

SEC Adopts Disclosure Rules under the Sudan Divestment Act of 2007

President Bush signed into law the Sudan Accountability and Divestment Act of 2007 ("Act")¹ on December 31, 2007, which, among other things, amended Section 13 of the Investment Company Act of 1940 ("Investment Company Act") to provide a safe harbor for registered investment companies and their directors, officers, employees, and investment advisers from civil, criminal, or administrative action "based solely upon the investment company divesting from, or avoiding investment in, securities issued by persons that the investment company determines, using credible information that is available to the public, conduct or have direct investments in business operations in Sudan."²

Section 4(a) of the Act provides that the safe harbor will not be available "unless the investment company makes disclosures in accordance with regulations prescribed by the [Securities and Exchange] Commission."³ To that end, Section 4(b) of the Act requires the Securities and Exchange Commission ("SEC") to prescribe regulations that would require invest-

ment companies wishing to claim protection under the safe harbor to provide disclosures regarding their divestment of Sudan-related securities in their shareholder reports prepared under Section 30 of the Investment Company Act. The SEC proposed such regulations on February 11, 2008 (the "Proposed Rule")⁴ and adopted the final regulations on April 24, 2008 (the "Final Rule").⁵ With the exception of adding a new termination provision and transition period, the SEC adopted the Final Rule as proposed. The Final Rule went into effect on April 30, 2008.

Amendments to Forms N-CSR and N-SAR

The Final Rule amends Forms N-CSR (to be used for disclosure by management investment companies) and N-SAR (to be used for disclosure by unit investment trusts) to require registered investment companies seeking to avail themselves of the safe harbor to disclose certain "information that will identify the securities

¹ Pub. L. No. 110-174, available at <http://www.govtrack.us/congress/bill.xpd?bill=110-2271>.

² *Id.* at Section 4(a); *Sudan Accountability and Divestment Act of 2007 Signed into Law*, DechertOnPoint, (Jan. 2008, Issue 1), available at http://www.dechert.com/library/FS_1_01-08_Sudan_Accountability_and_Divestment_Act_of_2007.pdf.

³ *Id.* Note that Section 4(a) of the Act makes clear that the safe harbor will not protect investment companies or their directors, officers, employees or investment officers from breaches of their fiduciary duties in connection with divestment of or non-investment in Sudan-related securities.

⁴ Disclosure of Divestment by Registered Investment Companies in Accordance with Sudan Accountability and Divestment Act of 2007, Exchange Act Release No. 57,306, Investment Company Act Release No. 28,148 (Feb. 11, 2008) (Proposing Release).

⁵ Disclosure of Divestment by Registered Investment Companies in Accordance with Sudan Accountability and Divestment Act of 2007, Exchange Act Release No. 57,711, Investment Company Act Release No. 28,254 (Apr. 28, 2008) (Adopting Release).

divested and the magnitude of the divestment.”⁶ Specifically, investment companies are required to provide the following information for each security for which the investment company seeks the safe harbor: (1) issuer name; (2) trading symbol; (3) CUSIP number; (4) total number of shares involved (in the case of equity securities) or the amount of principal divested (in the case of debt securities); and, (5) the dates of divestment. Further, if the investment company continues to hold securities of the issuer in question, it will be required to disclose the same information with regard to those securities as of the date of the filing. The purpose of the second requirement is to inform shareholders if an investment company continues to hold securities of the issuer or issuers in question. The Final Rule does not require any disclosure to be added to shareholder reports, which are required to be included in N-CSR filings.⁷

The Final Rule permits an investment company that divests its holdings in a series of transactions to deem all the transactions to have occurred at the time of the last transaction, as was proposed in the Proposed Rule. The Proposing Release noted that this flexibility is intended to decrease the risk that third parties will be able to trade ahead, or “front-run,” an investment company’s trades in Sudan-related securities.⁸ If an investment company chooses to disclose a series of transactions at once, the Final Rule still will require the investment company to disclose the same information regarding the securities, including the dates of each transaction in the series.

⁶ The Final Rule redesignates the previous single, undesignated paragraph in Item 6 of N-CSR as Item 6(a) and adds new Item 6(b)(1)-(5) of Form N-CSR and adds new Item 133.A.-E. to Form N-SAR.

⁷ In response to a public comment requesting that the SEC require disclosure of divestments made in accordance with the Act be included in shareholder reports, the SEC concluded that such a requirement is not necessary, finding that the new N-CSR and N-SAR disclosure requirements and the existing requirement for disclosure of quarterly portfolio holdings in semi-annual shareholder reports and on Form N-Q “will provide shareholders with ready access to information about such divestments.”

⁸ However, the Final Rule makes clear that an investment company still may choose to disclose each transaction in a series individually.

Termination Provision

In response to requests by commenters, the Final Rule includes a termination provision consistent with the provision in the Act requiring the investment company-related sections of the Act to terminate 30 days after the President certifies to Congress that the Sudanese government has honored certain commitments such as ceasing attacks on civilians, demobilizing and demilitarizing certain militias, and granting free and unfettered access for delivery of humanitarian aid.⁹ The Final Rule clarifies that its disclosure requirements will cease to apply to divestitures occurring after the investment company-related provisions of the act terminate.



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⁹ See Section 12 of the Act.

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