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Subject: Requirements of the Trust Indenture Act of 1939

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MR. SCHILLER: I shall attempt to give you briefly some of the background and history of the Act, describe the purposes of the Act, and show you in broad outline how the Act fits into the scheme of the other Acts which the Commission administers.

The Act was preceded by a study and investigation made by the Commission under Section 211 of the 1934 Act of protective and reorganization committees. The Commission studied about 400 defaulted indentures and about 600 indentures that were filed under the 1933 Act. As a result of this study a number of material deficiencies became apparent particularly with respect to the inadequate protective provisions to investors which indicated necessity for legislation--among these were the failure of the obligor to provide an independent trustee to represent the interests of the investors. The trustee where one was named did not have adequate rights and powers or duties and responsibilities to protect and enforce the rights of the investors. In many cases there was no notice of default given, and sometimes even the term "default" itself was questionable or not precisely defined.

In connection with the functions of trustees, I would like to mention a case of Hazzard v. Chase National Bank of the City of New York, decided early in 1936. This involved a situation in which an obligor, as authorized by an indenture, requested the trustee to be allowed to withdraw certain securities of some operating companies which had been pledged under the indenture and substitute stock of a holding company subsidiary. After that was done with the consent of the trustee, the subsidiary went into bankruptcy. Judge Rosenman, who decided the case, concluded that under the trust indenture as it was drawn the trustee was not liable to the debenture holders for the damage resulting from this substitution. The Judge in deciding the case said that "the facts in the case showed as clearly as can be imagined how utterly unjust to the investing public is the modern trust indenture." This was in 1936. "The status of the trustee," he said, "is more that of a stakeholder than one of a trustee." Under those circumstances you can see that the necessity for the legislation was acute.

In passing the Act the legislators had in mind several purposes. Among the more important ones were:

(1) To assure the security holders of the services of an independent and disinterested trustee with adequate rights, powers, duties and responsibilities to protect their interests and rights.

(2) To designate the standards of eligibility and qualifications of a trustee and to minimize conflicting interests so that trustees can truly represent the security holders they purport to represent.

(3) To outlaw exculpatory provisions which were formerly used to eliminate all kinds of liability of the indenture trustee, and to impose on that trustee, after default, the duty to use the same degree of care and skill that a prudent man would in the conduct of his own affairs.

(4) To require the obligor to file certain reports, certificates, and opinions with the trustee and security holders.

The Act can be said to be divided into two parts. The early sections of the Act, 302 to 309, follow the familiar pattern of the other Acts by setting forth definitions, types of securities and transactions which are exempt from the Act and the types of securities for which indentures are required to be qualified. Sections 310 to 318 set forth the provisions of the Act which have to be included in an indenture. These are what I call the substantive provisions. In other words, they are required to be, or the substances of them are required to be, physically incorporated within the indenture itself.

There is available for staff use a "1939 Act Bible" compiled by Mr. Shreve which contains a discussion of the various sections of the Act required to be incorporated in an indenture. There is also available a model indenture published by Commerce Clearing House (CCH) containing the format which may be used to express statutory requirements.

Since the definitions set forth in Section 303 need no amplification, let us consider the type of security with which the Act is concerned. The Act applies to any kind of a debt security. In other words, whenever a public offering of a debt security of any kind is to be made and no exemption is available (I shall discuss the exemptions in just a moment the Act provides that such securities must be issued under an indenture which must be qualified under the Act. The Act specifically says that it applies to any note, bond, debenture, or evidence of indebtedness, whether or not secured, or certificates of interest or participation in any of those instruments, or any guarantee of any of those instruments.

There are two important exemptions which appear quite frequently in the course of work. In these two situations debt securities may be issued and qualification under the 1939 Act is not required. These are set forth in Section 304(a)(8) and (9) of the Act. The first is when a debt security of $250,000 or less is to be issued without an indenture. If a company proposes to issue a debt security of not more than $250,000 otherwise than under an indenture, it need not qualify under the Trust Indenture Act. The Act states that this exemption shall not apply within more than a twelve consecutive month period. In other words, $250,000 of debt can be issued otherwise than under an indenture within a twelve month period. The second exception is where you have securities to be issued under an indenture which limits the amount of securities to be

outstanding thereunder to $1,000,000. Not more than $1,000,000 of debentures may be issued under this exemption within a thirty-six month period. Offerings of all other debt securities are required to be qualified under the 1939 Act unless they are otherwise specifically exempt from qualification under other provisions of Section 304 of the Act. Here is where the 1933 Act meshes in with the 1939 Act. Basically speaking (without burdening you with particular sections), most of the exemptions that are available under the Securities Act of 1933 are also available under the 1939 Act to an issuer who is issuing debt securities for financing. Typical examples of securities exempt under both Acts are Government securities, securities issued by religious organizations, building and loan associations, etc. -- those that are exempt under Section 3(a)(2) through (8) and (11) of the 1933 Act. In other words, if no registration is required under the 1933 Act by virtue of the exemption provided by the enumerated substitution of Section 3(a) of that Act, then debt securities are also exempt under the 1939 Act. However, not all the exemptions which are listed in the 1933 Act under Section 3(a) are exempt from qualification under the 1939 Act. There are two major exceptions, that is: (1) any security of an issuer which is issued in exchange for other securities, and (2) securities approved by a court in a reorganization. Those are the 3(a)(9) and (10) exemptions of the Securities Act of 1933. Where, therefore, debt securities are to be issued in exchange for other securities, or debt securities to be issued are to be approved by a court in a particular reorganization, although no registration is required under the 1933 Act, such securities are not exempt under the 1939 Act and require compliance with that Act.

MR. BLACKSTONE: You mean that there has to be a trust indenture to qualify them under the 1939 Act even though they don't have to register under the 1933 Act.

MR. SCHILLER: Correct. To summarize briefly -- where debt securities to be issued are exempt from registration under Section 3(a) of the 1933 Act, then, with the two exceptions I have mentioned relating to exchanges of securities and corporate reorganization approved by a court, no qualification is required under the 1939 Act. If, of course, no exemption is available under the 1933 Act debt securities would have to be issued under an indenture which must be qualified under the 1939 Act or one would have to look to other provisions of the 1939 Act for an exemption.

I should also mention that, of course, a private offering exemption is also exempt under Section 304(b) of the 1939 Act. In fact, in a recent case we had a situation where an offering of debt securities was to be made to forty institutional investors for investment. We took the position they were exempt under the 1933 Act and also exempt under the 1939 Act, so no qualification under the latter Act was necessary.

To complete the picture I should also point out that the "no sale" rule, Rule 133, does not apply to the 1939 Act and debt securities issued in that type of transaction are required to be qualified under the 1939 Act.

Section 304(c) of the Act provides that an application may be filed with the Commission to exempt from any provision of the Act additional securities to be issued under a trust indenture which was executed prior to the effective date of the 1939 Act if at the time the application is filed there are securities outstanding which had been issued prior to or within 6 month of the enactment date of the Act. The Act says, in effect, that, securities having been issued under an old indenture and outstanding, you can make an application for subsequent issues under that indenture for any exemption under the Act which may be necessary. The exemption that comes up most frequently in these cases is the one that requires up to a certain percentage of security holders to require the trustee to take action. Under the old indentures, usually about 25% of the security holders could require the trustee to take action. Section 316(a) of the Act requires that at least a majority of security holders is required to direct trustee action. This led to an interesting situation. There are issuers who have indentures that were executed prior to the effective date of the Act and want to issue additional securities but claim they required consent of bondholders to comply with Sec. 316(a) by increasing the percentage vote to a majority. If such issuers continue to issue additional securities and redeem the old ones, there will come a time when all of the old securities, under the indenture upon which an application for exemption may be based, will have been redeemed and such issuers will then be faced with the problem as to how they can then issue additional securities under an indenture which will meet the requirements of the Act. We have overcome that difficulty by suggesting to issuers who find themselves in this so-called "box" that what they should do when they issue a new series under the old indenture is to insert a clause to conform with Section 316(a) to become effective after the old series are no longer outstanding. The effect will be that when the old securities are no longer outstanding, the clause will become operative and the indenture will then meet the requirements of the Act. Such procedure became necessary because Section 304(c) specifically says that the issuer can file an application thereunder only when securities are outstanding under the indenture which were issued prior to or within 6 months after the effective date of the Act.

Now, as to debt securities which are required to be registered under the Securities Act of 1933, where such is the case, the usual rules applicable to registration under the Securities Act of 1933 apply. That is, an issuer has to file a registration statement and a prospectus with respect to the indenture securities and, in addition, an indenture meeting the standards of the Act is required to be filed as a part of the registration statement. In addition (and this is something you don't have under the 1933 Act), there is also filed a Form T-1 which has to be signed by the trustee. Form T-1 is a statement of eligibility and qualification filed only under the 1939 Act. That form has a number of items which have to be answered by the trustee. The answer to those items will indicate to the staff whether the trustee meets the eligibility requirements of Section 310(a) of the Act, and it also indicates whether or not there is any conflict of interest on its face, measured again by the standards of Section 310(b) of the Act.

The other situation is where an issuer does not have to file a registration statement under the 1933 Act, but in the instances I have previously indicated is faced with the necessity of qualifying the indenture nevertheless. When you "qualify" the indenture, you file on a Form T-3 which is an application for qualification of an indenture under the 1939 Act. That application becomes effective in the same way that a 1933 Act statement becomes effective, to wit, 20 days after filing of the latest amendment, unless acceleration is granted. Such qualification must be cleared with the Commission in the same way that you clear a registration statement. The difference between the two approaches is that where an issuer files a 1933 Act registration statement the indenture becomes qualified when the 1933 Act registration becomes effective. In the second case where the securities are exempt under the 1933 Act you must nevertheless file and qualify the indenture on the basis of Form T-3.

MR. BLACKSTONE: To make that clear, two situations where you don't have to file a 1933 Act registration but nevertheless an indenture would have to be qualified are the exchange situations in 3(a)(9) and in 3(2)(10) where there has been a reorganization subject to court supervision. If there is an indenture used in connection with an exchange or a court reorganization, you don't have any registration filed under the 1933 Act, but the basic indenture itself has to be qualified here under the 1939 Act.

MR. SCHILLER: Those are two situations where you would require qualification of the indenture as distinguished from the qualification which occurs by virtue of the effective registration under the 1933 Act. In addition, you would require qualification in a situation where the "no sale" theory applies under Rule 133. We might get an application for qualification with a Regulation A filing where exemption under Section 304(a)(8) or (9) is not available.

Section 308 of the Act and Rules T-7A-28 to 31 provide for incorporation by reference of any document or information filed under any of the other Acts. In other words, if you have any documents which were filed and are included in some other registration statement, you are permitted to incorporate them by reference.

Lastly, Section 309 provides that the indenture is qualified when the registration statement or the application for qualification becomes effective. The section also exempts the trustee from any failure of the indenture to comply with the Act or the rules. Finally, the Act specifically provides that the Commission has no power to enforce the provisions of this indenture.

I shall now turn the discussion over to Mr. Spiro who will continue with Section 310 of the Act.

MR. SPIRO. In the financial world an indenture is a very significant instrument. It makes possible the wide-spread holding of debt securities

like the wide-spread holding of stock. Essentially it is an instrument which defines the rights of the security holders, the duties of the obligor (the issuer of the security), and, the responsibilities of the trustee to protect the security holders. It is a very detailed instrument. For example, even the unsecured indenture under which it is customary to issue debentures, provides a schedule for redemption, remedies in case of default, what happens in the case of default, what happens upon consolidation, merger sale, transfer or lease of the obligor's property and discharge upon payment. It leaves little, if anything, to conjecture. In addition, if the contract so provides, it makes provisions for a sinking fund, conversion into other securities or subordination to other securities.

The secured debenture, particularly the open-end indenture of a utility company includes even more details. It usually provides for the issue of additional bonds or a new series on the basis of property additions subjected to the lien of the indenture, or in substitution of outstanding bonds (called a refunding operation) or against the deposit of cash. It also provides for the release of property subject to the lien of the indenture upon payment of cash or the substitution of other property.

From both a contractual and legal standpoint it purports to solve all rights and obligations and leaves little, if anything, to doubt and ambiguity, or even controversy. That is to say, a good indenture will do all that. Unfortunately all are not that good.

Yet with all its merits, the indenture, as such, had certain serious defects. It was weighted in favor of the trustee and in favor of the obligor. The security holder was more or less a stepchild. The Act, of course, puported to change all that. I would suggest that it purported to change that situation by three broad approaches. First, it prescribes meaningful duties and responsibilities of the trustee. Second, it requires the obligor to file with the trustee specific information, opinions, and other documents in order to assist the trustee in carrying out its duties. Third, it reserves to the security holder the absolute right to bring suit for payment due upon his security when such payment becomes due. Let it be understood at this point that these standards imposed by the Act apply only to an indenture that is qualified under the Act. It does not apply to indentures that are not qualified thereunder.

Perhaps the most important provisions of the Act are those that set the standards of the trustee. You will better understand the standards if I review again the case known as the Hazzard case to show you what were the obligations of the trustee before the Act was passed.

This was a typical situation in point before the Act was passed and from this you can judge how significant is the change in the duties and responsibilities of the trustee. The Chase National Bank as successor to the Equitable Trust Company was trustee under an indenture made by the National Electric Power Company and covered an issue of $10,000,000 of debentures. The debentures were secured by various securities. The obligor had the right to withdraw the securities upon substitution of others,

provided certain conditions were met. It appears that the obligor had withdrawn certain securities of substantial value and substituted others that became worthless. A bondholder brought suit against the bank, alleging that the bank was guilty of bad faith and gross negligence in permitting the substitution which, of course, the bank denied. The indenture provided that the trustee "shall not be answerable or accountable for any act, default, neglect or misconduct of any ... attorneys, agents or employees, if reasonable care has been exercised in the appointment and retention thereof, nor shall the Trustee be otherwise answerable or accountable under any circumstances whatsoever except for its own gross negligence or bad faith." (emphasis added)

The language of the court is revealing. It said in part:

> "I am constrained to conclude that the defendant was not guilty of that kind of gross negligence, in view of the fact that everything which it did was specifically permitted, and everything which it failed to do was specifically excused, by the express provision of the trust indenture itself. Although the defendant was negligent, as judged by the standards of care imposed upon a common-law trustee, it cannot be said that under the language of the indenture it was guilty of willful passivity or of reckless disregard of the rights of debenture holders when, in fact, it complied with every detail of its contractual duty." (emphasis added)

In addition, and of equal significance, the court held that a trustee's liability is not measured by the ordinary relationship between a trustee and a beneficiary, but is measured by the express terms of the indenture. In other words the liability is based on contract and not on a fiduciary relationship of a trustee.

Section 315(c) and (d) of the Act, of course, did away with the standard of gross negligence and bad faith, at least insofar as an indenture qualified under the Act is concerned. The sections prescribe a high standard of conduct to be met by trustees. Section 315(c) requires the trustee, in case of default, to exercise such of the rights and powers vested in it by such indenture and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs. Again, to demonstrate the contractual nature of the relationship between trustee and security holders, the Act requires that the indenture to be qualified shall contain such provision. Section 315(d) prohibits any provision in the indenture relieving the trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, with certain exceptions ennumerated in Section 315(d). Again, the Act does not create a fiduciary relationship between the security holder and the trustee. It requires only that an indenture shall contain the provisions in the Act setting forth the standards and duties to be observed by the trustee. The liability of the trustee is still a liability based on contract. That is why it is necessary for us to see to it that these standard are contained in the indenture. Section 315(a) is permissive and provides:

"The indenture to be qualified may provide that prior to its default the indenture trustee shall not be liable except for the performance of such duties as are specifically set forth in such indenture." (emphasis added)

Again it provides -

"The indenture trustee may conclusively rely for the truth of the statements or correctness of the opinions expressed therein in the absence of bad faith on the part of such trustee or certificates or opinions conforming to the requirements of the indenture."

A trustee may rely on these certificates before default, but it must not be negligent. Furthermore, as the Act further provides, it must examine the certificates. So you see the situation is quite different than it was before the Act was passed. The Hazzard case still applies to indentures that are not qualified.

Trustees sometimes try to relieve themselves of liability. You will find in the indenture clauses to the effect that the trustee shall not be liable for this or for that. It is our task to pick those things out, and where they conflict with Section 315(c) and (d) to require the provision to make them subject to those provisions to the extent required.

QUESTION. Suppose an indenture has been qualified, and for some reason or other we have missed a clause in it which is probably in conflict with the intent of the Act?

MR. SPIRO. Section 318(a) provides that any provision required by the Act to be included in the indenture shall control in case of conflict. I think that the more issues that we can resolve in an indenture will make it easier for the security holder to assert his rights in case he has to. Whenever there is a question, it is customary to leave it to the court. That means delay, expense, etc.

MR. SHREVE. That is probably half of the problem. Section 318(a) says that the required provision shall control. However, if you should omit one of the required provisions, there is nothing that brings that required provision into the indenture by operation of the Statute, or otherwise. So you have only one shot at it, and that is at the time it is being qualified.

MR. BLACKSTONE. There is also the obligation of the Commission to begin a stop-order proceeding to prevent an indenture from becoming qualified if it conflicts with the Act. I do not know of any way the Commission can fulfill that duty if we do not, in fact, examine the indenture and spot those which are deficient.

MR. SPIRO. The next section I shall consider is Section 310(b) which is the section dealing with conflict of interest.

One of the objections which the legislators found and which is cited in the purposes of the Act, is that there was a conflict of interest between the trustee and the obligor. The Act set about to elminate that conflict of interest.

The Act sets forth nine specific categories of conflict. Unless the conflict fits one of these categories, there is no conflict. These are exclusive. No others could be urged. You will find they are quite inclusive.

The first one deals with a conflict arising out of the trustee being a trustee under more than one indenture made by the same obligor. An obligor might have certain of its assets secured by one indenture, and other assets secured by another indenture. The Act provides that the same trustee under such two indentures creates a conflict.

MR. BLACKSTONE. You mean that it is a conflict between the trustee and the obligor so that is is inconsistent for the trustee to be looking after the rights of the bondholders, because he has a relationship with the obligor in such a way that he is apt to favor the obligor or one of the groups of bondholders rather than the other. It is a conflict with his interest as an independent trustee looking solely after the rights of the bondholders.

MR. SPIRO. A trustee cannot do justice to both classes of security holders in that position. When you have two secured indentures in that situation, you have a conflict of interest and the same trustee cannot be trustee under both. There is an exception to that which is specific, namely, indentures of a real estate company having no substantial unmortgaged assets, and which indentures are secured by separate and distinct parcels of the real estate. You are acquainted, no doubt, with companies that issue participation in separate and distinct parts of the real estate.

There is of course the problem of two unsecured indentures. There also you may or may not have a conflict. Let me explain to you how the Act works in that respect. Where you have two unsecured indentures, having the same obligor and same trustee, there is an exception and no conflict of interest unless the Commission finds that a conflict exists. When the obligor comes in with an offering, or with an application for qualification, whether under the 1933 Act or exclusively under the 1939 Act, which involves a second indenture having the same trustee and the indenture is qualified, the Commission, in effect, is saying that no conflict exists, although it does not actually make that finding. The fact that the indenture is qualified is, in effect, saying that no conflict exists. Now you have the situation where the second indenture having the same obligor and the same trustee is not qualified because of another exemption - as, for example, the private exemption. Recently we had a matter involving Household Finance Corporation. The Corporation filed an application under Section 310(b)(1)(ii) there being a conflict by reason of having a trustee under both indentures. In that case the

Corporation was selling its debt securities to an insurance company, claiming the exemption in favor of a private offering, and the indenture had the same trustee as an indenture previously qualified under our Act. In other words, it had one indenture qualified and another indenture not qualified because of an exemption, and the Corporation was offering the securities to an institutional buyer. Was there a conflict? It doesn't follow as a matter of course where two indentures are unsecured, that there is no conflict of interest. Since the second indenture was not qualified there was no finding in effect that there was no conflict. So it was necessary for Household Finance to make an application under Section 310(b)(1)(ii) for an order of the Commission declaring that no conflict exists. This is a typical reason for the numerous applications under Section 310(b)(1)(ii) for an order of the Commission that no conflict exists.

MR. SHREVE. The problem there arises, of course, under the indenture that has been qualified, not the one that has been exempt from qualification, because the old indenture provided that if the trustee was a trustee under more than one indenture a conflict of interest would arise and he had to resign under that old indenture. The effect of the order of the Commission is for permission to stay as trustee under the old indenture which was qualified and the subsequent indenture which is not qualified.

I might add to what I have already said that there are two situations in which the problem arises: one, where the second indenture must be qualified, and therefore the Commission must decide whether it wants to institute an action itself to adjudicate qualification. That type of action has never been instituted to my knowledge, though the occasion for it has arisen. Those were resolved at the staff level by getting another trustee. In those cases the principal problem that we run into is whether one is junior or senior to another indenture and we feel that there would be a conflict between the interest of the trustee in enforcing the rights of the security holders under the two indentures because of that junior-senior relationship. However, when they come to us with an application, we also apply the principles of seeing whether the provisions of the indentures are substantially the same, that there doesn't appear to be any provision which would allow for jockeying between one set of creditors and another set of creditors, and one provision we like to see is that a default under one constitutes a default under the other. That is not always present.

MR. SPIRO. Let me take up this T-1. The form is geared to the various statutory subdivisions so that the answers will make apparent whether or not a conflict exists. It is very often that a trustee may not fully understand the impact of agiven set of facts. We, by our experience, may give them more weight for the purposes of Form T-1. So it is always good to look at the prospectus as well. That is to say, do not confine yourself to the T-1 for the purpose of thinking in terms of conflict. That thought should always be in mind, whatever you read and whatever contacts you have in processing a particular application.

Let me go to Section 310(b) and show you how these categories involve matters we deal with every day. Section 310(b)(2) provides that there is

a conflict if the trustee or any of its directors is an obligor or underwriter, for an obligor. Section 310(b)(3) in effect prohibits a person in a control relationship from acting as trustee. Section 310(b)(4) creates a conflict of interest if there are interlocking directors. That, you know, is true even in corporate law, beginning with the Munsen case. The Act prescribes certain exceptions, as for example, one director of the obligor may be a director of the trustee.

One of the questions raised under this section was whether a lawyer, who is under general retainer for the obligor or the trustee, is an employee within the meaning of that section. The Commission at one time considered us lawyers employees within the meaning of the section and then changed its mind and thought otherwise. A conflict is created if there is a cross-ownership of specified outstanding securities between the trustee and the obligor or the trustee and an underwriter. In every one of these the underwriter is an important factor. An underwriter is defined to mean every person who, within three years prior to the time of the determination, was an underwriter of any security of the obligor outstanding.

I would like to take up Section 311 because there again is a great advance in protection of the security holder. This section is designed to prevent a trustee who is also a creditor of the obligor from receiving or retaining a preferred payment. As you know, it is customary for an obligor to go to the bank where it does business and make that bank the trustee. The obligor may borrow from the bank, keep a deposit there, and do a commercial business there. The obligor does not go to an outsider or stranger with its trust business because the trusteeship is a source of good income for the trustee. Section 311 prevents a trustee from improving its position by a preferred payment within four months before default and four months after default. In other words, if, because of its particular knowledge, the trustee finds it to its advantage to take hold of the bank balance of the obligor on deposit with it and apply the balance to the payment of its debt, and that occurs within four months before a default under the indenture or four months thereafter. Section 311 provides that the trustee must hold the balance for the benefit of the trustee and all other indenture security holders. This is a great advance over the Bankruptcy Act which permits recovery of the balance taken by the trustee only if the trustee had reasonable cause to believe that it was receiving a preference. That limitation is not in the Trust Indenture Act.

Section 311 provides certain exceptions. It excepts payments received for ordinary commercial transactions, payments received from a guarantor, payments received upon sale of a claim, or payments received from the liquidation of collateral securities received by the bank prior to the beginning of the four-months period. But this, though quite an advance, does not create a fiduciary relationship. Again, the right stems from the indenture provision.

Next we will discuss Sections 310(a)(1) and (a)(2). These sections set standards to be met by the trustee, one of which is that the trustee must be an institutional trustee with a minimum capital surplus of $150,000, exercise trust powers and be subject to state or federal jurisdiction.

Every now and then a filing is made in which the trustee does not meet these conditions, particularly foreign filings. A Canadian company may make an offering of debt securities and name a Canadian bank as trustee. The trustee does not meet the requirements since it is not organized under the laws of a State, Territory, the District of Columbia or the United States. In that case the Commission's policy is determined on a case to case basis. It is customary in those cases to file an application for an exemption from the provisions of 310(b) so that a foreign trustee could act. In the Saginaw matter the Commission said it was not inclined to grant an exemption. In the Gatineau Power matter back in 1946 the Commission granted an exemption. Recently the Commission granted an exemption. As to what are the standards for the exemption, I might say that in one case there was an American paying agent around whom the American investors could rally, who is given a security holders' list, and who really performs many of the functions of the trustee.

I now move on to other sections, those requiring the delivery of certificates, lists, and opinions by the obligor to the trustee to assist the trustee in carrying out its duties. The obligor does not stand on the sidelines and let the trustee and security holders swim for themselves. Section 314(d)(1) which applies to secured indentures requires the obligor to furnish to the trustee a certificate of an engineer and of an independent engineer under certain circumstances, setting forth the fair value of the property to be released. In addition, the certificate is required to state that in the opinion of the person making the certificate, the release will not impair the security under the indenture in contravention of the terms thereof.

Section 314(d)(2) requires a certificate or opinion of an engineer, appraiser or other expert as to the value of any securities which are subjected to the lien. Securities may be added when a company acquires the securities of another company. Section 314(d)(3) requires the delivery to the trustee of a certificate or opinion as to the value to the obligor of property subjected to the lien of the indenture. For example, that situation arises when the obligor builds a new plant and it wants to subject that plant to the lien of the indenture. One of the problems under this section bears on the date as of which the value must be determined.

The Division requires that the value must be determined as of a current date. The Division has, however, made certain exceptions. Bear in mind that when property is released the certificates must state the fair value of the property to be released and when property is subjected to the lien of the indenture, the certificate must state the fair value to the company of the property to be added to the lien. In other words, the property must have some value to the company.

In addition Section 314(c)(1) requires the delivery of a certificate of an officer stating that all conditions precedent to the taking of action by the trustee have been met, Section 314(c)(2) requires the delivery of an opinion of counsel that all conditions precedent to the taking of such action by the trustee have been met. If the action relates to verifica-

tion of facts by an accountant, the obligor also is required to deliver to the trustee a certificate of an accountant as to such facts. Those certificates are required to be delivered in every case where application is made to the trustee for action, whether it be to discharge the indenture, etc.

The certificate must include the factors set forth specifically in Section 314(e). It must include a statement that the writer has read the condition precedent, a brief statement as to the scope of his examination or investigation, a statement that in his opinion he has made such examination or investigation as is necessary for him to express an informed opinion, and a statement as to whether or not the conditions precedent have been complied with.

Adjourned.