

**THE SECURITIES ACTS AMENDMENTS OF 1964  
(CORPORATIONS AFFECTED)**

**Address by**

**Morgan Shipman  
Special Counsel  
Office of Program Planning  
Securities and Exchange Commission  
Washington, D. C.**

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CORPORATIONS AFFECTED BY  
THE SECURITIES ACTS AMENDMENTS OF 1964

Although the title of my speech refers to "corporations" affected by the new law, it is well to note at the outset that issuers other than corporations can be subject to the new disclosure obligations. Also, I will cover only the extension of sections 12, 13, 14, and 16, although the new law also makes important changes in section 15(d).

In determining whether -- and when -- an issuer is subject to the new disclosure obligations, the relevant sections are new sections 12(g), 12(h), and 12(i). I would like briefly to outline these sections before discussing them in detail.

Section 12(g)(1) lies at the heart of the scheme. If its coverage criteria are met and if no exemption is available, the issuer must file a registration statement under that section. Section 12(g)(1) also sets forth the time at which the statement must be filed. Once registration of a class of securities is effected under that section, sections 13, 14, and 16 become applicable.

Section 12(g)(2) provides statutory exemptions for seven different types of securities. Even if the coverage criteria of section 12(g)(1) are met, an issuer fitting within one of these exemptions need not register.

Sections 12(g)(3) and 12(h) provide the Commission with discretionary authority to exempt from section 12(g), 13, 14, or 16.

Finally, section 12(i) provides for the transfer to the three federal bank regulatory agencies of the jurisdiction to administer and enforce sections 12, 13, 14(a), 14(c), and 16 of the Exchange Act with respect to certain bank securities. Thus, the rules of those agencies will be determinative on these questions insofar as most bank securities are concerned.

I. THE REGISTRATION CRITERIA OF SECTION 12(g)(1)

In brief, new section 12(g)(1) applies to any issuer -- domestic or foreign -- having a specified nexus with interstate commerce and having, on any fiscal year-end after July 1, 1964, total assets in excess of one million dollars and one or more classes of equity securities held by seven hundred and fifty or more persons. With respect to fiscal year-ends after July 1, 1966, the shareholder test is lowered to five hundred or more. Note that the fiscal year need only end after July 1, 1964. For example, a calendar-year issuer meeting the criteria on December 31, 1964 must file its registration statement within one hundred and twenty days thereafter.

Like sections 12(a) to 12(d), which deal with exchange listings, section 12(g)(1) is in no way dependent upon whether the issuer has ever filed a Securities Act registration statement. Indeed, the section is applicable to several classes of issuers which are exempted from the Securities Act registration requirements.

Section 12(g) differs from sections 12(a) to 12(d) in one important respect. Exchange listing is always voluntary. But under section 12(g), registration is required for securities meeting its criteria. I should add that an issuer may, under section 12(g)(1), voluntarily register any class of equity securities not required to be registered. A management might wish to take advantage of this provision if it anticipates a proxy battle and prefers that it be conducted under the Commission's proxy rules.

As I mentioned earlier, section 12(g)(1) is also applicable to any type of issuer meeting its coverage criteria and is not restricted to corporations.

Section 12(g)(1) contains three separate coverage criteria -- the test concerning a nexus with interstate commerce; the total assets test; and the shareholder test. Registration is required only if all three tests are met. The statutory tests are applied only on the last day of the issuer's fiscal year, and different results at other times are immaterial.

(a) Nexus with Interstate Commerce or Use of the Mails

Section 12(g)(1) reaches those issuers that either: (1) are engaged in interstate commerce or a business affecting interstate commerce, or (2) whose securities are traded by use of the mails or means or instrumentalities of interstate commerce. This criterion probably has little exclusionary significance, as it will be a rare issuer which meets the other two tests and not this one.

(b) Total Assets

The legislative history shows that the term means gross assets, so that liabilities cannot be deducted. Therefore, section 12(g)(1) can apply to issuers with thin equities or even to those that are insolvent. The Commission has proposed Rule 12g5-2, which would define "total assets" as those shown on the balance sheet "as required to be filed on the form prescribed for registration under section 12(g) and prepared in accordance with the pertinent provisions of Regulation S-X." That Regulation is, of course, the Commission's general accounting regulation. Under Regulation S-X, valuation and qualifying reserves -- such as reserves for bad debts and depreciation -- must be deducted from the specific assets to which they apply. On consolidated statements, total assets means the total assets shown on the issuer's balance sheet or the balance sheet of the issuer and its subsidiaries consolidated, whichever is the larger.

(c) The Shareholder Test

The precise scope of the third criterion contained in section 12(g)(1)-- the shareholder test -- depends on the definitions given to its key terms: "equity security," "class," and "held of record." Although all three terms appear elsewhere in the Exchange Act or rules thereunder, in the context of section 12(g)(1) their definition becomes jurisdictional.

### Equity Security

Section 3(a)(11) of the Exchange Act provides a broad definition of the term "equity security." The term includes any stock or similar security and any security convertible into such a security or carrying any warrant or right for such a security. It also includes any warrant or right to subscribe to any stock or similar security. Under these definitions, pure debt obligations carrying no voting rights and having a fixed maturity date and rate of return are not "equity securities." On the other hand, these same obligations become equity securities if they are convertible into stock or carry warrants or rights to subscribe to stock. The term "any stock" includes preferred stock; and voting trust certificates and certificates of deposit are equity securities when the underlying securities are. In addition, stock-like interests in non-corporate issuers are equity securities.

In addition to the securities which the statute specifically denominates as equity securities, the Commission is empowered under section 3(a)(11) to act by rule to bring other securities into the definition of equity securities.

### Class

Under section 12(g)(1), the shareholder test is applied to each class of the issuer's equity securities, and not to all equity securities. Also registration is required of classes of equity securities. For example, an issuer with two classes, each held by 400 persons, would not be required to register either class. If the issuer has 1,000 holders of one class and 300 holders of the other class, only the former class need be registered. This explains the jurisdictional significance of the definition of "class."

Section 12(g)(5) of the Exchange Act defines "class" for the purpose of section 12(g). As defined, "class" includes "all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges."

The statutory definition, taken verbatim from section 15(d), indicates that many types of differences in the character of different securities are to be disregarded in a determination of class for the purposes of section 12(g). For example, preferred stock issued in several different series bearing different terms may be regarded as the same class if, in the overall context, the holders of the different classes have substantially similar rights and privileges.

### Held of Record

Although the shareholder test is tied to the number of holders of record, the statute contemplates that the issuer's stock books are not in every instance to be controlling. Under section 12(g)(5), the Commission can define the term as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of section 12(g).

The Commission has proposed Rule 12g5-1, which would define the term for the purposes of sections 12(g) and 15(d). The proposed Rule provides that, generally speaking, the holders of record shall be those shown on the issuer's books. There is no specification of the form or content of those records. But if records are not properly maintained, any person who would be identified as an owner on properly maintained records is included.

This general proposition is supplemented by several specific provisions. Securities held by a corporation or a partnership -- whether or not the partners are identified -- would be considered as held by one person. Each trust -- whether the securities are held in the name of the trust, one or more trustees, or both -- would be deemed a single holder of record. Securities held by persons in other fiduciary capacities would be included as held of record by each separate account. Joint trustees, guardians, or custodians would be included as a single record holder.

The proposed rule also specifies that securities jointly held by two persons with the same surname shall be included as held by a single person.

The problem of bearer or unregistered securities is dealt with by providing that each outstanding certificate of that type would be included as held by one person. But, if the issuer can establish they would be held of record under the provisions of the rule by a lesser number of persons if they were registered, the smaller figure will be used.

In four types of situations, the proposed rule would require, as exceptions to the general provision, that an issuer go beyond its books.

The first exception deals with voting trust certificates, certificates of deposit, or similar evidences of a security interest. The record holders of these interests -- rather than the voting trustees or depositaries -- are to be deemed the holders of record of the underlying security.

The second exception relates to securities held by stock purchase, pension, profit sharing, and certain other plans of the issuer or its affiliates. In that situation the securities of the issuer held by the plan would be deemed to be held of record by the number of employees with a direct beneficial interest in the securities held by the plan.

The third exception concerns street name securities held of record by brokers, dealers, banks, or their nominees. These securities would be included as held of record by the number of separate customers or custodial or advisory accounts for which they are being held. This requirement, however, would be hedged by three exculpatory conditions designed to protect issuers that cannot readily obtain the necessary information. First, information need be requested only from registered owners known to be brokers, dealers, banks, or their nominees. Second, the rule expressly provides that the issuer may rely in good faith upon such information as is received in response to the request. Third, a recipient of a request need furnish information only to the extent that it can be readily supplied.

The fourth and final exception provides that where the issuer knows -- or has reason to know -- that the form of holding securities of record is used primarily to circumvent section 12(g) or 15(d), the securities will be deemed to be held of record by the beneficial owners. This is a catch-all to deal with the manifold types of circumvention that might be attempted.

The Commission has received numerous comments on the street name and employee plans provisions of the proposed rule. These comments are being carefully studied, and there may be some revision before adoption of the rule.

## II. STATUTORY EXEMPTIONS

Section 12(g)(1) by its terms is inapplicable to "exempted securities." The Act and the rules thereunder define that term as including, to the extent relevant for section 12(g)(1), only certain governmental securities.

Section 12(g)(2) exempts seven types of securities from registration under section 12(g)(1).

First, any security that is both listed and registered on a national securities exchange is excluded. This exemption does not cover securities which enjoy unlisted trading privileges but which are not listed on any exchange. Also, an issuer with one class of securities listed on an exchange will have to register unlisted classes meeting the criteria of section 12(g)(1). Although such registration of additional classes will result in no additional reporting duties under section 13, additional duties under sections 14 and 16 may be incurred.

Second, all securities issued by a company registered under the Investment Company Act are exempted.

Third, there is an exemption for share accounts of savings and loan associations or similar institutions that are both supervised and examined by a federal or state authority having regulatory jurisdiction over them. However, capital stock or other securities evidencing non-withdrawable capital issued by these institutions are subject to section 12(g)(1).

Fourth, there is an exemption for any security issued by a charitable, religious, educational, or similar organization meeting certain standards. This exemption is written in terms very close to those in the section 3(a)(4) exemption contained in the Securities Act.

Fifth, section 12(g)(1) is not applicable to any securities of "cooperative associations" as defined in the Agricultural Marketing Act, approved June 15, 1929. The exemption is also extended to all securities of a federation of such associations, if the federation possesses no greater powers or purposes than the cooperative associations so defined.

Sixth, there is a tightly drawn exemption for securities of certain mutual or cooperative organizations. This exemption was added primarily to cover certain rural electrification cooperatives, but some other cooperatives might fit within its terms.

The last and the most important exemption is the one for securities of insurance companies meeting the three conditions Commissioner Owens discussed earlier.

These exemptions in section 12(g)(2) are exemptions only from section 12(g)(1). They are not exemptions from the Securities Act, section 15(d) of the Exchange Act, or from the duties the Exchange Act imposes on listed companies. For example, a listed insurance company would always be fully subject to sections 13, 14, and 16. And an insurance company meeting the conditions specified in the section 12(g)(2) exemption may nevertheless be subject to section 15(d).

### III. THE COMMISSION'S DISCRETIONARY EXEMPTIVE POWERS

Section 12(h) gives the Commission discretionary power to exempt companies or classes of companies from section 12(g), 13, 14, or 16. This can be done upon a finding that the action is not inconsistent with the public interest or the protection of investors. Exemptions can be granted by rule or regulation -- or by order, after notice and opportunity for hearing. Exemption can be complete or partial.

In addition, section 12(g)(3) specifically empowers the Commission to exempt foreign securities and certificates of deposit therefor if it finds the exemption is in the public interest and is consistent with the protection of investors. It is under this provision that the Commission has adopted the temporary exemptive rule for foreign securities that Commissioner Owens mentioned.

### IV. TIMING OF FILING OF REGISTRATION STATEMENT AND APPLICABILITY OF SECTIONS 13, 14, AND 16

Commissioner Owens has noted that the registration statement must be filed within one hundred and twenty days after the first fiscal year-end after July 1, 1964 on which the tests are met. He has also noted the Commission's action in extending the filing date for certain issuers, and that a statement becomes effective sixty days after filing. Several other points should be kept in mind.

First, the statute states that until the registration statement is effective, the express civil liabilities of section 18 will not be applicable. However, several recent cases under Rule 10b-5 indicate, by analogy, that the implied civil liabilities under that Rule might be incurred if the statement is deficient in material respects. Thus, despite the sixty-day exemption from section 18, the initial registration statement should be prepared with this possibility in mind.

Second, the statute is not altogether clear whether a security is registered under section 12(g) -- and subject to sections 13, 14, and 16 -- when the registration statement is filed or upon the effectiveness of the statement. However, the Commission has proposed a rule stating that a security is not registered under section 12(g) -- or subject to sections 13, 14, and 16 -- until the effectiveness of the registration statement.

Also, the Commission has adopted an exemptive rule to the effect that neither section 14(a) nor the rules thereunder will in any event be applicable to a security registered under section 12(g) until the earlier of December 31, 1965 or sixty days after the last date on which the registration statement is required to be filed. The exemption is not available with respect to solicitations by a registered public utility holding company or its subsidiaries. This rule is intended to encourage issuers to file their registration statements early. An effect of the rule is that in most cases, the proxy rules will not be applicable to annual meetings until 1966.

#### V. FORMS FOR USE IN REGISTRATION

The Commission has proposed revisions in Form 8-A which would permit that summary form to be used in registration under section 12(g)(1) by an issuer, if it meets any one of the following four conditions:

- (a) It has any other class of security listed on an exchange or already registered under section 12(g); or
- (b) The issuer is subject to section 15(d) and has filed its annual report for the last fiscal year ending before the effective date of the section 12(g) registration statement; or
- (c) The registration statement on Form 8-A will become effective within one year after the end of the last fiscal year for which certified financials were included in a Securities Act registration statement; or
- (d) This is a technical one -- the issuer would be required to file under section 15(d) but for the fact that it has a security enjoying unlisted trading privileges on an exchange, and the issuer has in fact filed an annual report pursuant to section 13 for the last fiscal year ending before the effective date of the registration statement on Form 8-A.

This Form would require only a description of the securities to be registered, specimens or copies of such securities, and copies of the constituent instruments defining the rights of the holders of such securities.

The Commission announced that any issuer which registers under section 12(g) before the final adoption of the revisions to Form 8-A may -- if it meets the terms and conditions as to the use of the form -- use the proposed amended form for such registration.

The Commission already has under active consideration the type of form to be used by issuers not eligible to use the proposed Form 8-A. The present Form 10 -- the basic form for listing applications -- may be prescribed, although with some modifications. The Commission expects to have the form published for comment fairly soon.



## VI. CONSEQUENCES OF FAILURE TO REGISTER AS REQUIRED

The legislative history shows that failure to register a class of securities as required does not automatically freeze or make illegal the trading in those securities.

On the other hand, sections 13, 14, and 16 might be held to be applicable to securities required to be, but not, registered. Literally, the opposite would appear to be the case, as sections 13, 14, and 16 literally apply only to securities "registered pursuant to section 12." However, the Commission has held, and some courts have impliedly also held, that provisions of the Investment Company Act which by their terms are applicable only to registered investment companies are also applicable to investment companies required to be, but not, registered under that Act. If sections 13, 14, and 16 are held applicable to an issuer of securities required to be, but not, registered, then such issuer could encounter serious problems under the doctrine of the Borak case -- which will be discussed in more detail by one of the following speakers; and the issuer's insiders might be subject to unanticipated liabilities under section 16. This possibility makes it all the more important for counsel carefully to ascertain in advance whether registration is required.

Of course, the Commission has several direct enforcement powers -- including a new power to hold an administrative proceeding and issue an order requiring compliance -- to deal with issuers failing to register securities as required by section 12(g); and section 32(a) provides criminal penalties for willful violations of the Exchange Act or its rules.

## VII. ADMINISTRATION WITH RESPECT TO BANK SECURITIES

The application of the new provisions to bank securities presents several special considerations. Banks are fully subject to section 12(g)(1). But under the new law, sections 12, 13, 14(a), 14(c), and 16 are administered and enforced -- with respect to securities of banks whose deposits are insured by the F.D.I.C. -- by the three federal banking regulatory agencies. The Comptroller of the Currency will administer and enforce these sections with respect to national and District of Columbia banks; the Board of Governors of the Federal Reserve System will do so with respect to state member banks; and the Federal Deposit Insurance Corporation will do so with respect to all other insured banks. The federal banking agencies are charged with the administration of the enumerated sections with respect to listed, as well as over-the-counter, bank securities. The statute expressly states that the Commission's rules and forms are not to be applicable to the banking agencies or the banks insofar as sections 12, 13, 14(a), 14(c), and 16 are concerned. This means that most banks must look to rules and forms of the appropriate federal banking agency to ascertain the requirements under sections 12, 13, 14(a), 14(c), and 16. For example, exemptions from section 16 for insiders of such banks will be governed solely by the banking agency's rules.

The bank agencies received many ancillary powers -- powers contained in sections other than 12, 13, 14(a), 14(c), and 16 -- to administer and enforce the enumerated sections. For example, the federal bank agencies will have the power to conduct investigations, issue subpoenas, issue rules, or suspend trading when necessary to administer and enforce the sections for which they are given responsibility.

On the other hand, the statute does not in any way limit the Commission's pre-existing powers to administer and enforce other sections of the Exchange Act with respect to bank securities. For example, the Commission will administer and enforce the anti-manipulation and anti-fraud provisions of sections 9, 10, and 15(c) with respect to bank securities. In some cases violations with respect to bank securities may result in the Commission and a bank agency having concurrent jurisdiction with respect to a given matter. For example, it is conceivable that a series of transactions could constitute violations of both section 13 and section 10(b). In that case both the Commission and the appropriate bank agency could move.