SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 230, 239, 240, 249 and 260

[Release Nos. 33–7759, 34–42054; 39–2378, International Series Release No. 1208; File No. S7–29–98]

RIN 3235–AD97

Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission today is adopting tender offer and Securities Act registration exemptive rules for cross-border tender and exchange offers, business combinations, and rights offerings relating to the securities of foreign companies. The purpose of the exemptions is to facilitate U.S. investor participation in these types of transactions.

EFFECTIVE DATE: January 24, 2000, except §§ 200.30–1(e)(16) and 200.30–3(a)(68) will be effective November 10, 1999.

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SUPPLEMENTARY INFORMATION: We are adopting new Rules 800, 801 and 802 under the Securities Act of 1933 (''Securities Act''),[1] Rule 4d–10 under the Trust Indenture Act of 1939 (''Trust Indenture Act''),[2] revisions to Form F–X and Rule 144 under the Securities Act,[3] revisions to Rules 13e–3, 13e–4, 14d–1, 14d–9, and 14e–2[4] under the Securities Exchange Act of 1934 (''Exchange Act''),[5] portions of new Rule 14e–5[6] under the Exchange Act, and Rules 30–1 and 30–3[7] of the Commission's Rules Delegating Authority to the Directors of the Division of Corporation Finance and Market Regulation, respectively. We are also adopting new Form CB under the Securities Act and the Exchange Act.

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Appendix A—Form CB Tender Offer/Rights Offering Notification Form

I. Executive Summary

A. Summary of Amendments

U.S. security holders are often excluded from tender and exchange offers, business combinations and rights offerings involving foreign private issuers. It is very common for bidders to exclude U.S. security holders from these transactions to avoid the application of the U.S. securities laws, particularly when U.S. security holders own a small amount of the securities of the foreign private issuer.[8] When bidders exclude U.S. security holders from tender or exchange offers, they deny U.S. security holders the opportunity to receive a premium for their securities and to participate in an investment opportunity. Similarly, when issuers exclude U.S. security holders from participation in rights offerings, U.S. security holders lose the opportunity to purchase shares at a possible discount from market price. U.S. investors must react to these transactions, which may significantly affect their existing investment in the foreign private issuer, without the disclosure or other protections afforded by U.S. or foreign law.

Today, the Commission is adopting exemptive rules that are intended to encourage issuers and bidders to extend tender and exchange offers, rights offerings and business combinations to the U.S. security holders of foreign private issuers. The purpose of the exemptions adopted today is to allow U.S. holders to participate on an equal basis with foreign security holders. In the past, some jurisdictions have permitted exclusion of U.S. holders despite domestic requirements to treat all holders equally on the basis that it would be impracticable to require the bidder to include U.S. holders. The rules adopted today are intended to

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[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 77aaa *et seq.*

[3] 17 CFR 239.42 and 17 CFR 230.144.

[4] 17 CFR 240.13e–3, 240.13e–4, 240.14d–1, 240.14d–9 and 240.14e–2.

[5] 15 U.S.C. 78a *et seq.*

[6] The portion of the text of new Rule 14e–5 (formerly Rule 10b–13) that is being adopted today is contained in a separate release that updates and simplifies the rules and regulations applicable to takeover transactions. See Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 7760 (October 22, 1999) (''Regulation M–A Release'').

[7] 17 CFR 200.30–1 and 200.30–3.

[8] As we noted in the proposing release, Cross-Border Tender Offers, Business Combinations and Rights Offerings, Securities Act Release No. 7611 (November 13, 1998) (63 FR 69136) (Section II.A.), because a large percentage of foreign companies have only a small number of U.S. security holders, it is quite common for bidders for the securities of those foreign companies to exclude U.S. holders. For example, based on a sample of 31 tender offers compiled in 1997 by the U.K. Takeover Panel (the entity that regulates tender offers in the United Kingdom), when the U.S. ownership of the target was less than 15% (30 offers), the bidders excluded U.S. persons in all of the offers. When the U.S. ownership was more significant, such as 38% (one offer), the bidders included U.S. persons. In the 30 offers that excluded U.S. persons, the ownership percentage was as follows: In 27 offers, U.S. persons held less than 5%; in the remaining three offers, U.S. persons held 7%, 8% and 10–15%, respectively.

eliminate the need for such disadvantageous treatment of U.S. investors.

The exemptions balance the need to provide U.S. security holders with the protections of the U.S. securities laws against the need to promote the inclusion of U.S. security holders in these types of cross-border transactions. The specific exemptions are:

- Tender offers for the securities of foreign private issuers will be exempt from most provisions of the Exchange Act and rules governing tender offers [9] when U.S. security holders hold 10 percent or less of the subject securities. In addition to bidders, the subject company, or any officer, director or other person who otherwise would have an obligation to file Schedule 14D–9 also may rely on the exemption. We refer to this exemptive relief in this release as the ''Tier I'' exemption.
- When U.S. security holders hold 40 percent or less of the class of securities of the foreign private issuer sought in the offer, limited tender offer exemptive relief will be available to bidders to eliminate frequent areas of conflict between U.S. and foreign regulatory requirements. We refer to this exemptive relief in this release as the ''Tier II'' exemption. The Tier II exemption represents a codification of current exemptive and interpretive positions.
- Under new Securities Act exemptive Rule 801, equity securities issued in rights offerings by foreign private issuers will be exempt from the registration requirements of the Securities Act, if U.S. security holders own 10 percent or less of the issuer's securities that are the subject of the rights offering.
- Under new Securities Act exemptive Rule 802, securities issued in exchange offers for foreign private issuers' securities and securities issued in business combinations involving foreign private issuers will be exempt from the registration requirements of the Securities Act and the qualification requirements of the Trust Indenture Act, if U.S. security holders hold 10 percent or less of the subject class of securities.
- Tender offers for the securities of foreign private issuers will be exempt from new Rule 14e–5 [10] (formerly Rule 10b–13) of the Exchange Act, which prohibits a bidder from purchasing securities otherwise than pursuant to the tender offer. This exemption will allow purchases outside the tender offer during the offer when U.S. security holders hold 10 percent or less of the subject securities.

The U.S. anti-fraud and anti-manipulation rules and civil liability provisions will, however, continue to apply to these transactions. Certain commenters believed that this liability will remain a hurdle to including U.S. security holders, particularly in view of the amount of litigation in the United States and the ability of subject companies to institute litigation as a defensive measure. However, in a transaction eligible for the exemptions adopted today, many of the disclosure and procedural protections of the federal securities laws will not be available. Therefore, it is necessary that the anti-fraud provisions continue to provide a basic level of protection for U.S. security holders participating in these transactions. The application of these provisions, however, may be different in the context of foreign disclosure requirements and practices. The Commission considers the information that is required to be disclosed by a form or schedule generally to be important in investment decisions. However, the omission of the information called for by U.S. forms in the context of foreign disclosure requirements and practices would not necessarily violate the U.S. disclosure requirements. An antifraud action could be brought by the Commission and investors if the omitted information is material in the context of the transaction and the disclosure provided is misleading as a result of the omission of the information.

In addition to the above exemptions, we are adopting amendments to the Commission's general organization rules. These amendments delegate to the Directors of the Divisions of Corporation Finance and Market Regulation authority to exempt tender offers from specific tender offer requirements. The delegation of authority is intended to conserve Commission resources by permitting the staff to review and act on exemptive applications under sections 14(d) and 36(a) [11] of the Exchange Act when appropriate. Nevertheless, the staff may submit matters to the Commission for consideration as it deems appropriate. In addition, under section 4A(b) [12] of the Exchange Act, the Commission retains discretionary authority to review, upon its own initiative or upon application by a party adversely affected, any exemption granted or denied by the Division pursuant to delegated authority.[13]

B. Changes From the 1998 Proposals

The rules adopted today differ from those contained in the November 1998 proposing release [14] in significant respects. These modifications are being made in response to comments we received on the proposals.[15] The following is a list of the most important changes from the proposals:

- Offerors may offer cash to U.S. persons and securities to non-U.S. persons in a Tier I tender offer without violating the equal treatment requirements of that exemption.
- The Tier II exemption has been revised to harmonize it with the amendments to the tender offer rules (''Regulation M–A'') that also are being adopted today in a separate release.[16]
- The U.S. ownership limitations for the exemptions from the Securities Act registration requirements for exchange offers, business combinations and rights offerings have been increased from five to 10 percent.
- Securities held by all persons owning 10 percent or more of the outstanding securities, as well as the securities held by the offeror, are excluded from the calculation of the percentage of the class held by U.S. owners, rather than securities owned by just foreign 10 percent holders, as proposed.
- Securities purchased in a rights offering conducted under Rule 801 will only be restricted to the extent that the securities held by the U.S. holder at the time of the offering were restricted.
- We have modified the method of determining U.S. ownership. An offeror must ''look through'' the record ownership of certain brokers, dealers, banks or nominees holding securities of the subject company for the accounts of their customers to determine the percentage of the securities held in nominee accounts that have U.S. addresses. We are adopting, with minor

[9] 15 U.S.C. 78m(e) and 78n(d); 17 CFR 240.13e–3, 240.13e–4, 240.14d–1 to 240.14d–10, 240.14e–1 and 240.14e–2.

[10] Rule 10b–13 was revised and redesignated as new Rule 14e–5 in the Regulation M–A Release, *supra* note 6.

[11] 15 U.S.C. 78mm(a).

[12] 15 U.S.C. 78d–1(b).

[13] Information concerning the filing of exemptive relief applications can be found in Release No. 34–39624; Rule 0–12 under the Exchange Act (17 CFR 240.0–12).

[14] *See* the proposing release, *supra* note 8. Similar exemptions were originally proposed in International Tender and Exchange Offers, Securities Act Release No. 6897 (June 5, 1991) (56 FR 27582) and Cross-Border Rights Offers, Securities Act Release No. 6896 (June 4, 1991) (56 FR 27564).

[15] We received 19 letters of comment on the 1998 proposals. Those letters can be obtained for public inspection and copying by requesting File No. S7–29–98 through our public reference room in Washington DC. Electronically submitted comments are available on our Internet web site (http://www.sec.gov).

[16] Regulation M—A Release, *supra* note 6.

changes, the proposal that a third-party bidder in an unsolicited or ''hostile'' tender offer may rely upon a presumption that the U.S. ownership percentage limitations of the Tier I, Tier II and Rule 802 exemptions are not exceeded based on the relative level of trading volume in the United States. We are not adopting the proposed rebuttable presumption that persons holding through ADR facilities are U.S. holders.

- In order to provide a level playing field in the case of competing offers, we have provided that if an offeror commences a tender offer or a business combination during an ongoing tender offer or business combination for securities of the same class that is the subject of its offer, the second offeror will be eligible to use the same exemption (Tier I, Tier II, or Rule 802) as the prior offeror, so long as all the conditions of the exemption, other than the limitation on U.S. ownership, are satisfied by the second offeror. In light of this change, we are not adopting the proposal that if an offeror commences an offer during an ongoing tender or exchange offer for securities of the same class that is the subject of its offer, the offeror could calculate the percentage of subject securities held by U.S. holders as of the same date used by the initial offeror.

- We provide guidance regarding when bidders can provide information on the Internet about offshore tender and exchange offers without triggering U.S. requirements.

- The Tier I and Tier II tender offer exemptions are available if the subject company is a closed-end investment company that is registered under the Investment Company Act of 1940 (the ''Investment Company Act'').[17] As proposed, the Tier I and Tier II tender offer exemptions would not have been available if the subject company was any type of investment company registered or required to be registered under the Investment Company Act.

- The registration exemptions for rights offerings, business combinations and exchange offers provided by Rules 801 and 802 are available for securities issued by closed-end investment companies that are registered under the Investment Company Act. As proposed, Rules 801 and 802 would not have been available for securities issued by any type of investment company, whether foreign or domestic, that is registered or required to be registered under the Investment Company Act.

[17] 15 U.S.C. 80a–1 *et seq.*

II. Discussion

A. The Tier I Exemption

Under the Tier I exemption adopted today, eligible issuer and third-party tender offers will not be subject to Rules 13e–3, 13e–4, Regulation 14D or Rules 14e–1 and 14e–2. These provisions contain disclosure, filing, dissemination, minimum offering period, withdrawal rights and proration requirements that are intended to provide security holders with equal treatment and adequate time and information to make a decision whether to tender into the offer. The Tier I exemption provides that tender offers for the securities of foreign private issuers are exempt from these U.S. tender offer requirements, so long as:

- U.S. security holders hold 10 percent or less of the class of securities sought in the tender offer;
- In the case of an offer that otherwise would be subject to Rule 13e–4 or Regulation 14D under the Exchange Act, bidders submit, rather than file, an English language translation of the offering materials to the Commission under cover of Form CB and, in the case of a foreign offeror, file a consent to service on Form F–X;
- U.S. security holders participate in the offer on terms at least as favorable as those offered to any other holders; and
- Bidders provide U.S. security holders with the tender offer circular or other offering documents, in English, on a comparable basis to that provided to other security holders.

The exemption is available to U.S. and foreign bidders. The domicile or reporting status of the bidder is not relevant. Instead of complying with the U.S. tender offer rules, a bidder taking advantage of the exemption will comply with any applicable rules of the foreign subject company's home jurisdiction or exchange.

1. U.S. Ownership Limitation

We are adopting, as proposed, 10 percent as the maximum level of ownership by U.S. security holders that a subject company can have and be eligible for the Tier I exemption.[18] Under the proposals, we solicited comment on whether to increase the 10 percent limitation for U.S. ownership to 15 or 20 percent. Commenters on the proposals largely favored adopting a higher eligibility percentage. We have decided, however, that 10 percent is an appropriate level of U.S. ownership for exclusive reliance on home jurisdiction requirements. At and below that level of U.S. ownership, broad-based exemptions are necessary to encourage inclusion of U.S. security holders.[19] We believe that U.S. holders' interests are best served by being able to participate in, rather than being excluded from, the tender offer, even though they do not receive the full protections of the U.S. tender offer rules. Above the 10 percent level of U.S. ownership, more tailored relief of the type permitted by the new Tier II exemption would address conflicting regulatory mandates and offering practices.

We also believe that it is appropriate to set the Tier I and Securities Act registration exemption limit on U.S. ownership at the same percentage to level the playing field for stock and cash tender offers. As discussed below, we have decided to raise the ownership level for the Securities Act exemption from five to 10 percent. As a result, an exchange offer would be exempt both from the tender offer and Securities Act registration requirements if U.S. security holders hold 10 percent or less of the subject company's securities.

In order to provide a level playing field in the case of competing offers, we also believe it is appropriate to provide that if a bidder commences a tender offer or a business combination during an ongoing tender offer or business combination for securities of the same class that is the subject of its offer, the second bidder will be eligible to use the same exemption (Tier I, Tier II, or Rule 802) as the prior offeror provided that all the conditions of the exemption, other than the limitation on U.S. ownership, are satisfied by the second bidder. Thus, if the initial bidder relies on the Tier I exemption to make a tender offer, a subsequent competing bidder would not be subject to the 10 percent ownership limitation condition of the Tier I exemption. As a result, the second bidder will not be disadvantaged by any movement of securities into the United States following the announcement of the initial offer.

Neither the Tier I nor the Tier II tender offer exemption is available for any transaction or series of transactions that technically complies with the exemption but is part of a plan or scheme to evade the tender offer provisions of the Exchange Act.[20] For example, if an initial offer is commenced solely as a pretext for making a subsequent offer automatically eligible for the exemption, the Tier I exemption would not be available.

[18] *See* Section II.F. *infra* for a discussion of how U.S. ownership is determined.

[19] *See* the proposing release, *supra* note 8, at note 15.

[20] *See* Instruction 4 to paragraphs (h)(8) and (i) to revised Rule 13e–4 and Instruction 5 to paragraphs (c) and (d) of revised Rule 14d–1.

2. Disclosure and Dissemination—Form CB

We are adopting, as proposed, the requirement that a bidder or issuer relying on the Tier I exemption submit any offering materials prepared under foreign law to the Commission for notice purposes only, under cover of Form CB.[21]

The requirement to submit a Form CB only applies if the tender offer would have been subject to Regulation 14D or Rule 13e–4, but for the Tier I exemption. If the tender offer would have been subject only to section 14(e) and Regulation 14E, the offering document and any recommendation do not need to be submitted to the Commission because the current regulations do not require a filing in connection with those offers.[22] The materials submitted under cover of Form CB will not be deemed filed with the Commission. Therefore, the person submitting the materials will not be subject to the express liability provisions of Section 18 of the Exchange Act.[23]

Form CB must be received by the Commission no later than the next business day after the publication or dissemination of the offering circular or disclosure document being filed under cover of Form CB. Thus, filing persons will have one extra day from the date the offering circular or disclosure document is first published, sent or given to security holders to submit the offering circular or disclosure document to the Commission. If the bidder is a foreign company, it must also file a Form F–X with the Commission at the same time as the submission of the Form CB to appoint an agent for service in the United States. Form F–X, which was adopted in 1991, has been modified to reflect its use in connection with the submission of a Form CB.

A number of commenters argued that Forms CB and F–X would be too burdensome and would discourage offerors from relying on the exemptions. We believe, however, that our interest in monitoring the availability of the exemptions and ensuring that U.S. security holders have access to these documents through their public availability and meaningful recourse for fraudulent statements in the documents justify the minimal burdens of preparing these forms. We will not require the payment of a filing fee with the submission of a Form CB or the filing of a Form F–X.

We are adopting, as proposed, the requirement that offerors disseminate any tender offer circular or other informational document to U.S. security holders in English on a comparable basis to that provided to security holders in the foreign subject company's home jurisdiction. If the foreign subject company's home jurisdiction permits dissemination solely by publication, the offeror likewise will publish the offering materials simultaneously in the United States, although it may in addition mail the materials directly to U.S. holders. If the materials are disseminated by publication, the offeror must publish the materials in a manner reasonably calculated to inform U.S. investors of the offer.[24]

3. Equal Treatment

Offerors relying on the Tier I exemption must permit U.S. security holders to participate in the offer on terms at least as favorable as those offered to any other holders of the subject securities, subject to certain exceptions for exchange offers, as discussed below. In addition, equal treatment requires that the procedural terms of the tender offer, that is, duration, pro rationing, and withdrawal rights, must be the same for all security holders.[25]

a. Cash Alternative

The proposals would have required as a condition to the Tier I exemption that U.S. security holders be offered the same amount and form of payment, including securities if offered elsewhere. We solicited comments on whether the exemption should permit U.S. security holders to be offered only cash, even if non-U.S. security holders are offered consideration consisting at least partly of securities. Commenters generally believed that we should permit cash-only consideration to be paid to U.S. security holders to avoid the exclusion of U.S. security holders from cross-border tender offers. We agree. As adopted, U.S. holders may be offered only cash, but the bidder must have a reasonable basis to believe that the cash is substantially equivalent to the value of the securities and any cash or other consideration offered to non-U.S. holders.[26]

To assure that U.S. security holders receive substantially equivalent value for their securities, if the offered security is not a ''margin security'' within the meaning of Regulation T,[27] the offeror must provide upon the request of the Commission or a U.S. security holder an opinion from an independent expert stating that the cash-only consideration is substantially equivalent to the securities and any cash offered outside the United States.[28] If the offered security is a ''margin security'' within the meaning of Regulation T, an opinion would not be required.[29] Instead, the offeror must undertake to provide any U.S. holder or the Commission staff upon request information on recent trading prices of the offeror's securities.

The American Bar Association objected to requiring a valuation opinion because it would raise significantly the cost to issuers and bidders and consequently discourage them from including U.S. security holders in a tender offer.[30] We believe, however, that an offeror seeking to use this exception to avoid issuing securities to U.S. holders would not find this requirement excessively burdensome, particularly when the

[21] The subject company, or any officer, director or other person who otherwise would have an obligation to file a Schedule 14D–9, may satisfy that obligation by submitting the recommendation to the Commission on Form CB.

[22] Financial statements submitted under cover of new Form CB that comply with the accounting requirements of the filer's home jurisdiction need not be reconciled to U.S. generally accepted accounting principles, regardless of whether the Form CB is submitted in connection with a Tier I exempt offer or under new Rule 801 or 802.

[23] 15 U.S.C. 78r.

[24] *Cf.* Exchange Act Rule 14d–4(b) [17 CFR 240.14d–4(b)].

[25] The fact that a foreign security trades in the United States in the form of an American Depositary Receipt (ADR), and the ADR depositary requires holders to provide it with instructions to tender into the offer a reasonable time before the close of the offer, or imposes fees in connection with the tender, would not contravene this condition.

[26] Revised Rules 13e–4(h)(8)(ii)(C) and 14d–1(c)(iii). The determination should be made at the commencement of the offer. The amount of cash consideration must be adjusted during the term of the offer only if the bidder no longer has a reasonable basis to believe the cash is substantially equivalent to the value of the securities offered to non-U.S. holders, for example, if the bidder increase the offer price.

[27] (12 CFR 220.2). The definition of a ''margin security'' in Regulation T, which is issued by the Board of Governors of the Federal Reserve System pursuant to the Exchange Act, inlcudes ''foreign margin stock.'' Foreign margin stock'' comprises both securities on the Federal Reserve Board's List of Foreign Margin Stocks and those deemed to have a ''ready market'' for net capital purposes under Rule 15c3–1 (17 CFR 240.15c3–1) under the Exchange Act. All stocks that appear on the Financial Times/Standard & Poor's World Actuaries Indices (FR/S&P Indices) are effectively treated as having a ''ready market'' for net capital purposes. *See Securities Credit Transactions; Borrowing by Brokers and Dealers*, 63 FR 2806 (January 16, 1998) at II.B.2.

[28] The opinion would address only the relative values of the cash and non-cash consideration offered to investors for the subject securities. The opinion would not need to address the fairness of either form of consideration in relation to the value of the subject securities.

[29] We believe that securities that are ''margin securities'' under Regulation T would be sufficiently liquid so that a U.S. investor should be able to ascertain the market value of the offered securities.

[30] *See* comment letter dated March 2, 1999, *supra* note 15.

opinion is required only when the offered security is not a ''margin security'' within the meaning of Regulation T. On the other hand, an independent opinion would provide reasonable assurance that U.S. security holders are receiving equivalent value to that offered to non-U.S. holders.

In many cases, foreign jurisdictions will not allow the bidder to offer U.S. holders cash when that option is not provided in all other jurisdictions. In addition, the bidder may not have sufficient cash to fund such an offer. Some bidders have used a ''vendor placement,'' in which U.S. holders agree to appoint an independent agent to receive the securities offered in an exchange offer and sell them immediately into an existing offshore trading market for those securities. The agent would then remit the proceeds, minus expenses, to the U.S. holders. The staff has granted no-action relief under the Securities Act registration requirements and the equal treatment requirement of Rule 14d-10 to qualifying vendor placements.[31] That procedure will continue to be available under appropriate circumstances.

b. Blue Sky Exemption

If the offeror has determined to offer securities to all U.S. holders on the basis of the new Rule 802 exemption, the offeror may exclude subject company security holders residing in any state that does not provide an exemption from registration or qualification under the state blue sky law. Similarly, if the offeror registers securities under the Securities Act, the offeror may exclude subject company security holders residing in any state that refuses to register or qualify the offer and sale of securities in that state after a good faith effort by the offeror.

In both cases, however, the offeror must offer those security holders cash consideration instead of excluding them, if it has offered cash consideration to security holders in another state or in a jurisdiction outside the United States. The offeror must offer the cash consideration only if it is offering a cash-only alternative consideration—not merely a partial cash/partial securities form of consideration.

c. Loan Notes

Finally, we are adopting, as proposed, the exception to the equal treatment requirement providing that the offeror does not need to offer a ''loan note'' alternative to U.S. security holders. Loan notes, common in the United Kingdom, are short-term notes that may be redeemed in whole or in part for cash at par on any interest date in the future. The purpose of the loan notes is the deferral of the recognition of income and capital gains on the sale of securities under foreign tax laws. Since this tax benefit is not available to U.S. security holders, a bidder would not need to offer loan notes to U.S. security holders.

4. Rule 13e–3 Exemption

We are adopting, as proposed, the exemption from the Commission's going private disclosure requirements under Rule 13e–3 for transactions eligible for the Tier I exemption. Rule 13e–3 mandates the filing of a Schedule 13E–3. Schedule 13E–3 requires disclosure about the fairness to unaffiliated security holders of the transaction that may cause an equity security to lose its public trading market. As we noted in the proposing release, we believe this exemption is appropriate because it may not be practical to impose Rule 13e–3 procedural, disclosure and filing requirements when there are no other U.S. requirements, including dissemination and disclosure requirements. Rule 13e–3 will continue to apply to offers subject to the Tier II exemptions.

5. Sections 13(d), 13(f) and 13(g)

The rules adopted today would not affect the beneficial ownership reporting requirements of Sections 13(d), 13(f) and 13(g) of the Exchange Act.[32] We solicited comment on whether those provisions should apply to non-U.S. persons owning securities in foreign private issuers. We also solicited comment on whether these rules should apply only if U.S. ownership exceeded a certain percentage. Two commenters believed that these rules should not apply where the security holder bought the shares of a foreign private issuer on a foreign market. These commenters pointed to evidence of uneven compliance with those requirements in that situation as evidence that the scope of the Exchange Act's beneficial ownership disclosure requirements are not widely understood outside the United States. The American Bar Association, on the other hand, submitted a comment letter that urged that the beneficial ownership reporting requirements continue to apply. The ABA did not believe that the application of these requirements to offshore purchases of foreign securities presents a serious compliance problem or that the current approach is an impediment to cross-border transactions.[33]

We believe that the need for disclosure of the ownership and control of reporting companies trading in our markets, domestic and foreign, justifies any burdens related to filing reports under those rules.

B. The Tier II Exemption

Commenters generally supported the proposed scope and conditions of the Tier II exemption, under which offerors would be entitled to limited relief from the U.S. tender offer rules to minimize conflicts with foreign regulatory schemes. This relief will be available for both issuer and third party tender offers when the subject company is a foreign private issuer and U.S. ownership is no greater than 40 percent. The offeror must comply with the remaining tender offer provisions, including the procedural, disclosure, and filing requirements of the Williams Act. Because the offeror would file a Schedule TO,[34] a Form CB or F–X is not required. We are adopting the Tier II exemption with some modifications from the 1998 proposals, because some of the relief contained in the 1998 proposals is no longer necessary due to the amendments adopted today in the Regulation M–A Release.

First, as with Tier I, in order to provide a level playing field in the case of competing offers, if the initial offeror relies on the Tier II exemption to make a tender offer, a subsequent competing bidder would not be subject to the 40 percent ownership limitation condition of the Tier II exemption.

Second, the proposal that a cross-border tender offer would commence only upon mailing or publishing the offer rather than upon announcement is no longer necessary. In the Regulation M–A Release, we have repealed the requirement that a cash tender offer commence or be withdrawn within five business days of announcement. Instead, an offer commences once the bidder disseminates transmittal forms or discloses instructions on how to tender into an offer.[35] Only then is the bidder required to file the Schedule TO. Therefore, separate relief for foreign offers is not necessary.

Third, the proposal that a bidder could terminate withdrawal rights in a cross-border tender offer once all

[31] *See* the staff no-action letters *TABCORP Holdings Limited* (Aug. 27, 1999), *Durban Roodepoot Deep, Limited* (Feb 23, 1999), and *AMP Limited* (Sept. 17, 1998).

[32] 15 U.S.C. 78m(d), 78m(g), and 78m(f).

[33] *Supra* note 30.

[34] Schedules 13E–4 and 14D–1, the schedules previously used for issuer and third-party tender offers, respectively, have been combined into new Schedule TO in the Regulation M–A Release, *supra* note 6.

[35] Revised Rule 14d–2.

conditions were satisfied and keep the offer open for acceptances only is also not necessary. The Regulation M–A Release adopted a similar proposal to allow third-party bidders to provide at their election for a ''subsequent offering period'' without withdrawal rights and made it applicable to both domestic and foreign transactions.[36] Regulation M–A provides, in part, that bidders that include a subsequent offering period must promptly pay for tendered securities and announce the approximate number and percentage of outstanding securities that were deposited by the close of the initial offering period no later than 9:00 a.m. Eastern time on the next business day after the scheduled expiration date of the initial offering period and immediately begin the subsequent offering period. We have clarified that bidders relying on the Tier II exemption will satisfy the foregoing requirements if the bidder pays for tendered securities and makes the announcement in accordance with the law or practice of the bidder's home jurisdiction and the subsequent offering period commences immediately following such announcement.[37] The bidder would not have to extend withdrawal rights during the period between the close of the offer and the commencement of the subsequent offering period. Otherwise, separate relief for foreign offers is not necessary.

We are adopting the Tier II provisions relating to the All-Holders/Best Price provisions,[38] notice of extensions,[39] prompt payment,[40] and the interpretation regarding a waiver or reduction of minimum conditions as proposed. Under our interpretation on changes to the minimum condition, we will not object if bidders meeting the requirements for the Tier II exemption reduce or waive the minimum acceptance condition without extending withdrawal rights during the remainder of the offer (unless an extension is required by Rule 14e–1), if the following conditions are met:

- The bidder must announce that it may reduce the minimum condition five business days prior to the time that it reduces the condition. A statement at the commencement of the offer that the bidder may reduce the minimum condition is insufficient;
- The bidder must disseminate this announcement through a press release and other methods reasonably designed to inform U.S. security holders, which could include placing an advertisement in a newspaper of national circulation in the United States;
- The press release must state the exact percentage to which the acceptance condition may be reduced and state that a reduction is possible. The bidder must declare its actual intentions once it is required to do so under the regulations of the home jurisdiction;
- During this five-day period, security holders who have tendered their shares in the offer will have withdrawal rights;
- This announcement must contain language advising security holders to withdraw their tenders immediately if their willingness to tender into the offer would be affected by a reduction of the minimum acceptance condition;
- The procedure for reducing the minimum condition must be described in the offering document; and
- The bidder must hold the offer open for acceptances for at least five business days after the revision or waiver of the minimum acceptance condition.

Apparently because the Tier II proposals were codifications of exemptive and interpretive positions that we currently apply in cross-border acquisitions, they did not result in significant comment. To the extent that an offeror needs additional relief from that provided in Tier II, the staff, pursuant to delegated authority, will consider applications for exemptions on a case-by-case basis.[41]

C. Other Rules Governing Tender Offers

1. Rule 14e–5 (Former Rule 10b–13)

We are adopting two new exceptions to new Rule 14e–5. In the proposing release, we proposed to amend then Rule 10b–13 under the Exchange Act to facilitate the inclusion of U.S. security holders in tender offers for foreign securities by adding two exceptions for cross-border offers.[42] We are adopting both of the proposed exceptions, the exception for Tier I offers and the exception to permit ''connected exempt market makers'' and ''connected exempt principal traders,'' as defined by the U.K. City Code on Takeovers and Mergers (City Code),[43] to continue their U.K. market making activities during cross-border offers that are subject to the City Code.

Rule 14e–5 prohibits, in connection with a tender offer for equity securities, a covered person from purchasing or arranging to purchase any subject securities or any related securities except as part of the tender offer. The rule protects investors by preventing an offeror from extending greater or different consideration to some security holders by offering to purchase their shares outside the offer, while other security holders are limited to the offer's terms. The rule applies to: The offeror and its affiliates; the offeror's dealer-manager and its affiliates; any advisor to the offeror, dealer-manager or their affiliates, whose compensation is dependent on the completion of the offer; and any person acting, directly or indirectly, in concert with any of the other covered persons in connection with any purchase or arrangement to purchase any subject securities or any related securities.

Many foreign jurisdictions do not expressly prohibit an offeror from purchasing or arranging to purchase the subject security outside the terms of the offer. As noted in the proposing release, a strict application of Rule 14e–5 in some cases could disadvantage U.S. security holders where the offeror decides not to extend the offer in the United States because of the rule's restrictions. In that circumstance,

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[36] The text of new Rule 14d–11 is contained in the Regulation M–A Release, *supra note* 6.

[37] Revised Rule 14d–1(d)(2)(v).

[38] Revised Rules 13e–4(i)(2)(i), 13e–4(i)(2)(ii), 14d–1(d)(2)(i), and 14d–1(d)(2)(ii). A bidder may make one offer to U.S. holders and another only to non-U.S. holders if the offer to U.S. holders is made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers. A bidder may also offer loan notes solely to non-U.S. holders.

The exception to the equal treatment condition of the Tier I exemption for cash only consideration adopted today would not apply to Tier II offers. The staff will continue to consider requests for that type of relief on a case-by-case basis. *See Amendments to Tender Offer Rules: All-Holders and Best-Price*, Exchange Act Release No. 23421 (July 7, 1986), [51 FR 25973] at Section III.B.3. Likewise, vendor placement arrangements will be considered on a case-by-case basis.

[39] Revised Rules 13e–4(i)(2)(iii) and 14d–1(d)(2)(iii) (Notice of extensions may be made in accordance with the requirements of the home jurisdiction law or practice).

[40] Revised Rules 13e–4(i)(2)(iv) and 14d–1(d)(2)(iv) (Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the prompt payment requirements of Rule 14e–1(c)).

[41] The offeror would need to submit a written application requesting relief, along with a discussion of the basis for the request. If the request relates to an issuer tender offer, the request should be directed to the Office of Risk Management and Control in the Commission's Division of Market Regulation and the Office of Mergers and Acquisitions in the Commission's Division of Corporation Finance. If the request relates to a third party tender offer, the request should be directed to the Office of Mergers and Acquisitions.

The application must comply with the requirements of Rule 0–12 under the Exchange Act. When U.S. ownership is greater than 40 percent, the staff will consider relief on a case-by-case basis only when there is a direct conflict between the U.S. laws and practice and those of the home jurisdiction. Any relief would be limited to what is necessary to accommodate conflicts between the regulatory schemes and practices.

[42] After a comprehensive review of Rule 10b–13, including its application in the context of offers for U.S. issuers, we revised Rule 10b–13 and redesignated it as new Rule 14e–5. The text of the new rule is found in the Regulation M–A Release, *supra* note 6.

[43] The City Code on Takeovers and Mergers and the Rules Governing Substantial Acquisition of Shares (Fifth Edition, Dec. 12, 1996). The City Code states general principles for the regulation of takeovers conducted in the United Kingdom and the Republic of Ireland.

flexible application of Rule 14e–5 is necessary and appropriate to encourage offerors for the securities of foreign private issuers to extend their offers to U.S. security holders. We believe the two exceptions we are adopting strike the proper balance between the investor protection goals of Rule 14e–5 and the interests of U.S. investors in being included in tender offers.

a. Tier I Offers

We are adopting, substantially as proposed, an exception for purchases or arrangements to purchase made outside, but during the time of, a Tier I tender offer. For tender offers that are substantially foreign in character, such as Tier I offers, we suggested in the proposing release that allowing U.S. security holders to participate in these offers outweighs the benefits derived from applying Rule 14e–5 to such offers. Commenters agreed with this evaluation.

This exception is based primarily on a number of exemptions from Rule 10b–13 to accommodate cross-border tender offers. This limited exception for Tier I tender offers largely represents a codification of the conditions contained in the exemptions previously granted by the Commission. The exception, however, being limited to Tier I offers, only extends to offers where U.S. persons hold of record 10 percent or less of the class of securities sought in the offer.

The exception requires that: The tender offer is an excepted Tier I offer; [44] the offering documents furnished to U.S. holders prominently disclose the possibility of any purchases, or arrangements to purchase, or the intent to make such purchases; the offering documents disclose the manner in which any information about any such purchases or arrangements to purchase will be disclosed; the offeror discloses information in the United States about any such purchases or arrangements to purchase in a manner comparable to the disclosure made in the home jurisdiction, as defined in § 240.13e–4(i)(3); and the purchases comply with the applicable tender offer laws and regulations of the home jurisdiction. Although not proposed, we are including a requirement that the offering documents disclose the manner in which any information about any such purchases or arrangements to purchase will be disclosed. This additional requirement ensures that security holders will know how to obtain the information that this exception requires to be disclosed.

Consistent with the proposed rule, we are not limiting the exception to purchases that are made outside the United States. Under the new exception for Tier I offers, offerors may purchase subject securities, subject to the conditions noted above, in transactions in the United States that otherwise would be prohibited under Rule 14e–5.[45] Under the requirement that the offeror disclose information in the United States about any such purchases or arrangements to purchase in a manner comparable to the disclosure made in the home jurisdiction, we expect that such disclosure will be provided in English.

We did not propose, and we are not adopting, an exception to Rule 14e–5 for Tier II offers because of the greater U.S. interest in those offers. Despite comments to the contrary, we believe that we should continue to review requests for relief from Rule 14e–5 for offers other than Tier I eligible offers on a case-by-case basis. In that context, we will consider factors such as proportional ownership of U.S. security holders of the subject security in relation to the total number of shares outstanding and to the public float; whether the offer will be for ''any-and-all'' shares or will involve prorationing; whether the offered consideration will be cash or securities; whether the offer will be subject to a foreign jurisdiction's laws, rules, or principles governing the conduct of tender offers that provide protections comparable to Rule 14e–5; and whether the principal trading market for the subject security is outside the United States.[46]

In our view, this exception will simplify the procedural requirements for foreign tender offers and further promote the extension of such offers to U.S. security holders, without compromising the investor protections of the rule.

b. Market Making by ''Connected Exempt Market Makers'' and ''Connected Exempt Principal Traders''

We are adopting the exception for ''connected exempt market makers'' and ''connected exempt principal traders'' [47] as proposed. Based upon our experience with U.K. regulatory requirements for tender offers, we recognize that there is sufficient regulatory oversight of purchases by connected exempt market makers and connected exempt principal traders in the United Kingdom to permit them an exception. Commenters supported this exception.

The exception permits purchases or arrangements to purchase if: The purchase or arrangement to purchase is effected by a connected exempt market maker or a connected exempt principal trader, as those terms are used in the City Code; the issuer of the subject security is a foreign private issuer; the tender offer is subject to the City Code; the connected exempt market maker or the connected exempt principal trader complies with the applicable provisions of the City Code; and the tender offer documents disclose the identity of the connected exempt market maker or the connected exempt principal trader and disclose, or describe how U.S. security holders can obtain information regarding market making or principal purchases by such market maker or principal trader to the extent that this information is required to be made public in the United Kingdom.[48]

As was proposed, this exception is not limited to Tier I tender offers. The exception applies to offerors or anyone acting on behalf of offerors (such as advisors and other nominees or brokers).

2. Regulation M

We are not changing Regulation M in this release. We did not propose any changes to Regulation M for cross-border exchange offers, whether qualifying for the registration exemption under Rule 802 or the Tier I or Tier II exceptions from the U.S. tender offer

[44] Excepted by either revised Rule 13e–4(h)(8) or revised Rule 14d–1(c).

[45] Of course, broker-dealers that solicit tenders from U.S. persons would be required to register as broker-dealers under Section 15 of the Exchange Act (15 U.S.C. 78o), absent an available exemption.

[46] As noted in the proposing release, this approach would comport with the Commission's action in a recent cross-border offer involving a U.K. target company with substantial U.S. ownership. *See* proposing release, *supra* note 8, at n. 92 and accompanying text.

[47] Under the City Code, connected exempt market makers and connected exempt principal traders are market makers or principal traders that are affiliated with the bidder's advisors (Eligible Traders).

[48] This exception is based on a limited class exemption under Rule 10b–13 to permit ''connected exempt market makers'' and ''connected exempt principal traders'' to continue their U.K. market making activities during a cross-border offer that is subject to the City Code. *See Exemption under Rule 10b–13 for Certain Principal Trading and Market Making Activities* dated June 29, 1998 (Eligible Trader Class Exemption). Without Rule 10b–13 relief, Eligible Traders would have been forced to withdraw from trading in U.K. target securities, with possible adverse consequences for the liquidity of those securities. This limited class exemption recognized the information barrier and other requirements contained in the City Code that Eligible Traders must satisfy to be exempt from the City Code's ''acting in concert'' provisions. This exemption required the Eligible Trader to comply with specified disclosure and recordkeeping requirements, and the Eligible Trader is prohibited from making purchases in the United States, which are consistent with conditions contained in other Rule 10b–13 exemptions granted in the cross-border context.

provisions, or for cross-border rights offerings qualifying for the registration exception under proposed Rule 801. In the proposing release, we asked whether exemptions from various rules under Regulation M are necessary to accommodate cross-border rights offerings or exchange offers conducted pursuant to Rules 801 or 802. Several commenters thought that an exception from Regulation M is appropriate in such instances.

We still are uncertain whether such changes are necessary despite the comments because there continues to be a lack of requests for relief in these contexts. We still believe we should evaluate the need for exemptions from Regulation M after we gain experience with the Regulation's operation in the context of those offerings. We will, however, carefully consider commenters' suggestions for an exception from Regulation M, and determine if we should propose such an exception.

D. Exemption From the Securities Act for Exchange Offers, Business Combinations, and Rights Offerings

1. Summary

The rules adopted today also provide exemptions from Securities Act registration requirements for securities issued to U.S. security holders of a foreign private issuer in exchange offers, business combinations, and rights offerings. These exemptions are being adopted as Rule 801 for rights offerings and Rule 802 for business combinations and exchange offers. Rule 800 provides common definitions for both rules. The exemptions are available only if the subject company (or the issuer in an issuer tender offer or rights offering) is a foreign private issuer and U.S. security holders hold no more than 10 percent of the subject securities.[49]

The exemptions are not available for any transaction or series of transactions that technically complies with the exemptions but is part of a plan or scheme to evade the registration provisions of the Securities Act.[50] For example, if the exchange offer or rights offering is a sham conducted solely as a pretext for distributing securities in the United States, the exemptions would not be available.[51]

2. Eligibility Conditions

a. U.S. Ownership Limitation

As adopted, exchange offers, business combinations, and rights offerings will be exempt from registration under the Securities Act if U.S. security holders own 10 percent or less of the foreign private issuer's securities that are the subject of the offer. Based on the suggestions of commenters, we have increased the U.S. ownership limit from five to 10 percent. When U.S. security holders own 10 percent or less of the issuer, U.S. participation is generally not necessary for the success of the offering. Therefore, it is quite common for offerors to exclude U.S. security holders below this level.[52] Commenters unanimously indicated that an increase was necessary to facilitate including U.S. persons in these transactions. Commenters' suggestions ranged from 10 to 30 percent.

We do not believe it is necessary to increase the level above 10 percent for exchange offers. It is common for offerors to include U.S. security holders above that level, since they are usually necessary for the success of the offer.[53] Because a rights offering may be used as a financing device, we considered keeping the threshold for rights offerings at five percent. However, exclusion of U.S. holders in rights offerings is common even with much higher U.S. ownership levels.[54] U.S. participation is rarely viewed as necessary for the success of the offer, since from an issuer's viewpoint, the fewer shares sold to existing security holders at a discount, the better. For that reason, the goal of facilitating U.S. participation in foreign rights offerings would be significantly undermined by the proposed lower U.S. ownership ceiling of five percent. This is particularly true in light of our decision to modify the method for calculation of U.S. holdings to make the test reflect U.S. beneficial, rather than merely record, ownership. However, we do not believe that the ownership threshold should be increased above 10 percent for rights offerings because it is our view that the benefits obtained by providing U.S. security holders with the protections of the Securities Act at ownership levels above 10 percent outweigh the benefits that would be obtained by raising the ownership threshold in order to provide incentives for foreign private issuers to include U.S. security holders above the 10 percent level.

Some commenters suggested that we adopt an exemption from both the Securities Act and tender offer provisions if the subject company has less than 300 U.S. holders, regardless of the percentage of the foreign private issuer's securities owned by those investors. We do not believe that it is necessary or appropriate to exempt an offering of securities to up to 300 U.S. investors from the Securities Act registration requirements, in what may be a predominantly U.S. transaction, based solely on the foreign status of the subject company. U.S. investors in cross-border exchange offers should be provided with the protections of Securities Act registration, unless application of those provisions likely would result in the exclusion of U.S. holders from the transaction. Where U.S. participation is not incidental to the transaction, those requirements should continue to apply. With respect to the tender offer provisions, offers involving less than 300 U.S. holders are likely to be subject only to Regulation 14E, not the filing and procedural requirements of Regulation 14D, and thus will not need exemptive relief beyond that adopted today.

As with the tender offer exemptions, in order to provide a level playing field in the case of competing offers, the rules adopted today provide that if a bidder commences a tender offer or a business combination during an ongoing tender offer or business combination made

[49] As we stated in the proposing release, the exemptions adopted today under new Rules 801 and 802 are non-exclusive. An issuer making an offering in reliance on either of the rules may claim any other available exemption under the Securities Act. Securities issued under new Rules 801 or 802 would not be integrated with any other exempt offerings by the issuer. General Notes 5–7 to new Rules 800, 801, and 802.

[50] *See* General Note 2 to new Rules 800, 801, and 802.

[51] Therefore, a foreign company could not, for example, conduct a rights offering under Rule 801 that is targeted at the U.S. holders. If the offeror does not have a bona fide expectation that non-U.S. holders would participate in the offering to a similar extent as U.S. holders, the pro rata nature of the offering would be a sham. Another example would be when an initial offer is commenced solely as a pretext for making a subsequent offer automatically eligible for the exemptions.

[52] *See* note 8, *supra.*

[53] Although comprehensive statistics on transactions that exclude U.S. investors is not available, a significant number of transactions with greater than 10 percent U.S. ownership are extended to U.S. holders. For example, U.S. holders owned more than ten percent of the subject class of securities in 31 of the 54 requests for exemptive relief received by the Commission between 1990 and 1998.

[54] Between 1994 and 1998, 78 rights offerings were made to U.S. shareholders holding American or Global depositary receipts held by the Bank of New York. In 30 of the rights offerings (39%), U.S. shareholders were excluded entirely. In the remaining 48 offerings (61%), the Bank of New York sold the rights and provided shareholders with the cash, after costs. A significant number of these offerings had U.S. holders who held more than five percent of the securities at issue. *See* the letter from Emmet, Marvin & Martin, LLP dated February 17, 1999, *supra* note 15. Costs borne by U.S. shareholders in these cases include transaction fees, ADR cash distribution or issuance fees, and potential liquidity costs if the foreign market is small.

pursuant to Rule 802 for securities of the same class subject to its offer, the second bidder will be eligible to use Rule 802 so long as all the conditions of the exemption, other than the limitation on U.S. ownership, are satisfied. Thus if the initial bidder relies on the Rule 802 exemption to make a tender offer, a subsequent competing bidder would not be subject to the 10 percent ownership limitation condition of the Rule 802 exemption. We do not believe it appropriate to provide, however, that if the initial bidder relied on the Tier I exemption but did not also rely on the Rule 802 exemption, a subsequent competing bidder may use the Rule 802 exemption without regard to the ownership limitation condition. As a policy matter, when relief is not necessary to ensure that competing offers are subject to the same regulatory requirements, we believe it is more important to limit relief from the Securities Act registration requirements to situations where it can be verified that U.S. security holders own 10 percent or less of the subject class of securities.[55]

b. Equal Treatment

The terms and conditions of the offer must be at least as favorable for U.S. security holders as foreign holders. Rules 801 and 802 provide exceptions to the equal treatment requirement similar to the Tier I exemption with respect to state blue-sky requirements.

c. Transfer Restrictions

The new exemptions restrict the transferability of the securities acquired in an exempt transaction. To the extent that the subject securities are ''restricted securities'' under Rule 144 in the hands of a U.S. investor prior to the Rule 801 or 802 transaction, securities acquired by that investor in the Rule 801 or 802 transaction will be ''restricted securities.'' [56] Conversely, if the securities that are the subject of the transaction made pursuant to Rule 801 or 802 are unrestricted, then securities acquired in the transaction will be unrestricted. In the latter case, the securities would be freely tradable by non-affiliate security holders, so long as they are not participating in the offer under circumstances in which they could be deemed statutory underwriters.[57]

In the case of a rights offering under Rule 801, the proportion of restricted to unrestricted securities will be determined as of the record date that determines the allocation of rights among security holders. In the case of an exchange offer or business combination, the proportion will be based upon the securities tendered or exchanged by the holders.

We proposed this approach for transfer restrictions only with respect to Rule 802 for exchange offers. In contrast, the Rule 801 exemption for rights offerings proposed in 1998 would have required that all securities purchased upon the exercise of the rights be restricted within the meaning of Rule 144. We are persuaded by the large number of commenters who argued that it was not necessary to require unaffiliated U.S. security holders to accept restricted securities in rights offerings where they currently hold unrestricted securities. However, we think it is appropriate to require that security holders receive restricted securities in the transaction if they held restricted securities before the transaction. Otherwise, a rights offering or exchange offer could be used as a pretext for creating a large pool of freely tradable securities in the hands of investors who previously held only restricted securities. This restriction, along with the requirement that the offer be made to all holders on a pro rata basis, and that U.S. ownership in the subject company's securities be limited to 10 percent, should minimize the potential that Rules 801 and 802 will be misused as a means to conduct illegal distributions in the United States. Moreover, securities issued in a rights offering or exchange offer to affiliates of the issuer would not be freely tradable.[58]

d. Additional Requirements for Rights Offerings

Rule 801, as adopted today, is available only for rights offerings of equity securities made on a pro rata basis to existing security holders of the same class, including holders of ADRs evidencing those securities. Under Rule 800, the term ''equity security'' does not include convertible securities, warrants, rights, or options.[59] Rule 801 is limited to the offer of securities of the same class of securities as those held by the offerees, because the offerees already have made the decision to invest in that class.

Rule 801 requires that the rights granted to U.S. security holders not be transferable except offshore in accordance with Regulation S.[60] Certain commenters believed that restricting the transferability of the rights would put U.S. security holders at a disadvantage to non-U.S. security holders who could transfer the rights. However, we believe this restriction is appropriate to assure that foreign private issuers do not extend the offerings to new investors in the United States and that a market not develop in the United States for the rights without adequate disclosure regarding the issuer.

e. Offeror Eligibility Requirements

As adopted, Rule 801 requires that the offeror be a foreign private issuer. It does not impose any other offeror eligibility requirements. Where U.S. participation is only incidental to the offering, no other offeror eligibility criteria are necessary. Investors are already familiar with the issuer and the security. The commenters concurred that imposition of additional criteria would only diminish the effectiveness of the exemption by narrowing its scope and causing U.S. security holders to continue to be excluded.

As adopted, Rule 802 does not contain any limitations based on the domicile or reporting status of the offeror. Any offeror can use Rule 802 regardless of whether it is a U.S. company or a foreign private issuer and regardless of whether it is a reporting company. The subject company, however, must be a foreign private issuer. Requiring a U.S. bidder for the securities of a foreign subject company to register the U.S. portion of an exchange offer would place the U.S. bidder, particularly a non-reporting U.S. company, at a competitive disadvantage to a foreign bidder for the same company. In the case of a business combination where there is no surviving

[55] In this situation, the subsequent bidder commencing an exchange offer or business combination will be entitled to calculate the percentage of U.S. ownership 30 days before commencement of its offer. *See* Section II.F.1. *infra.* Assuming that the subsequent offer is commenced within 30 days of the announcement of the initial Tier I offer, the subsequent bidder would not be disadvantaged by any movement of securities into the United States following that announcement when calculating the percentage of U.S. ownership of the subject securities for purposes of eligibility under new Rule 802.

[56] *See* General Note 8 to new Rules 800–802. Under Securities Act Rule 144(d), the holding period for the restricted securities issued in the Rule 801 or 802 transaction will depend on the nature of the transaction. Investors in issuer exchange offers not involving an additional cash investment will be able to ''tack'' the holding period for the tendered restricted security to the holding period for the new security, and thus would calculate the holding period from the time it originally acquired the tendered security from the issuer or an affiliate. The holding periods for restricted securities received in a rights offering or third-party exchange offer, however, would begin with the issuance of those securities in the Rule 801 or 802 transaction.

[57] *See* Section 2(a)(11) of the Securities Act, 15 U.S.C. 77b(11).

[58] Under Rule 144(e)(1) (17 CFR 230.144(e)(1)), affiliates of the issuer are subject to volume restrictions on the resale of their securities.

[59] New Rule 800(b).

[60] 17 CFR 230.901 through 230.905.

acquiror and the issuer is the successor company to all participating companies, all participants in the business combination must be foreign private issuers.

Finally, neither Rule 801 nor 802 impose a dollar limitation on the value of securities that may be sold to U.S. investors in an exempt transaction. The American Bar Association commented that a dollar limitation appears to be too arbitrary given the different sizes of companies and the fluctuating market value of securities being offered.[61] We agree.

f. Informational Requirements

Rules 801 and 802 do not mandate that specific information be sent to U.S. security holders. Instead, when any document, notice or other information is provided to offerees, copies (translated into English) must be provided to U.S. security holders in a similar manner. The documents must include a legend regarding the foreign nature of the transaction and the issuer's disclosure practices. The legend also must state that investors may have difficulty in enforcing rights against the issuer and its officers and directors. Some commenters noted that imposing a requirement for a legend on the cover page was unnecessarily burdensome and could discourage offerors from extending offers to U.S. security holders.[62] To address these concerns, the legend need not be placed on the cover page; rather, it need only be placed in a prominent position in the document.

Rules 801 and 802 both require that the offeror provide the notice or offering document to U.S. security holders in English at the same time it provides the information to offshore offerees. We proposed that offerors be required to deliver rights offering materials to U.S. investors, even if those materials were only published overseas. In contrast, exchange offer materials would not be required to be delivered if not delivered in the home jurisdiction. We are persuaded by those commenters who indicated that offerors will not be inclined to avail themselves of Rules 801 or 802 if burdensome documentation and dissemination requirements are imposed by the U.S. rules and who were of the view that U.S. security holders should be provided with information on the same basis as that provided to offerees in other jurisdictions. As noted above, exclusion of U.S. holders in rights offerings is common even at high U.S. ownership levels. U.S. participation is rarely viewed as necessary for the success of the offer, and U.S. investors may thereby be deprived of the opportunity to acquire shares at attractive prices, resulting in their positions being diluted. Requiring the offeror to mail rights offering materials to U.S. security holders might create an additional incentive for offerors to exclude U.S. security holders from participating in the rights offering. In order to encourage foreign private issuers to include U.S. security holders in rights offerings, the rules adopted today provide that for both rights offerings and exchange offers, the offeror must disseminate any informational documents to U.S. holders, in English, on at least a comparable basis to that provided to security holders in the offeror's home jurisdiction. If the offeror disseminates by publication in its home jurisdiction, the offeror must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer. Of course, the offeror may mail to U.S. security holders in any event.

We are adopting, as proposed, the requirement that an offeror submit a notification to the Commission on new Form CB. A foreign company also must file a Form F–X at the same time it submits the Form CB to appoint an agent for service of process in the United States. The new form will include as an attachment a copy of any document, notice or other information disseminated to U.S. offerees.

g. Trust Indenture Act Exemption

We are adopting, as proposed, a new rule under section 304(d) of the Trust Indenture Act that would exempt any debt security issued pursuant to Rule 802 under the Securities Act from having to comply with the provisions of the Trust Indenture Act. Therefore, the rules adopted today will permit offerors to offer debt securities in an exchange offer or business combination without complying with the provisions of the Trust Indenture Act. As one commenter noted, a failure to provide relief under the Trust Indenture Act would essentially undermine the usefulness of the other relief in the case of debt securities.[63] Accordingly, we believe that the benefits to be obtained by U.S. investors by providing exemptions under the Trust Indenture Act when debt securities are issued pursuant to a Rule 802 exemption justify not providing U.S. investors with the protections of the Trust Indenture Act in these types of transactions.

E. Investment Companies

As proposed, Rules 801 and 802 would not have been available for securities issued by an investment company, whether foreign or domestic, that is registered or required to be registered under the Investment Company Act. The proposal excluded foreign investment companies from these exemptions because the Investment Company Act generally prohibits foreign investment companies from publicly offering their securities in the United States or to U.S. persons.[64] Domestic investment companies were excluded because, unlike other issuers, investment companies that are registered or required to be registered under the Investment Company Act generally must register the securities that they offer or sell outside the United States.[65] The proposing release noted, however, that a closed-end investment company that is registered under the Investment Company Act, like other non-investment company issuers, may be able to rely on the safe harbor provided by Regulation S under the Securities Act to issue securities abroad without registering those securities under the Securities Act.[66] We requested comment whether Rule 802 should be available to registered closed-end investment companies.

In response to commenters' suggestions, both Rules 801 and 802, as adopted, are available for securities issued by closed-end investment companies that are registered under the Investment Company Act. We believe that this result is consistent with the Commission's previous decision to permit closed-end investment companies to rely on the Regulation S safe harbor to issue unregistered securities abroad.[67] These rules, however, are not available to any other type of investment company, whether foreign or domestic, that is registered or required to be registered under the Investment Company Act.[68]

[61] *Supra* note 30.

[62] *See* letter from Sullivan & Cromwell dated February 12, 1999, *supra* note 15 and the letter from the American Bar Association dated March 2, 1999, *supra* note 30.

[63] *Id.*

[64] *See* proposing release, *supra* note 8, at note 126 and accompanying text.

[65] *See id.* at note 127 and accompanying text.

[66] *See id.* at note 127.

[67] *See* Offshore Offers and Sales, Securities Act Release No. 6863 (April 24, 1990) (55 FR 18306), at notes 151–53 and accompanying text.

[68] As explained in the proposing release, both foreign and domestic issuers that are excepted from the definition of ''investment company'' under the Investment Company Act would be permitted to use these exemptions, so long as reliance on the exemptions is consistent with their unregistered status under the Investment Company Act. *See*

Continued

As proposed, the Tier I and Tier II tender offer exemptions also would not have been available if the subject company was an investment company registered or required to be registered under the Investment Company Act. As adopted these exemptions are available if the subject company is a closed-end investment company registered under the Investment Company Act.[69] Consistent with the Commission's application of Regulation S and the exemptions in Rules 801 and 802, the Tier I and Tier II tender offer exemptions as adopted are available if the subject company is a closed-end investment company registered under the Investment Company Act.

F. Determination of U.S. Ownership

1. Definition of U.S. Holder

Today's amendments revise the method for determining the amount of securities held by U.S. holders from that included in the 1998 proposals. The amount owned by U.S. holders is important under both the Tier I and II tender offer exemptions. It is also important in determining the availability of the Securities Act exemptions under Rules 801 and 802. Relief in each case is conditioned, at least in part, on the percentage of the subject company's securities held by U.S. security holders not exceeding a specified threshold.

The proposed approach was based on the definition of ''foreign private issuer,'' [70] which at the time was based solely on record, not beneficial ownership. We recently amended that definition to require companies claiming foreign private issuer status to look through certain bank, broker-dealer and other nominees to determine the residence of the nominee's client accounts.[71] We likewise are adopting that modified approach for the purpose of determining the amount of securities held by U.S. holders under the new exemptive rules. Like the revised foreign private issuer definition, the starting point is Rule 12g3–2(a) under the Exchange Act.[72] Rule 12g3–2(a) follows the definition of ''securities held of record'' in Rule 12g5–1, but requires the offeror to ''look through'' the record ownership of brokers, dealers, banks or nominees appearing on the issuers' books or those of transfer agents, depositaries, or others acting on the issuer's behalf. If those record owners hold securities for the accounts of customers, the issuer must determine the residency of those customers. This method of calculation more closely reflects the beneficial ownership of the issuer's securities.

We have limited the application of the ''look through'' provisions of Rule 12g3–2(a) to securities held of record (1) in the United States, (2) in the issuer's home jurisdiction, and (3) in the primary trading market for the issuer's securities if different from the issuer's home jurisdiction. These jurisdictions should cover most of the trading volume for the issuer's securities, and searches in these jurisdictions are likely to yield the greatest number of U.S. beneficial owners. This modification to the Rule 12g3–2(a) approach should reduce the burden on foreign companies while still producing a reasonably accurate picture of the size of the U.S. ownership of the foreign issuer.[73]

Some commenters pointed out that it is not always possible for issuers to obtain information about separate customer accounts, as required by Rule 12g3–2(a). Brokers, dealers, banks or other nominees may be unwilling or unable to provide information about their customer accounts. We note, however, that the duty to inquire about separate customer accounts already exists for issuers deciding whether the reporting exemption in Rule 12g3–2(a) is available. In addition, the offeror would not be asking nominees to provide the number of U.S. security holders or the names of those security holders, but only the aggregate amount of the nominee's holdings that are represented by U.S. accounts. Thus, the offeror would not have to ask the nominees for information regarding possible 10 percent holders. If after reasonable inquiry, however, the offeror is unable to obtain information about the nominee's customer accounts, including cases where the nominee's charge for supplying this information would be unreasonable, the offeror may rely on a presumption that the customer accounts are held in the nominee's principal place of business.[74]

Also similar to the revised approach under the foreign private issuer definition, issuers and offerors must take into account information regarding U.S. ownership derived from beneficial ownership reports that are provided to the issuer or filed publicly in the United States or in the home jurisdiction, as well as beneficial ownership information that otherwise is provided to the issuer or offeror.

We recognize that by focusing on beneficial ownership rather than record ownership, we have made it more difficult to stay below the relevant ownership ceilings and thus have limited the applicability of the exemptive rules. Indeed, that is one reason why we increased the U.S. ownership threshold under Rules 801 and 802 to 10 percent. Nevertheless, we believe that it is critical that the exemptive rules function based upon a fair assessment of the U.S. participation in the offering. Reliance on record ownership would result in applicability of the exemption when actual U.S. investor interest, and therefore their importance to the success of the transaction, far exceeds the stated ceilings.

We are not adopting as part of the final rules a proposed rebuttable presumption (also proposed for the purposes of the foreign private issuer definition) that if a foreign private issuer's securities trade in the U.S. markets in the form of ADRs, the securities deposited in the ADR program are held solely by U.S. residents. Commenters on the foreign private issuer proposal pointed out that, for a number of reasons, non-U.S. security holders may choose to hold securities in ADR form. It appears that issuers will not rely on the presumption and will feel the need to query ADR depositaries regarding the owners of ADRs. Therefore, we have eliminated the presumption from these rule revisions as well.[75] Issuers will thus have to

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proposing release, *supra* note 8, at notes 128–29 and accompanying text.

[69] *See supra* note 67 and accompanying text. One commenter suggested generally that these exemptions be made available whenever the subject company is a foreign investment company. Because we have not received any requests for relief in connection with a tender offer for a foreign investment company, we have not expanded the Tier I or Tier II exemptions to cover subject companies that are foreign open-end investment companies.

[70] Exchange Act Rule 3b–4 (17 CFR 240.3b–4).

[71] International Disclosure Standards, Exchange Act Release No. 41936 (September 28, 1999), 64 FR 53900.

[72] 17 CFR 240.12g3–2(a).

[73] For example, a German foreign private issuer traded solely on the Frankfurt Stock Exchange would have to query banks and broker-dealers that are either registered owners with the company or appear on participant lists of depositaries and that are based in Germany or the United States. The issuer would request information on the number of shares held by customer accounts that reflect a U.S. address for the customer.

[74] Because it will be difficult for third-party offerors in an unsolicited or ''hostile'' tender offer to ascertain whether the exemption is available without information on the subject company's U.S. ownership, we are adopting the proposed presumption that the U.S. ownership percentage limitations are not exceeded based on the relative level of trading volume in the United States. *See* Section II.F.3. *infra.*

[75] The revisions from the proposal do not affect the treatment of bearer securities in determining U.S. ownership. Since neither a U.S. residence nor the name of an offshore nominee will appear on the records of the issuer for the holder of the bearer

examine the participant lists of ADR depositaries and query home country or U.S. broker-dealer or bank nominees appearing on those lists to ascertain the amount of ADRs held by U.S. investors.

We have revised the time period for calculating the percentage of U.S. ownership from the proposal. As proposed, the calculation would have been made at the commencement of the offer. Based on commenters' suggestions, we revised the proposal to include a 30 day ''look back'' period to accommodate the offeror's or issuer's planning process. As revised, the offeror would make the calculation of U.S. ownership 30 days before the commencement of the tender offer. Or, in the case of a business combination such as a merger where the securities are issued by the acquiring company, the calculation will be based on U.S. ownership of the company to be acquired 30 days before the commencement of the solicitation for the merger. In business combinations such as an amalgamation, where the securities are issued by a successor company to all participating companies, the calculation would be made based on U.S. holder information available 30 days before commencement, but applied on a pro forma basis as if measured immediately after completion of the business combination.

We are not adopting the proposal that if a bidder commences an offer during an ongoing tender or exchange offer for securities of the same class subject to its offer, the bidder could calculate the percentage of subject securities held by U.S. holders as of the same date used by the initial bidder. We believe that this proposal is unnecessary because the rules adopted today provide that if a bidder commences a tender offer or a business combination during an ongoing tender offer or business combination for securities of the same class subject to its offer, the second bidder will be eligible to use the same exemption as the prior bidder (Tier I, Tier II, or Rule 802) so long as all the conditions of the exemption, other than the limitation on U.S. ownership, are satisfied by the second bidder. In addition, if the bidder chooses to rely on a different exemption from the initial bidder, the bidder will be entitled to calculate the percentage of U.S. ownership 30 days before commencement of its tender offer or commencement of the solicitation for the merger. Accordingly, the subsequent bidder should not be disadvantaged by any movement of securities into the United States following the announcement of the initial bid.[76]

The issuer must include securities underlying ADRs in determining the amount of securities outstanding of the class that is the subject of the offer, as well as the amount of the subject class of securities held by U.S. holders. On the other hand, other types of securities that are convertible into or exchangeable for subject securities, such as warrants, options, and convertible securities, would not be taken into account in calculating U.S. ownership.

2. Exclusion of Holdings of More Than 10 Percent

We proposed that offerors exclude securities held by non-U.S. security holders of more that 10 percent of the class from the calculation of the U.S. ownership percentage. We requested comment regarding whether it would be appropriate to exclude securities held by affiliates, whether held outside the United States or in the United States, from both elements of the calculation, thus focusing only on the percent of the company's total world-wide non-affiliated float held in the United States. Many commenters objected to excluding only non-U.S. 10 percent holders. Commenters argued that since many foreign private issuers have one or more significant security holders—indeed, many are controlled by founding families—their exclusion from the calculation could severely limit the availability of the exemptions.

Several commenters suggested that a better approach would be to exclude large or institutional U.S. security holders, as well as foreign 10 percent holders. One commenter suggested excluding the securities of the bidder, regardless of the amount. Commenters argued that large U.S. security holders do not need the protections of the securities laws and could easily go overseas to participate in the transaction or participate on a private placement basis. Absent exemptive relief, bidders would extend the offer only to the larger, and exclude the smaller, U.S. security holders (assuming U.S. institutional investor participation would not trigger U.S. all-holders requirements).

For these reasons, we are persuaded by the commenters that large U.S. holders likewise should be excluded from the calculation of U.S. ownership. Similarly, exclusion of securities held by a bidder or bidding group will provide greater assurance of an accurate assessment of the significance to the offer of the participation by U.S. public investors.

Because the 10 percent holders are viewed as affiliates for purposes of calculating U.S. ownership, they presumably would be treated as affiliates for purposes of Rule 144[77] as well . They would therefore be subject to limitations on the amount of securities received in the offer that they could resell. Treating these securities as control shares should minimize the potential that, in cases where there are a significant number of shares held by a relatively few U.S. holders, the Securities Act exemptions for cross-border rights offerings and exchange offers under Rules 801 and 802 will be misused as a means to conduct illegal distributions in the United States.

3. Determination of Eligibility by Persons Other Than the Issuer

As we noted in the November 1998 release, the principal disadvantage of using a U.S. ownership threshold as a condition for the applicability of the exemptions is that it will be difficult for third-party offerors to ascertain whether the exemption is available without information on the subject company's U.S. ownership.[78] It will be even more difficult for persons other than the issuer to obtain information from nominees, including information on 10% holders, as required under the modified approach adopted today.[79] We are adopting, with minor changes, the proposal that a third-party bidder in an unsolicited or ''hostile''[80] tender offer may rely upon a presumption that the U.S. ownership percentage limitations

securities, these securities will not be treated as being held by U.S. residents, unless the offeror knows or has reason to know that these securities are held by U.S. residents.

[76] See note 55, *supra.*

[77] 17 CFR 230.144.

[78] Exemptions for transactions like issuer tender offers or rights offerings do not pose this problem. An issuer can and must examine its own records and those of transfer agents and depositaries acting on its behalf to obtain the necessary information regarding U.S. ownership of its own securities.

[79] This concern is eliminated if the hostile bidder commences its offer after a prior competing tender offer or a business combination for securities of the same class subject to its offer and chooses to rely on the same exemption as the prior offeror because, as previously noted, the second bidder will be eligible to use the same exemption (Tier I, Tier II, or Rule 802) as the prior offeror, provided that all the conditions of the exemption, other than the limitation on U.S. ownership, are satisfied by the second bidder. A presumption remains necessary, however, when the hostile bidder either makes the initial offer or is the subsequent bidder but chooses to rely on a different exemption from that used by a prior offeror.

[80] New Rule 802(c)(1) and Instruction 3.i. to revised Rules 14d–1(c) and (d) make the presumption inapplicable to offers ''made pursuant to an agreement'' with the issuer. The agreement need not be written.

of the Tier I,[81] Tier II[82] and Rule 802 exemptions are not exceeded unless:

(1) The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States, on the Nasdaq market or on the OTC market, as reported to the NASD, over the 12-calendar-month period ending 30 days before commencement of the offer, exceeds 10 percent in the case of Tier I offers and Rule 802, and 40 percent in the case of Tier II offers, of the worldwide aggregate trading volume of that class of securities over the same period;

(2) The most recent annual report or other informational form filed or submitted by the issuer or security holders to securities regulators in its home jurisdiction or elsewhere (including with the Commission) indicates that U.S. holdings exceed the applicable threshold;[83] or

(3) The bidder knows or has reason to know from other sources that the level of U.S. ownership of the subject class exceeds the thresholds.

As to whether the foreign subject company is a foreign private issuer, the bidder can rely on the exemptions if the issuer of the subject securities files reports with the Commission under the foreign integrated disclosure system[84] or has claimed an exemption from reporting under Exchange Act Rule 12g3–2(b),[85] unless the bidder knows the foreign subject company is not a foreign private issuer.

One commenter believed that the presumption should be available for both hostile and negotiated transactions. The commenter was concerned that takeover situations are often fluid and that hostile offers often turn friendly shortly after commencement of the tender offer. We believe, however, that application of the exemption should turn on an accurate assessment of U.S. ownership whenever possible. A bidder in a negotiated transaction would be able to arrange to get this information from the subject company as part of the acquisition agreement. We believe that the presumption should be available only when there is no assurance that the issuer will obtain and provide the offeror with current information about U.S. ownership. If information on U.S. ownership can be obtained, that information should determine whether the exemptions are available, rather than a presumption based on trading activity. For this reason, notwithstanding the views of some commenters, an issuer, affiliate, or friendly bidder could not rely upon the presumption.

Even if the above presumption is not available, the bidder may nevertheless rely on the exemption if it can demonstrate that U.S. ownership is in fact less than the relevant threshold or, in the case of competing bids, if the bidder chooses to rely on the same exemption (Tier I, Tier II, or Rule 802) as that used by a prior offeror.[86]

G. Internet Disclosure

There is no limitation under the exemptive provisions adopted today on the use of the Internet to publish offering materials and other information about the cross-border transaction.[87] However, when materials are required to be disseminated directly to U.S. holders (for example, in a Tier II offer subject to Regulation 14D or when materials are mailed in the home country in a Tier I offer), Internet dissemination of the offering materials would not, without more, constitute adequate dissemination under the new exemptive rules.[88] If an offeror publishes in its home country, posting the materials on its web site would not constitute adequate publication in the United States. Electronic dissemination could satisfy a dissemination requirement only if conducted in a manner consistent with the guidance provided in our 1995 release on electronic dissemination, including the requirement to obtain the U.S. holder's consent to receive the mandated materials by electronic means or other evidence of delivery.[89]

In response to the request of several commenters, we are providing guidance on whether materials relating to offshore tender and exchange offers could be posted on the Internet without triggering U.S. tender offer and securities registration requirements with respect to that offer. We note that the exemptions adopted today are intended to facilitate the inclusion of U.S. investors in cross-border transactions, not to provide a means to avoid U.S. jurisdiction. However, U.S. investors would benefit from timely and reliable information about foreign corporate actions, even if they are not able to participate in the transactions.

1. General Approach

The posting of information on a web site may constitute an offer of securities for purposes of the U.S. securities laws. We recently published our views clarifying when the posting of materials on Internet web sites would not be considered an offer or soliciting activity in the United States for purposes of the registration requirements of the federal securities laws (the ''1998 Internet Release'').[90] In the 1998 Internet Release, we expressed the view that offering materials posted on a web site would not be viewed as an offer, general solicitation or directed selling efforts in the United States, so long as the offeror implements precautionary measures that are reasonably designed to ensure that the Internet offer is not targeted to persons in the United States or to U.S. persons. The 1998 Internet Release stated that when an offeror prominently discloses that the offer is being made to countries other than the United States and implements adequate measures

[81] *See* revised Rules 13e–4(h)(8) and Rule 14d–1(c).

[82] *See* revised Rules 13e–4(i) and 14d–1(d).

[83] If U.S. ownership of more than 10 percent is reported in public filings with the Commission or a foreign regulator, such as Schedule 13D or 13G, we would take the position that the bidder has reason to know the level of U.S. ownership exceeds 10 percent.

[84] This includes Form 20–F and 6–K, which are available only to foreign private issuers.

[85] 17 CFR 240.12g3–2(b).

[86] For example, if a hostile bidder makes a tender offer in reliance on the Tier I exemption, the hostile bidder may rely on the presumption. If the hostile bid is then followed by a subsequent bid, whether by the issuer, an affiliate, or a hostile or friendly third-party bidder, the subsequent bidder also may use the Tier I exemption so long as the subsequent bidder satisfies all of the conditions of the Tier I exemption other than the ownership limitation condition. If, however, the subsequent bidder wishes to rely upon new Rule 802 to make an exchange offer or business combination, the subsequent bidder will have to satisfy the ownership limitation condition of Rule 802 as well as its other conditions even though both Rule 802 and the Tier I exemption each use a 10% ownership threshold. In this situation, if the subsequent bidder is a hostile bidder, it may use the presumption discussed above if all of the conditions of the presumption are satisfied to commence a Rule 802 offer in response to the initial Tier I or Tier II offer. Even if the above presumption is not available, the bidder may nevertheless rely on the Rule 802 exemption if it can demonstrate that U.S. ownership is in fact less than the relevant threshold. The bidder will be entitled to calculate the percentage of U.S. ownership 30 days before commencement of its exchange offer or commencement of the solicitation for the merger.

Another example would be where a third-party bidder in a negotiated transaction desires to make an exchange offer or business combination in reliance on the Section 802 exemption. The third party bidder would not be entitled to rely on the presumption because it is not a hostile party. If, after calculating the percentage of the issuer's securities held by U.S. holders, the friendly party commences an exchange offer or business combination in reliance on the Section 802 exemption, then a subsequent offeror also may rely on the Section 802 exemption so long as all of the conditions of such exemption, other than the ownership limitation condition, are satisfied.

[87] The Internet materials would be filed or submitted with, or as an amendment to, the Schedule TO or the Form CB, when applicable.

[88] *See* Section II.D.2. of the Regulation M–A Release, *supra* note 6.

[89] *See* Electronic Dissemination, Securities Act Release No. 7233 (Oct. 6, 1995) (60 FR 53458).

[90] Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Securities Act Release No. 7516 (March 23, 1998) (63 FR 14806).

reasonably designed to guard against sales to persons in the United States or to U.S. persons in an offshore Internet offer, we will not view the offer as targeted to persons in the United States or to U.S. persons and thus will not treat it as occurring in the United States for Securities Act registration purposes.

Offshore rights offerings fall squarely within the guidance set forth in that release. As a general matter, an offeror conducting a tender or exchange offer also may rely on the guidance in the 1998 Internet release. This discussion provides additional guidance as to what constitutes adequate precautions to prevent participation by persons in the United States or U.S. persons in the context of these types of offshore transactions. What constitutes adequate measures depends on all the facts and circumstances of any particular situation. These procedures are not exclusive; other procedures that suffice to guard against sales to persons in the United States or to U.S. persons also can be used to demonstrate that the offer is not targeted at the United States.

2. Offshore Tender and Exchange Offers, Rights Offerings and Business Combinations on the Internet

Posting materials relating to tender and exchange offers and rights offerings on the web site of the offeror or subject company, or a third party, presents special problems not present in the context of public underwritten offerings. U.S. holders of the subject securities already are familiar with the subject company and its securities and are more likely to be alerted immediately to the posting of offering materials. Investors may either monitor the target's web site or employ a search service to alert it to any materials posted on the Internet relating to that company. Also, because of their existing investment in those securities, U.S. investors are more likely to have an incentive to find indirect means to participate in the offer, even though the materials state that the offer is not being made in the United States. As a result, offerors using a web site to publicize their offer should take special care that it is not used as a means to induce indirect participation by U.S. holders of those securities.

One way in which the offeror could take special care to prevent sales to U.S. holders would be, in responding to inquiries and processing letters of transmittal, to obtain adequate information to determine whether the holder is a person in the United States or a U.S. person. Another example of such special care would be if the offeror obtains representations by the investor, or anyone tendering on the investor's behalf, that the investor is not a person in the United States or a U.S. person. Similarly, in disseminating the cash or securities consideration to tendering investors, special care should be taken to avoid mailing into the United States.

Despite the use of disclaimers and the implementation of precautionary measures against accepting tenders or the exercise of rights from the United States, a web site posting could be viewed as an offer in the United States if the content of the web page clearly is designed to induce U.S. investors to find an indirect means to participate in the offer through offshore nominees or other means. Offerors cannot accomplish indirectly what they purport not to be doing directly.

In many cases, even though the offer materials disseminated outside the United States state that the offer is not being made in the United States, the bidder will allow U.S. institutional investors to participate either under Regulation S for offers and sales taking place outside the United States, or as a private or limited placement under section 4(2) or other exemption from registration.[91] In the 1998 release, we concluded that a posting of offering materials on a web site was not necessarily offering activity in the United States, even though the web site is accessible by investors in the United States. This conclusion was premised on the implementation of measures both to prevent the targeting of U.S. investors and to prevent actual sales to persons in the United States or to U.S. persons in the offshore offer. A web site that is accessible in the United States cannot be used to entice U.S. investors to participate in the offering offshore. Accordingly, reliance on Regulation S to allow participation by U.S. persons offshore would not be appropriate with respect to tender or exchange offers posted on an unrestricted web site.

Business combinations present different issues from tender or exchange offers because participation by U.S. holders is not voluntary. In order to attempt to avoid U.S. jurisdiction, offerors often do not provide U.S. investors an opportunity to vote on the transaction. It is neither practicable nor desirable to treat U.S. holders differently from other security holders when their company is merged out of existence. No special precautions should be taken to prevent U.S. holders from receiving the merger consideration in a business combination involving a foreign company merely because the proxy statement/prospectus was posted on a web site available in the United States.

3. U.S. Exempt Component

The 1998 Internet Release recognized that a simultaneous private offering in the United States could accompany the offshore Internet offering.[92] In that case, special precautions must be instituted to assure that the Internet offering is not used as a general solicitation to find qualified investors in the private offering. A general solicitation for participants in a private offering is inconsistent with the requirements of section 4(2) of the Securities Act[93] as well as Regulation D.[94] Likewise, to the extent an offeror conducting an offshore exchange offer or rights offering on the Internet wishes to extend that offer to persons in the United States on a private offering basis, means must be in place to provide reasonable assurance that the web site is not used to solicit U.S. investors for the private U.S. offering. Measures to assure that the U.S. participants did not learn about the offering from the web site could include:

- Not placing U.S. investors that respond to the offshore Internet offering in the U.S. private offering;
- Extending the U.S. offer only to U.S. investors who were solicited before, or independently from, the posting of offering materials on the Internet;
- Using separate contact persons for the Internet solicitation from that for the U.S. offering; and
- Not referring to the private U.S. offering in the web site materials, except to the extent mandated by foreign law.

These measures are not exclusive. Other procedures that suffice to guard against sales to persons in the United States or to U.S. persons also can be used to demonstrate that the web site is not used to solicit U.S. investors for the private U.S. offering.

4. Domestic Issuers

In the 1998 Internet release, we expressed special concerns with U.S. companies' use of the Internet to conduct a purportedly offshore Internet offer. We stated that a domestic company could not use a web site to disseminate the offering materials, unless access to that site was limited to non-U.S. persons. This position was based on the potential for abuse when a U.S. company purports to rely on

[91] Exchange offers for securities subject to section 14(d) of the Exchange Act could not be made in the United States on a private offering basis, consistent with the all-holders provisions of Rule 14d–10.

[92] *See* note 90 *supra*, at Section IV.A.2.

[93] 15 U.S.C. 77d.

[94] 17 CFR 230.501 through 17 CFR 230.508.

Regulation S to conduct an offering of its securities solely offshore, and on our approach under Regulation S to put offshore unregistered offerings by domestic companies on the same regulatory footing as private placements.

In light of the exemptive relief adopted today, we believe that there will be very limited circumstances where a U.S. bidder would have a reason to exclude U.S. holders of the foreign subject company from an exchange or tender offer for that company. At a minimum, any U.S. offeror purporting to extend an Internet tender or exchange offer solely to non-U.S. investors should likewise limit access to the web site to non-U.S. persons.

III. Paperwork Reduction Act

Our staff submitted the amendments as proposed to the Office of Management and Budget (''OMB'') for review in accordance with the Paperwork Reduction Act of 1995 (''PRA'').[95] The title to the affected information collection is ''Form CB'' and revised ''Form F–X''. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. This collection of information has been assigned OMB Control Nos. 3235–0518 and 3235–0379.

The rules and rule amendments exempt from the tender offer and registration rules cross-border tender offers, exchange offers, rights offerings and business combinations when U.S. ownership of the foreign private issuer is not significant. The purpose of these exemptions is to facilitate the ability of offerors to include U.S. security holders of foreign private issuers in these types of transactions. The rules and rule amendments are intended to reduce the regulations applicable to some cross-border transactions and therefore are expected to reduce the existing collection of information requirements. The amendments will eliminate certain existing reporting requirements for entities conducting an exempt tender or exchange offer. Specifically, in a tender offer that qualifies under the Tier 1 exemption, the acquiror will not need to comply with Schedule TO. Further, in an exchange offer, business combination or rights offer for foreign private issuers' securities, when U.S. security holders hold 10 percent or less of the subject securities, an acquiror will not need to file a registration statement registering the securities being issued.

[95] 44 U.S.C. 3501 *et seq.*

Rules 13e–4(h)(8)(iii)(B) and 14d–1(c)(3)(i) require bidders to disseminate any informational documents to U.S. holders in English. This may require some bidders to translate documents. We estimate that it costs approximately $.30 per word to translate an information document into English. However, we cannot estimate with certainty how many information documents will be filed, how many will need to be translated into English, or how long such documents will be.

Rules 801(a)(4)(i) and 802(a)(3)(i) under the Securities Act and Rules 13e–4(h)(8)(iii)(A), 14d–1(c)(3)(iii) under the Exchange Act require that an entity conducting an exempt tender or rights offer in connection with a cross-border transaction pursuant to the exemptions submit Form CB. Similarly, revised Rule 14d–9 requires that the company that is the subject of an exempt third party tender offer, or any officer, director or other person who otherwise would have an obligation to file Schedule 14D–9, will be exempt from such obligation if such person submits Form CB. The collection of information will be necessary so that we can determine whether the transaction meets the eligibility requirements of the exemptive rules. We also have to collect information to assure that information about the transaction will be publicly available. Security holders will thus have the opportunity to make informed investment decisions, particularly since the transactions relate to potential changes in control.

Form CB is a cover sheet that incorporates the offering documents sent to security holders pursuant to the requirements of the country in which the issuer is incorporated. Form CB also requires disclosure of the identity of the entity conducting the tender or rights offer. Form CB must be submitted to the Commission on the business day following the date the offering documents are published or disseminated to security holders in the home jurisdiction.

Form CB also requires that a non-U.S. entity must file a consent to service of process on Form F–X. Form F–X is used by certain non-U.S. entities to appoint an agent for service of process in the United States. The revisions to Form F–X add non-U.S. entities submitting a Form CB to the list of entities currently required to file Form F–X. This collection of information is necessary to provide investors with information concerning the U.S. person designated as agent for service of process.

For the tender and exchange offer exemptions, domestic and foreign entities wishing to engage in cross-border transactions or that are the target of a tender offer will likely be the respondents to the collection of information requirement. With respect to rights offerings, the likely respondents will be foreign private issuers conducting rights offerings. We have no data to help us determine how many entities will actually rely on the exemptions, because reliance on the exemptions is voluntary. As noted in the proposed release, we estimated that 824 Forms CB will be filed each year under the rules adopted today. We estimate that it will impose an estimated burden of 2 hours for a total burden of 1648 hours. We estimate that half of the entities submitting Form CB will be foreign entities that will be required to file Forms F–X (412) each year under the adopted rules. Form F–X currently is estimated to impose an estimated burden of 2 hours for a total burden of 824 hours.

The changes that have been made to the proposed rules do not affect our estimate of the number of entities that will file a Form CB for tender offers in reliance on the Tier I exemption or pursuant to an exemption from registration under Rules 801 and 802. Rules 801 and 802 use a ten percent threshold for U.S. ownership rather than the five percent threshold that was originally proposed. We also have excluded securities held by 10% U.S. holders and bidders from the calculation of U.S. ownership. We believe that any increase in the number of entities that will file a Form CB pursuant to Rules 801 and 802 because of these changes will be offset at least partially by the change in the method of calculation of U.S. ownership, which requires offerors to ''look through'' the record ownership of brokers, dealers, banks or nominees holding securities for the accounts of their customers.

Neither we nor OMB received any comments in response to our request for comment regarding the information collection obligation.

IV. Cost-Benefit Analysis

U.S. residents holding securities in foreign private issuers are often excluded from tender offers and rights offerings for the foreign private issuers' securities because of conflicts between U.S. and foreign regulation of these offers. As a result, U.S. security holders of foreign private issuers are unable to benefit fully from any premium offered in a tender offer or are unable to purchase additional securities at a discount in a rights offering.

The rules and rule amendments adopted today exempt cross-border tender offers from the tender offer rules

(the ''Tier I exemption'') and exchange offers, rights offerings and business combinations from Securities Act registration requirements when U.S. security holders hold 10 percent or less of the subject securities. When the U.S. ownership in the foreign private issuer does not exceed 40 percent, the proposal also includes exemptions from certain of the tender offer rules (the ''Tier II exemption'').

The purpose of these exemptions is to facilitate U.S. security holder participation in these types of transactions by removing regulatory barriers. The rules and rule amendments are intended to reduce the tender offer and registration requirements for cross-border transactions. We expect the exemptions to reduce the costs and burdens of extending these types of offers to U.S. security holders. U.S. security holders of foreign private issuers will benefit by being able to participate in these types of transactions. The consideration paid in a tender or exchange offer, merger or similar transaction typically reflects a premium to tendering security holders.[96] U.S. security holders who are excluded from tender or exchange offers may be subjected to a risk that the consideration they may receive in a back-end merger or business combination may not be equivalent to the consideration being paid in the tender or exchange offer. In addition, the market for the securities that are the subject of the tender or exchange offer may not be liquid enough to permit investors to buy or sell securities at comparable prices. In rights offerings, U.S. security holders who are excluded from participation lack the opportunity to purchase the issuer's securities at a discount.[97] The commenters agreed that the rules would serve to facilitate U.S. investor participation in these transactions.

Entities relying on the Tier I exemption will benefit from the rules because they will not need to comply with the procedural and filing requirements of the tender offer rules. Specifically, an acquiror will not need to file Schedule TO. In lieu of these forms, an acquiror will submit to the Commission Form CB, which is significantly less burdensome.[98] Also, a non-U.S. acquiror will file a Form F–X contemporaneously with the Form CB to appoint an agent for service of process in the United States. A number of commenters argued that Forms CB and F–X will be too burdensome and will discourage offerors from relying on the exemptions. We believe, however, that our interest in monitoring the availability of the exemptions and ensuring that U.S. security holders have access to these documents through their public availability justify the minimal burdens of preparing these forms or any increased risk of suit from making service of process and assertion of U.S. jurisdiction marginally easier.

In response to comments, the rules we adopt today permit offerors relying on the Tier I exemption to offer only cash to U.S. holders, even if securities are offered to foreign investors. Offerors offering a cash-only alternative to U.S. security holders, however, must obtain an opinion from an independent third party stating that the cash being offered to U.S. security holders is substantially equivalent to the value of the securities being offered to foreign security holders, unless the offeror's securities are ''margin securities'' within the meaning of Regulation T. In the latter case, the offeror need only provide information on recent trading prices of the offeror's securities in lieu of an opinion.

Similarly, entities relying on Rules 801 or 802 in connection with a rights offer or exchange offer will benefit from the rules because they will not need to comply with the Securities Act registration requirements. Specifically, an issuer will not need to file the registration forms, including Forms S–1, S–2, S–3, S–4, F–1, F–2, F–3 and F–4. Instead of these forms, an issuer will submit Form CB and, if the issuer is a non-U.S. entity, file Form F–X, which as discussed above are significantly less burdensome.

We estimate that Form CB and Form F–X will take substantially less time to prepare than Schedule TO or a registration statement.[99] In addition, we believe it takes a lesser degree of professional skill, including that of securities lawyers and accountants, to prepare a Form CB and Form F–X than to prepare a Schedule TO or a registration statement. In some cases, the professional skills required will include the ability to translate from a foreign language into English.

Entities relying on the Tier I and Tier II exemptions will also benefit from the proposals because they will not need to comply with all of the procedural requirements of the tender offer rules.[100] For example, in the Tier I exemption, an acquiror will be exempt from all of the procedural requirements of the U.S. tender offer rules, including those relating to the duration of the offer and withdrawal rights.

In the Tier II exemption, an acquiror will receive limited relief from the Commission's tender offer rules. The Tier II exemption provides relief from the U.S. tender offer rules that are common impediments to extending offers to U.S. security holders. However, an acquiror relying on the Tier II exemption will have to comply with the remaining tender offer provisions. These provisions include, among others, the following: (1) Keeping the offer open 20 business days; (2) filing a Schedule TO; (3) disseminating the offering documents; and (4) offering withdrawal rights. Although compliance with these requirements may impose costs to cross-border tender offers, compliance will still be less burdensome than satisfying all the U.S. tender offer requirements or applying to the Commission for exemptive relief.

The transfer restrictions that we adopt today provide that to the extent the securities that are the subject of an exchange offer, business combination or rights offering are ''restricted securities'' under Rule 144 in the hands of the U.S. investor, then securities acquired by that investor in the transaction will be ''restricted securities.'' The transfer restrictions are the same as we proposed with respect to exchange offers and business combinations but are less restrictive than those proposed for rights offerings. We had proposed that securities received in a rights offering pursuant to Rule 801 be restricted whether or not the securities that are subject to the offering were restricted. We are persuaded by the large number

[96] Of the 403 tender offers for foreign companies by foreign bidders recorded by Securities Data Corporation in 1998, Securities Data Corporation reports an average premium of over 42% for 215 transactions, measured from four weeks prior to the first bid. If the premium is measured from the price one day before the bid, the average premium drops to 38%.

For the period 1971 to 1991, the average historical merger premium was over 23% as reported in G.W. Schwert, ''Markup Pricing in Mergers and Acquisitions,'' *Journal of Financial Economics, 41* (1996). The premium is measured from four weeks prior to the first bid. Excluding this period, the premium remains over 10%.

[97] *Supra* note 54.

[98] *See* Section II.A.2. *supra* for a description of the Form CB. *See* note 99, *infra,* for information regarding the estimated burden associated with Form CB as compared to the current reporting requirements.

[99] For purposes of the Paperwork Reduction Act, we estimate that Forms CB and F–X will impose an estimated burden of two hours per Form. This contrasts with Schedule TO which has an estimated burden of 586 hours per form, and Forms S–1, S–2, S–3, S–4, F–1, F–2, F–3 and F–4 which have an estimated burden of 1,239, 470, 397, 1,233, 1,868, 1,397, 166, and 1,308 hours per form, respectively.

[100] We cannot quantify the cost savings that will result from not imposing the procedural requirements of the tender offer rules because we do not know how many companies will use the exemption or how much compliance with these particular aspects of the tender offer rules from which an exemption is granted would cost. Commenters did not provide us with any such data.

of commenters who argued that requiring unaffiliated U.S. security holders to accept restricted securities when they currently hold unrestricted securities is not necessary nor desirable.

The rules we adopt today base the method of calculation of the amount of the subject securities held by U.S. holders on the method of calculation used in Rule 12g3–2(a) under the Exchange Act. That method more closely reflects the beneficial ownership of the issuer's securities. Rule 12g3–2(a) requires the offeror to ''look through'' the record ownership of brokers, dealers, banks or nominees holding securities for the accounts of their customers to determine the residency of those customers. Offerors also must take into account information regarding U.S. ownership derived from beneficial ownership reports that are provided to the issuer or filed publicly, whether in the United States or other countries, as well as information that otherwise is provided to the issuer or offeror.

Several commenters on the proposed release and the international disclosure standards proposing release suggested that using a beneficial ownership test would create a substantial burden for companies that trade in many different markets, and that widely-held companies would have to invest significant effort and expense in determining beneficial ownership in many jurisdictions where the likelihood of finding U.S. owners is small. In order to address these concerns, we have limited the application of the ''look through'' provisions of Rule 12g3–2(a) to voting securities held of record (1) in the United States, (2) in the issuer's home jurisdiction, and (3) in the primary trading market for the issuer's securities if different from the issuer's home jurisdiction. These jurisdictions should cover most of the trading volume for the issuer's securities, and searches in these jurisdictions are likely to yield the greatest number of U.S. beneficial owners. This modification to the test should reduce the burden on foreign companies while still producing a reasonably accurate picture of whether U.S. ownership exceeds the specified thresholds.

Some commenters pointed out that it is not always possible for issuers to obtain information about separate customer accounts, as required by Rule 12g3–2(a). As noted in the discussion above, we have minimized this burden. In any event, if after reasonable inquiry, the offeror is unable to obtain information about the nominee's customer accounts, including when the nominee's fees would be unreasonable, the offeror may rely on a presumption that the customer accounts are held in the nominee's principal place of business.

No specific data was provided in response to the Commission's request in the proposing release regarding the costs and benefits associated with today's amendments. We have anecdotal information regarding numerous transactions that have excluded U.S. security holders. The commenters also agreed that these exclusionary offers are common practice. Because offerors do not file documents with the Commission when U.S. security holders are excluded, we cannot calculate the number of cross-border transactions that have excluded U.S. security holders with certainty. Further, if the transaction is a tender offer for securities that are not registered under section 12 of the Exchange Act, and is subject only to Regulation 14E, there is no filing obligation. Therefore, we are unable to estimate the number of entities that will take advantage of the exemptions. While we are unable to determine how many U.S. security holders will benefit from the rules by being able to participate in cross-border tender, exchange and rights offerings, we believe that the rules will benefit U.S. security holders by removing regulatory barriers to including U.S. security holders in these types of offers. The commenters agreed.

V. Findings and Considerations

A. Effect on Competition/Exchange Act Section 23(a)

Section 23(a) of the Exchange Act [101] requires us, in adopting rules under the Exchange Act, to consider the impact any rule would have on competition. We cannot adopt any rule that would impose a burden on competition not necessary or appropriate in the public interest. We did not receive any information on the impact of increased competition for capital for domestic companies as a result of an increase in securities offered into the United States by foreign companies or as to whether the benefit to U.S. investors will offset the cost of any such increased competition for capital. Because the rules we adopt today are designed to allow U.S. investors to participate in the full benefits of security ownership that they are currently denied when U.S. ownership of the foreign private issuer is relatively small, we do not believe the relative cost will be large. Exempting foreign tender, exchange and rights offers from certain federal securities laws may have a competitive effect on U.S. issuers, who remain subject to all federal securities laws. We believe these effects are justified in order to benefit U.S. shareholders in foreign companies. Therefore, our view is that any anticompetitive effects of the rules adopted today for cross-border tender and exchange offers, business combinations and rights offerings are necessary or appropriate in the public interest.

B. Promotion of Efficiency, Competition and Capital Formation

Section 2(b) [102] of the Securities Act and Section 3(f) [103] of the Exchange Act, as amended by the National Securities Markets Improvement Act of 1996, [104] provide that whenever the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission also shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. For the reasons stated above, we believe the rules will facilitate a variety of cross-border transactions, thereby enhancing the efficiency of global competition for capital.

C. Exemptive Authority Findings

We find that it is appropriate, in the public interest and consistent with the protection of investors, as well as the purposes fairly intended by the Trust Indenture Act: (i) To exempt eligible tender offers from certain provisions of the Exchange Act and the rules thereunder relating to tender offers, as described in this release, (ii) to exempt eligible tender and exchange offers, business combinations and rights offerings from the registration provisions of the Securities Act, as described in this release, (iii) to exempt eligible exchange offers or business combinations from the Trust Indenture Act, as described in this release, and (iv) to amend the Commission's general organization rules in order to delegate to the Directors of the Divisions of Corporation Finance and Market Regulation authority to exempt tender offers from specific tender offer requirements.

We make these findings based on the reasons described in the release. In particular, we believe that U.S. investors will benefit by the exemptions because they will facilitate the inclusion of U.S. investors in cross-border tender and

[101] 15 U.S.C. 78w(a).

[102] 15 U.S.C. 77b(b).

[103] 15 U.S.C. 78c(f).

[104] Pub. L. No. 104–290, section 106, 110 Stat. 3416 (1996).

exchange offers, business combinations and rights offerings. Our use of exemptive authority will enable U.S. holders to have the opportunity to receive a premium for their securities in a tender or exchange offer and to participate in investment opportunities on an equal basis with foreign security holders. Similarly, the rules will enable U.S. security holders to have the opportunity to purchase shares at a possible discount from market price in cross-border rights offerings. Moreover, investors will still receive the protections of the antifraud provisions of the federal securities laws.

D. Delegated Authority

The Commission also finds, in accordance with section 553(d) of the Administrative Procedure Act,[105] that the delegation of exemptive authority in this release relates to agency organization, procedure, or practice. Accordingly, the delegation is effective upon publication.

VI. Summary of Final Regulatory Flexibility Analysis

A Final Regulatory Flexibility Analysis (''FRFA'') has been prepared in accordance with 5 U.S.C. 604 regarding the rules being adopted today. The analysis notes that the adopted rules are intended primarily to facilitate tender and rights offerings for securities of foreign private issuers held by U.S. residents. The resulting reduction in the expense, time and effort of making such offerings will benefit U.S. security holders. These persons normally are excluded from such offerings. Entities that wish to extend these offers to U.S. security holders also will benefit because it will be cheaper for them to comply with U.S. securities laws and easier to make offers to U.S. security holders.

The adopted rules are limited to tender offers and exchange offers for the securities of foreign private issuers. But both foreign and domestic bidders, whatever their size, are eligible to use these exemptions. Only foreign private issuers are eligible to use the exemption for rights offerings. Small entities can rely on the adopted tender and exchange offer exemptions on the same basis as larger entities, so long as they meet the conditions for relying on them.

We know of approximately 836 Exchange Act reporting companies that are not investment companies that currently satisfy the definition of ''small business'' under Rule 0–10. There are approximately 320 investment companies that satisfy the ''small business'' definition. We have no data to determine how many reporting or non-reporting small businesses may actually rely on the rules, or may otherwise be affected by the rules. However, we believe that the rules will result in a substantial savings to entities (both small and large) that qualify for the exemptions. Qualifying entities under the Tier I and Securities Act exemptions will not have to comply with the tender offer and registration requirements of the U.S. securities laws.

The FRFA notes that the adopted rules will eliminate certain existing reporting requirements for entities conducting an exempt tender or exchange offer. Specifically, an acquiror under Tier I will not need to file Schedule TO. Further, in a rights or exchange offer, an acquiror will not need to register the securities being issued. In place of these filing obligations, an acquiror relying on the new exemptions will submit, rather than file, Form CB. Form CB is merely a cover sheet that incorporates the offering documents sent to security holders pursuant to the requirements of the country in which the issuer is incorporated. Also, a non-U.S. acquiror will file a Form F–X contemporaneously with the Form CB to appoint an agent for service of process in the United States. We believe Form CB and Form F–X are significantly less burdensome to prepare than a Schedule TO or a registration statement.

As stated in the analysis, we considered several alternatives to the rules adopted today, including:

- The Commission considered requiring that offerors deliver rights offering materials to U.S. investors, even if those materials were only published overseas, as proposed. In order to encourage foreign private issuers to include U.S. security holders in rights offerings, the rules adopted today provide that for both rights offerings and exchange offers, the offeror must disseminate any informational documents to U.S. holders, in English, on a comparable basis to that provided to security holders in the offeror's home jurisdiction. If the offeror disseminates by publication in its home jurisdiction, the offeror must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer. We were persuaded by those commenters who indicated that offerors will not be inclined to avail themselves of Rules 801 or 802 if burdensome documentation and dissemination requirements are imposed by the U.S. rules. This will minimize the burden on offerors in rights offerings, including small businesses.
- The Commission considered whether to require a valuation opinion in all cases where an offeror chooses to offer U.S. security holders cash in lieu of the securities, cash and other consideration offered to non-U.S. security holders in reliance on the Tier I exemption. We decided to only require a valuation opinion where the offered securities are not ''margin securities'' within the meaning of Regulation T in order to minimize the burden on offerors, including small businesses.
- The Commission considered whether to use a beneficial ownership test in determining U.S. ownership. In reviewing the method of determining U.S. ownership, we were persuaded by those commenters that suggested that a beneficial ownership test would create a substantial burden for companies that trade in many different markets, and that widely-held companies would have to invest significant effort and expense in determining beneficial ownership in many jurisdictions where the likelihood of finding U.S. owners is small. In order to address these concerns, we limited the application of the ''look through'' provisions of Rule 12g3–2(a) to voting securities held of record (1) in the United States, (2) in the issuer's home jurisdiction, and (3) in the primary trading market for the issuer's securities if different from the issuer's home jurisdiction. This modification to the test should reduce the burden on companies, including small businesses, while still producing a reasonably accurate picture of whether U.S. ownership exceeds the specified thresholds.
- The Commission considered permitting registration of securities issued in rights offering and exchange offers to be based on home country documents. However, the Commission determined not to repropose a home-country based registration system because the disclosure and accounting standards of foreign jurisdictions are not always consistent with the level of prospectus disclosure expected in a registered offer under the Securities Act. Further, a registration-based exemption would lead to a periodic reporting obligation that small entities might find burdensome.

The analysis also indicates that the rules and forms being adopted today do not duplicate or conflict with any existing federal rule provisions.

We requested but received no comments on the Initial Regulatory Flexibility Analysis prepared in connection with the proposing release. A copy of the FRFA may be obtained by

[105] 5 U.S.C. 553(d).

contacting Laura Badian, in the Office of Mergers and Acquisitions, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC. 20549, at (202) 942–2920.

VII. Statutory Basis and Text of Amendments

We are adopting these revisions pursuant to sections 3(b), 7, 8, 10, 19 and 28 of the Securities Act, sections 12, 13, 14, 23 and 36 of the Exchange Act, and section 304 of the Trust Indenture Act.

List of Subjects

17 CFR Part 200

Authority delegations (Government agencies).

17 CFR Parts 230, 239, 240, 249 and 260

Reporting and recordkeeping requirements, Securities.

Final Rule

In accordance with the foregoing, we are amending Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The authority citation for part 200 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. By amending § 200.30–1 by adding paragraph (e)(16) to read as follows:

§ 200.30–1 Delegation of authority to Director of Division of Corporation Finance.

* * * * *

(e) * * *

(16) To grant requests for exemptions from:

(i) Tender offer provisions of sections 13(e) and 14(d)(1) through 14(d)(7) of the Act (15 U.S.C. 78m(e) and 78n(d)(1) through 78n(d)(7)), Rule 13e–3 (§ 240.13e–3 of this chapter) and Rule 13e–4 (§ 240.13e–4 of this chapter), Regulation 14D (§§ 240.14d–1 through 240.14d–11 of this chapter) and Schedules 13E–3, TO, and 14D–9 (§§ 240.13e–100, 240.14d–100 and 240.14d–101 of this chapter) thereunder, pursuant to Sections 14(d)(5), 14(d)(8)(C) and 36(a) of the Act (15 U.S.C. 78n(d)(5), 78(d)(8)(C), and 78mm(a)); and

(ii) The tender offer provisions of Rules 14e–1, 14e–2 and 14e–5 of Regulation 14E (§§ 240.14e–1, 240.14e–2 and 240.14e–5 of this chapter) pursuant to section 36(a) of the Act (15 U.S.C. 78mm(a)).

* * * * *

3. By amending § 200.30–3 by adding paragraph (a)(68) to read as follows:

§ 200.30–3 Delegation of authority to Director of Division of Market Regulation.

* * * * *

(a) * * *

(68) Pursuant to Section 36(a) of the Act, 15 U.S.C. 78mm(a), to grant requests for exemptions from the tender offer provisions of Rule 14e–1 of Regulation 14E (§ 240.14e–1 of this chapter).

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

4. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77r, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–24, 80a–28, 80–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

5. By amending § 230.144 as follows:

a. By removing the word ''and'' at the end of paragraph (a)(3)(iv),

b. Removing the period and adding in its place ''; '' at the end of paragraph (a)(3)(v), and

c. Adding paragraphs (a)(3)(vi) and (vii) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(a) * * *

(3) * * *

(vi) Securities acquired in a transaction made under § 230.801 to the same extent and proportion that the securities held by the security holder of the class with respect to which the rights offering was made were as of the record date for the rights offering ''restricted securities'' within the meaning of this paragraph (a)(3); and

(vii) Securities acquired in a transaction made under § 230.802 to the same extent and proportion that the securities that were tendered or exchanged in the exchange offer or business combination were ''restricted securities'' within the meaning of this paragraph (a)(3).

* * * * *

6. By adding §§ 230.800 through 230.802 and an undesignated center heading to read as follows:

Exemptions for Cross-Border Rights Offerings, Exchange Offers and Business Combinations

General Notes to §§ 230.800, 230.801 and 230.802

1. Sections 230.801 and 230.802 relate only to the applicability of the registration provisions of the Act (15 U.S.C. 77e) and not to the applicability of the anti-fraud, civil liability or other provisions of the federal securities laws.

2. The exemptions provided by § 230.801 and § 230.802 are not available for any securities transaction or series of transactions that technically complies with § 230.801 and § 230.802 but are part of a plan or scheme to evade the registration provisions of the Act.

3. An issuer who relies on § 230.801 or an offeror who relies on § 230.802 must still comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) and any other applicable provisions of the federal securities laws.

4. An issuer who relies on § 230.801 or an offeror who relies on § 230.802 must still comply with any applicable state laws relating to the offer and sale of securities.

5. Attempted compliance with § 230.801 or § 230.802 does not act as an exclusive election; an issuer making an offer or sale of securities in reliance on § 230.801 or § 230.802 may also rely on any other applicable exemption from the registration requirements of the Act.

6. Section 230.801 and § 230.802 provide exemptions only for the issuer of the securities and not for any affiliate of that issuer or for any other person for resales of the issuer's securities. These sections provide exemptions only for the transaction in which the issuer or other person offers or sells the securities, not for the securities themselves. Securities acquired in a § 230.801 or § 230.802 transaction may be resold in the United States only if they are registered under the Act or an exemption from registration is available.

7. Unregistered offers and sales made outside the United States will not affect contemporaneous offers and sales made in compliance with § 230.801 or § 230.802. A transaction that complies with § 230.801 or § 230.802 will not be integrated with offerings exempt under other provisions of the Act, even if both transactions occur at the same time.

8. Securities acquired in a rights offering under § 230.801 are ''restricted securities'' within the meaning of § 230.144(a)(3) to the same extent and proportion that the securities held by the security holder as of the record date for the rights offering were restricted securities. Likewise, securities acquired in an exchange offer or business combination subject to § 230.802 are ''restricted securities'' within the meaning of § 230.144(a)(3) to the same extent and proportion that the securities tendered or exchanged by the security holder in that transaction were restricted securities.

9. Section 230.801 does not apply to a rights offering by an investment company registered or required to be registered under the Investment Company Act of 1940 (15

U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company. Section 230.802 does not apply to exchange offers or business combinations by an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company.

§ 230.800 Definitions for §§ 230.800, 230.801 and 230.802.

The following definitions apply in §§ 230.800, 230.801 and 230.802.

(a) *Business combination. Business combination* means a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of security holders of one or more of the participating companies. It also includes a statutory short form merger that does not require a vote of security holders.

(b) *Equity security. Equity security* means the same as in § 240.3a11–1 of this chapter, but for purposes of this section only does not include:

(1) Any debt security that is convertible into an equity security, with or without consideration;

(2) Any debt security that includes a warrant or right to subscribe to or purchase an equity security;

(3) Any such warrant or right; or

(4) Any put, call, straddle, or other option or privilege that gives the holder the option of buying or selling a security but does not require the holder to do so.

(c) *Exchange offer. Exchange offer* means a tender offer in which securities are issued as consideration.

(d) *Foreign private issuer. Foreign private issuer* means the same as in § 230.405 of Regulation C.

(e) *Foreign subject company. Foreign subject company* means any foreign private issuer whose securities are the subject of the exchange offer or business combination.

(f) *Home jurisdiction. Home jurisdiction* means both the jurisdiction of the foreign subject company's (or in the case of a rights offering, the foreign private issuer's) incorporation, organization or chartering and the principal foreign market where the foreign subject company's (or in the case of a rights offering, the issuer's) securities are listed or quoted.

(g) *Rights offering. Rights offering* means offers and sales for cash of equity securities where:

(1) The issuer grants the existing security holders of a particular class of equity securities (including holders of depositary receipts evidencing those securities) the right to purchase or subscribe for additional securities of that class; and

(2) The number of additional shares an existing security holder may purchase initially is in proportion to the number of securities he or she holds of record on the record date for the rights offering. If an existing security holder holds depositary receipts, the proportion must be calculated as if the underlying securities were held directly.

(h) *U.S. holder. U.S. holder* means any security holder resident in the United States. To determine the percentage of outstanding securities held by U.S. holders:

(1) Calculate percentage of outstanding securities held by U.S. holders as of the record date for a rights offering, or 30 days before the commencement of an exchange offer or the solicitation for a business combination.

(2) Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the exchange offer, business combination or rights offering, such as warrants, options and convertible securities. Exclude from those calculations securities held by persons who hold more than 10 percent of the subject securities in an exchange offer, business combination or rights offering, or that are held by the offeror in an exchange offer or business combination;

(3) Use the method of calculating record ownership in Rule 12g3–2(a) under the Exchange Act (§ 240.12g3–2(a) of this chapter), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company's jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different from the subject company's jurisdiction of incorporation;

(4) If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this provision, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

(5) Count securities as owned by U.S. holders when publicly filed reports of beneficial ownership or information that is otherwise provided to you indicates that the securities are held by U.S. residents.

(i) *United States. United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

§ 230.801 Exemption in connection with a rights offering.

A rights offering is exempt from the provisions of Section 5 of the Act (15 U.S.C. 77e), so long as the following conditions are satisfied:

(a) *Conditions.*—(1) *Eligibility of issuer.* The issuer is a foreign private issuer on the date the securities are first offered to U.S. holders.

(2) *Limitation on U.S. ownership.* U.S. holders hold no more than 10 percent of the outstanding class of securities that is the subject of the rights offering (as determined under the definition of ''U.S. holder'' in § 230.800(h)).

(3) *Equal treatment.* The issuer permits U.S. holders to participate in the rights offering on terms at least as favorable as those offered the other holders of the securities that are the subject of the offer. The issuer need not, however, extend the rights offering to security holders in those states or jurisdictions that require registration or qualification.

(4) *Informational documents.* (i) If the issuer publishes or otherwise disseminates an informational document to the holders of the securities in connection with the rights offering, the issuer must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination. If the issuer is a foreign company, it must also file a Form F–X (§ 239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

(ii) The issuer must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction.

(iii) If the issuer disseminates by publication in its home jurisdiction, the issuer must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(5) *Eligibility of securities.* The securities offered in the rights offering are equity securities of the same class as the securities held by the offerees in the

United States directly or through American Depositary Receipts.

(6) *Limitation on transferability of rights.* The terms of the rights prohibit transfers of the rights by U.S. holders except in accordance with Regulation S (§ 230.901 through § 230.905).

(b) *Legends.* The following legend or an equivalent statement in clear, plain language, to the extent applicable, appears on the cover page or other prominent portion of any informational document the issuer disseminates to U.S. holders:

This rights offering is made for the securities of a foreign company. The offer is subject to the disclosure requirements of a foreign country that are different from those of the United States. Financial statements included in the document, if any, have been prepared in accordance with foreign accounting standards that may not be comparable to the financial statements of United States companies.

It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue the foreign company or its officers or directors in a foreign court for violations of the U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment.

§ 230.802 Exemption for offerings in connection with an exchange offer or business combination for the securities of foreign private issuers.

Offers and sales in any exchange offer for a class of securities of a foreign private issuer, or in any exchange of securities for the securities of a foreign private issuer in any business combination, are exempt from the provisions of section 5 of the Act (15 U.S.C. 77e), if they satisfy the following conditions:

(a) *Conditions to be met.*—(1) *Limitation on U.S. ownership.* Except in the case of an exchange offer or business combination that is commenced during the pendency of a prior exchange offer or business combination made in reliance on this paragraph, U.S. holders of the foreign subject company must hold no more than 10 percent of the securities that are the subject of the exchange offer or business combination (as determined under the definition of ''U.S. holder'' in § 230.800(h)). In the case of a business combination in which the securities are to be issued by a successor registrant, U.S. holders may hold no more than 10 percent of the class of securities of the successor registrant, as if measured immediately after completion of the business combination.

(2) *Equal treatment.* The issuer must permit U.S. holders to participate in the exchange offer or business combination on terms at least as favorable as those offered any other holder of the subject securities. The issuer, however, need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the issuer must offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction.

(3) *Informational documents.* (i) If the issuer publishes or otherwise disseminates an informational document to the holders of the subject securities in connection with the exchange offer or business combination, the issuer must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination. If the bidder is a foreign company, it must also file a Form F–X (§ 239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

(ii) The issuer must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the foreign subject company's home jurisdiction.

(iii) If the issuer disseminates by publication in its home jurisdiction, the issuer must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(b) *Legends.* The following legend or an equivalent statement in clear, plain language, to the extent applicable, must be included on the cover page or other prominent portion of any informational document the offeror publishes or disseminates to U.S. holders:

This exchange offer or business combination is made for the securities of a foreign company. The offer is subject to disclosure requirements of a foreign country that are different from those of the United States. Financial statements included in the document, if any, have been prepared in accordance with foreign accounting standards that may not be comparable to the financial statements of United States companies.

It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue a foreign company or its officers or directors in a foreign court for violations of the U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment.

You should be aware that the issuer may purchase securities otherwise than under the exchange offer, such as in open market or privately negotiated purchases.

(c) *Presumption for certain offers.* For exchange offers conducted by persons other than the issuer of the subject securities or its affiliates, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities, unless:

(1) The exchange offer is made pursuant to an agreement with the issuer of the subject securities;

(2) The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States, on the Nasdaq market or on the OTC market, as reported to the NASD, over the 12-calendar-month period ending 30 days before commencement of the offer, exceeds 10 percent of the worldwide aggregate trading volume of that class of securities over the same period;

(3) The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission indicates that U.S. holders hold more than 10 percent of the outstanding subject class of securities; or

(4) The offeror knows, or has reason to know, that U.S. ownership exceeds 10 percent of the subject securities.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

7. The authority citation for part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

* * * * *

8. By amending § 239.42 as follows:

a. By revising the section heading;

b. At the end of paragraph (e), removing the word ''and'';

c. At the end of paragraph (f), removing the period and adding ''; and''; and

d. By adding paragraph (g).

The revisions to § 239.42 read as follows:

§ 239.42 Form F–X, for appointment of agent for service of process and undertaking for issuers registering securities on Form F–8, F–9, F–10, or F–80 (§§ 239.38, 239.39, 239.40, or 239.41 of this chapter) or registering securities or filing periodic reports on Form 40–F (§ 249.240f of this chapter), or by any issuer or other non-U.S. person filing tender offer documents on Schedule 13E–4F, 14D–1F or 14D–9F (§§ 240.13e–102, 240.14d–102 or 240.14d–103 of this chapter), by any non-U.S. person acting as trustee with respect to securities registered on Form F–7 (§ 239.37 of this chapter), F–8, F–9, F–10, F–80 or SB–2 (§ 239.10 of this chapter), or by a Canadian issuer qualifying an offering statement pursuant to Regulation A (§ 230.251 et seq.) on Form 1–A (§ 239.90 of this chapter), or registering securities on Form SB–2, or by any non-U.S. issuer providing Form CB to the Commission in connection with a tender offer, rights offering or business combination.

* * * * *

(g) By any non-U.S. issuer providing Form CB to the Commission in connection with a tender offer, rights offering or business combination.

§ 239.42 (Form F–X) [amended]

8a. By amending Form F–X (referenced in § 239.42 of this chapter) General Instruction 1 by adding paragraph (g) and revising Item II.F.(b) to read as follows:

[Note: Form F–X does not and this amendment will not appear in the Code of Federal Regulations.]

Form F–X

General Instructions

1. Form F–X must be filed with the Commission:

* * * * *

(g) by any non-U.S. issuer providing Form CB to the Commission in connection with a tender offer, rights offering or business combination.

* * * * *

II. * * *

F. * * *

(b) The use of Form F–8, Form F–80 or Form CB stipulates and agrees to appoint a successor agent for service of process and file an amended Form F–X if the Filer discharges the Agent or the Agent is unwilling or unable to accept service on behalf of the Filer at any time until six years have elapsed following the effective date of the latest amendment to such Form F–8, Form F–80 or Form CB;

* * * * *

9. By adding § 239.800 and Form CB to read as follows:

§ 239.800 Form CB, report of sales of securities in connection with an exchange offer or a rights offering.

This Form is used to report sales of securities in connection with a rights offering in reliance upon § 230.801 of this chapter and to report sales of securities in connection with an exchange offer or business combination in reliance upon § 230.802 of this chapter.

Note: Form CB does not appear in the Code of Federal Regulations. Form CB is attached as Appendix A.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

10. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

11. By amending § 240.13e–3 by adding paragraph (g)(6) to read as follows:

§ 240.13e–3 Going private transactions by certain issuers or their affiliates.

* * * * *

(g) *Exceptions.* * * *

* * * * *

(6) Any tender offer or business combination made in compliance with § 230.802 of this chapter, § 240.13e–4(h)(8) or § 240.14d–1(c).

12. By amending § 240.13e–4 as follows:

a. By removing the word ''or'' at the end of paragraph (h)(7);

b. Redesignating paragraph (h)(8) as (h)(9); and to

c. Adding new paragraphs (h)(8) and (i) to read as follows:

§ 240.13e–4 Tender offers by issuers.

* * * * *

(h) * * *

(8) *Cross-border tender offers (Tier I).* Any issuer tender offer (including any exchange offer) where the issuer is a foreign private issuer as defined in § 240.3b–4 if the following conditions are satisfied.

(i) Except in the case of an issuer tender offer which is commenced during the pendency of a tender offer made by a third party in reliance on § 240.14d–1(c), U.S. holders do not hold more than 10 percent of the class of securities sought in the offer (as determined under Instruction 2 to paragraph (h)(8) and paragraph (i) of this section); and

(ii) The issuer or affiliate must permit U.S. holders to participate in the offer on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the offer; however:

(A) *Registered exchange offers.* If the issuer or affiliate offers securities registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the issuer or affiliate need not extend the offer to security holders in those states or jurisdictions that prohibit the offer or sale of the securities after the issuer or affiliate has made a good faith effort to register or qualify the offer and sale of securities in that state or jurisdiction, except that the issuer or affiliate must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(B) *Exempt exchange offers.* If the issuer or affiliate offers securities exempt from registration under § 230.802 of this chapter, the issuer or affiliate need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the issuer or affiliate must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(C) *Cash only consideration.* The issuer or affiliate may offer U.S. holders cash only consideration for the tender of the subject securities, notwithstanding the fact that the issuer or affiliate is offering security holders outside the United States a consideration that consists in whole or in part of securities of the issuer or affiliate, if the issuer or affiliate has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-U.S. holders, and either of the following conditions are satisfied:

(*1*) The offered security is a ''margin security'' within the meaning of Regulation T (12 CFR 220.2) and the issuer or affiliate undertakes to provide, upon the request of any U.S. holder or the Commission staff, the closing price and daily trading volume of the security on the principal trading market for the security as of the last trading day of each of the six months preceding the announcement of the offer and each of the trading days thereafter; or

(*2*) If the offered security is not a ''margin security'' within the meaning of Regulation T (12 CFR 220.2), the issuer or affiliate undertakes to provide, upon the request of any U.S. holder or the Commission staff, an opinion of an independent expert stating that the cash consideration offered to U.S. holders is substantially equivalent to the value of

the consideration offered security holders outside the United States.

(D) *Disparate tax treatment.* If the issuer or affiliate offers ''loan notes'' solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders.

(iii) *Informational documents.* (A) If the issuer or affiliate publishes or otherwise disseminates an informational document to the holders of the securities in connection with the issuer tender offer (including any exchange offer), the issuer or affiliate must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 249.480 of this chapter) by the first business day after publication or dissemination. If the issuer or affiliate is a foreign company, it must also file a Form F–X (§ 239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

(B) The issuer or affiliate must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction.

(C) If the issuer or affiliate disseminates by publication in its home jurisdiction, the issuer or affiliate must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(iv) An investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company, may not use this paragraph (h)(8); or

* * * * *

(i) *Cross-border tender offers (Tier II).* Any issuer tender offer (including any exchange offer) that meets the conditions in paragraph (i)(1) of this section shall be entitled to the exemptive relief specified in paragraph (i)(2) of this section provided that such issuer tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (i)(2) of this section:

(1) *Conditions.* (i) The issuer is a foreign private issuer as defined in § 240.3b–4 and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company; and

(ii) Except in the case of an issuer tender offer which is commenced during the pendency of a tender offer made by a third party in reliance on § 240.14d–1(d), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer (as determined under Instruction 2 to paragraphs (h)(8) and (i) of this section).

(2) *Exemptions.* The issuer tender offer shall comply with all requirements of this section other than the following:

(i) *Equal treatment—loan notes.* If the issuer or affiliate offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders, notwithstanding paragraph (f)(8) and (h)(9) of this section.

(ii) *Equal treatment—separate U.S. and foreign offers.* Notwithstanding the provisions of paragraph (f)(8) of this section, an issuer or affiliate conducting an issuer tender offer meeting the conditions of paragraph (i)(1) of this section may separate the offer into two offers: One offer made only to U.S. holders and another offer made only to non-U.S. holders. The offer to U.S. holders must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offer.

(iii) *Notice of extensions.* Notice of extensions made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e–1(d).

(iv) *Prompt payment.* Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e–1(c).

Instructions to paragraph (h)(8) and (i) of this section:

1. *Home jurisdiction* means both the jurisdiction of the issuer's incorporation, organization or chartering and the principal foreign market where the issuer's securities are listed or quoted.

2. *U.S. holder* means any security holder resident in the United States. To determine the percentage of outstanding securities held by U.S. holders:

i. Calculate the U.S. ownership as of 30 days before the commencement of the issuer tender offer;

ii. Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by persons who hold more than 10 percent of the subject securities;

iii. Use the method of calculating record ownership in § 240.12g3–2(a), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, your jurisdiction of incorporation, and the jurisdiction that is the primary trading market for the subject securities, if different than your jurisdiction of incorporation;

iv. If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business; and

v. Count securities as beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you.

3. *United States. United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

4. The exemptions provided by paragraphs (h)(8) and (i) of this section are not available for any securities transaction or series of transactions that technically complies with paragraph (h)(8) or (i) of this section but are part of a plan or scheme to evade the provisions of this section.

13. By amending § 240.14d–1 as follows:

a. By redesignating paragraphs (c), (d), (e), and (f) as paragraphs (e), (f), (g) and (h);

b. Removing the reference to ''§ 240.14d–1(c)'' in newly redesignated paragraph (f) and adding in its place ''§ 240.14d–1(e); and

c. Adding new paragraphs (c) and (d) and Instructions thereto to read as follows:

§ 240.14d-1 Scope of and definitions applicable to Regulations 14D and 14E.

* * * * *

(c) *Tier I.* Any tender offer for the securities of a foreign private issuer as defined in § 240.3b–4 is exempt from the requirements of sections 14(d)(1) through 14(d)(7) of the Act (15 U.S.C. 78n(d)(1) through 78n(d)(7)), Regulation 14D (§ 240.14d–1 through § 240.14d–10) and Schedules TO (§ 240.14d–100) and 14D–9 (§ 240.14d-101) thereunder, and § 240.14e–1 and § 240.14e–2 of Regulation 14E under the Act if the following conditions are satisfied:

(1) *U.S. ownership limitation.* Except in the case of a tender offer which is

commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or § 240.13e-4(h)(8), U.S. holders do not hold more than 10 percent of the class of securities sought in the offer (as determined under Instruction 2 to paragraphs (c) and (d) of this section).

(2) *Equal treatment.* The bidder must permit U.S. holders to participate in the offer on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offer; however:

(i) *Registered exchange offers.* If the bidder offers securities registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the bidder need not extend the offer to security holders in those states or jurisdictions that prohibit the offer or sale of the securities after the bidder has made a good faith effort to register or qualify the offer and sale of securities in that state or jurisdiction, except that the bidder must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(ii) *Exempt exchange offers.* If the bidder offers securities exempt from registration under § 230.802 of this chapter, the bidder need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the bidder must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(iii) *Cash only consideration.* The bidder may offer U.S. holders only a cash consideration for the tender of the subject securities, notwithstanding the fact that the bidder is offering security holders outside the United States a consideration that consists in whole or in part of securities of the bidder, so long as the bidder has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-U.S. holders, and either of the following conditions are satisfied:

(A) The offered security is a ''margin security'' within the meaning of Regulation T (12 CFR 220.2) and the issuer undertakes to provide, upon the request of any U.S. holder or the Commission staff, the closing price and daily trading volume of the security on the principal trading market for the security as of the last trading day of each of the six months preceding the announcement of the offer and each of the trading days thereafter; or

(B) If the offered security is not a ''margin security'' within the meaning of Regulation T (12 CFR 220.2) the issuer undertakes to provide, upon the request of any U.S. holder or the Commission staff, an opinion of an independent expert stating that the cash consideration offered to U.S. holders is substantially equivalent to the value of the consideration offered security holders outside the United States.

(iv) *Disparate tax treatment.* If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders.

(3) *Informational documents.* (i) The bidder must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction.

(ii) If the bidder disseminates by publication in its home jurisdiction, the bidder must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(iii) In the case of tender offers for securities described in section 14(d)(1) of the Act (15 U.S.C. 78n(d)(1)), if the bidder publishes or otherwise disseminates an informational document to the holders of the securities in connection with the tender offer, the bidder must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 249.480 of this chapter) by the first business day after publication or dissemination. If the bidder is a foreign company, it must also file a Form F–X (§ 239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

(4) *Investment companies.* The issuer of the securities that are the subject of the tender offer is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company.

(d) *Tier II.* A person conducting a tender offer (including any exchange offer) that meets the conditions in paragraph (d)(1) of this section shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section provided that such tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section:

(1) *Conditions.* (i) The subject company is a foreign private issuer as defined in § 240.3b–4 and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company;

(ii) Except in the case of a tender offer which is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or § 240.13e–4(i), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer (as determined under Instruction 2 to paragraphs (c) and (d) of this section); and

(iii) The bidder complies with all applicable U.S. tender offer laws and regulations, other than those for which an exemption has been provided for in paragraph (d)(2) of this section.

(2) *Exemptions.*—(i) *Equal treatment—loan notes.* If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders, notwithstanding § 240.14d–10.

(ii) *Equal treatment—separate U.S. and foreign offers.* Notwithstanding the provisions of § 240.14d–10, a bidder conducting a tender offer meeting the conditions of paragraph (d)(1) of this section may separate the offer into two offers: one offer made only to U.S. holders and another offer made only to non-U.S. holders. The offer to U.S. holders must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers.

(iii) *Notice of extensions.* Notice of extensions made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e–1(d).

(iv) *Prompt payment.* Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e–1(c).

(v) *Subsequent offering period/ Withdrawal rights.* A bidder will satisfy the announcement and prompt payment requirements of § 240.14d–11(d), if the bidder announces the results of the tender offer, including the approximate number of securities deposited to date, and pays for tendered securities in accordance with the requirements of the

home jurisdiction law or practice and the subsequent offering period commences immediately following such announcement. Notwithstanding section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)), the bidder need not extend withdrawal rights following the close of the offer and prior to the commencement of the subsequent offering period.

Instructions to paragraphs (c) and (d):

1. *Home jurisdiction* means both the jurisdiction of the subject company's incorporation, organization or chartering and the principal foreign market where the subject company's securities are listed or quoted.

2. *U.S. holder* means any security holder resident in the United States. Except as otherwise provided in Instruction 3 below, to determine the percentage of outstanding securities held by U.S. holders:

i. Calculate the U.S. ownership as of 30 days before the commencement of the tender offer;

ii. Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by persons who hold more than 10 percent of the subject securities, or that are held by the bidder;

iii. Use the method of calculating record ownership in Rule 12g3–2(a) under the Act (§ 240.12g3–2(a) of this chapter), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company's jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different than the subject company's jurisdiction of incorporation;

iv. If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business; and

v. Count securities as beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you.

3. In a tender offer by a bidder other than an affiliate of the issuer of the subject securities, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less (40 percent or less in the case of 14d–1(d)) of such outstanding securities, unless:

i. The tender offer is made pursuant to an agreement with the issuer of the subject securities;

ii. The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States, on the Nasdaq market, or on the OTC market, as reported to the NASD, over the 12-calendar-month period ending 30 days before commencement of the offer, exceeds 10 percent (40 percent in the case of 14d–1(d)) of the worldwide aggregate trading volume of that class of securities over the same period;

iii. The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission indicates that U.S. holders hold more than 10 percent (40 percent in the case of 14d–1(d)) of the outstanding subject class of securities; or

iv. The bidder knows or has reason to know that the level of U.S. ownership exceeds 10 percent (40 percent in the case of 14d–1(d)) of such securities.

4. *United States. United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

5. The exemptions provided by paragraphs (c) and (d) of this section are not available for any securities transaction or series of transactions that technically complies with paragraph (c) or (d) of this section but are part of a plan or scheme to evade the provisions of Regulations 14D or 14E.

* * * * *

14. By amending § 240.14d–9 by revising the introductory text of paragraph (d)(2) and adding paragraph (d)(2)(iii) to read as follows:

§ 240.14d–9 Recommendation or solicitation by the subject company and others.

* * * * *

(d) * * *

* * * * *

(2) Notwithstanding paragraph (d)(1) of this section, this section shall not apply to the following persons:

* * * * *

(iii) Any person specified in paragraph (d)(1) of this section if:

(A) The subject company is the subject of a tender offer conducted under § 240.14d–1(c);

(B) Any person specified in paragraph (d)(1) of this section furnishes to the Commission on Form CB (§ 249.480 of this chapter) the entire informational document it publishes or otherwise disseminates to holders of the class of securities in connection with the tender offer no later than the next business day after publication or dissemination;

(C) Any person specified in paragraph (d)(1) of this section disseminates any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the issuer's home jurisdiction; and

(D) Any person specified in paragraph (d)(1) of this section disseminates by publication in its home jurisdiction, such person must publish the information in the United States in a manner reasonably calculated to inform U.S. security holders of the offer.

* * * * *

15. By amending § 240.14e–2 by adding paragraph (d) to read as follows:

§ 240.14e–2 Position of subject company with respect to a tender offer.

* * * * *

(d) *Exemption for cross-border tender offers.* The subject company shall be exempt from this section with respect to a tender offer conducted under § 240.14d–1(c).

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

16. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

17. By adding Subpart E, § 249.480 and Form CB to read as follows:

Subpart E—Forms for Statements Made in Connection With Exempt Tender Offers

§ 249.480 Form CB, tender offer statement in connection with a tender offer for a foreign private issuer.

This form is used to report an issuer tender offer conducted in compliance with § 240.13e–4(h)(8) of this chapter and a third-party tender offer conducted in compliance with § 240.14d–1(c) of this chapter. This report also is used by a subject company pursuant to § 240.14e–2(d) of this chapter.

Note: Form CB does not appear in the Code of Federal Regulations. Form CB is attached as Appendix A.

PART 260—GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

18. The authority citation for part 260 continues to read as follows:

Authority: 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss, 78*ll*(d), 80b–3, 80b–4, and 80b–11.

19. By adding § 260.4d–10 to read as follows:

§ 260.4d–10 Exemption for securities issued pursuant to § 230.802 of this chapter.

Any debt security, whether or not issued under an indenture, is exempt from the Act if made in compliance with § 230.802 of this chapter.

By the Commission.

Dated: October 22, 1999.

Margaret H. McFarland,

Deputy Secretary.

Appendix A—Form CB

Note: Form CB does not appear in the Code of Federal Regulations.

Securities and Exchange Commission

Washington, D.C. 20549

Form CB—Tender Offer/Rights Offering Notification Form

(Amendment No. ____)

Please place an X in the box(es) to designate the appropriate rule provision(s) relied upon to file this Form:

Securities Act Rule 801 (Rights Offering) ☐
Securities Act Rule 802 (Exchange Offer) ☐
Exchange Act Rule 13e–4(h)(8) (Issuer Tender Offer) ☐
Exchange Act Rule 14d–1(c) (Third Party Tender Offer) ☐
Exchange Act Rule 14e–2(d) (Subject Company Response) ☐

(Name of Subject Company)

(Translation of Subject Company's Name into English (if applicable))

(Jurisdiction of Subject Company's Incorporation or Organization)

(Name of Person(s) Furnishing Form)

(Title of Class of Subject Securities)

(CUSIP Number of Class of Securities (if applicable))

(Name, Address (including zip code) and Telephone Number (including area code) of Person(s) Authorized to Receive Notices and Communications on Behalf of Subject Company)

(Date Tender Offer/Rights Offering Commenced)

*An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden. This collection of information has been reviewed by OMB in accordance with the clearance requirements of 44 U.S.C. 3507.

General Instructions

I. Eligibility Requirements for Use of Form CB

A. Use this Form to furnish information pursuant to Rules 13e–4(h)(8), 14d–1(c) and 14e–2(d) under the Securities Exchange Act of 1934 (''Exchange Act''), and Rules 801 and 802 under the Securities Act of 1933 (''Securities Act'').

Instructions

1. For the purposes of this Form, the term ''subject company'' means the issuer of the securities in a rights offering and the company whose securities are sought in a tender offer.

2. For the purposes of this Form, the term ''tender offer'' includes both cash and securities tender offers.

B. The information and documents furnished on this Form are not deemed ''filed'' with the Commission or otherwise subject to the liabilities of Section 18 of the Exchange Act.

II. Instructions for Submitting Form

A. You must furnish five copies of this Form and any amendment to the Form (see Part I, Item 1.(b)), including all exhibits and any other paper or document furnished as part of the Form, to the Commission at its principal office. Each copy must be bound, stapled or otherwise compiled in one or more parts, without stiff covers. The binding must be made on the side or stitching margin in such manner as to leave the reading matter legible.

B. The persons specified in Part IV may manually sign the original and at least one copy of this Form and any amendments. You must conform any unsigned copies. Typed signatures are acceptable so long as manually signed copies are retained by the filing person for five years.

C. You must furnish this Form to the Commission no later than the next business day after the disclosure documents submitted with this Form are published or otherwise disseminated in the subject company's home jurisdiction.

D. In addition to any internal numbering you may include, sequentially number the manually signed original of the Form and any amendments by handwritten, typed, printed or other legible form of notation from the first page of the document through the last page of the document and any exhibits or attachments. Further, you must set forth the total number of pages contained in a numbered original on the first page of the document.

III. Special Instructions for Complying With Form CB

Under Sections 3(b), 7, 8, 10, 19 and 28 of the Securities Act of 1933, and Sections 12, 13, 14, 23 and 36 of the Exchange Act of 1934 and the rules and regulations adopted under those Sections, the Commission is authorized to solicit the information required to be supplied by this form by certain entities conducting a tender offer, rights offer or business combination for the securities of certain issuers.

Disclosure of the information specified in this form is mandatory. We will use the information for the primary purposes of assuring that the offeror is entitled to use the Form and that investors have information about the transaction to enable them to make informed investment decisions. We will make this Form a matter of public record. Therefore, any information given will be available for inspection by any member of the public.

Because of the public nature of the information, the Commission can use it for a variety of purposes. These purposes include referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statutes or provisions.

Part I—Information Sent to Security Holders

Item 1. Home Jurisdiction Documents

(a) You must attach to this Form the entire disclosure document or documents, including any amendments thereto, in English, that you have delivered to holders of securities or published in the subject company's home jurisdiction that are required to be disseminated to U.S. security holders or published in the United States. The Form need not include any documents incorporated by reference into those disclosure document(s) and not published or distributed to holders of securities.

(b) Furnish any amendment to a furnished document or documents to the Commission under cover of this Form. Indicate on the cover page the number of the amendment.

Item 2. Informational Legends

You may need to include legends on the outside cover page of any offering document(s) used in the transaction. *See* Rules 801(b) and 802(b).

Note to Item 2. If you deliver the home jurisdiction document(s) through an electronic medium, the required legends must be presented in a manner reasonably calculated to draw attention to them.

Part II—Information Not Required To Be Sent to Security Holders

The exhibits specified below must be furnished as part of the Form, but need not be sent to security holders unless sent to security holders in the home jurisdiction. Letter or number all exhibits for convenient reference.

(1) Furnish to the Commission any reports or information (in English or an English summary thereof) that, in accordance with the requirements of the home jurisdiction, must be made publicly available in connection with the transaction but need not be disseminated to security holders.

(2) Furnish copies of any documents incorporated by reference into the home jurisdiction document(s).

(3) If any name is signed to this Form under a power of attorney, furnish manually signed copies of the power of attorney.

Part III—Consent to Service of Process

(1) When this Form is furnished to the Commission, the person furnishing this Form (if a non-U.S. person) must also file with the Commission a written irrevocable consent and power of attorney on Form F–X.

(2) Promptly communicate any change in the name or address of an agent for service to the Commission by amendment of the Form F–X.

Part IV—Signatures

(1) Each person (or its authorized representative) on whose behalf the Form is submitted must sign the Form. If a person's authorized representative signs, and the authorized representative is someone other than an executive officer or general partner, provide evidence of the representative's authority with the Form.

(2) Type or print the name and any title of each person who signs the Form beneath his or her signature.

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

(Signature) _____
(Name and Title) _____
(Date) _____

[FR Doc. 99–28354 Filed 11–9–99; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 229, 230, 232, 239, and 240

[Release No. 33–7760; 34–42055; IC–24107; File No. S7–28–98]

RIN 3235–AG84

Regulation of Takeovers and Security Holder Communications

AGENCY: Securities and Exchange Commission.

ACTION: Final Rules.

SUMMARY: We are adopting comprehensive revisions to the rules and regulations applicable to takeover transactions (including tender offers, mergers, acquisitions and similar extraordinary transactions). The revised rules will permit increased communications with security holders and the markets. The amendments also will: Balance the treatment of cash and stock tender offers; simplify and centralize the disclosure requirements; and eliminate regulatory inconsistencies in mergers and tender offers. In addition, we are updating the tender offer rules by providing for a subsequent offering period, clarifying certain filing and disclosure requirements and reducing compliance burdens where consistent with investor protection. We believe these revisions will lead to a more well informed and efficient market.

EFFECTIVE DATE: The rules and amendments will become effective January 24, 2000.

FOR MORE INFORMATION CONTACT: Dennis O. Garris, Chief, or James J. Moloney, Special Counsel, in the Office of Mergers & Acquisitions, Division of Corporation Finance, at (202) 942–2920. For questions on new Rule 14e–5, contact James A. Brigagliano, Assistant Director, Irene Halpin, Florence Harmon or Michael Trocchio, Special Counsels, in the Office of Risk Management and Control, Division of Market Regulation, at (202) 942–0772. For questions on investment companies, contact Martha B. Peterson, Special Counsel, in the Office of Disclosure Regulation, Division of Investment Management, at (202) 942–0721.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Rules 13e–1, 13e–3, 13e–4, 14a–4, 14a–6, 14a–12, 14c–5, 14d–1, 14d–2, 14d–3, 14d–4, 14d–5, 14d–6, 14d–7, 14d–9, 14e–1[1] and Schedules 14A, 13E–3, and 14D–9[2] under the Securities Exchange Act of 1934 (''Exchange Act'').[3] We are rescinding Exchange Act Rule 14a–11.[4] We are adopting: amendments to Item 10 of Regulation S–K;[5] a new subpart of Regulation S–K, the 1000 series (''Regulation M–A''); a new tender offer schedule, Schedule TO, to replace Schedules 13E–4 and 14D–1;[6] new tender offer Rule 14e–5 to replace Rule 10b–13;[7] and new tender offer Rules 14d–11 and 14e–8. We also are adopting amendments to Rule 13(d) of Regulation S–T and Rule of Practice 30–3.[8] Lastly, we are adopting amendments to Rules 135, 145 and 432, Forms S–4 and F–4, and new Rules 162, 165, 166 and 425 under the Securities Act of 1933 (''Securities Act'').[9]

Table of Contents

[1] 17 CFR 240.13e–1, 13e–3, 13e–4, 14a–4, 14a–6, 14a–12, 14c–5,14d–1, 14d–2, 14d–3, 14d–4, 14d–5, 14d–6, 14d–7, 14d–9, and 14e–1.

[2] 17 CFR 240.14a–101, 13e–100, and 14d–101.

[3] 15 U.S.C. 78a *et seq.*

[4] 17 CFR 240.14a–11.

[5] 17 CFR 229.10.

[6] 17 CFR 240.13e–101, 14d–100.

[7] 17 CFR 240.10b–13.

[8] 17 CFR 232.13(d); 17 CFR 200.30–3.

[9] 17 CFR 230.135, 145, and 432; 17 CFR 239.25 and 34; 15 U.S.C. 77a *et seq.*