

BULLETIN

01-SB-001

The Department has been asked whether investment companies that meet the criteria set forth in Section 401 (13)¹ of the Securities Act of 2000 (“the Act”) are exempt from the requirement of Section 305 to make notice filings with, and pay associated fees to, the Department of Insurance and Securities Regulation on and after June 1, 2001.²

The Commissioner of the District of Columbia Department of Insurance and Securities Regulation finds that the fact that an investment company meets the criteria of Section 401(13) does not relieve that company of the duty to make a notice filing and pay a fee as required by Section 305 of the Act.

Analysis

Section 305 sets forth a comprehensive scheme for treatment of offerings of securities issued by investment companies under the Act. It provides that unless the subject of an offering is a “federal covered security” under Section 18(b)(1) of the federal Securities Act of 1933,³ it must either register the offering by coordination under Section 303 of the Act or make a notice filing under Section 308 and pay a fee under subsections (b) or (c) and (d) of Section 305.

Section 308 contains provisions regarding the treatment of various categories of federal covered securities under the Act, including investment company securities and

¹ Section 401 provides that the categories of securities listed in that section are exempt from the requirements of Sections 301, 307 and 405.

² Section 805 of the Act provides that Titles III and IV of the Act become applicable on June 1, 2001.

³ Section 18(b)(1) provides that securities that are listed on certain specified national securities exchanges or other national securities markets are federal covered securities. Section 18(c) provides that securities that meet the criteria of Section 18(b)(1) are not subject to the notice filing and fee requirements that the states may impose on other federal covered securities. Some investment company securities meet the criteria of Section 18(b)(1).

other securities and securities transactions that are subject to various exemptions from SEC registration under Sections 3 and 4 of the Securities Act of 1933.

Sections 305 and 308 provide alternative treatments of one category of federal covered securities -- investment company securities under Section 18(b)(2) of the Securities Act of 1933. Section 305 applies to the offer and sale of indefinite amounts of investment company securities. Section 308 applies to “a federal covered security that is not otherwise exempt from the requirements of Section 301 [the section that sets forth the basic registration requirement] pursuant to section 401 or 402.” With regard to the investment company securities that are subject to their requirements, both Section 305 and Section 308 require the filing of registration statements or of notice filing. Both sections require the payment of fees.

Section 305 is intended to govern the treatment of the securities of investment companies under the Act. Section 305 provides a comprehensive scheme for the treatment of offerings of the securities of investment companies. Unlike Section 308, Section 305 allows for a “second look” at sales volume of securities that are the subject of notice filings; it also allows for a registration period in excess of one year, which is advantageous to one type of investment company securities offering. Accordingly, the implementing regulations are based on the framework contained in Section 305.

Sections 401 and 402 do not exempt any securities from the requirements of Section 305. Those sections provide that the securities and transactions in securities set forth in the body of those sections are exempt from the requirements of: Section 301 (the general registration requirement section); Section 307 (the general “stop order” section); and Section 405 (the sales literature section). Section 305, unlike Section 308, makes no reference to the exemptions from the requirements of Section 301 that are found in Sections 401 and 402.

In the absence of any explicit provision exempting investment company securities from the requirements of Section 305, the Department has examined the Act to see if there is any basis for reading Section 401(13), or any other provision of the Act to provide an exemption to Section 305. There is a reference in Section 305(b) to the notice filing procedures in Section 308, which are found in Subsections (b) and (c) of Section 308. This reference, however, cannot be read to require the exemptions in Section

308(a) to be read into Section 305. Section 305 specifically recognizes the federal covered status of listed securities under Section 18(b)(1) of the Securities Act of 1933, and then goes on to set forth an otherwise comprehensive treatment of offerings of investment company securities of all types. If an exemption of the magnitude claimed here had been intended, the drafters of the legislation would have so provided directly, as they did in Section 308, Section 401 and Section 301.

Approved by: Lawrence H. Mirel, Commissioner

Dated: April 30, 2001