

**MEMO# 9607**

January 20, 1998

# **SEC AMENDMENTS TO BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS -- FINAL RULE**

1 Release No. 34-39538 (January 12, 1998), 63 Fed. Reg. 2854 (January 16, 1998) ("Adopting Release"). Specifically, the Commission amended Regulation 13D-G and Schedules 13D and 13G of the Securities Exchange Act of 1934 ("Exchange Act"), and related Rules 13d-1, 13d-2, 13d-3, and 13d-7 thereunder, and adopted conforming amendments to Rule 16a-1 under the Exchange Act. 2 The other categories of investors presently permitted to use the Schedule 13G include Qualified Institutional Investors and Exempt Investors. 3 The Adopting Release notes that Qualified Institutional Investors and Exempt Investors will continue to have up to 45 calendar days after the end of the calendar year in which to file Schedule 13G. [9607] January 20, 1998 TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 1-98 COMPLIANCE ADVISORY COMMITTEE No. 2-98 INVESTMENT ADVISER MEMBERS No. 4-98 SEC RULES MEMBERS No. 7-98 UNIT INVESTMENT TRUST MEMBERS No. 2-98 RE: SEC AMENDMENTS TO BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS -- FINAL RULE

The Securities and Exchange Commission has adopted amendments to its rules relating to the reporting of beneficial ownership in publicly-held companies.<sup>1</sup> The amendments expand the class of investors eligible to use the short-form Schedule 13G, in lieu of Schedule 13D, by creating a new category of investors and by expanding the list of Qualified Institutional Investors. They also eliminate the requirement that original and amendments to Schedules 13G be provided to each exchange where the security is traded. Moreover, the amendments provide guidance regarding the attribution of beneficial ownership among entities under common control. The amendments are effective February 17, 1998. A copy of the Adopting Release, including a chart displaying the effects of the amendments to Regulation 13D-G, is attached, and it is briefly summarized below.

**New Category of Investors** The amendments create a new category of investors eligible to file Schedule 13G by adding any person who owns less than 20% of an issuer's class of securities and who certifies that it is not seeking to acquire or influence "control" of the issuer ("Passive Investors").<sup>2</sup> Passive Investors choosing to file a Schedule 13G must file the initial schedule within 10 calendar days after acquiring beneficial ownership of more than 5%, but less than 20%, of a class of subject securities.<sup>3</sup> Passive Investors must file amendments to Schedule 13G promptly.<sup>4</sup> The Adopting Release notes that what constitutes "promptly" under Regulation 13D-G is based upon the facts and circumstances surrounding the materiality of the change in information triggering the filing obligation and the filing person's previous disclosures. <sup>5</sup> By contrast, Qualified Institutional Investors have until 10 days after the month in which they acquired greater than 10% to amend their Schedule 13G; and those holding more than

10% have until 10 days after the month in which they increased or decreased their beneficial ownership by more than 5%. 6 See Letter from Alexander C. Gavis, Assistant General Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated September 9, 1996 ("1996 Comment Letter"). 7 In relying upon informational barriers, the amended rules advise companies, among other things, to maintain and enforce written policies and procedures reasonably designed to prevent the flow of information to and from the other business units, divisions, and entities that relate to the voting and investment powers over the securities. 2 13G within 45 calendar days after the end of the calendar year to report any change in the information previously reported, and must amend the schedule during the year if the investor acquires more than 10% of the subject securities, which filing must occur promptly after crossing the 10% threshold.4 Between the 10% and less than 20% range, the amended rules require additional amended Schedule 13G filings "promptly" during the year if the Passive Investor increases or decreases its beneficial ownership by more than 5% of the class.5 Expansion of List of Qualified Institutional Investors The amended rules expand the list of Qualified Institutional Investors eligible to file Schedule 13G to include control persons of Qualified Institutional Investors (including parent holding companies), as recommended by the Institute in our 1996 comment letter on the re-proposed amendments.6 In addition, the amendments expand the list to include: (1) state and local governmental employee benefit plans, (2) savings associations, (3) church employee benefit plans, and (4) investment advisers that are prohibited from registering under the Investment Advisers Act of 1940, pursuant to Section 203A of that Act. As part of this expansion, the Commission also adopted conforming amendments to the beneficial owner definition of Rule 16a-1 under the Exchange Act to reflect each of these additions in the list of persons that are not deemed to be the beneficial owners of securities held for the benefit of third parties. Attribution of Beneficial Ownership Among Entities Under Common Control In response to concerns regarding the adverse effects of the attribution provisions of Rule 13d-3 under the Exchange Act, which require the attribution to a parent entity of all securities beneficially owned by its subsidiaries, the amended rules address such concerns and provide guidance on when attribution may not be required. Specifically, the amended rules clarify that in instances where the organizational structure of the parent and related entity are such that the voting and investment powers over the subject securities are exercised independently, attribution may not be required for the purposes of determining whether a filing threshold has been exceeded and the aggregate amount owned by the controlling persons. The amended rules note that determining whether the voting and investment powers are "exercised independently" from the parent and other related entities is based on the facts and circumstances. Attribution may not be required, for example, in situations where corporate entities have in place certain informational barriers that ensure that the voting and investment powers are exercised independently from parent and affiliated entities.7 ` Required Schedule 13D Filings and Cooling-Off Period The amended rules require Passive Investors and Qualified Institutional Investors that determine they hold subject securities with a disqualifying purpose or effect to file a Schedule 13D no later than 10 8 The 20% limit applies only with respect to Passive Investors reporting on Schedule 13G. Qualified Institutional Investors and Exempt Investors are not subject to the 20% limitation in recognition of the fact that such institutions purchase securities in the ordinary course of business and may be burdened by a limitation on the amount of securities that can be reported on the short-form Schedule 13G. 9 The Adopting Release reminds registrants, however, that Schedule 13D must continue to be sent to each exchange on which the security is traded, as required by statute. 3 calendar days after the change in investment purpose. In addition, a "cooling-off" period will commence with this change and last until the expiration of the 10th calendar day from the date on which a Schedule 13D is filed.

During this time, these investors are prohibited from voting or directing the voting of the subject securities, or acquiring additional beneficial ownership of any equity securities of the issuer or any person controlling the issuer. For a Passive Investor that acquires 20% or more of the subject securities, the amended rules similarly require the investor to report the acquisition on Schedule 13D (rather than amend its Schedule 13G) within 10 calendar days, and to be subject to a cooling-off period commencing from the time the investor reaches the 20% threshold until the expiration of the 10th calendar day from the date on which a Schedule 13D is filed.<sup>8</sup> During this time, the investor is prohibited from voting or directing the voting of the subject securities and from acquiring additional beneficial ownership in any equity securities of the issuer. For Passive Investors and Qualified Institutional Investors who have lost their eligibility to file on Schedule 13G, the amended rules permit such persons to switch back to Schedule 13G after re-establishing their eligibility. Filing of Schedule 13G with Each Exchange As we recommended in our 1996 Comment Letter, the Commission has eliminated the requirement that original and amendments to Schedules 13G be provided to each exchange where the security is traded or to the National Association of Securities Dealers, as was originally proposed. The Adopting Release explains that these filings will be made by persons without a disqualifying purpose or effect (and thus do not represent control transactions), and that Schedules 13G will be available electronically -- via EDGAR and the Commission's World Wide Web site -- thereby obviating the need for additional filings. Accordingly, the amended rules require only that copies of all original and amendments to Schedules 13G filed with the Commission by Passive Investors, Qualified Institutional Investors, and Exempt Investors be sent to the issuer and not to any exchange or automated quotation system on which the securities are traded.<sup>9</sup> Barry E. Simmons Assistant Counsel Attachment Note: Not all recipients of this memo will receive an attachment. If you wish to obtain a copy of the attachment referred to in this memo, please call the Institute's Library Services Division at (202)326- 8304, and ask for this memo's attachment number: 9607.