Dated: March 22, 1999.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 240 and 270

[Release Nos. 33–7656, 34–41189, IC–23745; File No. S7–10–99; International Series Release No. 1188]

RIN 3235–AH32

Offer and Sale of Securities to Canadian Tax-Deferred Retirement Savings Accounts

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is proposing a new rule that would permit foreign securities to be offered to U.S. participants in certain Canadian tax-deferred retirement accounts and sold to those accounts without being registered under the Securities Act of 1933. The Commission also is proposing a new rule that would permit foreign investment companies to offer securities to those U.S. participants and sell securities to their Canadian retirement accounts without registering under the Investment Company Act of 1940. These rules would enable investors who hold securities in certain Canadian tax-deferred retirement accounts, and who reside or are temporarily present in the United States, to manage their investments within those accounts.

DATES: Comments must be received on or before May 28, 1999.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street, NW, Washington, DC 20549–0609. Comments also may be submitted electronically to the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7–10–99; this file number should be included on the subject line if E-mail is used. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 5th Street, NW, Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Cynthia Gurnee Pugh, Special Counsel, at (202) 942–0690, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 450 5th Street NW, Washington DC 20549–0506, or Paul M. Dudek, Chief, at (202) 942–2990, Office of International Corporate Finance, Division of Corporation Finance, Securities and Exchange Commission, 450 5th Street NW, Washington DC 20549–0302.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (''Commission'') today is proposing for public comment rule 237 (17 CFR 230.237) under the Securities Act of 1933 (15 U.S.C. 77a) (the ''Securities Act''), rule 7d–2 (17 CFR 270.7d–2) under the Investment Company Act of 1940 (15 U.S.C. 80a) (the ''Investment Company Act''), and amendments to rule 12g3–2 under the Securities Exchange Act of 1934 (15 U.S.C. 78a) (the ''Exchange Act'').

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Executive Summary

In Canada, individuals can invest a portion of their earnings in tax-deferred retirement savings accounts (''Canadian retirement accounts''), which operate in a manner similar to Individual Retirement Accounts (''IRAs'') in the United States. Individuals themselves can decide how to invest the assets held in the accounts, but contributions and withdrawals are subject to strict limits. Individuals who have established Canadian retirement accounts and later moved to the United States (''Canadian/U.S. Participants'' or ''participants'') have encountered obstacles to the continued management of their retirement investments in those accounts. Most securities held in these accounts, and the investment companies (''funds'') that issue many of those securities, are not registered in the United States, and issuers therefore cannot publicly offer and sell those securities to Canadian/U.S. Participants. As a result, these participants have not been able to make changes in their retirement accounts to carry out the financial planning needed to meet their individual retirement goals.

The Commission is proposing two rules that would enable Canadian/U.S. Participants to continue to manage the assets in their Canadian retirement accounts. The proposed rules would provide relief from the U.S. registration requirements, under certain conditions, for offers of securities to these participants and sales to their accounts. Under the proposals, (i) securities of foreign issuers, including securities of foreign funds, could be offered to Canadian/U.S. Participants and sold to their Canadian retirement accounts without being registered under the Securities Act or the Exchange Act and (ii) foreign funds could offer securities to Canadian/U.S. Participants and sell securities to their Canadian retirement accounts without registering as investment companies under the Investment Company Act. The offer and sale of these securities, however, would remain fully subject to the antifraud provisions of the U.S. securities laws.

I. Introduction

More than half of all Canadian households invest retirement savings through some form of Canadian retirement account.[1] Canadian retirement accounts, like IRAs in the United States,[2] encourage retirement saving by permitting individuals to invest savings on a tax-deferred basis.[3]

[1] *See, e.g.*, Royal Trust Seventh Annual RRSP Survey (1997), available at <http://www.royalbank.com/rt-wealth/01survey/01fk.html> (visited Dec. 22, 1998). Assets held in Canadian retirement accounts represent a sizable portion of Canadian pension assets. *See* The Conference Board of Canada, *Maximizing Choice: Economic Impacts of Increasing the Foreign Property Limit* at Table 1 (Jan. 1998), available at <http://www.ific.ca/eng/frames.asp?l1=Regulation__and__Committees> (through the ''Current Issues & Initiatives'' and the ''Impact of the Foreign Property Rule'' hyperlinks) (visited Dec. 22, 1998). In addition, a 1998 survey reports that approximately half of Canadian retirement account holders plan to invest the greatest proportion of their annual contributions in mutual funds. *See* Royal Trust Eighth Annual RRSP Survey (1998), available at <http://www.royalbank.com/rt-wealth/01survey/01h3.html> (visited Dec. 28, 1998).

[2] *See* 26 U.S.C. 408, 408A (providing for Individual Retirement Accounts under U.S. tax law). Canadian retirement accounts are established and governed by the Income Tax Act of Canada and the regulations thereunder. *See generally* Income Tax Act, R.S.C. 1985, ch. 1 (5th Supp.) (Can.) (as amended) (''Canadian Income Tax Act''); Income Tax Regulations, C.R.C., ch. 945 (1997) (Can.) (''Canadian Income Tax Regulations'').

[3] Contributions to a Canadian retirement account and earnings on those contributions are not subject to Canadian income tax until withdrawn. A

Similar to U.S. law, Canadian law restricts the amount of money that a participant may contribute to a Canadian retirement account, and early withdrawals by a participant are subject to immediate taxation.[4] Unlike U.S. law, Canadian law also restricts the investments that may be held in a Canadian retirement account to certain ''qualified investments,'' which must consist primarily of Canadian securities.[5] A participant who violates any of these restrictions may face significant adverse tax consequences.[6]

Individuals who establish Canadian retirement accounts while living and working in Canada and who later move to the United States often continue to hold their retirement assets in their Canadian retirement accounts rather than prematurely withdrawing (or ''cashing out'') those assets, which would result in immediate taxation in Canada.[7] Once in the United States, however, these participants (*i.e.*, Canadian/U.S. Participants) may not be able to manage their Canadian retirement account investments.[8] Most securities and most funds that are ''qualified investments'' for Canadian retirement accounts are not registered under the U.S. securities laws. Funds and other issuers therefore generally cannot offer and sell those securities in the United States without violating the registration requirements of the Securities Act[9] and, in the case of securities of an unregistered fund, the Investment Company Act.[10] As a result of these registration requirements of the U.S. securities laws, Canadian/U.S. Participants have not been able to purchase or exchange securities for their Canadian retirement accounts as needed to meet their changing investment goals or income needs.[11]

The Commission and its staff have interpreted section 7(d) to generally prohibit a foreign fund from making a U.S. private offering if that offering would cause the securities of the fund to be beneficially owned by more than 100 U.S. residents. See Resale of Restricted Securities, Securities Act Release No. 6862 (Apr. 23, 1990) [55 FR 17933 (Apr. 30, 1990)] at text following n.64; Investment Funds Institute of Canada, SEC No-Action Letter (Mar. 4, 1996); Touche Remnant & Co., SEC No-Action Letter (Aug. 27, 1984). Given the large number of Canadian/U.S. Participants, it is unlikely that a Canadian fund could sell securities to Canadian retirement accounts of Canadian/U.S. Participants without exceeding the limit of 100 U.S. beneficial owners.

The Commission and its staff have received numerous inquiries from Canadian/U.S. Participants concerned about their inability to manage retirement assets held in their Canadian retirement accounts. In addition, the Investment Funds Institute of Canada (''IFIC''), an association representing Canadian mutual funds, has filed a petition for rulemaking requesting that the Commission adopt rules to permit Canadian mutual funds to offer securities to Canadian/U.S. Participants and sell securities to their accounts, without registering those securities under the Securities Act or registering as investment companies under the Investment Company Act (''IFIC Petition'').[12]

II. Discussion

The Securities Act's registration and disclosure requirements are premised on the notion that investors in a public offering are best protected if they are provided with full and fair disclosure of material information needed for an informed investment decision.[13] Securities offered publicly in the United States generally must be registered with the Commission, and a prospectus must be delivered to investors.[14] Congress recently amended the Securities Act to authorize the Commission to adapt its regulations, including its registration requirements, to the changing circumstances in which securities are offered and traded.[15] Under these

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Canadian retirement account typically is structured as a trust and must be registered with the Canadian Minister of National Revenue and maintained with a qualified Canadian financial institution, such as a trust company, insurance company, or bank. *See generally* Canadian Income Tax Act ¶¶ 146(1), 146.3(1). The most common types of Canadian retirement accounts are Registered Retirement Savings Plans (''RRSPs'') and Registered Retirement Income Funds (''RRIFs''). *See* Canadian Income Tax Act ¶¶ 146 (RRSPs), 146.3 (RRIFs). RRSPs and RRIFs may be ''self-directed,'' in which the individual participant decides how to invest account assets, or ''single vendor,'' in which a Canadian trustee or plan manager invests the account assets. The rules proposed in this release do not cover the offer or sale of securities to single vendor and other types of Canadian retirement accounts whose assets are managed exclusively in Canada. *See infra* note 26.

[4] Contributions to an RRSP Canadian retirement account are subject to an annual limit of 18 percent of an individual's ''earned income'' (*i.e.*, generally income from Canadian employment or self-employment) for the previous year (up to a maximum of $13,500 (Can.)), less certain pension adjustments. *See* Canadian Income Tax Act ¶ 146(1) (''earned income,'' ''RRSP deduction limit,'' ''RRSP dollar limit''). Early withdrawals are subject to withholding tax and must be included in taxable income in the year withdrawn. *See,* e.g., *id.* ¶¶ 146(8) (benefits taxable), 153(1)(j) (withholding).

[5] Canadian Income Tax Act ¶¶ 146(1), 146.3(1) (defining ''qualified investment'' for RRSPs and RRIFs); Canadian Income Tax Regulations § 4900 (qualified investments). At least 80 percent of the book value of a Canadian retirement account must be invested in Canadian securities. *See generally* Foreign Property of Registered Plans, Revenue Canada Bulletin No. IT–412R2 (Jan. 16, 1995).

[6] For example, excess contributions to a Canadian retirement account generally are subject to a penalty tax of one percent per month of the excess contributions. *See* Contributions to Registered Retirement Savings Plan, Revenue Canada Bulletin No. IT–124R6 (Jan. 31, 1995), at ¶ 30. Non-qualified investments held in a Canadian retirement account are subject to a penalty tax of one percent per month of the market value of the non-qualified investments, and earnings on non-qualified investments are subject to Canadian income tax. *See, e.g.,* Canadian Income Tax Act ¶¶ 146(10.1), 207.1(1).

[7] *See supra* note 4.

[8] The Commission believes that a significant number of Canadian/U.S. Participants may face this predicament. At the end of 1995, approximately 660,000 U.S. residents were either Canadian citizens or former Canadian citizens. Bureau of the Census, U.S. Dep't of Commerce, March 1996 Current Population Survey. In addition, U.S. citizens who live and work in Canada on a temporary basis may be able to establish Canadian retirement accounts, and so may face this predicament upon returning to the United States.

[9] Absent an exemption, all securities offered or sold through use of the U.S. mails or other means of interstate commerce must be registered under the Securities Act. *See* section 5(a) of the Securities Act (15 U.S.C. 77e(a)).

[10] The Investment Company Act requires a foreign fund to obtain an order from the Commission permitting it to register under that Act before it uses the U.S. mails or any means of interstate commerce in connection with a public offering of its securities. *See* section 7(d) of the Investment Company Act (15 U.S.C. 80a–7(d)). The Commission may issue this type of order only if it finds both that registration of the foreign fund is consistent with the public interest and protection of investors and that it is legally and practically feasible to enforce the provisions of the Investment Company Act against the fund. *Id.* Rule 7d–1 (17 CFR 270.7d–1) specifies the conditions that a Canadian fund may meet to satisfy the standards of section 7(d). Only one Canadian fund currently is registered with the Commission.

[11] The registration requirements of the Securities Act generally would not preclude Canadian/U.S. Participants from purchasing some types of securities for their Canadian retirement accounts in secondary market transactions on stock exchanges or in other markets. As discussed below, however, Canadian broker-dealers that effect transactions, including secondary market transactions (*i.e.,* those involving securities that are not required to be registered under the Securities Act), for Canadian/U.S. Participants are subject to the broker-dealer registration requirements of the Exchange Act, absent an exemption. *See infra* note 24. In addition, there are generally no secondary markets for the securities of open-end management funds (or ''mutual funds''), which continuously publicly offer and redeem securities. The requirement that public offers be registered under the Securities Act thus deters most foreign mutual funds from offering securities to Canadian/U.S. Participants.

[12] The IFIC Petition is available for inspection and copying in the Commission's Public Reference Room in File No. 4–407 and File No. S7–10–99. The proposed rules respond to the issues raised in that petition.

[13] *See* Securities Act Concepts and Their Effects on Capital Formation, Securities Act Release No. 7314 (July 25, 1996) (61 FR 40044 (July 31, 1996)) at text accompanying n.13; *SEC* v. *Ralston Purina Co.,* 346 U.S. 119, 124 (1953).

[14] Section 5 of the Securities Act (15 U.S.C. 77e).

[15] Section 28 of the Securities Act (15 U.S.C. 77z–3) (enacted as part of the National Securities

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amendments, the Commission may exempt persons, securities or transactions from any provision of the Securities Act, if necessary or appropriate in the public interest and consistent with the protection of investors.[16] Congress intended the Commission to use this authority to address, among other things, developments in the securities markets that ''do not fit neatly into the existing regulatory framework.''[17]

The growth of self-directed Canadian retirement accounts, the migration of participants to the United States, and the need of these participants to manage their retirement investments by buying and selling Canadian and other foreign securities for their accounts, appear to be developments that do not fit neatly into the existing regulatory framework of the Securities Act. According to some Canadian/U.S. Participants, the registration requirements of the Securities Act have operated to impede rather than promote their interests. These participants have purchased securities in Canada pursuant to a Canadian retirement program and, as a result, have the protections of the Canadian securities laws and regulatory system with respect to those investments. In light of the need for these investors to be able to manage their Canadian retirement account assets,[18] and the existence of a well-developed legal system in Canada, the Commission believes that it may be in the public interest and consistent with the protection of investors to exempt from the registration requirements of the Securities Act offers of foreign securities to Canadian/U.S. Participants and sales to their retirement accounts. The Commission therefore is proposing new rule 237 under the Securities Act to exempt these transactions from Securities Act registration, under certain conditions discussed below.[19]

The registration requirement of the Investment Company Act is an additional regulatory provision that can prevent Canadian/U.S. Participants from purchasing securities of foreign funds in the course of managing their Canadian retirement accounts. A foreign fund that publicly offers securities in the United States not only must register its securities under the Securities Act, but also must obtain an order permitting it to register as an investment company under the Investment Company Act.[20] Because most Canadian funds have not obtained such an order (and cannot be expected to do so[21]), Canadian/U.S. Participants have not been able to purchase securities of Canadian funds for their Canadian retirement accounts. As a result, participants who hold securities of Canadian funds through their Canadian retirement accounts cannot exchange those securities for other Canadian fund securities as, for example, they age and their financial needs change.[22] In order to allow Canadian/U.S. Participants to manage their Canadian retirement accounts, the Commission is proposing new rule 7d–2 under the Investment Company Act, which would permit a foreign fund to make offers to these participants and sales to their retirement accounts without registering as an investment company under the Investment Company Act.[23]

The provisions of proposed rules 237 and 7d–2 are substantially the same. They are designed to permit offers of foreign securities to Canadian/U.S. Participants and sales to their accounts, and to permit participants to receive prospectuses and other informational materials necessary for managing their investments, without permitting the types of additional sales or communications that could result in a more generalized public offering of securities in circumvention of the registration requirements of the U.S. securities laws.[24] The proposed rules would strictly limit the activities of persons making offers or sales in reliance on the rules, and would in no way limit the application of the antifraud provisions of the U.S. securities laws or the provisions of any state laws that may govern the offer or sale of securities to Canadian retirement accounts.

A. Proposed Securities Act Rule[25]

1. Scope of the Rule

Proposed rule 237 under the Securities Act would exempt from the registration requirements of that Act the offer of a foreign issuer's securities to a ''participant'' and the sale of those securities to his or her Canadian retirement account.[26] The rule would

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Markets Improvement Act of 1996, Pub. L. 104–290, 110 Stat. 3416).

[16] *Id.*

[17] S. Rep. No. 293, 104th Cong., 2d Sess. 15 (1996).

[18] Financial planning experts stress the importance of periodically reallocating retirement investments to reflect the investor's changing age and income needs. *See, e.g.*, Laird H. Shuart & Michael E. Ruhlman, Planning for Retirement in the 21st Century—A New Approach 77–78 (1991); Timothy E. Johnson, Investment Principles 452–53 (1978). Some analysts also have suggested that, due to increasing life expectancies and health care costs, the careful management of individual retirement investments may be more important than ever. *See, e.g.*, Employee Benefit Research Institute, Fundamentals of Employee Benefit Programs 179, 196 (5th ed. 1997).

[19] *See infra* Part II.A.2. The Commission anticipates that this proposed exemption from the Securities Act's registration requirements would be used primarily in connection with offers and sales of securities of Canadian mutual funds, although other foreign issuers may use the exemption for offers and sales to Canadian/U.S. Participants in connection with public offerings.

[20] As noted above, section 7(d) of the Investment Company Act requires a foreign fund to obtain an order from the Commission permitting it to register under that Act before it uses the U.S. mails or any means of interstate commerce in connection with a public offering of its securities. *See supra* note 10. The requirement that a foreign fund register under the Investment Company Act before making a public offering in the United States is intended to subject foreign funds that access the U.S. markets to the same type and degree of regulation as domestic funds. *See* S. Rep. No. 1775, 76th Cong., 3d Sess. 13 (1940); H.R. Rep. No. 2639, 76th Cong., 3d Sess. 13 (1940).

[21] According to IFIC, a Canadian fund that satisfies the conditions necessary to obtain such an order likely would not be able to continue to operate as a registered mutual fund under Canadian law. *See* IFIC Petition, *supra* note 12, at n.34.

[22] This is true even for Canadian/U.S. Participants who already own securities of the other funds in their retirement accounts.

[23] Proposed rule 7d–2 would deem a foreign fund's offer of securities to Canadian/U.S. Participants, and the sale of securities to their Canadian retirement accounts, not to be a ''public offering'' for purposes of section 7(d) of the Investment Company Act, under the conditions discussed below. As noted earlier, the Commission and its staff have interpreted section 7(d) to generally prohibit a foreign fund from making a U.S. private offering if that offering would cause the securities of the fund to be beneficially owned by more than 100 U.S. residents. *See supra* note 10. Ownership by Canadian/U.S. Participants of foreign fund shares through their Canadian retirement accounts, however, would not count toward the 100 U.S. investors under this interpretation of section 7(d).

[24] Purchases or sales of securities held through Canadian retirement accounts generally are effected through Canadian securities dealers. Absent an exemption, however, Canadian broker-dealers that effect securities transactions for Canadian/U.S. Participants with respect to their Canadian retirement accounts are subject to the broker-dealer registration requirements of section 15 of the Exchange Act (15 U.S.C. 78*o*). Although rule 15a–6 under the Exchange Act (17 CFR 240.15a–6) provides several conditional exemptions from this registration requirement for foreign broker-dealers, additional relief may be required to permit Canadian broker-dealers to engage in activities generally necessary to maintain participants' Canadian retirement accounts without registration under the Exchange Act. The Commission has received a request for exemptive relief from the broker-dealer registration requirements of the Exchange Act for certain Canadian broker-dealers that effect transactions for Canadian/U.S. Participants with respect to their Canadian retirement accounts. Letter from Susan E. Pravda, Epstein, Becker & Green, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission (Jan. 7, 1999). The Commission will be considering this request for exemptive relief.

[25] The following discussion focuses on the scope and conditions of proposed rule 237. The scope and conditions of proposed rule 7d–2, as noted above, are largely identical. *See infra* note 47 and accompanying text.

[26] The definition of ''Canadian retirement account'' would include self-directed individual retirement accounts that are both established and qualified for tax-advantaged treatment under Canadian law. Proposed rule 237(a)(2). The

define a ''participant'' as any individual in the United States who is entitled to receive the income and assets from a Canadian retirement account.[27] Typically, a participant would be an individual who established a Canadian retirement account while living and working in Canada and has moved to the United States either permanently or temporarily.[28] The exemption would be available for offers and sales of securities of any type of issuer.[29] To qualify for the exemption, however, the securities must be eligible for investment by Canadian retirement accounts, and they also must be available for purchase by Canadian investors other than participants.[30]

The proposed rule would exempt sales to a Canadian/U.S. Participant's retirement account in connection with an exchange or re-allocation of existing Canadian retirement account investments, as well as sales in connection with new investments made with additional contributions to the account. The Commission believes that most Canadian/U.S. Participants would not be permitted to make significant additional contributions to their Canadian retirement accounts, because Canadian tax law penalizes contributions greater than a specified percentage of an individual's Canadian earned income (*i.e.*, income that is earned and taxable in Canada), which an individual residing in the United States ordinarily would not have.[31] The Commission requests comment whether this view of Canadian tax law is accurate. If participants generally would be able to make significant additional contributions to their Canadian retirement accounts, should the proposed exemption exclude additional purchases? If additional purchases are excluded, would persons relying on the exemption be able to adequately monitor whether purchase requests from participants, or their broker-dealers, represent the exchange or re-allocation of previous Canadian retirement account investments, rather than additional acquisitions with new contributions?

2. Conditions of the Rule

a. Limitations on Marketing Activities. Proposed rule 237 includes conditions that limit the activities of persons relying on the rule, in order to prevent the exemption from being used as an avenue for a distribution of securities in the United States beyond the rule's limited purpose. Thus, a person relying on the rule would be permitted to solicit a Canadian/U.S. Participant only if that person is an authorized agent of the participant.[32] Persons relying on the rule would be limited to (i) processing transaction requests from participants,[33] (ii) paying dividends and distribution on securities held in a Canadian retirement account,[34] (iii) delivering

definition would exclude Canadian retirement accounts that are not self-directed, because those accounts are managed entirely in Canada and generally would not entail U.S. registration requirements. The proposed definition therefore does not include Registered Pension Plans (Canadian Income Tax Act ¶ 147.1), Deferred Profit Sharing Plans (Canadian Income Tax Act ¶ 147), single vendor RRSPs and RRIFs, and other Canadian tax-advantaged plans whose investments are managed by trustees or other fiduciaries in Canada.

[27] Proposed rule 237(a)(6). Participants, for example, would include individuals who have established Canadian retirement accounts with Canadian earned income and are in the United States (i) permanently, (ii) as a result of being stationed or transferred by an employer, or (iii) only during the winter months. An individual's status as a participant would not depend on the length of his or her stay in the United States. A participant would be an ''annuitant'' of a Canadian retirement account as provided by Canadian law. *See* Canadian Income Tax Act ¶¶ 146(1), 146.3(1) (defining ''annuitant'' as the individual, or a spouse in certain cases, for whom a RRSP or RRIF will provide retirement income).

[28] Certain ''deemed'' Canadian residents (*i.e.*, Canadian government and military personnel) may be able to establish Canadian retirement accounts with income earned while living and working in the United States. *See infra* note 31.

[29] Persons relying on the exemption would be persons that engage in transactions not otherwise exempt from the registration requirements of section 5 of the Securities Act (*i.e.*, issuers, underwriters or dealers under U.S. law). *See, e.g.*, section 4(1) of the Securities Act (15 U.S.C. 77d(1)).

[30] The types of securities that are qualified investments for Canadian retirement accounts are identified in the Canadian Income Tax Act and the Canadian Income Tax Regulations. *See supra* note 5 and accompanying text. The proposed rule would be available only for ''eligible securities'' issued by a ''qualified company.'' Eligible securities would be securities issued by a qualified company that (i) are offered to participants or sold to their Canadian retirement accounts in reliance on the proposed rule and (ii) may also be purchased by Canadians other than participants. Proposed rule 237(a)(3)(i), (ii). The rule would define a qualified company as a foreign issuer whose securities are qualified for investment on a tax-deferred basis by a Canadian retirement account under Canadian law. Proposed rule 237(a)(7). A ''foreign issuer'' would include any issuer that is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country, except for an issuer that has a substantial presence in the United States as described in the rule. Proposed rule 237(a)(5). This definition is modeled on the definitions of ''foreign issuer'' and ''foreign private issuer'' in rule 405 under the Securities Act (17 CFR 230.405).

As noted above, the proposed exemption would be available only for offers and sales of eligible securities of qualified companies. No condition of the rule, however, would require that a participant's Canadian retirement account comply with the other requirements of Canadian tax law, such as the limitations on contributions. *See generally supra* notes 4—5 and accompanying text (discussing certain restrictions on Canadian retirement account contributions and investments).

[31] *See* Canadian Income Tax Act ¶ 146(1) (defining ''earned income''). *See also supra* notes 4, 6 (describing restrictions on Canadian retirement account contributions and certain penalties on excess contributions). Taxation in Canada generally depends on an individual's residence in Canada. Whether a Canadian/U.S. Participant's income is subject to Canadian tax or U.S. tax typically would depend on several factors, including (i) the permanence and purpose of the stay in the United States, (ii) residential ties to Canada, (iii) residential ties to the United States, and (iv) regularity and length of return visits to Canada. *See generally* Determination of an Individual's Residence Status, Revenue Canada Bulletin No. IT–221R2 (Feb. 25, 1983). Under the United States-Canada Tax Treaty and Canadian law, Canadian government employees, diplomats, and military personnel stationed in the United States are ''deemed'' to be Canadian residents, and their income remains subject to Canadian tax, despite their residence in the United States. *See* Convention with Respect to Taxes on Income and on Capital, Sept. 26, 1980, U.S.-Can., art. IV, para. 5, T.I.A.S. No. 11,087 (as amended by protocols); Canadian Income Tax Act ¶ 250(1) (deemed residents of Canada). Because most Canadian/U.S. Participants, other than deemed Canadian residents, who relocate to, maintain primary residence in, or spend most of their time in, the United States would no longer be residents of Canada for tax purposes, the Commission believes that they would not be able to contribute significant additional income to their Canadian retirement accounts. For individuals who are deemed residents of Canada, however, additional contributions to a Canadian retirement account may be the only mechanism for making a Canadian tax-advantaged retirement investment while in the United States.

[32] Proposed rule 237(b)(3). Generally, a ''solicitation'' would include any contact (*i.e.*, telephone calls, mailings, facsimile transmissions, electronic mail or similar communications) with a participant that is intended to generate interest in, or induce the purchase of, eligible securities. The exception for solicitations by authorized agents is intended to permit Canadian broker-dealers relying on the rule to continue to provide investment advice to their Canadian/U.S. Participant customers. For example, a broker-dealer relying on the rule would not be prohibited from providing investment advice, prospectuses or other similar materials to an *existing* client who is a participant about possible investments in the participant's Canadian retirement account. Of course, to the extent persons relying on the rule are engaged in broker-dealer activity in the United States, they would be required to register as broker-dealers under section 15 of the Exchange Act, absent an available exemption. *See supra* note 24.

[33] Proposed rule 237(b)(1)(i). A person relying on the rule also would be permitted to effect routine transactions in securities held in a participant's Canadian retirement account. *Id.* Routine transactions would include routine or mechanical transfers of securities held in the account, such as transfers caused by a participant's death or divorce, and rollovers or other transfers of assets among Canadian retirement accounts as required or allowed under Canadian law. The Commission believes that generally these types of transfers would not entail registration under the Securities Act in any event.

[34] Proposed rule 237(b)(1)(ii). The payment of dividends would include the issuance of securities under a dividend reinvestment plan. For guidance on whether registration of securities issued pursuant to a dividend reinvestment plan would be required absent the proposed exemption, *see, e.g.*, Securities Act Release No. 929 (July 29, 1936) (11 FR 10957 (1936)); Investment Company Act Release No. 6480 (May 10, 1971) (36 FR 9627 (May 1971)); Interpretation of the Division of Corporation Finance Relating to Dividend Reinvestment and

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written offering materials upon the request of a participant,[35] and (iv) delivering updated offering materials, proxy statements, account statements and other materials typically provided to other security holders regarding securities held in a Canadian retirement account.[36] Persons relying on the rule could not engage in activities that would condition the U.S. market for the securities, such as advertising the securities in the United States,[37] or that would facilitate secondary trading in the securities, such as arranging for dealers to make a secondary market in the United States when there was no pre-existing U.S. market.[38]

As noted above, under the rule the only updated written offering materials or other informational materials that could be delivered to a Canadian/U.S. Participant would be those that concern securities already held in the participant's retirement account.[39] The Commission requests comment whether Canadian funds commonly use joint prospectuses or other joint informational materials to offer and sell securities of several affiliated funds or different classes or series of the same fund. If so, should rule 237 specifically permit persons relying on the rule to deliver updated joint prospectuses and other joint materials that concern both securities that are held in a participant's retirement account and securities that are not held in the account?

Under the proposed rule, offering materials for eligible securities must prominently disclose that the securities are not registered with the Commission and may not be offered or sold in the United States unless registered or exempt from registration under the U.S. securities laws.[40] This disclosure requirement would apply to all written offering materials, including prospectuses, advertisements and newsletters that are sent to participants in reliance on the proposed exemption. Comment is requested on this disclosure requirement.

The Commission also requests comment whether the rule should prohibit resales in the United States of securities offered and sold in reliance on the proposed exemption.[41] Is a restriction on resales necessary to ensure that unregistered securities sold to Canadian retirement accounts in reliance on the proposed exemption are not later transferred to persons in the United States who are not Canadian/U.S. Participants?

b. Restriction on Disclaiming Canadian or U.S. Law or Jurisdiction. Proposed rule 237 is premised on, among other things, the availability of the investor protections afforded by Canadian law for Canadian retirement account investments. We believe that, because these accounts were opened and remain in Canada, Canadian law would be applicable and Canadian courts would have jurisdiction. Nonetheless, we are proposing to include in the rule the condition that a person relying on the rule not disclaim the applicability of Canadian law or jurisdiction in any proceeding involving eligible securities.[42] The Commission requests comment on this proposed condition.

As noted above, offers and sales of securities made in reliance on the proposed rule would remain fully subject to the antifraud provisions of the U.S. securities laws. The proposed rule therefore also would include the condition that a person relying on the rule not disclaim the applicability of U.S. law, or the jurisdiction of the courts of the United States, in any proceeding involving eligible securities.[43] Comment is requested on this proposed condition of the rule.

The Commission also requests comment whether it would be unduly burdensome for rule 237 to require any person that relies on the rule to provide the Commission, upon request, with information, documents, testimony and assistance relating to their offers and sales of securities in reliance on the rule.[44] This type of provision could facilitate the Commission's ability to investigate allegations of fraud. In the alternative, should the rule require any person relying on the rule to designate an agent for service of process in the United States?[45] Finally, comment is requested whether persons relying on rule 237 should be required to obtain from each participant who desires to purchase securities offered and sold in reliance on the rule a written acknowledgment that those securities are not subject to the registration provisions of the U.S. securities laws.

B. Proposed Investment Company Act Rule

Proposed rule 7d–2 under the Investment Company Act would deem a foreign fund's offer of securities to Canadian/U.S. Participants and sale to their accounts not to be a ''public offering'' that would require the fund to register as an investment company under that Act.[46] The scope of this proposed rule, and the conditions that must be met by a foreign fund relying on the rule, would be substantially the same as the proposed scope and conditions of rule 237 under the Securities Act.[47] The Commission requests comment whether any specific provisions of proposed rule 7d–2 should differ from those of rule 237. Are any provisions of proposed rule 7d–2 broader than necessary to achieve the intended purpose of permitting Canadian/U.S. Participants to manage their Canadian retirement account investments? Comment also is requested whether rule 7d–2 should address the other issues on which comment was solicited in the discussion of proposed rule 237.[48]

Similar Plans, Securities Act Release No. 5515 (July 22, 1974) (39 FR 28520 (Aug. 8, 1974)).

[35] Proposed rule 237(b)(1)(iii).

[36] Proposed rule 237(b)(1)(iv).

[37] Proposed rule 237(b)(4). Activities with respect to an eligible security that constitute ''directed selling efforts'' for purposes of Regulation S under the Securities Act (17 CFR 230.901–.905) generally would be considered to ''condition'' the U.S. market for purposes of proposed rule 237. *See* 17 CFR 230.902(c); Offshore Offers and Sales, Securities Act Release No. 6863 (Apr. 24, 1990) (55 FR 18306 (May 2, 1990)), at nn.47–72 and accompanying text.

[38] Proposed rule 237(b)(4).

[39] *See supra* note 36 and accompanying text.

[40] Proposed rule 237(b)(2).

[41] For example, the rule could provide that securities offered and sold in reliance on the exemption may not be eligible for resale other than in accordance with the requirements of Regulation S under the Securities Act, which generally excludes from Securities Act registration offers and sales of securities that occur in offshore transactions and do not involve U.S. marketing activities. A Canadian/U.S. Participant who desires to sell eligible securities thus might be required either to sell the securities in the Canadian or other foreign markets or, with respect to securities of a Canadian mutual fund, to tender the securities to the fund for redemption.

[42] Proposed rule 237(b)(5). The rule would define ''Canadian law'' to include the federal laws of Canada, the laws of any province or territory of Canada, and the rules of any Canadian federal or provincial regulator or self-regulatory authority, depending upon the applicability of each. Proposed rule 237(a)(1).

[43] Proposed rule 237(b)(5).

[44] For example, persons relying on the rule could be required to provide the Commission with the types of information, documents, testimony, and assistance described in rule 15a-6(a)(3)(i)(B) under the Exchange Act [17 CFR 240.15a-6(a)(3)(i)(B)], with respect to offers and sales of securities made in reliance on the rule.

[45] For example, rule 237 could require issuers, underwriters and other persons that rely on the rule to file a form similar to Form F–X under the Securities Act [17 CFR 239.42] identifying a U.S. agent for service of process. Designating an agent for service of process also might facilitate the ability of Canadian/U.S. Participants to pursue antifraud remedies in the United States.

[46] *See generally supra* notes 20–23 and accompanying text.

[47] *See supra* Part II.A (discussion of the scope and conditions of proposed rule 237). The one substantive difference is that proposed rule 7d-2 would require written offering materials for eligible securities to disclose prominently not only that the securities are not registered with the Commission, but also that the foreign fund that issued those securities is not registered with the Commission. Proposed rule 7d–2(b)(2).

[48] *See supra* Part II.A.

C. Proposed Amendments to Exchange Act Rule 12g3–2

Section 12(g)(1) of the Exchange Act provides that an issuer whose securities are traded by any means of interstate commerce must register its equity securities with the Commission under the Exchange Act if it has more than 500 shareholders and total assets over $1 million.[49] The Exchange Act authorizes the Commission to exempt securities of foreign issuers from this registration requirement.[50] Under this authority, the Commission has adopted rule 12g3–2(a), which exempts securities of a foreign private issuer from the registration requirement if fewer than 300 shareholders reside in the United States.[51] Rule 12g3–2(b) exempts securities of a foreign private issuer that has 300 or more shareholders resident in the United States if the issuer notifies the Commission that it is electing to be exempt under that rule, furnishes certain information to the Commission that it provides to shareholders in its home country, and meets certain other requirements.[52]

The registration requirements under the Exchange Act were designed to assure that U.S. investors would have available adequate information about publicly held issuers. In the case of Canadian retirement accounts, participants already have a source of information through the administrators of their retirement accounts. Thus, it appears that counting Canadian/U.S. Participants toward the 300 shareholder limit of rule 12g3–2(a) is not necessary with respect to Canadian/U.S. Participants.[53] The Commission therefore is proposing to amend rule 12g3–2 to provide that participants who hold shares of a foreign private issuer only through their Canadian retirement accounts should not be counted for purposes of determining whether the issuer has fewer than 300 shareholders who reside in the United States.[54]

D. General Request for Comments

The Commission requests comment on the proposed rules and rule amendments that are the subject of this Release, suggestions for additional provisions or changes to existing rules or forms, and comments on other matters that might have an effect on the proposals contained in this Release. The Commission also requests comment whether the proposals, if adopted, would promote efficiency, competition and capital formation. Comments will be considered by the Commission in satisfying its responsibilities under section 2(b) of the Securities Act and section 3(f) of the Exchange Act.[55] The Commission encourages commenters to provide data to support their views. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[56] the Commission also requests information regarding the potential impact of the proposals on the economy on an annual basis. Commenters are requested to provide empirical data to support their views.

III. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. The proposals would provide substantial benefits to Canadian/U.S. Participants. Because most securities that are held in Canadian retirement accounts, and the Canadian funds that issue many of those securities, are not registered under the U.S. securities laws, those securities generally cannot be sold by issuers to persons in the United States without violating the registration requirements of the Securities Act and, in the case of securities of an unregistered fund, the Investment Company Act.[57] As a consequence, Canadian/U.S. Participants have not been able to purchase or exchange securities for their Canadian retirement accounts as needed to meet their changing investment goals or income needs. Proposed rules 237 and 7d–2 would permit offers of a foreign issuer's securities to a Canadian/U.S. Participant and sales to his or her account, under certain conditions consistent with the protection of investors. The proposals thus would benefit these investors by making it possible for them to manage their Canadian retirement account investments.

Proposed rules 237 and 7d–2 also would benefit foreign issuers and other persons that offer securities of foreign issuers (including securities of foreign funds) to Canadian/U.S. Participants and sell those securities to Canadian retirement accounts. Absent the proposals, these persons likely would forego offering foreign securities to Canadian/U.S. Participants and selling foreign securities to their accounts, because securities that are not registered under the U.S. securities laws may not be publicly offered or sold in the United States. Under the proposed rules, these persons would be able to sell those securities to participants' Canadian retirement accounts, because the proposals would permit (i) foreign securities, including securities of foreign funds, to be offered to Canadian/U.S. Participants and sold to their accounts without being registered under the Securities Act and (ii) foreign funds to offer securities to Canadian/U.S. Participants and sell securities to their accounts without registering as investment companies under the Investment Company Act.

Foreign issuers and other persons may incur costs when relying on the proposed rules to offer or sell securities. The proposed rules require that any written offering materials delivered to a Canadian/U.S. Participant in reliance on the rules include a prominent statement that the securities are not registered with the Commission and, in the case of securities issued by a foreign fund, that the fund also is not registered with the Commission. To meet these requirements, the foreign issuer, underwriter or broker-dealer may redraft an existing prospectus or other written offering material to add this disclosure statement, or may draft a sticker or supplement containing this disclosure to be added to existing offering materials. It appears that the associated costs likely would be minimal and are justified by the benefits of the relief provided by the proposed new rules. Comment is requested on the costs associated with these proposed disclosure requirements.

Proposed rules 237 and 7d–2 also could result in some U.S. issuers, including some U.S. funds, incurring costs in the form of lost new business from Canadian/U.S. Participants who, absent the proposals, might cash out their Canadian retirement accounts and invest those assets in securities that are registered in the United States. Based on

[49] 15 U.S.C. 78*l*(g)(1). Rule 12g–1 under the Act (17 CFR 240.12g–1) exempts an issuer from this section 12(g)(1) registration requirement if its total assets at fiscal year end do not exceed $10 million and, with respect to a foreign private issuer, the securities were not quoted in an automated inter-dealer quotation system.

[50] Section 12(g)(3) of the Exchange Act (15 U.S.C. 78*l*(g)(3)) provides that the Commission may exempt any security of a foreign issuer from this registration requirement if the Commission finds that an exemption is in the public interest and consistent with the protection of investors.

[51] Exchange Act rule 12g3–2(a) (17 CFR 240.12g3–2(a)).

[52] *See* Exchange Act rule 12g3–2(b) (17 CFR 240.12g3–2(b)).

[53] In fact, counting these shareholders toward the 300 shareholder limit may hinder foreign issuers or broker-dealers from selling foreign securities to Canadian/U.S. Participants' retirement accounts out of concern that the issuer might not have complied with the requirements of section 12(g).

[54] Proposed rule 12g3–2(a)(2).

[55] Section 2(b) of the Securities Act (15 U.S.C. 77b(b)) and section 3(f) of the Exchange Act (15 U.S.C. 78c(f)) require the Commission, when it engages in rulemaking and is required to consider whether an action is consistent with the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

[56] Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

[57] *See supra* notes 9–11.

inquiries that the Commission has received from Canadian/U.S. Participants, however, it appears that many currently do not choose this investment strategy because of the adverse tax consequences that likely would result from such action. It therefore appears that the proposals would not significantly affect the number of participants that may cash out their Canadian retirement accounts in order to invest their retirement assets in U.S.-registered securities. The proposed rules thus should not result in significant costs for U.S. issuers, including U.S. funds, in the form of lost new business. Because the proposed rules primarily will affect foreign issuers and other foreign persons, it appears that the proposals also would not cause any other costs or benefits for U.S. issuers. Comment is requested on these assumptions, and in particular whether the proposals would result in significant costs, in the form of lost new business or otherwise, for U.S. issuers.

The proposed amendments to rule 12g3–2(a) would provide that a foreign issuer need not count the Canadian/U.S. Participants who hold its securities only through their Canadian retirement accounts for purposes of determining whether the issuer has fewer than 300 shareholders resident in the United States and thus qualifies for the exemption from Exchange Act registration afforded by the rule. These proposed amendments would benefit any foreign issuer whose securities might not qualify for the rule 12g3–2(a) exemption from Exchange Act registration if it were required to count participants who hold its securities in Canadian retirement accounts for purposes of determining whether it has fewer than 300 U.S. shareholders. The proposed amendments also may benefit Canadian/U.S. Participants, because without the amendments foreign issuers and broker-dealers might be reluctant to sell foreign securities to participants' Canadian retirement accounts out of concern that those sales might make the foreign securities subject to registration under section 12(g). There would appear to be no significant costs to foreign issuers, domestic issuers, or investors associated with these proposed amendments.

The Commission requests comment on the potential costs and benefits of the proposals and any suggested alternatives to the proposals. Specific comment is requested on the potential costs or benefits of these proposals to U.S. issuers, including U.S. funds. Data is requested concerning these costs and benefits.

IV. Paperwork Reduction Act

Certain provisions of the proposed rules contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and the Commission has submitted the proposed rules to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d). The titles for the collections of information are: ''Exemption for offers and sales to certain Canadian tax-deferred retirement savings accounts'' and ''Definition of 'public offering' as used in section 7(d) of the Act with respect to certain tax-deferred retirement savings accounts.'' An agency may not sponsor, conduct, or require response to an information collection unless a currently valid OMB control number is displayed.

Proposed rule 237 would permit securities of foreign issuers, including securities of foreign funds, to be offered to Canadian/U.S. Participants and sold to their accounts without being registered under the Securities Act. The rule would require written offering materials for securities offered or sold in reliance on the rule to disclose prominently that the securities are not registered with the Commission and may not be offered or sold in the United States unless registered or exempt from registration. Proposed rule 7d–2 under the Investment Company Act would permit foreign funds to offer securities to Canadian/U.S. Participants and sell securities to their accounts without registering as investment companies under the Investment Company Act. The rule would require written offering materials for securities offered or sold in reliance on the rule to make the same disclosure concerning those securities as required by proposed rule 237, and in addition to disclose prominently that the foreign fund that issued those securities is not registered with the Commission. The purpose of these disclosure requirements is to ensure that participants are aware that those securities are not subject to the protections afforded by registration under the U.S. securities laws.

The burden under either rule associated with adding this disclosure to written offering materials should be minimal and is non-recurring. The foreign issuer, underwriter or broker-dealer may redraft an existing prospectus or other written offering material to add this disclosure statement, or may draft a sticker or supplement containing this disclosure to be added to existing offering materials. In either case, based on discussions with representatives of the Canadian fund industry, the staff estimates that it would take an average of 10 minutes per document to draft the requisite disclosure statement. The staff estimates the annual burden as a result of the disclosure requirements of proposed rules 7d–2 and 237 as follows.

A. Proposed Rule 7d–2

The staff understands that there are approximately 1,300 publicly offered Canadian funds that potentially may rely on proposed rule 7d–2 to offer securities to Canadian/U.S. Participants and sell securities to their accounts without registering under the Investment Company Act. The staff estimates that during the first year that proposed rule 7d–2 is in effect, approximately 910 (70 percent) of these Canadian funds are likely to rely on the rule. The staff further estimates that each of those 910 Canadian funds, on average, distributes 3 different written offering documents concerning those securities, for a total of 2,730 offering documents.[58]

The staff therefore estimates that during the first year that proposed rule 7d–2 is in effect, approximately 910 respondents[59] would be required to make 2,730 responses by adding the new disclosure statements to approximately 2,730 written offering documents. Thus, the staff estimates that the total annual burden associated with this disclosure requirement in the first year after rule 7d–2 becomes effective would be approximately 455 hours (2,730 offering documents × 10 minutes per document).

In each year following the first year that proposed rule 7d–2 is in effect, the staff estimates that approximately 65 (5 percent) additional Canadian funds may rely on the rule to offer securities to Canadian/U.S. Participants and sell securities to their accounts, and that each of those funds, on average, distributes 3 different written offering documents concerning those securities, for a total of 195 offering documents. The staff therefore estimates that in each year after the first year that proposed rule 7d–2 becomes effective,

[58] Because Canadian tax law effectively precludes non-Canadian funds from being held in a Canadian retirement account, it is unlikely that any funds from countries other than Canada will rely on proposed rule 7d–2 to sell their shares to the Canadian retirement accounts of Canadian/U.S. Participants.

[59] This estimate of respondents assumes that all respondents are Canadian funds that redraft existing offering documents to add the required disclosure. The number of respondents may be greater if foreign underwriters or broker-dealers draft a sticker or supplement to add the required disclosure to an existing offering document.

approximately 65 respondents[60] would make 195 responses by adding the new disclosure statement to approximately 195 written offering documents. The staff therefore estimates that after the first year, the annual burden associated with the rule 7d–2 proposed disclosure requirement would be approximately 32.5 hours (195 offering documents × 10 minutes per document).

B. Proposed Rule 237

Canadian issuers other than Canadian funds. The Commission understands that there are approximately 3,500 Canadian issuers other than funds that potentially may rely on proposed rule 237 to make an initial public offering of their securities to Canadian/U.S. Participants.[61] The staff estimates that in any given year approximately 35 (or 1 percent) of those issuers are likely to rely on proposed rule 237 to make a public offering of their securities to participants, and that each of those 35 issuers, on average, distributes 3 different written offering documents concerning those securities, for a total of 105 offering documents.

The staff therefore estimates that during each year that proposed rule 237 is in effect, approximately 35 respondents[62] would be required to make 105 responses by adding the new disclosure statements to approximately 105 written offering documents. Thus, the staff estimates that the total annual burden associated with the proposed rule 237 disclosure requirement would be approximately 17.5 hours (105 offering documents × 10 minutes per document).

Other foreign issuers. In addition, issuers from foreign countries other than Canada could rely on proposed rule 237 to offer securities to Canadian/U.S. Participants and sell securities to their accounts without becoming subject to the registration requirements of the Securities Act. Because Canadian law strictly limits the amount of foreign investments that may be held in a Canadian retirement account, however, the staff believes that the number of issuers from other countries that might rely on proposed rule 237, and that therefore would be required to comply with the proposed offering document disclosure requirements, would be negligible.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the function of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the staff's estimate of the burden of the proposed collections of information; (iii) enhance the quality, utility and clarity of the information to be collected; and (iv) minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements of the proposed rules should direct them to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503; and (ii) Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street NW, Washington, DC 20549–0609, with reference to File No. S7–10–99. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication; therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this Release.

V. Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (''IRFA'') in accordance with 5 U.S.C. 603 regarding proposed rules 237 and 7d–2, and the proposed amendments to rule 12g3–2. The following summarizes the IRFA.

A. Reasons for the Proposed Action

In Canada, individuals can invest a portion of their earnings in tax-deferred Canadian retirement accounts, which operate in a manner similar to IRAs in the United States. Individuals who establish Canadian retirement accounts while living and working in Canada and who later move to the United States (''Canadian/U.S. Participants'' or ''participants''), however, have encountered difficulties managing their Canadian retirement account investments. Most securities and most funds that are ''qualified investments'' for Canadian retirement accounts are not registered under the U.S. securities laws. Issuers, therefore, cannot publicly offer and sell those securities in the United States without violating the registration requirements of the Securities Act and, in the case of securities of an unregistered fund, the Investment Company Act. As a result of these registration requirements of the U.S. securities laws, Canadian/U.S. Participants have not been able to purchase or exchange securities for their Canadian retirement accounts as needed to meet their changing investment goals or income needs.

B. Objectives

To enable Canadian/U.S. Participants to manage the assets in their Canadian retirement accounts, the Commission is proposing two new rules that would provide relief from the U.S. registration requirements, under certain conditions, for offers of foreign securities to Canadian/U.S. Participants and sales to their accounts. Proposed rule 237 under the Securities Act would permit securities of foreign issuers, including securities of foreign funds, to be offered to Canadian/U.S. Participants and sold to their accounts without being registered under the Securities Act. Proposed rule 7d–2 under the Investment Company Act would permit foreign funds to offer securities to Canadian/U.S. Participants and sell securities to their accounts without registering as investment companies under the Investment Company Act.

The Commission also is proposing to amend rule 12g3–2 under the Exchange Act. Section 12(g)(1) of the Exchange Act provides that an issuer whose securities are traded by any means of interstate commerce must register its equity securities with the Commission under the Exchange Act if it has more than 500 shareholders and total assets over $1 million.[63] The Commission is authorized to exempt securities of foreign issuers from this registration requirement, and has adopted rule 12g3–2 to exempt (i) securities of a foreign private issuer if the issuer has fewer than 300 shareholders resident in

[60] *See supra* note 59.

[61] Canadian funds would rely on both proposed rule 7d–2 and proposed rule 237 to offer securities to participants and sell securities to their Canadian retirement accounts without violating the registration requirements of the Investment Company Act or the Securities Act. Proposed rule 237, however, would not require any disclosure in addition to that required by proposed rule 7d–2. Thus, the disclosure requirements of proposed rule 237 would not impose any burden on Canadian funds in addition to the burden imposed by the disclosure requirements of rule 7d–2. To avoid double-counting this burden, the staff has excluded Canadian funds from the estimate of the hourly burden associated with proposed rule 237.

[62] This estimate of respondents assumes that all respondents are foreign issuers that redraft existing offering documents to add the required disclosure. The number of respondents may be greater if foreign underwriters or broker-dealers draft a sticker or supplement to add the required disclosure to an existing offering document.

[63] Rule 12g–1 under the Act exempts an issuer from this section 12(g)(1) registration requirement if its total assets at fiscal year end do not exceed $10 million and, with respect to a foreign private issuer, the securities were not quoted in an automated inter-dealer quotation system.

the United States (rule 12g3–2(a)); and (ii) securities of a foreign private issuer with 300 or more shareholders resident in the United States if the issuer furnishes certain information to the Commission that it provides to shareholders in its home country, and meets certain other requirements (rule 12g3–2(b)).

The registration requirements under the Exchange Act were designed to assure that U.S. investors would have available adequate information about publicly held issuers. In the case of Canadian retirement accounts, however, Canadian/U.S. Participants already have a source of information through the administrators of their retirement accounts. Because it appears that counting Canadian/U.S. Participants toward the 300 shareholder limit of rule 12g3–2(a) would serve little purpose with respect to Canadian/U.S. Participants, the Commission is proposing to amend rule 12g3–2(a) to provide that participants who hold shares of a foreign private issuer only through their Canadian retirement accounts need not be counted for purposes of determining whether the foreign issuer has fewer than 300 shareholders resident in the United States.

C. Legal Basis

The Commission is proposing rule 237 pursuant to the authority set forth in sections 19(a) and 28 of the Securities Act (15 U.S.C. 77s(a); 77z–3) and is proposing rule 7d–2 pursuant to section 38(a) of the Investment Company Act (15 U.S.C. 37(a)). Rule 12g3–2 is proposed to be amended pursuant to the authority set forth in section 19(a) of the Securities Act and section 12(g)(3) of the Exchange Act (15 U.S.C. 78*l*(g)(3)).

D. Small Entities Subject to the Rules

Proposed rules 237 and 7d–2 primarily will affect foreign issuers and other persons that offer securities to participants and sell securities to their retirement accounts. Foreign businesses, however, are not small entities for purposes of the Regulatory Flexibility Act.[64] Therefore, these proposals are unlikely to have a significant economic impact on a substantial number of small entities.

It is possible, however, that some domestic issuers could be affected by proposed rules 237 and 7d–2, because they may lose potential new business from Canadian/U.S. Participants who, absent the proposals, might choose to cash out their Canadian retirement accounts and invest those assets in securities registered under the U.S. securities laws. Based on inquiries that the Commission has received from Canadian/U.S. Participants, however, it appears that many participants currently do not choose this investment strategy because of the adverse tax consequences that likely would result from such action. It is likely, therefore, that the proposals would not significantly affect the number of participants that may cash out their Canadian retirement accounts, and thus that the proposals should not have any significant affect on U.S. issuers, including U.S. funds, in the form of lost new business. Moreover, even if absent the proposals some Canadian/U.S. Participants would cash out their Canadian retirement accounts and invest those assets in domestic issuers, including domestic funds, we have no basis for predicting whether they would invest in domestic issuers that are small entities.[65] Therefore, it appears that these proposals are unlikely to have a significant economic impact on a substantial number of domestic issuers that are small entities.

The proposed amendments to rule 12g3–2 would affect only foreign private issuers whose securities might not qualify for the exemption from Exchange Act registration afforded by rule 12g3–2(a) if the issuers are required to count Canadian/U.S. Participants who hold their securities in Canadian retirement accounts for purposes of determining whether they have fewer than 300 U.S. shareholders. Because foreign businesses are not small entities for purposes of the Regulatory Flexibility Act, it appears that these proposed amendments will not have a significant economic impact on a substantial number of small entities.

E. Reporting, Recordkeeping, and Other Compliance Requirements

Proposed rules 237 and 7d–2 each would require written offering documents relating to securities that are offered and sold in reliance on the rule to disclose prominently that those securities are not registered with the Commission and, in the case of securities of a non-U.S. fund, that the fund also is not registered with the Commission. These proposed rules, however, are only available for offers and sales of securities of foreign issuers. Because foreign businesses are not small entities for purposes of the Regulatory Flexibility Act, this compliance requirement would have no impact on small entities. Proposed rules 237 and 7d–2, and the proposed amendments to rule 12g3–2, do not involve any other reporting, recordkeeping, or compliance requirements. The Commission has not identified any overlapping or conflicting rules or forms.

F. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant economic impact on small entities. Virtually all of the entities that would be affected by proposed rules 237 and 7d–2, and the proposed amendments to rule 12g3–2, however, are foreign, and foreign businesses are not considered small entities for purposes of the Regulatory Flexibility Act. As noted above, it appears that the only potential impact that any of the proposals may have on U.S. issuers, including those that are small entities, is the potential loss of new business from Canadian/U.S. Participants as a result of proposed rules 237 and 7d–2. As explained above, it appears that any such impact would not be significant. Therefore, alternatives to the proposed rules, including (i) establishing different compliance or reporting standards that take into account the resources available to small entities; (ii) clarifying, consolidating or simplifying the compliance requirements for small entities; (iii) using performance rather than design standards; or (iv) exempting small entities from coverage of all or part of the rule, would not minimize any impact that the proposals may have on small entities.

The Commission encourages the submission of comments on matters discussed in the IRFA. Comment specifically is requested on the number of small entities that would be affected by the proposals and the impact of the proposals on small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be placed in the same public comment file as comments on the proposals. A copy of the IRFA may be obtained by contacting Cynthia Gurnee Pugh, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0506.

[64] *See* 13 CFR 121.105 (defining ''business concern'' for purposes of the Small Business Administration's definition of ''small business'').

[65] For purposes of the proposed rules, a domestic issuer (other than an investment company) that has total assets of $5 million or less and that is engaged or proposes to engage in small business financing is considered a small entity. 17 CFR 230.157. A domestic investment company that, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less is considered a small entity. 17 CFR 270.0–10.

VI. Statutory Authority

The Commission is proposing rule 237 pursuant to authority set forth in sections 19(a) and 28 of the Securities Act (15 U.S.C. 77s(a); 77z–3), rule 7d–2 pursuant to authority set forth in section 38(a) of the Investment Company Act (15 U.S.C. 37(a)), and the amendments to rule 12g3–2 pursuant to authority set forth in section 19(a) of the Securities Act and section 12(g)(3) of the Exchange Act (15 U.S.C. 78*l*(g)(3)).

List of Subjects

17 CFR Parts 230 and 270

Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Proposed Rules

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

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

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

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

* * * * *

2. Section 230.237 is added to read as follows:

§ 230.237 Exemption for offers and sales to certain Canadian tax-deferred retirement savings accounts.

(a) *Definitions.* As used in this section:

(1) *Canadian law* means the federal laws of Canada, the laws of any province or territory of Canada, and the rules or regulations of any federal, provincial, or territorial regulatory authority, or any self-regulatory authority, of Canada.

(2) *Canadian Retirement Account* means a trust or other arrangement, including, but not limited to, a ''Registered Retirement Savings Plan'' or ''Registered Retirement Income Fund'' administered under Canadian law, that is self-directed and:

(i) Operated exclusively to provide retirement benefits to a Participant; and

(ii) Established in Canada, administered under Canadian law, and qualified for tax-deferred treatment under Canadian law.

(3) *Eligible Security* means a security issued by a Qualified Company that:

(i) Is offered to a Participant, or sold to his or her Canadian Retirement Account, in reliance on this section; and

(ii) May also be purchased by Canadians other than Participants.

(4) *Foreign Government* means the government of any foreign country or of any political subdivision of a foreign country.

(5) *Foreign Issuer* means any issuer that is a Foreign Government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country, except an issuer meeting the following conditions:

(i) More than 50 percent of the outstanding voting securities of the issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States; and

(ii) Any of the following:

(A) The majority of the executive officers or directors are United States citizens or residents;

(B) More than 50 percent of the assets of the issuer are located in the United States; or

(C) The business of the issuer is administered principally in the United States.

(iii) For purposes of this definition, the term *resident*, as applied to security holders, means any person whose address appears on the records of the issuer, the voting trustee, or the depositary as being located in the United States.

(6) *Participant* means a natural person who is a resident of the United States, or is temporarily present in the United States, and currently is entitled to receive the income and assets from a Canadian Retirement Account.

(7) *Qualified Company* means a Foreign Issuer whose securities are qualified for investment on a tax-deferred basis by a Canadian Retirement Account under Canadian law.

(8) *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(b) *Exemption.* The offer to a Participant, or the sale to his or her Canadian Retirement Account, of Eligible Securities by any person is exempt from section 5 of the Act (15 U.S.C. 77e) if the person:

(1) Limits its activities with respect to Participants and their Canadian Retirement Accounts to the following:

(i) Processing requests from a Participant (or his or her authorized agent) for the purchase, sale, exchange, or redemption of an Eligible Security, and effecting other routine transactions under Canadian law;

(ii) Paying dividends and distributions on securities of a Qualified Company held in a Canadian Retirement Account;

(iii) Delivering, upon request, written offering materials or other informational materials concerning an Eligible Security; and

(iv) Delivering updated written offering materials, shareholder reports, account statements, proxy statements, or other materials concerning securities of a Qualified Company held in a Canadian Retirement Account.

(2) Includes in any written offering materials delivered to a Participant, or to his or her Canadian Retirement Account, a prominent statement that the Eligible Security is not registered with the U.S. Securities and Exchange Commission and may not be offered or sold in the United States or to any person in the United States unless registered, or an exemption from registration is available.

(3) Has not directly or indirectly solicited the Participant concerning the Eligible Security, unless the person was an authorized agent of the Participant at the time of the solicitation.

(4) Has not directly or indirectly engaged in activities that are intended or could reasonably be expected to condition the market in the United States or to facilitate secondary market trading in the United States with respect to an Eligible Security.

(5) Has not asserted that Canadian or U.S. law, or the jurisdiction of the courts of Canada (or a province or territory of Canada) or of the United States, does not apply in a proceeding involving an Eligible Security.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

4. Section 240.12g3–2 is amended by revising paragraph (a) to read as follows:

§ 240.12g3–2 Exemptions for American depositary receipts and certain foreign securities.

(a) Securities of any class issued by any foreign private issuer shall be exempt from section 12(g) of the Act if the class has fewer than 300 holders resident in the United States. This exemption shall continue until the next

fiscal year end at which the issuer has a class of equity securities held by 300 or more persons resident in the United States. For the purpose of determining whether a security is exempt pursuant to this paragraph:

(1) Securities held of record by persons resident in the United States shall be determined as provided in § 240.12g5–1 except that securities held of record by a broker, dealer, bank or nominee for any of them for the accounts of customers resident in the United States shall be counted as held in the United States by the number of separate accounts for which the securities are held. The issuer may rely in good faith on information as to the number of such separate accounts supplied by all owners of the class of its securities which are brokers, dealers, or banks or a nominee for any of them.

(2) Persons in the United States who hold the security only through a Canadian Retirement Account (as that term is defined in rule 237(a)(2) under the Securities Act of 1933 (§ 230.237(a)(2) of this chapter)), may not be counted as holders resident in the United States.

* * * * *

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

5. The general 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, 80a–39 unless otherwise noted:

6. Section 270.7d–2 is added to read as follows:

§ 270.7d–2 Definition of ''public offering'' as used in section 7(d) of the Act with respect to certain Canadian tax-deferred retirement savings accounts.

(a) *Definitions.* As used in this section:

(1) *Canadian law* means the federal laws of Canada, the laws of any province or territory of Canada, and the rules or regulations of any federal, provincial, or territorial regulatory authority, or any self-regulatory authority, of Canada.

(2) *Canadian Retirement Account* means a trust or other arrangement, including, but not limited to, a ''Registered Retirement Savings Plan'' or ''Registered Retirement Income Fund'' administered under Canadian law, that is self-directed and:

(i) Operated exclusively to provide retirement benefits to a Participant; and

(ii) Established in Canada, administered under Canadian law, and qualified for tax-deferred treatment under Canadian law.

(3) *Eligible Security* means a security issued by a Qualified Company that:

(i) Is offered to a Participant, or sold to his or her Canadian Retirement Account, in reliance on this section; and

(ii) May also be purchased by Canadians other than Participants.

(4) *Foreign Government* means the government of any foreign country or of any political subdivision of a foreign country.

(5) *Foreign Issuer* means any issuer that is a Foreign Government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country, except an issuer meeting the following conditions:

(i) More than 50 percent of the outstanding voting securities of the issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States; and

(ii) Any of the following:

(A) The majority of the executive officers or directors are United States citizens or residents;

(B) More than 50 percent of the assets of the issuer are located in the United States; or

(C) The business of the issuer is administered principally in the United States.

(iii) For purposes of this definition, the term *resident,* as applied to security holders, means any person whose address appears on the records of the issuer, the voting trustee, or the depositary as being located in the United States.

(6) *Participant* means a natural person who is a resident of the United States, or is temporarily present in the United States, and currently is entitled to receive the income and assets from a Canadian Retirement Account.

(7) *Qualified Company* means a Foreign Issuer whose securities are qualified for investment on a tax-deferred basis by a Canadian Retirement Account under Canadian law.

(8) *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(b) *Public Offering.* For purposes of section 7(d) of the Act (15 U.S.C. 80a–7(d)), the term ''public offering'' does not include the offer to a Participant, or the sale to his or her Canadian Retirement Account, of Eligible Securities issued by a Qualified Company, if the Qualified Company:

(1) Limits its activities with respect to Participants and their Canadian Retirement Accounts to the following:

(i) Processing requests from a Participant (or his or her authorized agent) for the purchase, sale, exchange, or redemption of an Eligible Security, and effecting other routine transactions under Canadian law;

(ii) Paying dividends and distributions on securities of a Qualified Company held in a Canadian Retirement Account;

(iii) Delivering, upon request, written offering materials or other informational materials concerning an Eligible Security; and

(iv) Delivering updated written offering materials, shareholder reports, account statements, proxy statements, or other materials concerning securities of a Qualified Company held in a Canadian Retirement Account.

(2) Includes in any written offering materials delivered to a Participant, or to his or her Canadian Retirement Account, a prominent statement that the Eligible Security, and the Qualified Company that issued the Eligible Security, are not registered with the U.S. Securities and Exchange Commission, and that the Eligible Security may not be offered or sold in the United States or to any person in the United States unless the security and the Qualified Company are registered, or exemptions from registration are available.

(3) Has not directly or indirectly solicited the Participant concerning the Eligible Security, unless the person was an authorized agent of the Participant at the time of the solicitation.

(4) Has not directly or indirectly engaged in activities that are intended or could reasonably be expected to condition the market in the United States or to facilitate secondary market trading in the United States with respect to an Eligible Security.

(5) Has not asserted that Canadian or U.S. law, or the jurisdiction of the courts of Canada (or a province or territory of Canada) or of the United States, does not apply in a proceeding involving an Eligible Security.

Dated: March 19, 1999.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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