance products in light of recently adopted changes to disclosure requirements for variable insurance prospectuses, which require disclosure of the range of operating expenses of underlying funds in the contract prospectus, with detailed information about the expenses of each underlying fund required to be

[39] *See supra* note 9.

[40] 17 CFR 230.482(b)(3)(i).

[41] *See* ''Availability of Month-End Performance Information,'' *supra.*

[42] 17 CFR 230.482(b)(1)(i). Similar disclosure will also be required in an advertisement used with a profile pursuant to rule 498 under the Securities Act [17 CFR 230.498]. 17 CFR 230.482(b)(1)(ii).

Rule 482 currently does not require a fund to highlight the importance of information regarding the fund's investment objectives, risks, and charges and expenses. The rule does, however, require an advertisement to identify a source from which an investor may obtain a prospectus containing more complete information about the fund, which should be read carefully before investing. Current 17 CFR 230.482(a)(3)(i). The rule also requires that a fund that advertises performance data include some information about sales loads and other non-recurring fees. Current 17 CFR 230.482(a)(6).

[43] *See* Securities and Exchange Commission, *Mutual Fund Investing: Look at More Than a Fund's Past Performance* (last modified Jan. 24, 2000) *http://www.sec.gov/investor/pubs/mfperform.htm* (cautioning investors to look beyond performance when evaluating funds and to consider the costs relating to a fund investment). *See also* NASD Notice to Members No. 98–107 (1998) (reminding members of their obligation to ensure that discussions concerning fees and expenses in fund advertising are fair, balanced, and not misleading).

disclosed in the fund's prospectus.[44] A variable insurance product advertisement should direct investors to both the contract prospectus and the underlying fund prospectuses. Both the contract prospectus and the underlying fund prospectuses contain information relating to the product's investment objectives, risks, and charges and expenses as well as other important information.

Presentation of Explanatory Information

We are adopting, with modifications suggested by commenters, requirements that funds present certain information in their rule 482 advertisements more prominently. These prominence requirements are designed to prevent advertisements from marginalizing or minimizing the presentation of the required disclosure. The amendments will require print advertisements to present required narrative disclosures in a type size at least as large as and of a style different from, but at least as prominent as, that used in the major portion of the advertisement.[45] This requirement will apply to the required narrative disclosures about the prospectus and the performance data.[46] The amendments will also provide an exception to this requirement, which was suggested by a commenter; *i.e.*, when performance data is presented in a type size smaller than that of the major portion of the advertisement, the required narrative disclosure pertaining to the performance data may appear in a type size no smaller than that of the performance data.[47] We were persuaded that, in such cases, presenting the required performance-related narrative disclosure in a type size larger than that of the performance data itself may be distracting.

The newly adopted type size and style requirements will apply to print advertisements. We have modified the proposed requirement, as suggested by a commenter, to clarify that if an advertisement is delivered through an electronic medium, the type size and style requirements may be satisfied by presenting the required narrative disclosures in any manner reasonably calculated to draw investor attention to them.[48] This is consistent with rule 420(b) under the Securities Act, which provides that prospectuses distributed through an electronic medium may satisfy legibility requirements applicable to printed documents by presenting all required information in a format readily communicated to investors, and where indicated, in a manner reasonably calculated to draw investor attention to the specific information.[49]

We are adopting, as proposed, the requirement that radio and television advertisements give the required narrative disclosures emphasis equal to that used in the major portion of the advertisement.[50] Two commenters recommended that, with respect to television advertisements, we clarify that the required narrative disclosures need not be provided orally and that, instead, they may be provided in written text on the television screen. We do not agree that the required disclosures would have an emphasis equal to that of the major portion of the advertisement if the required disclosures are in written form, while the major portion of the advertisement is spoken. If the required disclosures appear in writing on a television screen during a spoken advertisement, we believe that they are more likely to be overlooked, and not seen as a significant part of the advertisement, than if they are included in the spoken presentation of the advertisement.

In addition, we are adopting, as proposed, a requirement that the narrative disclosures that specifically relate to fund performance be presented in close proximity to the performance data in both print and radio and television advertisements.[51] In a print advertisement, this information also would be required to appear in the body of the advertisement and not in a footnote. Rule 482 currently requires that performance advertisements identify the dates during which quoted performance occurred.[52] We are adopting, as proposed, a requirement that this information be adjacent to, and have no less prominence than, the performance quotation itself.[53] These proximity requirements are intended to help investors more readily find information necessary to understand and evaluate the performance data shown, and to remind investors of the limitations of performance data.

While the newly adopted prominence and proximity requirements apply only to certain information expressly required by rule 482, we wish to emphasize that the purpose of these requirements is to encourage fair and balanced advertisements. In that regard, we encourage funds and their underwriters and dealers to review their advertisements to ensure that the format of all the information in an advertisement results in a fair and balanced presentation. For example, an advertisement that hypes extraordinary performance but contains only footnote disclosure of unusual circumstances that have contributed to fund performance may not result in a fair and balanced presentation.[54]

[44] Form N–4, Item 3 [17 CFR 239.17b; 17 CFR 274.11c]; Form N–6, Item 3 [17 CFR 239.17c; 17 CFR 274.11d].

[45] 17 CFR 230.482(b)(5). The presentation requirements for rule 482 are the same as those currently required under rule 134. 17 CFR 230.134(a)(iii). The presentation requirements would replace the current rule 482 requirement that certain required disclosures be ''conspicuous.'' Current 17 CFR 230.482(a)(3).

[46] 17 CFR 230.482(b)(1) and (3). The narrative disclosure covered by the prominence requirement will also include, if applicable, the ''subject to completion'' legend that will be required by rule 482(b)(2) and, if the advertisement is used with a profile under rule 498 under the Securities Act [17 CFR 230.498], disclosure advising investors to consider the fund's investment objectives, risks, and charges and expenses carefully before investing, explaining that the profile contains this and other information about the fund, describing the procedures for investing in the fund, and indicating the availability of the prospectus. 17 CFR 230.482(b)(1)(ii) and (b)(2). In addition, the prominence requirement will extend to disclosures specific to money market funds. 17 CFR 230.482(b)(4).

[47] 17 CFR 230.482(b)(5).

[48] *Id.*

[49] 17 CFR 230.420(b). Rule 420 applies to rule 482 advertisements. Note to rule 482(a) [17 CFR 230.482(a)]. *See* Securities Act Release No. 7289 (May 9, 1996) [61 FR 24652, 24652 (May 15, 1996)] (amending Commission rules to provide that issuer, when delivering electronic version of document, may comply with requirements prescribing physical appearance of paper document by (i) presenting the information in a format readily communicated to investors; and (ii) where legends are required to be printed in red ink or bold-face type, or in a different font size, presenting legends in any manner reasonably calculated to draw attention to them).

[50] 17 CFR 230.482(b)(5).

[51] *Id.* The disclosure subject to the proximity requirement would include all of the disclosures required by paragraphs (b)(3)(i) and (ii) of rule 482. 17 CFR 230.482(b)(3)(i) and (ii). Paragraph (b)(3)(i) of rule 482 requires disclosure that the performance data quoted represents past performance; that past performance does not guarantee future results; in the case of a non-money market fund, that the investment return and principal value of an investment will fluctuate; that current performance may be lower or higher than the performance data quoted; and a toll-free telephone number or Web site where an investor may obtain month-end performance data. Paragraph (b)(3)(ii) of rule 482 requires that, if a sales load or any other nonrecurring fee is charged, the advertisement must disclose the maximum amount of the load or fee. In addition, if the sales load or fee is not reflected, the advertisement must also disclose that the performance data does not reflect its deduction, and that, if reflected, the load or fee would reduce the performance quoted. *Cf.* Proposing Release, *supra* note 7, 67 FR at 36721 n. 82 (omitting to state explicitly that disclosures of paragraph (b)(3)(ii) of rule 482 are covered by proximity requirement).

[52] Current 17 CFR 230.482(d)(1)(i), (e)(1)(iv), (e)(2)(v), (e)(3)(iv), (e)(4)(vi), and (e)(5)(v).

[53] 17 CFR 230.482(d)(1)(iv), (d)(2)(v), (d)(3)(iv), (d)(4)(vi), (d)(5)(v), and (e)(1)(i).

[54] *See* Section II.B., ''Applicability of Antifraud Provisions to Fund Advertising,'' *supra* (discussing Commission's concerns with inadequate disclosure in fund performance advertising of unusual circumstances contributing to performance).

Two commenters also recommended that for purposes of spoken advertisements, such as those on radio and television, we clarify that the proximity requirements would not require that the required performance-related disclosures immediately follow any performance information so long as they are given emphasis equal to that of the major portion of the advertisement. In the case of spoken advertisements, we believe that the required performance-related disclosures should appear immediately after, immediately before, or briefly separated from the performance information. Our goal is that investors be readily able to understand the limitations of past performance data, and we would be concerned if performance information in a spoken advertisement were significantly separated from the required disclosures. On the other hand, we recognize that, in a relatively short, spoken advertisement, funds should have some flexibility to determine the appropriate placement of the required disclosures.

One commenter requested clarification of how the proximity requirements would apply to advertisements consisting of lists of fund performance information over multiple pages. The commenter stated that we should not interpret the amendments to require that the required disclosures be repeated on every page of such a listing, which could result in the required disclosures being viewed as boilerplate and ignored. We agree that, in the case of an advertisement that consists of a list of performance data longer than one page in length, the required performance-related disclosures may appear once, at the beginning of the list, such as on the cover page or first page, provided that the required disclosures are presented in conformity with the prominence requirements of the rule.[55]

Several commenters requested clarification concerning the applicability of the proximity requirements to Web site advertisements, arguing that it should be sufficient if the required performance-related disclosures appear either (i) on a screen that must be accessed prior to the investor accessing the actual performance information, or (ii) through a pop-up message or link on the screen that contains the performance information. As a general matter, we disagree with this interpretation of the proximity requirements and would expect the required performance-related disclosures to appear on the same webpage as the performance data to which the disclosures relate and in close proximity to that data. This will provide investors who are reviewing a Web site advertisement with access to the required disclosure that is substantially equivalent to that provided through a paper advertisement that meets the proximity requirements.

We are also adopting amendments to rule 34b–1 to clarify that the newly adopted prominence and proximity requirements will apply to supplemental sales literature.[56]

D. Reorganization of Rule 482 and Technical Form Amendments

We are adopting, as proposed, amendments reorganizing rule 482 to make it easier to use. We are also adopting, as proposed, amendments to Forms N–1A, N–3, N–4, and N–6 to reflect the removal of the ''substance of which'' requirement in rule 482.[57] In addition, we are adopting additional technical amendments to Forms N–3 and N–4, also to reflect the removal of the ''substance of which'' requirement in rule 482.[58]

E. Rule 482(a)(5)(i) Relating to Variable Insurance Products

Rule 482 generally prohibits a rule 482 advertisement from containing or being accompanied by an application to purchase fund shares.[59] However, the rule contains an exception from the prohibition against applications for unit investment trusts that offer variable annuity or variable life insurance contracts.[60] These contracts permit investors to allocate premiums among a variety of underlying mutual funds in which the unit investment trust invests. The contract prospectuses contain descriptions of the underlying mutual funds, which are considered rule 482 advertisements for the underlying funds.[61] The underlying funds are separately registered as management investment companies on Form N–1A and offer their shares through separate prospectuses. The exception from the prohibition on applications for variable insurance contracts permits an application for the contract (which provides for investor allocation of purchase payments to specific underlying funds) to accompany the contract prospectus, even though the contract prospectus constitutes a rule 482 advertisement for the underlying mutual funds and even though prospectuses for the underlying funds do not accompany the contract prospectus.[62]

By its terms, the exception permits a contract application to accompany a rule 482 advertisement for the underlying funds only when the rule 482 advertisement is a part of the contract prospectus itself. As we noted in the Proposing Release, in recent years, members of the variable insurance industry have argued that it should be permissible for a contract prospectus and application to be accompanied by other rule 482 advertisements for the underlying funds that are not a part of the prospectus itself.[63]

Advocates of this position argue that rule 482 permits either of the following: (i) delivery of a rule 482 advertisement for an underlying fund (without an application); and (ii) delivery of a contract prospectus with an application. Therefore, they argue that, under rule 482, delivery of a rule 482 advertisement for an underlying fund (without an application) could be either preceded or followed by delivery of a contract prospectus with an application. As a result, they conclude that it should be permissible for a contract prospectus and application to be accompanied by other rule 482 advertisements for the underlying funds because whether the delivery of the additional rule 482 advertisements is made together with the contract material or separately from

[55] This clarification is limited to advertisements consisting of multi-page *paper* documents. Applicability of the presentation requirements to Web sites consisting of multiple Web pages is discussed *infra.*

[56] 17 CFR 270.34b–1(a) and (b)(1)(i).

[57] *See* Item 21 of Form N–1A [17 CFR 239.15A; 17 CFR 274.11A]; Items 4 and 25 of Form N–3 [17 CFR 239.17a; 17 CFR 274.11b]; Items 4 and 21 of Form N–4 [17 CFR 239.17b; 17 CFR 274.11c]. The amendments delete Item 25 of Form N–6 [17 CFR 239.17c; 17 CFR 274.11d].

Form N–1A is the registration form for open-end management investment companies. Form N–3 is the registration form for separate accounts organized as management investment companies that offer variable annuity contracts. Form N–4 is the registration form for separate accounts organized as unit investment trusts that offer variable annuity contracts. Form N–6 is the registration form for separate accounts that are registered as unit investment trusts and that offer variable life insurance policies.

[58] *See* General Instruction F and Item 28 of Form N–3 and General Instruction F and Item 24 of Form N–4.

[59] Current 17 CFR 230.482(a)(5); newly adopted 17 CFR 230.482(c).

[60] Current 17 CFR 230.482(a)(5)(i); newly adopted 17 CFR 230.482(c)(1).

[61] *See* Item 5(c) of Form N–4 and Item 4(c) of Form N–6 (requiring brief description of each underlying mutual fund offered through the contract). *See also* Investment Company Act Release No. 14575 (June 14, 1985) [50 FR 26145, 26155 n. 48 and accompanying text (June 25, 1985)] (describing treatment of underlying mutual funds in contract prospectus as omitting prospectuses).

[62] *See* Investment Company Act Release No. 15315 (Sept. 17, 1986) [51 FR 34384, 34391 n. 60 (Sept. 26, 1986)].

[63] Proposing Release, *supra* note, 67 FR at 36723.

it is a question of form rather than substance.

We solicited comment regarding whether it should be permissible for a contract prospectus and application to be accompanied by other rule 482 advertisements for the underlying funds that are not a part of the prospectus itself. Three commenters supported permitting the practice. None opposed permitting the practice.

We agree that rule 482 advertisements for the underlying funds not contained in the contract prospectus itself should be permitted to be delivered simultaneously with the contract prospectus and the accompanying contract application, and we are adopting a revision to rule 482 to clarify that this practice is permitted.[64] We are persuaded that whether the delivery of the additional rule 482 advertisements is made together with the contract material or separately from it is a question of form rather than substance.

F. Compliance Dates

The amendment eliminating the ''substance of which'' requirement from rule 482 will take effect on November 15, 2003. Fund advertisements submitted for publication after March 31, 2004, should comply with all other amendments adopted in this release. This timeframe is consistent with the transition period requested by most commenters. Some variable insurance commenters requested a 12-month transition period, but, in light of the modifications we have made to the proposal (*e.g.,* month-end performance may be provided by Web site rather than by telephone), we do not believe that such a lengthy transition period is necessary.

III. Cost/Benefit Analysis

The Commission is sensitive to the costs and benefits associated with its rules. To provide funds with the ability to disclose more timely information in advertisements, the amendments adopted today remove the ''substance of which'' requirement contained in rule 482 under the Securities Act, and rescind the provisions in rule 134 under the Securities Act that apply to funds. In addition, the amendments reinforce the antifraud protections in the fund advertising rules, and require enhanced disclosure of certain information in fund advertisements designed to encourage advertisements that convey balanced information to prospective investors. Finally, the amendments make certain organizational changes to rule 482 and technical amendments to the registration forms.

In the Proposing Release, we provided an analysis of the costs and benefits of the amendments then proposed, and we requested comments.[65] Three commenters commented directly on this cost/benefit analysis, while others raised cost and benefit issues with regard to specific substantive provisions without specifically mentioning the cost/benefit analysis.

A. Benefits

The amendments modify rule 482 of the Securities Act and related rules and forms to provide more timely, informative, and balanced information in fund advertising for the benefit of investors. The amendments also simplify and clarify the advertising rules, thus, reducing regulatory compliance costs, and these cost savings may be passed on to investors.

1. Enhanced Disclosure of Information to Investors

Currently, the regulations concerning advertising include significant disclosure requirements. The amendments, as adopted, enhance the disclosure required to be provided to investors in fund advertising in several respects:

- *Availability of Monthly Performance Figures.* Performance advertisements will have to disclose a toll-free or collect telephone number or a Web site where an investor may obtain performance data current to the most recent month-end, unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use.[66] Easy access to and awareness of this information will benefit investors not only by providing potentially more timely performance data and reducing the ability of funds to selectively use performance data, but also by highlighting for investors the limitations of relying too heavily on any one set of performance figures. In addition, availability of updated monthly performance data will make it easier for investors to compare performance among competing funds.
- *Legend.* If an advertisement provides performance figures, the amendments require the inclusion of a legend stating that past performance does not guarantee future results, and that current performance may be lower or higher than the data quoted.[67] This legend will benefit investors by making them more aware of the limitations of relying on performance data for investment decisions and thus may result in more informed investment decisions.
- *Availability of Information Regarding Investment Objectives, Risks, and Charges and Expenses.* Rule 482 advertisements will have to highlight the availability of information concerning the fund's investment objectives, risks, and charges and expenses.[68] This provision will benefit investors by directing them to important information that could affect their returns, and will allow investors to more easily compare the objectives, risks, and costs of competing funds.
- *Prominence Requirements.* Rule 482 advertisements will be required to present certain disclosures, including those discussed above, (i) in a size and type style at least as prominent as that used in the major portion of the advertisement (or, in the case of performance-related disclosures, in a type size no smaller than that of the performance data when the performance data is presented in a type size smaller than that of the major portion of the advertisement), or (ii) in the case of radio or television advertisements, with emphasis equal to that used in the major portion of the advertisement.[69] These provisions help to ensure that advertisers do not marginalize or minimize the presentation of the required disclosure described above.
- *Proximity Requirement.* In addition, the required disclosures regarding performance data will have to be presented in the body of the advertisement in close proximity to the performance data and not in a footnote. With regard to television or radio advertisements, the required disclosures will also have to be presented in close proximity to the performance data.[70] The length of and the date of the last day in the base period used in computing yield quotations, average annual total returns, after-tax returns, and other performance measures will have to be adjacent to the performance data.[71] As with other disclosure requirements, this provision will help investors to more easily find information necessary to evaluate the performance figures shown and will

[64] 17 CFR 230.482(c)(1).

[65] *See* Proposing Release, *supra* note, at Section IV, ''Cost/Benefit Analysis,'' 67 FR at 36723–26.

[66] 17 CFR 230.482(b)(3)(i).

[67] *Id.*

[68] 17 CFR 230.482(b)(1)(i). This disclosure would also be required in an advertisement used with a profile pursuant to rule 498 under the Securities Act. 17 CFR 482(b)(1)(ii).

[69] 17 CFR 230.482(b)(5).

[70] *Id.*

[71] 17 CFR 230.482(d)(1)(iv), (d)(2)(v), (d)(3)(iv), (d)(4)(vi), (d)(5)(v), and (e)(1)(i).

help to remind investors of the limitations of performance data.

The benefits of these enhanced disclosure requirements to investors may be limited by the extent to which funds currently provide this disclosure voluntarily. Staff discussions with members of the fund industry indicate that most investment companies already comply with many of the requirements of the amendments, by, for example, calculating performance data on at least a monthly basis, inserting warnings in advertisements that past performance is no guarantee of future performance, and operating Web sites and telephone call banks.

Nevertheless, in the case of investment companies that do not already voluntarily comply with the requirements of the amendments, the enhanced disclosure requirements provide two benefits to investors. To the extent investment decisions are made based on advertising, the improved disclosure will result in investors making better informed investment decisions, and therefore in a more efficient distribution of assets by investors among different funds. The transparency resulting from the enhanced disclosure in fund advertising may, in turn, also contribute to increased competition among funds and result in a more efficient allocation of resources among competing investment products. Although it is not possible to precisely quantify the beneficial effects of more efficient allocation of investors' assets and increased competition, they may be significant, given the size of the mutual fund industry.[72]

2. Simplification and Clarification of Fund Advertising Rules

The amendments add clarifying language to rule 482 and rule 156 under the Securities Act and rule 34b–1 under the Investment Company Act to reemphasize the applicability of the antifraud provisions of the federal securities laws to fund advertisements. In addition, the amendments reorganize rule 482 to make it easier for funds to apply, by adding headings, reordering provisions, and clarifying certain language.

The reemphasis of the applicability of the antifraud provisions may help to deter presentation of misleading information in advertisements. The amendments to reorganize rule 482 may aid funds and others in understanding and complying with the advertising rules, making it easier and cheaper for funds to advertise. Both of these improvements may, in turn, contribute to an increased flow of accurate and useful investment information to investors, which may lead to better-informed investment decisions and amplify the previously discussed benefits of efficient asset allocation.[73] Although difficult to quantify, this easing of regulation may provide some reduction of burden to the funds that choose to advertise.

3. Elimination of the ''Substance of Which'' Requirement and the Rescission of Rule 134 Provisions That Apply to Funds

To simplify the current structure of fund advertising rules and to provide funds the ability to disclose more timely information in advertisements, the amendments also remove the provision contained in rule 482 limiting advertisements only to that information the ''substance of which'' is in the statutory prospectus. We believe that, with the elimination of the ''substance of which'' requirement from rule 482, funds will no longer need to rely on rule 134. As a result, the amendments also remove the provisions of rule 134 that apply specifically to funds and exclude both registered investment companies and business development companies from relying on rule 134.

The elimination of the ''substance of which'' requirement eliminates requirements for funds to include or update advertising related information in their prospectus or SAI, both in the initial registration statements and in post-effective amendments, before issuing an advertisement to the public. This will reduce filing costs for funds, including both internal costs and external costs such as outside legal fees. The amendments will also reduce the costs associated with printing and distributing prospectuses and SAIs. The elimination of unnecessary information from the prospectus or SAIs, because it will remove distracting clutter, may make the remaining information more understandable to investors.

Finally, the rescission of the rule 134 provisions that apply to funds consolidates the regulation of most fund advertising in rule 482, which will cover advertisements now covered by rule 134. This simplification will contribute to the benefits of easier and cheaper advertising as discussed in section III.A.2 (''Simplification and Clarification of Fund Advertising Rules'') above, principally by removing the unnecessary restrictions on the content of the advertisements and the unnecessary distinction with regard to their legal classification. The transfer of fund advertising regulation from rule 134 to rule 482 may also enhance investor protection by subjecting fund advertisements formerly governed by rule 134 to potential civil liability under section 12(a)(2) of the Securities Act.[74]

One commenter disagreed that there would be a benefit to funds as a result of having to comply with only one advertising rule. The commenter stated that, in its experience, there is no correlation between the number of advertising rules and the costs of advertising. We do not believe, however, that this commenter's particular experience negates our conclusion with regard to the potential benefits of simplifying the regulation of fund advertising. In compiling the cost/benefit analysis, the staff found that some funds estimated no savings resulting from the amendments intended to simplify and clarify the advertising rules; these amendments included the rescission of rule 134 as it applies to funds, as well as other amendments such as the removal of the ''substance of which'' requirement. On the other hand, the staff also found that others did anticipate such a savings. Our estimate below represents an average, overall benefit for all the amendments intended to simplify and clarify the advertising rules and, as such, takes into account those funds that foresee no benefits from the simplification and clarification of the rules.

4. Quantification of Benefits

The Commission estimates that, on an annual basis, the amendments will save funds approximately 1.96 burden hours, or $73.03, per investment company in internal costs but only negligible amounts in external costs. We estimate that 5,025 investment companies will be affected by the amendments, and, thus, the Commission estimates that the annual internal burden associated with rule 482 will decrease by approximately 9,849 (1.96 hours per investment

[72] *See* Investment Company Institute, *2001 Mutual Fund Fact Book* at 63.

[73] The trade-off between lower advertising burdens and increased advertising activity is complex and further complicated by business cycles and marketing strategy among other factors. We believe, however, that investors and funds will enjoy benefits in any event—either resources will be saved in reducing the costs and burdens of advertising or they will be spent to increase the amount and timeliness of information provided to investors in advertising.

[74] The benefits of potential direct investor suits in both remedying fraudulent advertising by funds and deterring such advertising in the future are difficult to quantify, but may be significant. The benefits will be reduced to the extent that the potential liability increases litigation and insurance costs for funds. However, because suits based on misleading advertising are relatively rare, we continue to estimate that the associated costs will be minimal.

company × 5,025 investment companies) burden hours.[75] These burden hours represent a monetary savings of approximately $366,974 (9,849 hours × $37.26 wage rate) per year.[76]

B. Costs

The Commission estimates that the costs of the amendments, in the aggregate, will be minimal and limited in duration. The Commission estimates that funds will incur one-time costs in modifying their current rule 482 advertisements to meet the new disclosure and presentation requirements, although many funds already provide the disclosure that would be required. For example, funds may have to modify their layouts and typesetting in order to convert existing advertisements to meet the requirements of the rule, or alternatively, replace existing advertisements more quickly than they otherwise would.

The requirement for funds to provide access to performance figures that are current as of the last month end may also impose costs, some of which will be ongoing, both to generate such figures on a monthly basis and to provide the information by a toll-free or collect telephone number or on a Web site. This could include costs for computer time, accounting personnel, information technology staff, and additional computer and telephone equipment. The cost/benefit analysis in the Proposing Release estimated that the costs of making updated performance information available would be negligible because many, if not most, funds already provide this or more current performance information through these means and, therefore, the marginal cost for most funds for making updated performance information available is expected to be negligible.

Several commenters, however, argued that the costs associated with the proposed requirement that updated performance information be provided by toll-free or collect telephone number would be significant.[77] Such costs, commenters stated, could include those of setting up and maintaining an automated telephone system to provide the updated performance data. While two commenters did provide some specific estimates of their own anticipated costs of compliance with this proposed requirement, none of the commenters gave cost figures applicable to the industry as a whole.[78] Moreover, none of the commenters estimated the number of funds that would incur such costs. The cost/benefit analysis in the Proposing Release reached its conclusion, in part, because information gathered by the staff indicated that many, if not most, funds already had toll-free telephone systems and used them to distribute performance data that was at least as current as the month-end. The information provided by the commenters does not persuade us that our conclusion regarding aggregate costs was incorrect.

In any event, we have modified the proposal to address these commenters' concerns. The amendments, as adopted, will not require month-end performance data to be made available by toll-free or collect telephone. Rather, funds may make the information available by toll-free or collect telephone number or on the fund's Web site. In addition, we have modified the proposal to provide that where the fund advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use, the fund is not also required to make such data available by telephone or through its website. We expect that both of these revisions to the proposed amendments will further reduce any cost burden associated with disclosing month-end performance data.

The elimination of the ''substance of which'' requirement and the rescission of rule 134 as applicable to funds may require some funds to incur costs to convert many of their rule 134 advertisements to rule 482 advertisements. These costs, however, should be minimal and non-recurring, since the rule 482 requirements would permit advertisements that are not significantly different from those currently permitted under current rule 134.

One commenter expressed concern regarding the proposed language of the new notes to rule 482(a) and rule 34b–1 stating that compliance with the rules does not relieve the fund, underwriter, or dealer of the obligation to ensure that the advertisement is not false or misleading. The commenter was concerned that the new notes may expand liability for independent directors in connection with fund advertisements, resulting in a significant cost burden. However, as we indicate above,[79] the new notes are to make clear that liability for advertisements is based on the federal securities laws and that the advertising rule amendments are not intended to change the existing liability standards.

With regard to the rescission of rule 134 as it applies to funds, a number of commenters expressed concern over costs associated with the higher standard of liability under rule 482, but did not provide any specific figures or other quantitative analysis. As we note

[75] The estimate of the number of investment companies is based on data derived from the Commission's EDGAR filing system. The estimate of the decrease in burden hours is based on information gathered from the fund industry by the Commission staff and from the staff's experience with the various advertising regulations.

[76] These figures are based on a Commission estimate of 5025 investment companies and an estimated hourly wage rate of $37.26. The estimated wage rate figure is based on published hourly wage rates for in-house attorneys ($33.66), paralegals ($19.93), and compliance examiners ($23.16) and the estimate, based on the Commission staff's discussions with certain fund complexes, that attorneys would account for 50% of hours spent on advertising regulation and that paralegals and compliance examiners would account for the remaining 50% in equal ratio, yielding a weighted wage rate of $27.60 (($33.66 × .50) + ($19.93 × .25) + (23.16 × .25) = $27.60). Securities Industry Association, *Report on Office Salaries in the Securities Industry 2000* (Sept. 2002); Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2000* (Sept. 2002). This weighted wage rate was then adjusted upward by 35% for overhead, reflecting the costs of supervision, space, and administrative support, to obtain the total per hour internal cost of $37.26 ($27.60 × 1.35 = $37.26).

The benefits estimated in this analysis differ from those provided in the Proposing Release because of intervening changes in the number of investment companies and the wage rates. Although the Commission modified the proposed amendments, these modifications did not affect our estimates of the benefits associated with the amendments. Some commenters indicated that the cost of making updated month-end information available by toll-free or collect telephone number, as the proposal would have required, would be significant. Nonetheless, the modification to the proposed requirement to permit funds to make month-end performance data available through a toll-free or collect telephone number or Web site did not affect our estimates of costs or benefits. The staff indicated in the Proposing Release that it expected the costs of making updated month-end information available by toll-free or collect telephone number would be negligible, because many, if not most, funds already provide month-end or more current performance information through those means. See Proposing Release, *supra* note 7, 67 FR at 36726.

[77] On the other hand, one commenter did not object to the telephone-only requirement, indicating that making updated monthly performance data available in the manner contemplated by the proposal would be affordable for all funds, regardless of size.

[78] One commenter estimated that the cost of installing an automated voice response telephone system for an insurance company to provide performance information about funds underlying variable contracts would be $500,000. Another commenter cited that $500,000 estimate and added that the estimate is for hardware and software requirements only and does not include personnel expenses and further stated that expenses for companies that do not presently have automated telephone systems would likely be several times higher. It appears that the commenter that calculated the $500,000 estimate intended that this figure represent the cost the commenter itself would incur and not a projection that every insurance company or every fund would incur a $500,000 expense. Another commenter, a fund supermarket, estimated the cost of updating its website to provide toll-free numbers for the many funds offered would amount to $70,000.

[79] *See* Section II.B., ''Applicability of Antifraud Provisions to Fund Advertising,'' *supra.*

above, however, suits based on misleading advertising are relatively rare and we continue to estimate that the associated costs will be minimal.[80]

We further note that the amendments, as adopted, extend the compliance period to two full calendar quarters after adoption, lowering conversion costs by allowing more time for planning and enabling funds to come into compliance in the regular course of quarterly advertising cycles. This extension reinforces our estimate that such expenses will be minimal.

The Commission estimates the one-time switchover costs for each investment company attributable to the amendments will be approximately 2.18 hours, or $81.23 (2.18 hours x $37.26 wage rate), in internal costs, and $2,417 in external costs.[81] In total this represents a one-time cost of approximately 10,955 (2.18 hours x 5,025 investment companies) internal burden hours (translating into approximately $408,183 (10,955 hours x $37.26 wage rate) in internal costs) and $12,145,425 ($2,417 cost per investment company x 5,025 investment companies) in external costs.[82]

C. Conclusion

The Commission expects that the advertising rule amendments will encourage more informed and efficient investing, while easing the regulatory burden on fund advertising, and that these likely benefits would justify the associated costs.

IV. Consideration of Effects on Efficiency, Competition, and Capital Formation

Section 2(c) of the Investment Company Act, Section 2(b) of the Securities Act, and Section 3(f) of the Exchange Act require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[83]

In the Proposing Release, we requested comment on whether the proposed amendments would promote efficiency, competition, and capital formation. The Commission received one letter specifically addressing the effect of the proposed amendments on competition. This commenter objected to the rescission of rule 134 for funds on the grounds, among others, that investment companies would be treated less favorably than other issuers engaged in ongoing offerings of their securities that would continue to be able to rely on rule 134.

The amendments the Commission is adopting today seek to improve fund advertising by enhancing disclosure requirements and by simplifying and clarifying the rules, including elimination of the requirement that rule 482 advertisements contain only information the ''substance of which'' is included in the statutory prospectus. These changes may improve efficiency. The rule simplifications may lower the regulatory burden on funds engaged in advertising, freeing resources for more productive uses. For example, funds would no longer have to update their prospectuses or SAIs in order to change the types of performance information in advertisements. The enhanced disclosure requirements may provide greater and timelier access by investors to updated performance figures, which would promote more efficient allocation of investments by investors and more efficient allocation of assets among competing funds. The amendments may also improve competition, as enhanced disclosure may prompt funds to seek to provide better-informed investors with improved products and services. Finally, the effects of the amendments on capital formation are unclear. Although we believe that the amendments would benefit investors, the magnitude of the effect of the amendments on efficiency, competition, and capital formation is difficult to quantify, particularly given that most funds may already comply with at least some of the new disclosure requirements.

V. Paperwork Reduction Act

A. Introduction

As explained in the Proposing Release, certain provisions of the amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 [44 U.S.C. 3501 *et seq.*]. The titles for the existing collections of information are: (i) ''Form N–1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Open-End Management Investment Companies''; (ii) ''Form N–2—Registration Statement of Closed-End Management Investment Companies'' [84]; (iii) ''Form N–3—Registration Statement of Separate Accounts Organized as Management Investment Companies''; (iv) ''Form N–4—Registration Statement of Separate Accounts Organized as Unit Investment Trusts''; (v) ''Form N–6 Under the Investment Company Act and the Securities Act of 1933, Registration Statement of Insurance Company Separate Accounts Registered as Unit Investment Trusts that Offer Variable Life Insurance Policies''; and (vi) ''Rule 34b–1 of the Investment Company Act of 1940, Sales Literature Deemed To Be Misleading.'' A new collection of information has been created entitled ''Rule 482 under the Securities Act of 1933, Advertising by an Investment Company.''[85]

Form N–1A (OMB Control No. 3235–0307), Form N–2 (OMB Control No. 3235–0026), Form N–3 (OMB Control No. 3235–0316), Form N–4 (OMB Control No. 3235–0318), and Form N–6 (OMB Control No. 3235–0503) were adopted pursuant to section 5 of the Securities Act [15 U.S.C. 77e] and section 8(a) of the Investment Company Act [15 U.S.C. 80a–8(a)]. Rule 482 of Regulation C (OMB Control No. 3235–0565) was adopted pursuant to section 10(b) of the Securities Act [15 U.S.C.

[80] *See supra* note 74.

[81] These figures are based on averages derived from information gathered from several members of the fund industry by the Commission staff and from the staff's experience with the various advertising rules. Internal costs include, for example, the cost of reviewing all fund advertisements for compliance with the revised rules. External costs include, for example, the costs of typesetting and printing for new fund advertisements.

The costs estimate in this analysis differ from those provided in the Proposing Release because of intervening changes in the number of investment companies and the wage rates. Although the Commission modified the proposed amendments, these modifications did not affect our estimate of the costs associated with the amendments. *See supra* note 76.

[82] *See* discussion in notes 75 and 76, *supra,* regarding number of investment companies, wage rates, and previous estimates of costs and benefits.

[83] 15 U.S.C. 77b(b), 78c(f), and 80a–2(c).

[84] Although the amendments do not amend Form N–2, that form is included in this Paperwork Reduction Act (''PRA'') summary because the PRA burden for rule 482 has previously been included in the various investment company registration statement forms affected by rule 482, including Form N–2. As discussed below, the Commission has transferred the PRA burden associated with rule 482 from all of these registration statement forms to a new rule 482 category.

[85] The amendments modify rule 482, which is part of Regulation C under the Securities Act of 1933. Regulation C describes the disclosure that must appear in registration statements under the Securities Act and Investment Company Act. The PRA burden associated with rule 482 was previously included in the various investment company registration statement forms, not in Regulation C. However, because the amendments eliminate the rationale for allocating the PRA burden for rule 482 to the registration forms, the Commission has transferred the burden associated with rule 482 to a new category. The total PRA burden for each of the registration forms is different from that included in the PRA submissions that preceded this analysis because of the transfer of burden associated with rule 482, as well as the intervening changes in the number of filings. However, the newly adopted amendments to the forms do not have any effect on the burden hours for the forms.

77j(b)]. Rule 34b–1 (OMB Control No. 3235–0346) was adopted pursuant to section 34(b) of the Investment Company Act [15 U.S.C. 80a–33(b)].[86]

We published notice soliciting comments on the collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. OMB approved these collection requirements.

The amendments modify rule 482 under the Securities Act and related rules and forms, to provide more timely, understandable, and balanced information in fund advertising for the benefit of investors, while simplifying and clarifying the advertising rules for the benefit of funds.[87] First, the amendments enhance the disclosure that funds must provide in advertisements, including by highlighting the availability of information concerning investment objectives, risks, and charges and expenses, and requiring an amended legend stating that past performance does not guarantee future results. The amendments also set forth requirements to help ensure that funds present these and other required disclosures at least as prominently as the material included in the body of the advertisement. Second, if a fund advertisement includes performance data, the fund must make month-end performance figures available to investors by a toll-free or collect telephone number or on a Web site, and disclose the availability of this month-end performance data in the advertisement, unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use. Third, the amendments add clarifying language to rule 482 under the Securities Act and rule 34b–1 under the Investment Company Act to reemphasize the separate applicability of the antifraud provisions of the federal securities laws, and amend rule 156 under the Securities Act to provide further guidance regarding the factors to be weighed in determining whether a statement involving a material fact in investment company sales literature is or might be misleading. Fourth, the amendments (i) remove the provision contained in rule 482 that limits rule 482 advertisements to only that information the ''substance of which'' is in the statutory prospectus, and (ii) rescind the provisions in rule 134 under the Securities Act that apply to funds. Fifth, the amendments clarify portions of rule 482 (without changing their content) by adding headings, reordering provisions, and simplifying certain provisions. Finally, the amendments make technical and conforming changes to Forms N–1A, N–3, N–4, and N–6.

Compliance with the disclosure requirements is mandatory. Responses to the disclosure requirements will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

B. The Registration Forms Burden

Previously, the PRA burdens imposed by rule 482 were accounted for under the various registration forms used by investment companies affected by the rule: Form N–1A, Form N–2, Form N–3, Form N–4, and Form N–6. We have transferred the burden hours associated with rule 482 from these forms to a separate rule 482 category as follows:

Form	Hours transferred (hours)
Form N–1A	177,514
Form N–2	1,014
Form N–3	792
Form N–4	36,630
Form N–16	9,065
Total hours transferred to new rule 482 category	225,015

The information required to be filed with the Commission pursuant to the information collections contained in the registration forms permits the verification of compliance with securities law requirements and assures the public availability and dissemination of the information.

1. Form N–1A

The purpose of Form N–1A is to meet the registration and disclosure requirements of the Securities Act and the Investment Company Act and to provide investors with information necessary to evaluate an investment in the fund. The respondents to this information collection are open-end funds registering with the Commission. Compliance with the disclosure requirements on Form N–1A is mandatory. Responses to the disclosure requirements are not confidential.

The previous hour burden for preparing an initial Form N–1A filing was 824 burden hours per portfolio, and the Commission attributed 23 of these burden hours per portfolio to compliance with rule 482, reducing the remaining burden hours per portfolio to 801.[88] The previous annual hour burden for preparing post-effective amendments on Form N–1A was 122 hours per portfolio, and the Commission attributed 23 of these burden hours per portfolio to compliance with rule 482, reducing the remaining burden hours per portfolio to 99. The Commission estimated that, on an annual basis, 193 portfolios file initial registration statements on Form N–1A and 7,525 file post-effective amendments on Form N–1A. Thus, the burden hours attributable to rule 482 transferred from Form N–1A to the new rule 482 collection of information amounted to 177,514 ((23 hours x 193 portfolios) + (23 hours x 7,525 portfolios)). After shifting the rule 482 burden hours to a new collection of information, the total burden hours that remain allocated to Form N–1A for all purposes unassociated with rule 482 amount to 899,568 ((801 hours x 193 portfolios) + (99 hours x 7,525 portfolios)).

Except for the transfer of PRA burden from Form N–1A to the new collection of information for rule 482, the Commission estimates no effect on the remaining PRA burden for Form N–1A from the amendments. The change in PRA burden resulting from the amendments is accounted for under the new rule 482 collection of information.

2. Form N–2

The purpose of Form N–2 is to meet the registration and disclosure requirements of the Securities Act and the Investment Company Act and to enable funds to provide investors with information necessary to evaluate an investment in the fund. The respondents to this information collection are closed-end funds registering with the Commission. Compliance with the disclosure requirements of Form N–2 is mandatory. Responses to the disclosure requirements are not confidential.

The previous hour burden for preparing an initial registration statement on Form N–2 was 542.4 burden hours per filing, and the previous hour burden for preparing a post-effective amendment on Form N–2

[86] Although this release also amends rule 156, there are no burden hours assigned to that rule by OMB and it has no OMB control number.

[87] The Commission is adopting amendments to rules 134, 156, and 482 under the Securities Act, rule 34b–1 under the Investment Company Act, and Forms N–1A, N–3, N–4, and N–6 under the Investment Company Act and Securities Act.

[88] The estimate of the burden hours attributable to compliance with rule 482 for filings on Forms N–1A, and Form N–2 were based on information supplied to the Commission staff by members of the fund industry and the staff's experience with these registration forms.

was 107.4 hours per filing. The Commission attributed 5.7 of these burden hours per filing to compliance with rule 482, reducing the burden hours per filing to 536.7 and 101.7, respectively. The Commission estimated that, on an annual basis, 140 respondents file an initial registration statement on Form N–2 and 38 file post-effective amendments on Form N–2. Thus, the burden hours attributable to rule 482 transferred from Form N–2 to the new rule 482 collection of information amounted to 1,014 ((5.7 hours × 140 filings) + (5.7 hours × 38 filings)). After shifting the rule 482 burden hours to a new collection of information, the total burden hours that remain allocated to Form N–2 for all purposes unassociated with rule 482 amount to 79,003 ((536.7 hours × 140 filings) + (101.7 hours × 38 filings)).

Except for the transfer of PRA burden from Form N–2 to the new collection of information for rule 482, the Commission estimates no effect on the remaining Form N–2 PRA burden from the amendments. The change in PRA burden resulting from the amendments is accounted for under the new rule 482 collection of information.

3. Form N–3

The purpose of Form N–3 is to meet the registration and disclosure requirements of the Securities Act and the Investment Company Act and to enable funds to provide investors with information necessary to evaluate an investment in the fund. The respondents to this information collection are separate accounts, organized as management investment companies and offering variable annuities, registering with the Commission. Compliance with the disclosure requirements of Form N–3 is mandatory. Responses to the disclosure requirements are not confidential.

The previous annual hour burden for preparing an initial registration statement on Form N–3 was 910.5 hours per portfolio, and the Commission attributed 3.3 of these burden hours per portfolio to compliance with rule 482, reducing the remaining burden hours per portfolio to 907.2.[89] The previous annual hour burden for preparing post-effective amendments on Form N–3 was 151.7 hours per portfolio, and the Commission attributed 3.3 of these burden hours per portfolio to rule 482, reducing the remaining burden hours per portfolio to 148.4. The Commission estimated that, on an annual basis, no initial registration statements are filed on Form N–3 and 60 post-effective amendments, including 240 portfolios, are filed on Form N–3. Thus, the burden hours attributable to rule 482 transferred from Form N–3 to the new rule 482 collection of information amounted to 792 (3.3 hours × 240 portfolios). After shifting the rule 482 burden hours to a new collection of information, the total burden hours that remain allocated to Form N–3 for all purposes unassociated with rule 482 amount to 35,616 (148.4 × 240 portfolios) hours.

Except for the transfer of PRA burden from Form N–3 to the new collection of information for rule 482, the Commission estimates no effect on the remaining PRA burden for Form N–3 resulting from the amendments. The change in PRA burden resulting from the amendments is accounted for under the new rule 482 PRA collection of information.

4. Form N–4

The purpose of Form N–4 is to meet the registration and disclosure requirements of the Securities Act and the Investment Company Act and to enable separate accounts issuing variable annuity contracts to provide investors with information necessary to evaluate an investment in a contract. The respondents to this information collection are separate accounts, organized as unit investment trusts and offering variable annuities, registering with the Commission. Compliance with the disclosure requirements of Form N–4 is mandatory. Responses to the disclosure requirements are not confidential.

The previous hour burden for preparing an initial Form N–4 filing was 298 burden hours per filing, and the Commission attributed 24.8 of these burden hours per filing to rule 482, reducing the remaining burden hours per filing to 273.2.[90] The previous annual hour burden for preparing post-effective amendments on Form N–4 was 219.8 hours per filing, and the Commission attributed 24.8 of these burden hours per filing to rule 482, reducing the remaining burden hours per filing to 195. The Commission estimated that, on an annual basis, 157 respondents file initial registration statements on Form N–4 and 1320 respondents file post-effective amendments on Form N–4. Thus, the burden hours attributable to rule 482 transferred from Form N–4 to the new rule 482 collection of information amount to 36,630 ((24.8 hours × 157 filings) + (24.8 hours × 1320 filings)). After shifting the rule 482 burden hours to a new collection of information, the total hour burden that remains allocated to Form N–4 for all purposes unassociated with rule 482 amount to 300,292 ((273.2 hours × 157 filings) + (195 hours × 1320 filings)).

Except for the transfer of PRA burden from Form N–4 to the new collection of information for rule 482, the Commission estimates no effect on the remaining PRA burden for Form N–4 resulting from the amendments. The change in PRA burden resulting from the amendments is accounted for under the new rule 482 PRA collection of information.

5. Form N–6

The purpose of Form N–6 is to meet the registration and disclosure requirements of the Securities Act and the Investment Company Act and to enable separate accounts issuing variable life insurance policies to provide investors with information necessary to evaluate an investment in a policy. The respondents to this information collection are separate accounts, organized as unit investment trusts and offering variable life insurance policies, registering with the Commission. Compliance with the disclosure requirements of Form N–6 is mandatory. Responses to the disclosure requirements are not confidential.

The previous hour burden for preparing an initial registration statement on Form N–6 was 800 burden hours per filing and the hour burden for a post-effective amendment on Form N–6 was 100 hours per post-effective amendment filed as an annual update, and 10 hours per post-effective amendment filed for other purposes. The Commission attributed 35 of these burden hours per filing to compliance with rule 482 for both initial registration statements and post-effective amendments that are annual updates.[91] The Commission estimated no burden hours associated with rule 482 for additional post-effective amendments that are not annual updates. The Commission estimated that, on an annual basis, 59 initial registration

[89] Estimates of the burden hours attributable to rule 482 for Forms N–3, N–4, and N–6 were derived by estimating the total burden hours for compliance with rule 482 for all variable insurance separate accounts, based on the staff's discussions with a member of the variable insurance products industry that issues both variable annuities and variable life insurance policies. We then converted this estimated number of burden hours associated with rule 482 into a percentage of the total burden hours associated with Forms N–3, N–4, and N–6 collectively. We allocated the rule 482 burden to each form by multiplying the total burden of each form by this percentage. However, we excluded burden hours attributable to initial filings on Form N–3 because we anticipated no such filings.

[90] *See* discussion in note 89, *supra.*

[91] *See* discussion in note 89, *supra.*

statements will be filed on Form N–6 and 500 post-effective amendments will be filed on Form N–6, 200 as annual updates and 300 as additional post-effective amendments.[92] Thus, the burden hours attributable to rule 482 transferred from Form N–6 to the new rule 482 collection of information amounted to 9,065 ((35 hours × 59 filings) + (35 hours × 200 filings)). The total hour burden that remains allocated to Form N–6 for all purposes unassociated with rule 482 is 61,135 ((765 hours × 59 filings) + (65 hours × 200 filings) + (10 hours × 300 filings)) hours.

Except for the transfer of PRA burden from Form N–6 to the new collection of information for rule 482, the Commission estimates no effect on the remaining PRA burden for Form N–6 resulting from the amendments. The change in PRA burden resulting from the amendments is accounted for under the new rule 482 PRA collection of information.

C. Change in Burden Attributable to Amendments

The information required by the amendments to the advertising rules is primarily for the use and benefit of investors. The Commission is concerned that investors receive information in advertisements that is accurate, balanced, timely, not misleading, and otherwise appropriate and helpful in making investment decisions. The additional information that is required to be disclosed to investors pursuant to the collection of information provisions of the rules affected by the amendments, addresses these concerns regarding investor protection.

1. Rule 34b–1

Rule 34b–1, as amended, contains collection of information requirements. The rule applies to supplemental sales literature, *i.e.*, sales literature that is preceded or accompanied by the statutory prospectus, and requires the inclusion of standardized performance data in sales literature that includes performance data. Compliance with rule 34b–1 is mandatory for every registered investment company that issues supplemental sales literature. Responses to the disclosure requirements will not be kept confidential.

We estimated that approximately 37,000 responses are filed annually pursuant to rule 34b–1, and the burden per response is 2.9 hours. The amendments change rule 34b–1 to add language to clarify the Commission's present interpretation of its rules, namely, that compliance with rule 34b–1 does not relieve the fund, underwriter, or dealer of any obligations with respect to the sales literature under the antifraud provisions of the federal securities laws. This added language merely confirms the present state of the law and imposes no additional burden hours. In addition, the amendments to rule 34b–1 make the newly adopted changes in the narrative disclosure and presentation requirements under rule 482 applicable to supplemental sales literature, but these narrative disclosure and presentation requirements also will impose no additional burden for purposes of rule 34b–1.[93]

2. Rule 482

Rule 482, as amended, contains collection of information requirements in that it permits a fund to advertise information subject to certain disclosure requirements. Compliance with rule 482 is mandatory for every fund that issues rule 482 advertisements. Responses to the disclosure requirements will not be kept confidential.

The Commission currently estimates that 41,484 responses are filed annually by 5,025 funds pursuant to rule 482. The burden associated with rule 482 was previously included in the collections of information for the investment company registration statement forms, but at the time of the Proposing Release the Commission transferred this PRA burden to a new rule 482 collection of information. The Commission then adjusted this amount to account for the estimated savings of 6,890 burden hours associated with the proposed amendments to arrive at a total annual burden for rule 482 of 218,125.[94]

The Commission's per-investment-company burden estimates calculated at the time of the Proposing Release remain unchanged.[95] However, the Commission is adjusting the total annual burden hours associated with rule 482 to reflect a decrease in the number of investment companies from 5,587 to the current number of 5,025. The Commission estimates an increase of 3,653 (0.727 hours per fund × 5,025 funds) annual burden hours will be required to comply with the amendments as adopted, as a result of one-time switchover cost of 10,959 burden hours amortized over a three-year period. The Commission also estimates a decrease of 9,849 annual burden hours (1.96 hours per fund × 5,025 funds) resulting from the amendments as adopted due to the simplification and clarification of rule 482, including the removal of the ''substance of which'' requirement. The net result would be an annual decrease of approximately 6,196 (3,653 hours increase − 9,849 hours decrease) hours.[96] The current estimate of the total annual burden for rule 482, as amended, is 218,819.[97]

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis (''Analysis'') has been prepared in accordance with 5 U.S.C. 604, and relates to the Commission's

[92] Based on its analysis of data from the EDGAR filing system from 2000–2001, the Commission estimated that there are approximately 200 variable life insurance policies, with respect to which at least one post-effective amendment must be filed per year. In addition, the Commission estimated, also based on EDGAR filing data, that 300 additional post-effective amendments are filed for these variable life insurance policies each year, generally to make non-material changes to their registration statements.

[93] The secondary effect on the burden attributable to rule 34b–1 due to the amendments to rule 482 is estimated to be negligible. Both before and after the amendments, rule 34b–1 requires any performance data included in supplemental sales literature to be accompanied by performance data computed using the standardized formulas for advertising performance under rule 482. We estimate that the changes in types of disclosure and presentation that would be required by the amendments to rule 482 would not affect the amount of review necessary for funds to ensure compliance with rule 34b–1. Therefore, all changes in burden associated with the amendments are accounted for under the category associated with the principal rule generating the burden, *i.e.,* the new rule 482 collection of information.

[94] The Commission calculated this adjustment at the proposing stage by estimating a burden hour annual increase per investment company of 0.727 hours and a burden hour annual decrease per investment company of 1.96, and then multiplying these figures by the then current number of investment companies (5,587) to arrive at an estimated net decrease of approximately 6,890 total annual burden hours (0.727 × 5,587–1.96 × 5,587 = −6,889). The Commission then subtracted this estimated annual net decrease from the rule 482 burden hours that had been transferred from the registration forms, yielding the total annual rule 482 burden of 218,125 (225,015 hours transferred—6,890 decrease = 218,125), which was used in the Proposing Release.

[95] The estimates of changes in the burden hours per investment company attributable to rule 482 are based on a survey of information conducted by the Commission staff of members of the mutual fund and variable insurance products industry at the time of the Proposing Release. The Commission estimates no change in these per-investment-company burden rates due to changes to the amendments between the proposing stage and this adoption.

[96] This estimated net decrease of 6,196 hours compares to an estimated net decrease of 6,890 in the Proposing Release. The difference of 694 hours is a result of the change in the number of investment companies since the time of the Proposing Release.

[97] 218,125 total hours (Proposing Release estimate) + 694 hours (lower net decrease) as explained in note , *supra.*

rule and form amendments under the Securities Act and the Investment Company Act to provide investment companies with the ability to disclose more timely information in advertisements and to reinforce the antifraud protections that apply to investment company advertisements. The amendments implement a provision of NSMIA [98] by eliminating the requirement in rule 482 under the Securities Act that investment company advertisements contain only information the ''substance of which'' is included in the statutory prospectus. The amendments also require enhanced disclosure in investment company advertisements and are designed to encourage advertisements that convey balanced information to prospective investors, particularly with respect to past performance. The Commission is also rescinding the provisions in rule 134 under the Securities Act that apply to investment companies.

The Commission prepared an Initial Regulatory Flexibility Analysis (''IRFA'') in accordance with 5 U.S.C. 603. The Proposing Release included the IRFA and solicited comments on it. The Commission received one comment specifically addressing the IRFA.

A. Reasons for and Objectives of Amendments

The Commission amended the advertising regulations described above to achieve two separate objectives. First, the Commission is simplifying and clarifying the rules governing fund advertising. Specifically, the amendments remove the ''substance of which'' requirement of rule 482 and rescind the provisions of rule 134 that apply to investment companies, following Congress' directive in NSMIA to adopt rules or regulations allowing funds the use of a section 10(b) prospectus that may include information the substance of which is not included in the statutory prospectus.[99] We are also adopting technical amendments to reorganize and clarify the language of rule 482. These simplifying and clarifying amendments will aid funds and others in understanding and complying with the advertising rules, making it easier and cheaper for funds to advertise.

Second, the Commission is enhancing the disclosure required in rule 482 advertising. Specifically, we are requiring rule 482 advertisements to: (i) Highlight the availability of certain additional information, such as that regarding objectives, risks, charges, and expenses, as well as updated monthly performance figures; (ii) provide an amended legend; and (iii) present certain required disclosure with prominence equal to the major portion of the advertisement. We are adopting these amendments because of our concern about fund performance advertising that could create unrealistic investor expectations or even mislead potential investors. The enhanced disclosure requirements will help to ensure that investors find advertising clear, easy to use, and balanced, and that investors are made aware of important and timely information necessary to make informed investment decisions.

B. Significant Issues Raised by Public Comment

The Commission requested comment with respect to the IRFA prepared and published with the Proposing Release. Two commenters indicated that the cost of complying with the proposed requirement that updated information be made available through a toll-free or collect telephone number would be particularly burdensome for smaller fund complexes, stating that some smaller complexes do not already have automated voice response systems. The commenters cited costs of buying and maintaining an automated telephone system or dedicating employees to provide the required information. One of these commenters, the only commenter who specifically addressed the IRFA, also stated that the IRFA likely underestimated the costs that small fund complexes would incur from having to satisfy the requirement that updated monthly information be provided by a toll-free or collect telephone number.[100] One commenter indicated that making updated monthly performance data available in the manner contemplated by the proposal would be affordable for all funds, regardless of size.

None of the commenters provided additional data or figures to quantify this cost.[101] The commenters did not indicate either the number of small funds that would need to set up a telephone system (versus those that already have such a system in place that could be adapted to meet the proposed requirements) or how much small funds may have to pay to establish and maintain such systems.

C. Small Entities Subject to the Rule

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[102] Approximately 237 out of 5025 investment companies meet this definition.[103]

The Commission estimates, based on the staff's discussions with members of the fund industry, that approximately two-thirds of small entity funds do not advertise and, thus, do not incur any burdens or costs associated with rule 482. For small entity funds that do advertise, the Commission estimates an internal hour burden of approximately 80 hours per small entity fund. This represents approximately 6,320 (80 hours x 79 small entities) hours, or $235,483 (6,320 hours x $37.26 wage rate) in internal costs, for all small entities. The Commission estimates that the external cost burden associated with rule 482 for small entities, as with other funds, is negligible. To the extent small entities currently advertise, the burden and costs may affect them to a greater extent because small entities are unable to take advantage of economies of scale available to larger fund complexes.[104]

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[98] National Securities Markets Improvement Act of 1996, Pub. L. No. 104–290, 110 Stat. 3416, 3428, Section 204.

[99] *Id.*

[100] The commenter stated that the only costs that the IRFA discussed for small entities were those of actual production and review of advertising. However, the IRFA also refers to other one-time switchover costs that would result from the rule and recognizes that these costs may have a relatively greater effect on small entities. The IRFA states that among these costs are those of making available updated monthly performance data by a toll-free telephone number. Proposing Release, *supra* note , 67 FR at 36731.

[101] One commenter estimated the cost of implementing an automatic voice response system for fund performance at $500,000. Another commenter cited this estimate and stated that it is for hardware and software requirements only and does not include personnel expenses. The commenter also stated that expenses for companies that do not presently have automated telephone systems would likely be several times higher than the estimate provided. Neither of these commenters specifically addressed the issue of costs incurred by small entities. Both were focusing on the costs of a system that insurance companies would use to provide information about funds underlying their variable insurance products.

[102] 17 CFR 270.0–10.

[103] This estimate is based on figures compiled by the Commission staff regarding investment companies registered on Form N–1A, N–2, N–3, N–4, and N–6. In determining whether an insurance company separate account is a small entity for purposes of the Regulatory Flexibility Act, the assets of insurance company separate accounts are aggregated with the assets of their sponsoring insurance companies. 17 CFR 270.0–10(b). Currently, no insurance company separate account filing on Form N–3, Form N–4, or Form N–6 qualifies as a small entity.

[104] We note, however, that to the extent that the amendments reduce the regulatory burden of advertising, small entities may be encouraged to increase their advertising activity.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments will modify the disclosure requirements applicable to rule 482 advertisements. Advertisements will have to contain an amended legend, an explanation about where information about investment objectives, risks, and charges and expenses can be found, and, if performance figures are used, information about where updated performance information can be found, unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use. In addition, the required disclosure will generally have to be given as much prominence in the advertisement as the major portion of the advertisement. The amendments will also rescind the requirements of rule 134 as they apply to funds, but we expect that this will not result in any appreciable change in the disclosure that funds make in their advertisements because present rule 134 advertisements will generally become rule 482 advertisements.

The Commission has considered the potential effect that the amendments will have on the preparation of advertisements. Without regard to the size of the entity, we estimate that the amendments will result in a net decrease of 1.23 hours, or $45.83 (1.23 hours x $37.26 wage rate), per investment company per year in internal costs and a net increase of $805.67 per investment company per year in external costs.[105]

The Commission estimates some one-time switchover costs and burdens that will be imposed on all funds, but which may have a relatively greater impact on smaller firms. These costs include the costs of altering existing advertisements, including those now covered by rule 134, to comply with the new provisions of rule 482; generating performance figures on a monthly basis; and making available the updated monthly performance data through a toll-free or collect telephone number or a Web site when required. The costs of making updated performance data available could include expenses for computer time, legal and accounting fees, information technology staff, and additional computer and telephone equipment. However, we believe, based on consultation with a number of fund complexes, that many funds that presently advertise already provide performance information on a basis at least as current as monthly through these means and, therefore, expect the marginal cost increases for most funds to be minimal.

The Commission anticipates that the amendments will also provide ongoing reductions in the compliance burden for all funds by clarifying the language of rule 482, eliminating the ''substance of which'' requirement, and simplifying fund advertising requirements through rescission of rule 134 for fund advertising. These changes will effect savings primarily by reducing the time and money funds now spend on legal review and amending their prospectuses and SAIs to comply with the ''substance of which'' requirement in current rule 482.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small entities. In connection with the amendments, the Commission considered the following alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the amendments for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the amendments, or any part thereof, for small entities.

The Commission believes at the present time that special compliance or reporting requirements for small entities, or an exemption from coverage for small entities, would not be appropriate or consistent with investor protection. The disclosure amendments will provide shareholders and the public with more balanced information about a fund's performance. Different disclosure requirements for small entities, such as reducing the level of disclosure that small entities would have to provide shareholders in advertising, may create the risk that shareholders would not receive balanced information about a fund's performance or would receive confusing, false, or misleading information. In addition, applying different standards for advertising by small and large funds might impede investors' ability to adequately compare funds. We believe it is important for the enhanced advertising disclosure required by the amendments to be provided to investors by all funds, not just funds that are not considered small entities.

The Commission also notes that current advertising requirements, and its disclosure rules in general, do not distinguish between small entities and other funds. In addition, we believe that it would be inappropriate to impose a different timetable on small entities for complying with the requirements.[106] Further clarification, consolidation, or simplification of the proposals for funds that are small entities may be inconsistent with investor protection. We do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the present context.

We note, however, that we have modified our proposal in several ways that will reduce burdens on funds, including small funds, and will address the concerns raised by the commenters referenced above. As adopted, the amendments will not require funds to provide updated month-end performance data by toll-free or collect telephone. Rather, funds will be permitted to choose whether to make the month-end information available by telephone or on the fund's Web site. In general, commenters indicated that making the information available over a fund Web site would be less burdensome than using a telephone system. In addition, we have modified the proposal to provide that if the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use, the fund is not required to make such data available by telephone or on its Web site. We expect that both of these revisions to the proposed amendments will reduce the cost burden for all funds, including small entities.

VII. Statutory Authority

The Commission is adopting amendments to rule 134 pursuant to

[105] These figures are based on the Commission staff's discussions with several fund complexes. With regard to internal costs, they represent the net of the amortized one-time switchover cost of .727 hours per fund per year and the decrease in burden associated with rule 482, for purposes of the Paperwork Reduction Act, of 1.96 hours per fund per year. With regard to external costs, the $805.67 figure represents one-time switchover costs amortized over three years.

The estimate provided here differs from that provided in the Initial Regulatory Flexibility Analysis in the Proposing Release because of a change in the number of small entities and the wage rate used. *See supra* note #76. Although the Commission modified the proposed amendments, these modifications did not affect our estimate of the burden on small entities.

[106] The Commission has expanded the proposed compliance period from 90 days from the effective date to the end of the second full calendar quarter after adoption. This revision should lessen any burden for small entities, as well as other funds.

authority set forth in sections 2(a)(10) and 19(a) of the Securities Act [15 U.S.C. 77b(a)(10) and 77s(a)]. The Commission is adopting amendments to rule 156 pursuant to authority set forth in section 19(a) of the Securities Act [15 U.S.C. 77s(a)] and sections 10(b) and 23(a) of the Exchange Act [15 U.S.C. 78j(b) and 78w(a)]. The Commission is adopting amendments to rule 482 pursuant to authority set forth in sections 5, 10(b), 19(a), and 28 of the Securities Act [15 U.S.C. 77e, 77j(b), 77s(a), and 77z–3] and sections 24(g) and 38(a) of the Investment Company Act [15 U.S.C. 80a–24(g) and 80a–37(a)]. The Commission is adopting amendments to rule 34b–1 pursuant to authority set forth in sections 34(b) and 38(a) of the Investment Company Act [15 U.S.C. 80a–33(b) and 80a–37(a)]. The Commission is adopting amendments to Form N–1A, Form N–3, Form N–4, and Form N–6 pursuant to authority set forth in sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)] and sections 8, 24(a), 30, and 38 of the Investment Company Act [15 U.S.C. 80a–8, 80a–24(a), 80a–29, and 80a–37].

List of Subjects

17 CFR Part 230

Advertising, Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Rule and Form Amendments

■ For the reasons set out in the preamble, the Commission amends Title 17, Chapter II, of the Code of Federal Regulations as follows.

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

■ 1. The general authority citation for Part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

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■ 2. Section 230.134 is amended by:

■ a. Removing the authority citation following § 230.134;

■ b. Removing paragraphs (a)(3)(iii) and (a)(13);

■ c. Redesignating paragraphs (a)(3)(iv) and (a)(14) as paragraphs (a)(3)(iii) and (a)(13), respectively;

■ d. In newly redesignated paragraph (a)(13)(ii), revising the reference ''(a)(14)(i)'' to read ''(a)(13)(i)''; and

■ e. Revising paragraph (e) to read as follows:

§ 230.134 Communications not deemed a prospectus.

* * * * *

(e) This § 230.134 does not apply to a notice, circular, advertisement, letter, or other communication relating to an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act (15 U.S.C. 80a–2(a)(48)).

■ 3. Section 230.156 is amended by:

■ a. Removing the authority citation following § 230.156; and

■ b. Revising paragraph (b)(2)(i) to read as follows:

§ 230.156 Investment company sales literature.

* * * * *

(b) * * *

(2) * * *

(i) Portrayals of past income, gain, or growth of assets convey an impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances, including portrayals that omit explanations, qualifications, limitations, or other statements necessary or appropriate to make the portrayals not misleading; and

* * * * *

■ 4. Section 230.482 is revised to read as follows:

§ 230.482 Advertising by an investment company as satisfying requirements of section 10.

(a) *Scope of rule.* This section applies to an advertisement or other sales material (*advertisement*) with respect to securities of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (*1940 Act*), or a business development company, that is selling or proposing to sell its securities pursuant to a registration statement that has been filed under the Act. This section does not apply to an advertisement that is excepted from the definition of prospectus by section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)), or a Profile under § 230.498. An advertisement that complies with this section, which may include information the substance of which is not included in the prospectus specified in section 10(a) of the Act (15 U.S.C 77j(a)), will be deemed to be a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purpose of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

Note to paragraph (a): The fact that an advertisement complies with this section does not relieve the investment company, underwriter, or dealer of any obligations with respect to the advertisement under the antifraud provisions of the federal securities laws. For guidance about factors to be weighed in determining whether statements, representations, illustrations, and descriptions contained in investment company advertisements are misleading, *see* § 230.156. In addition, an advertisement that complies with this section is subject to the legibility requirements of § 230.420.

(b) *Required disclosure.* This paragraph describes information that is required to be included in an advertisement in order to comply with this section.

(1) *Availability of additional information.* An advertisement must include a statement that:

(i) Advises an investor to consider the investment objectives, risks, and charges and expenses of the investment company carefully before investing; explains that the prospectus contains this and other information about the investment company; identifies a source from which an investor may obtain a prospectus; and states that the prospectus should be read carefully before investing; or

(ii) If used with a Profile, advises an investor to consider the investment objectives, risks, and charges and expenses of the investment company carefully before investing; explains that the accompanying Profile contains this and other information about the investment company; describes the procedures for investing in the investment company; and indicates the availability of the investment company's prospectus.

(2) *Advertisements used prior to effectiveness of registration statement.* An advertisement that is used prior to effectiveness of the investment company's registration statement or the determination of the public offering price (in the case of a registration statement that becomes effective omitting information from the prospectus contained in the registration statement in reliance upon § 230.430A) must include the ''Subject to Completion'' legend required by § 230.481(b)(2).

(3) *Advertisements including performance data.* An advertisement that includes performance data of an open-end management investment company or a separate account

registered under the 1940 Act as a unit investment trust offering variable annuity contracts (*trust account*) must include the following

(i) A legend disclosing that the performance data quoted represents past performance; that past performance does not guarantee future results; that the investment return and principal value of an investment will fluctuate so that an investor's shares, when redeemed, may be worth more or less than their original cost; and that current performance may be lower or higher than the performance data quoted. The legend should also identify either a toll-free (or collect) telephone number or a Web site where an investor may obtain performance data current to the most recent month-end unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use. An advertisement for a money market fund may omit the disclosure about principal value fluctuation; and

Note to paragraph (b)(3)(i): The date of use refers to the date or dates when an advertisement is used by investors, not the date on which an advertisement is published or submitted for publication. The date of use refers to the entire period of use by investors and not simply the first date on which an advertisement is used.

(ii) If a sales load or any other nonrecurring fee is charged, the maximum amount of the load or fee, and if the sales load or fee is not reflected, a statement that the performance data does not reflect the deduction of the sales load or fee, and that, if reflected, the load or fee would reduce the performance quoted.

(4) *Money market funds.* An advertisement for an investment company that holds itself out to be a money market fund must include the following statement:

An investment in the Fund is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although the Fund seeks to preserve the value of your investment at $1.00 per share, it is possible to lose money by investing in the Fund.

A money market fund that does not hold itself out as maintaining a stable net asset value may omit the second sentence of this statement.

(5) *Presentation.* In a print advertisement, the statements required by paragraphs (b)(1) through (b)(4) of this section must be presented in a type size at least as large as and of a style different from, but at least as prominent as, that used in the major portion of the advertisement, provided that when performance data is presented in a type size smaller than that of the major portion of the advertisement, the statements required by paragraph (b)(3) of this section may appear in a type size no smaller than that of the performance data. If an advertisement is delivered through an electronic medium, the legibility requirements for the statements required by paragraph (b)(1) through (b)(4) of this section relating to type size and style may be satisfied by presenting the statements in any manner reasonably calculated to draw investor attention to them. In a radio or television advertisement, the statements required by paragraph (b)(1) through (b)(4) of this section must be given emphasis equal to that used in the major portion of the advertisement. The statements required by paragraph (b)(3) of this section must be presented in close proximity to the performance data, and, in a print advertisement, must be presented in the body of the advertisement and not in a footnote.

(6) *Commission legend.* An advertisement that complies with this section need not contain the Commission legend required by § 230.481(b)(1).

(c) *Use of applications.* An advertisement that complies with this section may not contain or be accompanied by any application by which a prospective investor may invest in the investment company, except that:

(1) *Variable annuity and variable life insurance contracts.* A prospectus meeting the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) by which a unit investment trust offers variable annuity or variable life insurance contracts may contain a contract application although the prospectus includes, or is accompanied by, information about an investment company in which the unit investment trust invests that, pursuant to this section, is deemed a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)); and

(2) *Profile.* An advertisement that complies with this section may be used with a Profile that includes, or is accompanied by, an application to purchase shares of the investment company as permitted under § 230.498.

(d) *Performance data for non-money market funds.* In the case of an open-end management investment company or a trust account (other than a money market fund referred to in paragraph (e) of this section), any quotation of the company's performance contained in an advertisement shall be limited to quotations of:

(1) *Current yield.* A current yield that:

(i) Is based on the methods of computation prescribed in Form N–1A (§§ 239.15A and 274.11A of this chapter), N–3 (§§ 239.17a and 274.11b of this chapter), or N–4 (§§ 239.17b and 274.11c of this chapter);

(ii) Is accompanied by quotations of total return as provided for in paragraph (d)(3) of this section;

(iii) Is set out in no greater prominence than the required quotations of total return; and

(iv) Adjacent to the quotation and with no less prominence than the quotation, identifies the length of and the date of the last day in the base period used in computing the quotation.

(2) *Tax-equivalent yield.* A tax-equivalent yield that:

(i) Is based on the methods of computation prescribed in Form N–1A (§§ 239.15A and 274.11A of this chapter), N–3 (§§ 239.17a and 274.11b of this chapter), or N–4 (§§ 239.17b and 274.11c of this chapter);

(ii) Is accompanied by quotations of yield as provided for in paragraph (d)(1) of this section and total return as provided for in paragraph (d)(3) of this section;

(iii) Is set out in no greater prominence than the required quotations of yield and total return;

(iv) Relates to the same base period as the required quotation of yield; and

(v) Adjacent to the quotation and with no less prominence than the quotation, identifies the length of and the date of the last day in the base period used in computing the quotation.

(3) *Average annual total return.* Average annual total return for one, five, and ten year periods, except that if the company's registration statement under the Act (15 U.S.C. 77a *et seq.*) has been in effect for less than one, five, or ten years, the time period during which the registration statement was in effect is substituted for the period(s) otherwise prescribed. The quotations must:

(i) Be based on the methods of computation prescribed in Form N–1A (§§ 239.15A and 274.11A of this chapter), N–3 (§§ 239.17a and 274.11b of this chapter), or N–4 (§§ 239.17b and 274.11c of this chapter);

(ii) Be current to the most recent calendar quarter ended prior to the submission of the advertisement for publication;

(iii) Be set out with equal prominence; and

(iv) Adjacent to the quotation and with no less prominence than the quotation, identify the length of and the last day of the one, five, and ten year periods.

(4) *After-tax return.* For an open-end management investment company,

average annual total return (after taxes on distributions) and average annual total return (after taxes on distributions and redemption) for one, five, and ten year periods, except that if the company's registration statement under the Act (15 U.S.C. 77a *et seq.*) has been in effect for less than one, five, or ten years, the time period during which the registration statement was in effect is substituted for the period(s) otherwise prescribed. The quotations must:

(i) Be based on the methods of computation prescribed in Form N–1A (§§ 239.15A and 274.11A of this chapter);

(ii) Be current to the most recent calendar quarter ended prior to the submission of the advertisement for publication;

(iii) Be accompanied by quotations of total return as provided for in paragraph (d)(3) of this section;

(iv) Include both average annual total return (after taxes on distributions) and average annual total return (after taxes on distributions and redemption);

(v) Be set out with equal prominence and be set out in no greater prominence than the required quotations of total return; and

(vi) Adjacent to the quotations and with no less prominence than the quotations, identify the length of and the last day of the one, five, and ten year periods.

(5) *Other performance measures.* Any other historical measure of company performance (not subject to any prescribed method of computation) if such measurement:

(i) Reflects all elements of return;

(ii) Is accompanied by quotations of total return as provided for in paragraph (d)(3) of this section;

(iii) In the case of any measure of performance adjusted to reflect the effect of taxes, is accompanied by quotations of total return as provided for in paragraph (d)(4) of this section;

(iv) Is set out in no greater prominence than the required quotations of total return; and

(v) Adjacent to the measurement and with no less prominence than the measurement, identifies the length of and the last day of the period for which performance is measured.

(e) *Performance data for money market funds.* In the case of a money market fund:

(1) *Yield.* Any quotation of the money market fund's yield in an advertisement shall be based on the methods of computation prescribed in Form N–1A (§§ 239.15A and 274.11A of this chapter), N–3 (§§ 239.17a and 274.11b of this chapter), or N–4 (§§ 239.17b and 274.11c of this chapter) and may include:

(i) A quotation of current yield that, adjacent to the quotation and with no less prominence than the quotation, identifies the length of and the date of the last day in the base period used in computing that quotation;

(ii) A quotation of effective yield if it appears in the same advertisement as a quotation of current yield and each quotation relates to an identical base period and is presented with equal prominence; or

(iii) A quotation or quotations of tax-equivalent yield or tax-equivalent effective yield if it appears in the same advertisement as a quotation of current yield and each quotation relates to the same base period as the quotation of current yield, is presented with equal prominence, and states the income tax rate used in the calculation.

(2) *Total return.* Accompany any quotation of the money market fund's total return in an advertisement with a quotation of the money market fund's current yield under paragraph (e)(1)(i) of this section. Place the quotations of total return and current yield next to each other, in the same size print, and if there is a material difference between the quoted total return and the quoted current yield, include a statement that the yield quotation more closely reflects the current earnings of the money market fund than the total return quotation.

(f) *Advertisements that make tax representations.* An advertisement for an open-end management investment company (other than a company that is permitted under § 270.35d-1(a)(4) of this chapter to use a name suggesting that the company's distributions are exempt from federal income tax or from both federal and state income tax) that represents or implies that the company is managed to limit or control the effect of taxes on company performance must accompany any quotation of the company's performance permitted by paragraph (d) of this section with quotations of total return as provided for in paragraph (d)(4) of this section.

(g) *Timeliness of performance data.* All performance data contained in any advertisement must be as of the most recent practicable date considering the type of investment company and the media through which the data will be conveyed, except that any advertisement containing total return quotations will be considered to have complied with this paragraph provided that:

(1)(i) The total return quotations are current to the most recent calendar quarter ended prior to the submission of the advertisement for publication; and

(ii) Total return quotations current to the most recent month ended seven business days prior to the date of use are provided at the toll-free (or collect) telephone number or Web site identified pursuant to paragraph (b)(3)(i) of this section; or

(2) The total return quotations are current to the most recent month ended seven business days prior to the date of use of the advertisement.

Note to paragraph (g): The date of use refers to the date or dates when an advertisement is used by investors, not the date on which an advertisement is published or submitted for publication. The date of use refers to the entire period of use by investors and not simply the first date on which an advertisement is used.

(h) *Filing.* An advertisement that complies with this section need not be filed as part of the registration statement filed under the Act.

Note to paragraph (h): These advertisements, unless filed with NASD Regulation, Inc., are required to be filed in accordance with the requirements of § 230.497.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 5. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 6. The authority citation for part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

■ 7. Section 270.34b–1 is amended by:
■ a. Adding a note following the introductory text of § 270.34b–1;
■ b. Revising paragraph (a);
■ c. Revising paragraph (b)(1)(i);
■ d. Revising the reference ''(d)(1)(i) of § 230.482'' in paragraph (b)(1)(ii)(A) to read ''(e)(1)(i) of § 230.482'';
■ e. Revising the reference ''§ 230.482(d)(1)(iii)'' in paragraph (b)(1)(ii)(B) to read ''§ 230.482(e)(1)(iii)'';
■ f. Revising the reference ''(d)(1)(i) of § 230.482'' in the first sentence of paragraph (b)(1)(ii)(C) to read ''(e)(1)(i) of § 230.482'';

■ g. Revising the reference ''(e)(3) of § 230.482'' in paragraph (b)(1)(iii)(A) to read ''(d)(3) of § 230.482'';
■ h. Revising the reference ''(e)(4) of § 230.482'' in paragraph (b)(1)(iii)(B) to read ''(d)(4) of § 230.482'';
■ i. Revising the reference ''(e)(4) of § 230.482'' in paragraph (b)(1)(iii)(C) to read ''(d)(4) of § 230.482'';
■ j. Revising the reference ''(e)(1) of § 230.482'' in paragraph (b)(1)(iii)(D) to read ''(d)(1) of § 230.482'';
■ k. Revising the references ''(e)(2)'' and ''(e)(1) of § 230.482'' in paragraph (b)(1)(iii)(E) to read ''(d)(2)'' and ''(d)(1) of § 230.482'', respectively;
■ l. Revising the reference ''paragraph (f) of § 230.482'' in paragraph (b)(2) to read ''paragraph (g) of § 230.482''; and
■ m. Revising the reference ''(e)(3)(ii), (e)(4)(ii)'' in paragraph (b)(3) to read ''(d)(3)(ii), (d)(4)(ii)'.

The addition and revisions read as follows:

§ 270.34b–1 Sales literature deemed to be misleading.

* * * * *

Note to introductory text of § 270.34b–1: The fact that the sales literature includes the information specified in paragraphs (a) and (b) of this section does not relieve the investment company, underwriter, or dealer of any obligations with respect to the sales literature under the antifraud provisions of the federal securities laws. For guidance about factors to be weighed in determining whether statements, representations, illustrations, and descriptions contained in investment company sales literature are misleading, *see* § 230.156 of this chapter.

(a) Sales literature for a money market fund shall contain the information required by paragraph (b)(4) of § 230.482 of this chapter, presented in the manner required by paragraph (b)(5) of § 230.482 of this chapter.

(b)(1) * * *

(i) In any sales literature that contains performance data for an investment company, include the disclosure required by paragraph (b)(3) of § 230.482 of this chapter, presented in the manner required by paragraph (b)(5) of § 230.482 of this chapter.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 8. The authority citation for Part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

Note: The text of Forms N–1A, N–3, N–4, and N–6 does not, and these amendments will not, appear in the *Code of Federal Regulations.*

9. Item 21 of Form N–1A (referenced in §§ 239.15A and 274.11A) is amended by:

a. Revising the introductory text of paragraphs (a) and (b); and

b. Removing paragraphs (a)(5) and (b)(7), to read as follows:

Form N–1A

* * * * *

Item 21. Calculation of Performance Data

(a) *Money Market Funds.* Yield quotation(s) for a Money Market Fund included in the prospectus should be calculated according to paragraphs (a)(1)–(4).

* * * * *

(b) *Other Funds.* Performance information included in the prospectus should be calculated according to paragraphs (b)(1)–(6).

* * * * *

10. General Instruction F of Form N–3 (referenced in §§ 239.17a and 274.11b) is amended by:

a. Removing General Instruction F.2; and

b. Redesignating General Instruction F.1 as General Instruction F.

11. Item 4 of Form N–3 (referenced in §§ 239.17a and 274.11b) is amended by:

a. Removing Item 4(c); and

b. Redesignating Item 4(d) as Item 4(c).

12. Item 25 of Form N–3 (referenced in §§ 239.17a and 274.11b) is amended by:

a. Removing Instruction 5 to paragraph (a); and

b. Revising paragraphs (a) and (b), and Instruction 6 to paragraph (b)(i), to read as follows:

Form N–3

* * * * *

Item 25. Calculation of Performance Data

(a) *Money Market Accounts.* Yield quotation(s) included in the prospectus for an account or sub-account that holds itself out as a ''money market'' account or sub-account should be calculated according to paragraphs (a)(i)–(ii).

(i) *Yield Quotation.* Based on the 7 days ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the yield by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one accumulation unit of the account or sub-account at the beginning of the period, subtracting a hypothetical charge reflecting deductions from contractowner accounts, and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then multiplying the base period return by (365/7) with the resulting yield figure carried to at least the nearest hundredth of one percent.

(ii) *Effective Yield Quotation.* Based on the 7 days ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the effective yield, carried to at least the nearest hundredth of one percent, by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one accumulation unit of the account or sub-account at the beginning of the period, subtracting a hypothetical charge reflecting deductions from contractowner accounts, and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then compounding the base period return by adding 1, raising the sum to a power equal to 365 divided by 7, and subtracting 1 from the result, according to the following formula:

$$\text{EFFECTIVE YIELD} = [(\text{BASE PERIOD RETURN} + 1)^{365/7}] - 1.$$

Instructions:

* * * * *

(b) *Other Accounts.* Performance information included in the prospectus should be calculated according to paragraphs (b)(i)–(iii).

(i) *Average Annual Total Return Quotation.* For the 1-, 5-, and 10-year periods ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the average annual total return by finding the average annual compounded rates of return over the 1-, 5-, and 10-year periods that would equate the initial amount invested to the ending redeemable value, according to the following formula:

$$P(1+T)^n = ERV$$

Where:

P = a hypothetical initial payment of $1,000
T = average annual total return
n = number of years
ERV = ending redeemable value of a hypothetical $1,000 payment made at the beginning of the 1-, 5-, or 10-year periods at the end of the 1-, 5-, or 10-year periods (or fractional portion).

Instructions:

* * * * *

6. Total return information in the prospectus need only be current to the end of the Registrant's most recent fiscal year.

(ii) *Yield Quotation.* Based on a 30-day (or one month) period ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate yield by dividing the net investment income per accumulation unit earned during the period by the maximum offering price per unit on the last day of the period, according to the following formula:

$$\text{YIELD} = 2\left[\left(\frac{a-b}{cd}+1\right)^{6}-1\right]$$

Where:

a = dividends and interest earned during the period.

b = expenses accrued for the period (net of reimbursements).

c = the average daily number of accumulation units outstanding during the period.

d = the maximum offering price per accumulation unit on the last day of the period.

Instructions:

* * * * *

(iii) *Non-Standardized Performance Quotation.* A Registrant may calculate performance using any other historical measure of performance (not subject to any prescribed method of computation) if the measurement reflects all elements of return.

* * * * *

13. Item 28 of Form N–3 (referenced in §§ 239.17a and 274.11b) is amended by:

a. Adding the word ''and'' after the semicolon at the end of Item 28(b)(15);

b. Removing Item 28(b)(16);

c. Redesignating Item 28(b)(17) as Item 28(b)(16); and

d. Revising Instruction 1 to Item 28 to read as follows:

Form N–3

* * * * *

Item 28.

* * * * *

(b) * * *

(15) copies of any agreements or understandings made in consideration for providing the initial capital between or among the Registrant, the Insurance Company, underwriter, adviser, or initial contractowners and written assurances from the Insurance Company or initial contractowners that the purchases were made for investment purposes without any present intention of redeeming; and

(16) copies of any codes of ethics adopted under Rule 17j–1 under the 1940 Act [17 CFR 270.17j–1] and currently applicable to the Registrant (*i.e.,* the codes of the Registrant and its investment advisers and principal underwriters). If there are no codes of ethics applicable to the Registrant, state the reason (*e.g.,* the Registrant is a Money Market Fund).

Instructions:

1. Subject to the Rules regarding incorporation by reference and Instruction 2 below, the foregoing exhibits shall be filed as part of the Registration Statement. Exhibits numbered 5, 12, 13, and 14 above need be filed only as part of a 1933 Act Registration Statement. Exhibits shall be lettered or numbered for convenient reference. Exhibits incorporated by reference may bear the designation given in a previous filing. Where exhibits are incorporated by reference, the reference shall be made in the list of exhibits.

* * * * *

14. General Instruction F of Form N–4 (referenced in §§ 239.17b and 274.11c) is amended by:

a. Removing General Instruction F.2; and

b. Redesignating General Instruction F.1 as General Instruction F.

15. Item 4 of Form N–4 (referenced in §§ 239.17b and 274.11c) is amended by:

a. Removing Item 4(b); and

b. Redesignating Item 4(c) as Item 4(b).

16. Item 21 of Form N–4 (referenced in §§ 239.17b and 274.11c) is amended by:

a. Removing Instruction 5 to paragraph (a); and

b. Revising paragraphs (a) and (b), and Instruction 6 to paragraph (b)(i), to read as follows:

Form N–4

* * * * *

Item 21. Calculation of Performance Data

(a) *Money Market Funded Sub-Accounts.* Yield quotation(s) included in the prospectus for an account or sub-account that holds itself out as a ''money market'' account or sub-account should be calculated according to paragraphs (a)(i)—(ii).

(i) *Yield Quotation.* Based on the 7 days ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the yield by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one accumulation unit of the account or sub-account at the beginning of the period, subtracting a hypothetical charge reflecting deductions from contractowner accounts, and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then multiplying the base period return by (365/7) with the resulting yield figure carried to at least the nearest hundredth of one percent.

(ii) *Effective Yield Quotation.* Based on the 7 days ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the effective yield, carried to at least the nearest hundredth of one percent, by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one accumulation unit of the account or sub-account at the beginning of the period, subtracting a hypothetical charge reflecting deductions from contractowner accounts, and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then compounding the base period return by adding 1, raising the sum to a power equal to 365 divided by 7, and subtracting 1 from the result, according to the following formula:

$$\text{EFFECTIVE YIELD} = [(\text{BASE PERIOD RETURN} + 1)^{365/7}] - 1.$$

Instructions:

* * * * *

(b) *Other Sub-Accounts.* Performance information included in the prospectus should be calculated according to paragraphs (b)(i)—(iii).

(i) *Average Annual Total Return Quotation.* For the 1-, 5-, and 10-year periods ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the average annual total return by finding the average annual compounded rates of return over the 1-, 5-, and 10-year periods that would equate the initial amount invested to the ending redeemable value, according to the following formula:

$$P(1+T)^{n} = ERV$$

Where:

P = a hypothetical initial payment of $1,000

T = average annual total return

n = number of years

ERV = ending redeemable value of a hypothetical $1,000 payment made at the beginning of the 1-, 5-, or 10-

year periods at the end of the 1-, 5-, or 10-year periods (or fractional portion).

Instructions:

* * * * *

6. Total return information in the prospectus need only be current to the end of the Registrant's most recent fiscal year.

(ii) *Yield Quotation.* Based on a 30-day (or one month) period ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate yield by dividing the net investment income per accumulation unit earned during the period by the maximum offering price per unit on the last day of the period, according to the following formula:

$$\text{YIELD} = 2\left[\left(\frac{a-b}{cd}+1\right)^{6}-1\right]$$

Where:

a = net investment income earned during the period by the portfolio company attributable to shares owned by the sub-account.

b = expenses accrued for the period (net of reimbursements).

c = the average daily number of accumulation units outstanding during the period.

d = the maximum offering price per accumulation unit on the last day of the period.

Instructions:

* * * * *

(iii) *Non-Standardized Performance Quotation.* A Registrant may calculate performance using any other historical measure of performance (not subject to any prescribed method of computation) if the measurement reflects all elements of return.

* * * * *

19. Item 24 of Form N–4 (referenced in §§ 239.17b and 274.11c) is amended by:

a. Adding the word ''and'' after the semicolon at the end of Item 24(b)(11);

b. Removing Item 24(b)(13); and

c. Revising Instruction 1 to Item 24.

The revisions read as follows:

Form N–4

* * * * *

Item 24

* * * * *

(b) * * *

(11) all financial statements omitted from Item 23; and

(12) copies of any agreements or understandings made in consideration for providing the initial capital between or among the Registrant, the depositor, underwriter, or initial contractowners and written assurances from the depositor or initial contractowners that the purchases were made for investment purposes without any present intention of redeeming.

Instructions:

1. Subject to the Rules regarding incorporation by reference and Instruction 2 below, the foregoing exhibits shall be filed as part of the Registration Statement. Exhibits numbered 3, 9, 10, and 11 above need to be filed only as part of a 1933 Act Registration Statement. Exhibits shall be lettered or numbered for convenient reference. Exhibits incorporated by reference may bear the designation given in a previous filing. Where exhibits are incorporated by reference, the reference shall be made in the list of exhibits.

* * * * *

20. General Instruction B.2.(b) of Form N–6 (referenced in §§ 239.17c and 274.11d) is amended by revising the reference ''Items 27(c), (k), (l), (n), and (o)'' to read ''Items 26(c), (k), (l), (n), and (o)''.

21. Item 25 of Form N–6 (referenced in §§ 239.17c and 274.11d) is removed.

22. Form N–6 (referenced in §§ 239.17c and 274.11d) is further amended by:

a. Redesignating Items 26 through 34 as Items 25 though 33;

b. Revising the reference ''Item 26'' in paragraph (j) of newly redesignated Item 25 to read ''Item 25''; and

c. Revising the reference ''Item 26'' in paragraphs (l) and (m) of newly redesignated Item 26 to read ''Item 25''.

By the Commission.

Dated: September 29, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–25114 Filed 10–3–03; 8:45 am]

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