SECURITIES AND EXCHANGE COMMISSION

MANUAL

TRUST INDENTURE ACT OF 1939

ANNOTATIONS UNDER SECTION 310 THROUGH 318

JUNE 1958

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A U T H E N T I C A T I O N

Acting under the authority vested in the Executive Director, I hereby certify that the Manual of the Trust Indenture Act of 1939 is an official publication of the Commission.

A. K. Scheidenhelm
Executive Director

(580907)

MANUAL

TRUST INDENTURE ACT OF 1939

This manual contains a summary of administrative interpretations under Sections 310 to 318, inclusive of the Trust Indenture Act of 1939. These sections of the Act contain the provisions required to be reflected in indentures filed for qualification under the Act. This manual includes the material originally compiled to August 1, 1952, and has been brought up to date to include administrative interpretations and proceedings since that date.

A description of each section of the statute as contained in the House report upon the bill is included in this manual, together with a discussion of the various problems which have arisen thereunder. Variations suggested in the so-called "model" indenture published by Commerce Clearing House have also been noted. References have been inserted to judicial and administrative interpretations and proceedings relating to the sections covered, and typical deficiencies have been appended to each section.

The purpose of this manual is to bring together on a current basis information with respect to the Act which will be useful to the members of the staff engaged in the processing of an application for qualification of an indenture. While new problems are always arising under indentures in relation to the requirements of the Act and will probably continue to arise in the future, it is hoped that the material assembled in this manual will afford an understanding of the treatment accorded to problems presented by these sections of the Act and stimulate an interest in the examination process.

Charles E. Shreve

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Section 310(a)(1) and (2)

Eligibility of the Trustees

Institutional Trustee

Section 310(a) is the first provision of the Act which is required to be included in indentures qualified thereunder.

Paragraph (1) requires that at least one trustee under the indenture be a corporation with corporate trust powers, which is subject to governmental supervision or examination.[1/] This trustee is referred to as the "institutional trustee."

Under paragraph (2), the indenture must require that such institutional trustee have at all times a combined capital and surplus of a specified minimum amount, not less than $150,000. If the indenture so provides, however, the combined capital and surplus set forth in the most recent annual report of condition published pursuant to law or to the requirements of the supervising or examining authority will be conclusive evidence as to the amount thereof.[2/]

The indenture provision incorporating Section 310(a) of the Act should clearly set forth both that the trustee is a corporation and that it is authorized to exercise corporate trust powers. A statement such as "if there be such a corporation willing and able to accept the trusteeship upon reasonable and customary terms" should not be inserted in the indenture in such form as to qualify the statutory requirements.[3/]

It is also desirable to implement the requirement of Section 310(a) by providing for the resignation or removal of the trustee when it is no

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1/ House Report No. 1016, 76th Cong., 1st Session, p. 46.
2/ Idem.
3/ Cf. C.C.H. Model Indenture, p. 5, Sec. 5.T2.

longer eligible under the standards of Section 310(a) and the appointment of an eligible successor.[4/]

A provision often found in indentures is that a successor to the trustee by merger, consolidation or transfer of assets, shall be successor trustee under the indenture "anything in the indenture to the contrary notwithstanding." If language similar to that quoted is to be retained, it should be made clear that the successor trustee must be eligible under Section 310(a).[5/]

It is not necessary that the power to exercise corporate trust powers extend to all of the areas in which mortgaged property is located. It is for this reason that provision is made in the Act for the appointment of a co-trustee.[6/]

In the case of issues by corporations organized under the laws of and doing business in the Province of Quebec, a special problem has arisen under this section by reason of provisions of the laws of that jurisdiction limiting the exercise of corporate trust powers therein only to trust companies qualified in said Province. No American trust company had been so qualified and Canadian Counsel advised that it was considered unlikely that the authorities of that Province would permit an American trust company to qualify. Furthermore, it appeared that it would be unlawful for the American trustee to hold title to property in the Province of Quebec.

4/ Id. at pp. 43 and 44, Secs. 8.18 and 8.19.
5/ Id. at p. 50, Sec. 8.22.
6/ Letter dated September 12, 1939, to Wells, Martin, Lane & Offutt.

It probably was not contemplated that the co-trustee provided for by Section 310(a)(3) of the Act would, by reason of local laws, be expected to exercise the main functions of trusteeship. On the other hand, the elimination of a United States institutional trustee would deprive investors of a spokesman in this country to protect their interests. In this connection, any attempt to specify powers which the American institutional trustee may not perform by reason of being unqualified to act should be operative only so long as such disability should continue. 7/

Deficiencies

It should be stated that the trustee will be a corporation, as required by Section 310(a)(1) of the Act.

The statement "if there be such a corporation willing and able to accept the trusteeship on reasonable and customary terms" in the section of the indenture purporting to incorporate the language of Section 310(a), (1) and (2) of the Act should be eliminated or revised so as to be inapplicable to the statutory requirements.

It is suggested that provision be made in the indenture for the resignation or removal of a trustee not eligible under Section 310(a) of the Act and for the appointment of a successor trustee.

The provision that a successor to the trustee by merger, consolidation or transfer of assets will be successor trustee under the indenture "anything in the indenture to the contrary notwithstanding" appears to conflict with Section 310(a) of the Act. The quoted language should therefore either be deleted or it should be made clear that such successor must be eligible under Section 310(a).

Exemption - Gatineau Power Co., File No. 2-6439 (22-548)

Gatineau Power Company, a Canadian corporation, filed an application under Section 304(d) of the Act for exemption from the requirement of Section 310(a)(1) of the Act that it have an institutional trustee organized under the laws of the United States or of any State or Territory or of the

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7/ See memoranda dated January 23 and March 14, 1946, re Saguenay Power Company, Ltd., File No. 2-6194 (22-503).

District of Columbia. The proposed institutional trustee was Royal Trust Company of Montreal, which otherwise met the requirements of eligibility and qualification under Section 310 of the Act. The Commission by order dated June 27, 1946, granted the application.

The arguments made in support of the application included the following:

1. An American trustee could not exercise any powers in Canada where the trust estate and obligor were located.

2. The use of the term "trustee" where there was no power to act would be misleading and might prejudice the obligor's title to property held under emphyteutic leases.

3. The cost of providing an American trustee who could perform no useful function would be a hardship.

4. It would be unfair to Canadian bondholders to have an American trustee.

In view of the possible effect of an American trustee upon the title to mortgaged property and the proposal to provide an American paying agent to maintain bondholders' lists and otherwise act as a rallying point for American investors, this case can be distinguished from Saguenay Power Company, Ltd. 8/

Exemption - Fifth Avenue Hotel Corp., File No. 22-274

In the case of the application for qualification of an indenture by Fifth Avenue Hotel Corporation, the Commission on November 4, 1943, granted an exemption under Section 304(c)(1) of the Act to permit the retention of an individual trustee without the addition of an institutional trustee. This indenture was filed for qualification under the Act for the purpose of permitting the solicitation of consents by bondholders to the extension of a mortgage upon applicant's properties. The mortgage as originally drawn

in 1938, under a plan of reorganization approved by the United States District Court for the Eastern District of New York, named Harold St. L. O'Dougherty as sole trustee. The application for exemption was based upon the contention that since the indenture made no provision for the appointment of an institutional co-trustee and the individual trustee was removable by holders of a majority of outstanding bonds, the appointment of such an institutional trustee would require the consent of bondholders within the meaning of Section 304(c)(1) of the Act. 9/

Exemption - Philippine Long Distance Telephone Company
File No. 2-4444 (22-42)

On June 27, 1940, an application was filed by Philippine Long Distance Telephone Company under Section 304(c) of the Act for exemption from all of its provisions in connection with a proposed $500,000 issue of First Mortgage Bonds. The bonds were to be issued under an indenture dated July 1, 1938, under which a $1,468,500 previous bond issue was outstanding (believed to be entirely in the hands of residents of the Philippines). The trustee was Hongkong and Shanghai Banking Corporation, a corporation of the British Colony of Hongkong authorized to do business in the Commonwealth of the Philippines.

The bases of the application were briefly as follows:

1. Difficulties of communication and unsettled conditions.

2. Importance to present security holders of keeping present trustee and difficulty in finding another.

3. Company had no power to remove the trustee.

4. Disproportionate expense in complying with Act.

9/ See also application filed by New Jersey Realty Company, File No. 22-600.

The Commission agreed to an exemption from 310(a)(1) of the Act so as to permit a foreign trustee but the trustee stated that it was unwilling to serve under an indenture conforming to the Act. On August 14, 1940, after a hearing was held, an order was entered exempting applicant from all of the provisions of the Act with respect to such issue, subject to the conditions (agreed to by applicant) that the bonds were to be offered only in the Philippines and in foreign countries or their possessions, and that full disclosure was to be made in the prospectus of the respects in which the indenture did not comply with the Act.

Thereafter, on March 26, 1941, when it was discovered that certain of the proposed purchasers were American corporations, the indenture was qualified under the Act except as to Sections 310(a)(1), 316(a)(1) and 317(a)(2) with respect to which an unconditional exemption was granted for the purpose of the proposed offering.

Exemption - Trans-Canada Pipe Lines Limited
File No. 2-12927 (22-1989)

Application was filed under Section 304(d) to exempt an issue of $80,000,000 of subordinated debentures to permit a Canadian trustee (Montreal Trust Company) to act as sole institutional trustee. A major part of the offering was to be made in Canada. Provision was included in the indenture whereby an American institution would be designated as agent to receive service for the indenture trustee of all papers and documents in any action arising out of the provisions of the indenture.

The pipe line was a quasi-governmental operation financed in part by the Government and the designation of the indenture trustee had political implications. An opinion of Canadian counsel pointed out that

an indenture trustee not incorporated or licensed in Canada or one of its Provinces could not do business in Canada in that capacity without complying with certain registration requirements on an annual basis and submitting to inspections in each Province when called upon to do so. The opinion was expressed that it was probable that no United States bank or trust company would be interested in acting as trustee under these conditions.

In view of the protective provisions included in the indenture, the character of the issuer, the offering and trustee, the limited benefits to be derived from appointing an American trustee, and the international situation involved, it was recommended that the Commission grant the exemption. An order granting the application was entered on January 17, 1957.

Section 310(a)(3)

Co-Trustees

Paragraph (3) will permit the making of provision for individual co-trustees, as is necessary under some State laws.[10/] In so providing, it requires that the rights, powers, duties and obligations of the trustees shall be imposed upon and exercised or performed by the institutional trustee alone or jointly with the co-trustee. Exception is made where under the laws of a particular jurisdiction the institutional trustee shall be incompetent or unqualified to act, in which case the co-trustee may act alone. The proper allocation of powers is sometimes difficult in the case of an issuer having properties securing an issue in a jurisdiction where an American trustee is not qualified to act.[11/]

Only under those indentures where it appears that there is or may be a co-trustee need this provision be inserted. The need for such a co-trustee depends upon the laws of the States where the trust powers are to be exercised.

Deficiencies

It should be made clear, pursuant to Section 310(a)(3) of the Act that all powers under the indenture are imposed upon and may be exercised by the institutional trustee except under the limited exceptions where such trustee is "incompetent or unqualified" to act.

10/ House Report No. 1016, 76th Cong., 1st Session, p. 46.

11/ See indenture of Saguenay Power Company, Ltd., File No. 2-6194 (22-503).

Exemption - re certain German corporate debtors

Pursuant to applications filed under Section 304(d) of the Act, the Commission has permitted indentures securing debt adjustment bonds of certain German corporate debtors to provide that the mortgage securing such bonds be registered in favor of the German co-trustee and that certain acts with respect to the release of property, insurance moneys, the reduction of the registered amount of liens and the disposition of release moneys be performed only by the German co-trustee. The exercise of these powers and duties is subject, however, to ultimate control by the American institutional trustee if such control is exercised within thirty days after notice is received by the institutional trustee of the proposed acts to be taken by the German co-trustee. 11a/

11a/ Allgemeine Elektricitats-Gesellschaft, File No. 22-1706, Release No. 81.

Rudolph Karstadt Aktiengesellschaft, File No. 22-1763, Release No. 88.

Energie-Versorgung Schwaben Aktiengesellschaft, File No. 22-1764, Release No. 89.

Rheinisch-Westfalisches Elektrizitatswerk Aktiengesellschaft, File No. 22-1785, Release No. 91.

Harpener Bergbau-Aktiengesellschaft, File No. 22-1909, Release No. 98.

Berliner Kraft-Und Licht (Bewag)-Aktiengesellschaft, File No. 22-2096, Release No. 109.

Elektrowerke Aktiengesellschaft, File No. 22-2117, Release No. 110.

In such cases the debt adjustment bonds were to be issued in connection with the German debtors' offer of settlement to be made pursuant to the London Agreement on German External Debts of February 27, 1953. Each of the German companies had outstanding dollar bonds which had been in default for many years. The London Agreement provided, among other things, for the consensual settlement of foreign currency (including dollar) obligations of German corporate debtors by the refunding and extension of such obligations.

While it was not contended that the American institutional trustee was incompetent or unqualified to act, it was contended that the vesting of title and related powers in the German co-trustee was essential to the orderly settlement and payment of the obligations, since the rights in the security of both the holders of the new bonds and the old bonds are rights in German property, created under German mortgage law and to a large extent dependent upon the interpretation of the German law implementing the London Agreement.

Section 310(a)(4)

Certificates of Interest or Participation

Paragraph (4) requires that in the case of certificates of interest or participation, the trustee has the legal power to exercise the rights of a holder of the underlying securities.[12/]

12/ House Report No. 1016, 76th Cong., 1st session, p. 47.

Section 310(b)

Disqualification of Trustee

Conflicts of Interest - General

This subsection requires that if any trustee has or acquires any conflicting interest as defined therein, it shall, within ninety days after ascertaining that it has such conflicting interest, either eliminate such conflicting interest or resign. If the trustee fails to comply with this requirement, it must notify the bondholders of that fact within ten days after the expiration of the 90-day period. If the trustee fails to comply with this requirement after written request, removal proceedings may be instituted by any security holder who has been a bona fide holder of indenture securities for at least six months. The subsection then proceeds to state what shall be deemed to be a conflicting interest. If there are two or more trustees, each trustee is to be considered separately, for the purposes of this subsection.[13/]

It will be noted that the first paragraph of Section 310(b) requires that the resignation of a trustee having a conflict of interest, as defined, shall take effect upon the appointment of a successor trustee and such successor's acceptance of the appointment and provision is made for bondholders to petition a court for the appointment of a successor. The purpose of this language is evidently to assure the continuity of a trustee in office and to prevent the "orphaning" of the trust. However, there is nothing in the Act to prevent the trustee from resigning or being removed

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13/ House Report No. 1016, 76th Cong., 1st Session, p. 47.

for other causes without making provision for preventing a vacancy,[14] except as otherwise provided in Section 310(a). Also, it has been the practice, when indentures provide for a co-trustee pursuant to Section 310(a)(3) of the Act, to provide that the appointment and removal of such co-trustee may be made by the company, the institutional trustee or otherwise, or the co-trustee may resign without provision for preventing a vacancy. Such co-trustee should, of course, resign or be subject to removal if he has a conflicting interest as prohibited by Section 310(b).

The conflicting interests prohibited by the statute were commonly referred to by representatives of the Commission at the hearings upon the bill as "rules of thumb."[15] A memorandum accompanying a letter dated May 11, 1939, from Robert E. Healy, Acting Chairman, to Hon. William P. Cole, Jr., Chairman of the subcommittee of the House Committee on Interstate and Foreign Commerce, stated in part as follows:

> " . . . The Commission recognizes, however, that it will be impracticable to apply the 'case by case' treatment to the conflict problem under the present bill, dealing as it does with various types of indentures and different classes of issuers. The Commission believes that it would be even more impracticable, under the present bill, to attempt to

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14/ C.C.H. "Modal" indenture, p. 44, Section 8.19; letter dated January 4, 1955, to F. J. Woods.

15/ Statements of William O. Douglas, Senate Hearings p. 58, June 9, 1937, and House Hearings on H.R. 10292, pp. 36-37, April 25, 1938; Testimony of Edmund Burke, Jr., House Hearings pp. 264-266, April 11, 1939; letter dated May 17, 1939, from Robert E. Healy, Acting Chairman, to Hon. William P. Cole, Jr.

> provide for continuing jurisdiction by a governmental agency over the conflict problem throughout the life of each indenture which is qualified under the bill. The Commission has, therefore, endorsed the proposal, which is embodied in Section 310(b), to establish reasonable 'rules of thumb' with respect to the possession of conflicting interests by the trustee, such rules to be policed by the trustee itself and the indenture security holders throughout the life of the indenture.
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> "The Commission recognizes, of course, that in many cases these 'rules of thumb' will not outlaw the possession by an indenture trustee of some interests which, in the light of the facts of a particular case, are in fact materially conflicting..."

The Commission, in an effort to overcome some of the more apparent inadequacies of these "rules of thumb," has sought to extend their application. Thus, particularly under Section 310(b)(1) of the Act, the terms "obligor" and "trustee" were for a time construed to include persons controlling, controlled by or under common control with such persons. Subsequently, however, the Commission, in recognition of the intended rigid scope of these provisions, determined that such construction should not be followed.[16/]

Deficiencies

The term "company" is substituted for the term "obligor" in the indenture provision purporting to conform to Section 310(b) of the Act. Accordingly, the term "company" should be defined to include any obligor upon the securities to be issued.

The indenture should provide that the provisions thereof which purport to conform to Section 310(b) of the Act are applicable to any separate or co-trustee.

16/ See discussion, pp. 14a-16, infra.

Section 310(b)(1)

Dual Trusteeship

Trusteeship under more than one indenture made by the same obligor is to be deemed a conflicting interest with the exceptions mentioned in this paragraph. Cases in which one indenture is a collateral trust indenture secured exclusively by bonds issued under the other indenture are excepted. A similar exception is provided where the obligor is a real-estate company having no substantial unmortgaged assets and where both indentures are secured by wholly separate and distinct parcels of real estate. No real conflict of interest exists in such cases. Where the indenture to be qualified is wholly unsecured, provision is made for the exception of other unsecured indentures, in the absence of a finding by the Commission that a material conflict of interest is likely. In addition, the Commission is authorized to make further exceptions where the issuer establishes that trusteeship under both indentures is not likely to involve a material conflict of interest.[17/]

The fact that more than one series of bonds may be issued under a single indenture does not, in the ordinary case, constitute a conflict of interest under this provision because the language of this section requires that there be "another indenture."[18/] There may be, however,

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17/ House Report No. 1016, 76th Cong., 1st Session, p. 47.

18/ See memorandum dated August 28, 1941, re Warren Brothers Company.

exceptions to this position as where checking conflicts of interest are probable or where it appears that the device of a single indenture is being utilized for the purpose of evading the requirements of this provision. Thus, in one case it was proposed to create a single indenture having several series issuable thereunder. Each series was to be separately secured and default under one series was not to affect or accelerate the maturity of any other series not in default.[19/] The view was expressed that because of the distinct and separate nature of the different series, the provisions relating to each such series may be considered as separate indentures and that a separate trustee should be provided therefor. It was recommended that the provisions as to each series be incorporated in separate instruments.

In another case it was suggested that a conflict of interest may arise under this provision by reason of the fact that one of the series to be issued under the indenture was to possess a senior lien and the other series was to possess a junior lien.[20/] However, this position has not been consistently followed. In the case of two unsecured indentures, one being senior and one junior, opinion is expressed that a conflict may exist.[20a/]

A trustee named under a proposed indenture owned a substantial amount of construction notes of the issuer, in which such trustee issued participation certificates to 16 other banks. The loan agreement contained restrictive covenants and other provisions similar to those to be found in

19/ Letter dated October 24, 1946, re Amortized Mortgages, Inc.
Letter dated October 20, 1952, to Lyon Borton of Kobbs, Thatcher & Frederick.

20/ Exemption granted Alma Hotel Corporation, File No. 22-564, under Section 304(c) of the Act, discussed at p. 19, infra.

20a/ Memo. March 24, 1954, re State Loan & Finance Corp.;
Memo. January 25, 1955, re Continental Baking Co.; memo April 17, 1956, re Lockheed Aircraft Corp.; memo. June 10, 1957, re National Tea Co.; clearance memo re Gera Corp., File No. 22-2210; memo and Commission minute of August 13, 1957, re Shamrock Oil and Gas Corp.

indentures. The issuer was advised that there was sufficient doubt as to the qualification of the proposed trustee under Section 310(b)(1) of the Act so as to make it inappropriate for the Commission to express an opinion thereon.[21/]

The Commission advised in one case that it would be favorably disposed to grant applications to permit the same trustee to act under a series of indentures to be separately secured by whiskey warehouse receipts. Provision would be made whereby default in payment of one series would be a default under all and other provisions thereof would be substantially the same.[21a/]

In another case the staff expressed the view that no conflict of interest is apparent merely because one of two unsecured indentures permitted conversion of the debentures into common stock,[21b/] or because one unsecured indenture contained a negative pledge clause.[21c/]

No question was raised in a case where the proposed indenture trustee was also trustee under the issuer's pension plan, which provided that the assets of the plan were to be segregated in a trust fund for the benefit of employees and that such assets could not be invested in securities of the company or its affiliates.[22/]

21/ Detroit Edison Company, File No. 2-4609; Commission Minute of December 17, 1940.

21a/ Minute of October 10, 1957, re Barton Distilling Company.

21b/ Memorandum of November 29, 1954, by H. V. Lese.

21c/ Letter of September 24, 1957, re Central Gas and Electric Co.

22/ Letter dated April 25, 1945, to Mudge, Stern, Williams and Tucker re Continental Baking Co. Cf. application of American Box Board Co., File No. 2-5726, discussed at p. 20, infra.

At first the position was taken that the term "obligor" as used in Section 310(b)(1) of the Act could be construed to include a parent, subsidiary, or affiliate of the issuer[23/] because it was felt that essentially the same conflict of interest would exist where the proposed indenture trustee was also trustee under an indenture of such other company. Thereafter, the Commission determined that Section 310(b)(1) of the Act should be construed so as not to include a parent, subsidiary or sister company within the meaning of the term "obligor" upon the indenture securities unless it appears that there is good cause to believe that under the

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23/ Southern Natural Gas Co., File No. 2-4755; Commission Minutes of May 13 and 20, 1941. See also minute of April 12, 1941, re Pennsylvania Gas and Electric Corporation.

doctrine of Consolidated Rock Co. v. DuBois, 312 U.S. 510, or for other good and sufficient reasons, the affiliated company is liable to the security holders of the issuer.[24/] This determination was published in a release containing an opinion of the General Counsel in which it was emphasized that Section 310(b) of the Act was not intended to cover every possible conflict of interest but established "rules of thumb" prohibiting certain types of conflicting interests which have resulted in the greatest injury to investors.[25/]

A similar position was originally taken with respect to the term "trustee" as used in this provision, holding that if a parent, subsidiary or affiliate of the trustee was a trustee under an indenture of the same obligor the trustee under the proposed indenture would be disqualified.[26/] On January 15, 1941, Form T-1, relating to the eligibility and qualification of the trustee, was amended so as to elicit such information with respect to parents and subsidiaries and, to a limited extent, with respect to other affiliates of the trustee. Having taken the position above referred to with respect to "obligor," as discussed in the published opinion of the General Counsel, it was felt that the position should not be taken that there is a conflict of interest under this provision where one bank is trustee under an indenture of an obligor and an affiliate of

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24/ Commission Minute of September 10, 1941. See Memorandum to the Commission from Edmund Burke, Jr., dated September 8, 1941.

25/ Trust Indenture Act Release No. 16, November 14, 1941.

26/ Letter dated January 10, 1941, to Sullivan and Cromwell re Marine Midland Trust Company of New York.

such bank is trustee under another indenture of the same obligor.[27/] Accordingly, Form T-1 was again amended to eliminate the requirement for disclosure of such information.[28/]

A variation in the language of clause (i) to which objection has been made is to state in the indenture to be qualified that it shall be specifically described in the other indenture, rather than to provide that the other indenture shall be specifically described in the indenture to be qualified.

Where a parent company guaranteed the bond issues of two subsidiaries, which bond issues had the same indenture trustee, it was urged that since the guarantees were unsecured there was an automatic exemption under clause (i) of Section 310(b)(1). However, the position was taken that since the guarantor was an "obligor" upon the bonds, as defined in Section 303(12), such exemption was not operative.[29/]

For a time it was felt to be inappropriate to repeat clause (ii) of this provision in the indenture, since it appears to relate solely to the jurisdiction of the Commission to entertain applications for exemption thereunder. Accordingly, the practice was encouraged of including only the prohibitory language of the provision in indentures and incorporating

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27/ Memorandum to the Commission from Baldwin B. Bane dated November 3, 1943.

28/ Commission minute of December 29, 1943, and Trust Indenture Act Release No. 27 of January 17, 1944.

29/ Letter dated March 24, 1949, to Shearman & Sterling & Wright re Consolidated Edison Company of New York, Inc. See discussion at p. 29, infra.

the exceptions by reference to the statute. It was subsequently recognized, however, that no harm resulted from the inclusion of the entire provision in the indenture and that such practice was in keeping with the general purpose of the Act to require certain of its provisions to be repeated in the indenture rather than to incorporate such provisions by reference. It was therefore determined to raise no further objection to the inclusion of the full provision in indentures.[30/] Subsequently, it has been the practice where such incorporation by reference is employed, to suggest that the statutory language (or the applicable portions thereof) be substituted.

It will be noted that when an indenture trustee is exempted under clauses (i) or (ii), the procedure specified by the Act is to include in the indenture a provision excluding from the operation of paragraph (1) the other indenture under which securities of the same obligor are outstanding and having the same trustee, and an order of the Commission thereunder does not operate except to permit the inclusion of such a provision in the indenture. It is therefore necessary to include a description of the old indenture as excluded from the indenture provision unless it is a situation where the disability is to be removed prior to the issuance of securities under the new indenture.

30/ Memorandum to staff from Baldwin B. Bane dated June 13, 1940.

Deficiencies

It appears that the indenture trustee is disqualified under Section 310(b)(1) of the Act because it is also trustee under another indenture of the same obligor and none of the statutory exceptions is applicable. Another indenture trustee should therefore be obtained or its conflicting interest should be eliminated.

The old indenture to be excluded from the operation of Section 310(b)(1) by reason of clause (i) thereof (or by reason of an order under clause (ii)) should be specifically described in the indenture provision.

The provision of the indenture which purports to contain the language of Section 310(b)(1)(i) of the Act should adhere to the statutory language instead of providing that the indenture being qualified will be described in some other indenture.

Clause (ii) of Section 310(b)(1) of the Act should be set forth in the indenture and not incorporated by reference.

Applications

It will be noted that under clause (i), where both indentures are wholly unsecured, the exemption is automatic unless a proceeding is instituted by the Commission pursuant to Section 305(b) or Section 307(c). It has been the policy of the staff not to institute such a proceeding in the absence of extenuating circumstances not found in the ordinary case.[31/]

Effective February 5, 1941, the Commission adopted Rule T-10B-2 designed to expedite the disposition of certain applications under clause (ii).[32/] This rule provides that where an application is based upon the claim that no material conflict will arise because, prior to or concurrently with the delivery of the new indenture securities, the

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31/ However, a somewhat more critical approach is taken under clause (ii) where clause (i) is not technically available; see applications discussed at p. 21, infra.

32/ Trust Indenture Act Release No. 8.

other indenture or indentures will be discharged or measures to assure the discharge will be provided, the application shall be deemed to have been granted unless, within seven days after it is filed, the Commission orders a hearing thereon. No order is necessary if no hearing is instituted. If the registration statement or application for qualification is declared to be effective prior to the expiration of the 7-day period, such period is deemed to have been accelerated.[32a/]

Applications under this provision should be made by the obligor and not by the trustee.

Exemption - Alma Hotel Corporation - File No. 22-564

Alma Hotel Corporation filed an application for the qualification under the Act of an indenture (as proposed to be amended) under which its Class A and Class B bonds were outstanding, in connection with the proposed solicitation for assents to the extension of the maturity of such bonds. Inasmuch as the Class A bonds were senior to the Class B bonds, applicant was advised that there may be a conflict of interest in The Central Trust Company of Cincinnati, as indenture trustee, under the provisions of Section 310(b)(1) of the Act.[33/]

Application for exemption was filed under Section 304(c)(1) of the Act upon the ground that it would require the assent of bondholders if

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32a/ In the case of Commonwealth Edison Co. and Northern Illinois Gas Co. (File No. 22-1470), suggested withdrawal of application under this rule to avoid the delay of publication. No action was taken under Section 305(b).

33/ See also application by New Jersey Realty Company, File No. 22-600. See Note 20(a) supra relating to two unsecured debenture issues, one junior to the other.

there were to be two indentures and two trustees, and under Section 304(c)(2) of the Act primarily upon the ground that it would be impracticable if not impossible to provide for two indentures and two trustees without materially altering the plan of administration provided under the existing indenture. Exemption was granted under Section 304(c)(1) of the Act.

Application - American Box Board Co. - File No. 2-5726 (22-407)

American Box Board Company filed a registration statement, including a trust indenture dated as of May 1, 1945, to The Michigan Trust Company, trustee, securing $1,750,000 principal amount of 20-year, 4-1/2 convertible debentures.

The Michigan Trust Company was also trustee under outstanding convertible debentures and notes which were to be paid off with the proceeds of the proposed issue.

Finally, The Michigan Trust Company was also trustee of a Profit Sharing Incentive Retirement Plan which owned a substantial part of the outstanding debentures and notes and proposed to acquire from 14 per cent to 27 per cent of the debentures being registered.

In view of the fact that participations in the retirement plan appeared to represent "certificates of participation" in securities of the registrant, an application was filed under Section 310(b)(1)(ii) of the Act. In view of the analogy which appeared to exist between this situation and the exemption provided by clause (B) of Section 310(b)(1), the application was granted by the Commission.

Applications - The American Tobacco Company - File Nos. 2-4985 (22-192), 34/ 2-5509 (22-348) et al.

Several companies which qualified indentures under which they publicly offered issues of unsecured debentures, then wished to make offerings of debentures exempt from the provisions of the Act under new indentures having the same trustee as their respective previous indentures. However, it appeared that to do so would disqualify such trustees under the old qualified indentures by reason of the provisions of Section 310(b)(1) of the Act which declares it to be a conflict of interest if the trustee acts as such under more than one indenture of the same obligor and makes no exception where the subsequent indenture is not formally qualified although both are unsecured.

These companies therefore filed applications under Section 310(b)(1)(ii) of the Act with respect to their old qualified indentures for rulings by the Commission that trusteeship by such trustees under the said old indentures and the proposed new indentures would not involve a material conflict of interest. The provisions of Section 310(b)(1), including clause (ii) thereof were substantially contained in the old indentures.

34/ See, also, The Champion Paper and Fibre Co., File No. 2-5794 (22-419); Public Finance Service Inc. (22-227); Tri-Continental Corporation, File No. 2-6166 (22-500); General Shareholdings Corp., File No. 2-6031 (22-489),(Merger); Household Finance Corp., File Nos. 2-5787 (22-417) and 2-10434 (22-1433); The Flying Tigers Line, Inc., File No. 2-9760 (22-1272); General Motors Acceptance Corp., File Nos. 2-10295 (22-1404) and 2-10453 (22-1439); Sylvania Electric Products Co., File No. 2-10013 (22-1163); Gulf Sulphur Corp., File No. 2-11751 (22-1718); and Pacific Northwest Pipeline Corp., File No. 2-11486 (22-1673).

The new indentures were usually substantially the same as the old indentures except for differences in amounts, dates, redemption prices, etc. Some also contained different periods of grace on default, sinking fund requirements, and restrictive covenants.[35/] Furthermore, the effectiveness of provisions of the indentures conforming to Sections 310(b), 312, 313, 314(a) and 318(a) of the Act was usually deferred until such time as the respective indentures should be formally qualified under the Act.

The applications were granted having particularly in mind that if the new indentures had been formally qualified under the Act, an exception under clause (i) of Section 310(b)(1) would have been applicable.

Application - The Brooklyn Union Gas Co. - File No. 2-5415 (22-317)

Application was filed by The Brooklyn Union Gas Co. under Section 310(b)(1)(ii) of the Act by reason of the fact that City Bank Farmers Trust Company, the trustee named under a proposed indenture mortgage, was also trustee under the following indentures of the same obligor:

(1) Outstanding issue of bonds in the amount of $6,000,000 (non-callable, due May 1, 1947);

(2) An issue of bonds in the amount of $10,000,000 (callable);

35/ The indentures of The Champion Paper and Fibre Company, File No. 2-5794 (22-419), provided that an event of default under one resulting in acceleration of the maturity of the debt secured thereby, would constitute a default under the other.

(3) Four issues of bonds of companies which had been merged with the registrant, all held as collateral for the $6,000,000 non-callable issue above; and

(4) An issue of debentures in the amount of $18,000,000.

It was proposed to redeem the issues referred to under (2) and (4) above simultaneously with the issue of the new bonds. Furthermore, the principal amount of the $6,000,000 non-callable issue referred to under (1) was to be deposited with the trustee and the interest upon such issue was to be deposited at the interest dates. The application was granted as to all of such issues on August 25, 1944.[36/]

Application - Cambridge Building Corporation - File No. 22-270 - 14 S.E.C.651

Application was filed by Cambridge Building Corporation (Cambridge) under Section 310(b)(1)(ii) of the Act with respect to a proposed issue of 3% Refunding Mortgage Bonds under an indenture of Cambridge to The Pennsylvania Company for Insurances on Lives and Granting Annuities (The Pennsylvania Company) as trustee.

The Pennsylvania Company was sole successor trustee under a first mortgage from C. Benton Cooper secured upon an apartment house with respect to which the aforementioned Cambridge mortgage was a second lien.

Pursuant to an offer made by Cambridge in 1934, 98.8 per cent of the $1,397,500 Cooper bonds were exchanged for Cambridge bonds and such Cooper bonds were deposited as additional security for the Cambridge bonds.

36/ A like application was granted with respect to a subsequent offering of this company, File No. 2-6381 (22-531).

It appearing that the remaining holders of the Cooper bonds were unknown and had not been heard from for ten years (other than one holder who retained $4,000 of the $16,700 undeposited bonds for the purpose of opposing action adverse to the Cambridge bonds) and that no practical steps could be taken by them under the Cooper mortgage, the application was granted. 36a/

Application - Capital Transit Company - File No. 2-5531 (22-356)

Capital Transit Company proposed to issue bonds secured by a mortgage to Union Trust Company of the District of Columbia, trustee. Part of the proceeds of the offering was to be used to redeem bonds of companies merged into Capital Transit Company. The indenture for the bonds of one such company, The Capital Traction Company, of which Union Trust Company of the District of Columbia was also trustee, contained no provision for redemption prior to maturity on June 1, 1947.

Application was filed under Section 310(b)(1)(ii) of the Act upon the ground that no material conflict of interest would arise by reason of the agreement of Capital Transit Company to deposit with the trustee under the new mortgage an amount equal to the principal of, and unpaid interest to maturity upon, the outstanding bonds of Capital Traction Company, to be applied to the purchase or payment of such bonds. The application was granted.

36a/ A like application was granted with respect to a subsequent solicitation to extend the Cambridge bonds, File No. 22-1405.

Application - Niagara Mohawk Power Corp. - File No. 2-8214 (22-942)

Niagara Mohawk Power Corporation (Niagara Mohawk) proposed to issue $40,000,000 principal amount of General Mortgage Bonds under its mortgage indenture to The Marine Midland Trust Company of New York (Marine Midland) as trustee. It also had outstanding, as successor under a consolidation agreement entered into on January 5, 1950, $56,360,000 principal amount of First Mortgage Bonds of Buffalo Niagara Electric Corporation.

Under the terms of both indentures, which were qualified under the Act, Marine Midland would be disqualified as indenture trustee under the provisions thereof incorporating Section 310(b)(1) of the Act. Application was filed under clause (ii) of said section for the purpose of continuing Marine Midland as trustee under both indentures for a period of ninety days from January 5, 1950, during which period consideration would be given to taking steps to effect the consolidation of the two mortgages into one instrument. Niagara Mohawk and Marine Midland agreed that within such 90-day period the conflict of interest would be eliminated or Marine Midland would resign as trustee under one of the indentures and would notify the Commission of such action.

The Commission granted the application for such period of ninety days, by its order of January 9, 1950.

Application - Philadelphia Transportation Co. - File No. 2-6019 (22-486)

Philadelphia Transportation Company filed an application pursuant to Section 310(b)(1)(ii) of the Act for an order by the Commission to permit Girard Trust Company, trustee under four equipment trust indentures of the applicant, to act as trustee under a proposed First Mortgage Indenture securing $7,000,000 of new bonds. The basis of the application was that Girard Trust Company had resigned as trustee under said equipment trust indentures subject to the appointment of substitute trustees. Since these equipment trust indentures provided no machinery for the appointment of substitute trustees, the application stated that the issuer would take prompt steps in a court of competent jurisdiction for this purpose. The application was granted and the indenture was qualified on December 10, 1945.

Thereafter, an amendment was filed to the application for the purpose of changing the basis of the application. It was proposed to deposit $172,125 with Girard Trust Company, being an amount sufficient to pay off the equipment trust certificates under three indentures in full to June 1, 1946 (maturity date) in lieu of appointing new trustees thereunder, and to appoint a new trustee under the fourth indenture by agreement with the relatively few holders of the certificates outstanding thereunder, thereby eliminating the need for court action. The amended application was also granted.

Application and Exemption - Prudence Bond Corporation - File No. 22-281[36b/]

Application was filed by Prudence Bond Corporation for a finding under Section 310(b)(1)(ii) of the Act and for exemption under Section 304(c)(2) of the Act, so as to permit City Bank Farmers Trust Company to act as trustee under eighteen series of its First Mortgage-Collateral Bonds. Separate indentures for each series were executed under a plan of reorganization and it was proposed to solicit the extension of the maturity of such bonds from May 1, 1945, to May 1, 1950, by consent of the holders of 51 per cent of the respective series, as provided in the indentures.[37/] The bonds of each series were secured by separate parcels of real estate, except that several series had a common interest in two properties, and each series had a proportionate interest in any surplus of collateral securing each series as well as a proportionate claim against the funds of the company.

Defaults in the payment of bonds of any series on acceleration or maturity and failure to extend the maturity of any series constituted a default of all series.

It further appeared that substantial expenses would have been incurred in requiring eighteen separate trustees and that the company may not have been able to obtain eighteen separate corporate trustees under the circumstances of this case.

36b/ See also Commission minute of October 10, 1957, authorizing staff to advise Barton Distilling Company that it is favorably disposed to granting applications to permit same trustee to act under series of indentures separately secured by whiskey warehouse receipts. Default in payment of one series will be a default under all.

37/ In the case of one series, the maturity could be extended unless the holders of 51 per cent of the bonds of that series dissented.

The application was granted pursuant to Section 310(b)(1)(ii) and Section 304(c)(2) of the Act.[38/] Consideration was given to the analogy between the facts of this case and the exception in Clause (C) of Section 310(b)(1) of the Act.

Application - Public Service Electric and Gas Co. - File No. 2-7711 (22-806)

The Chase National Bank of the City of New York (Chase) was trustee under a mortgage dated March 1, 1899, of Trenton Gas and Electric Company, to which Public Service Electric and Gas Co. (Public Service) was successor. Approximately $2,000,000 of these Trenton bonds were outstanding and were payable on March 1, 1949. Public Service filed a registration statement covering $50,000,000 of its debenture bonds to be issued under an indenture with Chase as trustee, under which the Trenton bonds were to be pledged when paid.

An application was filed under Section 310(b)(1)(ii) of the Act to permit Chase to act as trustee under both indentures until maturity and payment of the Trenton bonds. It was urged that it was not practical without undue effort or expense, to secure the necessary consents of the holders of a majority in principal amount of such bonds for the appointment of a new trustee; that Public Service was well able to pay the Trenton bonds; that Chase would resign as trustee under the indenture securing the Trenton bonds promptly after maturity and payment; that Public Service would accept the resignation and use its best efforts to secure the appointment of a successor trustee; and that the granting of the application should not extend the 90-day period permitted by the statute more than one or two months.

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By order of the Commission dated October 21, 1948, the application was granted.

Applications - Westchester Lighting Co. - File No. 2-7933 (22-873)
Consolidated Edison Co. of New York, Inc. - File No. 2-7934 (22-874)

Westchester Lighting Company (Westchester) and New York Steam Corporation both had secured bonds outstanding for which City Bank Farmers Trust Company (City Bank) was indenture trustee. Said bond issues, as well as a proposed new issue of $12,000,000 principal amount by Westchester under its same indenture, were guaranteed as to principal and interest by Consolidated Edison Company of New York, Inc. (Consolidated Edison), parent of both companies.

It appearing that Consolidated Edison was an "obligor" under both secured indentures, as defined in Section 303(12) of the Act, City Bank was disqualified to act as indenture trustee under Section 310(b)(1) of the Act. An application filed under Section 310(b)(1)(ii) of the Act was granted by order dated April 20, 1949, it appearing that no material conflict of interest would result.[38a/]

Application - The Hartford Electric Light Company - File No. 2-13660 (22-2222)

The Hartford Electric Light Company had outstanding five series of debentures issued under three indentures containing negative pledge clauses obligating the company to secure such debentures equally and ratably with any secured obligation created by it. The Connecticut Power Company was to be merged into Hartford. As a part of the plan of acquisition, four series

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38a/ See also Deutsche Rentenbank-Kreditanstalt, File No. 22-2059, Release No. 115.

of Connecticut bonds were to become secured obligations of Hartford. The Hartford negative pledge clauses thereby became operative, and it was proposed to execute a new indenture of mortgage equally and ratably securing all of the Hartford debentures.

Old Colony Trust Company, trustee under one Hartford indenture, was to be named trustee under the new mortgage indenture as well as the remaining Hartford indentures. The new mortgage indenture was qualified under the Act, and one indenture not previously qualified was conformed to the Act. The provisions of the various indentures (including events of default) were substantially the same and a provision was added whereby acceleration of maturity under one would accelerate all.

Since it appeared that the proposed procedure resulted in a situation similar to several series of bonds issued under a single indenture, and in recognition of the complex problems presented by having separate trustees under the several indentures, the Commission granted the application by order dated November 8, 1957 (Release No. 117), to permit Old Colony Trust Company to act as trustee under all Hartford indentures.

Applications - re certain German corporate debtors

The Commission has granted certain applications made pursuant to Sections 304(d) and 310(b)(1)(ii) of the Act to permit the same organization to act as trustee or co-trustee under an outstanding indenture and trustee or co-trustee under a new indenture in the case of certain German debtors making offers of settlement pursuant to the London Agreement on German External Debt.[38b/] The German law implementing the London Agreement,

38b/ Allgemeine Elektricitats-Gesellschaft, File No. 22-1706, Release No. 81.
Rudolph Karstadt Aktiengesellschaft, File No. 22-1763, Release No. 88.
Harpener Bergbau-Aktiengesellschaft, File No. 22-1909, Release No. 98.
Berliner Kraft-Und Licht (Bewag)-Aktiengesellschaft, File No. 22-2096, Release No. 109.
Elektrowerke Aktiengesellschaft, File No. 22-2117, Release Nos. 110 and 116.
Deutsche Rentenbank-Kreditanstalt, File No. 22-2059, Release No. 115.

which was adopted in order to allow an orderly and nondiscriminatory settlement of debts under the London Agreement, prohibits the German debtor from making payments or any other performance with respect to any old obligations until all refunding obligations issued by all German debtors, corporate or otherwise, have been paid in full.

By virtue of the provisions of the implementation law, the German trustee or co-trustee under the old indenture is without the power or incentive either to seek payment of the old bonds, out of such security or otherwise, in preference to payment on the new bonds or to prevent the orderly payment in full of the new bonds in accordance with their terms. Any remaining conflict of interest between the German trustee or co-trustee under the old and the new indentures would appear to be eliminated by reason of the powers of the American institutional trustee to direct action by the German co-trustee under the new indenture. In addition, the complicated nature of German real estate law and title registration procedures and the requirements for settlements under the London Agreement by which frequent changes in the land records must be made during the pendency of the settlement offer make it desirable that the holder of a lien be fully familiar with the entire records in each land register relating to the property subject to the lien.

Section 310(b)(2)

Trustee-Obligor and Trustee-Underwriter

Paragraph (2) of Section 310(b) provides that a trustee is to be deemed to have a conflicting interest if it or any of its directors or executive officers is an obligor upon the indenture securities, or an underwriter for the obligor.[39/] The term "underwriter" is defined in the last paragraph of subsection (b) to mean any person who was an underwriter within three years of outstanding securities of an obligor, and has been construed by the Commission to include underwriters of the proposed issue.[40/]

It appeared that a conflict of interest might arise under this section where the indenture trustee was to buy ten per cent of the proposed bond issue at the underwriter's price. It was conceded to be a close question and no objection was raised, provided that disclosure of the transaction was made in the registration statement.[41/] A similar situation was presented in the case of the purchase of bonds of The Hawaiian Electric Company by the trustee, Hawaiian Trust Company, Ltd., with a view to distribution. A conflict of interest was recognized but an exemption was granted by the Commission under Section 304(c) of the Act.[42/]

Question was raised whether a title company, that insures the title to the mortgaged property, is disqualified to act as indenture trustee under Section 310(b)(2) of the Act. It is understood, in this connection,

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39/ House Report No. 1016, 76th Cong., 1st Session, p. 47.
40/ See discussion at pp. 50-52, infra.
41/ Letter dated June 6, 1940, to R. S. Hecht, Chairman of the Board of Hibernia National Bank.
42/ 12 S.E.C. 1135. See discussion at p. 44, infra.

that title companies sometimes write policies to insure the lender against defective title in the mortgaged property, in which event it might be contingently liable to holders of indenture securities. However, in view of the fact that such liability would be measured by the damage suffered through the defective title and is not a promise to pay the indenture security, such trustee would not appear to be a person liable on the indenture security as referred to in the definition of "obligor" in Section 303(12) of the Act.[43/]

43/ Memorandum dated November 10, 1949, of C. E. Shreve re question raised by Mr. Burns of Bell, Boyd and Marshall.

Section 310(b)(3)

Control

Under paragraph (3) of Section 310(b), a trustee is deemed to have a conflicting interest if it controls or is controlled by or is under common control with an obligor or underwriter.[44/] Under this provision, the test is actual direct or indirect control. The words "whether by agency, stock ownership or otherwise," which appeared in Sections 310(b)(3) and 310(b)(7) of the Senate Bill, were eliminated as unnecessary in view of the opinion of the Supreme Court on April 17, 1939, in Rochester Telephone Corporation v. U. S. and the Federal Communications Commission, 307 U. S. 125.[45/]

Rule T-10B-3, made effective by the Commission on May 13, 1941,[46/] was adopted for the purpose of enabling persons desiring to act as indenture trustees to determine in advance of the filing of a registration statement or an application for qualification of an indenture whether or not the Commission would find them to be disqualified to act as such because of a control relationship with any particular person who might be named as an underwriter for the obligor.

In one case, the proposed indenture trustee was also trustee under an indenture of the parent of the obligor under which all of the capital stock of the proposed issuer was pledged as collateral security. Although the voting power thus vested in the trustee was not being exercised by

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44/ See discussion of "underwriter," at page 50, infra.

45/ House Report No. 1016, 76th Cong., 1st Session, page 47.

46/ Trust Indenture Act Release No. 11, May 13, 1941.

reason of pending reorganization proceedings, such voting power was preserved by court order and four of the seven directors had been designated by this trustee. The trustee stated that it would not exercise this voting control without court order and that the court might divest it of this control. Nevertheless, the position was taken that the proposed indenture trustee appeared to have a conflicting interest under Section 310(b)(3) of the Act.[47/] There was no conflict under Section 310(b)(6) of the Act because the securities for which the stock was pledged were not in default.

In another case, it appeared that six of the twelve directors of the obligor were also directors of the proposed indenture trustee or the trustee's parent. There were also incidental cross-holdings of securities by officers and directors of the obligor and the trustee's parent. The Commission was unwilling to conclude that there was no conflict of interest proscribed by Section 310(b)(3) of the Act and directed that refusal order proceedings be instituted.[48/] A new trustee was thereupon selected. However, no question was raised with respect to a possible control relationship arising from miscellaneous minority interlocking relationships between a telephone company issuer and its parent on the one hand and the indenture trustee and its parent on the other, cross-stockholdings being nominal.[49/]

47/ See memorandum of April 5, 1945, re Portland General Electric Company. See also Commission Minute of July 27, 1939, re Northern Indiana Public Service Company, discussed at p. 48, infra.

48/ Commission Minute of November 8, 1940, re Boston Edison Company, File No. 2-4564 (22-67). Question was also raised of a conflict of interest under Section 310(b)(4) of the Act.

49/ See memorandum dated October 15, 1948, re Northwestern Bell Telephone Company, File No. 2-7705 (22-805).

Again, in the case of an exchange offer of debentures for the preferred stock of National Press Building Corporation, the president and a director of the trustee, National Savings and Trust Company, was a director and one of five voting trustees of the obligor. Question was raised of a conflict of interest under Section 310(b)(3), whereupon the individual resigned as voting trustee.[49a/]

Question was raised whether Union Trust Company of Pittsburgh might act as indenture trustee for an issue to be underwritten by Mellon Securities Corporation because of the question of possible common control.[50/] The Commission indicated that it was tentatively of the view that representations made as to the difficulty of obtaining another qualified trustee in Pittsburgh (where the indenture required the trustee to reside) that was not affiliated with competitors of the obligor would not warrant the issuance of an exemption order under Section 304(c) of the Act.[51/] Consequently, a new indenture trustee was appointed.

Application - J. P. Morgan & Co. Incorporated - File No. 25-1

Application pursuant to Rule T-10B-3 was filed by J. P. Morgan & Co. Incorporated as a prospective indenture trustee for a finding that it did not have any conflicting interest as defined in Clauses (3) or (6) of Section 310(b) of the Act by reason of any affiliation between it and Morgan Stanley & Co. Incorporated, a prospective underwriter for obligors at the time unknown. The question under Clause (3) of said section was whether J. P. Morgan & Co. Incorporated directly or indirectly controlled, or was directly or indirectly controlled by, or was under direct or indirect common control with the proposed underwriter. The question under

49a/ See memorandum of February 7, 1956, re National Press Building Corporation, File No. 22-1800.
50/ Jones & Laughlin Steel Corporation, File No. 2-4624 (22-90).
51/ Commission Minute of January 7, 1941.

Clause (6) was whether or not J. P. Morgan & Co. Incorporated was the beneficial owner of ten per cent or more of any class of security of such underwriter.[52/]

It was found that by reason of the community of interests of the owners of the stock of the proposed trustee and the underwriter, they were under common control.[53/] The opinion states in part as follows:

> " . . . The fact remains that the underwriter was launched as a Morgan concern with Morgan backing, and that the prosperity of the underwriter is still a matter of substantial interest not only to its own stockholders and management but to the management of the Morgan trust company as well.
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> "Thus the trust company is not only subject to the control of its own directors and officers; it is also susceptible of being materially influenced, in situations with which the Act is concerned, by those in control of the underwriter--not by virtue of any antagonistic powers or influences, but by virtue of the harmony of personal interests existing among the controlling members of the two managements.
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> "This confluence into the same hands of both the power and the incentive to control both corporations for the mutual benefit and protection of the persons controlling both of them makes the conclusion inescapable, in our opinion, that the trust company and the underwriter are controlled by a single unified group."

The Commission recognized its jurisdiction under Rule T-10B-3 to consider the issues raised under Section 310(b)(6) of the Act but in view of its conclusion on the question of common control, it considered this question to be academic.

52/ The issue of possible conflict of interest under Section 310(b)(3) of the Act because of the possible control relationship between J.P.Morgan & Co. Incorporated, as indenture trustee, and Morgan Stanley & Co. Incorporated, as underwriter, was resolved in the Matter of Shell Union Oil Corporation, File No. 2-4633 (22-95), by the substitution of another trustee. 8 SEC 520.

53/ 10 SEC 119, 149.

Thereafter, Morgan Stanley & Co. Incorporated was dissolved and converted into a partnership. As a part of the plan of liquidation, its preferred stock, theretofore owned substantially by the major stockholders of J. P. Morgan & Co. Incorporated, was liquidated and retired. J. P. Morgan & Co. Incorporated was thereupon advised 54/ pursuant to authorization by the Commission 55/ that upon the facts then known, no question would be raised with respect to the bank presently being qualified to act as indenture trustee when Morgan Stanley & Co. is an underwriter for the obligor insofar as the application of Section 310(b)(3) of the Act to that particular situation was concerned. There appeared to be no further question of a possible conflict under Section 310(b)(6) of the Act.

54/ Letter dated August 13, 1943, from Baldwin B. Bane, File No. 25-1-3.

55/ Commission Minute of August 13, 1943.

Application - Allgemeine Elektricitats-Gesellschaft, File No. 22-1706.[55a/]

Pursuant to an application under Section 304(d) of the Act, the Commission exempted from the provisions of Section 310(b)(3) of the Act, debt adjustment bonds, insofar as the indenture permitted the German co-trustee to serve as such notwithstanding an affiliation with an underwriter for the issuer. Fifty per cent of the outstanding capital stock of the German co-trustee was owned by a German partnership which had a three per cent participation in a syndicate which in 1954 underwrote capital stock of AEG and it was anticipated that such partnership would participate in future syndicates underwriting security issues of AEG. It appeared that disqualification of the proposed German co-trustee would make it difficult to obtain as co-trustee in Germany, any satisfactory organization or individual which was engaged in trust business in Germany and had any experience with foreign loans and trust indentures with respect thereto. Only a few German organizations have entered into this field, these being primarily the larger banks in Germany, all of which had relatively large participation in the syndicate, which in 1954 underwrote AEG's capital stock and accordingly were subject to the same disqualification as the proposed co-trustee.

55a/ Trust Indenture Act Release No. 81.

Section 310(b)(4)

Interlocking Directors, etc.

Paragraph (4) of Section 310(b) prohibits the indenture trustee itself or any of its directors or executive officers from being an officer, director, partner, employee, appointee or representative of an obligor upon the indenture securities, or of an underwriter for the obligor who is currently engaged in the business of underwriting. This paragraph, however, permits, in common parlance, one director or executive officer "each way" between the trustee and the obligor, but no person may at the same time be an executive officer of both. The second common director is permitted only if the number of directors of the trustee is more than nine. Clause (C) permits the trustee to be designated to act as such, or in certain specified ministerial capacities, by an obligor or underwriter.[56/] The failure of this provision to permit limited affiliation of the underwriter with the trustee is consistent with the requirements of the National Banking Act.[57/]

During the period that the terms "obligor" and "trustee" were construed by the Division to include their parents, subsidiaries and affiliates,[58/] such construction was also applied to the conflicts of interest referred to in paragraph (4) of Section 310(b) of the Act. Thus, in one case it was noted that the number of directors of the obligor who were also directors of the proposed indenture trustee and/or the trustee's parent exceeded the

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56/ House Report No. 1016, 76th Cong., 1st Session, p. 47. Third interlocking director prohibited - see memorandum of February 9, 1955, re Michigan Bell Telephone Co.; memorandum of March 17, 1955, re Southern California Edison Co.

57/ 12 U. S. Code §78.

58/ See discussion at pp. 14-16, supra.

num er permitted under this provision of the Act.[59] The Commission directed the institution of refusal order proceedings,[60] whereupon a new indenture trustee was selected. This question has become moot under the narrower construction since placed upon these terms. No such question appears to have been raised with respect to a director of the trustee also serving as a director of a parent of an underwriter.[61]

The question was raised of a possible conflict of interest under this provision in a situation where the president-director of an obligor was also a director of the indenture trustee, and it was proposed to add to the trustee's board of directors another person who was a director and vice-chairman of the board of the obligor. Since the number of directors of the trustee was more than nine, the only question presented was whether the proposed new director was also an executive officer of the obligor by reason of being vice-chairman of the board of the obligor.

59/ Question was also raised under Section 310(b)(3) of the Act with respect to control over the obligor, since six of the twelve directors of the obligor were also directors of the trustee or its parent. There were incidental cross-holdings of securities by officers and directors of the obligor and the trustee's parent.

60/ Commission minute of November 8, 1940, re Boston Edison Company, File No. 2-4564 (22-67). See also Commission's minute of April 3, 1941, re Koppers Co., File No. 2-4721 (22-111), involving situation where a director of the proposed indenture trustee was also a director of a parent of one of the underwriters. No question was raised because of small amount involved.

61/ Letter dated April 5, 1940, to Mudge, Stern, Williams & Tucker re Stone & Webster, Inc.

In view of the definition of "executive officer" contained in Section 303(6) of the Act, which excludes therefrom the chairman of the board of directors, and, in view of representations that the said vice-chairman of the board of directors performed no executive functions, it appeared that he could become a director of the indenture trustee without violating this provision.[62/] In another case it appeared that a director and senior vice-president of the trustee was also a director and chairman of the executive committee of the obligor. Obligor's bylaws provided that the chairman of the executive committee shall be deemed to be an executive officer. No further question was raised as to the qualification of the trustee in the light of such interlocking relationship upon receipt of advice that the bylaw provision would be eliminated and assurances that the person concerned was not in fact an officer of the company.[63/]

The question has arisen as to the meaning of the words "employee, appointee or representative" in various types of situations. Thus, in one case a vice-president of the trustee was also a director and financial adviser of the obligor on a monthly salary. It was stated that he took no part in the executive management nor the operation of the obligor and that he had no regular hours for attendance at the office of the obligor nor a desk or office therein. The staff took the position that

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62/ Letter dated October 21, 1946, to Peoples First National Bank & Trust Co. re Westinghouse Electric Corporation, File No. 2-4878 (22-159).

63/ Alan Wood Steel Company, File No. 2-7641 (22-792).

there was a conflict of interest under Section 310(b)(4) of the Act.[64/] On the other hand, a title company insuring title to the mortgaged property and acting as indenture trustee was regarded as an independent contractor not coming within the scope of this subsection.[65/]

The question of the interpretation of the words "employee, appointee or representative" has arisen most frequently in connection with the possible application thereof to an attorney for an obligor or of an underwriter for such obligor.[66/]

In a case where a member of the board of directors of a proposed indenture trustee was also a member of the law firm representing the obligor on general retainer, the Commission authorized the Division to advise such counsel that although it was a close question, the Commission was of the view that a court would construe his relationship to the issuer as that of an "employee" within the meaning of Section 310(b)(4) and would

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64/ See memorandum to the file dated January 8, 1942, by Robert McKellar, re Schenley Distillers Corporation, File No. 2-4925 (22-177).

65/ Memorandum dated November 10, 1949, of C. E. Shreve re question raised by Mr. Burns of Bell, Boyd and Marshall.

66/ The view has been expressed that the words "appointee or representative" relate only to persons selected by the obligor or underwriter and appointed especially to serve on the trustee's board as a representative of the obligor or underwriter. Cf. Section 17(c) of the Public Utility Holding Company Act of 1935.

hold the trustee to be disqualified thereunder.[67] In another case, a director of the proposed trustee and a member of the firm acting as its general counsel[68] was also a director of the obligor for which his firm was retained as special counsel in an appraisal proceeding. Counsel was advised that since his firm was not employed by the obligor on a general retainer,[69] he was not disqualified as an "employee, appointee or representative" of the obligor. When, at a later date, an application for qualification of an indenture was filed by this obligor, this firm had become its general counsel. Registrant was advised that a conflict of interest appeared to exist and another trustee was obtained pursuant to an undertaking in the registration statement.[70]

Thereafter, the staff took the position that there was a conflict of interest under this provision where the law firm, of which a director of the trustee was a member, was counsel for one of the proposed underwriters although not sole counsel and not on a retainer basis. Such counsel was afforded the opportunity to argue the matter informally before the Commission and the Commission expressed itself as being of the view that

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67/ Commission minute of September 1, 1943, re Atlanta Gas Light Company, File No. 2-5211 (22-262).

68/ The relationship of an officer or director of the obligor or underwriter as an employee, appointee or representative of the trustee is not prohibited by Section 310(b)(4).

69/ Cf. Investment Company Act Release No. 214, September 15, 1941.

70/ See Commission minutes of April 12 and 14, 1945, re York Corporation, File No. 2-5659 (22-396).

a conflict existed. However, the registration statement was permitted to become effective.[71/]

A proposed amendment to instruction 4 of Item 6 of Form T-1 and Item 3 of Form T-2, to include an attorney or a member of a firm of attorneys regularly retained or engaged by the obligor or any underwriter for the obligor, in the terms "employee," "appointee," and "representative," was circulated at the direction of the Commission.[72/] Thereafter, when such apparent conflicts arose, the Commission decided to raise no question with respect thereto in view of the fact that the general problem was under study by it.[73/]

The view was expressed by representatives of banks and trust companies who act as indenture trustees, that many of such companies would prefer to surrender this business than to give up their lawyer-directors who were valuable in connection with their ordinary trust business and that the result would be to throw this business to a relatively few institutions in the larger financial communities. Thereafter the Commission issued its

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71/ Commission minute of July 10, 1945, re Continental Baking Company, File No. 2-5773 (22-413).

72/ Commission minute of September 27, 1945.

73/ See Commission minute of September 27, 1945, re Southwestern Bell Telephone Company, File No. 2-5899 (22-454); and Commission minute of November 26, 1945, re Pacific Telephone & Telegraph Co., File No. 2-5996 (22-479).

release[74/] announcing the abandonment of the proposed amendment and the deficiency is no longer raised unless the lawyer is actually employed as house counsel of the obligor or underwriter, or other extenuating circumstances exist which would clearly establish the attorney as an employee, appointee or representative of the obligor or underwriter.[75/]

It was concluded that the term "partner," as used in this section, includes an executor or trustee who becomes a limited partner of an underwriter for the obligor.[75a/]

74/ Trust Indenture Act Release No. 35, February 6, 1947.

75/ See letter dated February 5, 1947, to Edmund Burke, Jr.

75a/ See memorandum dated April 23, 1951, re letter dated April 19, 1951, from Wilson & McIlvaine.

Exemption - The Hawaiian Electric Company - File Nos. 22-219, 12 S.E.C. 1135; and 2-5383 (22-312)

The Hawaiian Electric Company, Limited, issued under its indenture dated September 1, 1938, $2,000,000 principal amount of First Mortgage Series A Bonds and $3,000,000 of Series B Bonds. The trustee, Hawaiian Trust Company, Limited, participated with a group of financial institutions in the purchase of the said bonds with a view to distribution. Inasmuch as the trustee disposed of its holdings of Series A and B Bonds on or before May 1, 1941, it continued to be an "underwriter" for the obligor, as defined in Section 310(b) of the Act until May 1, 1944, and consequently could not qualify under Section 310(b)(2) of the Act.

In addition, the trustee had six directors in common with Bank of Hawaii and Bishop National Bank, both being underwriters of said issues, and was therefore also disqualified under Section 310(b)(4) of the Act.

Upon a showing that there were no institutions on the islands with sufficient facilities to act as trustee which were not similarly disqualified and the uncertain ability of a mainland trustee to function on the islands under existing laws and conditions, an exemption from such provisions of the Act by reason of the foregoing conflicts in interest was granted pursuant to Section 304(c)(2) with respect to a proposed offering of Series C Bonds.

Thereafter, when the conflict of interest under Section 310(b)(2) of the Act no longer existed, the Commission extended the exemption from Section 310(b)(4) of the Act to a proposed issue of Series D Bonds (the

Series C Bonds not having been publicly offered).[76] Like exemptions were granted with respect to the Series E and F Bonds.[77]

Exemption - Rheinisch-Westfalisches Elektrizitatswerk Aktiengesellschaft, File No. 22-1785 [77a]

Pursuant to an application under Section 304(d) of the Act, the Commission exempted from the provisions of Section 310(b)(4) of the Act, debt adjustment bonds insofar as the indenture permitted the German co-trustee to serve as such notwithstanding the fact that the chairman of the Aufsichtsratof the German co-trustee was also chairman of the Aufsichtsrat of the bank which had acted as an underwriter for the issuer.

The Aufsichtsrat of a German corporation has substantially different functions from that of the board of directors of a United States corporation. Under Section 95 of the German Stock Corporation Law, the duties and rights of members of the Aufsichtsrat of German corporations are extremely limited and the delegation of management powers to the Aufsichtsrat are specifically prohibited. Disqualification of the proposed co-trustee would have made it difficult to obtain as co-trustee any German organization satisfactory to the company which had adequate experience in dealing with foreign laws, since most of the available institutions which would come under consideration for such appointment had relationshipswith underwriters of the issuer involving ownership or control which were at least as serious as that relating to the proposed co-trustee.[77b]

76/ Trust Indenture Act Release No. 29, July 6, 1944.

77/ File Nos. 2-5906 (22-456) and 2-7011 (22-626).

77a/ Trust Indenture Act Release No. 91.

77b/ See also Allgemeine Elektricitats-Gesellschaft, File No. 22-1706, where a similar application was granted. Trust Indenture Act Release No. 81.

Section 310(b)(5), (6), (7), (8) and (9).

Cross-ownership of Securities

Like paragraph (4) of Section 310(b) (relating to interlocking directors and similar affiliations), paragraphs (5), (6), (7) and (8) (relating to cross-ownership of securities between the obligor, or its underwriter, and the trustee) are definitely defined prohibited relationships which in a given case may also constitute a control situation prohibited under paragraph (3) of this section. However, in the paragraph following, it is stated that the indenture to be qualified shall provide that the specifications of percentages in paragraphs (5) to (9), inclusive, shall not be construed as indicating that the ownership of such percentages of the securities of a person is or is not necessary or sufficient to constitute direct or indirect control for the purposes of paragraph (3) or (7) of this subsection.[78/] A predetermination of a conflict hereunder based upon a prohibited affiliation between the trustee and an underwriter may be had under Rule T-10B-3.[79/] Here, too, the terms "obligor" and "trustee" should not be construed to include their affiliates.[80/]

78/ This subsection also contains definitions for the purpose of paragraphs (6), (7), (8) and (9) with respect to "security" and "securities," the existence of a default, and the holding of securities by the trustee as collateral and in certain representative capacities.

79/ In the Matter of J. P. Morgan & Co. Incorporated, 10 SEC 119, 150.

80/ See discussion at pp.14a-16, supra.

Paragraph (5) imposes restrictions on the beneficial ownership, by the obligor and its underwriters and their respective officials, of voting securities of the trustee. Neither the obligor nor any of its officials may be the beneficial owner of more than ten per cent of such securities. A twenty per cent limit is placed upon their collective ownership of such securities. A ten per cent limit is placed upon the ownership of such securities, individually or collectively, by each underwriter and its officials.[81/]

The Commission granted acceleration in one case where it appeared that in one of the bidding groups for the debentures were included underwriters for a stand-by offering of common stock of the trustee by which they might be required to purchase more than ten per cent of the trustee's stock.[81a/]

Paragraphs (6), (7) and (8) deal with the matter of the beneficial ownership by the trustee of securities of an obligor or underwriter, and securities of persons who own substantial percentages of the voting securities of an obligor, or who stand in a control relationship with an obligor. The restrictions also apply to securities held as collateral security for an obligation as to which an uncured default in principal has continued for

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81/ House Report No. 1016, 76th Cong., 1st Session, p. 48. The statute prohibits such ownership by two or more of such persons. In this connection, Instruction 3 to Item 8 of Form T-1, which permits holdings of less than one per cent by "an underwriter," etc., to be omitted, was merely for the purpose of simplifying the requirements of the form and not a construction of the statutory language.

81a/ Commission minute of October 4, 1956, re Southern Bell Telephone and Telegraph Company.

more than thirty days. Paragraph (6) gives recognition to the fact that if a trustee is permitted by paragraph (1) of this subsection to act as trustee under more than one indenture, there is no reason why the ownership by the trustee of securities issued under any of such indentures should be deemed to constitute a conflicting interest.[82/] It thus seems clear that a conflicting interest does not arise under the Act merely because the trustee owns securities issued under the indenture under which such trustee is acting.[83/]

In one case it appeared that the proposed indenture trustee held common stock of the proposed obligor as collateral security under a defaulted obligation of the obligor's parent. It was contended that because such parent was in bankruptcy, the trustee could not reduce the collateral to possession and that if the trustee did obtain possession thereof, it would agree to resign. Conflicts of interest appearing to exist under paragraph (6), and possibly paragraph (3) of Section 310(b) of the Act, the Commission did not agree to such trustee accepting the position.[84/]

Ownership in a representative capacity--i.e., as executor, trustee or in a similar capacity--is given separate and more liberal treatment in paragraph (9), on the theory that such ownership does not involve as direct a conflict as beneficial ownership. If, on May 15 in any year, the trustee's holdings of such securities in a representative capacity exceed the prescribed 25 per cent limit, the trustee is to be deemed to have a conflicting interest. But any such securities (in an amount not

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82/ Ibid.

83/ Letter dated August 30, 1939, to Messrs. Hurt & Huntley.

84/ Commission minute dated July 27, 1939, re Northern Indiana Public Service Company.

exceeding the 25 per cent limit) which were acquired through becoming executor, administrator, or testamentary trustee of an estate which included them may be excluded from the calculation for a 2-year period. The trustee is required to make a check of its holdings of such securities in any of the specified representative capacities promptly after May 15 in each year. A similar check must be made when a principal or interest default under the indenture has continued for thirty days, and all such securities held by the trustee in any of the specified representative capacities, with sole or joint control over such securities, are thereafter to be considered as though beneficially owned by the trustee. 85/

Inasmuch as paragraph (9) requires this check to be made only once a year on May 15, it has not been considered necessary to require the filing of information with respect thereto in Form T-1 or T-2 86/ and a conflict thereunder probably is not subject to attack under Section 305(b)(3) or Section 307(c) of the Act.

Deficiencies

Since the date upon which a check is required to be made under Clause (9) of Section 310(b) of the Act is fixed by statute at May 15, it may not be changed.

85/ House Report No. 1016, 76th Cong., 1st Session, p. 48.

86/ Letter dated February 7, 1941, to Cravath, de Gersdorff, Swaine & Wood.

Section 310(b)

Definitions

There are contained at the end of Section 310(b) of the Act definitions of various terms used therein.

There are excluded from the operation of paragraphs (6), (7), (8), and (9), securities other than "corporate securities," securities held as collateral under the indenture to be qualified, or for an oglibation not in default as to principal for thirty days, and securities held in a ministerial capacity.[87/] Also, by excluding bank loans from the definition of "security," a trustee in the banking business may make loans to the obligor under the indenture without being disqualified to act as such trustee.[88/]

The final paragraph of subsection (b) defines the term "underwriter" as meaning, for the purposes of that subsection, any person who, within three years prior to the time of determination, was an underwriter of any securities of an obligor outstanding at such time.[89/] If the full definition of "underwriter" is incorporated in the indenture at this point, care should be taken to reflect the 1954 amendment to Section 303(4) of the Act.

The question has arisen as to whether this definition of underwriter excludes the proposed underwriters upon the issue with respect to which the registration statement or application for qualification was filed.

87/ House Report No. 1016, 76th Cong., 1st Session, p. 48.

88/ Letter dated January 24, 1940, to Leve, Hecht, Hadfield & Clarke re Skelly Oil Company; memo dated February 17, 1955, re Shell Oil Co.

89/ House Report No. 1016, 76th Cong., 1st Session, p. 48.

When this matter first came before the Commission it was decided to raise no question as to a conflict of interest under Section 310(b)(3) of the Act arising with respect to a control relationship between the trustee and an underwriter for the securities being registered.[90/] The basis of this determination was that such underwriter had not underwritten outstanding securities of the obligor within three years prior to the time that the determination was made and hence did not come within the definition. However, this position was subsequently reversed and the forms and rules were ordered to be amended in conformity therewith.[91/]

Although there is no ambiguity in this definition when read alone, it was felt that when read in the light of the legislative history and the policy declared in Sections 302(a)(3) and 302(b) of the Act, no such result was intended.[92/] The emphasis of this definition was evidently to place a three-year limit with respect to affiliations with underwriters and then only underwriters of securities outstanding at the time of the determination. To exclude prospective underwriters would place an artificial limit upon the power of the Commission to issue refusal orders under Section 305(b)(3) of the Act by preventing it from eliminating a certain future conflict apparent at the time of qualification of the indenture. Thus, as

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90/ Commission Minute of February 15, 1940, re Blaw-Knox Company, File No. 2-4300 (22-2). A like question could arise under paragraphs (2), (4), (5) or (6) of Section 310(b).

91/ Commission Minute of November 9, 1940, and Trust Indenture Act Release No. 5 amending Forms T-1, T-2 and T-3.

92/ To reach this conclusion, it is necessary to read the word "means" as "includes."

soon as any securities were offered by such affiliated underwriter, the machinery of Section 310(b) of the Act would be called into action, whereby the trustee should eliminate the conflict or resign within ninety days; if it failed to resign, it should give notice thereof to security holders within ten days thereafter, and then a security holder, after holding his security for six months, could petition a court for the removal of the trustee and the appointment of a successor. Such a procedure appears to reward the trustee for his own inactivity and for the indifference of security holders. While it may be the best that could be devised as a contractual remedy, it seems clear that Congress intended that at least at the outset the Commission should have an opportunity to see that the trustee would be qualified.

Rule T-10B-1, adopted pursuant to Section 319(a) of the Act, contains a definition of "Calculation of Percentages" which should be included with this provision of the indenture. This definition should not be altered or expanded. Also, it is the practice to incorporate definitions of "voting securities," "director" and "executive officer" from Section 303 of the Act.

Deficiencies

Rule T-10B-1 contains a definition of "Calculation or Percentages" which should be inserted in the indenture. The last paragraph of this definition states that differences in the interest rates and maturity dates of various series of secured evidences of indebtedness shall not be deemed sufficient to constitute such series different classes. This definition should not be enlarged to provide that differences in "redemption prices" also will not constitute such series different classes.

Section 310(c)

Qualifications of Trustee under Public Utility Act of 1935.

Subsection (c) of Section 310 provides that the Public Utility Act of 1935 shall not be held to establish or authorize the establishment of any standards regarding the eligibility and qualifications of the trustee or prospective trustee under an indenture to be qualified under the bill, or regarding the provisions of any such indenture with respect thereto, other than those established by this section. This subsection is intended to prevent the Commission from imposing more stringent requirements with respect to such matters, by virtue of the powers conferred on it by the Holding Company Act.[93/]

At the time that the bill was pending which became the Trust Indenture Act of 1939, the following was expressed in a letter dated December 14, 1938, from Chairman Douglas to Mr. R. G. Page:[94/]

> "The policy of this Commission if this bill becomes law will be to apply it to all trust indentures embraced within it, including indentures coming under the Public Utility Holding Company Act of 1935. Insofar as the Barkley Bill treats of a particular problem, the Commission will adhere to it and not endeavor to supplement or transcend it by use of other powers which it might have under the Public Utility Holding Company Act of 1935. In other words, it would be the policy of the Commission, once the Congress had defined, for example, what conflicts were or were not permissible, to apply the formula which Congress had provided to the exclusion of all other possible ones."

93/ House Report No. 1016, 76th Cong., 1st Session, p. 49.

94/ Commission Minute of December 14, 1938.

To carry out this policy and in view of the provisions of Section 311(c) of the Act, an arrangement was made, after the passage of the Act, between the directors of the Division of Public Utilities and the Registration Division (now the Division of Corporation Finance) whereby the latter Division would examine indentures filed under the Holding Company Act for compliance with the standards of the Trust Indenture Act although exempt therefrom.95/

95/ See Public Utilities Division staff memoranda dated May 15, 1940, and August 18, 1944.

Section 311

Preferential Collection of Claims Against Obligor

Subsection (a) of Section 311 is designed to eliminate competition between a trustee, who is also a creditor of the obligor, and the bondholders he represents, during and after the 4-months' period preceding a "default" as defined in the last paragraph of the subsection. The trustee[1/] is permitted to become a creditor of the obligor, but if it improves its position as such creditor, after the beginning of such 4-months' period, the proceeds of such preferential collection must be apportioned between the trustee and the bondholders in such manner that the trustee receives no greater percentage of its claim (afcer deducting nonpreferential collections) than the bondholders receive on the unsecured portion of their claim, after deducting receipts from other sources. In the case of bankruptcy, receivership or reorganization proceedings, administration of these provisions is vested in the court.[2/] A provision subordinating the indenture securities to other debt does not affect the application of this section.[3/]

An attempt to revise this provision to permit the trustee to retain payments received by it upon senior indebtedness was resisted. Such a provision was permitted to be included elsewhere in the indenture so that it could be tested under Section 318(a).[3a/]

The following items, as to which the element of competition is not present, are excluded from the apportionment requirement: (1) payments by persons, other than the obligor, who are liable upon the claim in

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1/ No objection has been raised to the addition of the phrase "in its individual capacity" in referring to the trustee hereunder.

2/ House Report No. 1016, 76th Cong., 1st Session, p. 49.

3/ Letter dated April 1, 1943, to Bodman, Longley, Bogle, Middleton and Armstrong.

3a/ Memo September 25, 1956, re Fansteel Metallurgical Corporation.

question; (ii) the proceeds of the bona fide sale of the claim by the trustee to a third person; (iii) distributions received in bankruptcy or receivership, or in reorganization proceedings pursuant to the Bankruptcy Act or applicable State law; (iv) realizations upon property held as security for the trustee's claim prior to the beginning of the 4-months' period; (v) realizations upon property received as security for a claim created within the 4-months' period, i.e., a so-called "rescue" or "distress" loan, if the property was so received simultaneously with the creation of the claim, and if the trustee establishes that it had no reasonable cause to believe that the "rescue" would be unsuccessful, that is, no reasonable cause to believe that a default would occur within four months.[4/]

The next to the last paragraph of the subsection is intended to prevent a trustee from evading the apportionment requirements in the event of resignation or removal.[5/]

Under the definitions of the terms "default" and "indenture security holder" contained in the final paragraph of the subsection, if the trustee is acting as trustee under two or more qualified indentures, all of which are in default, the accounting requirements come into operation four months prior to the earliest default, and the holders of securities outstanding under all of such indentures are entitled to the benefits thereof.[6/] The

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4/ House Report No. 1016, 76th Cong., 1st Session, p. 49.

5/ Ibid.

6/ Ibid.

practice has arisen, however, to extend the benefits of this provision to security holders under such other defaulted indentures having the same trustee and containing provisions substantially similar to the provisions of Section 311(a) of the Act, whether or not formally qualified under the Act. 7/

Subsection (b) permits the exclusion, from the apportionment requirements of Section 311(a), of certain classes of credits, the ownership or acquisition of which does not involve an acute conflict of interest. Included in this category are (i) credits evidenced by securities issued under an indenture, or by securities having a maturity of one year or more at the time of acquisition by the trustee; (ii) advances authorized by a receivership or bankruptcy court, or by the indenture, for the purpose of preserving the mortgaged property or of discharging tax liens or other prior liens or encumbrances on the trust estate, if appropriate notice of such advances is given to the security holders; (iii) certain disbursements of a minor nature; (iv) temporary credits arising from the sale of goods or securities sold in what is substantially a cash transaction, as for example, cases where payment is made by check which may take several days to clear; (v) creditor relationships arising from the ownership of securities of "Edge Act" corporations, which are comparatively few in number and are engaged almost exclusively in the financing of foreign trade; and (vi) credits arising from certain transactions in "self-liquidating paper" such as credits arising from the discount of drafts

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7/ CCH "Model" Indenture, p. 41, Section 8.16.

with bills of lading attached, which are ordinarily liquidated out of the proceeds of the goods, and credits arising out of similar transactions.[8/]

Pursuant to Section 319(a) of the Act, the Commission has adopted Rule T-11B-4 defining "cash transactions," and Rule T-11B-6 defining "self-liquidating paper." These definitions should be included in the indenture provisions incorporating Section 311(b) of the Act. Other definitions, such as the definition of "securities" in Section 2(1) of the Securities Act of 1933, are sometimes inserted in indenture provisions incorporating the language of this section.

Under subsection (c), the Commission, in the exercise of its jurisdiction under the Public Utility Holding Company Act of 1935 regarding the issue or sale of a security, may not take adverse action with regard thereto by reason of the fact that such issue or sale will result in an indenture trustee for the issuer or seller, or for a subsidiary or associate company or affiliate thereof, becoming a creditor, directly or indirectly, of any of the foregoing. But, where the lending institution is indenture trustee for the debtor itself, or for a subsidiary of the debtor, the Commission may require the indenture trustee to agree to be bound by the provisions of the Act with respect to preferential collections and the standard of conduct to be observed by the trustee in the period after default under the indenture. Sections 311, 315(c), and 315(d)(2) and (3).[9/]

8/ House Report No. 1016, 76th Cong., 1st Session, pp. 49-50.

9/ Id. at p. 50.

For the purposes of subsection (c), it has been the practice of the Public Utilities Division to require that all indentures under its jurisdiction conform to the standards of the Trust Indenture Act of 1939 although this Act is inapplicable thereto. 10/

Deficiencies

The substitution of the term "company" for the word "obligor" in the indenture provision purporting to incorporate the language of Section 311 of the Act, makes necessary the inclusion of a definition of the term "company" to include any obligor upon the securities to be issued.

The indenture should provide that the provisions thereof which purport to conform to Section 311 of the Act are applicable to any separate or co-trustee which may be appointed under the provisions thereof.

10/ See discussion at p. 53, supra.

Exemption - Aluminum Company of Canada, Limited, File No. 2-9624 (22-1242)
Aluminium Limited, File No. 2-9625 (22-1242)

On May 19, 1952, an application was filed by Aluminum Company of Canada, Limited, an issuer, and Aluminium Limited, as guarantor, under Section 304(d) of the Act for exemption to permit the inclusion in the indenture provision reflecting Section 311 of the Act the following definition:

> "'The Bankruptcy Act of applicable State law' shall be deemed to include any comparable statute of Canada or any province thereof which provides substantially as adequate safeguards for the rights of creditors as does the Bankruptcy Act."

It will be noted in this connection that Section 303(14) defines "State" as any State of the United States and Section 303(18) defines Bankruptcy Act as the United States Act of July 1, 1898, as amended.

The basis of the application was that the obligors are Canadian corporations and their assets are located principally in Canada. Since such reorganization proceedings are most likely to occur in Canada, the result of the statutory provisions without such proposed definition would be that instead of placing the indenture trustees and the debenture holders on a parity, as would be the case of a United States obligor, the debenture holders would be preferred over the trustees. This result appears to be contrary to the evident purpose and intention of the statute. Exemption was granted as requested. 10a/

10a/ See also application filed by Aluminum Company of Canada, Limited, File No. 2-13174 (22-2063).

Section 312

Bondholders' Lists

Subsection (a) of Section 312 requires the obligor to file with the trustee, at intervals of not more than six months and at such other times as the trustee may request, all information in its possession or control, or in the possession or control of any of its paying agents, as to the names and addresses of bondholders.[1/] It is customary to provide that such information be furnished within 45 to 60 days after the interest payment dates and be dated as of a date not more than 15 days prior to the time it is so furnished.[2/] Semi-annual reports would appear to be required even though interest is payable only once a year. A provision limiting the time to 30 days within which the obligor shall comply with intermediate requests by the trustee for information hereunder appears unobjectionable.

The trustee is under a specific duty to preserve, in as current a form as is reasonably practicable, all information as to names and

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1/ House Report No. 1016, 76th Cong., 1st Session, p. 50; also pp. 35-36. The report gives as an example information received from "ownership certificates" required by the Revenue Act of 1936. However, since January 1, 1943, such certificates have, with limited exceptions, been required only with respect to obligations containing a tax-free covenant and issued prior to January 1, 1934 (Income Tax Regulation 118, Section 34.143-4(a), under Section 143(a) of 1939 Code, now Section 1451 of 1954 Code.)

2/ CCH "Model" Indenture, p. 7, Section 6.01.

addresses of bondholders furnished to it by the obligor or its paying agents, and any such information received by the trustee itself in the capacity of paying agent.[3/] This requirement is usually expanded to refer also to information filed with it within two preceding years pursuant to the provisions of Section 313(c)(2) of the Act. It is also the practice to provide that the trustee may destroy such information upon receipt of new information of like character or, in the case of information pursuant to Section 313(c)(2) of the Act, two years after the receipt thereof.[4/] Inasmuch as such information need be filed only with the institutional trustee, separate or co-trustees are under no liability with respect to it.[5/] If it is clear that all outstanding securities must be registered or only the trustee may act as paying agent, appropriate revision may be made in the language of the indenture purporting to include Section 312(a) of the Act.

Under subsection (b), the trustee must, within five business days after application by any three or more bondholders who desire to communicate with other bondholders with respect to their rights, either afford to them access to such information, or advise them as to the approximate

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3/ House Report No. 1016, 76th Cong., 1st Session, p. 50.

4/ CCH "Model" Indenture, p. 7, Section 6.02(a).

5/ Id. at p. 47, Note.

number of bondholders and the approximate cost of mailing to them a specified form of proxy or other communication. In the latter event, the trustee must, on request of such applicants, mail to all bondholders whose names have been so furnished to it or received by it, copies of the form of proxy or other communication specified in the request with reasonable promptness after tender thereof and payment or provision for the payment of the reasonable expenses of such mailing, unless, within five days after such tender, the trustee files with the Commission a written statement that, in its opinion, such mailing would be contrary to the best interests of the bondholders or would be in violation of applicable law. If the trustee files such a written statement, it need not mail the communications unless and until the Commission, after notice and opportunity for hearing, enters an order refusing to sustain the objections. 6/

Subsection (c) is intended to exempt from the nondisclosure provisions of the Revenue Act the disclosure of information as to the names and addresses of the bondholders in accordance with the provisions of the indenture. In addition, the subsection protects the trustee from accountability by reason of mailing any material pursuant to a request made under subsection (b). 7/ It has, accordingly, been the usual practice

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6/ House Report No. 1016, 76th Cong., 1st Session, pp. 50-1. Note variations in CCH "Model" Indenture, p. 9, Section 6.02(b).

7/ Ibid.

to insert in indentures provisions exculpating the trustee with respect to the disclosure of the names and addresses of security holders and the mailing of material pursuant to subsection (b).

Deficiencies

It is suggested that the provision of the indenture containing Section 312(a) of the Act be amended to provide that the information as to names and addresses of security holders will be furnished to the trustee within 45 to 60 days after the interest payment dates so as to be in the most current form practicable.

Section 312(a) of the Act requires that the information as to names and addresses of security holders be provided to the trustee at stated intervals of not more than six months, whereas under the indenture provisions such intervals may exceed six months. However, no question will be raised if such stated intervals are within 45 to 60 days after the interest payment dates and the report is dated not more than 15 days prior to the time it is so furnished.

Section 313

Reports by Indenture Trustee

Under subsection (a) of Section 313, the indenture must require the trustee, or trustees if more than one,[1/] to transmit to the indenture security holders at least annually a brief report with respect to certain enumerated subjects. It is the practice to specify that such reports will be sent within 60 days after a designated date in each year[2/] or between designated dates not more than two months apart, in either case dated as of the earlier date. Furthermore, it is desirable that such reports be as of a date shortly after May 15 in each year so that current information can be included with respect to the qualification of the trustee under Section 310(b)(9) of the Act if it will not unduly delay or accelerate the filing of the initial report.[3/]

As to items requiring information not previously reported, the opinion was expressed that Section 313(a) was not intended to require the trustee to report matters prior to the date as of which information is given in the prospectus.[3a/]

The following subjects are to be covered by such reports:

(1) The eligibility and qualification of the trustee under Section 310. This is the only item of information enumerated in Section 313 which requires comment in the trustee's report when the response is in the negative.

1/ If releases of property from the lien of the indenture are to be made and additional securities are to be authenticated and delivered by the institutional trustee alone, a separate or co-trustee has no duty to report such information. See CCH "Model" Indenture, p. 47, Note.

2/ CCH "Model" Indenture, p. 11, Section 6.04.

3/ Id. at p. 13, Note.
Letter dated April 6, 1942, to Brown Company re change in date after qualification.

3a/ Memo dated October 21, 1957, re conversation with Ganson Purcell.

(2) The character and amount of any unpaid advances made by the trustee as such and aggregating more than one half of one per cent of the principal amount of bonds outstanding, if the trustee claims or may claim a lien or charge for such advances prior to that of the indenture securities. It is often the practice to revise this provision to permit the trustee to include in its report information concerning the circumstances surrounding the making of such advances and even though they aggregate less than one half of one per cent of outstanding indenture securities, for the purpose of providing the report required by Section 311(b)(2) of the Act.[4/]

(3) With certain exceptions, the amount, interest rate, and maturity date of all indebtedness owing to the trustee by the obligor, with a brief description of any collateral therefor. In this provision the term "company" should not be substituted for "obligor" upon the indenture securities.

(4) The property and funds physically in the possession of the trustee, as such. This provision is often omitted or appropriately modified in unsecured indentures, without objection.

4/ CCH "Model" Indenture, p. 11, Section 6.04 and notes.

(5) Releases or releases and substitutions, not previously reported.[5/] Releases of cash funds need not be reported hereunder.[5a/] This provision is usually omitted from unsecured indentures and secured indentures not authorizing releases.

(6) Additional issues not previously reported. This provision is usually omitted from indentures which do not provide for the issuance of additional securities thereunder.

(7) Any action, not previously reported, taken in the performance of the trustee's duties under the indenture, which in its opinion materially affects the indenture securities or the trust estate (if any).[6/]

Under subsection (b), the indenture must require the trustee, or trustees if more than one,[7/] to transmit, within ninety days after the event, brief interim reports with respect to:

(1) Releases or releases and substitutions of property (and the consideration paid) not certified to have a fair value of less than ten per cent of the principal amount of indenture securities outstanding.[8/]

5/ See p. 114, infra, re exemption, in the matter of Hugo Stinnes Corp., et al., 7 SEC 622, 632.

5a/ Letter of December 8, 1955, to Kirkpacrick, Pomeroy, Lockhart & Johnson.

6/ Ibid. Although change in indenture may not create a new security, it may nevertheless be proper subject for report pursuant to Section 3(a)(7). Letter dated July 9, 1941, re Kansas-Nebraska Natural Gas Co., Inc.

7/ See Note 1, supra, this section.

8/ See p. 114, infra, re exemption in the matter of Hugo Stinnes Corp., et al., 7 SEC 622, 632.

This provision is usually omitted from unsecured indentures and secured indentures not authorizing releases.

(2) The character and amount of any unpaid advances, described in paragraph (2) of subsection (a), which were made since the date of the last annual report, if and when the amount thereof, not previously reported, aggregates ten per cent of the principal amount of indenture securities outstanding. Here, too, it is often the practice to revise this provision to permit the trustee to include in its report information concerning the circumstances surrounding the making of such advances and even though they aggregate less than ten per cent of outstanding indenture securities, for the purpose of providing the report required by Section 311(b)(2) of the Act.

Under subsection (c), all reports must be transmitted to all registered holders of indenture securities, to holders who within two years have filed their names and addresses with the trustee for that purpose, and, except in the case of interim reports under subsection (b), to holders whose names and addresses have been furnished to or received by the trustee pursuant to Section 312. If only registered debentures may be issued, it is sufficient if reports are required to be sent only to the registered owners.

It is sometimes provided in indentures where there is or may be more than one trustee that the separate or co-trustee will furnish all appropriate information to the institutional trustee which will include the same in its report to indenture security holders.

Under subsection (d), copies of all reports must be filed with each stock exchange upon which the indenture securities are listed, and also with the Commission. The Commission has no statutory authority to regulate such reports. 9/

It is the practice to insert in the indenture an additional provision as follows:

> "For the purpose of this Section, all bonds which have been authenticated and delivered and not returned to the Trustee cancelled, shall be deemed to be outstanding."

Suitable modification of this provision should be made in indentures which provide that the indenture securities shall be held alive in sinking fund or other analogous funds. 10/

Deficiencies

It is suggested that the provision of the indenture purporting to conform to Section 313(a) of the Act require that reports thereunder be made as of a date shortly after May 15 in each year so that such reports will contain current information under Section 310(b)(9) of the Act. 11/

9/ See Section 309(a) of the Act.

10/ CCH "Model" Indenture, p. 14, Section 6.04(e) and Note.

11/ Cite only when the indenture securities are to be issued within sixty days of May 15.

It is noted that the reports under the provision of the indenture purporting to comply with Section 313(a) of the Act are to be transmitted at intervals which may exceed twelve months. However, no question will be raised if such reports are made within sixty days after a designated date in each year, to be dated as of such date. 12/

The provisions of Section 313(a)(3) of the Act should be inserted in the indenture in terms broad enough to include indebtedness owing to the trustee by any obligor upon the indenture securities.

The obligation to report under Section 313(a) and (b) of the Act should be in terms broad enough to include reports by all trustees under the indenture, to the extent applicable.

12/ This deficiency is cited only when such period may exceed twelve months by more than sixty days or two months.

Section 314(a)

Periodic Reports

Subsection (a) of Section 314 in effect requires the obligor to include in the indenture itself an undertaking comparable to that now required to be incorporated in most Securities Act registration statements, by virtue of Section 15(d) of the Securities Exchange Act of 1934. Under the latter section, the obligor must undertake to keep the registration statement current by filing with the Commission supplementary and periodic information, documents, and reports similar to those required, pursuant to Section 13 of the Exchange Act, in respect of securities listed and registered on a national securities exchange.[1/]

Paragraph (1) makes clear that where, as will generally be the case, the obligor must file periodic reports with the Commission pursuant to Section 13 or Section 15(d) of the Securities Exchange Act, it need only file with the trustee copies of those reports or such portions thereof as the Commission may prescribe by rules and regulations.[2/]

Where the obligor is not required to file reports under such sections of the Securities Exchange Act, the Commission may require the obligor to file similar reports with the trustee and the Commission.[3/]

1/ House Report No. 1016, 76th Cong., 1st Session, p. 52.

2/ Ibid.

3/ Ibid.

There is sometimes inserted in indentures a provision for a 15-days' limit upon the time within which such reports must be filed with the trustee after filing with the Commission[4/] and no question has been raised in instances where this period has been as long as thirty days. While any such provision is probably subject to the rules ultimately adopted, it would appear that any such designated period of more than thirty days should be avoided.

Paragraph (2) authorizes the Commission to require the inclusion in such reports of additional information, documents and reports with respect to compliance with the conditions and covenants provided for in the indenture, including, in the case of annual reports, certificates of independent public accountants as to such compliance, where such compliance is subject to verification by accountants.[5/] It is the practice, in inserting such provisions in indentures, to eliminate the language relating to certificates of independent public accountants, presumably upon the theory that it is addressed primarily to the Commission with respect to its rule-making powers thereunder.[6/]

4/ CCH "Model" Indenture, p. 10, Section 6.03.

5/ House Report No. 1016, 76th Cong., 1st Session, p. 52.

6/ CCH "Model" Indenture, p. 10, Section 6.03.

Paragraph (3) relates to the transmission of summaries of such reports to the bondholders.[7/]

The Commission's rules and regulations under subsection (a) may be prescribed either before or after the indenture is qualified. They must take into account the type of indenture and the amount of securities outstanding thereunder, the nature of the obligor's business, and, in the case of rules prescribed after the qualification of the indentures to which they apply, the additional expense involved.[8/] No rules and regulations for the purpose of making effective the provisions of subsection (a) have yet been adopted.[9/] It will normally be compliance with any such rules if reports under paragraphs (1) and (2) are sent only to the institutional trustee.[10/]

It is sometimes permitted by the Utilities Division, in subjecting utility indentures to the standards of this Act, although exempted

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7/ House Report No. 1016, 76th Cong., 1st Session, p. 52.

8/ Ibid.

9/ In the Matter of Hugo Stinnes Corporation, 7 SEC 622, 631, an application for exemption under Section 304(c)(2) from Section 314(a) of the Act on the ground of undue burden was denied upon the ground that it could not be determined in advance of the adoption of rules and regulations thereunder whether they would be burdensome and that such rules will undoubtedly contain machinery for relief if meritorious claims of hardship are presented.

10/ CCH "Model" Indenture, p. 47, Note.

therefrom, for indentures to defer the applicability of this subsection until such indentures are formally qualified thereunder.

Deficiencies

The indenture provision purporting to incorporate Section 314(a) of the Act should not designate more than thirty days as the time within which material may be filed or transmitted under the provisions thereof.

The indenture provision purporting to incorporate Section 314(a) of the Act should not refer to rules and regulations adopted by the Commission "under Section 314(a)" of the Act inasmuch as the rule-making powers accorded by Section 319(a) may also be involved.

Section 314(b)

Evidence of Recording of Indenture

Where the indenture is to be secured by the mortgage or the pledge of property, the obligor must furnish to the trustee promptly after the indenture is executed, and at least annually thereafter, an opinion of company counsel as to the necessity and sufficiency of the recording of the indenture, if recording is required.[11/] Evidence of recording under this section normally need be provided only to the institutional trustee.[12/]

Such a provision need be inserted in the indenture only if it is secured. It should relate to the original indenture as well as to supplemental indentures.[13/] It is customary to add to clause (1) of this subsection, relating to initial recording, the following language[14/] and there appears to be no reason why it should not also be made to apply to the clause (2), relating to annual recording:

> "It shall be a compliance with this subsection if (1) the opinion of counsel herein required to be delivered to the Trustee shall state that this Indenture or such supplemental indenture has been received for record and filing in each jurisdiction in which it is required to be recorded or filed

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11/ House Report No. 1016, 76th Cong., 1st Session, p. 52.

12/ CCH "Model" Indenture, p. 47, Note.

13/ Id. at pp. 3 and 4, Section 5. T 1.

14/ Id. at p. 4, Section 5. T 1.

> and that, in the opinion of counsel (if such is the case), such receipt for record or filing makes effective the lien intended to be created by this indenture or such supplemental indenture, and (2) such opinion is delivered to the Trustee within such time, following the date of execution and delivery of this Indenture or such supplemental indenture, as shall be practicable having due regard to the number and distance of the jurisdictions in which this Indenture or such supplemental indenture is required to be recorded or filed."

Clause (2) of this subsection is probably for the purpose of preserving the lien upon chattels in those jurisdictions where annual recordation is necessary to preserve such a lien, as well as to assure that after acquired property is specifically subjected to the lien of the indenture in those jurisdictions where general language in the indenture to that end is not sufficient. Accordingly, any designation of annual dates for the giving of such opinion of counsel in an indenture secured upon personal property should be examined for the purpose of ascertaining whether such dates are likely to fall after the initial recording date. It appears to be adequate for this purpose if the indenture provides that such reports shall be delivered to the trustee within three months after each anniversary of the execution and delivery of the indenture.[15/]

Deficiencies

The opinions of counsel to be furnished to the trustee pursuant to Section 314(b) of the Act should relate to the recording of the original indenture as well as to supplemental indentures.

The annual opinions under clause (2) of Section 314(b) of the Act should be provided to the trustee not less than annually after the anniversary of the date of the first recording.

15/ Ibid.

Section 314(c)

Evidence of Compliance with Conditions Precedent

Where the indenture establishes conditions precedent to action to be taken by the indenture trustee at the request or upon the application of the obligor, this subsection requires that the obligor furnish to the indenture trustee certain evidence of compliance with such conditions precedent. The type of action to which such conditions precedent may relate may include issuance of additional securities, releases and substitutions, or satisfaction and discharge of the indenture.

The following evidence of compliance with such conditions precedent is required by this subsection:

(1) Certificates or opinions of specified officers of the obligor;

(2) An opinion of counsel, who may be of counsel for the obligor; and

(3) A certificate or opinion of an accountant, where compliance with the condition precedent is subject to verification by accountants.

If, during any calendar year, additional issues of securities for which an accountant's certificate is required (and for which an independent certificate has not been furnished), reach a total of ten per cent of the indenture securities outstanding, the accountant's certificate with respect

to further additional issues during that calendar year must be made by an independent public accountant selected or approved by the indenture trustee in the exercise of reasonable care.[16/]

The provisions of Section 314(c) may either be inserted in the indenture at each place where they may appear to be applicable or may be inserted in one place in terms of general application. In the case of multiple insertion of the provisions of clauses (1) and (2), an attempt to enumerate all conditions precedent to each specific action to be taken by the trustee is apt to be hazardous without the addition of a general requirement for a statement that all conditions precedent to such action have been complied with.[17/] Section 314(c)(1) and (2) certificates are of extensive applicability in mortgage indentures, particularly with respect to the authentication of

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16/ House Report No. 1016, 76th Cong., 1st Session, p. 53. There appears to be some variation between the House Report and the language of Section 314(c)(3) of the Act in that the Act includes the securities to be issued in computing the ten per cent total calling for a certificate by an independent accountant.

The House Report further states as follows:

> "Subsection (c) specifically provides that no certificate or opinion need be made by any person other than a specified officer or employee of the obligor as to (A) dates or periods not covered by annual reports required to be filed by the obligor; or (B) as to the amount or value of property additions, except as provided in Sec. 314(d)(3); or (C) the adequacy of depreciation, maintenance, or repairs."

However, this provision appears in the statute to be a limitation upon clause (3) only, of Section 314(c).

17/ See discussion re Section 314(e) at p. 101, infra.

bonds and the release and substitution of cash or property. Even in debenture issues, they may be necessary with respect to calls for redemption and defeasance.[18] However, the provisions of Section 314(c) are not usually considered applicable to sinking fund payments or maintenance requirements the accuracy or adequacy of which are not usually conditions precedent to action by the trustee. Normally, such certificates are given only to the institutional trustee.[19]

Although some specification of an officer or officers to sign the certificate required by clause (1) should be made in the indenture, the addition of a general specification such as "the Treasurer or other duly authorized officer" has been accepted. In any event, it should be clear that the certificate is to be made by the designated officer or officers and is not to be a certificate of the company.[20]

The inclusion of the language of Section 314(e), which requires a statement in each certificate that the conditions precedent to the action in question have been complied with, is not ordinarily an adequate substitute for the requirements of clause (1) of Section 314(c), since

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18/ Various of these situations are referred to specifically in the first part of Section 314(c), as above indicated.

19/ CCH "Model" Indenture, p. 47, Note.

20/ Telegram of December 11, 1941, to Arthur Kramer of Cook, Nathan, Lehman & Greenman.

Section 314(e) does not of itself require the filing of a certificate and it is doubtful that it requires the certificates to which it relates to go beyond the scope of the specific conditions precedent referred to.[21/]

It has been considered to be acceptable for the opinion of counsel, referred to in clause (2) of Section 314(c), to state that upon the execution and delivery of certain designated documents, all conditions precedent to the action in question have been complied with.

Clause (3) of Section 314(c) requires the delivery of a certificate as to conditions precedent compliance with which is subject to verification by accountants, to be made variously by an accountant, by an independent accountant selected or approved by the trustee in the exercise of reasonable care, or by an officer or employee of the obligor. The usual situation in which a provision for such a certificate would be necessary is where the indenture contains an earnings ratio requirement to be met before additional bonds may be authenticated and delivered. The view was expressed in one case that it is not unreasonable to assume that the requirement for independent accountant's certificate may be computed upon basis of net property additions (after depreciation and retirements).[21a/]

21/ Section 314(e), p. 101, infra.

21a/ Letter of May 17, 1957, re Puget Sound Power & Light Company.

It is the practice to include in indentures a definition of "independent" in approximately the following form:[22/]

> "'Independent,' when applied to any accountant, engineer, appraiser, or other expert, shall mean such a person who (a) is in fact independent; (b) does not have any substantial interest, direct or indirect, in the Company or in any other obligor upon the Bonds issued hereunder or in any person directly or indirectly controlling, or controlled by, or under direct or indirect common control with the company or any other obligor; and (c) is not connected with the company or any other obligor upon the Bonds issued hereunder or any person directly or indirectly controlling, or controlled by, or under direct or indirect common control with the company or any such other obligor, as an officer employee, promoter, underwriter, trustee, partner, director, or person performing similar functions."

No objection is made to the addition of an exception to the effect that a person may be independent though "regularly retained" by the company to audit the company's books or in any other capacity for which peculiarly qualified.

Deficiencies

The provisions of Section 314(c)(1) and (2) of the Act should be inserted in the indenture so as to cover all requests by the company for action by the trustee to which there may be conditions precedent under the indenture. The insertion of the provisions of Section 314(e) of the Act does not accomplish this purpose.

22/ In some instances, the definitions include a further requirement that such independent persons be selected or approved by the trustee in the exercise of reasonable care, in which event such requirement of Section 314(c)(3) and 314(d) is not repeated elsewhere in the indenture.

The indenture should designate the officers who will provide a certificate under Section 314(c)(1) of the Act.

Section 314(c)(1) of the Act requires a certificate "made by" an officer or officers of the company and not a certificate of the company.

Inasmuch as it is hazardous to attempt to enumerate all conditions precedent in provisions inserted pursuant to Section 314(c)(1) and (2) of the Act, the general language of the statute, that all conditions precedent have been complied with, should be included.

A provision that the acceptance of an accountant's certificate or approval of the person making the certificate by the trustee is conclusive that such person is independent is in conflict with Section 314(c)(3) of the Act.

Section 314(c)(3) of the Act should be inserted in provisions of indentures which require earnings ratios as conditions precedent to the authentication of bonds.

Exemption - Hugo Stinnes Corporation, 7 SEC 622

This case involved an application under Section 304(c) of the Act as well as a hearing under Sections 305(b) and 307(c). Exemption was sought from, among others, the provisions of Section 314(c) of the Act upon the ground that such change would require the consent of bondholders under clause (1) of Section 304(c) of the Act, and would impose an undue burden on the issuer under clause (2) of said section.

The Commission determined that such provisions "which increase the duties of the trustee or the issuer for the benefit of security holders" may be inserted in an indenture without the consent of security holders. (p. 628) It was further held that compliance with Section 314(c) would effect no material addition of conditions on the release of property so as to constitute an undue burden on the issuer. (p. 629)

Section 314(d)

Certificates of Fair Value

General

This subsection specifies when a certificate or opinion as to fair value must be furnished, and when such certificate or opinion must be made by an independent engineer, appraiser, or other expert.[23/]

The provisions relating to the authentication of bonds and the release of property, with respect to which fair value certificates are normally necessary, are the most intricate part of indentures, particularly in the case of utility issues. The variety of situations which arise in such provisions was apparently not contemplated by the framers of the Act and considerable latitude has been administratively permitted in adapting the statutory language to the indenture requirements. By this means drafters of indentures have been encouraged to utilize statutory certificates of fair value as integral parts of the mechanical operation of such provisions.

Indenture provisions purporting to meet the requirements of Section 314(d) of the Act should state the amount of fair value attributed to the property in question and not state merely that it is not more or less than an indicated amount.[24/] Also, a definition of "fair value"

23/ House Report No. 1016, 76th Cong., 1st Session, p. 53.

24/ See letter dated December 14, 1942, to Egbert H. Womack of Shearman & Sterling.

should not be so restricted or inflated that something besides the true fair value is reported to the trustee.

In view of the practice of breaking up the provisions of Section 314(d) and inserting the resulting parts in various places in the indenture, it is important to make sure that all of the necessary elements are present. Thus, the provision that independent engineers, appraisers or other experts shall be selected or approved by the trustee in the exercise of reasonable care is sometimes to be found under a definition of "independent."[25/] It may also be provided that the acceptance of a certificate by the trustee conclusively indicates that such person is approved by the trustee.

Normally, such certificates are given only to the institutional trustee.[26/] There is no occasion for inserting the provisions of Section 314(d) of the Act in indentures which are not a lien upon any property or securities.

Deficiencies

Although only the shares of subsidiaries have been subjected to the lien of the indenture, it would appear to be desirable, where the property additions of such subsidiaries are used as the basis for determining the extent to which bonds may be authenticated and where such property may be disposed of only upon a basis normally used with respect to mortgaged property, that provision be made for the giving of fair value certificates with respect to such use or disposition in accordance with Section 314(d) of the Act.

25/ See discussion at p. 80, supra, with respect to definitions of "independent."

26/ CCH "Model" Indenture, p. 47, Note.

The fair value certificates pursuant to Section 314(d) of the Act should state the amount of the fair value to be attributed to the property in question and not that such fair value is not more or less than a stated amount.

A provision that the acceptance of a certificate of fair value, or approval of the person making such a certificate, by the trustee is conclusive that such person is independent, conflicts with the requirements of Section 314(d) of the Act, which requires that he be independent in fact.

Exemption - Hugo Stinnes Corporation, 7 SEC 622

The application of Hugo Stinnes Corporation under Section 304(c) of the Act for exemption from various provisions of the Act included an application for exemption from the requirements of Section 314(d) of the Act.

The indenture, under which assents to an extension were to be solicited, was secured directly and through wholly-owned subsidiaries upon German properties and the shares of such subsidiaries.

The Commission expressed the view (p. 629) that a consent of bondholders would not be needed within the meaning of Section 304(c)(1) of the Act and in view of the improbability of a release until existing difficulties were removed, compliance with Section 314(d) could not operate as a present burden within the meaning of Section 304(c)(2) of the Act. In this connection, the Commission stated (pp. 629-630):

> "The provisions required by Section 314(d) are designed to aid the trustee in his determination whether a proposed release would dilute the security or otherwise impair the lien. We cannot, therefore, with 'due regard to the public interest and the interests of investors' find that the inclusion of these provisions would result in an 'undue burden' within the meaning of Section 304(c)(2)."

The exemption was accordingly denied. It was also concluded (p. 640) that a provision for cancellation of the indenture upon deposit of cash to retire all outstanding obligations or deposit of all outstanding notes and coupons does not conflict with Section 314(d)(1) of the Act because such action could not impair the security under the indenture.

Section 314(d)(1)

Fair Value - Releases

Paragraph (1) requires such certificate or opinion as to fair value of any property or securities to be released from the lien of the indenture. The certificate or opinion must state that the proposed release will not impair the security under the indenture in contravention of the provisions of the indenture. When the fair value of property or securities released during any calendar year reaches a total of ten per cent of the principal amount of indenture securities outstanding, the certificate or opinion with respect to any further release during that calendar year must be made by an independent engineer, appraiser, or other expert. But an independent certificate or opinion need not be furnished as to any release which affects property or securities amounting to less than $25,000 or one per cent of the principal amount of indenture securities outstanding.[27/]

It is implicit in this provision that releases may be made which impair the security under the indenture when in accordance with the express provisions of the indenture. Thus, it is possible to provide for the release of property or securities without the substitution of other property or securities which is often done in certain limited situations.

27/ House Report No. 1016, 76th Cong., 1st Session, p. 53. There appears to be some variation between the House Report and the language of Section 314(d)(1) of the Act in that the Act includes the property or securities to be released in computing the ten per cent total calling for a certificate by an independent engineer, appraiser or other expert.

Furthermore, no objection has been raised to the release of properties of limited types without giving any certificate under Section 314(d)(1) of the Act. This is true in the so-called "monkey wrench" provisions commonly found in indentures, which permit an obligor to sell tools, equipment, machinery or other similar property which has become worn out or obsolete. To this is sometimes added the surrender of leaseholds, franchises and easements and the demolition or abandonment of property no longer useful to the business. Also, no certificates of fair value have been required with respect to the sale of timber and crops, although a different view has been taken with respect to oil and mineral interests. Such provisions should be carefully examined to prevent any undue expansion of such releases even though formal deed or act by the trustee may not be required. Such provisions often contemplate the substitution of other property, without providing for the giving of a certificate of fair value of such substituted property, to which practice no question has been raised.

Similarly, no certificates of fair value have been required with respect to the taking of property by condemnation or eminent domain.[28/]

Another type of provision permitted to be inserted in indentures is for the release of small properties no longer useful to the business aggregating in value not more than $25,000 in any one year, with respect to which the certificate required by Section 314(d)(1) of the Act will

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28/ In one case no question was raised as to the absence of a requirement for a certificate of fair value upon the sale of mortgaged property with approval of the Court where the proceeds were to be distributed first to bondholders in payment of the mortgage debt. The Madison, Incorporated, File No. 22-786.

be supplied annually. The establishment in advance of values at which specified properties may be released should not serve to avoid the giving of the required certificates of fair value.

It will be noted that paragraph (1) of Section 314(d) relates to "fair value" whereas paragraphs (2) and (3) refer to "fair value to such obligor." It is supposed that this distinction is based upon the theory that the sales price is governed by the public demand, whereas the purchase price may be governed by the needs of the obligor. This distinction should be preserved in the indenture. Furthermore, this subsection has been construed to require that a certificate of fair value be provided on a current basis; i.e., as of a date within not more than ninety days.

Deficiencies

The provision that tools, equipment, or machinery, "or other property" may be released from the lien of the indenture appears to be too broad to justify the omission of the certificate requirements of Section 314(d)(1) of the Act with respect thereto. However, no further question will be raised if the clause above quoted is amended to read "or other similar property."

The certificate requirements of Section 314(d)(1) of the Act should be met with respect to the properties which may be released at specified prices.

The words "to the Company" should be deleted after the words "fair value" as used in this provision, pursuant to Section 314(d)(1) of the Act.

Section 314(d)(2)

Fair Value - Deposited Securities

Under paragraph (2), where the deposit of securities with the trustee is to be made the basis of the issuance of indenture securities, the withdrawal of cash, or the release of property or other securities, a certificate or opinion of an engineer, appraiser, or other expert must be furnished as to the fair value to the obligor of the securities deposited. This requirement does not apply where the securities deposited are indenture securities or securities having a lien prior thereto.[29/] To this exception has been added, by administrative interpretation, purchase money mortgages taken back on property released, upon the theory that the fair value certificate with respect to the released property provides the necessary information for evaluating the purchase money mortgage. Similarly, it has been felt that fair value certificates are not needed with respect to the surrender of deposited securities in the consummation of a plan of reorganization, recapitalization or merger when the new securities to be issued will be deposited with the trustee. Also, provisions that require the investment of certain funds in U. S. Government Bonds without the giving of fair value certificates have not been considered to be objectionable, particularly when the obligor agrees to reimburse the trustee for any losses suffered thereby.

29/ House Report No. 1016, 76th Cong., 1st Session, pp. 53-54.

If, during any calendar year, the fair value to the obligor of securities so deposited reaches a total of ten per cent of the principal amount of the indenture securities outstanding, the certificate or opinion as to any further deposit of securities during such calendar year must be made by an independent engineer, appraiser, or other expert.[30/] But an independent certificate or opinion need not be furnished as to any deposit which amounts to less than $25,000 or one per cent of such aggregate principal amount. When an independent certificate or opinion is required in connection with the issuance of indenture securities, such certificate or opinion must cover all deposits which have been made the basis of the issuance of indenture securities since the commencement of the then current calendar year.[31/]

In Section 314(d)(2), the fair value referred to is "to such obligor" and this distinction from Section 314(d)(1) of the Act should be preserved in the indenture. Furthermore, this section has been construed to require that a certificate of fair value be provided on a current basis; i.e., as of a date within not more than ninety days.

30/ There appears to be some variation between the House Report and the language of Section 314(d)(2) of the Act in that the Act includes the securities to be deposited in computing the ten per cent total calling for a certificate by an independent engineer, appraiser or other expert.

31/ House Report No. 1016, 76th Cong., 1st Session, p. 54.

In many indentures securities are excluded from the definition of property additions which may be used as a basis for the authentication of bonds, the withdrawal of cash or the release of property, and in such cases, the provisions of Section 314(d)(2) of the Act need not be inserted in the indenture. However, in those cases where this provision is applicable, many of the questions which arise hereunder also arise under Section 314(d)(3) to the discussion of which reference is made.

Deficiencies

The words "to the company" should be inserted after the words "fair value" in conformity with Section 314(d)(2) of the Act.

The certificate required by Section 314(d)(2) of the Act should state the fair value of the securities to be deposited with the trustee on a current basis; i.e., within ninety days of the time that the certificate is furnished. 32/

32/ This deficiency is cited only if some longer period is specified or it otherwise appears that the certificate may not be provided on a current basis.

Section 314(d)(3)

Fair Value - Property Additions

Under paragraph (3) where indenture securities are to be issued, or cash withdrawn, or property or securities released, on the basis of the subjection of property to the lien of the indenture, the obligor must furnish to the trustee a certificate or opinion of an engineer, appraiser, or other expert as to the fair value of such property to the obligor. If the property in question has been used or operated by others, within six months prior to the date of acquisition thereof by the obligor,[33/] in a business similar to that in which it is to be used or operated by the obligor, the certificate or opinion must be made by an independent engineer, appraiser, or other expert, unless the fair value of such property to the obligor amounts to less than $25,000 or one per cent of the aggregate principal amount of indenture securities outstanding. Where an independent certificate or opinion is required in connection with the issuance of indenture securities, it must cover the fair value to the obligor of any such property so used or operated, which has been so subjected to the lien of the indenture since the commencement of the current calendar year.[34/]

33/ Sometimes the term "plant or system" is substituted for this requirement as to use, in which event the definition of that term should be checked for the purposes hereof.

34/ House Report No. 1016, 76th Cong., 1st Session, p. 54.

In Section 314(d)(3), the fair value referred to is "to such obligor" and this distinction from Section 314(d)(1) of the Act should be preserved in the indenture.

Where a mortgage is placed upon property to be improved by new construction and cash is pledged for that purpose, it seems to be futile to require the giving of fair value certificates as to such new construction as the basis for the release of cash and such certificates have not been required. However, fair value certificates are required with respect to properties subjected to the lien of the indenture as the basis for the release of insurance monies in those cases where such monies may be used to acquire new properties and which are not restricted to rebuilding and repairs.

Under the terms of some indentures, sinking fund payments may be reduced by offsetting the amount of property additions which may not thereafter be used as the basis for the authentication of bonds or the release of property or cash. Such use of property additions does not appear to constitute a purpose for which fair value certificates are required under the Act.

Indentures to which Section 314(d)(3) of the Act relates usually provide for the subjection of after acquired property to the lien of the indenture (automatically or by periodic conveyances) without regard to any use to be made of such property at the time for the authentication

of bonds or the release of property or cash. Inasmuch as the Act relates to the subjection of property to the lien for specified purposes and the fair value certificate is of significance to the trustee only at the time of such use, the practice has been to construe these certificate requirements to be operative at the time that the property additions are so used rather than at the time that the lien actually attaches.

It will also be noted that Section 314(d)(3) of the Act requires the giving of certificates of fair value but does not require that such certificates be used as the basis for the authentication of bonds or the release of property or cash against property additions. The usual basis of evaluating property additions for such purposes is cost or fair value to the company, whichever is less, although in some instances cost is the sole measure. Representatives of indenture trustee, however, have indicated that such trustees would probably be reluctant to take the indicated action under an indenture which uses cost alone as the basis for evaluating property additions when it appears from the statutory certificates of fair value that the security for the bonds may thereby be diluted or impaired. Ordinarily, the Commission has no concern under Section 314(d)(3) of the Act as to how "cost" is computed.

As in the case of other paragraphs of Section 314(d) of the Act, paragraph (3) has been construed to require that such certificates be given on a current basis (i.e., as of a date within ninety days of the

request for authentication of bonds or the release of property or cash). The application of this principle has been made particularly difficult in certain types of indentures, particularly of public utility companies. Many of such indentures, sometimes referred to as the "accounting type," provide for the carrying forward of unused credits of property additions and in some instances fair value is determined as at the time of acquisition rather than as at the time of the use of such additions as the basis for authenticating bonds or the release of property or cash. Such provisions are by their nature complex and often scattered throughout the indenture. For example, the indenture may include most of the principal parts of such provisions under the definition of such terms as "fair value," "independent," "gross property additions," "net property additions," "bondable property," "engineer's certificate," etc. Also, it is sometimes the practice to include an itemization or statement of the elements included in the formula employed to determine, by the computation therein indicated, the amount of net property additions available at any particular time.

The objection usually raised to giving a fair value certificate as to the credit carried forward of unused property additions, is that the formula involves certain computations with respect to all property additions since the date of the indenture, that it would, therefore, be necessary to appraise all of the property of the company and that, aside from the work and expense involved, it is sometimes difficult to identify property additions which may have been altered or replaced over the

course of years. Several formulae have been deemed acceptable as supplying the indenture trustee with information from which it is hoped that he may reasonably ascertain the current fair value of property additions and at the same time preserving the essential structure of such indenture provisions.

It has been considered acceptable if the indenture presumes that the credit carried forward arises from properties most recently acquired and certified and provides for the giving of new fair value certificates with respect to sufficient of such properties to cover the amount of such credit.

Another method of dealing with this problem is to place some limits upon the credit carried forward. Thus, as a rule of thumb, no question has been raised with respect to new fair value certificates covering the credit when limited in amount to roughly two per cent of the principal amount of bonds outstanding and to be outstanding under the proposed offering. In some cases the use of the credit has been restricted to a relatively few years (i.e., three years) from the date of the creation of the credit. Such provisions should not ordinarily prove burdensome, since the company can usually refrain from certifying property additions substantially in excess of the needs of the company at the time.

These methods of meeting the problem of current fair value certificates do not lend themselves to situations where property additions are annually certified on a cumulative basis or where fair value as at the time of acquisition is the basis of certification. Accordingly, in such situations

fair value certificates which are not current have been accepted by the Commission when the following additional requirements are included in the indenture (sometimes referred to as the "El Paso" formula):

A. Provision for a maintenance fund, usually, based upon a percentage of earnings, with an annual certificate to the trustee as to the manner in which such maintenance fund requirement is met;

B. Provision for an interim maintenance fund certificate at the time of the use of property additions as the basis for the authentication of bonds or the release of property or cash; and

C. Provision for periodic inspection of the company's properties by an independent engineer once every three to five years, or more often if requested by the trustee or bondholders, which engineer will report upon the adequacy of the maintenance provided and make recommendations which the company will follow (unless, in some cases, arbitration is requested).

The theory of the above provisions, insofar as they serve to meet the requirements of Section 314(d)(3) of the Act, is that they should provide the trustee with information from which (together with the fair value certificates furnished) he may reasonably determine the current fair value of the property additions credit carried forward and of property additions certified upon the basis of fair value as at the time of acquisition.[35/]

35/ This formula is acceptable where fair value is certified as at the time of acquisition even though there is no provision for unused additions credits. Memorandum dated October 16, 1950, re Milwaukee Gas Light Company, File No. 2-8631 (22-1026).

Some variations of these provisions have been accepted. A situation where there was no maintenance fund was considered to be acceptable where the periodic inspection under "C" above was made annually.[36/] Also, no objection was raised to a provision in an indenture requiring the periodic inspection of the company's property by an independent engineer only if the services of such a person could be obtained at a cost of not more than $5,000, the company providing assurances that an independent engineer could then be obtained at that figure. In the latter case it was provided that a company engineer would make the survey if an independent engineer was not obtainable for that amount.[37/]

Question has also arisen as to the date as of which fair value should be determined in an independent engineer's certificate covering the fair value to the obligor of property subjected to the lien of the indenture since the commencement of the then current calendar year and as to which a certificate of an independent engineer has not previously been given, as provided at the end of Section 314(d)(3) of the Act. In this situation no objection has been raised to indenture provisions which require the subsequent independent engineer's certificate to state the fair value of such property as of a date of the earlier certificate or certificates inasmuch as it was the fair value at the earlier date which was significant in respect to the transaction as to which the property additions were used.

36/ Crucible Steel Co. of America, File No. 2-6785 (22-585) and Western Massachusetts Electric Company, File No. 2-11114 (22-1576)--not independent.

37/ Ohio Associated Telephone Company, File No. 2-6731 (22-578).

Deficiencies

The words "to the company" should be inserted after the words "fair value" in conformity with Section 314(d)(3) of the Act.

The certificates of fair value, required by Section 314(d)(3) of the Act should be on a current basis; i.e., as of a date not more than ninety days prior to the request for the authentication of bonds or the release of property or cash. 38/

This indenture permits the authentication of bonds (and the release of property or cash) against net property additions theretofore certified to the trustee, whereas Section 314(d)(3) of the Act appears to require a certificate of fair value as of approximately the date of the request for the authentication of bonds (or the release of property or cash). If it is impracticable under this indenture to give a certificate of fair value on a current basis as to all of the property comprising the net additions credit, no further question will be raised if reasonable limitations are placed upon the amount of such credit (i.e., not more than $_____) 39/ or if the trustee is supplied with information from which it may reasonably ascertain the current fair value of the properties comprising such credit. 40/

38/ If the infirmity in the certificate is that it is based upon fair value at the time of acquisition, the alternative may be offered of complying with the "El Paso" formula discussed at p. 97, supra.

39/ As a rule of thumb, about two per cent of the amount of bonds to be outstanding and issued has been considered acceptable. If the indenture requires the giving of certificates showing fair value as at the time of acquisition, this alternative should not be offered.

40/ It may be possible to be more specific as to this alternative pursuant to the discussion of the "El Paso" formula at p. 97, supra,

The provision at the end of Section 314(d), requiring the independent engineer's certificate to cover certain property subjected to the lien of the indenture since the commencement of the current calendar year, should be appropriately inserted in the indenture.

Section 314(e)

Recitals as to Basis of Certificate or Opinion

Under this subsection, every certificate or opinion, by whomsoever made, must contain a statement by the person making the same that he has read the covenant or condition in question, and that in his opinion he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with, together with a brief statement as to the nature and scope of the investigation, and a statement as to whether or not, in the opinion of such person, such condition or covenant has been complied with.[41/] This provision would appear to be broad enough to cover certificates or opinions required by the terms of the indenture in addition to those required by Section 314(c) and (d) of the Act.

Question has been raised as to whether Section 314(e) applies to certificates under Section 314(d) of the Act.[42/] It is argued that the certificates of fair value are a part of the compliance and not with respect to compliance. Where the provisions of Section 314(e) are included in the indenture in the statutory language, no further clarification is needed. However, any language inserted in the indenture

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41/ House Report No. 1016, 76th Cong., 1st Session, p. 54. The indenture may provide that he has "caused to be made" the necessary investigation.

42/ Letter dated December 14, 1942, to Egbert H. Womack of Shearman & Sterling.

specifically limiting the scope of this section so as not to include Section 314(d) certificates in its scope would appear to be improper. In this connection, where the Section 314(d) certificates are used as an integral part of the authentication and release provisions of an indenture, it would appear that they do evidence compliance with the requirements thereof, including the provision of Section 314(d)(1) that the release "will not impair the security under such indenture in contravention of the provisions thereof."

Question has also been raised as to whether each of the Section 314(c)(1) and (2) certificates must state that all conditions precedent to the action in question have been complied with or whether the persons making the certificates may restrict themselves to matters within their particular provinces. Thus, factual conditions would be designated for inclusion in the officer's certificate and legal conditions would be designated for inclusion in the opinion of counsel. The provisions of these sections would appear to require general statements as to compliance with all conditions precedent, particularly in the light of Section 314(c)(3), which is specifically restricted to conditions "compliance with which is subject to verification by accountants." Accordingly, it has been the practice to insist upon the use of the general language of Section 314(c)(1) and (2) even though specific enumeration of matters to be included in such certificates is also provided.

However, in recognition of the practical problem which this construction sometimes presents, no objection has been made to the inclusion of a provision in indentures substantially as follows:[43/]

> "Any such certificate or opinion of an officer or officers of the Company may be based, in so far as it relates to legal matters, upon a certificate or opinion of, or representations by, counsel, and, in so far as it relates to matters which are subject to verification by accountants, upon a certificate or opinion of, or representations by, an accountant or accountants, unless such officer or officers know that the certificate or opinion or representations with respect to the matters upon which his certificate or opinion may be based as aforesaid are erroneous, or, in the exercise of reasonable care, should have known that the same were erroneous. Any such certificate or opinion of an appraiser or engineer may be based, in so far as it relates to legal matters, upon a certificate or opinion of, or representations by, counsel, and in so far as it relates to factual matters, information with respect to which is in the possession of the Company and which are not subject to verification by appraisers or engineers, upon a certificate or opinion of, or representations by, an officer or officers of the Company, unless such appraiser or engineer knows that the certificate or opinion or representations with respect to the matters upon which his certificate or opinion may be based as aforesaid are erroneous or, in the exercise of reasonable care, should have known that the same were erroneous. Any such certificate or opinion of an accountant may be based, in so far as it relates to legal matters, upon a certificate or opinion of, or representations by, counsel, and in so far as it relates to factual matters, information with respect to which is in the possession of the Company and which are not subject to verification by accountants, upon a certificate or opinion of, or representations by, an officer or officers of the Company, unless such accountant knows that the certificate or opinion or representation with respect to the matters upon which his certificate or opinion may be based as aforesaid are erroneous or, in the exercise of reasonable care, should have known that the same were erroneous. Any such certificate or opinion of counsel

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43/ The language quoted with respect to the knowledge of error in the certificates to be relied upon may be omitted only if such provision is made subject to the provision of the indenture reflecting Section 314(e) of the Act.

> may be based, in so far as it relates to factual matters, information with respect to which is in the possession of the Company, upon a certificate or opinion of, or representations by, an officer or officers of the Company, and, in so far as it relates to matters which are subject to verification by accountants upon a certificate or opinion of, or representations by, an accountant or accountants, and, in so far as it relates to matters required in this Indenture to be covered by a certificate or opinion of, or representations by, an appraiser or engineer, upon the certificate or opinion of, or representations by, such person so acting, unless such counsel knows that the certificate or opinion or representations with respect to the matters upon which his certificate or opinion may be based as aforesaid are erroneous or, in the exercise of reasonable care, should have known that the same were erroneous."

Another variation in such certificates which is not questioned is a provision that upon the execution and delivery of certain documents, all conditions precedent will be complied with. Such documents, usually referred to in the opinion of counsel, consist of deeds and other legal instruments.

It is possible, of course, that certificates, however carefully prepared, will sometimes contain errors. There appears to be no provision of the Act which would prohibit the correction of such errors by the submission to the trustee of new amended certificates or opinions.

In some cases (such as telephone companies) no objection has been raised to provisions for the determination of fair value without physical inventory.

Deficiencies

The provisions of Section 314(e) of the Act should be inserted in the indenture in such form that it applies to all certificates required to be filed with the trustee by the terms of the indenture.

The provision in the indenture that certificates or opinions to be delivered to the trustee under the terms of the indenture may be based upon certificates furnished by other persons, may conflict with the requirements of Section 314(e) of the Act. Accordingly, said provision should be made subject to the provision of the indenture containing Section 314(e) of the Act or it should be restricted by excepting matters which the person making the certificate knows are erroneous or, in the exercise of reasonable care should have known to be erroneous. Furthermore, such reliance should be restricted to matters within the special purview of knowledge of such other person.

Section 314(f)

Parties May Provide for Additional Evidence

This subsection makes clear that Section 314 does not require that the indenture provide that the obligor furnish to the indenture trustee any other evidence of compliance, but that the section does not prevent the inclusion of provisions for additional evidence if the parties so agree.[44/]

44/ House Report No. 1016, 76th Cong., 1st Session, p. 54.

Section 315

Duties and Responsibility of the Trustee

General

The provisions of Section 315(a), (c) and (d) of the Act prescribe the standards of conduct to be exercised by the indenture trustees.[1/] Care should be taken to see that these provisions are applicable to all trustees although they need not be held responsible for the acts of each other.[2/] Subsection (a) relates to prior to a default, subsection (c) relates to after a default, and subsection (d) prohibits exculpatory provisions except as therein specifically permitted. It is desirable to include these provisions at one place in the indenture without the addition of other matters so that specific cross-reference can be made to them for the purpose of qualifying other provisions which might otherwise have a prohibited exculpatory effect upon the trustee.[3/]

1/ It will be noted that the Act does not prohibit the exculpation of the company or persons other than the trustee (except that paying agents shall hold in trust under Section 317(b)). Accordingly, indentures continue to include broad immunity provisions protecting stockholders, officers and directors of the obligor corporation from any liability under or with respect to the indenture securities. Although such provisions frequently appear to fall within the scope of Section 14 of the Securities Act of 1933, no question is generally raised with respect thereto unless such provisions should be reflected in the prospectus when it becomes necessary to disclose the limiting effect of Section 14 thereon.

2/ CCH "Model" Indenture, p. 48, Section 8.20(4).

3/ Id. at pp. 20, 21 and 23, Sections 8.02, 8.03 and 8.07. For this purpose it is important that the language of the first part of Section 315(d) of the Act be included in the indenture.

Under the provisions of Section 318(a) of the Act, these provisions would be controlling in the case of other conflicting indenture provisions exculpating the trustee. However, it has been the practice in examining indentures to seek to eliminate or reconcile all such conflicting provisions. Generally, it appears that in most provisions exculpating the trustee from responsibility, there is some area in which they might lawfully operate and, consequently, it is sufficient if the indenture states that such provisions are subject to the provisions of the indenture inserted pursuant to Section 315(a), (c) and (d) of the Act. However, in some cases, such as a provision generally relieving the trustee from everything except willful misconduct, this method of correcting the defect is inadequate and the provision should be deleted.

Provisions of indentures which indemnify indenture trustees from "liabilities" are also of possible exculpatory effect even though the indemnification is not provided until the indenture securities are fully paid. It has been considered adequate in the case of such indemnification provisions if the words "incurred without negligence or bad faith" were added.[4/] There appears to be no prohibition in the Act against

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4/ Letter dated November 19, 1941, to Cadwalader, Wickersham & Taft, and "Model" Indenture, p. 25, Section 8.11.

giving the trustee a prior lien for his expenses, charges and liabilities incurred without negligence or bad faith.[5/]

Such indemnification provisions should not be confused with indemnifications as a condition precedent to action by the trustee at the direction of the holders of a majority of outstanding indenture securities, which indemnification is permitted by Section 315(d)(3) of the Act.[6/] Also, where indemnification is provided with respect to the entry and operation of the mortgaged property by the trustee, it usually seems clear that it relates to obligations to persons other than holders of indenture securities and no such restrictive language appears necessary in such situations.[7/]

Similarly, the question has been raised as to whether a trustee is required to expend or risk its own funds or incur personal financial

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5/ CCH "Model" Indenture, pp. 24 and 25, Sections 8.11 and 8.12; and House Report No. 1016, 76th Cong., 1st Session, p. 55, re Section 315(c) of the Act.

6/ Indentures frequently contain a "boiler plate" provision that notification and request for action on the part of the trustee by a stated percentage of bondholders, and offer of indemnity are conditions precedent to the exercise of the powers and trusts of the indenture. It should be clear therein that such matters are conditions precedent to action by bondholders, and are not conditions precedent to action by the trustee in derogation of his duties under Section 315(c) and (d) of the Act.

7/ CCH "Model" Indenture, p. 23, Section 8.05.

liability in the administration of the trust. The following language was approved by the Commission and has been frequently used in indentures qualified under the Act:[8/]

> "None of the provisions of this indenture contained shall require the trustees or either of them to advance or expend or risk their own funds or otherwise incur personal financial liability in the performance of any of their duties or in the exercise of any of their rights or powers if there is reasonable ground for believing that the repayment of such funds or liability is not reasonably assured to it by [9/] the security afforded to it by the terms of this indenture."

It is also customary for indentures to contain provisions designating the method of proving the ownership of indenture securities or of executing an instrument as such owner for the purposes of taking group action. However, a provision that such proof "shall be conclusive in favor of the trustee" may be exculpatory and should be made subject to the provisions of the indenture containing Section 315(c) and (d) of the Act.

A provision that the trustee may act or decline to act "as it may be advised by counsel to be appropriate" also appears to be exculpatory and should be similarly qualified or changed to read "as the trustee, being advised by counsel, may deem appropriate." The purpose

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8/ Commission Minute (2d) of February 13, 1940, re Indiana Associated Telephone Corp., File No. 2-4312 (22-6).

9/ In some cases the final clause "by the security afforded to it by the terms of this indenture" is omitted without objection.

of the latter change in language is to place the determination of proper action with the trustee who is subject to the standards of conduct prescribed by the Act. In this connection, a provision that the trustee shall take such action as it "in its sole discretion" shall determine, is not usually treated as exculpatory.

The so-called "Model" indenture published by Commerce Clearing House contains a number of provisions which while of possible exculpatory effect were recognized as not within the intended scope of the Act. Such a provision is that the trustee assumes no responsibility for the correctness of the recitals of fact in the indenture or bonds, makes no representation as to the value of, title to or security afforded by the mortgaged property, and makes no representation as to the validity of the indenture or the bonds.[10/] However, attempts to enlarge this provision should be carefully scrutinized.

Other "Model" provisions permit the trustee to be the owner or pledgee of indenture securities with the same rights he would have if not trustee,[11/] and to rely, prior to default, upon a certificate by an officer of the obligor as to matters to be proved or established before taking or suffering any action under the indenture.[12/] The "Model" also

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10/ CCH "Model" Indenture, p. 22, Section 8.04.

11/ Id. at p. 24, Section 8.09.

12/ Id. at p. 29, Section 8.13.

permits the insertion of a provision to the effect that the duties, liabilities, rights, privileges and immunities of the trustee in relation to the holders of indenture securities, shall be governed exclusively by the laws of a designated State.[13/]

Section 309(c) of the Act relieves the trustee under a qualified indenture from liability for failure of the indenture to comply with the requirements of the Act or any rule, regulation or order thereunder, and Section 319(c) protects the trustee as to acts done or omitted in good faith in conformity with any rule, regulation or order of the Commission even though it is thereafter amended or rescinded or determined to be invalid.

Deficiencies

The provisions of the sections of the indenture which incorporate Section 315(c) and (d) of the Act should be made applicable to any separate or co-trustee who may be appointed thereunder.

It is suggested that the provisions of the indenture purporting to contain Section 315(c) and (d) of the Act be included in the indenture at one place without the addition of other matters, so that specific cross-reference can more accurately be made thereto for the purpose of qualifying other provisions of the indenture which otherwise might have an exculpatory effect.

Although the first clause of Section 315(d) of the Act is not specifically required to be in the indenture, its inclusion is suggested as a means of qualifying other provisions of the indenture which might be in conflict therewith.

13/ Id. at p. 50, Section 8.23.

It is noted that this provision of the indenture provides for the payment of "liabilities" incurred by the trustee. It appears that such provision may be exculpatory in conflict with Section 315(c) and (d) of the Act. This may be cured by the addition of the words "incurred without negligence or bad faith."

It appears that the provision that the trustee shall not be required to expend or risk his own funds in the administration of the trust may be exculpatory in conflict with Section 315(c) and (d) of the Act. This may be cured by the addition of the words "if there is reasonable ground for believing that the repayment of such funds is not reasonably assured to it by the security afforded to it by the terms of this indenture.

The provision that a designated method of proof of ownership of indenture securities "shall be conclusive in favor of the trustee" may be exculpatory and should be made subject to the provisions of the indenture containing Section 315(c) and (d) of the Act.

It is noted that the indenture provides that notification and request for action on the part of the trustee by a specified percentage of bondholders, and offer of indemnity to the trustee are conditions precedent to the exercise of the powers and trusts of the indenture. It should be made clear therein that such matters are conditions precedent to action by bondholders and are not conditions precedent to action by the trustee in derogation of its duties under Section 315(c) and (d) of the Act.

The provision that the trustee may take action or decline to act "as it may be advised by counsel to be appropriate" appears to be exculpatory in conflict with Section 315(c) and (d) of the Act. This may be cured by changing the above-quoted provision to read "as the trustee, being advised by counsel, may deem appropriate."

The provision that the trustee will be under no duty with respect to the recording of the indenture or the lien afforded thereby may be exculpatory. In this connection, reference is made to the duty of the company in Section 314(b) of the Act to provide the trustee with evidence of such recording. Accordingly, the provision should be made subject to the provisions of the indenture containing Section 315(c) and (d) of the Act.

Exemption - Hugo Stinnes Corporation, 7 SEC 622

Hugo Stinnes Corporation, a Maryland corporation, filed an application on Form T-3 for qualification of an indenture under which it proposed to solicit assents to the extension of its bonds. An order was entered for a hearing under Sections 305(b) and 307(c) on the question of whether qualification of the indenture in the form submitted should be permitted. 14/

The indenture was secured directly and through wholly-owned American and German subsidiaries upon German properties and the shares of such subsidiary companies. Due to German exchange restrictions and the effect of the war then in progress upon trade which had previously served to provide the company with the necessary American dollars, it was necessary for the company to seek assents to an extension of the indebtedness secured by such indenture.

The application included a request for exemption from Sections 313(a)(5) and (7); 313(b)(1) and 315(a), (c) and (d) on the claim of undue burden. Applicant claimed that it was unduly burdened thereby because, under the unusual circumstances of this case, the inclusion

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14/ Hearing was also had on applications by the company under Section 304(c) and by certain German guarantors of the notes issued under the indenture, under Section 304(d) of the Act, for exemption of the contracts of guarantee.

of such provisions would have rendered it impossible to obtain the services of a trustee. Practically all of the pledged assets were outside of the country where access to news or information about them was difficult, if not impossible. Not only would the trustee be unable to report releases, etc., with respect to such properties as required by the above-listed provisions of Section 313, but the trustee could not be certain that information supplied by the issuer would meet the requirements of the indenture, to permit reliance thereon under Section 315(a)(2). (pp. 633-4)

The opinion, in granting exemption with respect to said provisions, stated in part as follows: (pp. 634-5)

> "The trustee claims that it has acted and will continue to act prudently and without negligence. It is not, however, willing to put its good intentions to the risk of being set forth in its contract. We cannot, in view of the exceptional circumstances of this case, ignore the practical effect of the trustee's attitude, the nonavailability of any other trustee and the impact of these facts on the issuer and the noteholders.
>
> "The requested exemption from Sections 313(a)(5) and (7), 313(b)(1), and 315(a), (c) and (d) is granted.
>
> "We cannot stress too heavily that our determination to grant the requested exemptions from provisions of the Act affecting the trustee has been made because of the highly exceptional circumstances of this case, including the ownership of assets in a foreign country at war, and that our grant of exemption has been particularly conditioned on the existence of these circumstances. Our decision should, therefore, not be regarded as having any general application as a precedent. It is, in no sense, to be taken as an indication of willingness to permit arbitrary boycotts of the Act by corporate trustees to write the Act off the books in cases falling under Section 304(c)."

Section 315(a)

Duties Prior to Default

Paragraph (1) makes clear that, prior to default, the trustee is to be liable for the performance of only such duties as are specifically set out in the indenture.[15/] It is customary to add that prior to default, no implied covenants or obligations shall be read into the indenture against the trustee whose duties shall be determined solely by the express provisions of the indenture.[16/] It is also contemplated that the indenture may provide that prior to default, the trustee is under no specific duty to exercise any unusual remedies or powers which may be included in the indenture.[17/]

Paragraph (2) permits the inclusion of provisions authorizing the trustee to rely upon certificates or opinions conforming to the requirements of the indenture, but the trustee must examine them to determine whether they do conform.[18/] This provision is also operative only before default and the words "in the absence of bad faith" should be included in accordance with the language of the statute.[19/] The

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15/ House Report No. 1016, 76th Cong., 1st Session, p. 55. See, also, id. at p. 31.

16/ CCH "Model" Indenture, p. 21, Section 8.03(a).

17/ Id. at p. 21, note *
For effect of such exculpation, see Prudence Bonds Corp. v. State Street Trust Co., 202 F. 2d 555.

18/ House Report No. 1016, 76th Cong., 1st Session, p. 55.

19/ CCH "Model" Indenture, p. 28, Section 8.13.

requirement that the trustee examine the certificate to determine whether it conforms to the requirements of the indenture, is often inserted elsewhere in the indenture.[20/] The language of this section is apparently broad enough to cover certificates beyond those required by Section 314(c) and (d) of the Act.[21/] However, the language of Section 315(a)(2) should not be expanded to permit reliance before default upon such additional documents as "statements, reports, orders or other instruments" as is sometimes attempted thereunder.[22/]

Paragraphs (1) and (2) of Section 315(a) are both exceptions to the standards prescribed by Section 315(d) and, presumably, in all respects not otherwise excepted, the trustee must act without negligence or willful misconduct both before and after default.

No objection is raised to the addition of language in the indenture making the provisions of Section 315(a) applicable after the curing of all defaults which may have occurred.[23/]

Deficiencies

A provision that the trustee may rely upon certain certificates should be limited to prior to default and in the absence of bad faith [24/], in accordance with Section 315(a)(2) of the Act.

20/ Id. at p. 21, Section 8.02.

21/ House Report No. 1016, 76th Cong., 1st Session, p. 30.

22/ Cf. CCH "Model" Indenture, p. 23, Section 8.07(1).

23/ Id. at pp. 20-21, Sections 8.02 and 8.03.

24/ See, however, id. at p. 28, Section 8.13.

The words "statements, reports, orders or other instruments" should be deleted from the provision of the indenture purporting to conform to Section 315(a)(2) of the Act.

A provision should be inserted in the indenture requiring the trustee to examine certificates on which he relies prior to default, for the purpose of determining whether they conform to the requirements of the indenture, in accordance with Section 315(a)(2) of the Act.

Section 315(b)

Notice of Defaults

The indenture must contain provisions requiring the trustee to give to the bondholders notice of known defaults under the indenture within ninety days after they occur. But the indenture may provide that, except in the case of defaults as to principal or interest or sinking fund or purchase fund installments, the trustee shall be protected in withholding notice so long as it determines that course to be in the interests of the bondholders. Such determination must be made in good faith, by the board of directors, or executive committee, or a trust committee composed of directors or responsible officers of the trustee.[25/]

The apparent purpose of this provision is to get information as to a default in the hands of all indenture security holders (and not only the class affected or assenters to a plan of refunding)[26/] within ninety days after the default so that they may act seasonably in protecting their interests.[27/] Any encroachment upon this period of ninety days should

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25/ House Report No. 1016, 76th Cong., 1st Session, p. 55. See, also, id. at p. 30.

26/ In the Matter of Hugo Stinnes Corp., 7 SEC, 622, 637.

27/ Letter dated October 25, 1945, to Egbert H. Womack, Shearman & Sterling & Wright, re Celanese Corporation of America, File No. 2-5935 (22-466).

therefore be resisted. Thus, the provision should not be so worded that the ninety days will run from the date when the trustee learns of the default instead of from the occurrence of the default as provided by the statute. Presumably, notices of defaults coming to the attention of the trustee after such ninety days have elapsed should be sent to bondholders promptly thereafter.[28/]

Subsections (a) and (c) of Section 315 of the Act refer to a default "as such term is defined in the indenture," whereas subsection (b) refers to "notice of all defaults" without such limitation. In order to give meaning to this difference in language, it was felt that Section 315(b) of the Act was intended to require notice of all known defaults under the indenture regardless of periods of grace specified in the usual definitions of events of default in indentures.[29/] Accordingly, indenture provisions incorporating Section 315(b) of the Act should recite that the term "default" as used therein is exclusive of periods of grace, if any, provided by the definition of events of default in the indenture. In

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28/ No objection was raised to a provision that notices of defaults coming to the attention of the trustee beyond the period of ninety days prescribed by the statute will be given "at the earliest practicable date within 30 days after such default shall be known to the trustee." See Oklahoma Gas & Electric Co., File No. 2-5566 (22-372).

29/ Letter dated November 27, 1945, to Egbert H. Womack, Shearman & Sterling & Wright.

this connection, the question was raised whether the period during which the trustee may give notice to the obligor for the purpose of ripening a breach of covenant into an event of default, is such a period of grace. The Commission agreed with the staff's position that Section 315(b) of the Act was intended to get information into the hands of indenture security holders within ninety days after any breach or failure by the obligor to comply with the requirements of the indenture and that such period should therefore be excluded.[30/] In this connection, it was felt that the right accorded to the trustee to withhold such notice was an adequate protection against the giving of notice of a breach of covenant which may never ripen into an event of default. Furthermore, no objection is raised to a modification of Section 315(b) of the Act as incorporated in an indenture so as to prohibit the trustee from giving such notice during the first sixty days of the ninety days following the breach.

Some distinction, however, has been permitted with respect to an event of default which is not a breach of covenant and with respect to which time may be regarded as an essential element of the default. Thus, in the case of a default arising from the fact that a judgment against

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30/ Letter dated October 28, 1946, to Leroy A. Wilson, vice-president, American Telephone and Telegraph Company, File No. 2-6782 (22-583), pursuant to Commission Minute of the same date.

the obligor is unsatisfied for sixty days, the period of sixty days has not been regarded as a period of grace so as to cause the ninety days referred to in the Act to run from the date that judgment is entered.

It seems clear that Section 315(b) was intended to place a duty of reporting defaults upon all trustees under the indenture and where there is a provision for an additional or co-trustee, it should be made specifically applicable to him. At the same time, it would appear to be inappropriate to permit such trustee to rely upon a determination made by the board of directors or an appropriate committee of another trustee that notice should, in a given case, be withheld. Accordingly, the provision of the indenture incorporating Section 315(b) of the Act should provide that such an additional corporate trustee will make the determination to withhold notice of default through its own board or appropriate committee and that an individual trustee will make such determination for himself.

For the purposes of this subsection and Section 315(d)(2) of the Act, it is customary to include a definition of "responsible officer."[31/] A typical definition of the term follows:

> "The term 'responsible officer or officers' of the trustee whenever used in this indenture shall mean and include the president, any vice president, the secretary, the treasurer, and trust officer of assistant trust officer, and any officer or assistant officer of the trustee customarily performing functions similar to those performed by the foregoing individuals or to whom any corporate trust matter is referred because of his knowledge of, and familiarity with, a particular subject."

31/ CCH "Model" Indenture, p. 16, note **, and p. 22, note *.

Deficiencies

It should be made clear that the period of ninety days, within which the trustee is required, by Section 315(b) of the Act, to give notices of defaults to holders of indenture securities, will begin to run upon the occurrence of a default and not from the date when the trustee learns of the default.

The term "default," as contained in subsections (a) and (c) of Section 315 of the Act, is qualified by the phrase "(as such term is defined in such indenture)" but no such qualification is contained with reference to "default" as used in subsection (b) of Section 315. Accordingly, Section 315(b) of the Act is interpreted to relate to "defaults" exclusive of any periods of grace provided in the indenture and a provision to that effect should be included therein.

It should be made clear that the period of sixty days during which the trustee is not to give notice of defaults is included within the ninety days referred to in Section 315(b) of the Act.

The provisions of Section 315(b) of the Act as incorporated in the indenture should relate to any separate or co-trustee provided for therein.

The determination by a separate or co-trustee to withhold notice of a default under Section 315(d) of the Act should, if a corporation, be made by its own board or appropriate committee and should, if an individual, be made by himself.

Section 315(c)

Duties of the Trustee in Case of Default

In case of default, the indenture must impose upon the trustee the duty of acting as a prudent man would act under the circumstances in the conduct of his own affairs. The standard provided for is substantially the same as that which is applicable in the field of personal trusts. Under this provision a trustee will no longer be able to demand notice of default, demand for action, and indemnity from the bondholders as a condition precedent to performing its obligations under the indenture. But there is nothing in the Act to prevent the inclusion of the customary provision giving the trustee a prior lien, upon the mortgaged or pledged property or the proceeds of suit, for its compensation and expenses in connection with enforcement.[32/] Indentures customarily contain such provisions.[33/]

Some variation from the statutory language, by restricting the application of this subsection to the existence of a default "which has not been cured," is permitted.[34/] It is, also, sometimes provided that a default shall be deemed to be cured when waived.[35/] A discussion of

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32/ House Report No. 1016, 76th Cong., 1st Session, p. 55. See, also, id. at pp. 32-33.

33/ CCH "Model" Indenture, pp. 24, 25 and 45, Sections 8.11, 8.12 and 8.19.

34/ Id. at p. 21, Section 8.02.

35/ Indenture of Houston Light & Power Co., File No. 2-8002 (22-894).

the treatment of exculpatory indenture provisions is contained herein at the beginning of Section 315.[36/]

Indenture provisions have sometimes been so phrased that the trustee may be called upon by the obligor to take certain prescribed action so long as the trustee does not know of a default. Such a provision appears to be inconsistent with Section 315(c) of the Act which places a higher responsibility upon the trustee after the occurrence of a default, as defined in the indenture, irrespective of whether the trustee knows of its existence. Furthermore, it seems clear that the absence of a default (rather than the absence of knowledge of a default) is the intended condition precedent and the requirement for knowledge of the default should be deleted.[37/] Objection to this action is sometimes made upon the ground that it places upon the trustee the unreasonable burden of always knowing whether a default exists. However, in view of the definitions of default usually contained in indentures, including the requirement for notice to ripen a breach of covenant into a default, it seems unlikely that a default would exist without being known to the trustee.

36/ See p. 107, et seq., supra.

37/ Making such a provision "subject to" the provision of the indenture containing Section 315(c) of the Act would not remedy the defect.

This section relates to the exercise of "rights and powers vested in it by such indenture." Such language may be broad enough to include implied rights and powers arising from the position of trust created by the indenture.[38/]

In view of the absence of any restriction, in relation to the existence of a default, upon the scope of the provisions of Section 315(d)(2) and (3) of the Act, it would appear that such provisions may be regarded as exceptions to the "prudent man" standard of Section 315(c) of the Act.

Deficiency

Since the condition precedent to action by the trustee under this provision of the indenture is the nonexistence of a default rather than the absence of knowledge of a default on the part of the trustee and since the responsibility of the trustee under Section 315(c) of the Act is effective upon the occurrence of a default as defined in the indenture, the language "known to the trustee" appears to be inconsistent therewith and should be deleted.

38/ Cf. CCH "Model" Indenture, p. 21, Section 8.03(a), re Section 315(a)(1) of the Act.

Section 315(d)

Responsibility of the Trustee

This subsection prohibits the inclusion in the indenture of provisions relieving the trustee from liability for its own negligent action or failure to act, or for its own willful misconduct. Included in this prohibition, of course, are provisions relieving the trustee from liability for the negligence of its employees, except to the extent that such provisions are permitted by paragraph (2) of the subsection.[39/]

Although this provision is stated in a negative form, it is advisable to incorporate it in the indenture for the purpose of qualifying other indenture provisions of possible exculpatory effect.[40/] A discussion of the treatment of exculpatory indenture provisions is contained herein at the beginning of Section 315.[41/]

The prohibition of exculpatory clauses is subject, however, to three important qualifications:[42/]

39/ House Report No. 1016, 76th Cong., 1st Session, p. 55. See, also, id. at p. 33.

40/ CCH "Model" Indenture, p. 21, Section 8.03.

41/ See p. 107, et seq., supra.

42/ These qualifications are permissive and accordingly, may be omitted or restricted.

Paragraph (1) permits the inclusion in the indenture of the provisions authorized by paragraphs (1) and (2) of subsection (a) of this section.[43/]

Paragraph (2) makes special provision with respect to losses arising from errors of judgment. If the trustee was not negligent in ascertaining the pertinent facts, it may be protected for losses arising from any error of judgment based upon such facts, if such judgment was made in good faith by responsible officers of the trustee.[44/] For the purposes of this subsection and Section 315(b) of the Act, it is customary to include a definition of "responsible officer."[45/]

Since Section 315(d) of the Act relates to all trustees, it seems clear that each separate corporate trustee can be protected only for relying upon the judgment of its own responsible officers and that each separate individual trustee can be protected only for relying upon his own judgment. A provision that such additional trustees may rely upon the judgment of a responsible officer of the principal corporate trustee is, accordingly, contrary to the requirements of Section 315(d)(2) of the Act.

43/ House Report No. 1016, 76th Cong., 1st Session, p. 55.

44/ Idem.

45/ CCH "Model" Indenture, p. 16, note ** and p. 22, note*. See discussion at p. 124 supra, for typical definition.

Paragraph (3) permits the inclusion of provisions protecting the trustee in respect of any action taken or omitted to be taken by it in good faith in accordance with the direction of the holders of not less than a majority in principal amount of the outstanding bonds relating to the time, method, and place of conducting any proceeding for any remedy available to the trustee, or exercising any trust or power conferred upon the trustee under the indenture.[46/]

This paragraph (3) is a logical correlative of Section 316(a) of the Act and should be considered in conjunction therewith.[47/] If an exemption is granted under Section 304(c)(1) from Section 316(a) of the Act with respect to a provision of an indenture for a direction to the trustee by the holders of less than a majority in principal amount of the outstanding bonds, it would seem logical to entertain an application for exemption under Section 304(c)(2), on the ground of undue burden, for the purpose of permitting a like change in the provisions of the indenture incorporating Section 315(d)(3) of the Act. Furthermore, although Section 316(a) is a permissive provision, at least the last

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46/ House Report No. 1016, 76th Cong., 1st Session, p. 56.

47/ The position has been taken that the obvious purpose of Section 315(d)(3) is to protect indenture trustees from mistakes made in good faith, including the possibility of following directions which a court might later hold to be beyond the powers of a majority. (See Brief of July 1945 filed Amicus Curiae in the case of Continental Bank v. First National Petroleum Trust, D.C.R.I., decided in 67 Fed. Supp. 859.)

sentence thereof, relating to the determination of indenture securities entitled to participate in the calculation of such direction or consent, must be included in the indenture for the purposes of Section 315(d)(3) of the Act and it is questionable whether Section 315(d)(3) of the Act should be included in an indenture which contains no provision for a direction to the trustee by the holders of not less than a majority in principal amount of the indenture securities. Since Section 316(a) of the Act is a permissive provision, the indenture may provide that the trustee may decline to follow such a direction.[48/] It would appear, however, that such modification might impair the protection afforded to the trustee under Section 315(d)(3) of the Act.

Deficiencies

Although Section 315(d) of the Act prohibits the inclusion of exculpatory provisions in an indenture, the language thereof should be included in the indenture for the purpose of qualifying other provisions in the indenture which may conflict therewith.

The provision that a separate or co-trustee may rely upon the judgment of a responsible officer of the principal corporate trustee conflicts with Section 315(d)(3) of the Act and should provide for reliance upon his own judgment, if an individual, or the judgment of its own responsible officers, if a corporation.

The provision of the indenture containing Section 315(d)(3) of the Act should relate only to action taken by the trustee in good faith at the direction of the holders of at least a majority in principal amount of outstanding indenture securities.

48/ CCH "Model" Indenture, pp. 19 and 20, note *.

The provisions of the last sentence of Section 316(a) of the Act should be incorporated in the indenture for the purposes of Section 315(d)(3) of the Act.

Since the indenture contains no provision for a direction by the holders of not less than a majority in principal amount of outstanding indenture securities, the provisions reflecting Section 315(d)(3) of the Act should be omitted.

Section 315(e)

Undertaking for Costs

This subsection authorizes the inclusion in the indenture of provisions requiring the filing of an undertaking for costs, and the assessment of reasonable costs (including reasonable attorneys' fees), in the discretion of the court, in any suit for the enforcement of rights or remedies under the indenture or against the trustee, as such. Precedent for this provision is to be found in Section 18(a) of the Securities Exchange Act of 1934. In the assessment of such costs, due regard is to be had to the merits and good faith of the suit or defense. The provisions of the subsection do not apply to suits by bondholders to collect principal or interest, or to suits instituted by bondholders holding in the aggregate more than ten per cent in principal amount of the outstanding bonds. Suits by the trustee are also excluded.[49/]

If this permissive provision is included in the indenture, it is important that it contain the exceptions above referred to.

49/ House Report No. 1016, 76th Cong., 1st Session, p. 56. See id. at p. 33 re similar New York statute.

Section 316(a)

Directions and Waivers by Bondholders

Subsection (a) of Section 316 specifically permits the inclusion in the indenture of provisions authorizing the holders of a majority of the outstanding bonds (1) to direct the time, method, and place of exercising any trust or power conferred upon the trustee, or of conducting any proceeding for any remedy available to the trustee; or (2) to consent to the waiver of any past default, and its consequences. The indenture may also contain provisions authorizing the holders of 75 per cent or more in principal amount of the outstanding bonds to consent to the postponement of any interest payment for not more than three years from its due date. Provision is made with respect to the exclusion of bonds owned by the obligor or persons standing in a control relation to it, in determining whether the required percentage of bonds has concurred in any such direction or consent.[1/]

It was the practice before the Act was passed of including numerous provisions in indentures for directions to the trustee or consents by holders of less than a majority of outstanding indenture securities. It seems clear, however, that if this permissive provision is to have any meaning, it must have been intended to exclude all other provisions not

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1/ House Report No. 1016, 76th Cong., 1st Session, p. 56.

consistent with its requirements. In this connection, it should also be noted that the protection accorded to the indenture trustee under Section 315(d)(3) of the Act is also dependent upon a direction by holders of not less than a majority of outstanding indenture securities.[2/] It was, therefore, early concluded that provision for directions or consents by less than the requisite majority specified in Section 316(a) of the Act is contrary to the requirements of the Act.[3/]

The broad scope of Section 316(a)(1)(A), relating to "exercising any trust or power conferred upon such trustee," tends to extend the application of this provision to a variety of situations in some of which the interests of holders of indenture securities might better be served by some smaller percentage than a majority. For example, holders of indenture securities are commonly accorded the power to cause the trustee to ripen a breach of covenant into an event of default, to accelerate the maturity after default, to cause investigations to be made, to call meetings, etc. In such situations the purposes and policies of the Act do not appear to

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2/ Earlier drafts of the bill combined these provisions. Reference is also made to the provision at the end of Section 316(a) with respect to reliance by the trustee upon a direction or consent.

3/ Letter dated January 26, 1940, to John Haskell, vice-president of the New York Stock Exchange; letter dated August 4, 1941, to George D. Jagels re Motor Transit Co.; and also letter dated June 6, 1940, to Adrian C. Leiby of De Forest & Elder re conflict with Louisiana statute. See also In The Matter of Hugo Stinnes Corp., et al., 7 S.E.C. 622, 630.

be circumvented if the holders of less than a majority of indenture securities are accorded the power to take direct action rather than to act through the trustee.[4/] Similarly, although no one (including the trustee) other than the holders of a majority of outstanding bonds may waive a past default and its consequences, provisions of indentures have been accepted which make such waiver automatic when the default has been cured.

Other provisions, such as the usual requirement for notice to the trustees by a percentage of holders of indenture securities as a condition precedent to an action by such holders to enforce the provisions of the indenture,[5/] and a provision that a percentage of holders of indenture securities may compel a retired trustee to make conveyances and transfers to a successor trustee, have been considered to be outside of the scope of this section. It will also be noted that the Act relates to a remedy, trust or power vested in the trustee which the holders of a majority of indenture securities may require him to exercise. Accordingly, if the holders of indenture securities are accorded the power to direct the trustee to take action which the trustee could not take without such direction, Section 316(a) would not appear to be applicable.[6/] Similarly,

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4/ C.C.H. "Model" Indenture, p. 17, note *.

5/ McQuiston v. Third Avenue Transit Corp., N. Y. Sup. Ct., Spec. Term, N. Y. City, 1949; P-H Corp. Serv., par. 20,601, April 20, 1949.

6/ In one case (61 Broadway Corp., File No. 22-333), a provision that the trustee shall have power of sale unless holders of 33-1/3 per cent of outstanding bonds object after notice was deemed not to be a direction under Section 316(a)(1) but a conditional power.

action by the trustee at the request of the issuer or some third party,[7] such as authentication or redemption of bonds, release of property, and similar provisions for the normal administration of the trust estate, do not contravene this section. Also, as this is a permissive provision, it is proper to restrict the actions which the trustee may be compelled to take.[8]

Another type of provision sometimes found in indentures is that the indenture trustee may take certain specified action but shall not be responsible for failing to take such action unless requested to do so by the holders of a stated percentage of indenture securities. Apart from the apparent conflict with Section 315(c) and (d) of the Act, the provision apparently accords powers governed by Section 316(a) so that the standards thereof should be applied.

Again, it has sometimes been the practice to provide that where the action or default affects only a single series of indenture securities, only action by holders of a majority of that series to compel the trustee to act or to waive the default is needed. Since there is no assurance that the vote so obtained will constitute action by holders of a majority of all securities outstanding under the indenture, it

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7/ Indenture of The Van Sweringen Co., File No. 22-824, provided for a committee to perform functions normally performed by the issuer.

8/ C.C.H. "Model" Indenture, pp. 19 and 20, note *.

falls short of the requirements of Section 316(a). Such a provision is usually cured by requiring a vote of a majority of the series as well as a majority of all of the securities outstanding under the indenture.

Provisions for the amendment of indentures are sometimes sufficiently broad to permit action under this section. In such cases the standards of Section 316(a) should be applied or the provisions for amendment should be appropriately restricted.[9/] The provisions of Section 316(a) apply both before and after a default.[10/]

The provisions of Section 316(a)(1) may not be utilized to circumvent the provisions of Section 316(a)(2) and Section 316(b) by directing the trustee not to bring any proceeding to enforce payment of principal or interest.[11/] There is, of course, no prohibition in the Act against the individual holder of indenture securities making any such agreement with respect to his own holdings.

9/ In this connection, the power to amend should not permit the postponement or reduction of interest or principal in contravention of Section 316(a)(2) or Section 316(b) of the Act and the percentage vote required should not be subject to amendment. In addition, a provision should be inserted that any amendment will conform to the requirements of the Act.

10/ Memorandum of Robert Ginnane dated June 11, 1940.

11/ Continental Bank & Trust Co. v. First Nat. Petroleum Trust, 67 Fed. Supp. 859. See also Schallitz v. Starrett Corp., 82 N. Y. Supp. (2d) 89. No objection was made to the provision in the indenture of Texmass Petroleum Co., File No. 2-8247 (22-947), that the payment of interest was subject to approval of R.P.C.

The final sentence of Section 316(a), which excludes indenture securities owned by an obligor or a person in a control relationship to such obligor in determining the required percentages of bonds under clauses (1) and (2), should be included in the indenture in terms broad enough to cover every instance of a direction or consent falling within the scope of this section.[12/] No objection is made to broadening the scope of the last sentence of Section 316(a) to cover any sort of action by holders of indenture securities under the indenture, provided that the language thereof relating to whether the trustee shall be protected is limited to reliance upon a direction or consent.[13/] In the latter connection, the language with respect to protection of the trustee in relying upon a direction or consent should not be rephrased to provide an affirmative exculpation.

The provisions of the last sentence of Section 316(a) should apply to indenture securities owned by any obligor upon the indenture securities and not just the company. Of course, if the indenture makes no provision for directions or consents, there is no need to include this portion of Section 316(a).[14/]

12/ The provisions of this part of Section 316(a) of the Act are often separately inserted in the indenture, sometimes with specific cross-references to the sections to which they apply. In some instances these provisions are added to a definition of "outstanding."

13/ No objection is made to the terms "request" or "waiver" which appear to be encompassed in the statutory language.

14/ See pp. 129 and 130, supra.

A provision may be added to the last sentence of Section 316(a) as follows: 15/

" . . . Bonds so owned which have been pledged in good faith may be regarded as outstanding for the purposes of this paragraph, if the pledgee shall establish to the satisfaction of the Trustee the pledgee's right to vote such bonds and that the pledgee is not a person directly or indirectly controlling or controlled by or under direct or indirect common control with the obligor. In case of a dispute as to such right, any decision by the Trustee taken upon the advice of counsel shall be full protection to the Trustee."

Deficiencies

The provisions of this section of the indenture, which require the trustee to take certain acts at the direction of holders of twenty per cent of the outstanding indenture securities, should be amended to require that such direction be given by the holders of at least a majority of the indenture securities in accordance with Section 316(a)(1) of the Act. This may be cured, in an appropriate case, by having holders of such smaller percentage of indenture securities act directly rather than through the trustee.

A provision of the indenture that wherever a specified percentage of bondholders may direct the trustee to take certain action or to waive a default, such action may be taken by such percentage of the class or classes affected if less than all classes are affected, conflicts with Section 316(a)(1) of the Act which reserves such powers to the holders of a majority of all outstanding indenture securities. There would, of course, be no objection to a requirement that such majority include a majority of the class or classes affected.

The indenture provides that the trustee will be fully protected if he takes certain action at the direction of the holders of twenty per cent of outstanding indenture securities. This provision conflicts with Section 315(d)(3) and Section 316(a)(1) of the Act.

The provisions of this section of the indenture, which authorize the holders of a majority of outstanding indenture securities to waive a default, should be amended to relate to "past" defaults in accordance with Section 316(a)(1) of the Act.

15/ C.C.H. "Model" Indenture, p. 19, Section 7.T3.

The provision that the trustee may waive defaults conflicts with Section 316(a)(1)(B) of the Act which reserves this power to the holders of not less than a majority of outstanding indenture securities.

The provision that the indenture may be amended with the approval of holders of 66-2/3 per cent of outstanding indenture securities appears to be broad enough to permit a waiver of past defaults and the calculation of such percentage should therefore be made subject to the provision of the indenture incorporating the language of the last sentence of Section 316(a) of the Act. Furthermore, this provision of the indenture should be restricted so that it will not permit the reduction or postponement of interest or principal in conflict with Section 316(a)(2) or Section 316(b) of the Act, or permit the reduction of the percentage vote in conflict with Section 316(a) of the Act.

The provisions of the indenture incorporating the last sentence of Section 316(a) of the Act should be inserted in such general terms (or by sufficient cross-references) that it will apply to all directions or consents falling within the scope of clauses (1) and (2) of Section 316(a).

The provision of the indenture incorporating the last sentence of Section 316(a) of the Act should relate to indenture securities owned by any obligor and not just the company.

The provision that "for the purpose of determining whether the indenture trustee shall be protected in relying on any such direction, request, consent, waiver, vote, or other action" exceeds the language permitted by the last sentence of Section 316(a) of the Act. The words "vote, or other action" should therefore be deleted.

It is noted that this section of the indenture, which purports to incorporate the last sentence of Section 316(a) of the Act, states that "the trustee shall be protected in relying on any such direction or consent." This language should be revised in accordance with the language of the statute by inserting "for the purpose of determining whether" before the above-quoted provision.

Exemptions

The requirements of Section 316(a) of the Act have given rise to more applications for exemption under Section 304(c) of the Act than all of the remaining provisions combined. The usual basis of these applications is that it would require the consent of holders of outstanding indenture securities to increase the percentage vote to a majority as required by this provision.[16/]

In view of the requirement of Section 304(c) that indenture securities issued before the effective date of the Act must be outstanding when the application for exemption is filed, in course of time open-end indentures must conform to the requirements of all of the provisions of the Act if additional securities are to be publicly offered thereunder after such old securities have been retired.[17/] It is, therefore, the practice to warn issuers of this "box" that continued exemptions may lead to and to suggest that provisions as to which exemption is sought be amended to conform to the requirements of the Act, to

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16/ In The Matter of Hugo Stinnes Corp., et al., 7 S.E.C., 622, 630.

17/ In the case of Virginia Electric & Power Co., File No. 2-5647 (22-393), it was necessary to refund all of the outstanding bonds in order to meet this problem. In some cases the registrant has left outstanding a small piece of the old issue in order to preserve the Commission's jurisdiction under Section 304(c). See Hawaiian Electric Company, File No. 2-5383 (22-312); Pacific Gas and Electric Co., File No. 2-5973 (22-474); and Central Maine Power Co., File No. 2-5024 (22-206).

be effective when the series whose consents are required are no longer outstanding. In some cases, when faced with this problem, counsel have given the opinion that upon the basis of provisions for amendment in the indentures, such amendments could be made without approval of holders of outstanding indenture securities and appropriate changes have thereupon been inserted in the indentures, effective immediately.[18/]

Exemption - Fifth Avenue Hotel Corporation, File No. 22-274

In the case of the application for qualification of an indenture by Fifth Avenue Hotel Corporation, the Commission on November 4, 1943, granted an exemption under Section 304(c)(1) of the Act upon the basis that it would require the consent of holders of outstanding indenture securities to modify certain provisions of the indenture to conform to the requirements of Sections 310(a) and 316(a)(1) of the Act.[19/] However, a request for exemption from the provisions of Section 316(a)(1), with respect to the power granted to the trustee in Section 4, Article VI, of the indenture to waive a past default and its consequences, was denied upon the ground that the elimination of this power in the trustee would not require the consent of holders of outstanding indenture securities.

18/ Connecticut Light & Power Co., File No. 2-5907 (22-457); Northern States Power Co., File No. 2-5924 (22-462); Ohio Edison Co., File No. 2-5623 (22-387); and Philadelphia Electric Company, File No. 2-6821 (22-593).

19/ See discussion, supra, at page 5.

Section 316(b)

Prohibition of Impairment of Holder's Right to Payment

Under subsection (b) of Section 316, the indenture must provide that, except as to an interest postponement consented to as provided in subsection (a), the right of any indenture security holder to receive his principal and interest when due and to bring suit therefor may not be impaired without his consent. Evasion of judicial scrutiny of the fairness of debt-readjustment plans is prevented by this prohibition. Until comparatively recently, a prohibition of this sort was perfectly standard in note and bond indentures. In many States it is necessary in order to preserve the negotiability of the notes or bonds; in others it is necessary if the notes or bonds are to be legal investments for insurance companies, savings banks, and the like. This prohibition does not prevent the majority from binding dissenters by other changes in the indenture or by a waiver of other defaults, and the majority may of course consent to alterations of its own rights.[20/] The provisions of Section 316(b) are regarded as available to non-assenters to a plan of debt-readjustment so as to accord them the right to sue on their bonds.[21/]

20/ House Report No. 1016, 76th Congress, 1st Session, page 56.

21/ Memorandum of Aaron Levy dated March 21, 1951, re Haas v. Palace Hotel Co., 224 P. 2d 783 (Cal. App. 1950).

The second exception in this section, permitting the inclusion of a provision in the indenture limiting or denying the right of a security holder to institute a suit if and to the extent that it would, under applicable law, result in the surrender, impairment, waiver or loss of the lien upon any property,[22/] was included in the bill by amendment from the floor of the House by Representative Hinshaw of California.[23/] In offering this amendment, Mr. Hinshaw stated:

> "No doubt if this amendment had been prepared in time, it would have been part of the regular bill. As you have heard, it carries the endorsement of the entire committee. The necessity for it arises from a peculiar circumstance in the laws of my State of California and perhaps several others of the Western States. The law of California differs from the law prevailing generally in providing that there can be but one action to foreclose a mortgage. Since 1898 it has been the settled law of California, Commercial Bank v. Kershner (120 Cal. 495), and numerous other cases following it, that if the holder of a mortgage note recovers a judgment on such note, without foreclosing the mortgage, he thereby waives entirely the mortgage security. For this reason California attorneys have been careful in drafting indentures secured by property in California to provide that individual bondholders have no right of action upon the bonds, as distinguished from such right as they may be given - generally based on the refusal of the trustee to act, after appropriate request - to foreclose the indenture. Where the trustee is given the power to sue upon the bonds, as distinguished from the power to foreclose the indenture, the added provision is inserted that such power of the trustee is subject to the limitation that if the exercise of such power would result in the security being surrendered, waived, or lost, the trustee shall not have such power prior to foreclosure of the indenture. Mr. Chairman, I ask the favorable consideration of the Committee for my amendment." 24/

22/ CCH "Model" Indenture, page 18, Note, re necessity for inserting this exception in indentures.

23/ Congressional Record, July 19, 1939, page 9528.

24/ In the opinion rendered in the case of Haas v. Palace Hotel Co., 224 P. 2d 783 (Cal. App. 1950), the court refused a minority bondholder who did not accept a plan of voluntary debt-readjustment, the right to sue on his bond or to foreclose. The indenture was qualified under the Act for the purpose of soliciting assents to such plan. U. S. Supreme Court denied certiorari October 8, 1951.

In view of the emphasis upon the right to sue for principal and interest in the legislative history of Section 316(b),[25/] the staff has acquiesced in the view that it relates solely to a suit on the bonds and does not accord any right to pursue a remedy under the indenture.[26/] As a consequence it has been the practice to insert in indentures provisions such as the following:[27/]

> "No holder of any Debenture or coupon shall have any right to institute any action, suit or proceeding at law or in equity for the execution of any trust hereunder or for the appointment of a receiver or for any other remedy hereunder, unless such holder previously shall have given to the Trustee written notice of the happening of one or more of the defaults herein specified, and unless also the holders of a majority in principal amount of the Debentures then outstanding shall have requested the Trustee in writing to take action in respect of the matter complained of, and unless also there shall have been offered to the Trustee security and indemnity

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25/ See also testimony of Mr. Edmund Burke, Jr., at Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives, 76th Congress on H.R. 2191 and H.R. 5220, April 4-11, 1939, at pages 284, 285.

26/ Letters of March 24 and April 19, 1949, to Roger Kent of Crimmins, Kent, Draper & Bradley re Palace Hotel Company of San Francisco, File No. 22-410.

27/ See McQuiston v. Third Avenue Transit Corp., N. Y. Sup. Ct., Spec. Term, N.Y. City, 1949; P-H Corp. Serv., par. 20,601, April 20, 1949, and Rabinowitz v. Kaiser Frazer Corp., 111 N.Y.S. 2d 539, 1952.

> satisfactory to it against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee, for thirty days after receipt of such notification, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding; and such notification, request and offer of indemnity are hereby declared in every such case to be conditions precedent to any such action, suit or proceeding by any holder of any Debentures or coupons; it being understood and intended that no one or more of the holders of Debentures or coupons shall have any right in any manner whatsoever by his or their action to enforce any right hereunder, except in the manner herein provided, and that every action, suit or proceeding at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding Debentures and coupons; provided, however, that nothing in this Indenture or in the Debentures or in the coupons contained shall affect or impair the obligation of the Corporation, which is absolute and unconditional, to pay the principal of, and the interest on, the Debentures to the respective holders of the Debentures and coupons at the respective due dates in such Debentures and coupons stated, or affect or impair the right of action, which is also absolute and unconditional, of such holders to institute suit to enforce the payment thereof."

It will be noted that the proviso at the end of the above-quoted provision varies from the language of Section 316(b) which it purports to incorporate in that it states that the obligation of the obligor "to pay" shall not be impaired, whereas the Act refers to the right of the security holder "to receive." This is a common variation which has been permitted.

It might appear, from the legislative purpose of preserving the negotiability of indenture securites, that the right to receive payment of principal and interest should be certain and unconditional. However, in view of the general scheme of providing a statutory framework to fit any plan of financing by debt security and the general use of income

debentures and other variations in payment of principal and interest, it seems clear that so drastic a purpose was not intended.[28/] In this connection, reference is made to the words "on or after the respective due dates expressed in such indenture security" in Section 316(b).

Also, it is not uncommon to include in indentures provisions such as the following:

> "The Company will not, directly or indirectly, extend, or assent to the extension of, the time for payment of any coupon or claim for interest upon any Bond, and it will not, directly or indirectly, take part in any arrangement therefor or for the purchasing or funding of such coupons or claims in any manner. No such coupon or claim so extended, nor any coupon or claim for interest upon any Bond which in any way at or after its maturity shall have been transferred or pledged separate and apart from the Bond to which it belongs, shall be entitled, in case of default hereunder, to the benefit or security of this Indenture, until the prior payment in full of the principal of all Bonds issued hereunder and outstanding and of all such coupons and claims not so extended or transferred or pledged."

Section 316(b) has not been construed to prohibit a provision in indentures to the effect that funds received by the trustee or paying agent for the payment of principal and interest may, if unclaimed after a specified number of years, be returned to the obligor.[29/]

28/ The indenture of Texmass Petroleum Co., File No. 2-8247 (22-947), provided that the payment of interest was subject to approval by the R.F.C. See, also, indenture of Jessop Steel Co., File No. 22-1022.

29/ CCH "Model" Indenture, page 53.

Provisions are frequently included in indentures authorizing a specified percentage of security holders to amend the provisions of the indenture. In order that such an amendment may not impair the right of a holder to receive his principal or interest as required by Section 316(b), the power to amend should be appropriately qualified.[30/] However, Section 316(b) does not prevent an amendment to the sinking fund provisions.[31/]

Deficiencies

The provision of the indenture prohibiting the holder of an indenture security from bringing action until the trustee has neglected or refused to take action after notice, appears to conflict with Section 316(b) of the Act. Accordingly, the provision should be restricted to remedies under the indenture and should not impair his right to sue for principal or interest under the indenture security.

The provisions of the indenture providing for amendment by a percentage vote of security holders should be restricted so as not to permit impairment of the right of a holder to receive principal or interest on the respective due dates without his consent.

30/ See discussion, supra, at p. 137 and letter dated April 18, 1941, to Dan Gordon Judge of Newman & Bisco re reorganization of 261 Fifth Avenue, New York.
Cf. Continental Bank & Trust Co. v. First National Petroleum Trust, 67 Fed. Supp. 859.

31/ Letter dated January 26, 1940, to John Haskell of New York Stock Exchange from Robert McKellar.

Exemption - Pacific Gas and Electric Co., File No. 2-4676 (22-102)[32/]

Application was filed by Pacific Gas and Electric Company under Section 304(c) of the Act for exemption of certain bonds proposed to be issued under its open-end mortgage indenture from the provisions, among others, of Section 316(b) of the Act. Such exemption was sought because Section 85 of the indenture contained provisions which in effect restricted and limited the right of an individual bondholder to institute suit or action at any time. As grounds for the exemption, the application stated:

> "Obviously, if the effect of such exception would be, under the laws of the State of California, to render entirely nugatory the provisions included in the mortgage in compliance with said Section 316(b), the rights of existing bondholders would not be impaired. However, if that be the case, no useful purpose would be served by compliance with said Section 316(b).
>
> "On the other hand, if the effect of such exception would not be to render entirely nugatory provisions included in the mortgage in compliance with said Section 316(b), then such provisions might be attacked as impairing the rights of existing bondholders."

It may be doubted that the exemption was necessary, in view of the proviso at the end of Section 316(b). If in California the practical effect of the proviso would be to make the provisions of Section 316(b) ineffectual as applied to a secured debt obligation, no purpose

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32/ Similar orders were entered regarding this indenture in subsequent registration statements.

would be served by insisting upon their insertion. By order dated February 21, 1941, the application for exemption from Section 316(b) was granted.

Exemption - Hamilton Gas Corp., File No. 22-382

Hamilton Gas Corp. filed an application under Section 304(c) of the Act for exemption of certain bonds proposed to be offered from the provisions, among others, of Section 316(b) of the Act. Under Section 10 of Article XIII of the indenture of mortgage, it would appear that holders of 66-2/3% of outstanding Series B bonds could amend the indenture so as to postpone the maturity of the bonds or otherwise affect the right of bondholders to receive payment. The application was filed upon the ground that it would require the consent of bondholders to restrict this provision in accordance with Section 316(b) of the Act and the provision incorporating said section was made expressly subject to Section 10 of Article XIII. By order dated March 19, 1945, the application was granted.

Section 317(a)

Special Powers of the Trustee

Subsection (a) requires that the indenture confer upon the indenture trustee two powers which are essential where an issue of indenture securities is publicly held. The first of these is the power, as trustee, to recover judgment against the obligor for the whole amount due and unpaid, in the event of a principal default, or an interest default which has continued for such period as the indenture provides. The second is the power to file proofs of claim, in judicial proceedings, on behalf of all indenture security holders.[1/]

It should be made clear in the indenture that the trustee's powers to sue and file proofs of claims are remedies against any obligor upon the indenture securities. On the other hand, such powers are remedial only and do not create liabilities not otherwise set forth in the indenture.

Provision is sometimes added to the language of Section 317(a)(1) that the right to sue includes the right to recover interest upon the overdue interest and principal at a specified rate.[2/] Also, no objection is raised to a provision that demand for payment must be made by the trustee before it may file suit hereunder.

1/ House Report No. 1016, 76th Cong., 1st Session, p. 57.

2/ C.C.H. "Model" Indenture, p. 17, Section 7. T1.

It will be noted that whereas the right of the trustee to sue under Section 317(a)(1) is dependent upon the existence of defaults in payment of principal or interest, no default need exist for the right to file proofs of claims to accrue under Section 317(a)(2). This distinction should be clearly preserved in the indenture.

In some instances attempt has been made to enumerate the types of proceedings in which proofs of claims may be filed. There is no objection to this procedure provided that such enumeration is not restrictive of the types of proceedings covered by Section 317(a)(2). To avoid this possibility it is desirable that some catch-all language be added such as "or any other judicial proceedings relative to the obligor, its creditors, or its property."

Provisions are commonly included in indentures authorizing the trustee to file proofs of claims for its expenses and charges.[3/]

Deficiencies

The provisions of Section 317(a) of the Act should be inserted in the indenture so as to relate to any obligor upon the indenture securities.

It should be made clear that the right of the trustee to file proofs of claims pursuant to Section 317(a)(2) of the Act is not dependent upon the existence of a default.

The enumeration in the indenture of proceedings in which proofs of claims may be filed by the trustee appears to be unduly restrictive under Section 317(a)(2) of the Act. It is therefore suggested that there be added to such enumeration the words "or any other judicial proceedings relative to the obligor, its creditors or its property."

3/ C C.H. "Model" Indenture, p. 25, Section 8.12

Exemptions

Exemptions have been granted from time to time under Section 304(c)(1) from the requirements of Section 317(a)(2)[4/] upon the theory that it would require the consent of security holders to insert a provision which, in effect, constitutes the execution of a power of attorney.[5/] In the Hugo Stinnes Corporation case[6/] such exemption from Section 317(a)(2) was granted only with respect to non-assenters.

4/ E.g., 870 Seventh Avenue Corporation, File No. 22-201; Pacific Gas and Electric Co., File No. 2-4676 (22-102).

5/ In the case of in re Plankington Bldg. Co. (1943) 135 F. 2d. 273, the Court implied the power in the trustee to file such proofs of claims.

6/ 7 S.E.C. 622, 638 (1940).

Section 317(b)

Duties of Paying Agent

Under subsection (b), funds deposited with paying agents for the payment of principal or interest must be held in trust, and the paying agent must be required to give the indenture trustee notice of any default in the making of such payments.[7/]

Since the paying agent is not normally a party to the indenture agreement it is customary to include this provision in the form of a covenant of the obligor that it will cause the paying agent to execute an agreement embracing the terms of Section 317(b). Also, a separate provision is often made where the trustee may act as paying agent or the obligor may act as its own paying agent.[8/] Of course, if it is clear that only the trustee may act as paying agent, the part of Section 317(b) relating to reports of default may be omitted. No objection is made to a provision that moneys held by the paying agent or the trustee need not be segregated from other funds except to the extent required by law.[9/] Also, the indenture may provide that the obligor may cause the paying

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7/ House Report No. 1016, 76th Cong., 1st Session, p. 57.

8/ C.C.H. "Model" Indenture, pp. 5, 6 and 24, Sections 5. T3 and 8.10.

9/ Id. at p. 24, Section 8.10.

agent to pay to the trustee all sums in its possession and that the trustee or paying agent may return to the obligor all funds unclaimed after a specified number of years.[10/]

It will be noted that Section 317(b) requires the paying agent to hold in trust for the benefit of indenture security holders or the indenture trustee. No objection has been raised if both are not named.

The portion of Section 317(b) requiring the paying agent to give to the trustee notice of defaults should relate to defaults by any obligor upon the indenture securities.

Deficiencies

The provisions of Section 317(b) of the Act should be fully inserted in the indenture unless it is made clear that only the trustee may serve as paying agent, in which case it should be stated that the trustee will hold such sums in trust for the purposes for which paid.

The provisions of Section 317(b) relating to notice of defaults should refer to defaults by any obligor upon the indenture securities.

10/ Id. at p. 6, Section 8.10(d) and note /.

Section 318

Effect of Prescribed Indenture Provisions

This section requires that the indenture to be qualified shall provide that if any provision thereof limits, qualifies, or conflicts with a provision which is required to be included in such indenture by the Act, such required provision shall control.[1/] In indentures which are not formally qualified but which are conformed to the standards of the Act by virtue of the jurisdiction of the Commission under the Public Utility Act of 1935, this provision is modified to relate to such provisions required to be included in an indenture qualified under the Act.[2/]

Although this section may serve to negate provisions of the indenture which conflict with required statutory provisions, such conflicting provisions should be eliminated or appropriately modified at the time of qualification.[3/] This is particularly necessary in the case of the so-called "permissive" provisions which are not affected by Section 318(a). It will be noted in this connection that Section 318(b) permits the insertion of other provisions "not in contravention of any provision of

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1/ House Report No. 1016, 76th Cong., 1st Session, p. 57.

2/ See discussion supra, at p. 53, re Sec. 310(c) of Act.

3/ In the Matter of Hugo Stinnes Corp., et al., 7 S.E.C. 622, 639. Exemption was denied from the provisions of Sec. 318(a), (p. 631).

this title." Similarly, the provisions of the Act should be inserted in the indenture in such form that they will be applicable to all holders of indenture securities outstanding thereunder, including holders of securities issued prior to the qualification of the indenture.4/

Indentures frequently contain extensive provisions for amendment, both by agreement between the obligor and the trustee and by the vote of holders of a specified percentage of indenture securities. This power to amend may have the effect of conforming the indenture to the requirements of the Act upon only a limited or conditional basis. Accordingly, in order that the indenture may be regarded as fully qualified, there should be inserted in any such provision the affirmative statement that any supplemental indenture will conform to the requirements of the Act. No objection is made if, for this purpose, the amendment is required to conform to the Act as in effect at the time of the execution of such amendment. In the past, a number of indentures were permitted to become qualified which contained only the negative statement that no supplemental indenture would conflict with the requirements of the Act. In view of the fact that a supplemental indenture may insert provisions which do not themselves conflict with the Act but which make necessary the insertion of statutory language or changes in statutory indenture provisions, it is customarily urged that the statement be made in affirmative form.

4/ Id. at p. 636.

Deficiencies

The provisions inserted in the indenture pursuant to the requirements of the Act should be in such form that they will be applicable to all holders of securities outstanding thereunder.

Provisions of the indenture for amendment by the company and the trustee or by a percentage vote of security holders should affirmatively require that any supplemental indenture will conform to the requirements of the Act.

When provisions of the indenture reflecting statutory provisions are made not operative until the indenture is formally qualified under the Act, a provision should be inserted at time of qualification declaring such provisions to be operative.

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AMERICAN BAR FOUNDATION

CORPORATE DEBT FINANCING PROJECT

SAMPLE INCORPORATING INDENTURE

(Demonstrating a Method of Incorporating by Reference Model Debenture Indenture Provisions—All Registered Issues—1967)

AND

MODEL DEBENTURE INDENTURE PROVISIONS ALL REGISTERED ISSUES 1967

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FOREWORD

Since 1963 the trend toward the use of corporate obligations in registered, rather than in coupon, form has been so pronounced that it can even be called phenomenal. In 1966, on a conservative estimate, more than $6 billion of corporate obligations solely in registered form were offered to the public in contrast to none in 1962, and only about $218 million in 1963. As the registered obligations movement has been responsive to the needs of investors and issuers alike, it may safely be predicted that its growth will continue.

It is, therefore, fitting that the Corporate Debt Financing Project of the American Bar Foundation[1] should follow the Model Debenture Indenture Provisions and the related Sample Incorporating Indenture published in 1965, with its "Model Debenture Indenture Provisions—All Registered Issues—1967" and the related Sample Incorporating Indenture. These instruments, like their predecessors, undoubtedly will be of great value to the financial community and members of the corporate bar. In this Foreword I shall endeavor to record a brief history of the movement toward registered obligations, the basic reasons why registered obligations meet the needs of the day, and how the "Model Debenture Indenture Provisions—All Registered Issues—1967" and the related Sample Incorporating Indenture treat certain of the technical problems inherent in registered obligations.

It was Rabelais who said, "What cannot be cured must be endured." No doubt the Greeks had said it long before. This philosophy seemed to permeate the financial community before the 1960's whenever the subject of registered obligations as a substitute for those with coupons was broached. The coupon form of obligation as a device for evidencing corporate debt was deeply entrenched although it was apparent that the registered form had many attractive benefits, such as the convenience of receiving interest by check, greatly reduced storage and handling costs, reduction of risks in the case of loss or theft, and the advantage both to investor and issuer of better notice procedures.

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[1]For a review of this project, see Churchill Rodgers, *The Corporate Trust Indenture Project*, 20 BUSINESS LAWYER 551 (1965).

Registered obligations, when exchangeable for coupon obligations, historically sold at several points in the market below those in coupon form of the same issue and maturity. As a general rule, registered obligations were not "good delivery" in the market and had to be exchanged for coupon obligations which always involved some delay in delivery. Inertia to a great degree, and the old fact that everyone's business is nobody's business, were not conducive to producing a concerted effort toward breaking down barriers and educating the investing public to the effect that there was no reason for issues in registered form to sell at a discount and, on the contrary, that there were compelling economic reasons for making a change.

Since World War II, we have seen many changes in method produced by change in technology. The computer alone has revolutionized our business methods. The coupon obligation problem, however, required a change in method through persuasion. It was necessary to convince the financial community that use of a different method would involve savings in labor and costs, economies in storage, and substantial benefits both to issuers and investors. Involved was abandoning a device, the coupon form of obligation, which had been used for well over 100 years, in favor of a device, the registered form, which had been in disfavor in the market place, as the preferred form of debt obligation to meet the requirements of a new and fast moving financial age.

There was nothing new about the registered form of obligation in corporate financing. Almost every corporate issue gave the holder the right to exchange coupon obligations for those in registered form and vice versa, at a fee (usually $2 per obligation), and at the risk of considerable delay in completing the mechanics of the exchange. New was the proposition that issues of obligations solely in registered form should be used for most corporate issues, which logically pursued could mean the eventual elimination of coupon obligations. This decidedly was a revolutionary concept.

In retrospect, the time was ripe for a change. With the advent of the Securities Act of 1933, a substantial part of corporate debt financing was effected through direct placement with insurance companies and other institutional investors. Bonds and deben-

tures thus issued were originally in registered form with provision for exchange into coupon form. Later it became quite common in direct placements for the institutional investor to take notes payable to the investor or order. Thus these institutional investors became fully aware of the savings in costs and space which were available through obligations which were not in coupon form. With rising costs and storage difficulties, trust companies and other large investors were eager to be free from the burden of handling and storing coupon obligations, and the cutting and processing of coupons. One trust company alone reported that it had one and one-half miles of shelf space devoted to coupon obligations. The saving in space was dramatically illustrated by a report from the Treasurer of the State of California that he had reduced a ton and a half of coupon bonds to less than ninety pounds by exchanging the coupon bonds for registered bonds. The prospects of savings in physical labor, costs of storage, coupon cutting and collection, as well as the convenience of receiving interest payments by check, indeed were most inviting. Changes in transportation also made the registered form more feasible. The use of air mail had expedited inter-city deliveries of bonds and reduced the possibility of delays in transfers. Also the investing public had become accustomed to the idea of a security in registered form through Government "E" bonds and through broader ownership of stock.

The enactment of Article 8 of the Uniform Commercial Code clarified problems which had affected obligations in registered form for many years. One troublesome problem involved the position of a bona fide purchaser of an obligation in registered form endorsed in blank which had been stolen or fraudulently transferred by a third party. Under the Uniform Stock Transfer Act in such a case a bona fide purchaser of shares of stock was protected, but until the enactment of the Uniform Commercial Code a bona fide purchaser, such as a bank making a loan against the security of a registered obligation which had been endorsed in blank and then stolen or fraudulently negotiated, would stand in no higher position than his immediate transferor. This was because the obligation was payable to registered assigns and was not a negotiable instrument under the Negotiable Instruments Law.

In Section 8-102 of the Code this problem was cured by providing that an instrument in bearer or registered form which is commonly recognized as a medium for investment comes within the definition of a security, and in Section 8-105 "securities" governed by Article 8 are made "negotiable instruments". Section 8-202 protects a bona fide purchaser of a "security" against defenses of the issuer except lack of genuineness, and under Section 8-301 he is protected against any adverse claims. Registered obligations, coupon obligations and stock certificates were thereby put in the same category. Other changes in the Code which were of benefit in making registered obligations better vehicles for commercial transactions include those in Section 8-207 which provides that prior to presentment for transfer the issuer or indenture trustee may treat a registered owner as the person entitled to receive notices and to exercise the rights of an owner, and Section 8-311 which protects a bona fide purchaser after registration even though the endorsement on the instrument transferred had been forged.

The Business Lawyer in its July 1962 issue (Vol. 17, p. 844) carried an article entitled *"The Coupon Bond—A Costly Paradox"*, by the undersigned. This article discussed the pros and cons of coupon and registered obligations. The conclusion was reached that there was no reason for the market to discriminate against registered obligations and that the problem of discrimination would be resolved by issues solely in registered form. The article produced a response which indicated that the time had arrived when a concerted effort should be made to give greater currency to registered obligations. A supplemental article was published in the January 1963 issue of *The Business Lawyer* (Vol. 18, p. 429) which told of the activation of a Special Committee of the American Bankers Association to promote a wider use of registered obligations. It is to this Special Committee, and, in particular, its able chairman, Russell H. Johnson, Executive Vice President of the United States Trust Company, that the credit should go for the remarkable success of the registered obligations movement since 1962.

The Special Committee, through speeches, writings and publicity, served as an educational catalyst to crystallize the sentiment in the financial community for registered obligations. The

savings, convenience and other benefits of registered obligations to issuers and investors were stressed. Technical difficulties were not ignored, and an effort was made to find solutions. Issuers with outstanding obligations were urged to waive fees on exchanges between coupon and registered obligations and to assure investors making exchanges to registered form that prompt exchanges to coupon obligations would be available. This endeavor was highly successful. For 1963, 48 corporations alone reported an increase of registered obligations of more than $1 billion principal amount in which 854,864 coupon pieces were exchanged for 13,641 pieces in registered form.

The movement was also helped in 1963 by the "Firestone Plan", in which an issue of coupon and registered obligations interchangeable without cost would be issued originally in registered form unless the purchaser asked for the coupon form. The "Firestone Plan" resulted in significant amounts of registered obligations being placed in the hands of investors and undoubtedly created a favorable climate among investors for all registered issues. It is difficult to estimate the amount of registered obligations issued under the "Firestone Plan", but it is believed that well over $1 billion of obligations in registered form were issued through the "Firestone Plan" in the first seven months of 1964.

It was contended that the turning point in the registered obligations movement would be the successful offering and acceptance by investors of a large issue in fully registered form. There was no major issue of obligations sold to the public before 1963 to support the thesis that an issue solely in registered form, for which transfers and exchanges would be expeditiously made, could be sold on a parity with an issue of obligations in coupon form. According to *The New York Times*, at the end of 1962 there were two issuers ready to bring out bonds solely in registered form, but "each company wants to be second".

The break came in July of 1963 when United Aircraft brought out $42,884,700 4½% Subordinated Debentures due August 15, 1988 on a rights offering to its shareholders. Thereafter, Consolidated Edison sold at competitive bidding $75,000,000 First Mortgage and Refunding Bonds, 4⅛% Series due 1993, and Bankers Trust Company of New York sold $100,000,000 Capital Notes due 1988 to the public through a negotiated sale to underwriters.

These offerings, in "all registered" form, were successful and convinced the financial community that issues solely in registered form could be sold without fear of discrimination and that the administration of such issues could be handled satisfactorily by the corporate trustees and others involved.

The success of the registered obligations movement since 1963, as stated, has been phenomenal.[2] Based alone on offerings mentioned in Moody's Bond Survey, the estimates of corporate debt issues solely in registered form are these:

	Number of Issues	Total Principal Amount
1964	17	$ 634,770,625
1965	74	3,890,523,594
1966	125	6,044,718,250

The foregoing, of necessity, has dealt only with the highlights of the registered obligations movement. The technical problems, however, cannot be ignored although they appear to be diminishing. Throughout it has been apparent that the trader who buys a bond or debenture in fully registered form and sells it in smaller denominations on the same day must have the ability to break down the bond into required denominations in order to make delivery within the customary four-day settlement period. The alternative is delay in delivery and carrying charges which, under the practice in the securities markets, fall upon the seller who cannot make delivery. There are several devices which may help in the solution of this problem, including an interim receipt used by Bankers Trust Company, or a fiduciary receipt suggested in 1964 by the undersigned.[3]

Joseph C. Kennedy, Vice President of Bankers Trust Company of New York, who has long been interested in the registered obligations movement, and Robert I. Landau, Assistant Vice President of Bankers Trust Company of New York, are co-authors of an article in the January 1967 issue of *The Business Lawyer* (Vol. 22, p. 353) entitled, "*Recent Developments in Debt Financing and*

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[2]Moody's Bond Survey of February 27, 1967 with respect to new issues did not show a single public utility or industrial issue in coupon form. There were nine issues totaling $370,000,000 in all registered form.

[3]Orvel Sebring, "*The Registered Bond Comes of Age.*" Address, American Life Convention, October 14, 1964.

Corporate Trust Administration.". This article deals in part with technical problems relating to registered bonds and is commended to those who are interested in such details.

Messrs. Kennedy and Landau discuss problems relating to transfers after initial distribution; those relating to registration and exchange facilities; the record date for interest payments; the dating of obligations; and the selection of obligations for partial redemption. The authors also point out technical problems inherent in convertible issues, which should be studied by counsel dealing with an issue of this kind. Recently certain holders of a convertible debenture issue in coupon form of a national corporation lost valuable conversion rights as they were not aware of the *published* call of the debentures and thus did not present their debentures for conversion prior to the expiration of the conversion right on the redemption date. To avoid such results issuers undoubtedly will continue to give serious attention to the registered form for convertible issues so as to require notice of redemption to be *mailed* to each holder, although, as indicated by Messrs. Kennedy and Landau, from the issuer's standpoint the cash cost of a convertible issue in registered form will probably exceed one in coupon form.

The Corporate Debt Financing Project of the American Bar Foundation has made a distinct contribution to corporate finance, and to all those who helped produce the Model Debenture Indenture Provisions and the Sample Incorporating Indenture should go the congratulations and appreciation of the financial community—lawyers, issuers, investors and underwriters.

It is now particularly fitting, with the growth of the registered obligations movement, that the Project should include model provisions for issues of bonds and debentures solely in registered form. In this effort the draftsmen have worked with an ear open to practical suggestions of those whose business it is, on a day to day basis, to deal with issues of obligations solely in registered form. The "*Recommended Procedures for Registered Bond Issues*" of the Corporate Trust Activities Committee, American Bankers Association (1966), contained many helpful suggestions which have been considered in preparing the "Model Debenture Indenture Provisions—All Registered Issues—1967" and the related Sample Incorporating Indenture. Also, drafts of these

two documents were sent to the trust officers of some 40 fiduciary institutions in 13 cities for their consideration and comments. Comments received from these trust officers proved to be invaluable.

The two documents published in this volume deal with all technical problems which are inherent in the instrument because it is in registered form, except those in the negotiable area such as convertibility. These understandably were omitted but will be the subject of a commentary as part of the Project.

It would not be possible in this review to itemize each point covered, but the following catalog of the more significant points may be of interest:

Dating of Debentures. It is clearly stated in Section 303[4] that all Debentures shall be dated the date of their authentication.

Record Dates. One of the benefits of a registered obligation is the ability of the investor to receive interest by check. To accomplish this result requires a mechanical device of having a record date so that the Trustee can have an opportunity to make a list of the holders of the obligations of record on a given date and then prepare the interest checks for mailing. Section 307 accomplishes this purpose by providing that interest is to be paid to persons in whose names Debentures are registered at the close of business on a Regular Record Date as specified in Article Three of the Indenture. Article Three adopts a simple and uniform system of fixing Regular Record Dates with relation to Interest Payment Dates—a most desirable practice—and carefully points out (Sample Incorporating Indenture page 7, lines 3 to 6) that the Interest Payment Date should be either the first or the 15th day of a month. In the former case the Regular Record Date will be the 15th, and in the latter case will be the last day of the next preceding calendar month.

Defaulted Interest. Section 307 also deals with the problem of Defaulted Interest and provides for a Special Record Date for the payment of such interest.

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[4]Section references are to "Model Debenture Indenture Provisions—All Registered Issues—1967" unless otherwise indicated. "Indenture" herein means the Sample Incorporating Indenture.

Partial Redemptions. To permit the orderly selection of the particular obligations to be redeemed, Section 305 provides for the closing of the transfer books for a period of fifteen days prior to the mailing of notice of the redemption of the obligations selected.

Authenticating Agent. The problem of multicity transfers is dealt with in several interlocking provisions. In § 3-1 of the Indenture "Place of Payment" may be defined to include offices or agencies of the Company in more than one city. Section 305 provides that Debentures may be surrendered for transfer "at the office or agency of the Company in a Place of Payment"; and Section 1002 requires the Company to maintain "an office or agency in each Place of Payment" where Debentures may be surrendered for transfer. In the absence of an Authenticating Agent, the office or agency of the Company in a Place of Payment other than the office of the Trustee does no more than forward the surrendered Debenture to the Trustee, and receive the new Debenture from the Trustee. The actual transfer, including the registration thereof on the Debenture Register and the authentication of the new Debenture, is processed at the office of the Trustee, which then forwards the new Debenture to the office or agency of the Company where the old Debenture was surrendered. With the appointment of one or more Authenticating Agents pursuant to § 6-14 of the Indenture, however, transfers can be fully processed at the office of an Authenticating Agent without incurring the delay involved in forwarding Debentures to and from the Trustee.

Debenture Forms. Section 201 expressly provides that any portion of the text of any Debenture may be set forth on the reverse thereof with appropriate reference thereto on the face of the Debenture. This style has been followed in most issues in the past few years and has greatly helped the investor both by reducing the size of the paper he receives and in emphasizing the all registered device. In making this provision, the draftsmen have again adopted for the Model Provisions a practice in the financial field which has been well received.

The great value of the Model Provisions and related Sample Incorporating Indentures prepared by the Project, aside from

permitting the device of incorporation by reference of substantial portions of an indenture, lies in the presentation to the members of the corporate bar of draftsmanship of high quality. The Project undoubtedly will have an influence on a considerable proportion of the documents under which registered obligations will be issued in the future. In particular, the Model Debenture Indenture Provisions should have a salutary effect in bringing about greater uniformity in the practical aspects of techniques applicable to registered obligations. For example, the provisions concerning the dating of Debentures, specifying the date from which interest accrues and fixing the Regular Record Date as either the last or the 15th day of a month should be constructive steps toward a uniform practice.

The registered obligations movement has come far since 1962, as attested by the more than $6 billion of obligations solely in registered form, publicly offered during 1966. For any pioneering effort, and particularly for a highly successful one, there are problems which require the attention of an experienced, professional body. The work of the American Bar Foundation Project, coming at this juncture in the registered obligations movement, is most timely. Its effect should be constructive and helpful in the financing of American business and to that growing body of investors who prefer the convenience, safety, economy and other benefits inherent in registered obligations.

ORVEL SEBRING

Philadelphia, Pa.
July 1967

INTRODUCTION

to

MODEL DEBENTURE INDENTURE PROVISIONS ALL REGISTERED ISSUES—1967

and related

SAMPLE INCORPORATING INDENTURE

In 1965 the American Bar Foundation published the "Model Debenture Indenture Provisions—1965" together with a related Sample Incorporating Indenture. The 1965 Model Provisions contemplated the issuance of debentures both in bearer form registerable as to principal with interest coupons attached and in fully registered form without coupons. In this respect, the 1965 Model Provisions reflected what theretofore had been the almost universal practice. There was at that time already a movement in progress to encourage the abandonment of the coupon form, as Orvel Sebring explains in the Foreword to this volume, but there was little indication that the "all registered" movement would progress as completely and as rapidly as it has.

The 1965 Model Provisions can be, and in fact have been, used for an all registered issue. It is possible through relatively simple provisions in the Sample Incorporating Indenture to delete from the Model Provisions all references to coupon debentures and coupons and to state that debentures will be issued only in fully registered form. There should be no question about the legal adequacy of this technique, but it no doubt has not seemed attractive to most draftsmen. Furthermore, certain special problems of a technical nature became apparent as experience developed with the all registered issue. The more significant of these are identified by Mr. Sebring in the Foreword. The solutions of these special problems did not appear in the 1965 Model Provisions, as these solutions had not been generally agreed upon and standardized at the time of publication. In the early part of 1966, the Corporate Trust Activities Committee of the American Bankers Association promulgated its "*Recommended Procedures for Registered Bond Issues*" offering solutions to many of the special problems peculiar to all registered issues. Thereupon the

officers of the Project decided that the time had come to produce this all registered version of the Model Provisions and the related Sample Incorporating Indenture, with the hope that it would not only be useful to the draftsmen unfamiliar with the special problems of the all registered form, but would also encourage the standardization of certain basic administrative provisions.

The 1967 All Registered Model Provisions, like the 1965 Model Provisions, are intended for use either intact, as "Exhibit A", to be incorporated by reference, or for direct use in an indenture in conventional form. The Introduction to the 1965 Model Provisions included explanations and instructions to aid the draftsman in using the Model Provisions. Since in these respects the 1967 and the 1965 Model Provisions are alike, the Introduction to the 1965 Model Provisions is re-printed in this volume. There is also reproduced on the following pages a letter from the Securities and Exchange Commission with regard to their examination of the 1967 Model Provisions and the related Sample Incorporating Indenture, with particular reference to conformity of these documents with the Trust Indenture Act of 1939.

LEONARD ADKINS LAWRENCE BENNETT
Co-Directors

INTRODUCTION

to

MODEL DEBENTURE INDENTURE PROVISIONS 1965

and related

SAMPLE INCORPORATING INDENTURE

The documents in this book represent the attainment of the initial objective of the American Bar Foundation's Corporate Debt Financing Project. The background, philosophy and program of the Project have been discussed by Churchill Rodgers in *The Corporate Indenture Project*, 20 Bus. Law. 551 (April, 1965). Mr. Rodgers there explains that the Sample Incorporating Indenture and the Model Debenture Indenture Provisions (the documents published herein) will be the subject of Commentaries which will appear in book form. These Commentaries will describe in appropriate detail the considerations which have led to the specific texts of these two documents. They will also discuss, and give examples of, those indenture provisions which are commonly negotiated and not susceptible of treatment in model form.

It is not the purpose of this introduction to anticipate the Commentaries by attempting to set forth any explanation or justification of specific provisions. The experienced practitioner will naturally be curious on many points, and there was some temptation to defer distribution of these documents until the Commentaries were ready to accompany them. On the whole, however, it has seemed more sensible to publish the completed documents with this brief explanation of how they are intended to be used. They will thus become available for use immediately.

The governing pattern of the two documents is the separation of negotiated and non-negotiated provisions, and the statement of the non-negotiated provisions in model form. It is the expectation that these Model Provisions will become commonplace, standardized "boilerplate". The beneficial results should be two-fold. The draftsman is spared the burden of contriving and the reader, of understanding different phrasing for ex-

pressing the same thought. The physical separation of the negotiated provisions should also facilitate negotiation. That is to say, it will make readily apparent to all concerned what needs to be negotiated and decided.

Obviously, the separation cannot be perfect for all purposes. In deciding what should go in the Model Provisions the Directors and the Steering Committee have striven for complete objectivity. The selection has been based not upon any doctrinaire views as to what should or should not be negotiated, but upon what has in fact been the prevailing practice. Inevitably situations will arise in which the Model Provisions are inappropriate in some particular context. Provision is made in the Sample Incorporating Indenture for expressing specific deviations from the Model Provisions. The fact that they will not fit every situation in every respect should not detract from their overall usefulness.

The Model Provisions are designed to be used by physical attachment, intact, to an "incorporating" indenture. The Sample Incorporating Indenture illustrates how this might be done. The Incorporating Indenture is thus *the* "Indenture". It is "this instrument" executed by the "Company" and the "Trustee". The Model Provisions are attached as Exhibit A. The Model Provisions are not an "instrument". They constitute only a collection of material designed to be incorporated by reference into the Indenture. Thus, the Model Provisions become operative only to the extent that they are so incorporated. When any provision is so incorporated,

> "such provision of the Model Provisions shall be deemed to be a part of this instrument as fully to all intents and purposes as though said provision had been set forth in full in this instrument". (Sample Incorporating Indenture, Page 1, Lines 15-17).

The incorporation by reference is not intended to be in gross but item by item, as appropriate.

The special numbering system for the Model Provisions facilitates this step by step incorporation. The number of the first article of the Indenture (illustrated by the Sample In-

corporating Indenture) is *One*, and sections within the article are designated by the symbol § and are numbered "1-1", "1-2" and upwards. Subsequent articles of the Indenture are numbered *Two* and upwards. In contrast to this, the first article of the Model Provisions is numbered "100", and sections within the article are designated by the word "Section" and are numbered Section "101", "102" and upwards. Subsequent articles of the Model Provisions are numbered 200 and upwards. This permits the numbering systems to be separately identifiable and yet coordinated, so that, for example, § 2-1 (of the Sample Incorporating Indenture) incorporates by reference Section 201 of the Model Provisions, and similarly with § 2-2 and upwards. For § 2-4, however, there is no corresponding Model Provision, this being the section reserved for the form of interest coupon, which is a negotiated provision. The draftsman of the Indenture must provide the specific text for § 2-4. What appears as § 2-4 of the Sample Incorporating Indenture is an illustrative example suggesting certain possible variables that might be negotiated; but it is not a Model Provision.

Article Ten of the Indenture provides a more complex illustration. Sections 1001 and 1007 of the Model Provisions set forth certain general covenants which appear in virtually all debenture indentures. Unless in a particular case there is some reason to vary these Model Provisions, they may be incorporated by reference intact by §§ 10-1 through 10-7 of the Indenture. Thereafter, according to the scheme of these documents, would follow the negotiated covenants. These must be set forth in full text in the Indenture and numbered § 10-8 et seq. The Commentaries will give actual examples of some of the more common negotiated covenants, but these examples are not intended as models to be incorporated by reference. They will be examples which the draftsman may use, modify or ignore as the business requirements of the particular financing indicate.

In certain instances the Indenture should supply a specification that is called for in the Model Provisions. See, for example, Article 600 of the Model Provisions. Section 609 of the Model Provisions refers to the principal office of the Trustee "specified in *Article Six*". ("Article Six", by the numbering system of these documents is necessarily a reference to the Indenture,

or "incorporating indenture". The corresponding article of the Model Provisions is "Article 600"). Article Six of the Sample Incorporating Indenture illustrates the technique for supplying the specification in the second (unnumbered) paragraph by stating:

> The location of the principal office of the Trustee referred to in § 6.9* shall be the City of....

The draftsman has further room for variation. He may incorporate by reference a section of the Model Provisions except for a change or addition set forth in the incorporating indenture. Alternatively he may simply omit to incorporate some section of the Model Provisions and state in full text in the incorporating indenture the negotiated agreement of the parties on the particular matter involved.

The draftsman intent upon utilizing these documents in the manner recommended by the Project should begin with the Sample Incorporating Indenture. It sets out the skeleton of an indenture. He should then provide therein the full text with respect to those matters for which there are no Model Provisions; incorporate the appropriate Model Provisions, as necessary to reflect the agreement of the parties; and supplement, amend, or supersede other Model Provisions as appropriate.

While this is the recommended use, it is not the only use which may be made of the Model Provisions. They may, for instance, be reprinted (to the extent so agreed) in an indenture of the conventional type, instead of being attached in full as Exhibit A. Both methods have equal validity. Assuming that copies of the Model Provisions are readily available in quantity at moderate cost, so that attachment of a set of the Model Provisions to each copy of an indenture is easy and inexpensive, reprinting all or part of the Model Provisions in a particular indenture seems to be unnecessarily expensive to the issuer. Nevertheless, if the draftsman prefers, the Model Provisions are equally available for such reprinting, in whole or in part.

The Sample Incorporating Indenture and Model Provisions have been subjected to examination and comment by members

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*Section 609 of the Model Provisions when incorporated into the Indenture becomes § 6.9.

of the Stock List Department of the New York Stock Exchange; by representative corporate trust officers of major banks or trust companies active in this field in nine cities—Birmingham, Boston, Chicago, Houston, Los Angeles, New York, Philadelphia, San Francisco and Washington;* and by an ad hoc consultative committee of the American Institute of Certified Public Accountants.† Many helpful suggestions of these groups are reflected in the documents in this book. These documents have also been examined by the Securities and Exchange Commission with particular reference to their conformity with the Trust Indenture Act of 1939, and the Foundation has received from the Commission the letter reproduced on the pages following. We therefore believe that the Model Provisions are practically and legally sound and have reached their present stage of as much adaptability and general acceptability as could reasonably be hoped for in an undertaking of this scope. While the draftsman must examine the Model Provisions with care to determine their applicability to a particular financing, we have used great care to assure ourselves that these Model Provisions are sound and workable for most debenture issues. We hope, therefore, that the draftsman can begin with a fair assumption that the Model Provisions will serve satisfactorily unless special circumstances require alteration.

The sole purpose of these documents is to enable businessmen and their counsel to concentrate their time and attention on negotiation, and the drafting of provisions expressing the results of negotiation. We hope that these documents contribute to this process, and that they commend themselves to the Bar and the financial community.

LEONARD ADKINS LAWRENCE BENNETT
Co-Directors

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*The 1967 all registered documents were sent for examination and comment to corporate trust officers of forty major banks and trust companies in thirteen cities—Atlanta, Birmingham, Boston, Chicago, Dallas, Houston, Los Angeles, New York, Philadelphia, Pittsburgh, St. Louis, San Francisco and Wilmington.

†As the 1967 all registered documents presented no new accounting problems, they were not submitted to the A. I. C. P. A. ad hoc committee.

American Bar Foundation

SAMPLE INCORPORATING INDENTURE

(Demonstrating a Method of Incorporating by Reference Model Debenture Indenture Provisions—All Registered Issues—1967)

APPROVED AND ADOPTED
JULY 1967

.....

and

.....

Trustee

Indenture

Dated as of ....., 19..

$.....

...% ..... DEBENTURES DUE ....

TABLE OF CONTENTS*

*In this Table of Contents, any reference to any "§" is to the designated subdivision of this instrument, and any reference to any "Section" is to the designated Section of the Model Provisions.

This Indenture dated ....., between ....., a ..... corporation (hereinafter called the "*Company*") having its principal office at [*Here insert street address for purposes of Section 105 of the Model Provisions*], and ....., a ..... corporation (hereinafter called the "*Trustee*"), sets forth certain of its provisions in full and incorporates others of its provisions by reference to the document entitled "AMERICAN BAR FOUNDATION-MODEL DEBENTURE INDENTURE PROVISIONS—ALL REGISTERED ISSUES—1967" (herein called the "*Model Provisions*") annexed hereto as *Exhibit A*, and such provisions as are set forth in full and such provisions as are incorporated by reference constitute a single instrument.

Whenever this instrument incorporates herein by reference, in whole or in part or as hereby amended, any provision of the Model Provisions, such provision of the Model Provisions shall be deemed to be a part of this instrument as fully to all intents and purposes as though said provision had been set forth in full in this instrument.

Recitals of the Company

The Company has duly authorized the creation of an issue of its Debentures (hereinafter called the "Debentures") of substantially the tenor and amount hereinafter set forth, and to provide therefor the Company has duly authorized the execution and delivery of this Indenture.

All things necessary to make the Debentures, when executed by the Company and authenticated and delivered hereunder and duly issued by the Company, the valid obligations of the Company, and to make this Indenture a valid agreement of the Company, in accordance with their and its terms, have been done.

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

For and in consideration of the premises and the purchase of the Debentures by the Holders thereof, it is mutually covenanted and agreed, for the equal and proportionate benefit of all Holders of the Debentures, as follows:

ARTICLE ONE

Definitions and Other Provisions of General Application

§ 1-1. Definitions.

(a) For all purposes of this Indenture, except as otherwise expressly provided or unless the context otherwise requires:

(1) "This Indenture" means this instrument as originally executed or as it may from time to time be supplemented or amended by one or more indentures supplemental hereto entered into pursuant to the applicable provisions hereof.

(2) All references in this instrument to designated *"Articles"*, *"Sections"* and other subdivisions are to the designated Articles, Sections and other subdivisions of this instrument as originally executed. The words *"herein"*, *"hereof"* and *"hereunder"* and other words of similar import refer to this Indenture as a whole and not to any particular Article, Section or other subdivision.

(3) Any reference in the Model Provisions to any particular Article or Section or other subdivision of the Model Provisions which is incorporated in this Indenture shall be a reference to the Article or Section or other subdivision of this Indenture incorporating such particular Article, Section or other subdivision.

(b) Definitions from Model Provisions.

Section 101 of the Model Provisions is herein incorporated as Subsection (b) of § 1-1 hereof.

(c) Other Definitions.

["Authenticating Agent" means the Person named as Authenticating Agent in § *6-14* until a successor Authenticating Agent shall have become such pursuant to § *6-14*, and thereafter "Authenticating Agent" shall mean such successor.]

[*Here insert additional definitions, if any, of general application.*]

§§ 1-2 through 1-10.

Sections 102 through 110 of the Model Provisions are herein incorporated as §§ 1-2 through 1-10 hereof respectively.

[*If the Indenture is to be qualified under the Trust Indenture Act, there should be added at this point an additional paragraph reading substantially as follows:*

"It is intended that this Indenture shall be qualified under the Trust Indenture Act and, accordingly, it is hereby declared that § 1-2 shall become operative forthwith."]

§ 1-11. Benefits of Indenture.

Nothing in this Indenture or in the Debentures, express or implied, shall give to any Person, other than the parties hereto and their successors hereunder [, the holders of Senior Debt] and the Holders of Debentures, any benefit or any legal or equitable right, remedy or claim under this Indenture.

[*The bracketed language above is to be used only if the Debentures are subordinated to certain specified "Senior Debt".*]

§ 1-12. Governing Law.

This Indenture shall be construed in accordance with and governed by the laws of the State of .....

ARTICLE TWO

Debenture Forms

§§ 2-1 through 2-3.

Sections 201 through 203 of the Model Provisions are herein incorporated as §§ 2-1 through 2-3 hereof respectively.

[*Since Section 201 of the Model Provisions provides for appropriate insertions, omissions, substitutions and variations in the Debenture forms required or permitted by other provisions of the Indenture, the filling in of the blanks in the form set out in Section 202 is not essential.*

As an alternative, the draftsman may prefer not to incorporate the form by reference but to set forth the form in full in the Incorporating Indenture, particularly if there is to be an Authenticating Agent.

Another alternative is to incorporate the form of Section 202 by reference and in addition specify, by reference to page and line numbers, the matters to be inserted in all the blanks. All three methods are feasible and legally sufficient.

If there is to be an Authenticating Agent, (i) Section 202 of the Model Provisions, if incorporated by reference, must first be amended by inserting the words "or on behalf of" after the first "by" in line 17 on page 14, and (ii) the following should be added as § 2-4:

"§ 2-4. Form of Authenticating Agent's Certificate of Authentication.

"This is one of the Debentures referred to in the within-mentioned Indenture.

ON BEHALF OF THE TRUSTEE

.....
Authenticating Agent

By .....
Authorized Officer"]

ARTICLE THREE

The Debentures

§ 3-1. Title and Terms.

The aggregate principal amount of Debentures which may be authenticated and delivered under this Indenture is limited to $....., except for Debentures authenticated and delivered upon transfer of, or in exchange for, or in lieu of other Debentures pursuant to §§ 3-4, 3-5, 3-6, 9-6 or 11-8.

The Debentures shall be known and designated as the "...% ..... DEBENTURES DUE ....." of the Company. Their Stated Maturity shall be ....., and they shall bear interest from *(commencement of first interest period)*, or from the most recent Interest Payment Date to which interest has been paid or duly provided for, payable semi-annually on..... ..... and ..... in each year, at the rate(s) set forth in the following text which shall be inserted in the Debentures at the respective points indicated therefor in the Form of Debenture set forth in Section 202 of the Model Provisions:

[One Example of Text to be Inserted]

".....% per annum until the principal hereof is paid or made available for payment."

[Another Example of Text to be Inserted]

"...% per annum until the principal hereof becomes due and payable, and at the rate of ...% per annum on any overdue principal and premium and (to the extent that the payment of such interest shall be legally enforceable) on any overdue instalment of interest."

[*The choice as to which of the foregoing examples is to be used will always be a matter for negotiation.*]

[The principal and the Redemption Price of, and the interest on, the Debentures shall be payable at the office or agency of the

Company in the City of ..... (herein called the "*Place of Payment*").]

or

[The principal and the Redemption Price of the Debentures shall be payable at the office or agency of the Company in the City of ..... or, at the option of the Holders of the Debentures, in the City of ..... (each of said cities being herein called a "*Place of Payment*"). Interest on each Interest Payment Date shall be payable at the office or agency of the Company in the City of .....]

[*The provisions with respect to the Place or Places of Payment must be drafted with due regard to the requirements of any securities exchange on which the Debentures are to be listed.*]

The Debentures shall be redeemable as provided in *Article Eleven*.

[The Debentures shall be entitled to the benefits of, and be redeemable for, the Sinking Fund as provided in *Article Twelve*.]

[The Debentures shall be convertible into Common Stock of the Company as provided in *Article Thirteen*.]

[The Debentures shall be subordinated in right of payment to certain other indebtedness of the Company as provided in *Article Fourteen*.]

§ 3-2. Denominations.

The Debentures may be issued in denominations of $....., $....., etc. and any multiple of $1.000 [and such multiples, if any, of $1,000 as the Company may from time to time authorize].

§§ 3-3 through 3-9.

Sections 303 through 309 of the Model Provisions are herein incorporated as §§ 3-3 through 3-9 hereof respectively.

The Regular Record Date referred to in § 3-7 for the payment of the interest payable, and punctually paid or duly provided for, on any Interest Payment Date shall be the [15th]

[last] day (whether or not a business day) of the calendar month next preceding such Interest Payment Date.

[*It is assumed that the Interest Payment Date will be either the first or the 15th day of a month. In the former case, the Regular Record Date will be the 15th, and in the latter case the last, day of the next preceding calendar month.*]

§ 3-10. Authentication and Delivery of Original Issue.

Forthwith upon the execution and delivery of this Indenture, or from time to time thereafter, Debentures up to the aggregate principal amount of $..... may be executed by the Company and delivered to the Trustee for authentication, and shall thereupon be authenticated and delivered by the Trustee upon Company Order, without any further action by the Company.

[*In the majority of cases, the dollar amount to be inserted in the blank in line 10 on this page will be the same as the amount inserted in the blank in line 6 on page 5. If, in any particular case, the negotiated terms provide that some portion of the total authorized amount of the Debenture issue may be authenticated and delivered only upon compliance with certain conditions precedent (e.g. meeting an earnings test), this § 3-10 must be modified to reflect these negotiated terms.*]

ARTICLE FOUR

Satisfaction and Discharge

Article 400 of the Model Provisions is herein incorporated as Article Four hereof, Sections 401 and 402 of the Model Provisions being §§ 4-1 and 4-2 hereof respectively.

ARTICLE FIVE

Remedies

§ 5-1. Events of Default.

Section 501 of the Model Provisions is hereby amended by adding thereto the following:

[*Here insert additional Events of Default to reflect the negotiated terms of the Debenture issue, including, among others, the treatment of subsidiaries.*]

Section 501 of the Model Provisions, as so amended, is herein incorporated as § 5-1 hereof.

§§ 5-2 through 5-15.

Sections 502 through 515 of the Model Provisions are herein incorporated as §§ 5-2 through 5-15 hereof respectively.

The required percentage in principal amount of the Outstanding Debentures referred to in § 5-13 shall be ....%.

[*Section 316(a)(1) of the Trust Indenture Act of 1939 (TIA) provides that this percentage must be "not less than a majority". Ordinarily this percentage would be the same as the percentage required for approval of a supplemental indenture under Section 902 of the Model Provisions.*]

ARTICLE SIX

The Trustee

§§ 6-1 through 6-13.

Sections 601 through 613 of the Model Provisions are herein incorporated as §§ 6-1 through 6-13 hereof respectively.

The location of the principal office of the Trustee referred to in § 6-9 shall be the City of ..... [or the City of .....].

[*If the Indenture is to be qualified under the Trust Indenture Act, there should be added at this point an additional paragraph reading substantially as follows:*

"It is intended that this Indenture shall be qualified under the Trust Indenture Act and, accordingly, it is hereby declared that §§ 6-8 and 6-13 shall become operative forthwith."]

[*If, in any particular case, it seems probable that an active market in the Debentures will exist in some place other than the*

location of the office of the Trustee, the parties may decide upon, or the rules of a securities exchange may require, the appointment of an Authenticating Agent. If an Authenticating Agent is to be appointed, an additional § 6-14 should be added, of which the following is an example:

"§ 6-14. Authenticating Agent.

"There shall be an Authenticating Agent appointed by the Trustee with power to act on its behalf and subject to its direction in the authentication and delivery of Debentures in connection with transfers and exchanges under §§ *3-4*, *3-5* and *11-8* as fully to all intents and purposes as though the Authenticating Agent had been expressly authorized by those Sections to authenticate and deliver Debentures. For all purposes of this Indenture, the authentication and delivery of Debentures by the Authenticating Agent pursuant to this Section shall be deemed to be the authentication and delivery of such Debentures 'by the Trustee'. Such Authenticating Agent shall at all times be a bank or trust company having its principal office in ....., and shall at all times be a corporation organized and doing business under the laws of the United States or of any State, with a combined capital and surplus of at least $5,000,000 and authorized under such laws to exercise corporate trust powers and subject to supervision or examination by Federal or State authority. If such corporation publishes reports of condition at least annually pursuant to law or the requirements of such authority, then for the purposes of this Section the combined capital and surplus of such corporation shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published.

"The Trustee hereby appoints ..... as Authenticating Agent.

"Any corporation into which any Authenticating Agent may be merged or converted or with which it may be con-

solidated, or any corporation resulting from any merger, consolidation or conversion to which any Authenticating Agent shall be a party, or any corporation succeeding to the corporate trust business of any Authenticating Agent, shall be the successor of the Authenticating Agent hereunder, if such successor corporation is otherwise eligible under this Section, without the execution or filing of any paper or any further act on the part of the parties hereto or the Authenticating Agent or such successor corporation.

"Any Authenticating Agent may at any time resign by giving written notice of resignation to the Trustee and to the Company. The Trustee may at any time terminate the agency of any Authenticating Agent by giving written notice of termination to such Authenticating Agent and to the Company. Upon receiving such a notice of resignation or upon such a termination, or in case at any time any Authenticating Agent shall cease to be eligible under this Section, the Trustee shall promptly appoint a successor Authenticating Agent, shall give written notice of such appointment to the Company and shall mail notice of such appointment to all Holders of Debentures as the names and addresses of such Holders appear on the Debenture Register, and shall publish notice of such appointment at least once in an Authorized Newspaper in the place where such successor Authenticating Agent has its principal office.

"The Trustee agrees to pay to the Authenticating Agent from time to time reasonable compensation for its services, and the Trustee shall be entitled to be reimbursed for such payments, subject to § *6-7*.

"The provisions of §§ *3-8*, *6-4* and *6-5* shall be applicable to any Authenticating Agent."]

ARTICLE SEVEN

Debentureholders' Lists and Reports by Trustee and Company

Article 700 of the Model Provisions is herein incorporated as Article Seven hereof, Sections 701 through 704 of the Model Provisions being §§ 7-1 through 7-4 hereof respectively.

/ The "reporting date" referred to in § 7-3 shall be .....

[*The "reporting date" should be not later than 1 year after the earliest issue date of any of the Debentures.*]

[*If the Indenture is to be qualified under the Trust Indenture Act, there should be added at this point an additional paragraph reading substantially as follows:*

"It is intended that this Indenture shall be qualified under the Trust Indenture Act and, accordingly, it is hereby declared that Article Seven shall become operative forthwith."]

ARTICLE EIGHT

Consolidation, Merger, Conveyance, Transfer or Lease

Article 800 of the Model Provisions is herein incorporated as Article Eight hereof, Sections 801 through 803 of the Model Provisions being §§ 8-1 through 8-3 hereof respectively.

ARTICLE NINE

Supplemental Indentures

Article 900 of the Model Provisions is herein incorporated as Article Nine hereof, Sections 901 through 906 of the Model Provisions being §§ 9-1 through 9-6 hereof respectively.

[*In the case of convertible Debentures, Article 900 of the Model Provisions, as incorporated herein, should be amended by adding to the proviso in Section 902 a new clause to the effect that no supplemental indenture shall adversely affect the conversion rights of the Debentureholders under Article Thirteen. In the case of subordinated Debentures, Article Nine should contain a new § 9-7 to the effect that no supplemental indenture shall*

adversely affect the rights of any holder of Senior Debt under Article Fourteen without the consent of such holder.]

ARTICLE TEN

Covenants

§§ 10-1 through 10-7.

Sections 1001 through 1007 of the Model Provisions are herein incorporated as §§ 10-1 through 10-7 hereof respectively.

[*If, in any particular case, the negotiated terms so provide, some of the covenants may be modified so as to be applicable to subsidiaries.*]

§ 10-8 and following.

[*Here insert one or more additional Sections covering negotiated covenants.*]

§ 10- [Final Section of Article Ten] Waiver of Certain Covenants.

The Company may omit in any particular instance to comply with any covenant or condition set forth in §§ ..... to ....., inclusive, if before or after the time for such compliance the Holders of at least .....% in principal amount of the Debentures at the time Outstanding, shall, by Act of such Debentureholders, either waive such compliance in such instance or generally waive compliance with such covenant or condition, but no such waiver shall extend to or affect such covenant or condition except to the extent so expressly waived, and, until such waiver shall become effective, the obligations of the Company and the duties of the Trustee in respect of any such covenant or condition shall remain in full force and effect.

[*The Sections to be referred to, and the percentage to be inserted (which must be not less than a majority), in the foregoing blanks will always be a matter for negotiation. Ordinarily this percentage would be the same as the percentage required for approval of a supplemental indenture under Section 902 of the Model Provisions.*]

ARTICLE ELEVEN

Redemption of Debentures

§ 11-1. Right of Redemption.

[*Here insert negotiated provisions with respect to the amounts, dates and conditions of and premiums on redemptions.*

The draftsman may wish to set forth here the exact text (to be inserted in the Form of Debenture) of a summary of these negotiated provisions, and of a summary of certain of the Model Provisions relating to redemption, which should include the following:

"It is provided in the Indenture that Debentures of this issue of a denomination larger than $..... may be redeemed in part ($..... or a multiple thereof) and that upon any partial redemption of any such Debenture the same shall be surrendered in exchange for one or more new Debentures for the unredeemed portion of principal.

"Debentures (or portions thereof as aforesaid) for whose redemption and payment provision is made in accordance with the Indenture shall cease to bear interest from and after the date fixed for redemption."]

§§ 11-2 through 11-8.

Sections 1102 through 1108 of the Model Provisions are herein incorporated as §§ 11-2 through 11-8 hereof respectively.

[*If in a direct placement detailed provisions for selection on a pro rata basis are desired, Section 1104 of the Model Provisions must be amended by adding the specific provisions for such pro rata selection.*]

ARTICLE TWELVE

Sinking Fund

[*Here insert negotiated provisions, if any, with respect to sinking fund payments. In drafting the sinking fund provisions, the draftsman should expressly provide that notices of redemption of Debentures for the sinking fund shall be given by the Trus-*

tee in the name and on behalf of the Company. Section 1105 of the Model Provisions, it will be noted, provides that notice of redemption of Debentures at the election of the Company shall be given "by the Company or, at the Company's request, by the Trustee", etc. The draftsman should also note, among other things, that Section 902 of the Model Provisions does not preclude the reduction or deferment of sinking fund obligations with the consent of the holders of 66⅔% in principal amount of the Outstanding Debentures. If, therefore, in any particular case, such modification of sinking fund obligations is not to be permitted under Section 902, an appropriate amendment of Section 902 must be made at the time it is incorporated herein.]

ARTICLE THIRTEEN

Conversion

[*Here insert negotiated provisions, if any, with respect to conversion of Debentures.*

In the case of convertible Debentures, certain Sections of the Model Provisions should be amended prior to incorporation herein including, among others, the following:

(1) *Section 508 should be amended by adding at the end of the Section heading the words* "and to Convert" *and by amending lines 9 and 10 on page 30 of the Model Provisions to read substantially as follows:*

> "enforcement of any such payment and the right to convert such Debenture in accordance with Article Thirteen and to institute suit for its enforcement, and such rights shall not be impaired without the consent of such Holder."

(2) *Presumably Article Thirteen will contain a provision requiring the execution of a supplemental indenture to preserve the right of conversion in the case of a reclassification of outstanding shares of stock or in the case of a successor Company, and, if so, Section 901 should be amended by adding a new Clause (5) providing for the execution of such a supplemental indenture.*

(3) *Section 902 should be amended by adding to the proviso a new Clause (4) to the effect that no supplemental indenture shall adversely affect the conversion right of any Debentureholder without the consent of the Debentureholder so affected.*

(4) *The first sentence of Section 1002 should be amended by adding at the end of line 25 on page 63 of the Model Provisions the words "or conversion".*

(5) *Section 1104 should be amended by adding at the end of the first paragraph a new sentence reading substantially as follows:*

"If any Debenture selected for partial redemption is converted in part before the termination of the conversion right resulting from such selection, the converted portion of such Debenture shall be deemed (so far as may be) to be the portion selected for redemption."

Section 1104 should be further amended by adding a provision that Debentures which have been converted during a selection of Debentures to be redeemed, shall be treated by the Trustee as Outstanding for the purpose of such selection.

(6) *Section 1105 should be amended by adding to the required contents of the notice of redemption a statement as to the time of the termination of the right to convert the Debentures to be redeemed and the current conversion price or rate.*

(7) *Section 1106 should be amended by adding at the end a new sentence reading substantially as follows:*

"If any Debenture called for redemption is converted pursuant to Article Thirteen, any money deposited with the Trustee or so segregated and held in trust for the redemption of such Debenture, shall be paid to the Company on Company Request, or if then held by the Company, shall be discharged from such trust."

Under these circumstances, the draftsman may be well advised not to amend and incorporate by reference Sections 508, 901, 902, 1002, 1104, 1105 and 1106 (or some of them), but rather to set forth these Sections in full in the Incorporating Indenture.]

ARTICLE FOURTEEN

Subordination

[*Here insert negotiated provisions, if any, with respect to subordination of Debentures.*]

* * * * *

This instrument may be executed in any number of counterparts, each of which so executed shall be deemed to be an original, but all such counterparts shall together constitute but one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Indenture to be duly executed, and their respective corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

(Name of Company)

By .....
President

Attest:

.....
Secretary

(Name of Trustee)

By .....
(Title)

Attest:

.....
(Title)

[Add Acknowledgments]

EXHIBIT A

American Bar Foundation

MODEL DEBENTURE INDENTURE PROVISIONS

ALL REGISTERED ISSUES

1967

APPROVED AND ADOPTED

JULY 1967

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Redemption of Debentures

CROSS-REFERENCE TABLE*

	Referred to in
104	101
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304	305
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401	402
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601	104, 603, 903
601(a)	601(c)
602	703(a)(6)
607	401, 504, 506, 611
608	605, 703(a)(1)
608(a)	608(b), 610(d)
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611	610(a)
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613(a)	613(b)
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613(b)(2)	703(a)(3)
613(b)(3)	703(a)(3)
613(b)(4)	703(a)(3)
613(b)(6)	703(a)(3)
613(c)	613(a), 613(b)
Art. Seven†	703(a)
701	702(a)
702(a)	702(b)
702(b)	702(c)
703(a)	703(b)
Art. 800	1007
301	802
Art. Nine†	513
901(4)	903
1003	401, 1106
1104	305

*This Table has been prepared primarily as an aid in drafting an Indenture. It would not necessarily be included in the Model Provisions when attached as Exhibit A to an Indenture.

†Of Incorporating Indenture.

Table showing Reflection in Model Provisions of Certain Provisions of Trust Indenture Act of 1939*

TIA		Reflected in Model Provisions	
		Section	Page
§ 303(1)		101(2)	1
(4)		608(d)(1)	42
(5)		608(d)(2)	42
(6)		608(d)(6)	43
(10)		101	6
(12)		608(d)(5)	43
		613(c)(5)	53
(13)		101	4
(16)		608(d)(4)	43
		608(e)(1)	43
§ 310(a)(1)		609	45
(a)(2)		609	45
(a)(3)		Not Applicable	
(a)(4)		Not Applicable	
(b)		608	37
§ 311(a)		613(a)	48
(b)		613(b)	51
(b)(2)		703(a)(2)	56
		703(b)	57
§ 312(a)		701	53
		702(a)	54
(b)		702(b)	54
(c)		702(c)	55
§ 313(a)		703(a)	56
(b)		703(b)	57
(c)		703(a)	56
		703(b)	57
(d)		703(c)	57

*This Table has been prepared as an aid in drafting the Model Provisions and to facilitate compliance with SEC Instructions as to Exhibits, Paragraph 4(c)(2), relating to the preparation of Form S-1, which require a "cross reference sheet showing the location in the indenture of the provisions inserted pursuant to Section 310 through 318(a) inclusive of the Trust Indenture Act of 1939", to accompany a copy of any indenture filed as an Exhibit which is to be qualified under TIA.

TABLE SHOWING REFLECTION OF TIA

TIA	REFLECTED IN MODEL PROVISIONS: SECTION	PAGE
§ 314(a)	704	57
(b)	Not Applicable	
(c)(1)	~~102~~	~~6~~
(c)(2)	~~102~~	~~6~~
(c)(3)	Not Applicable	
(d)	Not Applicable	
(e)	~~102~~	~~6~~
§ 315(a)	~~601(a)~~	~~33~~
	~~601(c)~~	~~33~~
(b)	~~602~~	~~34~~
	703(a)(6)	57
(c)	~~601(b)~~	~~33~~
(d)	~~601~~	~~33~~
(d)(1)	~~601(a)~~	~~33~~
(d)(2)	~~601(c)(2)~~	~~33~~
(d)(3)	~~601(c)(2)~~	~~34~~
(e)	~~514~~	~~32~~
§ 316(a)	101	4
(a)(1)(A)	~~502~~	~~24~~
	~~512~~	~~31~~
(a)(1)(B)	~~513~~	~~31~~
(a)(2)	Not Applicable	
(b)	508	30
§ 317(a)(1)	~~503~~	~~26~~
(a)(2)	~~504~~	~~27~~
(b)	1003	64
§ 318(a)	~~107~~	10

ARTICLE 100

Definitions and Other Provisions of General Application

Section 101. Definitions.

For all purposes of this Indenture, except as otherwise expressly provided or unless the context otherwise requires:

(1) the terms defined in this Article have the meanings assigned to them in this Article, and include the plural as well as the singular;

(2) if this Indenture is qualified under the Trust Indenture Act, all other terms used herein which are defined in that Act, either directly or by reference therein, have the meanings assigned to them therein; and

(3) all accounting terms not otherwise defined herein have the meanings assigned to them in accordance with generally accepted accounting principles.

Certain terms, used principally in *Article 600*, are defined in that Article.

"Act" when used with respect to any Debentureholder has the meaning specified in *Section 104*.

"Affiliate" of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, "control" when used with respect to any specified Person means the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms "controlling" and "controlled" have meanings correlative to the foregoing.

"Authorized Newspaper" means a newspaper of general circulation in the relevant area, printed in the English language and customarily published on each business day, whether or not published on Saturdays, Sundays or holidays. Whenever successive weekly publications in an Authorized Newspaper are required hereunder they

may be made (unless otherwise expressly provided herein) on the same or different days of the week and in the same or in different Authorized Newspapers.

"Board of Directors" means either the board of directors of the Company or any duly authorized committee of that board.

"Board Resolution" means a copy of a resolution certified by the Secretary or an Assistant Secretary of the Company to have been duly adopted by the Board of Directors and to be in full force and effect on the date of such certification, and delivered to the Trustee.

"Commission" means the Securities and Exchange Commission, as from time to time constituted, created under the Securities Exchange Act of 1934, or if at any time after the execution of this instrument such Commission is not existing and performing the duties now assigned to it under the Trust Indenture Act, then the body performing such duties on such date.

"Company" means the Person named as the "Company" in the first paragraph of this instrument until a successor corporation shall have become such pursuant to the applicable provisions of this Indenture, and thereafter "Company" shall mean such successor corporation.

"Company Request", "Company Order" and "Company Consent" mean, respectively, a written request, order or consent signed in the name of the Company by its Chairman of the Board, President or a Vice President, and by its Treasurer, an Assistant Treasurer, Controller, an Assistant Controller, Secretary or an Assistant Secretary, and delivered to the Trustee.

"Debentureholder" means a Person in whose name a Debenture is registered in the Debenture Register.

"Debenture Register" and "Debenture Registrar" have the respective meanings specified in *Section 305*.

"Event of Default" has the meaning specified in *Article Five*.

"Holder" when used with respect to any Debenture means a Debentureholder.

"Independent" when used with respect to any specified Person means such a Person who (1) is in fact independent, (2) does not have any direct financial interest or any material indirect financial interest in the Company or in any other obligor upon the Debentures or in any Affiliate of the Company or of such other obligor, and (3) is not connected with the Company or such other obligor or any Affiliate of the Company or of such other obligor, as an officer, employee, promoter, underwriter, trustee, partner, director or person performing similar functions. Whenever it is herein provided that any Independent Person's opinion or certificate shall be furnished to the Trustee, such Person shall be appointed by a Company Order and approved by the Trustee in the exercise of reasonable care, and such opinion or certificate shall state that the signer has read this definition and that the signer is Independent within the meaning hereof.

"Interest Payment Date" means the Stated Maturity of an instalment of interest on the Debentures.

"Maturity" when used with respect to any Debenture means the date on which the principal of such Debenture becomes due and payable as therein or herein provided, whether at the Stated Maturity or by declaration of acceleration, call for redemption or otherwise.

"Officers' Certificate" means a certificate signed by the Chairman of the Board, the President or a Vice President, and by the Treasurer, an Assistant Treasurer, the Controller, an Assistant Controller, the Secretary or an Assistant Secretary of the Company, and delivered to the Trustee. Wherever this Indenture requires that an Officers' Certificate be signed also by an engineer or an accountant or other expert, such engineer, accountant or other expert (except as otherwise expressly provided in this Indenture) may be in the employ of the Company, and shall be acceptable to the Trustee.

"Opinion of Counsel" means a written opinion of counsel, who may (except as otherwise expressly provided in this Indenture) be counsel for the Company, and shall be acceptable to the Trustee.

"Outstanding" when used with respect to Debentures means, as of the date of determination, all Debentures theretofore authenticated and delivered under this Indenture, *except:*

(i) Debentures theretofore cancelled by the Trustee or delivered to the Trustee for cancellation;

(ii) Debentures for whose payment or redemption money in the necessary amount has been theretofore deposited with the Trustee or any Paying Agent in trust for the Holders of such Debentures, *provided* that, if such Debentures are to be redeemed, notice of such redemption has been duly given pursuant to this Indenture or provision therefor satisfactory to the Trustee has been made; and

(iii) Debentures in exchange for or in lieu of which other Debentures have been authenticated and delivered pursuant to this Indenture;

provided, however, that in determining whether the Holders of the requisite principal amount of Debentures Outstanding have given any request, demand, authorization, direction, notice, consent or waiver hereunder, Debentures owned by the Company or any other obligor upon the Debentures or any Affiliate of the Company or such other obligor shall be disregarded and deemed not to be Outstanding, except that, in determining whether the Trustee shall be protected in relying upon any such request, demand, authorization, direction, notice, consent or waiver, only Debentures which the Trustee knows to be so owned shall be so disregarded. Debentures so owned which have been pledged in good faith may be regarded as Outstanding if the pledgee establishes to the satisfaction of the Trustee the pledgee's right so to act with respect to such Debentures and that the pledgee is not the Company or any other obligor upon the Debentures or any Affiliate of the Company or such other obligor.

"Paying Agent" means any Person authorized by the Company to pay the principal of (and premium, if any) or interest on any Debentures on behalf of the Company.

"Person" means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization or government or any agency or political subdivision thereof.

"Place of Payment" means a city or any political subdivision thereof designated as such in *Article Three*.

"Predecessor Debentures" of any particular Debenture means every previous Debenture evidencing all or a portion of the same debt as that evidenced by such particular Debenture; and; for the purposes of this definition, any Debenture authenticated and delivered under *Section 306* in lieu of a lost, destroyed or stolen Debenture shall be deemed to evidence the same debt as the lost, destroyed or stolen Debenture.

"Redemption Date" when used with respect to any Debenture to be redeemed means the date fixed for such redemption by or pursuant to this Indenture.

"Redemption Price" when used with respect to any Debenture to be redeemed means the price at which it is to be redeemed pursuant to this Indenture.

"Regular Record Date" for the interest payable on any Interest Payment Date means the date specified in *Article Three*.

"Responsible Officer" when used with respect to the Trustee means the chairman or vice-chairman of the board of directors, the chairman or vice-chairman of the executive committee of the board of directors, the president, any vice president, the secretary, any assistant secretary, the treasurer, any assistant treasurer, the cashier, any assistant cashier, any trust officer or assistant trust officer, the controller and any assistant controller or any other officer of the Trustee customarily performing functions similar to those performed by any of the above designated officers and also means, with respect to a particular corporate trust matter, any other officer to whom such matter is referred because of his knowledge of and familiarity with the particular subject.

"Special Record Date" for the payment of any Defaulted Interest (as defined in *Section 307*) means a date fixed by the Trustee pursuant to *Section 307*.

"Stated Maturity" when used with respect to any Debenture or any instalment of interest thereon means the date specified in such Debenture as the fixed date on which the principal of such Debenture or such instalment of interest is due and payable.

"Trustee" means the Person named as the "Trustee" in the first paragraph of this instrument until a successor Trustee shall have become such pursuant to the applicable provisions of this Indenture, and thereafter "Trustee" shall mean such successor Trustee.

"Trust Indenture Act" or "TIA" means the Trust Indenture Act of 1939, as in force at the date as of which this instrument was executed, or, if this Indenture is first qualified under TIA after the issuance of Debentures, as in force at the date of such qualification.

"Vice President" when used with respect to the Company or the Trustee means any vice president, whether or not designated by a number or a word or words added before or after the title "vice president".

Section 102. Compliance Certificates and Opinions.

This Section shall not be operative as a part of this Indenture until this Indenture is qualified under TIA, and until such qualification this Indenture shall be construed as if this Section were not contained herein.

Upon any application or request by the Company to the Trustee to take any action under any provision of this Indenture, the Company shall furnish to the Trustee an Officers' Certificate stating that all conditions precedent, if any, provided for in this Indenture relating to the proposed action have been complied with and an Opinion of Counsel stating that in the opinion of such Counsel all such conditions precedent, if any, have been complied with, except that in the case of any such application or request as to which the furnishing of such documents is specifically required by any provision of this Indenture relating to such particular application or request, no additional certificate or opinion need be furnished.

Every certificate or opinion with respect to compliance with a condition or covenant provided for in this Indenture shall include

(1) a statement that each individual signing such certificate or opinion has read such covenant or condition and the definitions herein relating thereto;

(2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;

(3) a statement that, in the opinion of each such individual, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and

(4) a statement as to whether, in the opinion of each such individual, such condition or covenant has been complied with.

Section 103. Form of Documents Delivered to Trustee.

In any case where several matters are required to be certified by, or covered by an opinion of, any specified Person, it is not necessary that all such matters be certified by, or covered by the opinion of, only one such Person, or that they be so certified or covered by only one document, but one such Person may certify or give an opinion with respect to some matters and one or more other such Persons as to other matters, and any such Person may certify or give an opinion as to such matters in one or several documents.

Any certificate or opinion of an officer of the Company may be based, in so far as it relates to legal matters, upon a certificate or opinion of, or representations by, counsel, unless such officer knows, or in the exercise of reasonable care should know, that the certificate or opinion or representations with respect to the matters upon which his certificate or opinion is based are erroneous. Any such certificate or Opinion of Counsel may be based, in so far as it relates to factual matters, upon a certificate or opinion of, or representations by, an officer or officers of the Company stating that the information with respect to such factual matters is in the possession of the Company, unless such Counsel knows, or in the exercise of reasonable care should know, that the certificate or opinion or representations with respect to such matters are erroneous.

Where any Person is required to make, give or execute two or more applications, requests, consents, certificates, statements, opinions or other instruments under this Indenture, they may, but need not, be consolidated and form one instrument.

Section 104. Acts of Debentureholders.

(a) Any request, demand, authorization, direction, notice, consent, waiver or other action provided by this Indenture to be given or taken by Debentureholders may be embodied in and evidenced by one or more instruments of substantially similar tenor signed by such Debentureholders in person or by agent duly appointed in writing; and, except as herein otherwise expressly provided, such action shall become effective when such instrument or instruments are delivered to the Trustee, and, where it is hereby expressly required, to the Company. Such instrument or instruments (and the action embodied therein and evidenced thereby) are herein sometimes referred to as the "Act" of the Debentureholders signing such instrument or instruments. Proof of execution of any such instrument or of a writing appointing any such agent shall be sufficient for any purpose of this Indenture and (subject to *Section 601*) conclusive in favor of the Trustee and the Company, if made in the manner provided in this Section.

(b) The fact and date of the execution by any Person of any such instrument or writing may be proved by the affidavit of a witness of such execution or by the certificate of any notary public or other officer authorized by law to take acknowledgments of deeds, certifying that the individual signing such instrument or writing acknowledged to him the execution thereof. Where such execution is by an officer of a corporation or a member of a partnership, on behalf of such corporation or partnership, such certificate or affidavit shall also constitute sufficient proof of his authority. The fact and date of the execution of any such instrument or writing, or the authority of the person executing the same, may also be proved in any other manner which the Trustee deems sufficient.

(c) The ownership of Debentures shall be proved by the Debenture Register.

(d) Any request, demand, authorization, direction, notice, consent, waiver or other action by the Holder of any Debenture shall bind the Holder of every Debenture issued upon the transfer thereof or in exchange therefor or in lieu thereof, in respect of anything done or suf-

fered to be done by the Trustee or the Company in reliance thereon, whether or not notation of such action is made upon such Debenture.

Section 105. Notices, etc., to Trustee and Company.

Any request, demand, authorization, direction, notice, consent, waiver or Act of Debentureholders or other document provided or permitted by this Indenture to be made upon, given or furnished to, or filed with,

(1) the Trustee by any Debentureholder or by the Company shall be sufficient for every purpose hereunder if made, given, furnished or filed in writing to or with the Trustee at its principal corporate trust office, or

(2) the Company by the Trustee or by any Debentureholder shall be sufficient for every purpose hereunder if in writing and mailed, first-class postage prepaid, to the Company addressed to it at the address of its principal office specified in the first paragraph of this instrument or at any other address previously furnished in writing to the Trustee by the Company.

Section 106. Notices to Debentureholders; Waiver.

Where this Indenture provides for notice to Debentureholders of any event, such notice shall be sufficiently given (unless otherwise herein expressly provided) if in writing and mailed, first-class postage prepaid, to each Debentureholder affected by such event, at his address as it appears in the Debenture Register, not later than the latest date, and not earlier than the earliest date, prescribed for the giving of such notice. In any case where notice to Debentureholders is given by mail, neither the failure to mail such notice, nor any defect in any notice so mailed, to any particular Debentureholder shall affect the sufficiency of such notice with respect to other Debentureholders. Where this Indenture provides for notice in any manner, such notice may be waived in writing by the Person entitled to receive such notice, either before or after the event, and such waiver shall be the equivalent of such notice. Waivers of notice by Debentureholders shall be filed with the Trustee, but such filing shall not be a condition precedent to the validity of any action taken in reliance upon such waiver.

In case, by reason of the suspension of publication of any Authorized Newspaper, or by reason of any other cause, it shall be impossible to make publication of any notice in an Authorized Newspaper or Authorized Newspapers as required by this Indenture, then such method of publication or notification as shall be made with the approval of the Trustee shall constitute a sufficient publication of such notice.

Section 107. Conflict with Trust Indenture Act.

If this Indenture is qualified under TIA and any provision hereof limits, qualifies or conflicts with another provision hereof which is required to be included in this Indenture by any of the provisions of TIA, such required provision shall control.

Section 108. Effect of Headings and Table of Contents.

The Article and Section headings herein and the Table of Contents are for convenience only and shall not affect the construction hereof.

Section 109. Successors and Assigns.

All covenants and agreements in this Indenture by the Company shall bind its successors and assigns, whether so expressed or not.

Section 110. Separability Clause.

In case any provision in this Indenture or in the Debentures shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

ARTICLE 200

Debenture Forms

Section 201. Forms Generally.

The Debentures and the certificates of authentication thereon shall be in substantially the forms set forth in this Article, with such appropriate insertions, omissions, substitutions and other variations as are required or permitted by this Indenture and may have such letters,

numbers or other marks of identification and such legends or endorsements placed thereon, as may be required to comply with the rules of any securities exchange, or as may, consistently herewith, be determined by the officers executing such Debentures, as evidenced by their execution of the Debentures. Any portion of the text of any Debenture may be set forth on the reverse thereof, with an appropriate reference thereto on the face of the Debenture.

The definitive Debentures shall be printed, lithographed or engraved or produced by any combination of these methods on steel engraved borders or may be produced in any other manner permitted by the rules of any securities exchange, all as determined by the officers executing such Debentures, as evidenced by their execution of such Debentures.

Section 202. Form of Debenture.

.....

...% ..... Debenture

Due.....

No..... $.....

....., a(n) *(State of Incorporation)* .....

corporation (hereinafter called the "Company", which term includes any successor corporation under the Indenture hereinafter referred to), for value received, hereby promises to pay to .....

....., or registered assigns, on ....., ... the sum of ..... Dollars and to pay interest thereon from *(commencement of first interest period)* ....., or from the most recent Interest Payment Date to which interest has been paid or duly provided for, semi-annually on ..... and ..... in each year, at the rate of [*At this point in the Debenture Form should be inserted the provisions relating to the interest rate or rates on the Debentures.*] The interest so payable, and punctually paid or duly provided for, on any Interest Payment Date will, as provided in said Indenture, be paid to the Person in whose name this Debenture (or one or more Predecessor Debentures,

as defined in said Indenture) is registered at the close of business on the Regular Record Date for such interest which shall be the ..... day (whether or not a business day) of the calendar month next preceding such Interest Payment Date. Any such interest not so punctually paid or duly provided for shall forthwith cease to be payable to the registered Holder on such Regular Record Date, and may be paid to the Person in whose name this Debenture (or one or more Predecessor Debentures) is registered at the close of business on a Special Record Date for the payment of such defaulted interest to be fixed by the Trustee, notice whereof shall be given to Debentureholders not less than 10 days prior to such Special Record Date, or may be paid, at any time in any other lawful manner not inconsistent with the requirements of any securities exchange on which the Debentures may be listed, and upon such notice as may be required by such exchange, all as more fully provided in said Indenture. [*At this point in the Debenture Form should be inserted the provisions relating to the Place or Places of Payment of the principal and the Redemption Price of, and the interest on, the Debenture.*] All such payments shall be made in such coin or currency of the United States of America as at the time of payment is legal tender for payment of public and private debts.

This Debenture is one of a duly authorized issue of Debentures of the Company designated as its .... % ..... Debentures Due ..... (herein called the "Debentures"), limited in aggregate principal amount to $ ....., issued and to be issued under an Indenture dated ..... (herein called the "Indenture"), between the Company and ..... as Trustee (herein called the "Trustee", which term includes any successor Trustee under the Indenture), to which Indenture and all indentures supplemental thereto reference is hereby made for a statement of the respective rights thereunder of the Company, the Trustee and the Holders of the Debentures, and the terms upon which the Debentures are, and are to be, authenticated and delivered.

[*At this point in the Debenture Form should be inserted the paragraphs, if any, relating to the negotiated terms of redemption, sinking or purchase fund, conversion and subordination.*]

If an Event of Default, as defined in the Indenture, shall occur, the principal of all the Debentures may be declared due and payable in the manner and with the effect provided in the Indenture.

The Indenture permits, with certain exceptions as therein provided, the amendment thereof and the modification of the rights and obligations of the Company and the rights of the Holders of the Debentures under the Indenture at any time by the Company with the consent of the holders of 66⅔% in aggregate principal amount of the Debentures at the time Outstanding, as defined in the Indenture. The Indenture also contains provisions permitting the Holders of specified percentages in aggregate principal amount of the Debentures at the time Outstanding, as defined in the Indenture, on behalf of the Holders of all the Debentures, to waive compliance by the Company with certain provisions of the Indenture and certain past defaults under the Indenture and their consequences. Any such consent or waiver by the Holder of this Debenture shall be conclusive and binding upon such Holder and upon all future Holders of this Debenture and of any Debenture issued upon the transfer hereof or in exchange herefor or in lieu hereof whether or not notation of such consent or waiver is made upon this Debenture.

No reference herein to the Indenture and no provision of this Debenture or of the Indenture shall alter or impair the obligation of the Company, which is absolute and unconditional, to pay the principal of (and premium, if any) and interest on this Debenture at the times, place, and rate, and in the coin or currency, herein prescribed.

As provided in the Indenture and subject to certain limitations therein set forth, this Debenture is transferable on the Debenture Register of the Company, upon surrender of this Debenture for transfer at the office or agency of the Company in .....,
duly endorsed by, or accompanied by a written instrument of transfer in form satisfactory to the Company and the Debenture Registrar duly executed by, the registered Holder hereof or his attorney duly authorized in writing, and thereupon one or more new Debentures, of authorized denominations and for the same aggregate principal amount, will be issued to the designated transferee or transferees.

The Debentures are issuable only as registered Debentures without coupons in denominations of $..... or ..... As provided in the Indenture and subject to certain limitations therein set forth, Debentures are exchangeable for a like aggregate principal amount of Debentures of a different authorized denomination, as requested by the Holder surrendering the same.

No service charge will be made for any such transfer or exchange, but the Company may require payment of a sum sufficient to cover any tax or other governmental charge payable in connection therewith.

The Company, the Trustee and any agent of the Company or the Trustee may treat the Person in whose name this Debenture is registered as the owner hereof for the purpose of receiving payment as herein provided and for all other purposes whether or not this Debenture be overdue, and neither the Company, the Trustee nor any such agent shall be affected by notice to the contrary.

Unless the certificate of authentication hereon has been executed by the Trustee by manual signature, this Debenture shall not be entitled to any benefit under the Indenture, or be valid or obligatory for any purpose.

IN WITNESS WHEREOF, the Company has caused this Debenture to be duly executed under its corporate seal.

Dated .....

.....

By .....

Attest:

.....

Section 203. Form of Trustee's Certificate of Authentication.

This is one of the Debentures referred to in the within-mentioned Indenture.

.....
as Trustee

By .....
Authorized Officer

ARTICLE 300

The Debentures

Section 301. Title and Terms.

[The subject matter indicated by the heading of this Section appears in the Indenture. This Section is mentioned in the Model Provisions merely to preserve a numerical sequence corresponding to that in the Indenture.]

Section 302. Denominations.

[The subject matter indicated by the heading of this Section appears in the Indenture. This Section is mentioned in the Model Provisions merely to preserve a numerical sequence corresponding to that in the Indenture.]

Section 303. Execution, Authentication and Delivery and Dating.

The Debentures shall be executed on behalf of the Company by its Chairman of the Board, its President or one of its Vice Presidents under its corporate seal reproduced thereon and attested by its Secretary or one of its Assistant Secretaries. The signature of any of these officers on the Debentures may be manual or facsimile.

Debentures bearing the manual or facsimile signatures of individuals who were at any time the proper officers of the Company shall bind the Company, notwithstanding that such individuals or any of them have ceased to hold such offices prior to the authentication and delivery of such Debentures or did not hold such offices at the date of such Debentures.

At any time and from time to time after the execution and delivery of this Indenture, the Company may deliver Debentures executed by the Company to the Trustee for authentication; and the Trustee shall authenticate and deliver such Debentures as in this Indenture provided and not otherwise.

All Debentures shall be dated the date of their authentication.

No Debenture shall be entitled to any benefit under this Indenture or be valid or obligatory for any purpose, unless there appears on such Debenture a certificate of authentication substantially in the form provided for herein executed by the Trustee by manual signature, and such certificate upon any Debenture shall be conclusive evidence, and the only evidence, that such Debenture has been duly authenticated and delivered hereunder.

Section 304. Temporary Debentures.

Pending the preparation of definitive Debentures, the Company may execute, and upon Company Order the Trustee shall authenticate and deliver, temporary Debentures which are printed, lithographed, typewritten, mimeographed or otherwise produced, in any denomination, substantially of the tenor of the definitive Debentures in lieu of which they are issued and with such appropriate insertions, omissions, substitutions and other variations as the officers executing such Debentures may determine, as evidenced by their execution of such Debentures.

If temporary Debentures are issued, the Company will cause definitive Debentures to be prepared without unreasonable delay. After the preparation of definitive Debentures, the temporary Debentures shall be exchangeable for definitive Debentures upon surrender of the temporary Debentures at the office or agency of the Company in a Place of Payment, without charge to the Holder. Upon surrender for cancellation of any one or more temporary Debentures the Company shall execute and the Trustee shall authenticate and deliver in exchange therefor a like principal amount of definitive Debentures of authorized denominations. Until so exchanged the temporary Debentures shall in all respects be entitled to the same benefits under this Indenture as definitive Debentures.

Section 305. Registration, Transfer and Exchange.

The Company shall cause to be kept at the principal corporate trust office of the Trustee a register (herein sometimes referred to as the "Debenture Register") in which, subject to such reasonable

regulations as it may prescribe, the Company shall provide for the registration of Debentures and of transfers of Debentures. The Trustee is hereby appointed "Debenture Registrar" for the purpose of registering Debentures and transfers of Debentures as herein provided.

Upon surrender for transfer of any Debenture at the office or agency of the Company in a Place of Payment, the Company shall execute, and the Trustee shall authenticate and deliver, in the name of the designated transferee or transferees, one or more new Debentures of any authorized denominations, of a like aggregate principal amount.

At the option of the Holder, Debentures may be exchanged for other Debentures of any authorized denominations, of a like aggregate principal amount, upon surrender of the Debentures to be exchanged at such office or agency. Whenever any Debentures are so surrendered for exchange, the Company shall execute, and the Trustee shall authenticate and deliver, the Debentures which the Debentureholder making the exchange is entitled to receive.

All Debentures issued upon any transfer or exchange of Debentures shall be the valid obligations of the Company, evidencing the same debt, and entitled to the same benefits under this Indenture, as the Debentures surrendered upon such transfer or exchange.

Every Debenture presented or surrendered for transfer or exchange shall (if so required by the Company or the Trustee) be duly endorsed, or be accompanied by a written instrument of transfer in form satisfactory to the Company and the Debenture Registrar duly executed, by the Holder thereof or his attorney duly authorized in writing.

No service charge shall be made for any transfer or exchange of Debentures, but the Company may require payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in connection with any transfer or exchange of Debentures, other than exchanges pursuant to *Section 304* or *906* not involving any transfer.

The Company shall not be required (i) to issue, transfer or exchange any Debenture during a period beginning at the opening of business 15 days before the day of the mailing of a notice of redemption of Debentures selected for redemption under *Section 1104* and ending

at the close of business on the day of such mailing, or (ii) to transfer or exchange any Debenture so selected for redemption in whole or in part.

Section 306. Mutilated, Destroyed, Lost and Stolen Debentures.

If (i) any mutilated Debenture is surrendered to the Trustee, or the Company and the Trustee receive evidence to their satisfaction of the destruction, loss or theft of any Debenture, and (ii) there is delivered to the Company and the Trustee such security or indemnity as may be required by them to save each of them harmless, then, in the absence of notice to the Company or the Trustee that such Debenture has been acquired by a bona fide purchaser, the Company shall execute and upon its request the Trustee shall authenticate and deliver, in exchange for or in lieu of any such mutilated, destroyed, lost or stolen Debenture, a new Debenture of like tenor and principal amount, bearing a number not contemporaneously outstanding.

In case any such mutilated, destroyed, lost or stolen Debenture has become or is about to become due and payable, the Company in its discretion may, instead of issuing a new Debenture, pay such Debenture.

Upon the issuance of any new Debenture under this Section, the Company may require the payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in relation thereto and any other expenses (including the fees and expenses of the Trustee) connected therewith.

Every new Debenture issued pursuant to this Section in lieu of any destroyed, lost or stolen Debenture shall constitute an original additional contractual obligation of the Company, whether or not the destroyed, lost or stolen Debenture shall be at any time enforceable by anyone, and shall be entitled to all the benefits of this Indenture equally and proportionately with any and all other Debentures duly issued hereunder.

The provisions of this Section are exclusive and shall preclude (to the extent lawful) all other rights and remedies with respect to the replacement or payment of mutilated, destroyed, lost or stolen Debentures.

Section 307. Payment of Interest; Interest Rights Preserved.

Interest on any Debenture which is payable, and is punctually paid or duly provided for, on any Interest Payment Date shall be paid to the Person in whose name that Debenture (or one or more Predecessor Debentures) is registered at the close of business on the Regular Record Date for such interest specified in *Article Three*.

Any interest on any Debenture which is payable, but is not punctually paid or duly provided for, on any Interest Payment Date (herein called "*Defaulted Interest*") shall forthwith cease to be payable to the registered Holder on the relevant Regular Record Date by virtue of having been such Holder; and such Defaulted Interest may be paid by the Company, at its election in each case, as provided in *Clause (1)* or *Clause (2)* below:

(1) The Company may elect to make payment of any Defaulted Interest to the Persons in whose names the Debentures (or their respective Predecessor Debentures) are registered at the close of business on a Special Record Date for the payment of such Defaulted Interest, which shall be fixed in the following manner. The Company shall notify the Trustee in writing of the amount of Defaulted Interest proposed to be paid on each Debenture and the date of the proposed payment, and at the same time the Company shall deposit with the Trustee an amount of money equal to the aggregate amount proposed to be paid in respect of such Defaulted Interest or shall make arrangements satisfactory to the Trustee for such deposit prior to the date of the proposed payment, such money when deposited to be held in trust for the benefit of the Persons entitled to such Defaulted Interest as in this Clause provided. Thereupon the Trustee shall fix a Special Record Date for the payment of such Defaulted Interest which shall be not more than 15 nor less than 10 days prior to the date of the proposed payment and not less than 10 days after the receipt by the Trustee of the notice of the proposed payment. The Trustee shall promptly notify the Company of such Special Record Date and, in the name and at the expense of the Company, shall cause notice

of the proposed payment of such Defaulted Interest and the Special Record Date therefor to be mailed, first class postage prepaid, to each Debentureholder at his address as it appears in the Debenture Register, not less than 10 days prior to such Special Record Date. The Trustee may, in its discretion, in the name and at the expense of the Company, cause a similar notice to be published at least once in an Authorized Newspaper in each Place of Payment, but such publication shall not be a condition precedent to the establishment of such Special Record Date. Notice of the proposed payment of such Defaulted Interest and the Special Record Date therefor having been mailed as aforesaid, such Defaulted Interest shall be paid to the Persons in whose names the Debentures (or their respective Predecessor Debentures) are registered on such Special Record Date and shall no longer be payable pursuant to the following *Clause (2)*.

(2) The Company may make payment of any Defaulted Interest in any other lawful manner not inconsistent with the requirements of any securities exchange on which the Debentures may be listed, and upon such notice as may be required by such exchange, if, after notice given by the Company to the Trustee of the proposed payment pursuant to this Clause, such payment shall be deemed practicable by the Trustee.

Subject to the foregoing provisions of this Section, each Debenture delivered under this Indenture upon transfer of or in exchange for or in lieu of any other Debenture shall carry the rights to interest accrued and unpaid, and to accrue, which were carried by such other Debenture.

Section 308. Persons Deemed Owners.

The Company, the Trustee and any agent of the Company or the Trustee may treat the Person in whose name any Debenture is registered as the owner of such Debenture for the purpose of receiving payment of principal of (and premium, if any), and (subject to *Section 307*) interest on, such Debenture and for all other purposes whatsoever, whether or not such Debenture be overdue, and neither the Company, the Trustee nor any agent of the Company or the Trustee shall be affected by notice to the contrary.

Section 309. Cancellation.

All Debentures surrendered for payment, redemption, transfer, exchange or conversion shall, if surrendered to any Person other than the Trustee, be delivered to the Trustee and, if not already cancelled, shall be promptly cancelled by it. The Company may at any time deliver to the Trustee for cancellation any Debentures previously authenticated and delivered hereunder which the Company may have acquired in any manner whatsoever, and all Debentures so delivered shall be promptly cancelled by the Trustee. No Debentures shall be authenticated in lieu of or in exchange for any Debentures cancelled as provided in this Section, except as expressly permitted by this Indenture. All cancelled Debentures held by the Trustee shall be disposed of as directed by a Company Order.

ARTICLE 400

Satisfaction and Discharge

Section 401. Satisfaction and Discharge of Indenture.

This Indenture shall cease to be of further effect (except as to any surviving rights of conversion or transfer or exchange of Debentures herein expressly provided for), and the Trustee, on demand of and at the expense of the Company, shall execute proper instruments acknowledging satisfaction and discharge of this Indenture, when

(1) either

(A) all Debentures theretofore authenticated and delivered (other than (i) Debentures which have been destroyed, lost or stolen and which have been replaced or paid as provided in *Section 306*, and (ii) Debentures for whose payment money has theretofore been deposited in trust or segregated and held in trust by the Company and thereafter repaid to the Company or discharged from such trust, as provided in *Section 1003)* have been delivered to the Trustee cancelled or for cancellation; or

(B) all such Debentures not theretofore delivered to the Trustee cancelled or for cancellation

(i) have become due and payable, or

(ii) will become due and payable at their Stated Maturity within 1 year, or

(iii) are to be called for redemption within 1 year under arrangements satisfactory to the Trustee for the giving of notice of redemption by the Trustee in the name, and at the expense, of the Company,

and the Company, in the case of (*i*), (*ii*) or (*iii*) above, has deposited or caused to be deposited with the Trustee as trust funds in trust for the purpose an amount sufficient to pay and discharge the entire indebtedness on such Debentures not theretofore delivered to the Trustee cancelled or for cancellation, for principal (and premium, if any) and interest to the date of such deposit (in the case of Debentures which have become due and payable), or to the Stated Maturity or Redemption Date, as the case may be;

(2) the Company has paid or caused to be paid all other sums payable hereunder by the Company; and

(3) the Company has delivered to the Trustee an OFFICERS' CERTIFICATE and an OPINION OF COUNSEL each stating that all conditions precedent herein provided for relating to the satisfaction and discharge of this Indenture have been complied with.

Notwithstanding the satisfaction and discharge of this Indenture, the obligations of the Company to the Trustee under *Section 607* shall survive.

Section 402. Application of Trust Money.

All money deposited with the Trustee pursuant to *Section 401* shall be held in trust and applied by it, in accordance with the provisions

of the Debentures and this Indenture, to the payment, either directly or through any Paying Agent (including the Company acting as its own Paying Agent) as the Trustee may determine, to the Persons entitled thereto, of the principal (and premium, if any) and interest for whose payment such money has been deposited with the Trustee; but such money need not be segregated from other funds except to the extent required by law.

ARTICLE 500

Remedies

Section 501. Events of Default.

"Event of Default", wherever used herein means any one of the following events (whatever the reason for such Event of Default and whether it shall be voluntary or involuntary or be effected by operation of law pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body):

(1) default in the payment of any interest upon any Debenture when it becomes due and payable, and continuance of such default for a period of 30 days; or

(2) default in the payment of the principal of (or premium, if any, on) any Debenture at its Maturity; or

(3) default in the performance, or breach, of any covenant or warranty of the Company in this Indenture (other than a covenant or warranty a default in whose performance or whose breach is elsewhere in this Section specifically dealt with), and continuance of such default or breach for a period of 30 days after there has been given, by registered or certified mail, to the Company by the Trustee or to the Company and the Trustee by the Holders of at least 10% in principal amount of the Outstanding Debentures,

a written notice specifying such default or breach and requiring it to be remedied and stating that such notice is a *"Notice of Default"* hereunder; or

(4) the entry of a decree or order by a court having jurisdiction in the premises adjudging the Company a bankrupt or insolvent, or approving as properly filed a petition seeking reorganization, arrangement, adjustment or composition of or in respect of the Company under the Federal Bankruptcy Act or any other applicable Federal or State law, or appointing a receiver, liquidator, assignee, trustee, sequestrator (or other similar official) of the Company or of any substantial part of its property, or ordering the winding up or liquidation of its affairs, and the continuance of any such decree or order unstayed and in effect for a period of 60 consecutive days; or

(5) the institution by the Company of proceedings to be adjudicated a bankrupt or insolvent, or the consent by it to the institution of bankruptcy or insolvency proceedings against it, or the filing by it of a petition or answer or consent seeking reorganization or relief under the Federal Bankruptcy Act or any other applicable Federal or State law, or the consent by it to the filing of any such petition or to the appointment of a receiver, liquidator, assignee, trustee, sequestrator (or other similar official) of the Company or of any substantial part of its property, or the making by it of an assignment for the benefit of creditors, or the admission by it in writing of its inability to pay its debts generally as they become due, or the taking of corporate action by the Company in furtherance of any such action.

Section 502. Acceleration of Maturity; Rescission and Annulment.

If an Event of Default occurs and is continuing, then and in every such case the Trustee or the Holders of not less than 25% in principal amount of the Debentures Outstanding may declare the principal

of all the Debentures to be due and payable immediately, by a notice in writing to the Company (and to the Trustee if given by Debentureholders), and upon any such declaration such principal shall become immediately due and payable.

At any time after such a declaration of acceleration has been made and before a judgment or decree for payment of the money due has been obtained by the Trustee as hereinafter in this Article provided, the Holders of a majority in principal amount of the Debentures Outstanding, by written notice to the Company and the Trustee, may rescind and annul such declaration and its consequences if

(1) the Company has paid or deposited with the Trustee a sum sufficient to pay

(A) all overdue instalments of interest on all Debentures,

(B) the principal of (and premium, if any, on) any Debentures which have become due otherwise than by such declaration of acceleration and interest thereon at the rate borne by the Debentures,

(C) to the extent that payment of such interest is lawful, interest upon overdue instalments of interest at the rate borne by the Debentures, and

(D) all sums paid or advanced by the Trustee hereunder and the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel;

and

(2) all Events of Default, other than the non-payment of the principal of Debentures which have become due solely by such acceleration, have been cured or waived as provided in *Section 513*.

No such rescission shall affect any subsequent default or impair any right consequent thereon.

Section 503. Collection of Indebtedness and Suits for Enforcement by Trustee.

The Company covenants that if

(1) default is made in the payment of any instalment of interest on any Debenture when such interest becomes due and payable and such default continues for a period of 30 days, or

(2) default is made in the payment of the principal of (or premium, if any, on) any Debenture at the Maturity thereof,

the Company will, upon demand of the Trustee, pay to it, for the benefit of the Holders of such Debentures, the whole amount then due and payable on such Debentures for principal (and premium, if any) and interest, with interest upon the overdue principal (and premium, if any) and, to the extent that payment of such interest shall be legally enforceable, upon overdue instalments of interest, at the rate borne by the Debentures; and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel.

If the Company fails to pay such amount forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, may institute a judicial proceeding for the collection of the sums so due and unpaid, and may prosecute such proceeding to judgment or final decree, and may enforce the same against the Company or any other obligor upon the Debentures and collect the moneys adjudged or decreed to be payable in the manner provided by law out of the property of the Company or any other obligor upon the Debentures, wherever situated.

If an Event of Default occurs and is continuing, the Trustee may in its discretion proceed to protect and enforce its rights and the rights of the Debentureholders by such appropriate judicial proceedings as the Trustee shall deem most effectual to protect and enforce any such rights, whether for the specific enforcement of any covenant or agree-

ment in this Indenture or in aid of the exercise of any power granted herein, or to enforce any other proper remedy.

Section 504. Trustee May File Proofs of Claim.

In case of the pendency of any receivership, insolvency, liquidation, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceeding relative to the Company or any other obligor upon the Debentures or the property of the Company or of such other obligor or their creditors, the Trustee (irrespective of whether the principal of the Debentures shall then be due and payable as therein expressed or by declaration or otherwise and irrespective of whether the Trustee shall have made any demand on the Company for the payment of overdue principal or interest) shall be entitled and empowered, by intervention in such proceeding or otherwise,

(i) to file and prove a claim for the whole amount of principal (and premium, if any) and interest owing and unpaid in respect of the Debentures and to file such other papers or documents as may be necessary or advisable in order to have the claims of the Trustee (including any claim for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel) and of the Debentureholders allowed in such judicial proceeding, and

(ii) to collect and receive any moneys or other property payable or deliverable on any such claims and to distribute the same;

and any receiver, assignee, trustee, liquidator, sequestrator (or other similar official) in any such judicial proceeding is hereby authorized by each Debentureholder to make such payments to the Trustee, and in the event that the Trustee shall consent to the making of such payments directly to the Debentureholders, to pay to the Trustee any amount due to it for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, and any other amounts due the Trustee under *Section 607*.

Nothing herein contained shall be deemed to authorize the Trustee to authorize or consent to or accept or adopt on behalf of any Debentureholder any plan of reorganization, arrangement, adjustment or composition affecting the Debentures or the rights of any Holder thereof, or to authorize the Trustee to vote in respect of the claim of any Debentureholder in any such proceeding.

Section 505. Trustee May Enforce Claims Without Possession of Debentures.

All rights of action and claims under this Indenture or the Debentures may be prosecuted and enforced by the Trustee without the possession of any of the Debentures or the production thereof in any proceeding relating thereto, and any such proceeding instituted by the Trustee shall be brought in its own name as trustee of an express trust, and any recovery of judgment shall, after provision for the payment of the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, be for the ratable benefit of the Holders of the Debentures in respect of which such judgment has been recovered.

Section 506. Application of Money Collected.

Any money collected by the Trustee pursuant to this Article shall be applied in the following order, at the date or dates fixed by the Trustee and, in case of the distribution of such money on account of principal (or premium, if any) or interest, upon presentation of the Debentures and the notation thereon of the payment if only partially paid and upon surrender thereof if fully paid:

FIRST: To the payment of all amounts due the Trustee under *Section 607;*

SECOND: To the payment of the amounts then due and unpaid upon the Debentures for principal (and premium, if any) and interest, in respect of which or for the benefit of which such money has been collected, ratably, without preference or priority of any kind, according

to the amounts due and payable on such Debentures for principal (and premium, if any) and interest, respectively.

Section 507. Limitation on Suits.

No Holder of any Debenture shall have any right to institute any proceeding, judicial or otherwise, with respect to this Indenture, or for the appointment of a receiver or trustee, or for any other remedy hereunder, unless

(1) such Holder has previously given written notice to the Trustee of a continuing Event of Default;

(2) the Holders of not less than 25% in principal amount of the Outstanding Debentures shall have made written request to the Trustee to institute proceedings in respect of such Event of Default in its own name as Trustee hereunder;

(3) such Holder or Holders have offered to the Trustee reasonable indemnity against the costs, expenses and liabilities to be incurred in compliance with such request;

(4) the Trustee for 60 days after its receipt of such notice, request and offer of indemnity has failed to institute any such proceeding; and

(5) no direction inconsistent with such written request has been given to the Trustee during such 60 day period by the Holders of a majority in principal amount of the Outstanding Debentures;

it being understood and intended that no one or more Holders of Debentures shall have any right in any manner whatever by virtue of, or by availing of, any provision of this Indenture to affect, disturb or prejudice the rights of any other Holders of Debentures, or to obtain or to seek to obtain priority or preference over any other Holders or to enforce any right under this Indenture, except in the manner herein provided and for the equal and ratable benefit of all the Holders of Debentures.

Section 508. Unconditional Right of Debentureholders to Receive Principal, Premium and Interest.

Notwithstanding any other provision in this Indenture, the Holder of any Debenture shall have the right which is absolute and unconditional to receive payment of the principal of (and premium, if any) and (subject to *Section 307*) interest on such Debenture on the respective Stated Maturities expressed in such Debenture (or, in the case of redemption, on the Redemption Date) and to institute suit for the enforcement of any such payment, and such right shall not be impaired without the consent of such Holder.

Section 509. Restoration of Rights and Remedies.

If the Trustee or any Debentureholder has instituted any proceeding to enforce any right or remedy under this Indenture and such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Trustee or to such Debentureholder, then and in every such case the Company, the Trustee and the Debentureholders shall, subject to any determination in such proceeding, be restored severally and respectively to their former positions hereunder, and thereafter all rights and remedies of the Trustee and the Debentureholders shall continue as though no such proceeding had been instituted.

Section 510. Rights and Remedies Cumulative.

No right or remedy herein conferred upon or reserved to the Trustee or to the Debentureholders is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

Section 511. Delay or Omission Not Waiver.

No delay or omission of the Trustee or of any Holder of any Debenture to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or an acquiescence therein. Every right

and remedy given by this Article or by law to the Trustee or to the Debentureholders may be exercised from time to time, and as often as may be deemed expedient, by the Trustee or by the Debentureholders, as the case may be.

Section 512. Control by Debentureholders.

The Holders of a majority in principal amount of the Outstanding Debentures shall have the right to direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee, *provided* that

(1) such direction shall not be in conflict with any rule of law or with this Indenture, and

(2) the Trustee may take any other action deemed proper by the Trustee which is not inconsistent with such direction.

Section 513. Waiver of Past Defaults.

The Holders of not less than the required percentage in principal amount of the Outstanding Debentures specified in *Article Five* may on behalf of the Holders of all the Debentures waive any past default hereunder and its consequences, except a default

(1) in the payment of the principal of (or premium, if any) or interest on any Debenture, or

(2) in respect of a covenant or provision hereof which under *Article Nine* cannot be modified or amended without the consent of the Holder of each Outstanding Debenture affected.

Upon any such waiver, such default shall cease to exist, and any Event of Default arising therefrom shall be deemed to have been cured, for every purpose of this Indenture; but no such waiver shall extend to any subsequent or other default or impair any right consequent thereon.

Section 514. Undertaking for Costs.

All parties to this Indenture agree, and each Holder of any Debenture by his acceptance thereof shall be deemed to have agreed, that any court may in its discretion require, in any suit for the enforcement of any right or remedy under this Indenture, or in any suit against the Trustee for any action taken or omitted by it as Trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant; but the provisions of this Section shall not apply to any suit instituted by the Trustee, to any suit instituted by any Debentureholder, or group of Debentureholders, holding in the aggregate more than 10% in principal amount of the Outstanding Debentures, or to any suit instituted by any Debentureholder for the enforcement of the payment of the principal of (or premium, if any) or interest on any Debenture on or after the respective Stated Maturities expressed in such Debenture (or, in the case of redemption, on or after the Redemption Date).

Section 515. Waiver of Stay or Extension Laws.

The Company covenants (to the extent that it may lawfully do so) that it will not at any time insist upon, or plead, or in any manner whatsoever claim or take the benefit or advantage of, any stay or extension law wherever enacted, now or at any time hereafter in force, which may affect the covenants or the performance of this Indenture; and the Company (to the extent that it may lawfully do so) hereby expressly waives all benefit or advantage of any such law, and covenants that it will not hinder, delay or impede the execution of any power herein granted to the Trustee, but will suffer and permit the execution of every such power as though no such law had been enacted.

ARTICLE 600

The Trustee

Section 601. Certain Duties and Responsibilities.

(a) Except during the continuance of an Event of Default,

(1) the Trustee undertakes to perform such duties and only such duties as are specifically set forth in this Indenture, and no implied covenants or obligations shall be read into this Indenture against the Trustee; and

(2) in the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture; but in the case of any such certificates or opinions which by any provision hereof are specifically required to be furnished to the Trustee, the Trustee shall be under a duty to examine the same to determine whether or not they conform to the requirements of this Indenture.

(b) In case an Event of Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and 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.

(c) No provision of this Indenture shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act, or its own wilful misconduct, *except* that

(1) this Subsection shall not be construed to limit the effect of *Subsection (a)* of this Section;

(2) the Trustee shall not be liable for any error of judgment made in good faith by a Responsible Officer, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts;

(3) the Trustee shall not be liable with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the Holders of a majority in principal amount of the Outstanding Debentures relating to the time, method and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee, under this Indenture; and

(4) no provision of this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur any financial liability in the performance of any of its duties hereunder, or in the exercise of any of its rights or powers, if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not reasonably assured to it.

(d) Whether or not therein expressly so provided, every provision of this Indenture relating to the conduct or affecting the liability of or affording protection to the Trustee shall be subject to the provisions of this Section.

Section 602. Notice of Defaults.

Within 90 days after the occurrence of any default hereunder, the Trustee shall transmit by mail to all Debentureholders, as their names and addresses appear in the Debenture Register, notice of such default hereunder known to the Trustee, unless such default shall have been cured or waived; *provided, however*, that, except in the case of a default in the payment of the principal of (or premium, if any) or interest on any Debenture or in the payment of any sinking or purchase-fund instalment, the Trustee shall be protected in withholding such notice if and so long as the board of directors, the executive committee or a trust committee of directors and/or Responsible Officers of the Trustee in good faith determine that the withholding of such notice is in the interests of the Debentureholders; and *provided, further*, that in the case of any default of the character specified in *Section 501(3)* no such notice to Debentureholders shall be given until at least 30 days after the occurrence thereof. For the purpose of this Section, the term "*default*" means any event which is, or after notice or lapse of time or both would become, an Event of Default.

Section 603. Certain Rights of Trustee.

Except as otherwise provided in *Section 601:*

(a) the Trustee may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, debenture or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties;

(b) any request or direction of the Company mentioned herein shall be sufficiently evidenced by a Company Request or Company Order and any resolution of the Board of Directors may be sufficiently evidenced by a Board Resolution;

(c) whenever in the administration of this Indenture the Trustee shall deem it desirable that a matter be proved or established prior to taking, suffering or omitting any action hereunder, the Trustee (unless other evidence be herein specifically prescribed) may, in the absence of bad faith on its part, rely upon an Officers' Certificate;

(d) the Trustee may consult with counsel and the written advice of such counsel or any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by it hereunder in good faith and in reliance thereon;

(e) the Trustee shall be under no obligation to exercise any of the rights or powers vested in it by this Indenture at the request or direction of any of the Debentureholders pursuant to this Indenture, unless such Debentureholders shall have offered to the Trustee reasonable security or indemnity against the costs, expenses and liabilities which might be incurred by it in compliance with such request or direction;

(f) the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, debenture or other paper or document, but the Trustee, in its discretion, may make such further inquiry or investigation into such facts or matters as it may see fit, and, if the Trustee shall determine to make such further inquiry or investigation, it shall be entitled to examine

the books, records and premises of the Company, personally or by agent or attorney; and

(g) the Trustee may execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents or attorneys and the Trustee shall not be responsible for any misconduct or negligence on the part of any agent or attorney appointed with due care by it hereunder.

Section 604. Not Responsible for Recitals or Issuance of Debentures.

The recitals contained herein and in the Debentures, except the certificates of authentication, shall be taken as the statements of the Company, and the Trustee assumes no responsibility for their correctness. The Trustee makes no representations as to the validity or sufficiency of this Indenture or of the Debentures. The Trustee shall not be accountable for the use or application by the Company of Debentures or the proceeds thereof.

Section 605. May Hold Debentures.

The Trustee, any Paying Agent, Debenture Registrar or any other agent of the Company, in its individual or any other capacity, may become the owner or pledgee of Debentures and, subject to *Sections 608* and *613*, if operative, may otherwise deal with the Company with the same rights it would have if it were not Trustee, Paying Agent, Debenture Registrar or such other agent.

Section 606. Money Held in Trust.

Money held by the Trustee in trust hereunder need not be segregated from other funds except to the extent required by law. The Trustee shall be under no liability for interest on any money received by it hereunder except as otherwise agreed with the Company.

Section 607. Compensation and Reimbursement.

The Company agrees

(1) to pay to the Trustee from time to time reasonable compensation for all services rendered by it hereunder (which com-

pensation shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust);

(2) except as otherwise expressly provided herein, to reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee in accordance with any provision of this Indenture (including the reasonable compensation and the expenses and disbursements of its agents and counsel), except any such expense, disbursement or advance as may be attributable to its negligence or bad faith; and

(3) to indemnify the Trustee for, and to hold it harmless against, any loss, liability or expense incurred without negligence or bad faith on its part, arising out of or in connection with the acceptance or administration of this trust, including the costs and expenses of defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder.

All such payments and reimbursements shall be made with interest at the rate of 6% per annum.

As security for the performance of the obligations of the Company under this Section the Trustee shall have a lien prior to the Debentures upon all property and funds held or collected by the Trustee as such, except funds held in trust for the payment of principal of (and premium, if any) or interest on Debentures.

Section 608. Disqualification; Conflicting Interests.

This Section shall not be operative as a part of this Indenture until this Indenture is qualified under T.I.A, and until such qualification this Indenture shall be construed as if this Section were not contained herein.

(a) If the Trustee has or shall acquire any conflicting interest, as defined in this Section, it shall, within 90 days after ascertaining that it has such conflicting interest, either eliminate such conflicting interest or resign in the manner and with the effect hereinafter specified in this Article.

(b) In the event that the Trustee shall fail to comply with the provisions of *Subsection (a)* of this Section the Trustee shall, within 10 days after the expiration of such 90-day period, transmit by mail to all Debentureholders, as their names and addresses appear in the Debenture Register, notice of such failure.

(c) For the purposes of this Section, the Trustee shall be deemed to have a conflicting interest if

(1) the Trustee is trustee under another indenture under which any other securities, or certificates of interest or participation in any other securities, of the Company are outstanding, unless such other indenture is a collateral trust indenture under which the only collateral consists of Debentures issued under this Indenture, provided that there shall be excluded from the operation of this paragraph any indenture or indentures under which other securities, or certificates of interest or participation in other securities, of the Company are outstanding, if

(i) this Indenture and such other indenture or indentures are wholly unsecured and such other indenture or indentures are hereafter qualified under TIA, unless the Commission shall have found and declared by order pursuant to Section 305(b) or Section 307(c) of TIA that differences exist between the provisions of this Indenture and the provisions of such other indenture or indentures which are so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify the Trustee from acting as such under this Indenture and such other indenture or indentures, or

(ii) the Company shall have sustained the burden of proving, on application to the Commission and after opportunity for hearing thereon, that trusteeship under this Indenture and such other indenture or indentures is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protec-

tion of investors to disqualify the Trustee from acting as such under one of such indentures;

(2) the Trustee or any of its directors or executive officers is an obligor upon the Debentures or an underwriter for the Company;

(3) the Trustee directly or indirectly controls or is directly or indirectly controlled by or is under direct or indirect common control with the Company or an underwriter for the Company;

(4) the Trustee or any of its directors or executive officers is a director, officer, partner, employee, appointee or representative of the Company, or of an underwriter (other than the Trustee itself) for the Company who is currently engaged in the business of underwriting, except that (i) one individual may be a director or an executive officer, or both, of the Trustee and a director or an executive officer, or both, of the Company but may not be at the same time an executive officer of both the Trustee and the Company; (ii) if and so long as the number of directors of the Trustee in office is more than nine, one additional individual may be a director or an executive officer, or both, of the Trustee and a director of the Company; and (iii) the Trustee may be designated by the Company or by any underwriter for the Company to act in the capacity of transfer agent, registrar, custodian, paying agent, fiscal agent, escrow agent, or depositary, or in any other similar capacity, or, subject to the provisions of *paragraph (1)* of this Subsection, to act as trustee, whether under an indenture or otherwise;

(5) 10% or more of the voting securities of the Trustee is beneficially owned either by the Company or by any director, partner, or executive officer thereof, or 20% or more of such voting securities is beneficially owned, collectively, by any two or more of such persons; or 10% or more of the voting securities of the Trustee is beneficially owned either by an underwriter for the Company or by any director, partner or

executive officer thereof, or is beneficially owned, collectively, by any two or more such persons;

(6) the Trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default (as hereinafter in this Subsection defined), (i) 5% or more of the voting securities, or 10% or more of any other class of security, of the Company not including the Debentures issued under this Indenture and securities issued under any other indenture under which the Trustee is also trustee, or (ii) 10% or more of any class of security of an underwriter for the Company;

(7) the Trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default (as hereinafter in this Subsection defined), 5% or more of the voting securities of any person who, to the knowledge of the Trustee, owns 10% or more of the voting securities of, or controls directly or indirectly or is under direct or indirect common control with, the Company;

(8) the Trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default (as hereinafter in this Subsection defined), 10% or more of any class of security of any person who, to the knowledge of the Trustee, owns 50% or more of the voting securities of the Company; or

(9) the Trustee owns, on May 15 in any calendar year, in the capacity of executor, administrator, testamentary or inter vivos trustee, guardian, committee or conservator, or in any other similar capacity, an aggregate of 25% or more of the voting securities, or of any class of security, of any person, the beneficial ownership of a specified percentage of which would have constituted a conflicting interest under *paragraphs (6), (7)* or *(8)* of this Subsection. As to any such securities of which the Trustee acquired ownership through becoming executor, administrator, or testamentary trustee of an estate which included them, the provisions of the

preceding sentence shall not apply, for a period of two years from the date of such acquisition, to the extent that such securities included in such estate do not exceed 25% of such voting securities or 25% of any such class of security. Promptly after May 15 in each calendar year, the Trustee shall make a check of its holdings of such securities in any of the above-mentioned capacities as of such May 15. If the Company fails to make payment in full of the principal of, or the premium, if any, or interest on, any of the Debentures when and as the same becomes due and payable, and such failure continues for 30 days thereafter, the Trustee shall make a prompt check of its holdings of such securities in any of the above-mentioned capacities as of the date of the expiration of such 30 day period, and after such date, notwithstanding the foregoing provisions of this paragraph, all such securities so held by the Trustee, with sole or joint control over such securities vested in it, shall, but only so long as such failure shall continue, be considered as though beneficially owned by the Trustee for the purposes of *paragraphs (6), (7)* and *(8)* of this Subsection.

The specification of percentages in *paragraphs (5)* to *(9)* inclusive, of this Subsection, shall not be construed as indicating that the ownership of such percentages of the securities of a person is or is not necessary or sufficient to constitute direct or indirect control for the purposes of *paragraph (3)* or *(7)* of this Subsection.

For the purposes of *paragraphs (6), (7), (8)* and *(9)* of this Subsection only, (i) the terms *"security"* and *"securities"* shall include only such securities as are generally known as corporate securities, but shall not include any note or other evidence of indebtedness issued to evidence an obligation to repay moneys lent to a person by one or more banks, trust companies or banking firms, or any certificate of interest or participation in any such note or evidence of indebtedness; (ii) an obligation shall be deemed to be *"in default"* when a default in payment of principal shall have continued for 30 days or more and shall not have been cured; and

(iii) the Trustee shall not be deemed to be the owner or holder of (A) any security which it holds as collateral security, as trustee or otherwise, for an obligation which is not in default as defined in clause (ii) above, or (B) any security which it holds as collateral security under this Indenture, irrespective of any default hereunder, or (C) any security which it holds as agent for collection, or as custodian, escrow agent, or depositary, or in any similar representative capacity.

(d) For the purposes of this Section:

(1) The term *"underwriter"* when used with reference to the Company means every person who, within three years prior to the time as of which the determination is made, has purchased from the Company with a view to, or has offered or sold for the Company in connection with, the distribution of any security of the Company outstanding at such time, or has participated or has had a direct or indirect participation in any such undertaking, or has participated or has had a participation in the direct or indirect underwriting of any such undertaking, but such term shall not include a person whose interest was limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission.

(2) The term *"director"* means any director of a corporation, or any individual performing similar functions with respect to any organization whether incorporated or unincorporated.

(3) The term *"person"* means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, an unincorporated organization, or a government or political subdivision thereof. As used in this paragraph, the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(4) The term *"voting security"* means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a person, or any security issued under or pursuant to any trust, agreement or arrangement whereby a trustee or trustees or agent or agents for the owner or holder of such security are presently entitled to vote in the direction or management of the affairs of a person.

(5) The term *"Company"* means any obligor upon the Debentures.

(6) The term *"executive officer"* means the president, every vice president, every trust officer, the cashier, the secretary, and the treasurer of a corporation, and any individual customarily performing similar functions with respect to any organization whether incorporated or unincorporated, but shall not include the chairman of the board of directors.

(e) The percentages of voting securities and other securities specified in this Section shall be calculated in accordance with the following provisions:

(1) A specified percentage of the voting securities of the Trustee, the Company or any other person referred to in this Section (each of whom is referred to as a "person" in this paragraph) means such amount of the outstanding voting securities of such person as entitles the holder or holders thereof to cast such specified percentage of the aggregate votes which the holders of all the outstanding voting securities of such person are entitled to cast in the direction or management of the affairs of such person.

(2) A specified percentage of a class of securities of a person means such percentage of the aggregate amount of securities of the class outstanding.

(3) The term *"amount"*, when used in regard to securities, means the principal amount if relating to evidences of indebtedness, the number of shares if relating to capital shares,

and the number of units if relating to any other kind of security.

(4) The term *"outstanding"* means issued and not held by or for the account of the issuer. The following securities shall not be deemed outstanding within the meaning of this definition:

(i) securities of an issuer held in a sinking fund relating to securities of the issuer of the same class;

(ii) securities of an issuer held in a sinking fund relating to another class of securities of the issuer, if the obligation evidenced by such other class of securities is not in default as to principal or interest or otherwise;

(iii) securities pledged by the issuer thereof as security for an obligation of the issuer not in default as to principal or interest or otherwise; and

(iv) securities held in escrow if placed in escrow by the issuer thereof;

provided, however, that any voting securities of an issuer shall be deemed outstanding if any person other than the issuer is entitled to exercise the voting rights thereof.

(5) A security shall be deemed to be of the same class as another security if both securities confer upon the holder or holders thereof substantially the same rights and privileges; *provided, however,* that, in the case of secured evidences of indebtedness, all of which are issued under a single indenture, differences in the interest rates or maturity dates of various series thereof shall not be deemed sufficient to constitute such series different classes and *provided further,* that, in the case of unsecured evidences of indebtedness, differences in the interest rates or maturity dates thereof shall not be deemed sufficient to constitute them securities of different classes, whether or not they are issued under a single indenture.

Section 609. Corporate Trustee Required; Eligibility.

There shall at all times be a Trustee hereunder which shall be a corporation organized and doing business under the laws of the United States of America or of any State, authorized under such laws to exercise corporate trust powers, having a combined capital and surplus of at least $5,000,000, subject to supervision or examination by Federal or State authority, and having its principal office in the place specified in *Article Six*. If such corporation publishes reports of condition at least annually, pursuant to law or to the requirements of the aforesaid supervising or examining authority, then for the purposes of this Section, the combined capital and surplus of such corporation shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published. If at any time the Trustee shall cease to be eligible in accordance with the provisions of this Section, it shall resign immediately in the manner and with the effect hereinafter specified in this Article.

Section 610. Resignation and Removal; Appointment of Successor.

(a) No resignation or removal of the Trustee and no appointment of a successor Trustee pursuant to this Article shall become effective until the acceptance of appointment by the successor Trustee under *Section 611*.

(b) The Trustee may resign at any time by giving written notice thereof to the Company. If an instrument of acceptance by a successor Trustee shall not have been delivered to the Trustee within 30 days after the giving of such notice of resignation, the resigning Trustee may petition any court of competent jurisdiction for the appointment of a successor Trustee.

(c) The Trustee may be removed at any time by Act of the Holders of a majority in principal amount of the Outstanding Debentures, delivered to the Trustee and to the Company.

(d) If at any time:

(1) the Trustee, after this Indenture shall have been qualified under TIA, shall fail to comply with *Section 608(a)*

after written request therefor by the Company or by any Debentureholder who has been a bona fide Holder of a Debenture for at least 6 months, or

(2) the Trustee shall cease to be eligible under *Section 609* and shall fail to resign after written request therefor by the Company or by any such Debentureholder, or

(3) the Trustee shall become incapable of acting or shall be adjudged a bankrupt or insolvent or a receiver of the Trustee or of its property shall be appointed or any public officer shall take charge or control of the Trustee or of its property or affairs for the purpose of rehabilitation, conservation or liquidation,

then, in any such case, (i) the Company by a Board Resolution may remove the Trustee, or (ii) subject to *Section 514*, any Debentureholder who has been a bona fide Holder of a Debenture for at least 6 months may, on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor Trustee.

(e) If the Trustee shall resign, be removed or become incapable of acting, or if a vacancy shall occur in the office of Trustee for any cause, the Company, by a Board Resolution, shall promptly appoint a successor Trustee. If, within 1 year after such resignation, removal or incapability, or the occurrence of such vacancy, a successor Trustee shall be appointed by Act of the Holders of a majority in principal amount of the Outstanding Debentures delivered to the Company and the retiring Trustee, the successor Trustee so appointed shall, forthwith upon its acceptance of such appointment, become the successor Trustee and supersede the successor Trustee appointed by the Company. If no successor Trustee shall have been so appointed by the Company or the Debentureholders and accepted appointment in the manner hereinafter provided, any Debentureholder who has been a bona fide Holder of a Debenture for at least 6 months may, on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the appointment of a successor Trustee.

(f) The Company shall give notice of each resignation and each removal of the Trustee and each appointment of a successor Trustee by mailing written notice of such event by first-class mail, postage prepaid, to the Holders of Debentures as their names and addresses appear in the Debenture Register. Each notice shall include the name of the successor Trustee and the address of its principal corporate trust office.

Section 611. Acceptance of Appointment by Successor.

Every successor Trustee appointed hereunder shall execute, acknowledge and deliver to the Company and to the retiring Trustee an instrument accepting such appointment, and thereupon the resignation or removal of the retiring Trustee shall become effective and such successor Trustee, without any further act, deed or conveyance, shall become vested with all the rights, powers, trusts and duties of the retiring Trustee; but, on request of the Company or the successor Trustee, such retiring Trustee shall, upon payment of its charges, execute and deliver an instrument transferring to such successor Trustee all the rights, powers and trusts of the retiring Trustee, and shall duly assign, transfer and deliver to such successor Trustee all property and money held by such retiring Trustee hereunder, subject nevertheless to its lien, if any, provided for in *Section 607*. Upon request of any such successor Trustee, the Company shall execute any and all instruments for more fully and certainly vesting in and confirming to such successor Trustee all such rights, powers and trusts.

No successor Trustee shall accept its appointment unless at the time of such acceptance such successor Trustee shall be qualified and eligible under this Article, to the extent operative.

Section 612. Merger, Conversion, Consolidation or Succession to Business.

Any corporation into which the Trustee may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Trustee shall be a party, or any corporation succeeding to all or substantially all of the corporate trust business of the Trustee, shall be the successor of the Trustee hereunder, provided such corporation shall be otherwise qualified and eligible under this Article, to the extent operative, without

the execution or filing of any paper or any further act on the part of any of the parties hereto. In case any Debentures shall have been authenticated, but not delivered, by the Trustee then in office, any successor by merger, conversion or consolidation to such authenticating Trustee may adopt such authentication and deliver the Debentures so authenticated with the same effect as if such successor Trustee had itself authenticated such Debentures.

Section 613. Preferential Collection of Claims against Company.

This Section shall not be operative as a part of this Indenture until this Indenture is qualified under TIA, and until such qualification this Indenture shall be construed as if this Section were not contained herein.

(a) Subject to *Subsection (b)* of this Section, if the Trustee shall be or shall become a creditor, directly or indirectly, secured or unsecured, of the Company within 4 months prior to a default, as defined in *Subsection (c)* of this Section, or subsequent to such a default, then, unless and until such default shall be cured, the Trustee shall set apart and hold in a special account for the benefit of the Trustee individually, the Holders of the Debentures and the holders of other indenture securities (as defined in *Subsection (c)* of this Section):

(1) an amount equal to any and all reductions in the amount due and owing upon any claim as such creditor in respect of principal or interest, effected after the beginning of such 4 months period and valid as against the Company and its other creditors, except any such reduction resulting from the receipt or disposition of any property described in *paragraph (2)* of this Subsection, or from the exercise of any right of set-off which the Trustee could have exercised if a petition in bankruptcy had been filed by or against the Company upon the date of such default; and

(2) all property received by the Trustee in respect of any claim as such creditor, either as security therefor, or in satisfaction or composition thereof, or otherwise, after the beginning of such 4 months period, or an amount equal to the

proceeds of any such property, if disposed of, *subject, however,* to the rights, if any, of the Company and its other creditors in such property or such proceeds.

Nothing herein contained, however, shall affect the right of the Trustee

(A) to retain for its own account (i) payments made on account of any such claim by any Person (other than the Company) who is liable thereon, and (ii) the proceeds of the bona fide sale of any such claim by the Trustee to a third person, and (iii) distributions made in cash, securities or other property in respect of claims filed against the Company in bankruptcy or receivership or in proceedings for reorganization pursuant to the Federal Bankruptcy Act or applicable State law;

(B) to realize, for its own account, upon any property held by it as security for any such claim, if such property was so held prior to the beginning of such 4 months period;

(C) to realize, for its own account, but only to the extent of the claim hereinafter mentioned, upon any property held by it as security for any such claim, if such claim was created after the beginning of such 4 months period and such property was received as security therefor simultaneously with the creation thereof, and if the Trustee shall sustain the burden of proving that at the time such property was so received the Trustee had no reasonable cause to believe that a default as defined in *Subsection (c)* of this Section would occur within 4 months; or

(D) to receive payment on any claim referred to in *paragraph (B)* or *(C)*, against the release of any property held as security for such claim as provided in *paragraph (B)* or *(C)*, as the case may be, to the extent of the fair value of such property.

For the purposes of *paragraphs (B)*, *(C)* and *(D)*, property substituted after the beginning of such 4 months period for property held as security at the time of such substitution shall, to the extent of

the fair value of the property released, have the same status as the property released, and, to the extent that any claim referred to in any of such paragraphs is created in renewal of or in substitution for or for the purpose of repaying or refunding any pre-existing claim of the Trustee as such creditor, such claim shall have the same status as such pre-existing claim.

If the Trustee shall be required to account, the funds and property held in such special account and the proceeds thereof shall be apportioned between the Trustee, the Debentureholders and the holders of other indenture securities in such manner that the Trustee, the Debentureholders and the holders of other indenture securities realize, as a result of payments from such special account and payments of dividends on claims filed against the Company in bankruptcy or receivership or in proceedings for reorganization pursuant to the Federal Bankruptcy Act or applicable State law, the same percentage of their respective claims, figured before crediting to the claim of the Trustee anything on account of the receipt by it from the Company of the funds and property in such special account and before crediting to the respective claims of the Trustee and the Debentureholders and the holders of other indenture securities dividends on claims filed against the Company in bankruptcy or receivership or in proceedings for reorganization pursuant to the Federal Bankruptcy Act or applicable State law, but after crediting thereon receipts on account of the indebtedness represented by their respective claims from all sources other than from such dividends and from the funds and property so held in such special account. As used in this paragraph, with respect to any claim, the term "*dividends*" shall include any distribution with respect to such claim, in bankruptcy or receivership or proceedings for reorganization pursuant to the Federal Bankruptcy Act or applicable State law, whether such distribution is made in cash, securities, or other property, but shall not include any such distribution with respect to the secured portion, if any, of such claim. The court in which such bankruptcy, receivership or proceedings for reorganization is pending shall have jurisdiction (i) to apportion between the Trustee and the Debentureholders and the holders of other indenture securities, in accordance with the provisions of this paragraph, the funds and property held in

such special account and proceeds thereof, or (ii) in lieu of such apportionment, in whole or in part, to give to the provisions of this paragraph due consideration in determining the fairness of the distributions to be made to the Trustee and the Debentureholders and the holders of other indenture securities with respect to their respective claims, in which event it shall not be necessary to liquidate or to appraise the value of any securities or other property held in such special account or as security for any such claim, or to make a specific allocation of such distributions as between the secured and unsecured portions of such claims, or otherwise to apply the provisions of this paragraph as a mathematical formula.

Any Trustee which has resigned or been removed after the beginning of such 4 months period shall be subject to the provisions of this Subsection as though such resignation or removal had not occurred. If any Trustee has resigned or been removed prior to the beginning of such 4 months period, it shall be subject to the provisions of this Subsection if and only if the following conditions exist:

(i) the receipt of property or reduction of claim, which would have given rise to the obligation to account, if such Trustee had continued as Trustee, occurred after the beginning of such 4 months period; and

(ii) such receipt of property or reduction of claim occurred within 4 months after such resignation or removal.

(b) There shall be excluded from the operation of *Subsection (a)* of this Section a creditor relationship arising from

(1) the ownership or acquisition of securities issued under any indenture, or any security or securities having a maturity of one year or more at the time of acquisition by the Trustee;

(2) advances authorized by a receivership or bankruptcy court of competent jurisdiction, or by this Indenture, for the purpose of preserving any property which shall at any time be subject to the lien of this Indenture or of discharging tax liens or other prior liens or encumbrances thereon, if

notice of such advances and of the circumstances surrounding the making thereof is given to the Debentureholders at the time and in the manner provided in this Indenture;

(3) disbursements made in the ordinary course of business in the capacity of trustee under an indenture, transfer agent, registrar, custodian, paying agent, fiscal agent or depositary, or other similar capacity;

(4) an indebtedness created as a result of services rendered or premises rented; or an indebtedness created as a result of goods or securities sold in a cash transaction as defined in *Subsection (c)* of this Section;

(5) the ownership of stock or of other securities of a corporation organized under the provisions of Section 25(a) of the Federal Reserve Act, as amended, which is directly or indirectly a creditor of the Company; or

(6) the acquisition, ownership, acceptance or negotiation of any drafts, bills of exchange, acceptances or obligations which fall within the classification of self-liquidating paper as defined in *Subsection (c)* of this Section.

(c) For the purposes of this Section only:

(1) The term *"default"* means any failure to make payment in full of the principal of or interest on any of the Debentures or upon the other indenture securities when and as such principal or interest becomes due and payable.

(2) The term *"other indenture securities"* means securities upon which the Company is an obligor outstanding under any other indenture (i) under which the Trustee is also trustee, (ii) which contains provisions substantially similar to the provisions of this Section, and (iii) under which a default exists at the time of the apportionment of the funds and property held in such special account.

(3) The term *"cash transaction"* means any transaction in which full payment for goods or securities sold is made

within 7 days after delivery of the goods or securities in currency or in checks or other orders drawn upon banks or bankers and payable upon demand.

(4) The term *"self-liquidating paper"* means any draft, bill of exchange, acceptance or obligation which is made, drawn, negotiated or incurred by the Company for the purpose of financing the purchase, processing, manufacturing, shipment, storage or sale of goods, wares or merchandise and which is secured by documents evidencing title to, possession of, or a lien upon, the goods, wares or merchandise or the receivables or proceeds arising from the sale of the goods, wares or merchandise previously constituting the security, provided the security is received by the Trustee simultaneously with the creation of the creditor relationship with the Company arising from the making, drawing, negotiating or incurring of the draft, bill of exchange, acceptance or obligation.

(5) The term *"Company"* means any obligor upon the Debentures.

ARTICLE 700

Debentureholders' Lists and Reports by Trustee and Company

This Article shall not be operative as a part of this Indenture until this Indenture is qualified under TIA, and until such qualification this Indenture shall be construed as if this Article were not contained herein.

Section 701. Company to Furnish Trustee Names and Addresses of Debentureholders.

The Company will furnish or cause to be furnished to the Trustee

(a) semi-annually, not more than 15 days after each Regular Record Date, a list, in such form as the Trustee may reasonably

require, of the names and addresses of the Holders of Debentures as of such Regular Record Date, and

(b) at such other times as the Trustee may request in writing, within 30 days after the receipt by the Company of any such request, a list of similar form and content as of a date not more than 15 days prior to the time such list is furnished,

excluding from any such list names and addresses received by the Trustee in its capacity as Debenture Registrar.

Section 702. Preservation of Information; Communications to Debentureholders.

(a) The Trustee shall preserve, in as current a form as is reasonably practicable, the names and addresses of Holders of Debentures contained in the most recent list furnished to the Trustee as provided in *Section 701* and the names and addresses of Holders of Debentures received by the Trustee in its capacity as Debenture Registrar. The Trustee may destroy any list furnished to it as provided in *Section 701* upon receipt of a new list so furnished.

(b) If 3 or more Holders of Debentures (hereinafter referred to as *"applicants"*) apply in writing to the Trustee, and furnish to the Trustee reasonable proof that each such applicant has owned a Debenture for a period of at least 6 months preceding the date of such application, and such application states that the applicants desire to communicate with other Holders of Debentures with respect to their rights under this Indenture or under the Debentures and is accompanied by a copy of the form of proxy or other communication which such applicants propose to transmit, then the Trustee shall, within 5 business days after the receipt of such application, at its election, either

(i) afford such applicants access to the information preserved at the time by the Trustee in accordance with *Section 702(a)*, or

(ii) inform such applicants as to the approximate number of Holders of Debentures whose names and addresses appear in the information preserved at the time by the Trustee

in accordance with *Section 702(a)*, and as to the approximate cost of mailing to such Debentureholders the form of proxy or other communication, if any, specified in such application.

If the Trustee shall elect not to afford such applicants access to such information, the Trustee shall, upon the written request of such applicants, mail to each Debentureholder whose name and address appear in the information preserved at the time by the Trustee in accordance with *Section 702(a)*, a copy of the form of proxy or other communication which is specified in such request, wth reasonable promptness after a tender to the Trustee of the material to be mailed and of payment, or provision for the payment, of the reasonable expenses of mailing, unless within 5 days after such tender, the Trustee shall mail to such applicants and file with the Commission, together with a copy of the material to be mailed, a written statement to the effect that, in the opinion of the Trustee, such mailing would be contrary to the best interests of the Holders of Debentures or would be in violation of applicable law. Such written statement shall specify the basis of such opinion. If the Commission, after opportunity for a hearing upon the objections specified in the written statement so filed, shall enter an order refusing to sustain any of such objections or if, after the entry of an order sustaining one or more of such objections, the Commission shall find, after notice and opportunity for hearing, that all the objections so sustained have been met and shall enter an order so declaring, the Trustee shall mail copies of such material to all such Debentureholders with reasonable promptness after the entry of such order and the renewal of such tender; otherwise the Trustee shall be relieved of any obligation or duty to such applicants respecting their application.

(c) Every Holder of Debentures, by receiving and holding the same, agrees with the Company and the Trustee that neither the Company nor the Trustee shall be held accountable by reason of the disclosure of any such information as to the names and addresses of the Holders of Debentures in accordance with *Section 702(b)*, regardless of the source from which such information was derived, and that the

Trustee shall not be held accountable by reason of mailing any material pursuant to a request made under *Section 702(b)*.

Section 703. Reports by Trustee.

(a) The term "*reporting date*", as used in this Section, means the date specified in *Article Seven*. Within 60 days after the reporting date in each year, the Trustee shall transmit by mail to all Debentureholders, as their names and addresses appear in the Debenture Register, a brief report dated as of such reporting date with respect to:

(1) its eligibility under *Section 609* and its qualifications under *Section 608*, or in lieu thereof, if to the best of its knowledge it has continued to be eligible and qualified under said Sections, a written statement to such effect;

(2) the character and amount of any advances (and if the Trustee elects so to state, the circumstances surrounding the making thereof) made by the Trustee (as such) which remain unpaid on the date of such report, and for the reimbursement of which it claims or may claim a lien or charge, prior to that of the Debentures, on any property or funds held or collected by it as Trustee, except that the Trustee shall not be required (but may elect) to report such advances if such advances so remaining unpaid aggregate not more than ½ of 1% of the principal amount of the Debentures Outstanding on the date of such report;

(3) the amount, interest rate and maturity date of all other indebtedness owing by the Company (or by any other obligor on the Debentures) to the Trustee in its individual capacity, on the date of such report, with a brief description of any property held as collateral security therefor, except an indebtedness based upon a creditor relationship arising in any manner described in *Section 613(b)(2), (3), (4)* or *(6)*;

(4) the property and funds, if any, physically in the possession of the Trustee as such on the date of such report;

(5) any additional issue of Debentures which the Trustee has not previously reported; and

(6) any action taken by the Trustee in the performance of its duties hereunder which it has not previously reported and which in its opinion materially affects the Debentures, except action in respect of a default, notice of which has been or is to be withheld by the Trustee in accordance with *Section 602*.

(b) The Trustee shall transmit by mail to all Debentureholders, as their names and addresses appear in the Debenture Register, a brief report with respect to the character and amount of any advances (and if the Trustee elects so to state, the circumstances surrounding the making thereof) made by the Trustee (as such) since the date of the last report transmitted pursuant to *Subsection (a)* of this Section (or if no such report has yet been so transmitted, since the date of execution of this instrument) for the reimbursement of which it claims or may claim a lien or charge, prior to that of the Debentures, on property or funds held or collected by it as Trustee, and which it has not previously reported pursuant to this Subsection, except that the Trustee shall not be required (but may elect) to report such advances if such advances remaining unpaid at any time aggregate 10% or less of the principal amount of the Debentures Outstanding at such time, such report to be transmitted within 90 days after such time.

(c) A copy of each such report shall, at the time of such transmission to Debentureholders, be filed by the Trustee with each stock exchange upon which the Debentures are listed, and also with the Commission. The Company will notify the Trustee when the Debentures are listed on any stock exchange.

Section 704. Reports by Company.

The Company will

(1) file with the Trustee, within 15 days after the Company is required to file the same with the Commission, copies of the annual reports and of the information, documents and other

reports (or copies of such portions of any of the foregoing as the Commission may from time to time by rules and regulations prescribe) which the Company may be required to file with the Commission pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934; or, if the Company is not required to file information, documents or reports ~~pursuant to~~ either of said Sections, then it will file with the Trustee and the Commission, in accordance with rules and regulations prescribed from time to time by the Commission, such of the supplementary and periodic information, documents and reports which may be required pursuant to Section 13 of the Securities Exchange Act of 1934 in respect of a security listed and registered on a National Securities Exchange as may be prescribed from time to time in such rules and regulations;

(2) file with the Trustee and the Commission, in accordance with rules and regulations prescribed from time to time by the Commission, such additional information, documents and reports with respect to compliance by the Company with the conditions and covenants of this Indenture as may be required from time to time by such rules and regulations; and

(3) transmit by mail to all Debentureholders, as their names and addresses appear in the Debenture Register, within 30 days after the filing thereof with the Trustee, such summaries of any information, documents and reports required to be filed by the Company pursuant to *paragraphs (1)* and *(2)* of this Section as may be required by rules and regulations prescribed from time to time by the Commission.

ARTICLE 800

Consolidation, Merger, Conveyance, Transfer or Lease

Section 801. Company May Consolidate, etc., only on Certain Terms.

The Company shall not consolidate with or merge into any other corporation or convey or transfer its properties and assets substantially as an entirety to any Person, unless:

(1) the corporation formed by such consolidation or into which the Company is merged or the Person which acquires by conveyance or transfer the properties and assets of the Company substantially as an entirety shall be a corporation organized and existing under the laws of the United States of America or any State or the District of Columbia, and shall expressly assume, by an INDENTURE SUPPLEMENTAL HERETO, executed and delivered to the Trustee, in form satisfactory to the Trustee, the due and punctual payment of the principal of (and premium, if any) and interest on all the Debentures and the performance of every covenant of this Indenture on the part of the Company to be performed or observed;

(2) immediately after giving effect to such transaction, no Event of Default, and no event which, after notice or lapse of time, or both, would become an Event of Default, shall have happened and be continuing; and

(3) the Company has delivered to the Trustee an OFFICERS' CERTIFICATE and an OPINION OF COUNSEL each stating that such consolidation, merger, conveyance or transfer and such supplemental indenture comply with this Article and that all conditions precedent herein provided for relating to such transaction have been complied with.

Section 802. Successor Corporation Substituted.

Upon any consolidation or merger, or any conveyance or transfer of the properties and assets of the Company substantially as an entirety in accordance with *Section 801*, the successor corporation formed by such consolidation or into which the Company is merged or to which such conveyance or transfer is made shall succeed to, and be substituted for, and may exercise every right and power of, the Company under this Indenture with the same effect as if such successor corporation had been named as the Company herein; *provided, however*, that

no such conveyance or transfer shall have the effect of releasing the Person named as the "*Company*" in the first paragraph of this instrument or any successor corporation which shall theretofore have become such in the manner prescribed in this Article from its liability as obligor and maker on any of the Debentures.

Section 803. Limitation on Lease of Properties as Entirety.

The Company shall not lease its properties and assets substantially as an entirety to any Person.

ARTICLE 900

Supplemental Indentures

Section 901. Supplemental Indentures Without Consent of Debentureholders.

Without the consent of the Holders of any Debentures, the Company, when authorized by a BOARD RESOLUTION, and the Trustee, at any time and from time to time, may enter into one or more indentures supplemental hereto, in form satisfactory to the Trustee, for any of the following purposes:

(1) to evidence the succession of another corporation to the Company, and the assumption by any such successor of the covenants of the Company herein and in the Debentures contained; or

(2) to add to the covenants of the Company, for the benefit of the Holders of the Debentures, or to surrender any right or power herein conferred upon the Company; or

(3) to cure any ambiguity, to correct or supplement any provision herein which may be inconsistent with any other provision herein, or to make any other provisions with respect to matters or questions arising under this Indenture which shall not be inconsistent with the provisions of this Indenture, *provided* such action shall not adversely affect the interest of the Holders of the Debentures; or

(4) to modify, eliminate or add to the provisions of this Indenture to such extent as shall be necessary to effect the qualification of this Indenture under TIA, or under any similar federal statute hereafter enacted, and to add to this Indenture such other provisions as may be expressly permitted by TIA, *excluding, however*, the provisions referred to in Section 316(a)(2) of TIA as in effect at the date as of which this instrument was executed or any corresponding provision in any similar federal statute hereafter enacted.

Section 902. Supplemental Indentures With Consent of Debentureholders.

With the consent of the Holders of not less than 66⅔% in principal amount of the Outstanding Debentures, by Act of said Holders delivered to the Company and the Trustee, the Company, when authorized by a Board Resolution, and the Trustee may enter into an indenture or indentures supplemental hereto for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of modifying in any manner the rights of the Holders of the Debentures under this Indenture; *provided, however*, that no such supplemental indenture shall, without the consent of the Holder of each Outstanding Debenture affected thereby,

(1) change the Stated Maturity of the principal of, or any instalment of interest on, any Debenture, or reduce the principal amount thereof or the interest thereon or any premium payable upon the redemption thereof, or change any Place of Payment where, or the coin or currency in which, any Debenture or the interest thereon is payable, or impair the right to institute suit for the enforcement of any such payment on or after the Stated Maturity thereof (or, in the case of redemption, on or after the Redemption Date), or

(2) reduce the percentage in principal amount of the Outstanding Debentures, the consent of whose Holders is required for any such supplemental indenture, or the consent of whose Holders

is required for any waiver (of compliance with certain provisions of this Indenture or certain defaults hereunder and their consequences) provided for in this Indenture, or

(3) modify any of the provisions of this Section or *Section 513*, except to increase any such percentage or to provide that certain other provisions of this Indenture cannot be modified or waived without the consent of the Holder of each Debenture affected thereby.

It shall not be necessary for any Act of Debentureholders under this Section to approve the particular form of any proposed supplemental indenture, but it shall be sufficient if such Act shall approve the substance thereof.

Section 903. Execution of Supplemental Indentures.

In executing, or accepting the additional trusts created by, any supplemental indenture permitted by this Article or the modifications thereby of the trusts created by this Indenture, the Trustee shall be entitled to receive, and (subject to *Section 601*) shall be fully protected in relying upon, an OPINION OF COUNSEL stating that the execution of such supplemental indenture is authorized or permitted by this Indenture. The Trustee may, but shall not (except to the extent required in the case of a supplemental indenture entered into under *Section 901(4)*) be obligated to, enter into any such supplemental indenture which affects the Trustee's own rights, duties or immunities under this Indenture or otherwise.

Section 904. Effect of Supplemental Indentures.

Upon the execution of any supplemental indenture under this Article, this Indenture shall be modified in accordance therewith, and such supplemental indenture shall form a part of this Indenture for all purposes; and every Holder of Debentures theretofore or thereafter authenticated and delivered hereunder shall be bound thereby.

Section 905. Conformity with Trust Indenture Act.

Every supplemental indenture executed pursuant to this Article shall conform to the requirements of TIA as then in effect if this Indenture shall then be qualified under TIA.

Section 906. Reference in Debentures to Supplemental Indentures.

Debentures authenticated and delivered after the execution of any supplemental indenture pursuant to this Article may, and shall if required by the Trustee, bear a notation in form approved by the Trustee as to any matter provided for in such supplemental indenture. If the Company shall so determine, new Debentures so modified as to conform, in the opinion of the Trustee and the Board of Directors, to any such supplemental indenture may be prepared and executed by the Company and authenticated and delivered by the Trustee in exchange for Outstanding Debentures.

ARTICLE 1000

Covenants

Section 1001. Payment of Principal, Premium and Interest.

The Company will duly and punctually pay the principal of (and premium, if any) and interest on the Debentures in accordance with the terms of the Debentures and this Indenture.

Section 1002. Maintenance of Office or Agency.

The Company will maintain an office or agency in each Place of Payment where Debentures may be presented or surrendered for payment, where Debentures may be surrendered for transfer or exchange and where notices and demands to or upon the Company in respect of the Debentures and this Indenture may be served. The Company will give prompt written notice to the Trustee of the location, and of any change in the location, of such office or agency. If at any time the Company shall fail to maintain such office or agency or shall fail to furnish the Trustee with the address thereof, such presentations, surrenders,

notices and demands may be made or served at the principal corporate trust office of the Trustee, and the Company hereby appoints the Trustee its agent to receive all such presentations, surrenders, notices and demands.

Section 1003. Money for Debenture Payments to be Held in Trust.

If the Company shall at any time act as its own Paying Agent, it will, on or before each due date of the principal of (and premium, if any) or interest on, any of the Debentures, segregate and hold in trust for the benefit of the Persons entitled thereto a sum sufficient to pay the principal (and premium, if any) or interest so becoming due until such sums shall be paid to such Persons or otherwise disposed of as herein provided, and will promptly notify the Trustee of its action or failure so to act.

Whenever the Company shall have one or more Paying Agents, it will, prior to each due date of the principal of (and premium, if any) or interest on, any Debentures, deposit with a Paying Agent a sum sufficient to pay the principal (and premium, if any) or interest, so becoming due, such sum to be held in trust for the benefit of the Persons entitled to such principal, premium or interest, and (unless such Paying Agent is the Trustee) the Company will promptly notify the Trustee of its action or failure so to act.

The Company will cause each Paying Agent other than the Trustee to execute and deliver to the Trustee an instrument in which such Paying Agent shall agree with the Trustee, subject to the provisions of this Section, that such Paying Agent will

(1) hold all sums held by it for the payment of principal of (and premium, if any) or interest on Debentures in trust for the benefit of the Persons entitled thereto until such sums shall be paid to such Persons or otherwise disposed of as herein provided;

(2) give the Trustee notice of any default by the Company (or any other obligor upon the Debentures) in the making of any such payment of principal (and premium, if any) or interest; and

(3) at any time during the continuance of any such default, upon the written request of the Trustee, forthwith pay to the Trustee all sums so held in trust by such Paying Agent.

The Company may at any time, for the purpose of obtaining the satisfaction and discharge of this Indenture or for any other purpose, pay, or by Company Order direct any Paying Agent to pay, to the Trustee all sums held in trust by the Company or such Paying Agent, such sums to be held by the Trustee upon the same trusts as those upon which such sums were held by the Company or such Paying Agent; and, upon such payment by any Paying Agent to the Trustee, such Paying Agent shall be released from all further liability with respect to such money.

Any money deposited with the Trustee or any Paying Agent, or then held by the Company, in trust for the payment of the principal of (and premium, if any) or interest on any Debenture and remaining unclaimed for 6 years after such principal (and premium, if any) or interest has become due and payable shall be paid to the Company on Company Request, or (if then held by the Company) shall be discharged from such trust; and the Holder of such Debenture shall thereafter, as an unsecured general creditor, look only to the Company for payment thereof, and all liability of the Trustee or such Paying Agent with respect to such trust money, and all liability of the Company as trustee thereof, shall thereupon cease; *provided, however,* that the Trustee or such Paying Agent, before being required to make any such repayment, may at the expense of the Company cause to be published once, in an Authorized Newspaper in each Place of Payment, notice that such money remains unclaimed and that, after a date specified therein, which shall not be less than 30 days from the date of such publication, any unclaimed balance of such money then remaining will be repaid to the Company.

Section 1004. Payment of Taxes and Other Claims.

The Company will pay or discharge or cause to be paid or discharged, before the same shall become delinquent, (1) all taxes, assessments and governmental charges levied or imposed upon it or upon

its income, profits or property, and (2) all lawful claims for labor, materials and supplies which, if unpaid, might by law become a lien upon its property; *provided, however,* that the Company shall not be required to pay or discharge or cause to be paid or discharged any such tax, assessment, charge or claim whose amount, applicability or validity is being contested in good faith by appropriate proceedings.

Section 1005. Maintenance of Properties.

The Company will cause all its properties used or useful in the conduct of its business to be maintained and kept in good condition, repair and working order and supplied with all necessary equipment and will cause to be made all necessary repairs, renewals, replacements, betterments and improvements thereof, all as in the judgment of the Company may be necessary so that the business carried on in connection therewith may be properly and advantageously conducted at all times; *provided, however,* that nothing in this Section shall prevent the Company from discontinuing the operation and maintenance of any of its properties if such discontinuance is, in the judgment of the Company, desirable in the conduct of its business and not disadvantageous in any material respect to the Debentureholders.

Section 1006. Statement as to Compliance.

The Company will deliver to the Trustee, within 120 days after the the end of each fiscal year, a written statement signed by the President or a Vice President and by the Treasurer, an Assistant Treasurer, the Controller or an Assistant Controller of the Company, stating, as to each signer thereof, that

(1) a review of the activities of the Company during such year and of performance under this Indenture has been made under his supervision and

(2) to the best of his knowledge, based on such review, the Company has fulfilled all its obligations under this Indenture throughout such year, or, if there has been a default in the fulfillment of any such obligation, specifying each such default known to him and the nature and status thereof.

Section 1007. Corporate Existence.

Subject to *Article 800*, the Company will do or cause to be done all things necessary to preserve and keep in full force and effect its corporate existence, rights (charter and statutory) and franchises; *provided, however*, that the Company shall not be required to preserve any right or franchise if the Board of Directors shall determine that the preservation thereof is no longer desirable in the conduct of the business of the Company and that the loss thereof is not disadvantageous in any material respect to the Debentureholders.

ARTICLE 1100

Redemption of Debentures

Section 1101. Right of Redemption.

[*The subject matter indicated by the heading of this Section appears in the Indenture. This Section is mentioned in the Model Provisions merely to preserve a numerical sequence corresponding to that in the Indenture.*]

Section 1102. Applicability of Article.

Redemption of Debentures at the election of the Company or otherwise, as permitted or required by any provision of this Indenture, shall be made in accordance with such provision and this Article.

Section 1103. Election to Redeem; Notice to Trustee.

The election of the Company to redeem any Debentures shall be evidenced by a Board Resolution. In case of any redemption at the election of the Company of less than all of the Debentures, the Company shall, at least 45 days prior to the Redemption Date fixed by the Company (unless a shorter notice shall be satisfactory to the Trustee) notify the Trustee of such Redemption Date and of the principal amount of Debentures to be redeemed.

Section 1104. Selection by Trustee of Debentures to be Redeemed.

If less than all the Debentures are to be redeemed, the particular Debentures to be redeemed shall be selected not more than 60 days prior to the Redemption Date by the Trustee, from the Outstanding Debentures not previously called for redemption, by such method as the Trustee shall deem fair and appropriate and which may provide for the selection for redemption of portions of the principal of Debentures of a denomination larger than $1,000. The portions of the principal of Debentures so selected for partial redemption shall be equal to $1,000 or the smallest authorized denomination of the Debentures, whichever is greater, or a multiple thereof.

The Trustee shall promptly notify the Company in writing of the Debentures selected for redemption and, in the case of any Debenture selected for partial redemption, the principal amount thereof to be redeemed.

For all purposes of this Indenture, unless the context otherwise requires, all provisions relating to the redemption of Debentures shall relate, in the case of any Debenture redeemed or to be redeemed only in part, to the portion of the principal of such Debenture which has been or is to be redeemed.

Section 1105. Notice of Redemption.

Notice of redemption shall be given by first-class mail, postage prepaid, mailed not less than 30 nor more than 60 days prior to the Redemption Date, to each Holder of Debentures to be redeemed, at his address appearing in the Debenture Register.

All notices of redemption shall state:

(1) the Redemption Date,

(2) the Redemption Price,

(3) if less than all Outstanding Debentures are to be redeemed, the identification (and, in the case of partial redemption, the respective principal amounts) of the Debentures to be redeemed,

(4) that on the Redemption Date the Redemption Price will become due and payable upon each such Debenture, and that interest thereon shall cease to accrue from and after said date, and

(5) the place where such Debentures are to be surrendered for payment of the Redemption Price, which shall be the office or agency of the Company in each Place of Payment.

Notice of redemption of Debentures to be redeemed at the election of the Company shall be given by the Company or, at the Company's request, by the Trustee in the name and at the expense of the Company.

Section 1106. Deposit of Redemption Price.

Prior to any Redemption Date, the Company shall deposit with the Trustee or with a Paying Agent (or, if the Company is acting as its own Paying Agent, segregate and hold in trust as provided in *Section 1003*) an amount of money sufficient to pay the Redemption Price of all the Debentures which are to be redeemed on that date.

Section 1107. Debentures Payable on Redemption Date.

Notice of redemption having been given as aforesaid, the Debentures so to be redeemed shall, on the Redemption Date, become due and payable at the Redemption Price therein specified and from and after such date (unless the Company shall default in the payment of the Redemption Price) such Debentures shall cease to bear interest. Upon surrender of such Debentures for redemption in accordance with said notice, such Debentures shall be paid by the Company at the Redemption Price. Instalments of interest whose Stated Maturity is on or prior to the Redemption Date shall be payable to the Holders of such Debentures registered as such on the relevant Record Dates according to their terms and the provisions of *Section 307*.

If any Debenture called for redemption shall not be so paid upon surrender thereof for redemption, the principal (and premium, if any) shall, until paid, bear interest from the Redemption Date at the rate borne by the Debenture.

Section 1108. Debentures Redeemed in Part.

Any Debenture which is to be redeemed only in part shall be surrendered at a Place of Payment (with, if the Company or the Trustee so requires, due endorsement by, or a written instrument of transfer in form satisfactory to the Company and the Trustee duly executed by, the Holder thereof or his attorney duly authorized in writing) and the Company shall execute and the Trustee shall authenticate and deliver to the Holder of such Debenture without service charge, a new Debenture or Debentures, of any authorized denomination as requested by such Holder in aggregate principal amount equal to and in exchange for the unredeemed portion of the principal of the Debenture so surrendered.

Model Simplified Indenture*

INTRODUCTION

The Model Simplified Indenture (text and accompanying notes), which is based on a form of indenture originally prepared by Morey W. McDaniel, chief finance counsel to Union Carbide Corporation,[1] has been prepared for the Section's Committee on Developments in Business Financing by a drafting committee chaired by Edward H. Fleischman and consisting of Morey W. McDaniel, Franklin Guerin, Edward Everett, J. Kirkland Grant and Leonard Sommer. This Model has been reviewed and approved by the committee, but the substantive positions taken in this Model do not necessarily represent the views of individual members of the Committee. The Securities and Exchange Commission officially called attention to the simplified form in early 1981,[2] and a number of issuers have used variants of the simplified form prior to publication of this Model.[3] Comments, criticisms and suggestions for revision of the Model and its accompanying notes are welcome and should be directed to the Committee on Developments in Business Financing, whose chairman is John J. McCann of New York City.

The materials presented here consist of this introduction, the text of the Model Simplified Indenture (cover page, cross-reference table, table of contents and indenture text, together with face, text and notices of assignment/conversion of the form of security which is an integral part of the indenture), and a set of explanatory Notes keyed to the individual sections of the text. In the process of preparation of this Model, the drafting committee reviewed standard forms of indenture as well as earlier versions of the simplified form, analyzed substantive provisions against the American Bar Foundation model indentures and commentaries referred to at greater length below, and considered individually a wealth of comments and suggestions submitted by members of the Committee on Developments in Business Financing, by counsel to indenture trustees[4] through the American Bankers Association's Corporate Securities Services Committee (with the unstinting assistance of its chairman, Robert I. Landau of New York City), and by many other interested practitioners. The Notes, which arise

*Note: Reprints of the Model Simplified Indenture materials are available at $3 each from: Section of Corporation, Banking and Business Law, American Bar Association, 1155 E. 60th St., Chicago, IL 60637.

1. *See* McDaniel, *A Simplified Indenture*, 13 Rev. Sec. Reg. 871 (1980).

2. Trust Indenture Act Release No. 39-605 (Jan. 8, 1981), 21 SEC Docket 1244.

3. The list includes the following: Control Data Corp. (Reg. No. 2-70816); Florida Gulf Realty Trust (Reg. No. 2-73253); Hawaiian Enterprises, Inc. (Reg. No. 2-75855); Integrated Resources, Inc. (Reg. No. 2-76096); Martin Marietta Corp. (Reg. No. 2-71131); Mobil Corp. (Reg. No. 2-79208); National Medical Enterprises, Inc. (Reg. No. 2-72580); Nasco Corp. (Reg. No. 2-69424); Pioneer Corp. (Reg. No. 2-79050); Provident Bancorp, Inc. (Exempt); Semicon Inc. (Reg. No. 2-70364); and Union Carbide Corp. (Reg. No. 2-70531).

4. Particular mention should be made of Messrs. David W. Swanson and John P. Campbell, both acknowledged authorities in this field, who offered many constructive suggestions even though they disagree with some of the substantive positions embodied in this Model.

principally out of discussions within the drafting committee during that process, are intended as an aid to understanding, and to consideration of alternatives, by users of the Model Simplified Indenture.

For holders of the debt issued thereunder, the governing indenture serves the same functions as the charter and bylaws serve for corporate stockholders. While reservations continue to be expressed about a simplified or plain-language form of indenture, there is evidence of a desire for wider and easier comprehension of indenture provisions for the benefit of debtholders, administering personnel of the indenture trustees, directors and officers of corporate obligors,[4] and their respective counsel. It has, for example, been recommended that trustee's counsel prepare an "English translation" of the normal form of indenture.[5] The Model Simplified Indenture is addressed to that desire, and at the same time to the professional challenge of reviewing, periodically, the substance and the language of responses to past problems to be sure they remain appropriate in present circumstances.

It has been more than a decade since the Committee on Developments in Business Financing originated, and the American Bar Foundation developed and published, two model debenture indentures and the lengthy and scholarly commentaries on the provisions thereof which have since served as the standard against which other indenture forms are to be compared.[7] Each of the ABF Model Indentures is a two-part indenture that seeks to segregate negotiable from nonnegotiable provisions. The Model Simplified Indenture proceeds on the different assumption that (except for provisions specifically required by the Trust Indenture Act) nearly all portions of an indenture are subject to negotiation in varying degrees, but seeks to prescribe the language of frequently encountered provisions in such a way as to achieve a consensus generally acceptable to counsel accustomed to analyzing indenture terms from the points of view of debtholders, corporate borrowers, lending institutions, investment bankers and indenture trustees. In the accompanying notes, the provisions of the Model Simplified Indenture are often explained with a comparison to the ABF Model Indentures or with reference to relevant stock exchange listing requirements[8] or prevailing administrative practice,[9] and there are also included re-

5. *See* A.B.A. Sec. of Corp., Banking and Bus. L., *Corporate Director's Guidebook*, 33 Bus. Law. 1591, 1602 (1978).

6. Schreiber and Wood, *Caveat Indenture Trustee: Avoiding the Expanding Scope of Section's Law*, 121/1 Trusts & Estates 48, 54 (Jan. 1982).

7. *See* American Bar Foundation, Commentaries on Indentures (1971) [hereinafter cited as ABF Indenture Commentaries]. The Commentaries volume includes the model indentures [hereinafter cited as ABF Model Indentures] as its Appendixes B and C. The ABF has also more recently published a model mortgage bond indenture, reviewed in 36 Bus. Law. 1917 (1981). For an account of the ABF indenture project, see Rodgers, *The Corporate Trust Indenture Project*, 20 Bus. Law. 551 (1965); Garrett, *A Borrower's View of the Model Corporate Debenture Indenture Provisions*, 21 Bus. Law. 675 (1966).

8. The published requirements and policies of the New York Stock Exchange are found in its Company Manual [hereinafter cited as NYSE Co. Manual] and those of the American Stock Exchange are found in its Company Guide.

minders of alternative approaches to the particular subject matter. Further, since users of the Model Simplified Indenture will find that behind its novel form lies quite conservative substance, it is hoped that individual draftsmen with particular biases or concerns will not be restrained from altering or adding provisions (while bearing in mind the practical problems of indenture administration[9]) and will find the Model adaptable to that end.

The Model Simplified Indenture has been prepared for an issue of unsecured convertible subordinated debt. For a "straight" senior debt issue, a nonconvertible subordinated issue, or a senior convertible issue, the user must delete the inapplicable article or articles along with cross-references elsewhere in the text and the relevant material in the form of the security. (For a secured issue, such substantial additions would be required that the prospective user would probably be well advised to start elsewhere.) Forms of financial covenants are not included; above all other provisions, financial covenants are the subject of negotiation and of tailoring to the particulars of the obligor's financial condition and the historic and projected results of its operations. In addition to the ABF Indenture Commentaries,[10] perhaps the best sources for examination of such covenants are indentures of competitors to the prospective obligor and of companies of comparable size engaged in similar activities.

Peculiarly for a field of practice that appears to have changed so little in decades, there has recently been, and there promises to continue to be, a surprising number of developments affecting indentures. The introduction of the simplified form of indenture, the widespread issuance of original issue discount and zero coupon obligations, the adoption by the SEC of temporary rule 415 under the Securities Act of 1933, the adaptation of provisions and techniques from Eurobond and other foreign debt markets, the enormous increase in the amount of debt securities placed in securities depositories, the rapid but short-lived spread of "economic defeasance" of nonmunicipal debt, and the growth of futures trading in debt instruments, do not constitute the whole list of factors that are quickening the pace of change. It has not been feasible to respond to most of these factors in the Model Simplified Indenture (although the desirability, for example, of providing for serial issuances under rule 415 "shelf registration" is clear). That task is entrusted to the ingenuity of users, who (it is believed) will find this Model adaptable to their differing purposes.

9. For SEC Staff interpretations under TIA sections 310 to 318, inclusive, see SEC, Manual Trust Indenture Act of 1939 (1958) (unpublished) [hereinafter cited as SEC TIA Manual].

10. For an excellent reference source, see Kennedy and Landau, Corporate Trust Administration and Management (2d ed. 1975).

11. *But see* Simpson, *The Drafting of Loan Agreements: A Borrower's Viewpoint*, 28 Bus. Law. 1161, 1162-63 (1973) (the ABF sample covenants reflect the interests of lenders).

UNIVERSAL BUSINESS CORPORATION

AND

GREATER BANK AND TRUST COMPANY

Trustee

INDENTURE

Dated as of

$

% Convertible Subordinated Debentures Due

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N.A. means not applicable.

INDENTURE dated as of , between UNIVERSAL BUSINESS CORPORATION, a Delaware corporation ("Company"), and GREATER BANK AND TRUST COMPANY, a New York corporation ("Trustee").

Each party agrees as follows for the benefit of the other party and for the equal and ratable benefit of the Holders of the Company's % Convertible Subordinated Debentures Due ("Securities"):

ARTICLE 1
DEFINITIONS AND INCORPORATION BY REFERENCE

Section 1.01. ***Definitions.***

"*Affiliate*" means any person directly or indirectly controlling or controlled by or under direct or indirect common control with the Company.

"*Agent*" means any Registrar, Paying Agent, Conversion Agent or co-registrar.

"*Board of Directors*" means the Board of Directors of the Company or any authorized committee of the Board.

"*Company*" means the party named as such above until a successor replaces it and thereafter means the successor.

"*Default*" means any event which is, or after notice or passage of time would be, an Event of Default.

"*Holder*" or "*Securityholder*" means a person in whose name a Security is registered.

"*Indenture*" means this Indenture as amended from time to time.

"*Officers' Certificate*" means a certificate signed by two Officers, one of whom must be the President, the Treasurer or a Vice-President of the Company. See Sections 12.04 and 12.05.

"*Opinion of Counsel*" means a written opinion from legal counsel who is acceptable to the Trustee. The counsel may be an employee of or counsel to the Company or the Trustee. See Sections 12.04 and 12.05.

"*principal*" of a debt security means the principal of the security plus the premium, if any, on the security.

"*SEC*" means the Securities and Exchange Commission.

"*Securities*" means the Securities described above issued under this Indenture.

"*TIA*" means the Trust Indenture Act of 1939 (15 U.S. Code §§ 77aaa-77bbbb) as in effect on the date shown above.

"*Trustee*" means the party named as such above until a successor replaces it and thereafter means the successor.

"*Trust Officer*" means the Chairman of the Board, the President or any other officer or assistant officer of the Trustee assigned by the Trustee to administer its corporate trust matters.

Section 1.02. ***Other Definitions.***

Term	Defined in Section
"Bankruptcy Law"	6.01
"Common Stock"	10.01
"Conversion Agent"	2.03
"Custodian"	6.01
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Section 1.03. ***Incorporation by Reference of Trust Indenture Act.*** Whenever this Indenture refers to a provision of the TIA, the provision is incorporated by reference in and made a part of this Indenture.

The following TIA terms used in this Indenture have the following meanings:

"indenture securities" means the Securities;
"indenture security holder" means a Securityholder;
"indenture to be qualified" means this Indenture;
"indenture trustee" or *"institutional trustee"* means the Trustee;
"obligor" on the indenture securities means the Company.

All other terms used in this Indenture that are defined by the TIA, defined by TIA reference to another statute or defined by SEC rule under the TIA have the meanings assigned to them.

Section 1.04. ***Rules of Construction.*** Unless the context otherwise requires:

(1) a term has the meaning assigned to it;

(2) an accounting term not otherwise defined has the meaning assigned to it in accordance with generally accepted accounting principles;

(3) "or" is not exclusive;

(4) words in the singular include the plural, and in the plural include the singular; and

(5) provisions apply to successive events and transactions.

ARTICLE 2
THE SECURITIES

Section 2.01. ***Form and Dating.*** The Securities shall be substantially in the form of Exhibit A, which is part of this Indenture. The Securities may have notations, legends or endorsements required by law, stock exchange rule or usage. Each Security shall be dated the date of its authentication.

Section 2.02. ***Execution and Authentication.*** Two Officers shall sign the Securities for the Company by manual or facsimile signature. The Company's seal shall be reproduced on the Securities.

If an Officer whose signature is on a Security no longer holds that office at the time the Security is authenticated, the Security shall nevertheless be valid.

A Security shall not be valid until authenticated by the manual signature of the Trustee. The signature shall be conclusive evidence that the Security has been authenticated under this Indenture.

The Trustee shall authenticate Securities for original issue up to the aggregate principal amount stated in paragraph 4 of Exhibit A upon a written order of the Company signed by two Officers. The aggregate principal amount of Securities outstanding at any time may not exceed that amount except as provided in Section 2.07.

The Trustee may appoint an authenticating agent acceptable to the Company to authenticate Securities. An authenticating agent may authenticate Securities whenever the Trustee may do so. Each reference in this Indenture to authentication by the Trustee includes authentication by such agent. An authenticating agent has the same rights as an Agent to deal with the Company or an Affiliate.

Section 2.03. ***Registrar, Paying Agent and Conversion Agent.*** The Company shall maintain an office or agency where Securities may be presented for registration of transfer or for exchange ("Registrar"), an office or agency where Securities may be presented for payment ("Paying Agent") and an office or agency where Securities may be presented for conversion ("Conversion Agent"). The Registrar shall keep a register of the Securities and of their transfer and exchange. The Company may appoint one or more co-registrars, one or more additional paying agents and one or more additional conversion agents. The term "Paying Agent" includes any additional paying agent; the term "Conversion Agent" includes any additional conversion agent. The Company shall notify the Trustee of the name and address of any Agent not a party to this Indenture. If the Company fails to maintain a Registrar, Paying Agent or Conversion Agent, the Trustee shall act as such.

Section 2.04. ***Paying Agent to Hold Money in Trust.*** The Company shall require each Paying Agent other than the Trustee to agree in writing that the Paying Agent will hold in trust for the benefit of Securityholders or the Trustee all money held by the Paying Agent for the payment of principal or interest on the Securities, and will notify the Trustee of any default by the Company in making any such payment. While any such default continues, the Trustee may require a Paying Agent to pay all money held by it to the Trustee.

The Company at any time may require a Paying Agent to pay all money held by it to the Trustee. Upon payment over to the Trustee, the Paying Agent shall have no further liability for the money. If the Company acts as Paying Agent, it shall segregate and hold as a separate trust fund all money held by it as Paying Agent.

Section 2.05. ***Securityholder Lists.*** The Trustee shall preserve in as current a form as is reasonably practicable the most recent list available to it of the names and addresses of Securityholders. If the Trustee is not the Registrar, the Company shall furnish to the Trustee on or before each interest payment date and at such other times as the Trustee may request in writing a list in such form and as of such date as the Trustee may reasonably require of the names and addresses of Securityholders.

Section 2.06. ***Transfer and Exchange.*** Where Securities are presented to the Registrar or a co-registrar with a request to register transfer or to exchange them for an equal principal amount of Securities of other denominations, the Registrar shall register the transfer or make the exchange if its requirements for such transactions are met. To permit registrations of transfer and exchanges, the Trustee shall authenticate Securities at the Registrar's request. The Company may charge a reasonable fee for any registration of transfer or exchange but not for any exchange pursuant to Section 2.10, 3.06, 9.05 or 10.02.

Section 2.07. ***Replacement Securities.*** If the Holder of a Security claims that the Security has been lost, destroyed or wrongfully taken, the Company shall issue and the Trustee shall authenticate a replacement Security if the Trustee's requirements are met. If required by the Trustee or the Company, an indemnity bond must be sufficient in the judgment of both to protect the Company, the Trustee, any Agent or any authenticating agent from any loss which any of them may suffer if a Security is replaced. The Company may charge for its expenses in replacing a Security.

Every replacement Security is an additional obligation of the Company.

Section 2.08. ***Outstanding Securities.*** The Securities outstanding at any time are all the Securities authenticated by the Trustee except for those cancelled by it, those delivered to it for cancellation, and those described in this Section as not outstanding.

If a Security is replaced pursuant to Section 2.07, it ceases to be outstanding unless the Trustee receives proof satisfactory to it that the replaced Security is held by a bona fide purchaser.

If Securities are considered paid under Section 4.01, they cease to be outstanding and interest on them ceases to accrue.

A Security does not cease to be outstanding because the Company or an Affiliate holds the Security.

Section 2.09. ***Treasury Securities.*** In determining whether the Holders of the required principal amount of Securities have concurred in any direction, waiver or consent, Securities owned by the Company or an Affiliate shall be disregarded, except that for the purposes of determining whether the Trustee

shall be protected in relying on any such direction, waiver or consent, only Securities which the Trustee knows are so owned shall be so disregarded.

Section 2.10. ***Temporary Securities.*** Until definitive Securities are ready for delivery, the Company may prepare and the Trustee shall authenticate temporary Securities. Temporary Securities shall be substantially in the form of definitive Securities but may have variations that the Company considers appropriate for temporary Securities. Without unreasonable delay, the Company shall prepare and the Trustee shall authenticate definitive Securities in exchange for temporary Securities.

Section 2.11. ***Cancellation.*** The Company at any time may deliver Securities to the Trustee for cancellation. The Registrar, Paying Agent and Conversion Agent shall forward to the Trustee any Securities surrendered to them for registration of transfer, exchange, payment or conversion. The Trustee shall cancel all Securities surrendered for registration of transfer, exchange, payment, conversion or cancellation and shall dispose of cancelled Securities as the Company directs. The Company may not issue new Securities to replace Securities that it has paid or delivered to the Trustee for cancellation or that any Securityholder has converted pursuant to Article 10.

Section 2.12. ***Defaulted Interest.*** If the Company defaults in a payment of interest on the Securities, it shall pay the defaulted interest in any lawful manner. It may pay the defaulted interest, plus any interest payable on the defaulted interest, to the persons who are Securityholders on a subsequent special record date. The Company shall fix the record date and payment date. At least 15 days before the record date, the Company shall mail to Securityholders a notice that states the record date, payment date, and amount of interest to be paid.

ARTICLE 3
REDEMPTION

Section 3.01. ***Notices to Trustee.*** If the Company wants to redeem Securities pursuant to paragraph 5 of the Securities, it shall notify the Trustee of the redemption date and the principal amount of Securities to be redeemed. If the Company wants to redeem Securities pursuant to paragraph 7 of the Securities, it shall notify the Trustee of the principal amount of Securities to be redeemed. The Company's notice shall specify the paragraph of the Securities pursuant to which it wants to redeem Securities.

If the Company wants to reduce the principal amount of Securities to be redeemed pursuant to paragraph 6 of the Securities, it shall notify the Trustee of the amount of the reduction and the basis for it. If the Company wants to credit against any such redemption Securities it has not previously delivered to the Trustee for cancellation, it shall deliver the Securities with the notice.

The Company shall give each notice provided for in this Section at least 50 days before the redemption date.

Section 3.02. ***Selection of Securities to be Redeemed.*** If less than all the Securities are to be redeemed, the Trustee shall select the Securities to be redeemed pro rata or by lot. The Trustee shall make the selection not more than 75 days before the redemption date from Securities outstanding not previously called for redemption. The Trustee may select for redemption portions of the principal of Securities that have denominations larger than $1000. Securities and portions of them it selects shall be in amounts of $1000 or whole multiples of $1000. Provisions of this Indenture that apply to Securities called for redemption also apply to portions of Securities called for redemption.

Section 3.03. ***Notice of Redemption.*** At least 30 days but not more than 60 days before a redemption date, the Company shall mail a notice of redemption to each Holder whose Securities are to be redeemed.

The notice shall identify the Securities to be redeemed and shall state:

(1) the redemption date;

(2) the redemption price;

(3) the conversion price;

(4) the name and address of the Paying Agent and Conversion Agent;

(5) that Securities called for redemption may be converted at any time before the close of business on the redemption date;

(6) that Holders who want to convert Securities must satisfy the requirements in paragraph 9 of the Securities;

(7) that Securities called for redemption must be surrendered to the Paying Agent to collect the redemption price; and

(8) that interest on Securities called for redemption ceases to accrue on and after the redemption date.

At the Company's request, the Trustee shall give the notice of redemption in the Company's name and at its expense.

Section 3.04. ***Effect of Notice of Redemption.*** Once notice of redemption is mailed, Securities called for redemption become due and payable on the redemption date at the redemption price.

Section 3.05. ***Deposit of Redemption Price.*** On or before the redemption date, the Company shall deposit with the Paying Agent money sufficient to pay the redemption price of and accrued interest on all Securities to be redeemed on that date. The Paying Agent shall return to the Company any money not required for that purpose because of conversion of Securities.

Section 3.06. ***Securities Redeemed in Part.*** Upon surrender of a Security that is redeemed in part, the Trustee shall authenticate for the Holder a new Security equal in principal amount to the unredeemed portion of the Security surrendered.

ARTICLE 4
COVENANTS

Section 4.01. ***Payment of Securities.*** The Company shall pay the principal of and interest on the Securities on the dates and in the manner provided in the Securities. Principal and interest shall be considered paid on the date due if the Paying Agent holds on that date money sufficient to pay all principal and interest then due.

The Company shall pay interest on overdue principal at the rate borne by the Securities; it shall pay interest on overdue installments of interest at the same rate to the extent lawful.

Section 4.02. ***SEC Reports.*** The Company shall file with the Trustee within 15 days after it files them with the SEC copies of the annual reports and of the information, documents, and other reports (or copies of such portions of any of the foregoing as the SEC may by rules and regulations prescribe) which the Company is required to file with the SEC pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934. The Company also shall comply with the other provisions of TIA § 314(a).

Section 4.03. ***Compliance Certificate.*** The Company shall deliver to the Trustee within 120 days after the end of each fiscal year of the Company an Officers' Certificate stating whether or not the signers know of any Default that occurred during the fiscal year. If they do, the certificate shall describe the Default and its status. The certificate need not comply with Section 12.05. See Section 12.10.

ARTICLE 5
SUCCESSORS

Section 5.01. ***When Company May Merge, etc.*** The Company shall not consolidate or merge into, or transfer or lease all or substantially all of its assets to, any person unless:

(1) the person is a corporation;

(2) the person assumes by supplemental indenture all the obligations of the Company under the Securities and this Indenture, except that it need not assume the obligations of the Company as to conversion of Securities if pursuant to Section 10.15 the Company or another person enters into a supplemental indenture obligating it to deliver securities, cash or other assets upon conversion of Securities; and

(3) immediately after the transaction no Default exists.

The surviving, transferee or lessee corporation shall be the successor Company, but the predecessor Company in the case of a transfer or lease shall not be released from the obligation to pay the principal of and interest on the Securities.

ARTICLE 6
DEFAULTS AND REMEDIES

Section 6.01. ***Events of Default.*** An "Event of Default" occurs if:

(1) the Company defaults in the payment of interest on any Security when the same becomes due and payable and the Default continues for a period of 30 days;

(2) the Company defaults in the payment of the principal of any Security when the same becomes due and payable at maturity, upon redemption or otherwise;

(3) the Company fails to comply with any of its other agreements in the Securities or this Indenture and the Default continues for the period and after the notice specified below;

(4) the Company pursuant to or within the meaning of any Bankruptcy Law:

(A) commences a voluntary case,

(B) consents to the entry of an order for relief against it in an involuntary case,

(C) consents to the appointment of a Custodian of it or for all or substantially all of its property, or

(D) makes a general assignment for the benefit of its creditors; or

(5) a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that:

(A) is for relief against the Company in an involuntary case,

(B) appoints a Custodian of the Company or for all or substantially all of its property, or

(C) orders the liquidation of the Company,

and the order or decree remains unstayed and in effect for 60 days.

The term "Bankruptcy Law" means title 11, U.S. Code or any similar Federal or State law for the relief of debtors. The term "Custodian" means any receiver, trustee, assignee, liquidator or similar official under any Bankruptcy Law.

A Default under clause (3) is not an Event of Default until the Trustee or the Holders of at least 25% in principal amount of the Securities notify the Company of the Default and the Company does not cure the Default within 60 days after receipt of the notice. The notice must specify the Default, demand that it be remedied and state that the notice is a "Notice of Default."

Section 6.02. ***Acceleration.*** If an Event of Default occurs and is continuing, the Trustee by notice to the Company, or the Holders of at least 25% in principal amount of the Securities by notice to the Company and the Trustee, may declare the principal of and accrued interest on all the Securities to be due and payable. Upon such declaration the principal and interest shall be due and payable immediately. The Holders of a majority in principal amount of the Securities by notice to the Trustee may rescind an acceleration and its consequences if the rescission would not conflict with any judgment or decree and if

all existing Events of Default have been cured or waived except nonpayment of principal or interest that has become due solely because of the acceleration.

Section 6.03. ***Other Remedies.*** If an Event of Default occurs and is continuing, the Trustee may pursue any available remedy to collect the payment of principal or interest on the Securities or to enforce the performance of any provision of the Securities or this Indenture.

The Trustee may maintain a proceeding even if it does not possess any of the Securities or does not produce any of them in the proceeding. A delay or omission by the Trustee or any Securityholder in exercising any right or remedy accruing upon an Event of Default shall not impair the right or remedy or constitute a waiver of or acquiescence in the Event of Default. All remedies are cumulative to the extent permitted by law.

Section 6.04. ***Waiver of Past Defaults.*** The Holders of a majority in principal amount of the Securities by notice to the Trustee may waive an existing Default and its consequences except a Default in the payment of the principal of or interest on any Security or a Default under Article 10.

Section 6.05. ***Control by Majority.*** The Holders of a majority in principal amount of the Securities may direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on it. However, the Trustee may refuse to follow any direction that conflicts with law or this Indenture, is unduly prejudicial to the rights of other Securityholders, or would involve the Trustee in personal liability.

Section 6.06. ***Limitation on Suits.*** A Securityholder may pursue a remedy with respect to this Indenture or the Securities only if:

(1) the Holder gives to the Trustee notice of a continuing Event of Default;

(2) the Holders of at least 25% in principal amount of the Securities make a request to the Trustee to pursue the remedy;

(3) such Holder or Holders offer to the Trustee indemnity satisfactory to the Trustee against any loss, liability or expense;

(4) the Trustee does not comply with the request within 60 days after receipt of the request and the offer of indemnity; and

(5) during such 60-day period the Holders of a majority in principal amount of the Securities do not give the Trustee a direction inconsistent with the request.

A Securityholder may not use this Indenture to prejudice the rights of another Securityholder or to obtain a preference or priority over another Securityholder.

Section 6.07. ***Rights of Holders to Receive Payment.*** Notwithstanding any other provision of this Indenture, the right of any Holder of a Security to receive payment of principal and interest on the Security, on or after the respective due dates expressed in the Security, or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of the Holder.

Notwithstanding any other provision of this Indenture, the right of any Holder of a Security to bring suit for the enforcement of the right to convert the Security shall not be impaired or affected without the consent of the Holder.

Section 6.08. ***Collection Suit by Trustee.*** If an Event of Default specified in Section 6.01(1) or (2) occurs and is continuing, the Trustee may recover judgment in its own name and as trustee of an express trust against the Company for the whole amount of principal and interest remaining unpaid.

Section 6.09. ***Trustee May File Proofs of Claim.*** The Trustee may file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of the Trustee and the Securityholders allowed in any judicial proceedings relative to the Company, its creditors or its property.

Section 6.10. ***Priorities.*** If the Trustee collects any money pursuant to this Article, it shall pay out the money in the following order:

First: to the Trustee for amounts due under Section 7.07;

Second: to holders of Senior Debt to the extent required by Article 11;

Third: to Securityholders for amounts due and unpaid on the Securities for principal and interest, ratably, without preference or priority of any kind, according to the amounts due and payable on the Securities for principal and interest, respectively; and

Fourth: to the Company.

The Trustee may fix a record date and payment date for any payment to Securityholders.

Section 6.11. ***Undertaking for Costs.*** In any suit for the enforcement of any right or remedy under this Indenture or in any suit against the Trustee for any action taken or omitted by it as Trustee, a court in its discretion may require the filing by any party litigant in the suit of an undertaking to pay the costs of the suit, and the court in its discretion may assess reasonable costs, including reasonable attorneys' fees, against any party litigant in the suit, having due regard to the merits and good faith of the claims or defenses made by the party litigant. This Section does not apply to a suit by the Trustee, a suit by a Holder pursuant to Section 6.07, or a suit by Holders of more than 10% in principal amount of the Securities.

ARTICLE 7
TRUSTEE

Section 7.01. ***Duties of Trustee.***

(a) If an Event of Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and 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.

(b) Except during the continuance of an Event of Default:

(1) The Trustee need perform only those duties that are specifically set forth in this Indenture and no others.

(2) In the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture. However, the Trustee shall examine the certificates and opinions to determine whether or not they conform to the requirements of this Indenture.

(c) The Trustee may not be relieved from liability for its own negligent action, its own negligent failure to act, or its own wilful misconduct, except that:

(1) This paragraph does not limit the effect of paragraph (b) of this Section.

(2) The Trustee shall not be liable for any error of judgment made in good faith by a Trust Officer, unless it is proved that the Trustee was negligent in ascertaining the pertinent facts.

(3) The Trustee shall not be liable with respect to any action it takes or omits to take in good faith in accordance with a direction received by it pursuant to Section 6.05.

(d) Every provision of this Indenture that in any way relates to the Trustee is subject to paragraphs (a), (b) and (c) of this Section.

(e) The Trustee may refuse to perform any duty or exercise any right or power unless it receives indemnity satisfactory to it against any loss, liability or expense.

(f) The Trustee shall not be liable for interest on any money received by it except as the Trustee may agree with the Company. Money held in trust by the Trustee need not be segregated from other funds except to the extent required by law.

Section 7.02. ***Rights of Trustee.***

(a) The Trustee may rely on any document believed by it to be genuine and to have been signed or presented by the proper person. The Trustee need not investigate any fact or matter stated in the document.

(b) Before the Trustee acts or refrains from acting, it may require an Officers' Certificate or an Opinion of Counsel. The Trustee shall not be liable for any action it takes or omits to take in good faith in reliance on the Certificate or Opinion.

(c) The Trustee may act through agents and shall not be responsible for the misconduct or negligence of any agent appointed with due care.

(d) The Trustee shall not be liable for any action it takes or omits to take in good faith which it believes to be authorized or within its rights or powers.

Section 7.03. ***Individual Rights of Trustee.*** The Trustee in its individual or any other capacity may become the owner or pledgee of Securities and may otherwise deal with the Company or an Affiliate with the same rights it would

have if it were not Trustee. Any Agent may do the same with like rights. However, the Trustee is subject to Sections 7.10 and 7.11.

Section 7.04. *Trustee's Disclaimer.* The Trustee makes no representation as to the validity or adequacy of this Indenture or the Securities, it shall not be accountable for the Company's use of the proceeds from the Securities, and it shall not be responsible for any statement in the Securities other than its authentication.

Section 7.05. *Notice of Defaults.* If a Default occurs and is continuing and if it is known to the Trustee, the Trustee shall mail to Securityholders a notice of the Default within 90 days after it occurs. Except in the case of a Default in payment on any Security, the Trustee may withhold the notice if and so long as a committee of its Trust Officers in good faith determines that withholding the notice is in the interests of Securityholders.

Section 7.06. *Reports by Trustee to Holders.* Within 60 days after the reporting date stated in Section 12.10, the Trustee shall mail to Securityholders a brief report dated as of such reporting date that complies with TIA § 313(a). The Trustee also shall comply with TIA § 313 (b)(2).

A copy of each report at the time of its mailing to Securityholders shall be filed with the SEC and each stock exchange on which the Securities are listed. The Company shall notify the Trustee when the Securities are listed on any stock exchange.

Section 7.07. *Compensation and Indemnity.* The Company shall pay to the Trustee from time to time reasonable compensation for its services. The Trustee's compensation shall not be limited by any law on compensation of a trustee of an express trust. The Company shall reimburse the Trustee upon request for all reasonable out-of-pocket expenses incurred by it. Such expenses shall include the reasonable compensation and out-of-pocket expenses of the Trustee's agents and counsel.

The Company shall indemnify the Trustee against any loss or liability incurred by it. The Trustee shall notify the Company promptly of any claim for which it may seek indemnity. The Company shall defend the claim and the Trustee shall cooperate in the defense. The Trustee may have separate counsel and the Company shall pay the reasonable fees and expenses of such counsel. The Company need not pay for any settlement made without its consent.

The Company need not reimburse any expense or indemnify against any loss or liability incurred by the Trustee through negligence or bad faith.

To secure the Company's payment obligations in this Section, the Trustee shall have a lien prior to the Securities on all money or property held or collected by the Trustee, except that held in trust to pay principal and interest on particular Securities.

When the Trustee incurs expenses or renders services after an Event of Default specified in Section 6.01(4) or (5) occurs, the expenses and the compensation for the services are intended to constitute expenses of administration under any Bankruptcy Law.

Section 7.08. ***Replacement of Trustee.*** A resignation or removal of the Trustee and appointment of a successor Trustee shall become effective only upon the successor Trustee's acceptance of appointment as provided in this Section.

The Trustee may resign by so notifying the Company. The Holders of a majority in principal amount of the Securities may remove the Trustee by so notifying the Trustee and the Company. The Company may remove the Trustee if:

(1) the Trustee fails to comply with Section 7.10;

(2) the Trustee is adjudged a bankrupt or an insolvent;

(3) a receiver or public officer takes charge of the Trustee or its property; or

(4) the Trustee becomes incapable of acting.

If the Trustee resigns or is removed or if a vacancy exists in the office of Trustee for any reason, the Company shall promptly appoint a successor Trustee. Within one year after the successor Trustee takes office, the Holders of a majority in principal amount of the Securities may appoint a successor Trustee to replace the successor Trustee appointed by the Company.

If a successor Trustee does not take office within 60 days after the retiring Trustee resigns or is removed, the retiring Trustee, the Company or the Holders of at least 10% in principal amount of the Securities may petition any court of competent jurisdiction for the appointment of a successor Trustee.

If the Trustee fails to comply with Section 7.10, any Securityholder may petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor Trustee.

A successor Trustee shall deliver a written acceptance of its appointment to the retiring Trustee and to the Company. Thereupon the resignation or removal of the retiring Trustee shall become effective, and the successor Trustee shall have all the rights, powers and duties of the Trustee under this Indenture. The successor Trustee shall mail a notice of its succession to Securityholders. The retiring Trustee shall promptly transfer all property held by it as Trustee to the successor Trustee, subject to the lien provided for in Section 7.07.

Section 7.09. ***Successor Trustee by Merger, etc.*** If the Trustee consolidates, merges or converts into, or transfers all or substantially all of its corporate trust business to, another corporation, the successor corporation without any further act shall be the successor Trustee.

Section 7.10. ***Eligibility; Disqualification.*** This Indenture shall always have a Trustee who satisfies the requirements of TIA § 310(a)(1). The Trustee shall always have a combined capital and surplus as stated in § 12.10. The Trustee is subject to TIA § 310(b), including the optional provision permitted by the second sentence of TIA § 310(b)(9). § 12.10 lists any excluded indenture or trust agreement.

Section 7.11. ***Preferential Collection of Claims Against Company.*** The Trustee is subject to TIA § 311(a), excluding any creditor relationship

listed in TIA § 311(b). A Trustee who has resigned or been removed is subject to TIA § 311(a) to the extent indicated.

ARTICLE 8
DISCHARGE OF INDENTURE

Section 8.01. ***Termination of Company's Obligations.*** The Company may terminate all of its obligations under this Indenture if:

(1) the Securities mature within one year or all of them are to be called for redemption within one year under arrangements satisfactory to the Trustee for giving the notice of redemption; and

(2) the Company irrevocably deposits in trust with the Trustee money or U.S. Government Obligations sufficient to pay principal and interest on the Securities to maturity or redemption, as the case may be. The Company may make the deposit only during the one-year period and only if Article 11 permits it.

However, the Company's obligations in Sections 2.03, 2.04, 2.05, 2.06, 2.07, 4.01, 7.07, 7.08 and 8.03, and in Article 10, shall survive until the Securities are no longer outstanding. Thereafter the Company's obligations in Sections 7.07 and 8.03 shall survive.

After a deposit the Trustee upon request shall acknowledge in writing the discharge of the Company's obligations under this Indenture except for those surviving obligations specified above.

In order to have money available on a payment date to pay principal or interest on the Securities, the U.S. Government Obligations shall be payable as to principal or interest on or before such payment date in such amounts as will provide the necessary money. U.S. Government Obligations shall not be callable at the issuer's option.

"*U.S. Government Obligations*" means direct obligations of the United States of America for the payment of which the full faith and credit of the United States of America is pledged.

Section 8.02. ***Application of Trust Money.*** The Trustee shall hold in trust money or U.S. Government Obligations deposited with it pursuant to Section 8.01. It shall apply the deposited money and the money from U.S. Government Obligations through the Paying Agent and in accordance with this Indenture to the payment of principal and interest on the Securities. Money and securities so held in trust are not subject to Article 11.

Section 8.03. ***Repayment to Company.*** The Trustee and the Paying Agent shall promptly pay to the Company upon request any excess money or securities held by them at any time.

The Trustee and the Paying Agent shall pay to the Company upon request any money held by them for the payment of principal or interest that remains unclaimed for two years. After payment to the Company, Securityholders entitled to the money must look to the Company for payment as general

creditors unless an applicable abandoned property law designates another person.

ARTICLE 9
AMENDMENTS

Section 9.01. ***Without Consent of Holders.*** The Company and the Trustee may amend this Indenture or the Securities without the consent of any Securityholder:

(1) to cure any ambiguity, defect or inconsistency;

(2) to comply with Sections 5.01 and 10.15;

(3) to provide for uncertificated Securities in addition to certificated Securities; or

(4) to make any change that does not adversely affect the rights of any Securityholder.

Section 9.02. ***With Consent of Holders.*** The Company and the Trustee may amend this Indenture or the Securities with the written consent of the Holders of at least 66⅔% in principal amount of the Securities. However, without the consent of each Securityholder affected, an amendment under this Section may not:

(1) reduce the amount of Securities whose Holders must consent to an amendment;

(2) reduce the rate of or change the time for payment of interest on any Security;

(3) reduce the principal of or change the fixed maturity of any Security;

(4) make any Security payable in money other than that stated in the Security;

(5) make any change in Section 6.04, 6.07 or 9.02 (second sentence);

(6) make any change that adversely affects the right to convert any Security; or

(7) make any change in Article 11 that adversely affects the rights of any Securityholder.

An amendment under this Section may not make any change that adversely affects the rights under Article 11 of any holder of an issue of Senior Debt unless the holders of the issue pursuant to its terms consent to the change.

After an amendment under this Section becomes effective, the Company shall mail to Securityholders a notice briefly describing the amendment.

Section 9.03. ***Compliance with Trust Indenture Act.*** Every amendment to this Indenture or the Securities shall be set forth in a supplemental indenture that complies with the TIA as then in effect.

Section 9.04. ***Revocation and Effect of Consents.*** Until an amendment or waiver becomes effective, a consent to it by a Holder of a Security is a continuing consent by the Holder and every subsequent Holder of a Security or

portion of a Security that evidences the same debt as the consenting Holder's Security, even if notation of the consent is not made on any Security. However, any such Holder or subsequent Holder may revoke the consent as to his Security or portion of a Security if the Trustee receives the notice of revocation before the date the amendment or waiver becomes effective. An amendment or waiver becomes effective in accordance with its terms and thereafter binds every Securityholder.

Section 9.05. ***Notation on or Exchange of Securities.*** The Trustee may place an appropriate notation about an amendment or waiver on any Security thereafter authenticated. The Company in exchange for all Securities may issue and the Trustee shall authenticate new Securities that reflect the amendment or waiver.

Section 9.06. ***Trustee Protected.*** The Trustee need not sign any supplemental indenture that adversely affects its rights.

ARTICLE 10
CONVERSION

Section 10.01. ***Conversion Privilege.*** A Holder of a Security may convert it into Common Stock at any time during the period stated in paragraph 9 of the Securities. The number of shares issuable upon conversion of a Security is determined as follows: Divide the principal amount to be converted by the conversion price in effect on the conversion date. Round the result to the nearest 1/100th of a share.

The initial conversion price is stated in paragraph 9 of the Securities. The conversion price is subject to adjustment.

A Holder may convert a portion of a Security if the portion is $1000 or a whole multiple of $1000. Provisions of this Indenture that apply to conversion of all of a Security also apply to conversion of a portion of it.

"*Common Stock*" means Common Stock of the Company as it exists on the date of this Indenture as originally signed.

Section 10.02. ***Conversion Procedure.*** To convert a Security a Holder must satisfy the requirements in paragraph 9 of the Securities. The date on which the Holder satisfies all those requirements is the conversion date. As soon as practical, the Company shall deliver through the Conversion Agent a certificate for the number of full shares of Common Stock issuable upon the conversion and a check for any fractional share. The person in whose name the certificate is registered shall be treated as a stockholder of record on and after the conversion date.

No payment or adjustment will be made for accrued interest on a converted Security.

If a Holder converts more than one Security at the same time, the number of full shares issuable upon the conversion shall be based on the total principal amount of the Securities converted.

Upon surrender of a Security that is converted in part, the Trustee shall authenticate for the Holder a new Security equal in principal amount to the unconverted portion of the Security surrendered.

If the last day on which a Security may be converted is a Legal Holiday in a place where a Conversion Agent is located, the Security may be surrendered to that Conversion Agent on the next succeeding day that is not a Legal Holiday.

Section 10.03. ***Fractional Shares.*** The Company will not issue a fractional share of Common Stock upon conversion of a Security. Instead the Company will deliver its check for the current market value of the fractional share. The current market value of a fraction of a share is determined as follows: Multiply the current market price of a full share by the fraction. Round the result to the nearest cent.

The current market price of a share of Common Stock is the Quoted Price of the Common Stock on the last trading day prior to the conversion date. In the absence of such a quotation, the Company shall determine the current market price on the basis of such quotations as it considers appropriate.

Section 10.04. ***Taxes on Conversion.*** If a Holder of a Security converts it, the Company shall pay any documentary, stamp or similar issue or transfer tax due on the issue of shares of Common Stock upon the conversion. However, the Holder shall pay any such tax which is due because the shares are issued in a name other than the Holder's name.

Section 10.05. ***Company to Provide Stock.*** The Company shall reserve out of its authorized but unissued Common Stock or its Common Stock held in treasury enough shares of Common Stock to permit the conversion of the Securities.

All shares of Common Stock which may be issued upon conversion of the Securities shall be fully paid and non-assessable.

The Company will endeavor to comply with all securities laws regulating the offer and delivery of shares of Common Stock upon conversion of Securities and will endeavor to list such shares on each national securities exchange on which the Common Stock is listed.

Section 10.06. ***Adjustment for Change in Capital Stock.*** If the Company:

(1) pays a dividend or makes a distribution on its Common Stock in shares of its Common Stock;

(2) subdivides its outstanding shares of Common Stock into a greater number of shares;

(3) combines its outstanding shares of Common Stock into a smaller number of shares;

(4) makes a distribution on its Common Stock in shares of its capital stock other than Common Stock; or

(5) issues by reclassification of its Common Stock any shares of its capital stock,

then the conversion privilege and the conversion price in effect immediately prior to such action shall be adjusted so that the Holder of a Security thereafter converted may receive the number of shares of capital stock of the Company which he would have owned immediately following such action if he had converted the Security immediately prior to such action.

The adjustment shall become effective immediately after the record date in the case of a dividend or distribution and immediately after the effective date in the case of a subdivision, combination or reclassification.

If after an adjustment a Holder of a Security upon conversion of it may receive shares of two or more classes of capital stock of the Company, the Company shall determine the allocation of the adjusted conversion price between the classes of capital stock. After such allocation, the conversion privilege and the conversion price of each class of capital stock shall thereafter be subject to adjustment on terms comparable to those applicable to Common Stock in this Article.

Section 10.07. ***Adjustment for Rights Issue.*** If the Company distributes any rights or warrants to all holders of its Common Stock entitling them for a period expiring within 60 days after the record date mentioned below to purchase shares of Common Stock at a price per share less than the current market price per share on that record date, the conversion price shall be adjusted in accordance with the formula:

$$C' = C \times \frac{O + \frac{N \times P}{M}}{O + N}$$

where:

- C' = the adjusted conversion price.
- C = the current conversion price.
- O = the number of shares of Common Stock outstanding on the record date.
- N = the number of additional shares of Common Stock offered.
- P = the offering price per share of the additional shares.
- M = the current market price per share of Common Stock on the record date.

The adjustment shall become effective immediately after the record date for the determination of stockholders entitled to receive the rights or warrants.

Section 10.08. ***Adjustment for Other Distributions.*** If the Company distributes to all holders of its Common Stock any of its assets or debt securities or any rights or warrants to purchase securities of the Company, the conversion price shall be adjusted in accordance with the formula:

$$C' = C \times \frac{M - F}{M}$$

where:

C' = the adjusted conversion price.
C = the current conversion price.
M = the current market price per share of Common Stock on the record date mentioned below.
F = the fair market value on the record date of the assets, securities, rights or warrants applicable to one share of Common Stock. The Company shall determine the fair market value.

The adjustment shall become effective immediately after the record date for the determination of stockholders entitled to receive the distribution.

This Section does not apply to cash dividends or cash distributions paid out of consolidated current or retained earnings as shown on the books of the Company. Also, this Section does not apply to rights or warrants referred to in Section 10.07.

Section 10.09. ***Current Market Price.*** In Sections 10.07 and 10.08 the current market price per share of Common Stock on any date is the average of the Quoted Prices of the Common Stock for 30 consecutive trading days commencing 45 trading days before the date in question. In the absence of one or more such quotations, the Company shall determine the current market price on the basis of such quotations as it considers appropriate.

Section 10.10. ***When Adjustment May Be Deferred.*** No adjustment in the conversion price need be made unless the adjustment would require an increase or decrease of at least 1% in the conversion price. Any adjustments that are not made shall be carried forward and taken into account in any subsequent adjustment.

All calculations under this Article shall be made to the nearest cent or to the nearest 1/100th of a share, as the case may be.

Section 10.11. ***When No Adjustment Required.*** No adjustment need be made for a transaction referred to in Section 10.06, 10.07 or 10.08 if Securityholders are to participate in the transaction on a basis and with notice that the Board of Directors determines to be fair and appropriate in light of the basis and notice on which holders of Common Stock participate in the transaction.

No adjustment need be made for rights to purchase Common Stock pursuant to a Company plan for reinvestment of dividends or interest.

No adjustment need be made for a change in the par value or no par value of the Common Stock.

To the extent the Securities become convertible into cash, no adjustment need be made thereafter as to the cash. Interest will not accrue on the cash.

Section 10.12. ***Notice of Adjustment.*** Whenever the conversion price is adjusted, the Company shall promptly mail to Securityholders a notice of the adjustment. The Company shall file with the Trustee a certificate from the Company's independent public accountants briefly stating the facts requiring the adjustment and the manner of computing it. The certificate shall be conclusive evidence that the adjustment is correct.

Section 10.13. ***Voluntary Reduction.*** The Company from time to time may reduce the conversion price by any amount for any period of time if the period is at least 20 days and if the reduction is irrevocable during the period.

Whenever the conversion price is reduced, the Company shall mail to Securityholders a notice of the reduction. The Company shall mail the notice at least 15 days before the date the reduced conversion price takes effect. The notice shall state the reduced conversion price and the period it will be in effect.

A reduction of the conversion price does not change or adjust the conversion price otherwise in effect for purposes of Sections 10.06 through 10.08.

Section 10.14. ***Notice of Certain Transactions.*** If:

(1) the Company takes any action that would require an adjustment in the conversion price pursuant to Section 10.06, 10.07 or 10.08 and if the Company does not let Securityholders participate pursuant to Section 10.11;

(2) the Company takes any action that would require a supplemental indenture pursuant to Section 10.15; or

(3) there is a liquidation or dissolution of the Company,

the Company shall mail to Securityholders a notice stating the proposed record date for a dividend or distribution or the proposed effective date of a subdivision, combination, reclassification, consolidation, merger, transfer, lease, liquidation or dissolution. The Company shall mail the notice at least 15 days before such date. Failure to mail the notice or any defect in it shall not affect the validity of the transaction.

Section 10.15. ***Reorganization of Company.*** If the Company is a party to a transaction subject to Section 5.01 or a merger which reclassifies or changes its outstanding Common Stock, the person obligated to deliver securities, cash or other assets upon conversion of Securities shall enter into a supplemental indenture. If the issuer of securities deliverable upon conversion of Securities is an affiliate of the surviving, transferee or lessee corporation, that issuer shall join in the supplemental indenture.

The supplemental indenture shall provide that the Holder of a Security may convert it into the kind and amount of securities, cash or other assets which he would have owned immediately after the consolidation, merger, transfer or lease if he had converted the Security immediately before the effective date of the transaction. The supplemental indenture shall provide for adjustments which shall be as nearly equivalent as may be practical to the adjustments provided for in this Article. The successor Company shall mail to Securityholders a notice briefly describing the supplemental indenture.

If this Section applies, Section 10.06 does not apply.

Section 10.16. ***Company Determination Final.*** Any determination that the Company or the Board of Directors must make pursuant to Section 10.03, 10.06, 10.08, 10.09 or 10.11 is conclusive.

Section 10.17. ***Trustee's Disclaimer.*** The Trustee has no duty to determine when an adjustment under this Article should be made, how it should be

made or what it should be. The Trustee has no duty to determine whether any provisions of a supplemental indenture under Section 10.15 are correct. The Trustee makes no representation as to the validity or value of any securities or assets issued upon conversion of Securities. The Trustee shall not be responsible for the Company's failure to comply with this Article. Each Conversion Agent other than the Company shall have the same protection under this Section as the Trustee.

ARTICLE 11
SUBORDINATION

Section 11.01. ***Agreement to Subordinate.*** The Company agrees, and each Securityholder by accepting a Security agrees, that the indebtedness evidenced by the Securities is subordinated in right of payment, to the extent and in the manner provided in this Article, to the prior payment in full of all Senior Debt, and that the subordination is for the benefit of the holders of Senior Debt.

Section 11.02. ***Certain Definitions.*** .

"*Debt*" means any indebtedness for borrowed money or any guarantee of such indebtedness.

"*Representative*" means the indenture trustee or other trustee, agent or representative for an issue of Senior Debt.

"*Senior Debt*" means Debt of the Company outstanding at any time except Debt that by its terms is not senior in right of payment to the Securities. Senior Debt may be further defined in Section 12.10.

A distribution may consist of cash, securities or other property.

Section 11.03. ***Liquidation; Dissolution; Bankruptcy.*** Upon any distribution to creditors of the Company in a liquidation or dissolution of the Company or in a bankruptcy, reorganization, insolvency, receivership or similar proceeding relating to the Company or its property:

(1) holders of Senior Debt shall be entitled to receive payment in full in cash of the principal of and interest (including interest accruing after the commencement of any such proceeding) to the date of payment on the Senior Debt before Securityholders shall be entitled to receive any payment of principal of or interest on Securities; and

(2) until the Senior Debt is paid in full in cash, any distribution to which Securityholders would be entitled but for this Article shall be made to holders of Senior Debt as their interests may appear, except that Securityholders may receive securities that are subordinated to Senior Debt to at least the same extent as the Securities.

Section 11.04. ***Default on Senior Debt.*** The Company may not pay principal of or interest on the Securities and may not acquire any Securities for cash or property other than capital stock of the Company if:

(1) a default on Senior Debt occurs and is continuing that permits holders of such Senior Debt to accelerate its maturity, and

(2) the default is the subject of judicial proceedings or the Company receives a notice of the default from a person who may give it pursuant to Section 11.12. If the Company receives any such notice, a similar notice received within nine months thereafter relating to the same default on the same issue of Senior Debt shall not be effective for purposes of this Section.

The Company may resume payments on the Securities and may acquire them when:

(a) the default is cured or waived, or

(b) 120 days pass after the notice is given if the default is not the subject of judicial proceedings,

if this Article otherwise permits the payment or acquisition at that time.

Section 11.05. ***Acceleration of Securities.*** If payment of the Securities is accelerated because of an Event of Default, the Company shall promptly notify holders of Senior Debt of the acceleration. The Company may pay the Securities when 120 days pass after the acceleration occurs if this Article permits the payment at that time.

Section 11.06. ***When Distribution Must Be Paid Over.*** If a distribution is made to Securityholders that because of this Article should not have been made to them, the Securityholders who receive the distribution shall hold it in trust for holders of Senior Debt and pay it over to them as their interests may appear.

Section 11.07. ***Notice by Company.*** The Company shall promptly notify the Trustee and the Paying Agent of any facts known to the Company that would cause a payment of principal of or interest on the Securities to violate this Article.

Section 11.08. ***Subrogation.*** After all Senior Debt is paid in full and until the Securities are paid in full, Securityholders shall be subrogated to the rights of holders of Senior Debt to receive distributions applicable to Senior Debt to the extent that distributions otherwise payable to the Securityholders have been applied to the payment of Senior Debt. A distribution made under this Article to holders of Senior Debt which otherwise would have been made to Securityholders is not, as between the Company and Securityholders, a payment by the Company on Senior Debt.

Section 11.09. ***Relative Rights.*** This Article defines the relative rights of Securityholders and holders of Senior Debt. Nothing in this Indenture shall

(1) impair, as between the Company and Securityholders, the obligation of the Company, which is absolute and unconditional, to pay principal of and interest on the Securities in accordance with their terms;

(2) affect the relative rights of Securityholders and creditors of the Company other than holders of Senior Debt; or

(3) prevent the Trustee or any Securityholder from exercising its available remedies upon a Default, subject to the rights of holders of Senior Debt to receive distributions otherwise payable to Securityholders.

If the Company fails because of this Article to pay principal of or interest on a Security on the due date, the failure is still a Default.

Section 11.10. ***Subordination May Not Be Impaired by Company.*** No right of any holder of Senior Debt to enforce the subordination of the indebtedness evidenced by the Securities shall be impaired by any act or failure to act by the Company or by its failure to comply with this Indenture.

Section 11.11. ***Distribution or Notice to Representative.*** Whenever a distribution is to be made or a notice given to holders of Senior Debt, the distribution may be made and the notice given to their Representative.

Section 11.12. ***Rights of Trustee and Paying Agent.*** The Trustee or Paying Agent may continue to make payments on the Securities until it receives notice of facts that would cause a payment of principal of or interest on the Securities to violate this Article. Only the Company, a Representative or a holder of an issue of Senior Debt that has no Representative may give the notice.

The Trustee in its individual or any other capacity may hold Senior Debt with the same rights it would have if it were not Trustee. Any Agent may do the same with like rights.

ARTICLE 12
MISCELLANEOUS

Section 12.01. ***Trust Indenture Act Controls.*** If any provision of this Indenture limits, qualifies, or conflicts with another provision which is required to be included in this Indenture by the TIA, the required provision shall control.

Section 12.02. ***Notices.*** Any notice or communication by the Company or the Trustee to the other is duly given if in writing and delivered in person or mailed by first-class mail to the other's address stated in Section 12.10. The Company or the Trustee by notice to the other may designate additional or different addresses for subsequent notices or communications.

Any notice or communication to a Securityholder shall be mailed by first-class mail to his address shown on the register kept by the Registrar. Failure to mail a notice or communication to a Securityholder or any defect in it shall not affect its sufficiency with respect to other Securityholders.

If a notice or communication is mailed in the manner provided above within the time prescribed, it is duly given, whether or not the addressee receives it.

If the Company mails a notice or communication to Securityholders, it shall mail a copy to the Trustee and each Agent at the same time.

All other notices or communications shall be in writing.

Section 12.03. ***Communication by Holders with Other Holders.*** Securityholders may communicate pursuant to TIA § 312(b) with other Securityholders with respect to their rights under this Indenture or the Securities. The Company, the Trustee, the Registrar and anyone else shall have the protection of TIA § 312(c).

Section 12.04. ***Certificate and Opinion as to Conditions Precedent.*** Upon any request or application by the Company to the Trustee to take any action under this Indenture, the Company shall furnish to the Trustee:

(a) an Officers' Certificate stating that, in the opinion of the signers, all conditions precedent, if any, provided for in this Indenture relating to the proposed action have been complied with; and

(2) an Opinion of Counsel stating that, in the opinion of such counsel, all such conditions precedent have been complied with.

Section 12.05. ***Statements Required in Certificate or Opinion.*** Each certificate or opinion with respect to compliance with a condition or covenant provided for in this Indenture shall include:

(1) a statement that the person making such certificate or opinion has read such covenant or condition;

(2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;

(3) a statement that, in the opinion of such person, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and

(4) a statement as to whether or not, in the opinion of such person, such condition or covenant has been complied with.

Section 12.06. ***Rules by Trustee and Agents.*** The Trustee may make reasonable rules for action by or a meeting of Securityholders. The Registrar, Paying Agent or Conversion Agent may make reasonable rules and set reasonable requirements for its functions.

Section 12.07. ***Legal Holidays.*** A "Legal Holiday" is a Saturday, a Sunday or a day on which banking institutions are not required to be open. If a payment date is a Legal Holiday at a place of payment, payment may be made at that place on the next succeeding day that is not a Legal Holiday, and no interest shall accrue for the intervening period.

Section 12.08. ***No Recourse Against Others.*** All liability described in the Securities of any director, officer, employee or stockholder, as such, of the Company is waived and released.

Section 12.09. ***Duplicate Originals.*** The parties may sign any number of copies of this Indenture. One signed copy is enough to prove this Indenture.

Section 12.10. *Variable Provisions.*

"*Officer*" means the President, any Vice-President, the Treasurer, the Secretary, any Assistant Treasurer or any Assistant Secretary of the Company.

The Trustee initially appoints National Bank and Trust Company authenticating agent.

The Company initially appoints the Trustee Paying Agent, Registrar, and Conversion Agent.

The first certificate pursuant to Section 4.03 shall be for the fiscal year ending on , 19

The reporting date for Section 7.06 is of each year. The first reporting date is

The Trustee shall always have a combined capital and surplus of at least $ as set forth in its most recent published annual report of condition.

In determining whether the Trustee has a conflicting interest as defined in TIA § 310(b)(1), the following is excluded: Indenture dated as of January 1, 1979, between the Company and Greater Bank and Trust Company, Trustee for the % Subordinated Debentures Due

Senior Debt does not include:

(1) the debentures described in the preceding paragraph;

(2) the Company's % Convertible Subordinated Notes Due , 19 ; and

(3) the Company's subordinated guarantee of the % Convertible Subordinated Debentures Due of Universal Overseas Finance Corporation.

The Securities are not senior in right of payment to the foregoing debt securities of the Company.

In Sections 10.03 and 10.09, the "*Quoted Price*" of the Common Stock is the last reported sales price of the Common Stock on the New York Stock Exchange —Consolidated Trading.

The Company's address is:

Universal Business Corporation
1 Commerce Plaza
New York, NY 10099

The Trustee's address is:

Greater Bank and Trust Company
500 Wall Street
New York, NY 10015

Section 12.11. *Governing Law.* The laws of the State of shall govern this Indenture and the Securities.

* * *

SIGNATURES

Dated: UNIVERSAL BUSINESS CORPORATION

By
Vice President

Attest:

Assistant Secretary (SEAL)

Dated: GREATER BANK AND TRUST COMPANY

By
Trust Officer

Attest:

Assistant Secretary (SEAL)

EXHIBIT A

(Face of Security)

No. $

UNIVERSAL BUSINESS CORPORATION

promises to pay to
or registered assigns, the principal sum of Dollars on

% Convertible Subordinated Debenture Due
Interest Payment Dates:
Record Dates:

Dated:

Authenticated:

GREATER BANK AND TRUST COMPANY as Trustee

By
Authorized Officer

OR

NATIONAL BANK AND TRUST COMPANY, as Authenticating Agent

By
Authorized Officer

UNIVERSAL BUSINESS CORPORATION

By

By

(SEAL)

(Back of Security)

UNIVERSAL BUSINESS CORPORATION
% Convertible Subordinated Debenture Due

1. *Interest.* Universal Business Corporation ("Company"), a Delaware corporation, promises to pay interest on the principal amount of this Security at the rate per annum shown above. The Company will pay interest semiannually on and of each year. Interest on the Securities will accrue from the most recent date to which interest has been paid or, if no interest has been paid, from . Interest will be computed on the basis of a 360-day year of twelve 30-day months.

2. *Method of Payment.* The Company will pay interest on the Securities (except defaulted interest) to the persons who are registered holders of Securities at the close of business on the record date for the next interest payment date even though Securities are cancelled after the record date and on or before the interest payment date. Holders must surrender Securities to a Paying Agent to collect principal payments. The Company will pay principal and interest in money of the United States that at the time of payment is legal tender for payment of public and private debts. However, the Company may pay principal and interest by check payable in such money. It may mail an interest check to a holder's registered address.

3. *Paying Agent, Registrar, Conversion Agent.* Initially, Greater Bank and Trust Company ("Trustee"), 500 Wall Street, New York, NY 10015, will act as Paying Agent, Registrar and Conversion Agent. The Company may change any Paying Agent, Registrar, Conversion Agent or co-registrar without notice. The Company may act in any such capacity.

4. *Indenture.* The Company issued the Securities under an Indenture dated as of ("Indenture") between the Company and the Trustee. The terms of the Securities include those stated in the Indenture and those made part of the Indenture by reference to the Trust Indenture Act of 1939 (15 U.S. Code §§ 77aaa-77bbbb) as in effect on the date of the Indenture. The Securities are subject to all such terms, and Securityholders are referred to the Indenture and the Act for a statement of such terms. The Securities are unsecured general obligations of the Company limited to $ in aggregate principal amount.

5. *Optional Redemption.* The Company may redeem all the Securities at any time or some of them from time to time at the following redemption prices (expressed in percentages of principal amount), plus accrued interest to the redemption date:

If redeemed during the 12-month period beginning _____ 1,

Year	Percentage	Year	Percentage

6. *Mandatory Redemption.* The Company will redeem $ principal amount of Securities on and on each thereafter through at a redemption price of 100% of principal amount, plus accrued interest to the redemption date. The Company may reduce the principal amount of Securities to be redeemed pursuant to this paragraph 6 by subtracting 100% of the principal amount (excluding premium) of any Securities that Securityholders have converted (other than Securities converted after being called for mandatory redemption), that the Company has delivered to the Trustee for cancellation or that the Company has

redeemed other than pursuant to this paragraph 6. The Company may so subtract the same Security only once.

7. *Additional Optional Redemption.* In addition to redemptions pursuant to paragraph 6, the Company may redeem not more than $ principal amount of Securities on and on each thereafter through at a redemption price of 100% of principal amount, plus accrued interest to the redemption date.

8. *Notice of Redemption.* Notice of redemption will be mailed at least 30 days but not more than 60 days before the redemption date to each holder of Securities to be redeemed at his registered address. Securities in denominations larger than $1000 may be redeemed in part but only in whole multiples of $1000. On and after the redemption date interest ceases to accrue on Securities or portions of them called for redemption.

9. *Conversion.* A holder of a Security may convert it into Common Stock of the Company at any time before the close of business on . If the Security is called for redemption, the holder may convert it at any time before the close of business on the redemption date. The initial conversion price is $ per share, subject to adjustment in certain events. To determine the number of shares issuable upon conversion of a Security, divide the principal amount to be converted by the conversion price in effect on the conversion date. On conversion no payment or adjustment for interest will be made. The Company will deliver a check for any fractional share.

To convert a Security a holder must (1) complete and sign the conversion notice on the back of the Security, (2) surrender the Security to a Conversion Agent, (3) furnish appropriate endorsements and transfer documents if required by the Registrar or Conversion Agent, and (4) pay any transfer or similar tax if required. A holder may convert a portion of a Security if the portion is $1000 or a whole multiple of $1000.

The conversion price will be adjusted for dividends or distributions on Common Stock payable in Company stock, subdivisions, combinations or certain reclassifications of Common Stock; distributions to all holders of Common Stock of certain rights to purchase Common Stock at less than the current market price at the time; distributions to such holders of assets or debt securities of the Company or certain rights to purchase securities of the Company (excluding cash dividends or distributions from current or retained earnings). However, no adjustment need be made if Securityholders may participate in the transaction or in certain other cases. The Company from time to time may voluntarily reduce the conversion price for a period of time.

If the Company is a party to a consolidation or merger or a transfer or lease of all or substantially all of its assets, the right to convert a Security into Common Stock may be changed into a right to convert it into securities, cash or other assets of the Company or another.

10. *Subordination.* The Securities are subordinated to Senior Debt, which is any Debt of the Company except subordinated Debt specified in the Indenture and Debt that by its terms is not senior in right of payment to the Securities. A

Debt is any indebtedness for borrowed money or any guarantee of such indebtedness. To the extent provided in the Indenture, Senior Debt must be paid before the Securities may be paid. The Company agrees, and each Securityholder by accepting a Security agrees, to the subordination and authorizes the Trustee to give it effect.

11. *Denominations, Transfer, Exchange.* The Securities are in registered form without coupons in denominations of $1000 and whole multiples of $1000. The transfer of Securities may be registered and Securities may be exchanged as provided in the Indenture. The Registrar may require a holder, among other things, to furnish appropriate endorsements and transfer documents and to pay any taxes and fees required by law or permitted by the Indenture. The Registrar need not exchange or register the transfer of any Security or portion of a Security selected for redemption. Also, it need not exchange or register the transfer of any Securities for a period of 15 days before a selection of Securities to be redeemed.

12. *Persons Deemed Owners.* The registered holder of a Security may be treated as its owner for all purposes.

13. *Amendments and Waivers.* Subject to certain exceptions, the Indenture or the Securities may be amended with the consent of the holders of at least 66⅔% in principal amount of the Securities, and any existing default may be waived with the consent of the holders of a majority in principal amount of the Securities. Without the consent of any Securityholder, the Indenture or the Securities may be amended to cure any ambiguity, defect or inconsistency, to provide for assumption of Company obligations to Securityholders or to make any change that does not adversely affect the rights of any Securityholder.

14. *Defaults and Remedies.* An Event of Default is: default for 30 days in payment of interest on the Securities; default in payment of principal on them; failure by the Company for 60 days after notice to it to comply with any of its other agreements in the Indenture or the Securities; and certain events of bankruptcy or insolvency. If an Event of Default occurs and is continuing, the Trustee or the holders of at least 25% in principal amount of the Securities may declare all the Securities to be due and payable immediately. Securityholders may not enforce the Indenture or the Securities except as provided in the Indenture. The Trustee may require indemnity satisfactory to it before it enforces the Indenture or the Securities. Subject to certain limitations, holders of a majority in principal amount of the Securities may direct the Trustee in its exercise of any trust or power. The Trustee may withhold from Securityholders notice of any continuing default (except a default in payment of principal or interest) if it determines that withholding notice is in their interests. The Company must furnish an annual compliance certificate to the Trustee.

15. *Trustee Dealings with Company.* Greater Bank and Trust Company, the Trustee under the Indenture, in its individual or any other capacity, may make loans to, accept deposits from, and perform services for the Company or its Affiliates, and may otherwise deal with the Company or its Affiliates, as if it were not Trustee.

16. *No Recourse Against Others.* A director, officer, employee or stockholder, as such, of the Company shall not have any liability for any obligations of the Company under the Securities or the Indenture or for any claim based on, in respect of or by reason of such obligations or their creation. Each Securityholder by accepting a Security waives and releases all such liability. The waiver and release are part of the consideration for the issue of the Securities.

17. *Authentication.* This Security shall not be valid until authenticated by the manual signature of the Trustee or an authenticating agent.

18. *Abbreviations.* Customary abbreviations may be used in the name of a Securityholder or an assignee, such as: TEN COM (= tenants in common), TEN ENT (= tenants by the entireties), JT TEN (= joint tenants with right of survivorship and not as tenants in common), CUST (= Custodian), and U/G/M/A (= Uniform Gifts to Minors Act).

The Company will furnish to any Securityholder upon written request and without charge a copy of the Indenture, which has in it the text of this Security in larger type. Requests may be made to: Secretary, Universal Business Corporation, 1 Commerce Plaza, New York, NY 10099.

ASSIGNMENT FORM

To assign this Security, fill in the form below:

I or we assign and transfer this Security to

(Insert assignee's soc. sec. or tax I.D. no.)

(Print or type assignee's name, address and zip code)
and irrevocably appoint _____

_____ agent
to transfer this Security on the books of the Company. The agent may substitute another to act for him.

CONVERSION NOTICE

To convert this Security into Common Stock of the Company, check the box:

To convert only part of this Security, state the amount:

$

If you want the stock certificate made out in another person's name, fill in the form below:

(insert other person's soc. sec. or tax I.D. no.)

(Print or type other person's name, address and zip code)

Date: _____ Your Signature: _____

(Sign exactly as your name appears on the other side of this Security)

NOTES ON SIMPLIFIED INDENTURE

General

1. *Time Periods and Percentages.* The various time periods and percentages appearing in the Model Simplified Indenture, to the extent not prescribed by the TIA, should be reviewed by prospective users of the Model Simplified Indenture in light of the conflicting interests of the particular parties. Certain of these periods and proportions are the subject of specific explanation in these notes (e.g., note 5 to Section 6.01). Users may alter any of these figures, but it should be noted that there do exist interrelationships among some periods or percentages (appearing in different sections of the Model Simplified Indenture) which are deliberate and should be considered in the alteration. For users' convenience, there is set forth below a list of the Sections containing time periods and percentages not prescribed by the TIA:

Sec. 2.12	Sec. 7.08 (4th ¶)
3.01 (last ¶)	8.01 (1)
3.02	8.01 (2)
3.03 (1st ¶)	8.03 (2nd ¶)
4.02	9.02 (1st ¶)
4.03	10.07 (1st ¶)
6.01 (1)	10.09
6.01 (2)	10.10 (1st ¶)
6.01 (5)	10.10 (2nd ¶)
6.01 (last ¶)	10.13 (1st ¶)
6.02	10.13 (2nd ¶)
6.04	10.14
6.06 (2)	11.04 (2)
6.06 (4)	11.04 (b)
6.06 (5)	11.05
7.06	12.10
7.08 (3rd ¶)	
Security ¶¶ 1, 5, 6, 7, 8, 9, 11, 13, 14	

Introductory Paragraphs

1. *Definitions.* The terms "Company," "Trustee" and "Securities" are defined in these paragraphs and further defined in Section 1.01. The definitions of those terms in Section 1.01 build on the definitions in the introductory paragraphs so that users need not repeat the Company's and Trustee's names and the title of the issue a second time in Section 1.01.

Section 1.01

1. *Affiliate.* Although this definition is set forth in Rule 0-2 under the TIA and would therefore be incorporated by virtue of Section 1.03, it is used sufficiently in the Model Simplified Indenture to warrant its appearance here.

The meaning of the words "control," "controlling," and "controlled" are, however, derived by incorporation from TIA Rule 0-2.

2. *Agent.* The terms "Registrar," "Paying Agent" and "Conversion Agent" are defined, and the term "co-registrar" is given content, in Section 2.03. The duties of these agents are set forth in U.C.C. Sections 8-401, 8-402, 8-403, 8-404 and 8-406. There is no comparable definition in the ABF Model Indentures.

3. *Board of Directors.* This definition is essentially the same as the one in the ABF Model Indentures. By an "authorized" board committee, it is intended to carry forward the ABF Indenture Commentaries' requirement (at 36) of compliance with applicable state law.

4. *Company.* Succession to the "Company," and successive successions, is provided for in Article 5 and Section 10.15. Each successive "Company" under Article 5 becomes an obligor on the Securities for payment and an obligor on the Indenture for other performance (although another "Company" may become obligor under Article 10—Conversion). In addition, while "Company" is deliberately broad enough to encompass non-corporate issuers, non-corporate users will find the Model Simplified Indenture adaptable, but not yet adapted, to their needs.

5. *Default.* This definition is not contained in the ABF Model Indentures. It refers to an Event of Default as defined in Section 6.01, and also includes an event which would become an Event of Default after notice or passage of time.

6. *Officers' Certificate.* By reference to Section 12.10, it is intended that flexibility be afforded to users to expand the list of persons who qualify as officers. (Section 12.10 is used as a repository for other variations in the text, in order to avoid changes, fill-ins and re-numberings to the greatest extent possible.) There is no provision in the Model Simplified Indenture for an engineer, accountant or other expert to give a certificate, as there is in the ABF Model Indentures, since such a provision accompanies negotiated covenants (which are not included in the Model Simplified Indenture).

7. *Principal.* The use of the term "principal" in the Model Simplified Indenture to include the "premium, if any" is intended to avoid the repetition of that phrase in many separate provisions of the Indenture. "Principal," standing alone, is proper in almost all contexts (e.g., there is an immediate Event of Default under clause (2) of Section 6.01 if the Company fails to pay "principal" when due), and the premium is specifically excluded in those provisions (e.g., paragraph 6 of the form of Security) where required. While resort may always be had to the reference to "context" in the introductory clause of Section 1.04, it is hoped that each use of the term "principal" has been tested against the foregoing.

8. *SEC.* The ABF Model Indentures define "Commission" to mean the SEC and any successor agency "performing the duties now assigned to [the SEC] under the Trust Indenture Act," i.e., under "the Trust Indenture Act of 1939, as in force at the date as of which this [indenture] was executed." While the SEC could by statute be consolidated or changed into some new or different

agency, just as the TIA could be combined into or replaced by legislation such as the proposed Federal Securities Code, the Model Simplified Indenture does not deal with those possibilities.

9. *Securities*. The generic term "Securities" is used so that the Model Simplified Indenture can be utilized with respect to unsecured debt instruments of whatever formal appellation (notes, debentures, certificates, etc.). However, the Model Simplified Indenture is a closed-end indenture and contemplates a single series of debt instruments, in a specific aggregate maximum principal amount; it does not provide for multiple series or issues.

10. *Subsidiary*. Since the term "subsidiary" may be used in different contexts with different definitional content, and since those contexts frequently involve negotiated provisions, definition of the term has been omitted from this Section.

11. *Trust Officer*. While senior officers of the Trustee will rarely if ever (at least in large metropolitan banks) act under the Indenture, it could be highly embarrassing if any of them sought to act and was precluded from doing so. In non-urban banks, senior officers may, in fact, administer corporate trust matters.

Section 1.03

1. *Incorporation by Reference*. In Trust Indenture Act Release No. 39-605 (Jan. 8, 1981), 21 SEC Docket 1244, the SEC called favorable attention to the technique of incorporation of TIA provisions by reference utilized in the Model Simplified Indenture. The legal basis for incorporation by reference may be summarized as follows: (i) the terms of a publicly-traded debt security include those made part of the security by reference to an indenture or to a statute or rule, U.C.C. Section 8-202(1); (ii) a qualified indenture may contain any provision that does not contravene a TIA provision, TIA Section 318(b); and (iii) a provision for incorporation by reference does not contravene any TIA provision. (Most indentures, like the ABF Model Indentures Section 101(2), incorporate by reference several definitions from the TIA and the Securities Act.) The drafting committee received a suggestion that the following language be added at the end of the first paragraph of Section 1.03 by those who choose to do so:

> Whenever this Indenture incorporates by reference a provision in TIA Sections 310-318(a) containing the statement "the indenture to be qualified" followed by the words "shall" or "may," in turn followed (not always immediately) by the words "require," "provide" or "contain," each such provision, including related definitions and rules of construction, is hereby adopted as a provision of this Indenture.

2. *Incorporated Law and Rules*. The TIA definition in Section 1.01 fixes the incorporated TIA to the statutory text in effect on the date borne by the Indenture. The effect is intended to be the same as long-form repetition, in

conventional indentures, of provisions permitted or required by TIA Sections 310-318. As to the possibility of change in definitional content of certain indenture terms via rule-making under the TIA, see TIA Section 309(c): no such rule may affect the interpretation of an indenture previously qualified.

Section 1.04

1. *GAAP.* Clause (2) contemplates generally accepted accounting principles as they exist at the time an accounting term is being construed. If an issuer is concerned that negotiated financial covenants (which must be added to the Model Simplified Indenture, if desired) have been structured on the basis of currently accepted accounting principles and that a future change in accounting principles may make those covenants too restrictive, clause (2) can be changed to lock onto accounting principles generally accepted at the date of the indenture. *See* Fogelson, *The Impact of Changes in Accounting Principles on Restrictive Covenants in Credit Agreements and Indentures*, 33 Bus. Law 769 (1978). Of course, that would impose upon the issuer the increasingly onerous obligation to restate subsequent years' financial statements, solely for indenture covenant purposes, on the basis of accounting principles no longer otherwise applied.

2. *And/Or.* Clause (3) eliminates the need for such awkward locutions as "and/or" and "A or B or both." *See* Bankruptcy Act, 11 U.S.C.A. § 102(5).

3. *Successive Successors, Occurrences, etc.* Clause (5) is intended to underscore the intended application and re-application of definitional provisions like "Company" and "Trustee" in Section 1.01, and operating provisions like Sections 5.01 and 10.06, to successive obligors, fiduciaries, mergers, conversion adjustments, etc.

Section 2.01

1. *The Form of Security.* The approach of the Model Simplified Indenture is to utilize the form of Security (attached as Exhibit A) as the place, and the only place, where several of the substantive provisions of the Indenture appear. The first sentence of this Section is intended to effectuate that approach and to make clear that those provisions, although appearing only in the form of Security, are part of the Indenture.

2. *Format of the Security.* The phrase "substantially in the form of Exhibit A," appearing in the first sentence of this Section, is intended to allow for changes in format in the physical Securities, whether printed or lithographed or typed and whether or not framed in steel-engraved borders. The phrase is also intended to allow for corrections in the definitive Securities of errors in or omissions from Exhibit A.

Section 2.02

1. *Execution of Securities.* The signatures of two Company Officers are required in order to comply with certain stock exchange requirements for listing. *See* NYSE Co. Manual at A-214.5. It is understood that the signature of an Officer attesting to the Company's seal is one of the two acceptable for this purpose. Manual signatures are, of course, satisfactory.

2. *Continuing Validity.* The second paragraph of this Section embodies a requirement, and uses the language, of the NYSE Co. Manual (at A-214.5). It is recognized that individual Securities bearing proper signatures may be invalid for reasons wholly unrelated to the signature requirement.

3. *Certificate of Authentication.* What was formerly a certificate by the Trustee is, as can be seen on Exhibit A, to be a signature (like that of a stock transfer agent) evidencing authentication.

4. *Purpose and Effect of Authentication.* The ABF Indenture Commentaries (at 141) express the principal purposes of authentication as the following: identification of the Security with the Indenture; prevention of an over-issue; and safeguarding against counterfeiting. As to the effect of authentication, see U.C.C. Section 8-208.

5. *Authenticating Agent.* While authentication is a principal responsibility of the Trustee, the capacity to appoint authenticating agents is preserved in the last paragraph of this Section if the Trustee chooses to use it, and authentication by an agent is treated as equivalent to authentication by the Trustee.

Section 2.03

1. *One Registrar Only.* Although an issuer can have more than one paying agent or conversion agent, only one definitive register of the names and addresses of Securityholders can be maintained, and that is done by the registrar. Thus the distinction between one registrar and one or more co-registrars.

2. *Exchange Requirements.* For Securities to be listed on the New York Stock Exchange, the Exchange still maintains the requirement for location of an office of the paying agent in Manhattan. *See* NYSE Co. Manual at A-4.

Section 2.05

1. *Persons Deemed Owners.* The customary provision permitting the Company and the Trustee to recognize the registered holder of a Security as the owner for all purposes is found in paragraph 12 of the form of Security. The portion of the customary provision which disregards notice to the contrary is omitted from paragraph 12. As noted in the ABF Indenture Commentaries (at 191), the customary provision "may" exceed the boundaries of U.C.C. Sections 8-403 and 8-404. Some draftsmen may choose to leave out paragraph 12 on the theory that U.C.C. Section 8-207(1) already covers the point.

Section 2.06

1. *Rules for Transfer and Exchange.* Section 12.06 contemplates that the Registrar may make reasonable rules and set reasonable requirements for its functions. Compliance with such reasonable requirements is prescribed in this Section as a condition to registration of transfer or exchange.

2. *Transfer Fees.* The last sentence of this Section is not intended to encourage the practice of charging fees to Securityholders but rather to protect issuers in the event that agency charges do become substantial. For Securities listed on the New York Stock Exchange, the Exchange forbids any such fee to be charged to Securityholders. *See* NYSE Co. Manual at A-81.

Section 2.07

1. *Mutilated Securities.* The language "lost, destroyed or wrongfully taken" is the language of U.C.C. Section 8-405, and a sufficient mutilation is treated as a destruction for U.C.C. purposes.

2. *Matured or Maturing Securities.* The language of the ABF Model Indentures, permitting payment of a matured or maturing Security (rather than issuance of a new Security which is then presented for payment), has been omitted on the assumption that such one-step payment would follow in any event.

3. *Replacement Securities.* The ABF Indenture Commentaries point out (at 184-85) that the Indenture cannot discharge the obligation represented by a lost or stolen Security that comes into the hands of a bona fide purchaser. Therefore the last sentence of this Section provides that the total obligations of the Company are increased by the issuance of replacement Securities. As a practical matter, such increase is offset either by the destruction or unenforceability of the lost or stolen Security or by the indemnity furnished for the issuance of the substituted Security.

Sections 2.08/2.09

1. *Replaced Securities.* The intent of the second paragraph of this Section is to allow a determination, at any time, of the Securities then deemed to be outstanding. *See* note 3 to Section 2.07.

2. *Converted Securities.* There is no specification in these Sections that converted Securities are no longer outstanding, both because that does appear to be self-evident and because (i) paragraph 9 of the form of Security requires surrender of each Security to a Conversion Agent in order to effect conversion, (ii) Section 2.11 requires the Conversion Agent to forward such Securities to the Trustee and further requires the Trustee to cancel such Securities, and (iii) this Section specifies that cancelled Securities are not outstanding.

3. *Securities Called for Redemption.* The only Securities which will cease to be outstanding on a redemption date if the Paying Agent has received funds sufficient to pay them are those Securities which are "payable on that date," i.e.,

those Securities as to which notice of redemption has been properly given. *See* Section 3.04.

4. *Securities Considered Paid.* Note 2 to Section 4.01 applies to this Section.

5. *Securities Held by the Company or an Affiliate.* According to the ABF Indenture Commentaries (at 42), it is the more usual practice to include as outstanding those Securities which are owned by the Company and its Affiliates except for purposes of giving consents, waivers, etc., but it is possible to exclude such Securities from the category of those outstanding.

Section 2.10

1. *Temporary Securities.* Use of temporary forms of the Securities until a definitive form is available has become relatively less frequent in recent years. The recent promulgation by the SEC of Rule 415 under the Securities Act could revive the necessity to use temporary forms upon initial issuance of Securities.

Section 2.11

1. *Destruction of Securities.* The Model Simplified Indenture, like the ABF Model Indentures, does not direct the Trustee to destroy securities surrendered to it. Destruction or other disposition of cancelled securities should be made the subject of a standing instruction from the Company to the Trustee, taking into account applicable document retention requirements.

Section 2.12

1. *Payees of Defaulted Interest.* If defaulted interest is paid to Securityholders as of a special record date, as provided in this Section, the rights of persons who were registered holders of the Securities on the regular record date are specifically overridden.

Section 3.01

1. *Specification to the Trustee.* Since redemption may be effected under the mandatory, optional or "additional optional" provisions of the form of Security, specification to the Trustee (in the required notice) appears appropriate. The ABF Model Indentures have no such requirement. *See also* note 1 to Section 3.03.

Section 3.02

1. *Method of Selection.* The requirement of selection either on a pro rata basis or by lot has been inserted into the Model Simplified Indenture not so much to avoid unnecessary discretion vested in the Trustee as to accord both with the requirements of the principal stock exchanges (*see* NYSE Co. Manual at A-177) and with the practices generally followed by indenture trustees. The ABF Model Indentures prescribe such "method as (the Trustee) shall deem

fair and appropriate." The drafting committee received a suggestion that the first sentence of this Section be changed to read as follows:

> If less than all the Securities are to be redeemed, the Trustee shall select the Securities to be redeemed by a method that complies with the requirements of any stock exchange on which the Securities are listed and that the Trustee considers fair and appropriate.

2. *Time of Selection.* The ABF Model Indentures provide for selection of Securities to be redeemed not more than 60 days prior to the redemption date. The Model Simplified Indenture, in specifying the methods of selection, adopts the approach of the ABF Model Indentures but prescribes a period of not more than 75 days since the notice of redemption may be given as early as 60 days before the redemption date.

3. *Notice to the Company.* The ABF Model Indentures also provide for a notice by the Trustee to the Company with respect to the Securities selected for redemption. The Model Simplified Indenture omits such a requirement since the Company can always make inquiry of the Trustee if it cares to do so.

Section 3.03

1. *Specification to the Securityholders.* While certain holders, particularly institutions, have expressed an interest in knowing for their own purposes whether redemption is being made pursuant to the mandatory, optional or "additional optional" provisions of the form of Security, the Model Simplified Indenture (like the ABF Model Indentures) does not require that such information be included among the statements in the redemption notice to Securityholders.

2. *Notice by Mail.* This Section is the first of several which prescribe notice by mail directly by Securityholders, without a parallel requirement of publication. Comparing the two methods, direct mail notice is more likely to reach a greater number of Securityholders. Of course the Company may, in any case, also publish the notice, and certain stock exchange policies require it to do so in the case of partial redemption of Securities. *See* NYSE Co. Manual at A-175.

Section 3.04

1. *Interest after the Redemption Date.* Paragraph 8 of the form of Security specifies that interest ceases to accrue after the redemption date on Securities called for redemption.

Section 3.05

1. *Funds Deposited for Redemption.* The requirement of deposit of moneys "sufficient" to pay the redemption price plus accrued interest is intended to import a requirement that on the redemption date the Paying Agent be in

possession of funds then available (i.e., funds cleared for its use) to pay for redemption and accrued interest.

Section 4.01

1. *Promise to Pay.* The Model Simplified Indenture defers to tradition in including in this Section a promise to pay that duplicates the promise to each Securityholder appearing in the form of Security. Inclusion of this separate promise running to the Trustee arose out of the pre-TIA need to give standing to the Trustee to enforce payment on behalf of the Securityholders. *See* note 1 to Section 6.08.

2. *Payments Deemed to be Made.* By depositing with the Paying Agent a sum sufficient for the purpose (*see* note 1 to Section 3.05), the Company is considered to have honored its obligation to pay principal and interest on the Securities, and those Securities cease to be outstanding. This Section makes clear that the Company must deposit an amount sufficient to pay all principal and interest due on the particular date, not (for example) just enough to pay principal and interest on Securities called for redemption if other amounts are due on the same date. As set forth in Section 2.04, each Paying Agent agrees to be a trustee in respect of all amounts so deposited.

3. *Interest on Overdue Payments.* While indentures generally provide that interest on overdue principal (and overdue interest, if lawful) will be computed at the pre-default rate, some users may consider this subject to be a matter for negotiation. If used, a penalty rate may better be placed in the Indenture rather than in the form of Security.

Section 4.02

1. *Reports by Company to Trustee and Securityholders.* TIA Section 314(a)(1) requires the Company to file its Exchange Act reports with the Trustee, but neither the SEC nor the stock exchanges require the Company to send Exchange Act reports or periodic shareholder reports to debtholders. It is rare for indentures to require the Company to send annual or quarterly reports to debtholders, either generally or upon request, and the Model Simplified Indenture does not do so. In 1977 the SEC received a recommendation that all Company reports made available to stockholders be made available as well to debtholders who request them. *See* House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Report of the Advisory Comm. on Corporate Disclosure to the Sec. and Exch. Comm'n. (Comm. Print 95-29), at 553 (1977).

Section 4.03

1. *Reason for Compliance Certificate.* The absence of financial covenants may obviate the rationale for an annual compliance certificate, and some indentures omit the requirement in such circumstances.

2. *Contents of Compliance Certificate.* If the annual certification includes reference to a Default that occurred during the last fiscal year, it must also describe the status of the Default (i.e., continuing, cured or waived) at the time of certification. The Model Simplified Indenture, however, like the ABF Model Indentures, does not require the inclusion in such certificate of the four recitals that derive from TIA Section 314(e) and are listed in Section 12.05. *Cf.* SEC TIA Manual at 101.

3. *Compliance Report from Auditors.* If complicated financial covenants are added to the Model Simplified Indenture, users may consider the addition of a requirement that the Company file with the Trustee an annual compliance report prepared by the Company's auditors. *See* ALI, Federal Securities Code § 1310(d)(3) (1980). For the form of such reports, see American Institute of Certified Public Accountants, Special Reports, Statement on Auditing Standards No. 14 (1976) at paragraphs 18-19.

Article 4 Further Covenants

1. *Techniques for Addition.* Where it is not practical to add covenants in full after Section 4.03, users might consider a single Section 4.04, to the general effect that "the Company shall perform each of the further covenants appearing in Appendix 1, which is part of this Article 4," with the text and related definitions of the several additional covenants set forth at length in an appendix attached to, and integrally a part of, the Indenture in the same manner as Exhibit A—the form of Security. In any event, users adding covenants should consider whether summary disclosure concerning any of such covenants should be set forth in the form of Security.

Section 5.01

1. *Scope.* It should be noted that this Section only applies to a transaction in which the Company consolidates or merges *into* another corporation or transfers or leases assets *to* another corporation.

2. *Non-Corporate Successors.* The ABF Model Indentures preclude the possibility of a non-corporate substituted obligor on the Securities by the combination of the traditional covenants (i) to preserve the obligor's corporate existence (which is omitted from the Model Simplified Indenture) and (ii) to limit consolidation, merger or asset transfer only to "another corporation." The Model Simplified Indenture seeks to achieve the same effect by requiring a corporate successor in clause (1) of this Section. Given the rate of evolution in capital formation devices and the increased use of vehicles (such as joint ventures) for projects involving the possibility of a public borrowing, the likelihood, over the life of a long-term Security issue, of substituting a non-corporate obligor by asset transfer should not be discarded without thought. It should be remembered, nevertheless, that certain institutional investors (particularly life insurance companies) may be substantially disadvantaged if debt instruments in their portfolios become the obligations of non-corporate obligors.

3. *Foreign Successor Obligors.* The ABF Model Indentures also preclude consolidation, merger and asset transfer except to domestic corporations. This Section stops short of that prohibition. The note set forth immediately above applies as well to the possibility of foreign successor obligors.

4. *Triangular Transactions.* The Model Simplified Indenture takes the position that the basic obligations under the Securities should follow the initial obligor's assets, subject to note 6 below. However, the exception to clause (2) of this Section recognizes the frequent pattern of merger into a subsidiary or vice versa, with the parent assuming subsequent obligations under Article 10—Conversions. The exception to clause (2) is also directed to the cash merger problems that were the subject of controversy in Broad v. Rockwell International Corporation, 642 F.2d 929 (5th Cir. 1981).

5. *Any Series of Related Transactions.* In the context of asset disposition by transfer or lease, serious consideration must be given to the possibility of accomplishing piecemeal, in a series of transactions, what is specifically precluded if attempted as a single transaction. Privately placed debt instruments frequently prohibit disposition of substantial assets (with a mathematical prescription of "substantial") in one or a series of related transactions.

6. *Termination of the Obligations of the Prior Obligor.* Under the ABF Model Indentures, the prior obligor remains liable on the Securities. The Model Simplified Indenture is similarly structured so that, whether or not the successor obligor properly assumes the obligations, the prior obligor (except in case of a merger or consolidation) is not released from its obligations to pay principal and interest on the Securities. Thus, if company A sells all of its assets to company B, which assumes all of A's liabilities, company A remains obligated to pay the Securities if B fails to do so. Issuers objecting to such continuing liability, or concerned that such liability may make it difficult to liquidate (or to proceed as an investment company) following a sale of assets, should change the last paragraph of this Section and consider appropriate summary disclosure in the form of Security.

Section 6.01

1. *Involuntary Defaults.* The ABF Model Indentures include, in the introductory clause to the default list, a lengthy parenthetical phrase which makes clear that default is occasioned whether the occurrence "shall be voluntary or involuntary or be effected by operation of law." The ABF Indenture Commentaries (at 305) reflect the purpose of this introductory material as intended to refute any argument that events resulting from *force majeure* are not to be treated as defaults. The ABF Indenture Commentaries go on to say that some draftsmen feel this phraseology to be unnecessary. The Model Simplified Indenture takes the latter view.

2. *Cross Defaults and Subsidiaries' Defaults.* The inclusion of cross-default provisions, and the drafting of such provisions, are matters for negotiation and are not addressed in the Model Simplified Indenture. Similarly, the extent to

which subsidiaries of an issuing Company represent a major part of the credit upon which the Securityholders are relying, and should therefore be included (along with the Company) in clauses (4) and (5) of this Section 6.01, is left to negotiation.

3. *Custodian.* The particular language of clauses (4)(C) and (5)(B) of this Section is derived from the new Bankruptcy Act, 11 U.S.C.A. § 303(h)(2). The new Act is reflected throughout this Section. *See* Committee on Developments in Business Financing, *Structuring and Documenting Business Financing Transactions Under the Federal Bankruptcy Code of 1978*, 35 Bus. Law. 1645 (1980).

4. *General Inability or Failure to Pay Debts as They Become Due.* Some current instruments include, among the specified defaults, the general inability or failure on the part of the Company to pay its debts as they become due. The Model Simplified Indenture omits this item on the ground that it may be a disguised cross-default and bestows no obvious practical advantage on the Securityholders but, particularly in times of tight or expensive funds (like the present), it may inhibit the Company's ability to stretch its payables.

5. *Grace Periods.* Grace periods are by their nature arbitrarily selected. The Model Simplified Indenture retains 30 days as the grace period for Default in payment of interest but prescribes 60 days as the period of non-compliance with an indenture covenant after receipt of proper notice of the Default. The ABF Model Indentures use 30 days for both.

6. *Disclosure; Accounting Consequences.* An issuer that is subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act must disclose material defaults under an indenture to the SEC on Form 10-Q, Item 3 —Defaults upon Senior Securities, and in its financial statements pursuant to Reg. S-X, Rule 4-08(c). Further, if the maturity of a long-term debt issue may be accelerated because of a default, the issuer may have to reclassify the issue as short-term debt until the default is cured or waived; *see* FASB, Classification of Obligations That Are Callable by the Creditor (exposure draft—July 30, 1982). Finally, if the consequences of default may be material to investors, the issuer may be subject to "timely public disclosure" obligations under Rule 10b-5 and other anti-fraud provisions and under applicable stock exchange policies (*see* NYSE Co. Manual at A-18).

Section 6.02

1. *Percentage of Holders Required for Acceleration.* The ABF Model Indentures use a 25% figure in the analog to this Section but use only a 10% figure in the analog to the final paragraph of Section 6.01 (the percentage of Holders whose notice to the Company and the Trustee is requisite to the ripening of the specified default). The Model Simplified Indenture uses 25% for both purposes.

2. *Accrued Interest.* The ABF Model Indentures omit to specify that, upon acceleration, accrued interest as well as principal of the Securities shall become

due and payable immediately. In part this may be because the ABF Model Indentures, or at least the ABF Indenture Commentaries, were written with coupon debentures in mind; the ABF Indenture Commentaries refer, in this connection (at 218), to the requirement that coupons be presented on the specified interest payment dates. The Model Simplified Indenture, on the other hand, does specify acceleration of interest, presumably interest accrued to the date of declaration.

3. *Rescission of Acceleration.* The ABF Model Indentures, along with many current instruments, include a lengthy paragraph providing that after acceleration the holders of a majority in principal amount of the outstanding Securities may rescind the declaration and its consequences, subject to compliance by the Company with a set of conditions. The Model Simplified Indenture subsumes all such conditions within the phrase "cured or waived" in the final sentence of this Section. (The Model Simplified Indenture deliberately uses the same majority requirement for rescission of acceleration in this Section and for waiver in Section 6.04; the ABF Indenture Commentaries point out alternative possibilities at 472-73.) *See also* note 2 to Section 6.04.

4. *Relationship to Sections 6.04 and 6.05.* Although the holders of only 25% in principal amount of the Securities may accelerate upon an Event of Default, the Model Simplified Indenture does not attempt to create an impasse between a 25% minority and the majority. It is intended that the power of the majority, bestowed by Sections 6.04 and 6.05, shall in any event govern.

5. *Relationship to Article 11.* While a declaration of acceleration may make principal and interest on the Securities immediately payable, no payment on the Securities may be made during the continuance of the circumstances provided for in Sections 11.04 and 11.05.

Section 6.03

1. *Available Remedies.* In authorizing the Trustee to "pursue any available remedy" for collection on the Securities or enforcement of the Indenture, the Model Simplified Indenture subsumes all of the customary phraseology: "actions, suits or proceedings," "at law or in equity," "under this Indenture or otherwise by law," etc. *Cf.* ABF Indenture Commentaries at 225-26. The provision that the Trustee may bring suit without having the Securities in its possession has been retained in the Model Simplified Indenture, although some may consider it unnecessary.

Section 6.04

1. *Sequence of Events.* As is implicit in note 3 to Section 6.02, the sequence of events is: first, default under Section 6.01; second, acceleration under the first sentence of Section 6.02; third, waiver under this Section 6.04 or cure by the Company; and fourth, rescission under the last sentence of Section 6.02. Conceptually, waiver or cure is a precondition to rescission of acceleration.

2. *Effect of Waiver.* Unlike the ABF Model Indentures, the Model Simplified Indenture omits the traditional language to the effect that no waiver shall have an effect upon any unwaived occurrence or upon a repetition of the waived occurrence. As a practical matter, any waiver given under this Section should state the date as of which it speaks and specify that it has no effect on any occurrence not specifically waived. (An action rescinding acceleration, under the last sentence of Section 6.02, should be equally specific.)

3. *Waiver of Past Default vs. Approval of Supplemental Indentures.* The Model Simplified Indenture uses a majority provision for waiver of past Defaults but a two-thirds provision for consent to supplemental indentures. The ABF Indenture Commentaries point out alternative possibilities at 472-73, and it is noted that some indentures covering debt securities to be offered under Securities Act Rule 415 have used a majority provision in both contexts. If the same percentage is used in both contexts, then those waiving a past Default will have the capacity, by consenting to a supplemental indenture, to effect what amounts to a permanent waiver.

Section 6.05

1. *Refusal by the Trustee.* The Model Simplified Indenture specifies three grounds for the Trustee's refusal to follow the directions of the holders of a majority of the Securities. *Cf.* ABF Indenture Commentaries at 237. In this connection, attention is drawn to Section 7.01(e), which relates to indemnities satisfactory to the Trustee. In light of such indemnities, the Trustee may not refuse to follow a direction, otherwise unexceptionable, that might create liability for it in its capacity as Trustee, but the Model Simplified Indenture (unlike the ABF Model Indentures) specifies that the Trustee may refuse to follow a direction that would involve it in personal liability.

Section 6.06

1. *"No Action" Clauses.* To aid the enforceability of this Section, paragraph 14 of the form of Security discloses the limitation on Securityholders' rights to sue. *See* ABF Indenture Commentaries at 232-35, and Note, *Conflict of Interests Between Indenture Trustee and Bondholders: Avoidance of "No-Action" Clauses Prohibiting Bondholder Suits Against the Obligor*, 62 Yale L.J. 109 (1953).

2. *Securityholders' Derivative Suits.* The courts have traditionally denied standing to debtholders to bring derivative suits on behalf of a solvent corporation. Standing to bring such suits might nullify the effect of this Section. *See* Coffee and Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 Colum. L. Rev. 261, 313, n.277 (1981); *but see* Note, *Creditors' Derivative Suits on Behalf of Solvent Corporations*, 88 Yale L.J. 1299, 1308, n.11 (1979).

Section 6.07

1. *Changes Affecting Mandatory Redemption before Maturity.* Under TIA Section 316(b) a Securityholder's right to receive principal and interest when due may not be impaired or affected without that holder's consent. The percentage of Securityholders prescribed in Section 9.02 may, however, consent to an amendment of the Indenture to change or suspend the mandatory redemption provisions of the Securities. See ABF Indenture Commentaries (at 309) with respect to "sinking funds," and SEC TIA Manual at 148.

Section 6.08

1. *Enforcement by the Trustee.* Prior to the TIA, as the ABF Indenture Commentaries indicate (at 225), the Trustee's right to sue for the whole amount owing on the Securities required an express covenant of payment (under specified circumstances) to the Trustee for the benefit of the Securityholders. That covenant was carried forward in the ABF Model Indentures and is preserved in Section 4.01 of the Model Simplified Indenture, although its continued necessity is rendered doubtful by TIA Section 317 (a)(1) and by the omission of 1898 Act Section 211 from the new Bankruptcy Act.

Section 6.09

1. *Proofs of Claim.* While the new Bankruptcy Act, 11 U.S.C.A. Section 501(a), omitting 1898 Act Section 211, expressly authorizes the Trustee to file proofs of claim on behalf of the Securityholders, TIA Section 317(a)(2) carries forward the requirement, dictated by the prior statute, that a qualifying Indenture specify this authority.

Section 6.10

1. *Payment over to the Company.* Clause fourth of this Section is characterized by the ABF Indenture Commentaries (at 231) as "improper conformance to secured bond indenture precedents," on the ground that the Trustee for unsecured debentures cannot collect or hold any monies beyond the indebtedness and related expenses. The Model Simplified Indenture respectfully disagrees.

2. *Escheat.* The payment of any unused funds back to the Company is also related to the provisions of Section 8.03, pursuant to which unclaimed moneys held by the Trustee or any paying agent, in the administration of the Indenture, are paid back to the Company upon its request after two years. The intention of both provisions is to return funds to the Company that, unless and until otherwise claimed, are rightfully its own.

Section 6.11

1. *Undertaking for Costs.* Variance of the permissive provisions of TIA Section 315(e) in favor of the Trustee would run counter to an administrative

position which may be summarized as follows: when the TIA permits the inclusion of indenture provisions, all other provisions not consistent with those provisions are excluded. *See* ABF Indenture Commentaries at 472, and ALI, Federal Securities Code § 1305, comment 2(b) (1980).

Sections 7.01/7.02

1. *Interest on Trust Funds.* The ABF Indenture Commentaries point out (at 260-61) that trust funds are not expected to be held by the Trustee for any significant period of time, and that it is therefore rare to find an agreement by the Trustee to pay interest.

2. *Segregation of Indenture Funds.* The ABF Indenture Commentaries explain (at 260) that express permission for the Trustee to commingle funds held under the Indenture is customary and reflects case and statutory law on the subject. It is normal in trust law that beneficiary assets may not be commingled except in a common trust fund or where specifically permitted by the trust instrument. Even the express permission is necessarily subject (as the ABF Indenture Commentaries go on to point out) to applicable state or federal banking law and regulations.

3. *Pre-Default Duties of Trustee.* The Model Simplified Indenture does not alter the very limited duties imposed under the TIA upon the Trustee prior to a Default, and in that connection includes (in clause (b)(1) of Section 7.01) the protective provision permitted by TIA Section 315(a)(1). A contrary position was considered by the Reporter for the Federal Securities Code, who concluded:

> "It has been persuasively urged that extension of the 'prudent man' test for purposes of *ascertaining the occurrence of a default* . . . would be impracticable and prohibitively expensive in terms of increased trustees' fees."

ALI, Federal Securities Code, Introduction at xl (1980). *See generally* Schreiber and Wood, *Current Indenture Trustee: Avoiding the Expanding Scope of Sutton's Law*, 121/1 Trusts & Estates 48 (Jan. 1982). [When asked why he robbed banks, notorious 1930s felon Willie Sutton replied, "Because that's where the money is." Thus Sutton's Law of Litigation for plaintiffs: "When in doubt, sue the bank."]

4. *Additional Immunity for Trustee.* The ABF Model Indentures deliberately omit the provision, contained in paragraph (d) of Section 7.02, exempting the Trustee from liability for any action taken in good faith which it believes to be authorized or within its rights or powers. The Model Simplified Indenture respectfully disagrees with one of the premises articulated (at 258) in the ABF Indenture Commentaries, to the effect that this provision will encourage the Trustee to act in questionable circumstances. The provision is, of course, subject to the overriding provisions of the TIA.

Section 7.03

1. *Ownership of "Securities" by the Trustee and Its Other Dealings with the Company.* The Model Simplified Indenture recognizes the interwoven strands of present-day economic activity and respectfully but deliberately adopts the position reflected in the ABF Model Indentures and in this Section. A general statement about the Trustee's potential dealings with the Company appears in paragraph 15 of the form of Security. For opposing views on the propriety of the Trustee's parallel (non-fiduciary) relationships with the Company, see Campbell and Zack, *Conflict of Interest in the Dual Role of Lender and Corporate Indenture Trustee: A Proposal to End It in the Public Interest*, 32 Bus. Law. 1705 (1977); and Smith, Case and Morison, *The Trust Indenture Act of 1939 Needs No Conflict of Interest Revision*, 35 Bus. Law. 161 (1979).

Section 7.05

1. *Timing of Notice of Default.* The obligation to mail notice of Default arises only when the Default is known to the Trustee. If that knowledge comes too long after the Default occurs (whether during or after the prescribed 90-day period) to allow of notice as a practical matter within the period prescribed, the Trustee need, and can, only mail the notice with such promptness as meets the overriding standard of Section 7.01.

Section 7.06

1. *Annual Report.* Although May 15 is the date as of which the Trustee reports on certain possible conflicting interests under TIA Section 310(b)(9), neither May 15 nor any other date is prescribed for the annual report required under TIA Section 313(a). The Model Simplified Indenture, therefore, like the ABF Model Indentures, allows selection of any date desired for the latter purpose.

2. *Notification of Listing.* So many new requirements outside the Indenture (see, for example, note 4 to Section 9.04) become applicable upon listing on a stock exchange that the Model Simplified Indenture requires the Company to notify the Trustee of the occurrence of that event.

Section 7.07

1. *Trustee's Compensation.* The Model Simplified Indenture, like the ABF Model Indentures, specifies that the Trustee's compensation is not limited by other laws governing compensation of trustees of express trusts.

2. *Experts Retained by the Trustee.* The term "agents," whose expenses are reimbursable to the Trustee, is not used restrictively in this Section, nor are the expenses of agents the only expenses so reimbursable. Expenses of and for experts such as appraisers and investment bankers are comprehended in the first paragraph of this Section.

3. *Cooperation in Defense of Claims.* The Model Simplified Indenture specifies that the Trustee may have separate counsel (for which the Company will pay) in the defense of any claim directed against the Trustee in its capacity as such. The requirement of cooperation by the Trustee with the Company in such defense is not inappropriate.

4. *Expenses of Administration in Bankruptcy.* The final paragraph of this Section has been added in the Model Simplified Indenture. While the Indenture provisions cannot predetermine the decision of a Bankruptcy Judge on the question, it is desirable to state the intention of the Company and the Trustee, at the time of entry into the Indenture, that compensation due to the Trustee for services rendered and expenses incurred after commencement of a proceeding in bankruptcy shall constitute expenses of administration, with their attendant priority in payment.

Section 7.08

1. *Appointment of Successor Trustee.* Since the Company will have an ongoing relationship with any substituted Trustee, the Model Simplified Indenture (like the ABF Model Indentures) provides for Company appointment of a successor, in the first instance, when a vacancy or prospective vacancy arises. While some indentures only permit Securityholders to name a successor Trustee with the Company's consent, the Model Simplified Indenture (again like the ABF Model Indentures) recognizes the primacy of the Securityholders' choice in the matter (see the second sentence of the third paragraph of this Section).

2. *For Want of a Trustee. . . .* In those rare circumstances where no successor Trustee has accepted appointment properly and in timely fashion, the Model Simplified Indenture has reduced to 10% the proportion of principal amount of Securities which is required in order to have standing to petition for appointment of a successor.

Section 8.01

1. *Pre-Maturity Discharge.* Under the Model Simplified Indenture, pursuant to the terms of the Indenture itself the Company may by proper deposit terminate all its obligations under the Indenture, with only specified exceptions. However, this falls short of full defeasance (along the municipal debt model) because the Company's obligations under Section 4.01 - Payment of Securities is one of the exceptions. The intended consequence is that (assuming no obligations under covenants added to Article 4 are also added to the list of exceptions specified in this Section) all substantive obligations undertaken by the Company for the benefit of Securityholders will be terminated by a proper deposit except that, no matter how or with whom it makes its deposit in trust, under the Model Simplified Indenture the Company will retain the ultimate responsibility vis-a-vis the Securityholders to assure that they are paid. The difference in result between the second sentence of this Section and the second sentence of Section 4.01 appeared to the drafting committee to be justified in

view of the difference in the time periods over which funds due to the Securityholders are likely to be held by a third party (albeit a fiduciary in both cases). See also note 3 to this Section.

2. *Distinction from "Economic Defeasance."* In mid-1982 some corporate debt issuers made pre-maturity deposits to a separate grantor trust to assure interest and principal payments on certain outstanding debt although the governing indentures contained no provisions therefor. Christened "economic defeasance," this technique achieved instant popularity, but the resulting accounting treatment was promptly made the subject of a proposed moratorium by the FASB, in its Action Alert dated August 11, 1982, and the subject of a temporary bar (prospectively applied) by the SEC, in Financial Reporting Release No. 3 (Aug. 24, 1982), 25 SEC Docket 1220.

3. *Applicable Period.* The Model Simplified Indenture, like the ABF Model Indentures, limits the possibility of termination by the Company of certain of its obligations under the Indenture (see note 1 to this Section) to the last year prior to redemption or maturity. Users intending to list Securities and concerned about the 10-day limit imposed in the New York Stock Exchange listing requirements (see NYSE Co. Manual at A-80) should note that the obligation to pay is not discharged under the Model Simplified Indenture prior to the date payment is due.

4. *Government Securities.* The class of securities with which the deposit contemplated by this Section may be made is deliberately limited to direct obligations of the United States, in order to remain as close as possible to a cash deposit. If such a deposit is in fact made, Securityholders should be notified at the time discharge takes place (since the rating of the Securities may be expected to improve to reflect their government securities backing). In any event, the class of eligible U.S. government securities should not be broader than the definition of "government security" in Section 2(a)(16) of the Investment Company Act of 1940 in order to avoid any problem that might otherwise arise under Section 3(a)(3) of that Act.

5. *Reasons for Early Deposit.* The Company may wish to discharge the Indenture prior to maturity in order to be relieved of covenants that have become too restrictive, to remove debt from its balance sheet or to effect a voluntary liquidation. It may be motivated to utilize the opportunity for discharge under this Section because (i) the Securities are non-callable or are not callable at the time, (ii) the Securities are callable but the call premium is too expensive (as in the case of deep discount or zero coupon securities), or (iii) the government securities necessary for deposit can be purchased at a substantial discount. Occasionally, as well, circumstances arise in which the Company might prefer to "buy in" the Securities but some Securityholders refuse to sell except at a prohibitive price, or in which the market for Securities is illiquid and the Company faces the necessity of paying a substantial premium to obtain Securities to be credited at par against required sinking fund payments; discharge by early deposit may then become a very important alternative.

6. *Mechanics of Deposit.* The Model Simplified Indenture contemplates that book entry (by which ownership of government securities is most frequently maintained) to the Trustee's account will be sufficient to effect the deposit with the Trustee.

7. *Amount of Deposit.* The government securities to be deposited must, by their terms, provide for sufficient sums to pay the principal and interest on the Securities at redemption or maturity and at all intervening interest payment dates. In that connection, non-callable securities are required so that there will be no reinvestment risk. To match the cash inflow more exactly with cash requirements, the Company may be able to purchase, from a government bond dealer, certificates or receipts evidencing interests in stripped government bonds (bonds whose unmatured coupons have been removed in whole or in part and sold separately) or in the coupons stripped from such bonds.

8. *Alternative of Full Defeasance.* The SEC Release cited in note 2 to this Section applies, pending issuance of a final FASB standard, unless the Company is discharged from all obligations with respect to the Securities. (A proposed SFAS, circulated by the FASB under date of October 13, 1982, would treat debt as extinguished "when the debtor's obligation is satisfied and there is no continuing or contingent recourse to the debtor," and would include as an example: "the debtor satisfies the debt pursuant to a defeasance provision, thereby eliminating the debtor's obligation to the creditor.") Users of the Model Simplified Indenture desiring the ability to achieve full defeasance must, therefore, add a reference (in the introductory clause of the first sentence of this Section) to termination of the Company's obligations under the Securities and must also delete the reference to Section 4.01 from the list of Sections specified (in the first paragraph of this Section) as surviving despite the deposit. In connection therewith, such users should consider the prospective consequences of such procedure, both at the time of drafting the Indenture and again at the time of making the deposit. In particular, consideration might be given to (i) indemnifying the Trustee or arranging for payment of any taxes that may be imposed on the deposited government securities or on the principal and interest payments on such securities received by the Trustee, and (ii) making disclosure to Securityholders of the occurrence of the deposit and the tax and other consequences thereof. Summary disclosure in the form of Security should also be considered.

9. *Effect of Other Debt Instruments.* In some cases negative pledge clauses in other instruments governing the Company's outstanding debt may prohibit an early deposit, which in certain respects resembles a pledge of cash collateral as security for an antecedent debt.

10. *Relationship to Article 11.* The deposit contemplated by this Section effectively "pays off" the Securityholders. Therefore, it may only be made when permitted by the subordination provisions (see the second sentence of clause (2) of this Section), but once properly made is free of the rights of holders of Senior Debt bestowed under Article 11 (see the third sentence of Section 8.02).

Section 8.03

1. *Unclaimed Money.* Money returned to the Company (after being held for unclaimed principal or interest by a Paying Agent for two years) ceases to be money held in trust under Section 2.04.

Section 9.01

1. *Uncertificated Securities.* To assure adaptability to the proposed amendments to U.C.C. Article Eight (adopted in New York in 1982), clause (3) of this Section permits amendment of the Indenture to provide for delivery of uncertificated Securities but not to mandate the replacement of certificated Securities.

2. *Ambiguities, Inconsistencies and Non-Adverse Changes.* The ABF Model Indentures allow amendment to cure ambiguities or correct inconsistencies or defects *provided* there is no adverse effect on the interest of Securityholders. The Model Simplified Indenture separates the two portions of that provision in recognition of the fact that it is frequently impossible to cure ambiguities or correct inconsistencies or defects without some minimal impact, which may be characterized as "adverse", upon the Securityholders. As to non-adverse changes which are unrelated to ambiguities or inconsistencies, the Model Simplified Indenture avoids the qualitative "materially adverse" which is found in some indentures and tends to engender thorny judgmental distinctions.

Section 9.02

1. *The Majority and Two-thirds Requirements.* See note 3 to Section 6.04.

2. *Additional Limitations.* The Model Simplified Indenture specifies that the limitations of this Section (and all of Sections 6.04 and 6.07) are non-amendable without the consent of all Securityholders, as is the case in the ABF Model Indentures.

3. *Amendments Affecting Subordination.* In this Section the Model Simplified Indenture states the requirements for amendments of Article 11, whether they affect the Securityholders (see clause (7) of this Section) or the holders of Senior Debt (see the second paragraph of this Section). With respect to the holders of Senior Debt, consent must be given by the holders of that percentage of the Senior Debt issue which is prescribed by the terms of the issue. With respect to the Securityholders, no counterpart to clause (7) of this Section is mentioned in the ABF Indenture Commentaries, and users concerned that Securityholders withholding consent could some day impede negotiations for restructuring of debt might consider returning to the general 66⅔% requirement.

4. *Notice to Securityholders.* Once an amendment requiring Securityholders' consent becomes effective, the Model Simplified Indenture requires that the Company notify Securityholders. The ABF Model Indentures have no such requirement.

5. *Non-Identical Securities.* The Model Simplified Indenture, like the ABF Model Indentures, does not preclude the Company from offering to increase the interest rate or reduce the conversion price or otherwise to provide a benefit only for Securityholders who consent to an amendment. *See* SEC staff correspondence *In re* Magic Marker Corp. (available July 30, 1971). However, the SEC staff in that correspondence required such specially-directed provisions to be part of a supplemental indenture effecting the amendment so procured.

Section 9.03

1. *Compliance of Supplemental Indentures with the TIA.* By virtue of TIA Section 309(e) the SEC's authority over an indenture ceases after that indenture has been qualified. For that reason the SEC insists that every indenture have a provision to the same effect as this Section. *See* SEC TIA Manual at 157, and 2 Loss, Securities Regulation, 729, n.27 (2d ed. 1961).

Section 9.04

1. *Effectiveness of Consents.* A consent given under the Model Simplified Indenture may and should prescribe the terms on which it will be "continuing," i.e., on which it may be used. For example, until a given date, or when joined in by the holders of a given percentage of Securities.

2. *Revocation of Consents.* While the Model Simplified Indenture provides that a subsequent Securityholder may revoke the consent given by his predecessor in interest, as a practical matter it may be extremely difficult to trace succession. The converse of this problem (see note 3 to this Section) is that it may be extremely difficult to establish that revocation has *not* occurred.

3. *Effect of Accumulation of Securities by Depositories.* In recent years it has become the increasingly prevalent practice for Securities to be delivered to securities depositories and to be registered and held, as a block, in the names of the depositories' nominees. An adverse consequence of this practice is, as a practical matter, to preclude utilization of consents by Securityholders to effect amendment of indentures governing publicly-held debt issues. The reason for this may be summarized as follows: (i) it is the registered holders whose consent is required by the Company and the Trustees, since those holders are recognized as the owners of the Securities under paragraph 12 of the form of Security; (ii) the actual registered holders are the nominees for the depositories, who for these purposes may be treated as identical with the depositories; (iii) each depository holds Securities for the accounts of its participant broker-dealers (among others), who in turn hold the Securities for their own accounts, for the accounts of their customers, for the accounts of other broker-dealers for whom they perform clearing services, and for the accounts of customers of those other broker-dealers; (iv) transfers can take place at each level among these accounts, some with and some without the depository's knowledge; (v) the depository, therefore, will not accept consent instructions from beneficial holders of Securities, or from those holders' broker-dealers, since the depository can at

no time determine which among the Securities it holds are the subject of such instructions or whether a newly-received instruction adds to, duplicates or revokes any portion of an instruction previously received. Users of the Model Simplified Indenture might consider adding, either in this Section or at the end of Article 9, provisions authorizing the Company to fix a record date for purposes of determining Securityholders whose consents will be sought and also authorizing the Trustee to accept such consents if received within a specified period after the record date. This technique, which has been used under some indentures, allows the depositories to function in the consent process in the same manner as they have long functioned in the shareholder proxy solicitation process. Selection of the exact period after the record date during which consents will be honored must balance the difficulties of reaching the large mass of Securityholders against the increasing likelihood that holders as of a record date in the past will no longer own the Securities.

4. *Solicitation of Consents.* The SEC's Exchange Act Regulations 14A and 14C apply to the solicitation of consents or the taking of action by consent, without a solicitation, in respect of a class of securities registered under Section 12 of that Act. Debt securities listed on a stock exchange, and convertible debt securities held of record by more than 500 persons at the end of any fiscal year of the issuer, must be registered under Section 12. If proposed amendments to an indenture would result in a sufficient change to create a "new security," the solicitation of consents to such amendments may also be deemed subject to registration under the Securities Act, in the absence of an exemption from registration under Section 3(a)(9) or otherwise. *See* SEC staff correspondence *In re* Sonderling Broadcasting Corp. (available March 23, 1979), and IDS Realty Trust, CCH Fed. Sec. L. Rep. [1975-76 Transfer Binder] ¶ 80,555 (available May 17, 1976); and *see* McGuigan and Aiken, *Amendment of Securities*, 9 Rev. Sec. Reg. 935 (1976).

Section 10.01

1. *Conversion Privilege.* The conversion privilege in the Model Simplified Indenture is similar to that in other indentures: the principal amount of the Securities is divided by the conversion price in effect on the conversion date, and the conversion price is subject to adjustment. A Security may be converted only in whole multiples of $1000.

2. *Common Stock.* The term "Common Stock" is used throughout Article 10. The definition of Common Stock, as the form of such stock existing on the date of the Indenture, is deliberately used by the Model Simplified Indenture without the customary phrase "as it may be constituted from time to time." In the circumstances addressed by Section 10.15 and the last paragraph of Section 10.06, the "Common Stock" will perforce be adjusted as a result of the transactions (and subsequent instruments) contemplated by such Sections. Further, this approach avoids the problem arising in certain reverse triangular cash mergers where (i) a new class of common stock is created and inherits the role

of (but is not substituted for) the "Common Stock" into which conversions have been and must continue to be made, and (ii) the holders of the "Common Stock" receive cash or other property.

Section 10.02

1. *Adjustment for Interest on Conversion.* Some indentures require a Securityholder converting between an interest record date and an interest payment date to return the accrued interest to the Company. The ABF Indenture Commentaries take no position on this subject, and the Model Simplified Indenture takes the opposite position. See note 3 to the form of Security. However, Securityholders converting, voluntarily or because of a well-timed call for redemption, prior to an interest record date lose all interest for the current interest period.

Section 10.05

1. *Compliance with Applicable Law and Listing Requirements.* Some indentures allow the Company to prohibit conversions, or at least to postpone delivery of the securities issuable on conversion, if registration or listing requirements are not met. The Model Simplified Indenture, like the ABF Indenture Commentaries (at 556), omits any such specific prohibition, and the implication is to the contrary.

Section 10.06

1. *Allocation of Adjustments Among Separate Classes of Securities Issuable Upon Conversion.* The Model Simplified Indenture specifies that, if more than one class of capital stock is issuable upon conversion, adjustment of each class must be effected separately.

Sections 10.07/10.08

1. *Algebraic Equations.* Standard indentures for convertible debt state the anti-dilution formulas in words. Consequently, a user must decipher the verbal text to discern the underlying formulas. The Model Simplified Indenture eliminates that step by stating the formulas as algebraic equations.

2. *Anti-Dilution Formulas Generally.* The Model Simplified Indenture deliberately uses the market price adjustment formula prevalent in recent years in public offerings. Selection of any formula is arbitrary, and often a question of bargaining between the parties to the indenture. The formulas appearing in these Sections reflect the following principle: Securityholders receive stated interest and stockholders receive normal dividends; when stockholders are to receive something more, such as an unusual distribution in kind or in cash, the Securityholders' conversion price should be adjusted. Parties to a proposed indenture may, of course, differ on what constitutes an "unusual" distribution. (It should be noted that these formulas do not make provision for adjustment

upon the issuance of other convertible securities or the exercise of other conversion rights.) For a justification of market price adjustment formulas generally, see Rauner, *Dilution and Anti-Dilution: A Reply to Professor Kaplan*, 33 U. Chi. L. Rev. 494 (1966).

2. *Applicability and Effect of Conversion Formulas.* Section 10.07 sets out the formula for adjustment of the conversion price in the case of a conventional rights offering, where stockholders are issued rights entitling them for a limited period to subscribe pro rata to additional shares at a discount from the then-current market price. Section 10.08 sets out the formula for adjustment in the case of other rights offerings and other distributions. If Section 10.08 rather than Section 10.07 applies to a rights offering, a greater downward adjustment of the conversion price, favorable to the Securityholders and adverse to the Company, may result because the two formulas do not operate in the same way. In a situation in which the Company has distributed substantial assets to its stockholders (for example, the spin-off of a major subsidiary), the application of Section 10.08 may thereafter materially increase the proportion of equity in the remaining Company reserved for the Securityholders. For recent cases arising out of spin-offs, see Prescott, Ball & Turben v. LTV Corp., 531 F.Supp. 213 (S.D.N.Y. 1981) (spin-off of shares of a subsidiary is a dividend and not a capital reorganization requiring shares to be held apart for debtholders) and the Baltimore & Ohio case cited in note 1 to Section 10.14. It is intended that these conversion formulas, their applicability and some of their possible variations be studied before use.

4. *Tax Consequences.* The tax consequences of non-cash distributions and conversion price adjustments are discussed in Bittker and Eustice, Federal Income Taxation of Corporations and Shareholders (4th ed. 1979), beginning at paragraph 7.20.

Section 10.11

1. *Participation in Transactions Otherwise Requiring Adjustment.* This Section provides for no adjustment of the conversion price if Securityholders are given notice of and allowed to participate in the transaction which would otherwise result in the adjustment. It is an approach which is different from those discussed in the ABF Indenture Commentaries and those embodied in most current indentures, and has been adapted from institutional instruments and some convertible preferred stock provisions. In many circumstances the tax implications of such participation will require careful exploration.

2. *Dividend Reinvestment Plans.* A dividend reinvestment plan where new shares are sold by the Company at a discount might be viewed as a continuous rights offering. However, this Section specifies that no adjustment is required for such a plan since, unlike a conventional rights offering, the right to participate in the plan is not transferable and has little or no independent or realizable value.

Section 10.12

1. *Computation of Adjustment.* Like the ABF Indenture Commentaries, the Model Simplified Indenture requires an accountant's computation. Some indentures permit the Company itself to calculate any adjustment in the conversion price.

2. *Publication of Notice.* In line with current practice (arising, presumably, from the *Boeing* case cited in note 1 to Section 10.14), the Model Simplified Indenture requires notice of conversion price adjustments to be mailed to all Securityholders of record rather than simply to be published. See note 2 to Section 3.03.

Section 10.13

1. *Voluntary Reduction.* In this Section the Model Simplified Indenture formalizes, and places limits on, a privilege occasionally utilized by issuers. Notice of the reduction in the conversion price, and of the period of its effectiveness, must be given to Securityholders.

2. *Applicability; Limitations.* A voluntary if temporary reduction in conversion price may be considered by the Company when it desires to stimulate conversions but is unwilling or unable to undergo the optional redemption procedure. It may also be considered in connection with a call for redemption, but in that case the requirement in this Section for a period of at least 20 days could inhibit a multi-step, gradual reduction intended to reduce the conversion price only as far as minimally necessary to induce the desired amount of conversions. For that reason, users may wish to consider deleting the 20-day limitation and reserving the right to make further reductions at any time during a period when a reduced conversion price is in effect.

3. *Relationship to Sections 10.06, 10.07 and 10.08.* Any reduced conversion price resulting under this Section is not subject to further adjustment except voluntarily by the Company. The third paragraph of this Section is intended to cause the Company to continue to calculate adjustments from the pre-reduction price, and always to keep in effect the lower of (i) the reduced price, while it is in effect, or (ii) the adjusted pre-reduction price.

Section 10.14

1. *Notices.* The underlying purpose of the notice requirements of this Section is to afford Securityholders the opportunity to convert and participate in the distribution, combination or liquidation as stockholders rather than to continue to hold their Securities and receive a conversion price adjustment. No notice is required under this Section (i) if the Company elects under Section 10.11 to let Securityholders participate in the transaction, or (ii) if the transaction is so minor that any adjustment may be deferred under Section 10.10; notice is, however, required in the case of a stock dividend or a stock split. The Company may also be subject to notice requirements arising under SEC rules (such as

Rules 10b-5 and 10b-17), under stock exchange and NASD policies (*see* NYSE Co. Manual at A-90-104, and CCH, NASD Manual at 1143-43.2), and under legal and equitable principles of general applicability. *See* Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Co., CCH Fed. Sec. L. Rep. ¶ 98,706 (3rd Cir. 1982) (failure to notify holders of convertible debentures of proposed spin-off of shares of subsidiary); Van Gemert v. Boeing Co., 520 F.2d 1373 (2d Cir. 1975) (failure to give adequate notice to holders of convertible debentures in bearer form of call for redemption); and Note, *Theories of Liability Under Convertible Debenture Redemption Notice Requirements*, 44 Fordham L. Rev. 817 (1976). If the Company has prepared a proxy or information statement for stockholders describing the forthcoming transaction, it should consider sending that statement to Securityholders along with the notice required by this Section.

Section 10.15

1. *Triangular Transactions.* The "person obligated to deliver" upon conversion may be the parent of the new obligor upon the rest of the Company's obligations under the Indenture. See note 4 to Section 5.01. If the parent is not that "person" but is the issuer of the securities deliverable upon further conversions, the parent is required by the second sentence of this Section to join in the supplemental indenture for the protection of Securityholders.

2. *Cash Mergers.* Conversion into cash is specifically contemplated by this Section. The fourth paragraph of Section 10.11 provides that interest will not be accrued nor will subsequent adjustments be made after the cash merger date. See also note 2 to Section 10.01.

Section 10.17

1. *Trustee's Non-Responsibility.* The Trustee's duties under the TIA and therefore under the Model Simplified Indenture, relate only to the debt features of the Securities. The Trustee has no duty to monitor the Company's compliance with the terms of the conversion privilege. *See* Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1083 (2d Cir. 1977) (trustee had no duty to communicate to debentureholders an opinion regarding the fairness of a reduction in the conversion price proposed by management to induce debentureholders to consent to an amendment of the indenture). Section 6.07 prescribes that each Securityholder's right to sue to enforce the conversion privilege may not be impaired or affected without such holder's consent.

Article 11 Generally

1. *Approach.* It is intended, first and foremost, that this Article appropriately reflect the substantive terms which institutional holders of Senior Debt expect to find in subordination provisions. At the same time, it is intended that issuers and prospective Securityholders not receive the impression that every possible

nuance has been drafted against their interests. If these objectives are achieved, "emerging" issuers will be able to use this Article with confidence in the acceptability of the subordination provisions to subsequent institutional lenders, and "mature" issuers will be able to use this Article with confidence that it complies, or will be accepted by senior creditors as effectively complying, with the "substantially as follows" stipulations of outstanding Senior Debt.

2. *Effect on Subordination of Changes in Senior Debt.* The ABF Indenture Commentaries (at 572-73) recommend a provision to the effect that holders of Senior Debt may extend, renew or change the Senior Debt without notice to or consent of Securityholders and without affecting the subordination of the Securities. The Model Simplified Indenture omits that provision because the Securities are subordinated to whatever Debt of the Company is "outstanding at any time" (unless expressly made not Senior—see "Senior Debt" definition in Section 11.02) regardless of when such Debt was incurred or how it may have changed since it was first incurred.

3. *Cross-References.* See note 5 to Section 6.02, note 7 to section 8.01, and note 3 to Section 9.02.

Section 11.01

1. *Agreement to Subordinate.* Express agreements to subordinate, such as the agreement set forth in this Section, furnish the basis for the contractual subordination provided for in Article 11, have uniformly been enforced by the courts, and, by facilitating correct analysis of the contractual rights involved, help assure continuance of such enforcement.

2. *Basis for Enforcing Subordination Provisions.* Although various theories for enforcement have been cited in the cases, the underlying basis for enforcing consensual or contractual subordination (as distinguished from equitable subordination) is that a creditor and a debtor can, by a subordination agreement between them, effectually give to another (or "senior") creditor of the debtor, in contingencies such as those set forth in Article 11, a right to receive from the debtor certain payments that the first creditor would otherwise be entitled to receive. Thus, the subordinated creditor in effect agrees that it will have no right, in such contingencies, to receive and retain payment from the debtor until *after* the senior creditor is paid in full. *See In re* Credit Industrial Corporation (Bankrupt), 366 F.2d 402, 407 (2d Cir. 1966), where, in enforcing the subordination agreement, the court stated: "Attention . . . must be focused on the contract upon the basis of which the noteholders loaned various amounts to CIC. If the terms of the contracts [the subordination agreements] are clear and unambiguous, as they are here, it is unnecessary to resort to strained theories of third-party beneficiary, estoppel or general principles of equity to evaluate and determine the proper respective positions of the parties involved."

Section 11.03

1. *Effect of Subordination Provisions.* The subordinated debt evidenced by the Securities and the unsecured Senior Debt of the Company would each constitute a type of unsecured debt of the Company and would be proved on a parity in bankruptcy, without any priority of the Senior Debt over the subordinated Securities. However, express agreements such as those set forth in Sections 11.01 and 11.03 "reallocate from the subordinated class to the senior class as much as is required to obtain for the latter the full equivalent in value of its claims." For an explanation of the mechanics of reallocation, *see* In the Matter of Imperial '400' National Inc., et al., Debtors, Corporate Reorganization Release No. 313 (Aug. 29, 1973), 2 SEC Docket 377, 381.

2. *Liquidations.* This Section applies to any liquidation, whether total or partial, voluntary or involuntary, and under whatever name (e.g., a "winding up"), in which a distribution is made to creditors.

3. *Post-Bankruptcy Interest.* The Model Simplified Indenture specifies that priority in right of payment will extend to interest accruing on Senior Debt even after the commencement of a bankruptcy proceeding.

Sections 11.04/11.05

1. *Prohibition of Payment During Default on Senior Debt; Applicable Conditions.* Section 11.04 prohibits payments on the Securities or purchase of them while there is a default on Senior Debt that permits the holders of Senior Debt to accelerate its maturity, but only if the default is the subject of judicial proceedings or if the Trustee receives notice of the default from one of the persons specified in Section 11.12. It should be emphasized that this prohibition applies even though there are no proceedings pending for the liquidation, dissolution or reorganization of the Company or for the distribution of its assets, and even though the holders of the Senior Debt have taken no action to accelerate the Senior Debt and would prefer not to do so for an indefinite period of time. Thus, in the absence of appropriate limitations, the prohibition could prevent payment on the Securities for a long period of time even in a deteriorating situation. In fact, if the default was a technical default or a financial default (such as failure to maintain a minimum net worth) on the Senior Debt rather than a default in the payment of interest or principal, the Company could, in the absence of appropriate limitations, continue to amortize the Senior Debt for an extended period during which payment on the Securities was prohibited but no action was being taken by the holders of the Senior Debt to resolve the situation. However, that possibility is obviated by the provision in Section 11.04 that the prohibition shall cease to be effective 120 days after the giving of the above-mentioned notice to the Trustee *unless* the default is *then* the subject of judicial proceedings initiated by the holders of Senior Debt or other persons. Such proceedings would presumably resolve the matter within a reasonable period of time. To avoid notices that, by accident or design, string together consecutive 120-day periods even though no holder of Senior Debt initiates

judicial proceedings, clause (2) of Section 11.04 provides that, if proper notice of default has been received by the Company and the 120-day period has passed without proceedings being initiated, the Company can look forward to a five-month breathing spell (deliberately less than one semi-annual interest period) during which payments can be made on the Securities and the Company can seek to cure the Default or obtain a waiver, free from the constant threat of another such notice.

2. *Conversion of Securities.* Section 11.04 excepts from its prohibition the acquisition of Securities in exchange for capital stock of the Company. Thus, Securities may be converted into Common Stock during a period when Section 11.04 would prohibit payments on the Securities or acquisition of Securities in exchange for other types of property.

3. *Acceleration of Securities; Limitations as to Payment.* The situation to which Section 11.05 is addressed occurs when payment of the Securities has been declared due after an Event of Default under the Indenture but there has been no acceleration of Senior Debt either because there has been no default on Senior Debt or because the holders of the Senior Debt have perceived that it would be to their advantage to defer acceleration. The Securities should not be paid, since to do so would fly in the face of the subordination agreements; but the holders of Senior Debt should not be allowed to keep the Securityholders *in statu quo ante* until the ultimate maturity of the Senior Debt. The solution presented in Section 11.05 is: prompt notice, a 120-day period for senior creditor action, and then resumption of payment on the Securities *unless* the provisions of Sections 11.03 or 11.04 *then* prohibit the payment.

4. *"Fish or Cut Bait" Provisions.* In essence the 120-day provisions of Sections 11.04 and 11.05 represent an accommodation between the position of the holders of Senior Debt, who do not want payments to be made on the subordinated debt evidenced by the Securities while there is a continuing default on Senior Debt or as a result of the acceleration of the Securities, and the position of the subordinated Securityholders, who do not want to be forced to accept a blockage of payments on the Securities, especially in a deteriorating situation, until the senior creditors decide, possibly after an extended period of time, that it is to the advantage of the senior creditors to accelerate the Senior Debt, initiate judicial proceedings, or take other actions to resolve the situation. Provisions of this type have been characterized as "fish or cut bait" provisions. They are common in private placements of senior and subordinated debt, but have not to date been frequently used in public issues. These provisions are included in Sections 11.04 and 11.05 in view of the objectives stated in note 1 to Article 11 Generally.

Section 11.08

1. *Subrogation.* As stated in this Section, subrogation rights for the benefit of Securityholders arise only to the extent that distributions otherwise payable to Securityholders have been applied to the payment of Senior Debt.

Section 12.02

1. *Notices.* The Model Simplified Indenture provides that all notices to Securityholders are to be given by first class mail, and that a copy of each such notice is to be mailed to the Trustee and each Agent. Some users may wish to leave the choice of class of mail for such notices to the discretion of the Trustee and the Company. For example, the Trustee's annual mailing to Securityholders required by TIA Section 313(a) may not warrant first class postage.

Section 12.04

1. *"No Default" Certification.* Although each Officers' Certificate must cover satisfaction of all relevant conditions precedent to the particular proposed action, the Model Simplified Indenture does not require that such Certificate also cover the absence of any default under the Indenture.

Section 12.08

1. *"No Recourse" Clause.* The ABF Indenture Commentaries indicate (at 138, 244) that the no-recourse clause is unnecessary or inappropriate, at least where the issuer is a corporation. While each of the federal securities laws specifically provides against waiver of claims arising thereunder, the extent to which Securityholders may waive claims arising under state law will depend on state law. *See* Note, *The "No-Recourse" Clause in Corporate Bonds and Indentures*, 34 Colum. L. Rev. 107 (1934). The Model Simplified Indenture defers on this point to widespread practice.

Section 12.09

1. *Counterpart Indentures.* Regardless of how many copies of the Indenture are executed, it is intended that the production of any one of such copies will be sufficient to satisfy a best evidence rule.

Section 12.10

1. *Function.* It would be the best of all worlds for a draftsman if the final text of the Model Simplified Indenture could be used with only changes in names and addresses of the Company and Trustee, deletion of an unwanted clause or two in the Sections constructed with that in mind (for example, clause (1) of Section 5.01), and additions only in one place. While that aim is unattainable, it explains the potpourri found in this Section.

2. *Exclusions from Senior Debt.* After listing the indebtedness excluded from Senior Debt, the Model Simplified Indenture suggests a specification of the other indebtedness (all or part of that listing) to which "the Securities are not senior in right of payment," in order to meet the requirements of any provisions in such other indebtedness similar to the first sentence of paragraph 10 of the form of Security. The objective is to avoid circular priorities.

Section 12.11

1. *Governing Law.* While there has been a recent suggestion that a federal law of trusts might apply (in regard to certain obligations of Federal Agencies) in an indenture stated as being governed by New York law, and while it is undoubtedly true that both the TIA and the statute or regulation authorizing the performance of corporate trust powers by the Trustee cut across the application of this Section, the Model Simplified Indenture retains the traditional approach to choice of governing law. The interpretation of TIA provisions in an indenture is, of course, a matter of federal law, and some federal courts have recognized an implied right of action to enforce those provisions. *See* Zeffiro v. First Pennsylvania Banking and Trust Company, CCH Fed. Sec. L. Rep. [1979 Transfer Binder] ¶ 96,950 (E.D. Pa. 1979); Morris v. Cantor, 390 F. Supp. 817 (S.D.N.Y. 1975).

Signature Page

1. *Formalities.* The Model Simplified Indenture omits both a testimonium clause ("In witness whereof . . .") and acknowledgments of signatures. If required, acknowledgments appropriate for filing in any jurisdiction can be added. An indenture governing unsecured debt is rarely required to be so filed. In deference to tradition, the Model Simplified Indenture does contemplate a seal and its attestation. Many instruments governing debt dispense with the formality of a seal.

Form of Security

1. *Seal.* The Company's seal is to be reproduced on the face of the Securities, pursuant to Section 2.02.

2. *Formalities.* The Model Simplified Indenture omits the usual express statements that (i) the provisions on the reverse form of Security are incorporated into the face of the Security and (ii) all terms defined in the Indenture have the same meaning in the form of Security. No change is intended, however.

3. *Interest on Debentures Cancelled After The Interest Record Date.* Paragraph 2 provides for payment of interest even though Securities are cancelled after the interest record date and on or before the interest payment date. This situation arises (i) if Securities are called before an interest record date for redemption after the record date but before or on the interest payment date, or (ii) if Securities are converted after the record date but before or on the payment date.

4. *Securities Credited Against Mandatory Redemption Requirement.* Pursuant to paragraph 6 of the form of Security, the principal amount of Securities required to be redeemed in any year may be reduced by the principal amount of Securities cancelled or optionally redeemed and by the principal amount of Securities converted *unless* those Securities were converted after having been called for a mandatory redemption.

5. *Disclosure of Principal Terms.* The form of Security included in the Model Simplified Indenture has been drafted to set forth in brief certain important terms in a place where they are readily accessible. *See* Van Gemert v. Boeing Co., 520 F.2d 1373, 1383 (2d Cir. 1975) (unreasonable for issuer to expect investors to send for, and then read and comprehend, a 113-page indenture). See note 1 to Article 4—Further Covenants, note 6 to Section 5.01 and note 8 to Section 8.01.

6. *Conversion Price Adjustments.* Paragraph 9 summarizes the events which will result in conversion price adjustments. Any substantive changes in or additions to the relevant Sections of Article 10 should also be reviewed against this paragraph to be sure that its text reflects such changes or additions.

7. *Abbreviations.* Paragraph 18 is derived from the NYSE Co. Manual at A-214.

8. *Availability of Indenture.* The boldface legend informs Securityholders how to obtain the Indenture, which includes the form of Security in larger size type.