(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]

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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]

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[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.*

I. Executive Summary and Background

Last fall, we proposed comprehensive changes to the various regulatory schemes applicable to issuer and third-party tender offers, mergers, going-private transactions and security holder communications.[10] The proposed changes were prompted by an increase in the number of transactions where securities are offered as consideration; an increase in the number of hostile transactions involving proxy or consent solicitations; and significant technological advances that have resulted in more and faster communications with security holders and the markets. Because these trends have continued since we issued the Proposing Release and commenters, for the most part, viewed the proposals as favorable,[11] we are adopting the proposals, with some modification.

As we noted in the Proposing Release, the existing regulatory framework imposes a number of restrictions on communications with security holders and the marketplace. In addition, the disparate regulatory treatment of cash and stock tender offers [12] may unduly influence a bidder's [13] choice of offering cash or securities in a takeover transaction. We also noted unnecessary differences in regulatory requirements between tender offers and other types of extraordinary transactions, such as mergers.[14] Finally, we noted that the multiple regulatory schemes that can apply to a transaction may impose additional compliance costs without necessarily providing a sufficient marginal benefit to security holders. Our goals in proposing and adopting these changes are to promote communications with security holders and the markets, minimize selective disclosure, harmonize inconsistent disclosure requirements and alleviate unnecessary burdens associated with the compliance process, without a reduction in investor protection.[15]

We also proposed broad changes to the regulation of securities offerings in a companion release.[16] Our proposed treatment of communications in the Securities Act Reform Release differs from our approach in the Proposing Release. The differences were due to the special nature of business combination transactions [17] in contrast to capital-raising transactions. At this time we are not adopting the Securities Act Reform proposals that are unrelated to business combination transactions. We are continuing to evaluate commenters' responses to the Securities Act Reform proposals and in the future we may take action on these proposals. We are adopting, however, several proposals in the Securities Act Reform Release that relate to business combination transactions. As a result, some proposals or concepts previously presented in the Securities Act Reform Release are incorporated into this release. Where we proposed changes that would appear in new forms included in the Securities Act Reform Release (Forms C and SB–3), those changes have been implemented in existing forms (Forms S–4 and F–4). In a separate release, we also are adopting significant changes to the regulatory scheme for cross-border tender offers, exchange offers and rights offerings.[18]

We believe these new rules and revisions should provide participants in the securities markets sufficient flexibility to accommodate changes in deal structure and advances in technology that continue to occur in today's markets. Briefly, the new rules and amendments adopted today will:

- Relax existing restrictions on oral and written communications with security holders by permitting the dissemination of more information on a timely basis, so long as the written communications are filed on the date of first use; in particular,
- Permit more communications before the filing of a registration statement in connection with either a stock tender offer or a stock merger transaction;
- Permit more communications before the filing of a proxy statement (whether or not a business combination transaction is involved);
- Permit more communications regarding a proposed tender offer without ''commencing'' the offer and requiring the filing and dissemination of specified information;
- Harmonize the various communications principles applicable to business combinations under the Securities Act, tender offer rules and proxy rules; and
- Eliminate the confidential treatment currently available for merger proxy statements, except when communications made outside the proxy statement are limited to those specified in Rule 135;
- Balance the treatment of stock and cash tender offers by permitting both issuer and third-party stock tender offers to commence as early as the filing of a registration statement;
- Simplify and integrate the various disclosure requirements for tender offers, going-private transactions, and other extraordinary transactions in a new series of rules within Regulation S–K, called ''Regulation M–A'';
- Combine the existing schedules for issuer and third-party tender offers into one schedule available for all tender offers, entitled ''Schedule TO'';
- Require a ''plain English'' summary term sheet in all tender offers, mergers and going-private transactions, except when the transaction is already subject to the Securities Act plain English rules;
- Update the financial statement requirements for takeover transactions; in particular,
- Eliminate the requirement to file financial statements for target companies [19] in most cash mergers, consistent with the treatment of cash tender offers;
- Clarify when financial statements of the acquiring company are not required in cash mergers, and when financial statements are required, reduce the financial statements for the acquiror from three years to two;
- Clarify when the bidder's financial statements are not required in cash tender offers, and when financial statements are required in third-party offers, reduce the requirement from three years to two;
- Require pro forma and related financial information in negotiated cash tender offers where the bidder intends to engage in a back-end securities transaction;

[10] Regulation of Takeovers and Security Holder Communications, Release No. 33–7607 (November 3, 1998) (63 FR 67331) (the ''Proposing Release'').

[11] The comment letters are available for inspection and copying in our Public Reference Room in File No. S7–28–98. Comments that were submitted electronically also are available on our web site (www.sec.gov).

[12] Stock tender offers, also referred to as exchange offers, are tender offers where the consideration offered to security holders includes securities (either equity or debt); these transactions generally are registered under the Securities Act.

[13] The term ''bidder'' is used throughout this release to refer to the offeror or purchaser in a tender offer.

[14] For a discussion of the regulatory schemes applicable to cash tender offers, exchange offers, cash and stock mergers, *see* Part II.A of the Proposing Release.

[15] In this release we focus on the amendments that we are adopting and how they differ from the original proposals. For a more complete discussion of the background and rationale for the changes, *see* the Proposing Release.

[16] Securities Act Reform Release, Release No. 33–7606A (November 13,1998) (63 FR 67174).

[17] For purposes of this release, the Proposing Release and the rules adopted in this release, a ''business combination transaction'' means any Rule 145(a) transaction (17 CFR 230.145(a)) (including mergers, recapitalizations, acquisitions, and similar matters) or tender offer (including issuer tender offers).

[18] Release No. 33–7759 (October 22, 1999) (the ''Cross-Border Adopting Release'').

[19] The term ''target'' is used throughout this release to refer to the company to be acquired in a business combination transaction or the company whose securities are the subject of the transaction, whether the transaction is agreed upon or unsolicited.

• Reduce the financial statements required for non-reporting target companies in stock mergers and stock tender offers;

• Permit an optional subsequent offering period after completion of a tender offer, during which security holders can tender shares without withdrawal rights;

• Clarify Rule 13e–1, which requires issuers to report intended repurchases of their own securities once a third-party tender offer has commenced;

• Conform the security holder list requirement in the tender offer rules with the comparable provision in the proxy rules so that the list will include non-objecting beneficial owners; and * clarify the rule that prohibits purchases outside a tender offer (Rule 10b–13), codify prior interpretations of and exemptions from the rule, and redesignate it as Rule 14e–5.

In several respects the rules adopted today differ from the proposed rule changes. The primary differences are as follows:

• The Securities Act exemption for communications is extended to all parties to the transaction and any persons acting on their behalf;

• The Securities Act exemption also is revised to clarify that an unintentional or immaterial breach of the filing requirement will not result in a loss of the exemption so long as a good faith and reasonable attempt was made to file and the material is filed as soon as practicable after discovery of the failure to file;

• A definition of ''public announcement'' is provided so that parties know when they need to begin filing written communications relating to the transaction and when the prohibition against making purchases outside the tender offer begins;

• A written communication relating to a proposed transaction that is a Rule 135 notice must be filed unless the notice only contains information that has already been filed;

• The confidential treatment currently available for preliminary merger proxy statements is retained under limited circumstances;

• The requirement in expanded Rule 14a–12 to furnish a proxy statement as soon as practicable is revised so that a proxy statement must be furnished at the time a form of proxy is given to or requested from security holders;

• Written communications permitted under expanded Rule 14a–12 must include either full participant information, as currently required, or a legend directing security holders where they can obtain participant information;

• Long form publication is retained as a means to commence a tender offer, rather than being eliminated as proposed;

• The provision permitting commencement of exchange offers as early as the filing of a registration statement is extended to issuer exchange offers, not limited to third-party offers as proposed;

• A bidder that commences an exchange offer early may not be required to deliver a final prospectus to security holders;

• An acquiror in a stock merger or stock tender offer need not provide any financial statements for a non-reporting target if the acquiror's security holders are not voting on the transaction and the acquisition is not significant to the acquiror at the 20% level;

• Subsequent offering period changes: this period can be between three and 20 business days, and is not fixed at ten business days as initially proposed; a bidder is not required to disclose an intent to engage in a back-end merger; and a bidder must announce the results of the initial offering period before beginning the subsequent offering period;

• A bidder must disclose pro forma financial information in the first tier of a two-tier transaction for negotiated transactions only, not for transactions where access to the target's financial information is limited;

• The information required by Rule 13e–1 regarding issuer repurchases of securities need not be disseminated to security holders; in addition, an exclusion from this rule is provided for certain periodic, routine repurchases; and

• Several additional exceptions are added to new Rule 14e–5.

At this time we are not adopting several concepts that we solicited comment on, including:

• A modification to the proxy rules that would permit the direct delivery of proxy materials to non-objecting beneficial owners;

• A federally-mandated proxy solicitation period;

• A ''test the waters'' provision for proxy solicitations;

• A requirement that bidders commencing a tender offer by summary advertisement mail their tender offer materials to security holders;

• A proxy analogue to the early commencement provision in exchange offers that would permit the sending of proxy cards with ''preliminary'' proxy materials; and

• An expansion of the Private Securities Litigation Reform Act of 1995[20] safe harbor from liability to cover forward-looking statements made in connection with tender offers.

In the future, depending on the effects of today's rule changes, we may consider proposing additional changes to further harmonize the regulatory requirements.

II. Discussion of New Regulatory Scheme

A. Overview

1. Increased Communications Permitted Before Filing Disclosure Document

Today, merger and acquisition transactions are occurring at a faster pace, due in part to the rapid development of new technologies and advancements in communications. As a result of economic and regulatory pressures, many companies are releasing more information to the market before a registration, proxy or tender offer statement is filed publicly with us.[21] In many cases, parties are releasing information on proposed transactions including pro forma financial information for the combined entity, estimated cost savings and synergies. As we noted in the Proposing Release, parties to business combination transactions provide several reasons for the need to disclose information early,[22] including the duty under Rule 10b–5 to disclose material information in a manner that is not misleading.[23] We also recognize that parties may be subject to other regulatory requirements to disclose information to the markets early.[24]

Existing restrictions on communications result primarily from the broad concepts of ''offer'' [25] and ''prospectus'' [26] under the Securities Act, ''solicitation'' [27] under the Exchange Act proxy rules, and ''commencement'' [28] under the Williams

[20] Pub. L. 104–67, 109 Stat. 737 (1995).

[21] Companies may disclose information in response to the market's demand for information regarding proposed transactions and the need to keep customers, employees and other constituencies adequately informed.

[22] *See* Part II.B.1 of the Proposing Release.

[23] 17 CFR 240.10b–5. We have long recognized the needs of issuers to communicate with security holders regarding important business and financial developments. *See* Releases No. 33–4697 (May 28, 1964) (29 FR 7317) and 33–5180 (August 16, 1971) (36 FR 16506). In addition, the Division of Corporation Finance has previously recognized the needs of bidders to disclose information regarding a contemplated ''back-end'' transaction (*i.e.*, a subsequent transaction in which the bidder acquires any remaining securities outstanding). Disclosure of information required by Schedule 14D–1 regarding a ''back-end'' transaction generally will not result in ''gun jumping'' because the information is not designed to prime the market for a subsequent registered offering of securities. Instead, the information aids investors in evaluating the terms of a tender offer and deciding whether to tender for cash or wait for securities in a back-end transaction. *See* Release No. 33–5927 (April 24, 1978) (42 FR 18163).

[24] Companies may be required to disclose information under the particular rules of the stock exchange or inter-dealer quotation system upon which their securities are traded.

[25] Section 2(a)(3) of the Securities Act (15 U.S.C. 77b) broadly defines ''offer'' as including every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. Offers are currently prohibited during the pre-filing period and restricted during the waiting period.

[26] The term ''prospectus'' is defined in section 2(a)(10) (15 U.S.C. 77b) to include any prospectus, notice, circular, advertisement, letter of communication, written or by radio or television, that offers any security for sale or confirms the sale of the security, except for communications that are preceded or accompanied by a statutory prospectus.

[27] ''Solicitation'' is broadly defined to include ''the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.'' *See* Rule 14a–1(*l*) (17 CFR 240.14a–1(*l*)).

[28] The Williams Act provides that only very limited information can be announced without either commencing a cash tender offer or requiring the filing of a registration statement in a stock offer.

Act tender offer rules.[29] We recognize that restricting communications to one document may actually impede, rather than promote, informed investing and voting decisions.

We are adopting, as proposed, non-exclusive exemptions under the Securities Act, proxy rules and tender offer rules that permit communications for an unrestricted length of time without a cooling-off period between the end of communications and filing. Written communications made in reliance on the exemptions must be filed. In response to comments, we have modified the exemptions slightly from those proposed, as discussed below.

One major benefit of permitting earlier communications is that more information will be available generally to all security holders, not simply to a limited audience of analysts and financially sophisticated market participants. Because the new rules do not require oral communications to be reduced to writing and filed, some selective disclosure may continue to occur.[30] Nevertheless, the rules adopted today are designed to reduce selective disclosure by permitting widespread dissemination of information through a variety of media calculated to inform all security holders about the terms, benefits and risks of a planned extraordinary transaction. We believe that parties to business combination transactions generally wish to inform the marketplace at large about their deals, and will use the new rules to accomplish this end. The new regulatory scheme is not intended to be used as a means to substitute selective oral disclosure for written and oral disclosure that becomes public on a widespread basis.[31] Although this release does not impose new requirements on oral communications, we remain extremely troubled by the selective disclosure of material information.[32] The staff is considering broader regulatory approaches to limit or inhibit written and oral selective disclosure by issuers in all contexts, including those addressed in this release. If we decide to pursue these approaches, we will issue a separate release seeking public comment.[33]

The scheme we adopt today provides the maximum amount of flexibility to disclose information to security holders and the markets.[34] This new communications scheme, however, does not change the current requirement that security holders receive a mandated disclosure document before they are asked to make a voting or investment decision (*e.g.*, a prospectus, proxy statement, or tender offer statement setting forth complete and balanced information).[35] Of course, security holders may buy or sell in the market before they receive the mandated disclosure document. That is true under the current regulatory scheme as well as under the new one. Under the new rules, security holders are likely to have information about the transaction at an earlier point in time, and they can choose to act on this information or wait for the complete disclosure document.

While it is possible under the new scheme to announce a proposed transaction long before a mandated disclosure document is filed, we do not believe acquirors will delay the filing of a mandated disclosure document unnecessarily because the longer they wait the greater the risk that market forces will affect the terms of the deal or another potential acquiror will announce a competing transaction. We believe that companies announcing a transaction should, and we encourage them to, file the mandated disclosure document as soon as possible after announcing a proposed transaction.

Our long-held concern regarding communications that could condition the market before dissemination of a mandated disclosure document is mitigated by the continuing requirement to deliver a disclosure document before any voting or investment decision can be made, and the attendant liability for false or misleading statements. Communications made in reliance on the new exemptions would, of course, be subject to section 10(b) liability.[36] We remind persons relying on the exemptions that fraudulent statements in these communications could not be cured by subsequent filings. In light of these considerations, we believe that the benefits conferred on the marketplace by the disclosure of more information on a timely basis outweigh the risks that the information will be incomplete or potentially misleading.

2. Eligibility

Our proposals did not make distinctions based on size and seasoned status. Due to the extraordinary nature of business combination transactions, security holders and the markets need full and timely information regarding those transactions regardless of the size or seasoned status of the companies involved. We recognized the inherent difficulties in selecting the appropriate focus for purposes of applying an eligibility test (*i.e.*, should you look at the status of the acquiror, the target or the combined entity?). All commenters who addressed the issue agreed with our view. Therefore, the exemptions are adopted as proposed, without any eligibility requirements.

We also asked whether the exemptions should be limited to the parties to the transaction or available to others who may be acting on behalf of the parties to the transaction. In particular, we noted that in a third-party stock offer the company to be acquired would not ordinarily be subject to the Securities Act restrictions on communications, but under certain circumstances, it could be viewed as joining with the acquiror in making the offer. In that case, the exemptions would need to extend to additional parties. In addition, we asked whether the parties' affiliates, dealer-managers,

See Rule 14d–2(c) and (d) (17 CFR 240.14d–2(c) and (d)).

[29] The Williams Act was enacted in 1968 as an amendment to the Exchange Act (sections 13(d)–(e) and 14(d)–(f)). The Williams Act regulates tender offers and imposes beneficial ownership reporting requirements. 15 U.S.C. 78m(d)–(e) and 15 U.S.C. 78n(d)–(f).

[30] Our exemptions permitting earlier communications do not in any way alter the liability traditionally imposed on insider trading. *See* Rules 10b–5 and 14e–3 (17 CFR 240.14e–3). Rule 14e–3 applies when a person ''has taken a substantial step or steps to commence, or has commenced, a tender offer,'' so the timing of this rule is not affected by the new regulatory scheme.

[31] The new rules only provide an exemption from section 5 (and comparable restrictions on communications under the proxy and tender offer rules). Oral communications under the new rules, like written communications, will have liability under the applicable regulatory scheme. *See* Part II.B.2 below.

[32] Chairman Levitt has expressed concerns about the selective disclosure of material information to analysts and institutional investors. *See* ''A Question of Integrity: Promoting Investor Confidence by Fighting Insider Trading,'' speech given Feb. 27, 1998, available on our web site (www.sec.gov).

[33] *See* ''Quality Information: The Lifeblood of Our Markets'' speech given by Chairman Levitt on Oct. 18, 1999, available on our web site (www.sec.gov). ''The behind-the-scenes feeding of material non-public information from companies to analysts is a stain on our markets. This selectiveness is a disservice to investors and it undermines the fundamental principle of fairness. In a time when instantaneous and free flowing information is the norm, these sort of whispers are an insult to fair and public disclosure * * *. (T)he Commission is planning to take action where it can. Within the next few months, we will consider proposing rules to close the gap between those in the so-called 'know' and the rest of us in the public.''

[34] We solicited comment on two alternatives to our primary communications proposal that were not favored by commenters and are not being adopted.

[35] The exemptions also apply to communications made after the mandated disclosure document is filed, so long as written communications are filed. They do not, however, alter the disclosure, filing and delivery requirements for the mandated disclosure documents.

[36] 15 U.S.C. 78j(b). The communications permitted under the exemptions adopted would be subject to liability under the particular regulatory scheme (the Securities Act, proxy or tender offer rules) as well as Rule 10b–5 and the other antifraud rules.

and others acting on behalf of the parties to the transaction should be permitted to rely on the exemption. Again, most commenters were consistent in recommending that we expand the exemptions to these persons. While we realize that in many circumstances the exemptions would not be necessary for persons other than the parties to the transaction or the party making the offer, we want to encourage full, complete and continuous communications with security holders. Therefore, we are adopting the exemptions to cover all persons acting on the parties' behalf.

3. Written Communications With Legend Filed on Date of First Use

We are adopting, as proposed, a condition to the communications exemptions that all written communications in connection with or relating to a business combination transaction be filed on or before the date of first use.[37] In addition, all written communications must include a prominent legend advising investors to read the registration, proxy or tender offer statement, as applicable.[38] We believe that a prompt filing requirement is necessary to protect security holders and assure that these communications are available to all investors on a timely basis.[39] In most cases, this information will need to be filed electronically via the EDGAR System, and thus will be rapidly disseminated to the marketplace.[40]

In the Proposing Release, we asked whether parties relying on the exemptions should be permitted to file written communications on a later date (*e.g.*, when the mandated disclosure document is filed or some other date). While several commenters viewed the requirement as reasonable, a few believed it would be burdensome. The latter group of commenters stated that a same-day filing requirement could cause parties to delay the release of information. These commenters believed that communications that would otherwise be made late in the day will be postponed until the materials can be filed on the same day. We believe, however, that in most cases parties to business combination transactions will be able to time their communications so that it is possible to file them on the same day they are made. Also, Rule 13(d) of Regulation S–T permits communications that are made outside of the Commission's business hours to be filed electronically as soon as practicable on the next business day.[41] Further, we have clarified that an immaterial or unintentional delay in filing will not preclude reliance on the Securities Act exemption.[42]

The filing requirement applies to written communications that are made public or are otherwise provided to persons that are not a party to the transaction.[43] As a general matter, this would include, for example, scripts used by parties to the transaction to communicate information to the public and other written material (*e.g.*, slides) relating to the transaction that is shown to investors.[44] In contrast, internal written communications provided solely to parties to the transaction, legal counsel, financial advisors, and similar persons authorized to act on behalf of the parties to the transaction would not need to be filed. Also, as explained in the Proposing Release, business information that is factual in nature and relates solely to ordinary business matters, and not the pending transaction, would not need to be filed. We expect that filing persons will apply traditional legal principles in determining whether a particular written communication is made in connection with or relates to a proposed business combination transaction.[45]

Several commenters criticized the proposed filing requirement because it could result in the filing of duplicative or substantially similar information when similar communications are made over time. In response to this concern, we are clarifying that any republication or redissemination of the same information would not need to be filed again to comply with the exemptions. If, however, information is either added to or changed from the content of an earlier communication, then the revised written communication must be filed.[46]

B. Communications Under the Securities Act

1. Securities Act Exemption and Filing Rules

We are exercising our exemptive authority to create an exemption that will permit more communications with security holders and the markets regarding a planned business combination transaction.[47] We find that free communications relating to business combination transactions are in the public interest and consistent with the protection of investors. Accordingly, we adopt new Rules 165, 166[48] and 425[49] and amend Rules 135 and 145.[50] These new and amended

[37] Written communications include all information disseminated otherwise than orally, including electronic communications and other future applications of changing technology. Videos and CD–ROMs, for example, should be filed on EDGAR by means of a transcript. *See* Rule 304 of Regulation S–T (17 CFR 232.304).

[38] The legend also would advise investors that they can obtain copies of the filed documents for free at the Commission's web site and explain which documents are available for free from the issuer or filing person, as applicable. *See* new Rule 165(c)(1) and revised Rules 14a–12(a)(1)(ii), 13e–4(c), 14d–2(b)(2), and 14d–9(a).

[39] We did not propose, and are not adopting, a requirement to deliver written communications to security holders.

[40] These communications must be filed on EDGAR to the same extent that the related prospectus, proxy statement or tender offer statement must be filed on EDGAR.

[41] 17 CFR 232.13(d). *See* Part II.C.3 below.

[42] *See* Part II.B.2 below.

[43] Oral communications are covered by the exemptions, but they do not need to be reduced to writing or filed. Oral communications, as proposed, will be subject to liability under the applicable regulatory scheme. For example, pre-filing oral communications regarding a proposed offering of securities in connection with a business combination transaction will be subject to section 12(a)(2) liability. *See* Part II.B.2 below.

[44] *Cf.* Rule 14a–6(c) (17 CFR 240.14a–6(c)) and Item 1016(g) of Regulation M–A.

[45] At this time we are not adopting proposed Rules 168 and 169, the exemptions for regularly released forward-looking information and factual business communications from the filing requirements. *See* Part VII.A.1.c.ii.(A) and (B) of the Securities Act Reform Release and Release No. 33–5009 (Oct. 7, 1969) (34 FR 16870). Although we are not adopting these rules, we do not expect parties to file ordinary or routine business communications that refer to the transaction in a non-substantive way.

[46] If the same written communication is redisseminated or contains only minimal changes (*e.g.*, correction of minor typographical errors, an update regarding a contact person, or stylistic changes including a change in the format, type-size, letterhead, addressee, etc.) without any change to the content of the information, the written communication would not need to be refiled. In addition, we do not expect persons to file responses to specific unsolicited inquiries if the responses are not disseminated to others. Of course, if a response to an unsolicited inquiry contained material information not otherwise available to the investing public (*e.g.*, projections), the communication would need to be filed.

[47] Section 28 of the Securities Act (15 U.S.C. 77z–3) gives us authority to, by rule or regulation, conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities or transactions from any provision of this title or any rule or regulation issued under this title to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with protection of investors.

[48] We adopt proposed Securities Act Rules 165, 166 and 167 as new Rules 165(b), 165(a) and 166, respectively. These rules are limited to business combination transactions since the Securities Act Reform Release proposals governing capital-raising transactions are not being adopted at this time.

[49] In the Securities Act Reform Release, we proposed a requirement that all ''free writing'' materials be filed as prospectus supplements in accordance with Rule 425. In this release, we adopt proposed Rule 425(b) and (c) as new Rule 425(a) and (b) and limit the rule to business combination transactions. Proposed paragraph (a) contained several exceptions from the filing requirement. We retain the exceptions that are still applicable in Rule 425(d).

[50] *See* Part II.B.3 below discussing revised Rules 135 and 145 in greater detail.

rules permit parties to communicate freely about a planned business combination transaction before a registration statement is filed, as well as during the waiting period and post-effective periods, so long as their written communications used in connection with or relating to the transaction are filed beginning with the first public announcement [51] and ending with the close of the proposed transaction.[52] As noted in the Proposing Release, these communications are not excluded from the definition of ''offer'' in the Securities Act,[53] as no content restriction is imposed on the communications.[54] Instead, new Rule 165 exempts persons making these communications from sections 5(b)(1) and (c) of the Securities Act.[55]

New Rules 165 and 166 are available only for business combination transactions. New Rule 165 defines a business combination transaction as a transaction specified in Rule 145(a) or an exchange offer. Thus, either the proxy rules or the tender offer rules must be applicable to the transaction. We have added a preliminary note to Rules 165 and 166 to state that the exemption is not available to communications that may technically comply with the rule, but have the primary purpose or effect of conditioning the market for a capital-raising or resale transaction.[56]

2. Liability for Communications

As proposed, both oral and written communications made in reliance on the Securities Act exemption would be offers subject to section 12(a)(2) liability, based on the belief that this level of liability would adequately protect investors without chilling communications.[57] Approximately half the commenters who addressed the issue agreed with the proposed liability standard, while the others believed that this potential level of liability could have a chilling effect on communications.

We are adopting the proposed regulatory scheme. To the extent that these communications constitute offers, they currently would be subject to section 12(a)(2) liability. As a result, we do not believe that the adopted rules alter the current liability levels for these communications.[58] In light of the extensive pre-filing communications that are ongoing in the marketplace now with respect to business combination transactions, we believe that a section 12(a)(2) standard of liability would not significantly chill communications.

Several commenters also indicated that the proposed section 5(c) exemption should not be conditioned on timely filing of all written communications. Commenters were concerned that a failure to timely file a written communication could result in a loss of protection under the exemption, resulting in a section 5 violation that would give security holders a right of rescission. In proposing the filing requirement, we did not intend to provide security holders with an automatic right of rescission if a communication is either filed late or there is an unintentional failure to file. To clarify this issue, we are revising the filing requirement in new Rule 165 to state that an immaterial or unintentional failure to file or delay in filing will not result in a loss of the exemption from section 5(b)(1) or (c), so long as a good faith and reasonable attempt to file the written communication is made and the communication is filed as soon as practicable after discovery of the failure to file.[59]

3. Rules 135 and 145

Currently, Rule 135 provides that disclosure of certain limited information in notice form will not be deemed an ''offer'' for purposes of section 5 of the Securities Act.[60] A Rule 135 notice is typically made upon announcement of a proposed securities offering before a registration statement is filed.[61] Rule 145(b)(1) contains a similar provision regarding the information in a stock merger that will not be deemed a ''prospectus'' or ''offer.'' [62]

We proposed several revisions to Rules 135 and 145 in the Proposing Release and the Securities Act Reform Release. In particular, we proposed moving the substance of Rule 145(b)(1) to Rule 135, as both rules contain similar provisions regarding the

[51] *See* Part II.B.4 below for the definition of public announcement.

[52] *See* Part II.A.3 above discussing the types of written communications that must be filed. Written communications relating to the transaction before the filing of a registration statement are prospectuses that must be filed under Rule 425. *See* new Rule 165(a). After a registration statement is filed (during what is called the ''waiting period''), and after effectiveness of the registration statement, written communications relating to the transaction are prospectuses that must be filed under Rule 425. *See* new Rule 165(b). Communications filed under Rule 425 do not need to be delivered to security holders. This does not, however, change the prospectus delivery requirements for the mandated prospectus that is part of the registration statement, and any supplements either before or after the registration statement is declared effective. These prospectuses and supplements would continue to be delivered to security holders and filed under Rule 424 (17 CFR 230.424) instead of Rule 425.

[53] A communication that contains no more information than that specified in Rule 135 will not be an offer, as is currently the case.

[54] We note, however, that a communication relating to an investment company that is permitted by the new and amended rules generally would have omitted to state a fact necessary in order to make the statements in the communication not materially misleading unless the communication includes the information specified in Rule 34b–1 (17 CFR 270.34b–1) under the Investment Company Act of 1940 (17 U.S.C. 80a–1 *et seq.*)

[55] New Rule 166 provides that communications before the first public announcement of a transaction will not be offers, so long as parties to the transaction take reasonable steps to prevent further distribution or publication until the first public announcement or the registration statement is filed.

[56] For example, the exemption would not be available where a non-reporting issuer conducts an exchange offer primarily for the purposes of giving its investors freely tradable securities and creating a public market in, or manipulating the market for, those securities. Likewise, it would be inappropriate to rely on the exemptions in effecting a merger of a public ''shell'' company to take a private company public. These mergers commonly are used to develop a market for the merged entity's securities, often as part of a scheme to manipulate the market for those securities.

[57] Of course, if a communication contains material information, that information must be disclosed in the registration statement that is declared effective. Therefore, the information ultimately will be subject to section 11 liability (15 U.S.C. 77k) as well.

[58] In some cases, these communications are filed and incorporated by reference into registration statements, and as a result also are subject to section 11 liability.

[59] New Rule 165(e). This provision is similar to the good faith standard in Rule 508(a) of Regulation D (17 CFR 230.508(a)). Although an immaterial or unintentional failure to file or delay in filing is a violation of the filing requirement, it would not render the exemption unavailable. Factors to be considered in determining whether a delay in filing is immaterial or unintentional include: The nature of the information, the length of the delay, and the surrounding circumstances, including whether a *bona fide* effort was made to file timely. If a written communication is made late in the day and the offeror attempts to file it, but experiences difficulty in filing electronically on EDGAR, and files as soon as practicable after business hours or the following business day, the exemption will continue to be available.

[60] 15 U.S.C. 77e. Rule 135 generally permits prospective offerors to issue notices that include the following information: (1) The name of the issuer; (2) the title, amount and basic terms of the securities to be offered, the amount of the offering, if any, by selling security holders, the anticipated time of the offering, and a brief statement of the manner and purpose of the offering, without naming the underwriters; and (3) any statement or legend required by state law. Other limited information also is permitted under the rule for rights offerings, exchange offers and offers to employees of the issuer or an affiliate.

[61] Cash tender offers and cash mergers do not involve the Securities Act, and thus no reliance on Rule 135 is necessary.

[62] Rule 145 is the rule that applies the registration requirements to business combinations involving security holder voting decisions. Rule 145(b)(1) provides that written communications containing only specified information about mergers and similar transactions are not deemed offers or a prospectus. Rule 135(a)(4) contains a similar provision for communications about exchange offers. Rule 145(b)(2), which provides that certain communications subject to the proxy rules are not offers, is being rescinded as proposed.

information that will not be deemed an offer. We are adopting those revisions.[63]

In addition to the changes proposed, we asked whether Rule 135 notices should be filed. Although Rule 135 does not currently require these notices to be filed, in many cases the 135 notice would be the first written communication relating to a proposed business combination transaction. We believe it is important for this information to reach the marketplace promptly and on a widespread basis. Generally, these notices are short documents (*e.g.*, press release or other form of written notice of an intended offer). Currently, the first press release or other written communication announcing a proposed business combination transaction often is filed under cover of Form 8–K.[64] In addition, under the new regulatory scheme these communications would have to be filed under the proxy or tender offer rules, if applicable. As a result, we do not believe that a filing requirement for the first public communication regarding a business combination will impose a significant burden.

We are adopting a filing requirement that encompasses Rule 135 notices. These notices must be filed under new Rule 425 because they are written communications relating to a proposed transaction. Even though we are requiring these notices to be filed, our rules provide that they will not constitute offers and therefore will not have section 12(a)(2) prospectus liability.[65] In addition, subsequent notices or announcements made under Rule 135 that do not contain new or different information are not required to be filed. This approach is consistent with the filing requirement under each of the three regulatory schemes.

4. Public Announcement

Under the terms of the exemptions, written communications must be filed beginning with the first public announcement of the business combination transaction. Today we are adopting a specific definition of ''public announcement'' that encompasses all communications that put the market on notice of a proposed transaction. For purposes of determining when a filing obligation is incurred under the exemptions, ''public announcement'' means any communication by a party to the transaction, or any person authorized to act on a party's behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the transaction.[66] We asked in the Proposing Release whether the term ''public announcement'' should be defined, and if so, how it should be defined. Although the commenters that responded favored a bright line definition, they opposed a broad definition that could potentially create difficulties in determining when a filing obligation is triggered.

We agree that a definition is necessary, but we believe that the definition should be sufficiently broad to cover communications that are reasonably designed to, or have the effect of, putting the markets or the security holders on notice of a proposed transaction. We do not believe the definition should be so narrow that the parties must actually intend to effect a broad dissemination of the information.[67]

1C. Communications Under the Proxy Rules

1. Rule 14a–12 Expanded

We are revising Rule 14a–12,[68] substantially as proposed, to permit both written and oral communications before the filing of a proxy statement so long as all written communications related to the solicitation are filed on the date of first use.[69] This is the same filing requirement adopted for the communications exemption under the Securities Act.[70] This exemption is not limited to business combination transactions, but is available regardless of the subject matter of the solicitation. Oral communications do not need to be reduced to writing and filed. In revising Rule 14a–12, we retain substantially all the proposed conditions to reliance on the exemption. These conditions are that no form of proxy is furnished until a proxy statement is delivered, the obligation to disclose participant information, and the requirement to file all written communications with a prominent legend advising security holders to read the proxy statement.

As a result of these changes to Rule 14a–12, management can communicate more freely with security holders about significant corporate events, including a proposed merger or acquisition, or other significant corporate governance matters that may require a security holder vote. Likewise, security holders are able to communicate more freely with one another. The revised rule does not, however, expand a company's or security holder's ability to secure promises to vote a certain way before a proxy statement is provided.[71] The expansion of Rule 14a–12 to non-contested matters is premised on the same rationale for increasing communications related to business combination transactions under the Securities Act. We recognize the many recent developments in technology that have enabled companies to communicate more frequently with security holders at a significantly reduced cost. In addition, security holders and the markets are demanding more information from public companies about new developments and proposed transactions. In light of the rapid pace of change in the securities markets and developments in technology, we believe the time has come to update the proxy rules to permit security holder communications to flow more freely and to facilitate a more informed security holder base.

We believe that the requirement to file all written communications, the condition that no proxy or form of proxy be furnished to security holders before

[63] Changes to Rules 135 and 145 in the Securities Act Reform Release that were specifically tailored to capital-raising transactions are not being adopted at this time.

[64] 17 CFR 249.308.

[65] New Rule 425(b).

[66] New Rule 165(f)(3). A similar definition of ''public announcement'' is included in revised Rules 13e–4(c) and 14d–2(b).

[67] Of course, if the regulations of the self-regulatory organization on which the securities are listed require a public announcement of the transaction, that would constitute a public announcement for purposes of the communications exemptions.

[68] The expansion of Rule 14a–12 to cover all solicitations eliminates the need for many of the provisions in Rule 14a–11. As a result, we are rescinding Rule 14a–11 and moving paragraphs (d) and (f) of Rule 14a–11 to new Rule 14a–12. These two provisions apply if soliciting persons refer to information in annual reports or use reprints or reproductions of previously published materials in their soliciting materials. Revised Rule 14a–12 makes it clear that these provisions are limited to election contests.

[69] Written communications by soliciting parties before a proxy statement is furnished to security holders must be filed on the date of first use and must provide information regarding the participants and their interests or include a legend advising security holders where they can obtain this information. *See* revised Rule 14a–12(a)(1). Once a proxy statement is furnished to security holders, any additional soliciting materials used must be filed on the date of first use but need not include participant information or a legend advising where to obtain that information. *See* revised Rule 14a–6(b).

[70] Communications under revised Rule 14a–12 generally will be filed under cover of the proxy statement cover sheet, with the Rule 14a–12 box checked. If a transaction is subject to the Securities Act in addition to one or more of the other regulatory schemes (*i.e.*, the proxy or tender offer rules), the written communications only need to be filed under Securities Act Rule 425. Although the materials are only filed under the Securities Act, they also would be deemed filed and take liability under the proxy or tender offer rules, as applicable.

[71] Similarly, the revised rule does not change a security holder's obligation under section 13(d) of the Exchange Act (15 U.S.C. 78m(d)) to file or amend a Schedule 13D (17 CFR 240.13d–101) when a voting arrangement, agreement or understanding is reached with respect to a company's securities.

a written proxy statement is delivered, and the requirement to include a legend on all written communications advising security holders to read the proxy statement and where to find participant information should be sufficient to protect against misleading solicitations. Together with the antifraud provisions of Rule 14a–9,[72] these requirements should maintain the integrity of the solicitation process and adequacy of information disseminated to security holders.[73] In addition to these safeguards, security holders will receive a complete proxy statement before they can vote.

In the Proposing Release we solicited comment on whether a federally mandated proxy solicitation period would be appropriate for mergers and similar transactions in light of the free communications permitted under the exemption. We noted that security holders may need a minimum amount of time (*e.g.*, 20 business days), similar to that in tender offers, to digest the free communications together with the information in the proxy statement. Most commenters that responded to this question were opposed to a minimum solicitation period. Because this is an area that traditionally has been governed by state corporate law, and in light of the improved ability of security holders to access information through electronic means, we believe that the existing solicitation periods are adequate. We are not adopting a minimum solicitation period at this time.

We also asked whether the proxy rules should be amended to permit direct delivery of proxy statements and other soliciting materials to non-objecting beneficial owners to facilitate more timely and informed voting decisions. We were concerned that security holders holding securities in street name may not receive materials from banks, broker-dealers, or other nominees in a timely fashion. While we believe that direct delivery of proxy materials to non-objecting beneficial owners may have benefits for security holders, at this time we reserve this concept for a future rulemaking project.

[72] 17 CFR 240.14a–9.

[73] We note that a communication relating to an investment company that is permitted by Rule 14a–12 generally would have omitted to state a fact necessary in order to make the statements in the communication not materially misleading unless the communication includes the information specified in Rule 34b–1 under the Investment Company Act of 1940.

a. The ''As Soon as Practicable'' Requirement

Many of the commenters urged us to revise the current and proposed condition in Rule 14a–12 that a written proxy statement meeting the requirements of Regulation 14A be sent or given to solicited security holders at the earliest practicable date. These commenters pointed out that, in practice, when the purpose of a solicitation becomes moot or the solicitation is otherwise discontinued, persons making pre-filing communications in reliance on the rule generally do not, and should not be required to, send security holders a written proxy statement. We recognize that literal adherence to the delivery requirement in Rule 14a–12 in circumstances where a solicitation is canceled prematurely may not provide a significant benefit to security holders, but could result in unnecessary costs to the soliciting parties and potentially mislead security holders into believing that the solicitation is ongoing.

In view of these concerns, current practice, and the overall approach to communications adopted today, we are eliminating the current ''as soon as practicable'' requirement. As revised, Rule 14a–12 requires that a definitive proxy statement be furnished to security holders when a form of proxy is either given to or requested from security holders.[74] When proxies are first requested from security holders the mandated disclosure document must be delivered to them so they can make informed voting decisions. This approach is consistent with the delivery requirements adopted under the other regulatory schemes.[75] As a result, parties relying on the rule are not obligated to furnish a written proxy statement if the solicitation is discontinued for any reason. If a solicitation is discontinued, we believe it would be appropriate for the soliciting persons to inform previously solicited security holders that the solicitation is over and provide a brief explanation of why it is being canceled.

b. Participant Information

We are modifying the current requirement to disclose participant information in proxy materials. Instead, the revised rule requires a prominent legend on written communications advising security holders where they can obtain a detailed list of the names, affiliations and interests of participants in the solicitation.[76] Of course, the soliciting materials could include the participant information in full, as currently required, instead of a legend.

The legend may refer to either a previously filed communication that contains the participant information, or a separate statement that contains the participant information and is filed as Rule 14a–12 material.[77] We are not eliminating the requirement to make participant information available to security holders. Rather, we are requiring disclosure of this information once instead of in every communication.

c. ''Test the Waters''

In addition to our proposal to expand Rule 14a–12, we solicited comment on adopting a broader ''test the waters'' approach to proxy solicitations. Under this approach, parties could engage in soliciting activities without filing proxy material so long as no form of proxy is requested or sent. Test the waters would permit both written and oral proxy solicitations before the filing of a proxy statement. Unlike the proposed expansion of Rule 14a–12, however, test the waters would not require written communications to be filed on first use.

Many commenters favored our concept of test the waters, but a few commenters expressed concern that it could result in unregulated and secret solicitations. At this time, we believe that our expansion of Rule 14a–12, as adopted, should provide sufficient flexibility to companies to communicate more frequently with security holders on a timely basis. After we gain some experience with communications under the expanded Rule 14a–12, depending on its effects, we may consider moving toward a test the waters approach in future rulemaking.

2. Limited Confidential Treatment of Merger Proxy Materials

Today, a proxy statement relating to a merger, consolidation, acquisition or similar matter may be filed confidentially with the Commission.[78] If the staff decides to review the proxy statement it may issue comments to the

[74] Revised Rule 14a–12(a)(2).

[75] For example, in Part II.D.1 below, we are revising the definition of commencement in the tender offer rules so that a complete tender offer statement need not be filed and disseminated until the means to tender are provided to security holders.

[76] In response to our question asking whether to retain the requirement to disclose the names of all participants and their interests, several commenters expressed the view that the requirement has resulted in lengthy and boilerplate disclosure that can be costly for participants without providing any significant benefit for security holders.

[77] The information must be filed under cover of Schedule 14A with the appropriate box on the cover page checked to designate that the material is filed under Rule 14a–12.

[78] Rule 14a–6(e)(2) (17 CFR 240.14a–6(e)(2)).

filing parties. When all comments are resolved, a public filing is made either a definitive proxy statement or, if securities are being offered, a registration statement that wraps around the proxy statement. We proposed to eliminate the provision for confidential treatment. We note the practice of disclosing extensive deal-related information to the market before a registration statement or proxy statement is filed publicly. We do not believe that material public information regarding a merger should receive confidential treatment.

Many commenters opposed eliminating confidential treatment due to a concern for increased liability. These commenters pointed out that they may be required to make revisions to their proxy statement disclosure in response to staff comment that would be subject to unnecessary public scrutiny. It is not clear, however, why the proxy statement situation warrants different treatment from exchange offers and other public filings that are routinely amended in response to staff comment. One commenter suggested that we retain confidential treatment when the parties to a transaction do not publicly disclose information about the transaction outside the proxy statement.

We have decided to retain confidential treatment under limited circumstances. Where the parties to a merger or other business combination transaction limit their public communications to those specified in Rule 135,[79] confidential treatment will continue to be available for the proxy materials. If, however, the parties elect to publicly disclose, either orally or in writing, information relating to the transaction that goes beyond Rule 135, confidential treatment will not be available.[80]

As a result, the parties to the transaction may choose either to forgo confidential treatment and communicate publicly about the deal in reliance on one of the new exemptions, or invoke confidential treatment and refrain from any publicity outside the proxy statement, except for the basic information permitted by Rule 135. We will use Rule 135 as a bright line in determining whether parties to a transaction have publicly disclosed sufficient information to the point that confidential treatment of the proxy materials is no longer warranted. This bright line will be applied whether or not the transaction is subject to the Securities Act and Rule 135. If a preliminary proxy statement is filed confidentially, but information beyond Rule 135 is subsequently disclosed, confidential treatment will no longer be available and all proxy materials related to the transaction must be filed publicly.

Two commenters recommended that we institute a procedure that would allow parties to seek an expedited, confidential pre-filing review of pro forma financial statements and other accounting matters if confidential treatment is eliminated. Currently, parties are permitted to, and frequently do, initiate pre-filing conferences with our accounting staff to resolve sensitive accounting issues before the filing a merger proxy statement. Our accounting staff will continue to be available for pre-filing conferences with filing parties.

Several commenters also indicated that if we decided to eliminate confidential treatment, we should not require that all exhibits be filed with the first public filing of the proxy statement. These commenters noted that in many cases some exhibits may not exist or are not in final form when the proxy statement is first filed. The limitation on confidential treatment adopted today would not require that all exhibits be filed with the initial filing of a proxy statement. As is the case today, a proxy statement may be filed first, without any exhibits. Schedule 14A does not have any exhibit requirements. Exhibits could be filed at a later date when the registration statement is wrapped around the proxy statement. If all exhibits are not final or complete at the time the registration statement is first filed, then those exhibits could be filed in an amendment to the combined proxy statement/registration statement.

3. Timing of Filings

Rule 14a–6(b) requires that definitive proxy materials be ''filed with, or mailed for filing to, the Commission not later than the date such material is first sent or given to security holders.'' [81] Similar language appears in several other proxy and information statement filing rules.[82] The mailing alternative, however, is no longer an option because companies must file electronically.[83] Therefore, we are amending the proxy and information statement filing rules as proposed to require filing no later than the date the materials are first sent or given to security holders.[84] This change is consistent with the filing requirements imposed under the exemptions adopted today.

We continue to believe that definitive materials should be available to security holders, the market and the staff as promptly as possible. EDGAR and other electronic sources of information, including the Internet, increasingly are relied upon by the investment community for information regarding public companies. When there is a lag between the time information is first disseminated and the time it is filed, persons relying on our filings for information on public companies are placed at a disadvantage.

D. Communications Under the Tender Offer Rules

1. ''Commencement,'' Communications, and Filing Requirements

Currently, the tender offer rules restrict a third-party bidder's communications regarding a proposed tender offer. The restrictions on communications stem from the concept of ''commencement,'' the five business day rule for cash tender offers,[85] and the requirement that a registration statement be filed promptly for registered exchange offers.[86] A target's

[79] Rule 135 generally exempts from the definition of ''offer'' any notice that states no more than specific limited information; *see* n.60 above. The Rule 135 limit on communications would apply to all parties to the transaction and anyone acting on their behalf in communicating to the public.

[80] Revised Rules 14a–6(e)(2) and 14c–5(c)(2). Confidential treatment will continue to be unavailable for going-private or roll-up transactions.

[81] 17 CFR 240.14a–6(b).

[82] *See* Rules 14a–4(f) (17 CFR 240.14a–4(f)), 14a–6(c) (17 CFR 240.14a–6(c)), 14a–11(c) (17 CFR 240.14a–11(c)), 14a–12(b) (17 CFR 240.14a–12(b)) and 14c–5(b) (17 CFR 240.14c–5(b)).

[83] *See* Rule 101(a)(1)(iii) of Regulation S–T (17 CFR 232.101(a)(1)(iii)). Paper filings are permitted only if a hardship exemption is available. Foreign private issuers that are not required to file electronically are exempt from the proxy and information statement requirements. Exchange Act Rule 3a–12–3 (17 CFR 240.3a–12–3).

[84] We also are adopting the proposed clarification to Rule 13(d) of Regulation S–T. The revised rule makes it clear that if a communication takes place after our official business hours (*i.e.,* 5:30 p.m. Eastern time) or on a non-business day, the communication must be filed electronically on EDGAR the following business day. This revision supersedes the interpretive position expressed by the Division of Corporation Finance in *Henry Lesser, Esq.* (November 28, 1995). This provision applies to all our rules that require filing on the same date that information is furnished, including the Securities Act, proxy and tender offer rules.

[85] Currently, an offer is deemed to ''commence'' on public announcement of the following limited information: the identity of the bidder, the identity of the subject company, the amount and class of securities sought and the price or range of prices offered, unless a tender offer statement is filed within five business days of the announcement and disseminated to security holders or the bidder makes a subsequent public announcement withdrawing the offer. *See* Rule 14d–2(b) and (c) (17 CFR 240.14d–2(b) and (c)). We refer to this as the ''five business day rule.''

[86] Although third-party bidders offering cash or exempt securities must file a tender offer statement within five business days, bidders offering registered securities are not bound by the same rule. They must file a registration statement relating to the securities offered ''promptly'' after announcing the limited information specified in Rule 135. *See* Rule 14d–2(e) 17 CFR 240.14d–2(e)).

communications regarding a tender offer are similarly restricted.[87] To harmonize the treatment of communications regarding business combination transactions under the three regulatory schemes, and to promote the dissemination of information to all security holders on a more timely basis, we are modifying the definition of ''commencement'' and eliminating the five business day rule and the requirement to promptly file a registration statement after announcing a registered exchange offer.[88]

In place of these rules, we are adopting a filing requirement for all written communications that relate to a tender offer beginning with and including the first public announcement of the transaction.[89] As with communications subject to the Securities Act and the proxy rules, written communications must be filed on the date that the communication is made.[90] In addition, written communications must contain a legend advising security holders to read the full tender offer or recommendation statement when it becomes available.

Under the revised rules, ''commencement'' is when the bidder first publishes, sends or gives security holders the means to tender securities in the offer.[91] We believe that security holders need the information required by the tender offer rules when they are either asked or able to tender their securities in an offer.[92]

To minimize the potential for dissemination of false offers into the marketplace in the absence of the five business day rule, we are adopting new Rule 14e–8. As proposed, this rule prohibits bidders from announcing an offer: without an intent to commence the offer within a reasonable time and complete the offer; with the intent to manipulate the price of the bidder or the target's securities; or without a reasonable belief that the person will have the means to purchase the securities sought. We believe that a specific rule prohibiting such conduct is appropriate. This antifraud rule is intended as a means to prevent fraudulent and misleading communications regarding proposed offers under the new communications scheme, in addition to the existing antifraud provisions.

Two commenters expressed concern that the rule could create new grounds for frivolous litigation, while others supported the proposal. Of course, if a target or other party decided to litigate under this new rule, the plaintiff would have the burden of showing that the bidder either did not have an intent to commence and complete the offer or did not reasonably believe it had the ability to purchase the securities. Although not required, a commitment letter or other evidence of financing ability (*e.g.,* funds on hand or an existing credit facility) would in most cases be adequate to satisfy the rule's requirement that the bidder have a reasonable belief that it can purchase the securities sought.[93]

Although we noted in the Proposing Release that eliminating the current restrictions could have potentially destabilizing effects on the securities markets,[94] it is not clear that the market effects differ greatly from those caused by merger announcements, which are not subject to the same constraints. Based on our experience with tender offers[95] and the factors discussed above influencing our decision to permit more communications regarding business combination transactions, we believe that the availability of more information on a timely basis will better assist security holders in making well informed individual investment decisions when confronted with news of a pending or proposed business combination. Accordingly, we are adopting the changes to the tender offer communications provisions substantially as proposed.

In reaching this conclusion, we note that communications regarding issuer tender offers are not similarly restrained.[96] Also, it appears that some bidders do not use the term ''tender offer'' in their public announcement of a proposed business combination transaction in an attempt to avoid triggering application of Rule 14d–2. Furthermore, security holders today, upon hearing news of a proposed tender offer for their securities (either directly by the formal notice published by the bidder or indirectly through rumors in the marketplace), must decide whether to: (i) Retain their securities until a tender offer statement is filed and disseminated so they can tender into the offer; or (ii) sell into the market at prevailing prices based on the limited information available.[97] Under the new approach, more time may elapse between announcement and the filing of the tender offer statement, but more information also may be available during that period. We do not believe there is a sufficiently compelling basis

[87] If the target company comments on the merits of an offer or otherwise makes a recommendation with respect to an offer, it may be required to file a disclosure document. *See* Rule 14d–9(a) (17 CFR 240.14d–9(a)).

[88] Revised Rule 14d–2(c). Rule 13e–4 has no comparable communications restrictions, but we are adopting changes to this rule to conform it to the new communications scheme.

[89] The public announcement also triggers the Rule 14e–5 restrictions on purchasing outside the tender offer, as discussed in Part II.G.5 below.

[90] Revised Rule 14d–2(b)(2). These communications will be filed under cover of Schedule TO or 14D–9, as appropriate. Both schedules have a box to check indicating that these are pre-commencement communications. No signature is required. *See* General Instruction D to Schedule TO and General Instruction B to Schedule 14D–9. If the transaction also is subject to the Securities Act, then communications must be filed under Rule 425 only, and those communications will be deemed filed under the tender offer rules.

[91] Generally, this will occur if the bidder provides security holders with a transmittal form to use to tender securities or if the bidder publishes an advertisement advising security holders how to tender in the offer or to contact the bidder for more information on how to tender securities in the offer. This also would occur if by some other means persons are able to tender securities to the bidder. At that time, the bidder must file and disseminate the tender offer schedule, and the required 20 business day period that all tender offers must remain open will begin to run. Revised Rule 14d–2(a).

[92] Although we are changing how a tender offer is commenced for purposes of the tender offer rules, we are not defining the term ''tender offer'' or changing our position on what activities may be deemed to constitute a tender offer. The tender offer rules still may apply to activities that function as unconventional tender offers. We maintain our position that the term ''tender offer'' should be interpreted flexibly in accordance with the intended purposes of sections 14(d) and 14(e). A determination of whether a particular transaction or series of transactions constitutes a tender offer will, of course, depend on the particular facts and circumstances and is not limited to ''conventional'' tender offers. *See* Release No. 34–15548 (Feb. 5, 1979) (44 FR 9956).

[93] This is not intended to change how bidders legitimately finance their offers today. Bidders may have sufficient funds on hand to complete the offer or they may arrange to borrow funds from an outside source. In most cases when the bidder expects to obtain funds from another source, financing is arranged in advance or immediately after announcing an offer. Bidders typically get a commitment letter from their lenders.

[94] *See* Part II.B.7.a of the Proposing Release and Release No. 34–15548 (February 5, 1979) (44 FR 9956).

[95] We have not observed any disruptive or destabilizing effects in cases where precommencement publicity is currently permitted, such as where Rule 135 information is disclosed regarding a proposed exchange offer more than five business days before a registration statement is filed.

[96] Issuer tender offers are subject to Rule 13e–4, which does not contain a comparable provision to the five business day rule or a requirement to file a registration statement promptly after announcing limited information about a registered exchange offer.

[97] Bidders often wait until the fifth business day following public announcement before filing a full tender offer statement in accordance with Rule 14d–3(a) (17 CFR 14d–3(a)). In addition, it can take several days before mailed copies of the tender offer statement are received by beneficial owners. Bidders offering registered securities must promptly file the registration statement after announcement, which in most cases is more than five business days after the announcement.

to continue treating third-party cash offers, exchange offers, issuer tender offers and mergers differently.[98]

Most of the commenters that addressed the proposals favored eliminating the five business days rule and the requirement to promptly file a registration statement after announcement of an exchange offer, as well as the revised definition of ''commencement.'' A few commenters, however, expressed concern that elimination of the five business day rule could revive certain inconsistent state law requirements. We do not believe that elimination of the five business day rule will result in a resurgence of inconsistent state anti-takeover statutes that impose disclosure or other requirements incompatible with our new regulatory scheme.

We have long defined when a tender offer commences. This definition served several purposes, including implementing a uniform nationwide timetable for the tender offer process, regulating the flow of information by identifying the date by which required disclosure filings must be made with the Commission, and helping to create a level playing field between bidders and targets. Under well-established principles, any state law that conflicted with this provision was preempted.

The new definition continues to serve these sorts of purposes—it establishes a uniform time at which a tender offer is deemed to commence, it continues to balance the rights and obligations of bidders and targets, and it facilitates the free flow of information from both bidders and targets before that date (subject to the antifraud provisions), based on our judgment that this flow of information is in the best interests of the holders of securities. The elimination of the five business day rule and the other changes in the rule are intended to provide security holders with the broadest possible disclosure of information at the earliest date possible.

We believe that courts would hold that any state law that conflicted with the new rule by attempting to establish a different commencement date or otherwise frustrating operation of the rule would be preempted.[99] For instance, we believe that any state provision that made it impossible to comply with both state and federal requirements or that created obstacles to the accomplishment and execution of the full purposes and objectives of the new rule would continue to be preempted.[100]

Security holders ultimately have the choice to sell into the market based on information disclosed early or wait until a complete, mandated disclosure document is sent to them before making an investment decision. The ability of security holders to sell into the market before a complete disclosure document is filed and disseminated is no different from their current position between the time a transaction is announced and the time a mandated disclosure document is filed and disseminated. However, we believe that liberalizing early communications will better serve investors and the markets by providing them with more information at an earlier date. The bidder continues to have the flexibility to commence promptly after the first public announcement. We encourage bidders to commence their offers as soon as they are able to do so, since security holders and other market participants will benefit from the complete information in the mandated tender offer materials. To the extent, however, that there are delays between announcement and commencement, we believe that investors will benefit from the free flow of information provided by the new regulatory scheme. Therefore, we are changing the current regulatory scheme, and is doing so we are clearly expressing our intent that these new rules serve, as an integrated whole, to regulate the various communications that persons may make regarding a potential or proposed business combination transaction.

Two commenters favored retaining the five business day rule for hostile offers, but eliminating it for negotiated transactions. We believe, however, that applying the rule only to hostile offers could present problems when the same target is the subject of both a negotiated transaction and a hostile offer, or when a negotiated transaction becomes hostile as a result of changed circumstances or another offer. Further, in light of the communications scheme we adopt today, it does not appear that security holders' best interests would be served by permitting expanded communications only with respect to negotiated transactions.

One commenter believed that the five business day rule provides investors and the markets with a degree of certainty regarding proposed offers and results in the dissemination of better information in a relatively short time. We believe that our requirements to file all written communications relating to a proposed transaction on first use will result in more information on a timely basis. As noted above, we do not believe bidders will have an incentive to unnecessarily delay commencing their offers because of the risk that market forces may affect the terms of the offer or a competing bidder will emerge.

Under these new and revised rules, bidders and targets alike have an increased ability to communicate with security holders along with the requirement to file all written communications related to an offer. Under the new scheme, the target must file all written communications relating to the transaction on the date the communication is made.[101] Targets need not file a formal recommendation statement until after the offer is formally commenced and a recommendation is made. The target remains obligated, however, to take a position with respect to the offer no later than 10 business days after the offer commences under Rule 14d–2.[102] If the target makes a recommendation after commencement, but before the tenth business day, then it must file a recommendation/solicitation statement on Schedule 14D–9 on or before the time the recommendation is first made.

These rules apply to issuer and third-party tender offers alike. In addition, the new rules make no distinction based on the form of consideration offered to security holders (*e.g.,* cash or stock). We do not believe that there is sufficient justification to treat tender offer communications differently based on either the nature of the bidder or the consideration offered. Security holders ultimately face the same investment decision—whether or not to tender in the offer.

2. Dissemination Requirements

We also reviewed the various methods to commence a tender offer in

[98] All tender offers must remain open for at least 20 business days. See Rule 14e–1(a) (17 CFR 240.14e–1(a)). If security holders are willing to wait to receive the tender offer statement containing the required information, they can consider the disclosure document in light of all earlier communications relating to the transactions before making an investment decision with respect to the offer. We have no reason to believe that the current minimum time period for tender offers is inadequate.

[99] *See Dynamics Corp. of America* v. *CTS Corp.,* 481 U.S. 69, 79 (1987).

[100] *See, e.g., Barnett Bank of Marion County* versus *Nelson,* 517 U.S. 25 (1996) (summarizing preemption principles); *see also Fidelity Fed. Sav. & Loan Assoc.* versus *de la Cuesta,* 458 U.S. 141, 154 (1982).

[101] Revised Rule 14d–9. These communications must include a legend similar to the one required on the bidder's pre-commencement communications, advising security holders to read the complete recommendation when it is available. Although we did not propose such a legend, we solicited comment on it, and the commenters who addressed the issue supported a legend requirement.

[102] *See* Rule 14e–2(a) (17 CFR 240.14e–2(a)).

the Proposing Release.[103] In reviewing these methods, we noted that long form publication [104] is rarely used by bidders due to the cost associated with publishing extensive information about the offer in a newspaper.[105] We proposed to eliminate long form publication.

Several commenters agreed that long form publication is rarely used, but urged us to retain the method, citing the lack of any abuse under the rule. In addition, these commenters noted that, in the future, long form publication may become a viable means of disseminating an offer using the Internet or another electronic delivery system. At this time, we do not believe that technology has developed to the point where bidders can rely solely on electronic media to disseminate information about a tender offer to security holders. In particular, posting the information on a web site alone would not be adequate dissemination.[106] Nevertheless, in response to commenters' requests that we retain long form publication as a means of commencement, we have decided not to eliminate it.

We solicited comment on whether the rules should continue to permit an offer to be commenced and disseminated by summary advertisement alone.[107] Currently, bidders that rely on the summary advertisement method to disseminate an offer tend also to mail their offering documents to security holders using a security holder list under Rule 14d–5. We asked whether bidders should always be required to use security holder lists when disseminating an offer. Two commenters favored retaining summary publication without the use of security holder lists. Both cited the lack of any abuse with the rule and the possibility that its elimination could force bidders to tip their hand when requesting a security holder list from the target in hostile transactions. Accordingly, we are not changing this aspect of the summary advertisement rule.[108] However, in keeping with the expansion of permissible communications, we are eliminating, as proposed, the current restriction on the information that may be included in a summary advertisement.[109]

Currently, bidders must hand deliver a copy of their tender offer statement and any additional tender offer materials to the target company as well as any other bidder that has made an offer for the same class of securities.[110] We proposed a similar delivery requirement for the first written communication disclosing a proposed offer. Under the new communications scheme for tender offers, bidders are able to disclose information about a proposed offer without commencing the offer.[111] In light of the many different communications media available to bidders, we believe targets need a reliable way to learn about proposed offers for their securities so they can respond in a timely manner. Therefore, we are adopting a requirement that the bidder deliver to the target and any other bidder the first written communication relating to the transaction that is filed, or required to be filed, with the Commission.[112] This material must be delivered on the date of the communication.[113]

E. Exchange Offers May Commence On Filing

1. Early Commencement

We are adopting the early commencement provision substantially as proposed, but extended to cover issuer exchange offers. Currently, registered exchange offers may not commence until the related registration statement becomes effective.[114] As we noted in the Proposing Release, this results in cash and stock tender offers being treated differently. Cash tender offers have a distinct timing advantage over stock tender offers because cash offers can commence as soon as a tender offer statement is filed and disseminated.[115] This change should minimize this regulatory disparity by permitting stock tender offers to commence as early as the date the related registration statement is first filed.

Almost all of the commenters that addressed early commencement indicated that it was a step in the right direction, but they believed more was needed to fully balance the regulation of cash and stock offers. We recognized in the Proposing Release that early commencement alone may not be sufficient to level the playing field between cash and stock tender offers because bidders would not be able to purchase shares tendered in the offer until after the related registration statement is effective. Accordingly, cash offers could close earlier than stock tender offers due to possible staff review and comment on the registration statement.

We solicited comment on whether there are other changes (*e.g.*, expedited staff review, automatic effectiveness on filing or effectiveness within a specified time after filing), that might further reduce the disparity in regulatory treatment. We also asked whether

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[103] *See* Part II.B.7.b of the Proposing Release.

[104] Rule 14d–2(a)(1) (17 CFR 240.14d–2(a)(2)).

[105] A bidder must publish the information specified in Rule 14d–6(e)(1) (17 CFR 240.14d–6(e)(1)).

[106] Not all security holders have access to the Internet. Even those that do have access would not have notice that a tender offer for their company's securities was posted on a web site. All commenters who addressed the question opposed electronic dissemination as the sole means to disseminate an offer, noting that there are no electronic sources of information as commonly available and widely followed as newspapers. Of course, it is permissible to post tender offer materials on a web site in addition to using other methods of dissemination. Electronic media also may be used to satisfy requirements to deliver tender offer material in accordance with our guidelines for electronic delivery. *See* Release No. 33–7233 (October 6, 1995) (60 FR 53458). For example, a summary advertisement for a tender offer could contain a consent form for security holders to indicate their willingness to receive the complete tender offer materials by means of a specified electronic medium.

[107] Rule 14d–6(a)(2) (17 CFR 240.14d–6(a)(2)).

[108] Similarly, we are retaining the current requirement that bidders using stockholder lists also publish summary advertisements.

[109] We are amending Rule 14d–6(a)(2) to delete the language limiting the information that can appear in a summary advertisement. We are retaining the prohibition against including a transmittal form with the summary advertisement. A summary advertisement may (and must, if it is designed to commence the offer) include the means to tender, *e.g.*, a telephone number to call to obtain the complete tender offer materials, including the transmittal form.

[110] Rule 14d–3(a)(2). The current rule also requires telephonic notice and mailing of tender offer material to any securities exchange or the NASD on which the securities are listed or traded. We are not extending this delivery requirement to pre-commencement communications because the exchanges and the NASD are relying less on paper filings and more on electronic databases to obtain EDGAR filings.

[111] Communications regarding offers can be made without a summary advertisement of the offer appearing in newspapers.

[112] As proposed, this requirement would have been triggered by the first communication setting forth specified information. We believe, however, that it will be simpler for bidders to know that this obligation will attach at the same time the first pre-commencement communication is filed. Once target companies and other bidders receive notice of the transaction, they can monitor the Commission's filings for subsequent pre-commencement materials.

[113] Revised Rule 14d–2(b)(2). Instead of hand delivery, the rule only requires ''delivery,'' so the bidder may use any other means of delivery that is equally prompt and equally likely to receive the attention of the target company (*e.g.*, an e-mail to the corporate secretary, chief executive officer and other persons of similar authority at the target company, where the target company uses these e-mail addresses for public communications). We have similarly modified the bidder's current obligation to hand deliver a copy of the mandated disclosure document. *See* revised Rule 14d–3(a)(2).

[114] *See* Rule 14d–2(a)(4). Commencement occurs when definitive copies of the prospectus/tender offer material are first published, sent or given to security holders.

[115] As a result, the 20 business day period that a tender offer must remain open typically begins to run earlier for cash offers than stock offers. See Rule 14e–1(a).

expedited staff review would minimize the regulatory differences.

Commenters had mixed views. Some commenters favored automatic effectiveness or effectiveness shortly after filing, while others believed the potential for post-effective staff review and comment would discourage bidders from offering securities as consideration in a tender offer.[116] Most commenters, however, were in agreement that expedited staff review is essential to balancing the regulatory treatment of the two types of offers. Due to the risks associated with automatic effectiveness and effectiveness shortly after filing (before the staff has had an adequate opportunity to review the disclosure), we believe these measures would not be in security holders' best interests, especially in the business combination context where the disclosure and accounting issues can be particularly complex. We are, however, committed to expediting staff review of exchange offers so that they may compete more effectively with cash tender offers.

As proposed, early commencement was limited to third-party offers. We solicited comment, however, on whether early commencement would provide any benefits to issuers making exchange offers for their own securities. Several of the commenters believed that issuers should have the same ability to commence an exchange offer upon filing.[117] We agree that there is no reason to exclude issuer exchange offers from early commencement, and therefore, we have decided to treat third-party and issuer exchange offers alike under the new rule.

We also asked whether there should be a proxy analogue to early commencement so that parties to a business combination transaction involving a voting decision would be able to furnish proxy cards with preliminary proxy materials. Currently, proxy cards may only accompany the definitive proxy statement/prospectus.[118] A proxy analogue would further balance the regulatory treatment of mergers and tender offers.

We are not adopting a proxy analogue to early commencement at this time. We note that all tender offers must remain open for at least 20 business days.[119] Currently, the minimum proxy solicitation period is dictated by applicable state corporate law requirements.[120] A proxy solicitation period, accordingly, could be less than 20 business days. Further, under the new rules adopted today, we are specifying the appropriate time periods necessary for dissemination of a prospectus supplement when there are material changes to the information previously disseminated. The proxy rules do not have similar provisions. Since the proxy solicitation area has traditionally been governed by state law, and because we are not adopting a federally mandated proxy solicitation period,[121] we are not adopting an analogue to early commencement that would permit the sending of proxy cards along with preliminary proxy materials. We may consider extending the concept to the solicitation of proxies once we have sufficient experience with early commencement of exchange offers. Any proxy analogue to early commencement would, of course, require the establishment of a uniform proxy solicitation period and well-defined time periods for the dissemination and receipt of a supplement containing all material changes from the preliminary proxy statement previously sent or given to security holders.[122]

Under the new rules,[123] to commence an exchange offer early (before effectiveness of a registration statement), a bidder must file a registration statement relating to the securities offered and include in the preliminary prospectus all information, including pricing information,[124] necessary for investors to make an informed investment decision.[125] Information may not be omitted under Rule 430 or Rule 430A under the Securities Act.[126] Bidders also must disseminate the prospectus and related letter of transmittal to all security holders and file a tender offer statement with us before the exchange offer can commence.[127]

Early commencement is at the option of the bidder. Exchange offers can commence as early as the filing of a registration statement, or on a later date selected by the bidder up to the date of effectiveness.[128] If a bidder does not commence its exchange offer before effectiveness of the related registration statement, then the exchange offer would need to commence on or shortly after effectiveness, as is the case today.

As proposed, we are adopting new Rule 162 to permit the tender of securities into an exchange offer before a registration statement is effective.[129] New Rule 162(a) exempts the tender of securities from section 5(a) of the Securities Act.[130] Security holders may

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[116] The latter group was primarily concerned that staff comment could necessitate the dissemination of a post-effective amendment.

[117] These commenters also urged us to extend early commencement to going-private transactions as well. We do not believe going-private transactions warrant early commencement, especially in light of the numerous comments issued by the staff of the Division of Corporation Finance that result in significant changes to the disclosure. Therefore, we are not extending early commencement to Rule 13e–3 transactions. In addition, as proposed, early commencement is not available to roll-up transactions. A roll-up transaction is any transaction or series of transactions that directly or indirectly, through acquisition or otherwise, involves the combination or reorganization of one or more ''finite-life'' entities (usually limited partnerships) where the securities to be issued are registered under the Securities Act. *See* Release No. 33–6900 (June 17, 1991) (56 FR 28979); Release No. 33–6922 (October 30, 1991) (56 FR 57237); Release No. 33–7113 (December 1, 1994) (59 FR 63676); and the 900 series of Regulation S–K.

[118] Rule 14a–4(f).

[119] Rule 14e–1(a).

[120] Most state corporate laws require that notice of a meeting be sent to security holders no less than 10 days and no more than 60 days before the meeting.

[121] *See* Part II.C.1 above.

[122] *See* Part II.E.2 below discussing appropriate time periods for the dissemination of a prospectus supplement containing materials changes.

[123] New Rule 162 and revised Rules 13e–4(e)(2) and 14d–4(b).

[124] If the registration statement as first filed does not contain a prospectus with this information, the bidder may file a pre-effective amendment to supply the requisite information and then commence the offer.

[125] We are not changing our current position regarding the level of information necessary to adequately inform security holders of the consideration offered; the pricing information required is the same information that would be required in an effective registration statement today. Often, in a business combination transaction the consideration offered to security holders is based on a formula pricing mechanism that is based on the market price of either the target or the bidder's securities during a specified period. The requirement to provide pricing information in a prospectus that is delivered to security holders to commence an exchange offer would be satisfied if all material elements of the formula are described in sufficient detail so that security holders can evaluate the offer. A fixed price is not required under early commencement.

[126] Rule 430 and 430A (17 CFR 230.430 and 430A).

[127] Because tender offer statements generally incorporate by reference a substantial amount of the required information from the related registration statement, the actual filing of a tender offer statement would serve primarily as notice to us and the markets that the exchange offer commenced. Of course, any prospectus furnished to security holders before the registration statement is effective must include the red herring legend required by Item 501(b)(10) of Regulation S–K (17 CFR 229.501(b)(10)).

[128] Regulation M (17 CFR 242.100 through 242.105) prohibits purchases of the bidder's securities during an exchange offer's restricted period, beginning when the bidder commences its offer. The restrictions under Rule 10b–13 (new Rule 14e–5) start when the bidder makes its first public announcement.

[129] Rule 162, as adopted, is extended to issuer exchange offers subject to Rule 13e–4 as well as third-party exchange offers subject to Regulation 14D (17 CFR 240.14d–1 through 17 CFR 240.14d–101).

[130] This exemption is necessary to prevent the tendering of securities into an offer from being viewed as a ''sale'' without an effective registration statement. We are using our exemptive authority

withdraw tendered securities until they are purchased, and bidders may not purchase the tendered securities until the registration statement is declared effective, as is currently the case. Because security holders must receive a mandated disclosure document before having to make an investment decision, we believe that early commencement, together with the communications scheme adopted today, is consistent with the public interest and the protection of investors. Early commencement gives bidders an incentive to disseminate their offering materials broadly to all security holders as soon as practicable. Further, the new rule provides bidders with greater flexibility in choosing the form of consideration to offer in a business combination transaction and should serve to facilitate the growth of our capital markets.

2. Dissemination of a Supplement and Extension of the Offer

Under the early commencement provision adopted, bidders are required to disseminate a prospectus to all security holders. If a bidder wants to commence its exchange offer early, it must disseminate a preliminary prospectus to all security holders as discussed above. The new rules also provide that bidders sending a preliminary prospectus must disseminate a supplement to security holders if there are any material changes, whether as a result of staff review, or due to any other material changes in the information previously disclosed. Exchange offers must remain open for a specified minimum period of time after a supplement is sent to security holders containing the new information, depending on the significance of the change. This is to permit security holders to react to the information by tendering securities or by withdrawing securities already tendered.

Since the tender offer rules do not currently establish specific minimum time periods necessary for the disclosure and dissemination of material changes, other than those relating to changes in price or the amount of securities sought,[131] we are establishing well-defined periods necessary for the dissemination of a prospectus supplement that contains material changes under early commencement. The mandated periods we adopt today are consistent with our current rules and interpretive positions in this area.[132] Therefore, we are revising Rule 14d–4 to specify the minimum time periods necessary for the dissemination of changes to preliminary prospectuses that are used to commence an exchange offer early.[133] As a result, exchange offers that commence early must remain open for at least:

- Five business days for a prospectus supplement containing a material change other than price or share levels;
- Ten business days for a prospectus supplement containing a change in price, the number of shares sought, the dealer's soliciting fee, or other similarly significant change;
- Ten business days for a prospectus supplement included as part of a post-effective amendment; and
- 20 business days for a revised prospectus when the initial prospectus was materially deficient; for example, failing to comply with the going-private rules or filing a ''shell'' document solely to trigger commencement and staff review.[134]

Of course, if a material change in the information previously disseminated to security holders occurred shortly before the expiration of the offer, a prospectus supplement would need to be disseminated to security holders and the offer extended for the appropriate length of time. We also believe that these time periods represent general guidelines that should be applied uniformly to all tender offers, including those subject only to Regulation 14E.[135]

We asked whether bidders should be required to deliver a final prospectus to security holders. Commenters who addressed the issue believed that the requirement to deliver prospectus supplements containing all material changes should effectively eliminate the need for the dissemination of a final prospectus. We agree that the informational purpose of the prospectus may best be served by requiring bidders to deliver to security holders prospectus supplements containing material changes rather than redeliver a final prospectus repeating substantial amounts of information that was previously delivered.[136] The use of prospectus supplements should adequately inform security holders of the information they need to make an informed investment decision.

Accordingly, we are using our exemptive authority[137] to exempt exchange offers that commence early from the final prospectus delivery requirement.[138] In doing so, we are not changing the final prospectus delivery requirement in Exchange Act Rule 15c2–8(d).[139] Under these circumstances, where a preliminary prospectus is delivered to security holders along with prospectus supplements containing material changes to the information previously disseminated, we believe that the cost of delivering a final prospectus is not justified by any marginal benefit to security holders. Although we are eliminating the requirement to deliver a final prospectus, bidders would still need to file a final prospectus.

F. Disclosure Requirements for Tender Offers and Mergers

1. Schedules Combined and Disclosure Requirements Moved to Subpart 1000 of Regulation S–K (''Regulation M–A'')

Currently, there are different disclosure schedules for issuer tender offers, third-party tender offers and going-private transactions.[140] Since a given transaction may involve more than one of these regulatory schemes, a company may be required to file a separate disclosure document to satisfy each applicable disclosure regime. In

under section 28 of the Securities Act to adopt this new rule.

[131] Rule 14e–1(b) [17 CFR 240.14e–1(b)]. A tender offer must remain open for ten business days after a notice of an increase or decrease in the percentage of the class of securities being sought, the consideration offered, or the dealer's soliciting fee.

[132] *See* Release No. 34–24296 (April 3, 1987) [52 FR 11458].

[133] Revised Rules 14d–4(b) and (d) and 13e–4(e). This approach was favored by all commenters who addressed the issue.

[134] The 20 business day period required by the tender offer rules will not begin to run if the prospectus disseminated to security holders is materially deficient. For example, if the initial prospectus does not comply with the roll-up rules, the minimum solicitation period under the roll-up rules will not begin until a revised prospectus satisfying the roll-up rules is disseminated.

[135] 17 CFR 240.14e–1 through 17 CFR 240.14e–8.

[136] Any supplements sent to security holders should present the informational changes in a clear, concise and understandable manner. *See* Rule 421 of Regulation C (17 CFR 230.421). If there are a number of changes necessitating the delivery of several supplements, offerors should consider the need to give security holders a complete unified document containing all changes and updates in a revised preliminary or final prospectus.

[137] Section 28 of the Securities Act.

[138] *See* new Rule 162(b), which provides an exemption from section 5(b)(2) of the Securities Act (15 U.S.C. 77e(b)(2)). This rule does not provide an exemption for exchange offers that commence on the date of effectiveness or later, for which a final prospectus must be delivered to security holders. In the Securities Act Reform Release we proposed to eliminate the requirement to deliver a final prospectus for certain capital-raising transactions, but not business combination transactions. *See* proposed Rule 173 and Part VIII.C.3.b of the Securities Act Reform Release.

[139] 17 CFR 240.15c2–8(d). This rule requires all brokers or dealers that participate in a distribution of securities registered under the Securities Act to take reasonable steps to comply promptly with the written request of any person for a copy of the final prospectus. The broker or dealer must comply with this request until the expiration of the applicable 40-day or 90-day period under section 4(3) of the Act. 15 U.S.C. 77(d)(3). *See* Rule 174 (17 CFR 230.174).

[140] Schedules 13E–4, 14D–1 and 13E–3, respectively.

addition, the disclosure requirements appearing in the rules and schedules can often lead to duplicative, and sometimes inconsistent, requirements. In light of the increased pressure to announce a business combination transaction soon after it is entered into and the attendant requirement to file mandated disclosure documents quickly, we proposed to integrate, simplify and update the disclosure requirements currently in the rules and schedules. Our basic approach was to combine all the disclosure requirements in one central location in a subpart of Regulation S–K, called Regulation M–A. The specific disclosure requirements in schedules were keyed to items under Regulation M–A in a manner consistent with the integrated disclosure system previously adopted for proxy and registration statements.

All commenters addressing the proposed changes in this area believed that it was time to update and simplify the disclosure requirements for business combination transactions.[141] We are adopting Regulation M–A substantially as proposed. This series of disclosure items incorporates all the current disclosure requirements for issuer and third-party tender offers, tender offer recommendation statements and going-private transactions. The new regulation includes some disclosure items for cash merger proxy statements as well. We have made slight modifications, where necessary, to harmonize and clarify the requirements, as well as a few substantive changes that are discussed below in more detail. In some cases the disclosure requirements may appear different, but that is because we have made an effort to draft the items in Regulation M–A using clear, plain language. In the future, we expect to expand this new regulation to cover additional disclosure items as necessary.

We are combining current Schedules 13E–4 and 14D–1 (the schedules now used for issuer and third-party tender offers, respectively), into new Schedule TO, as proposed.[142] In addition, we are changing the rules to allow one filing to satisfy both the tender offer and going-private disclosure requirements.[143] As a result, the information required by Schedules 14D–1, 13E–4 and 13E–3 can be disclosed in one combined filing.[144] We believe that these revisions will reduce the need to file two or more schedules for what is essentially the same transaction.[145]

We have included an instruction in new Schedule TO, as proposed, listing the specific line items that must be complied with for different types of transactions.[146] In addition, we have revised the current instruction requiring information that is incorporated by reference to be filed as an exhibit. As revised, filers can incorporate information included in documents previously filed electronically on EDGAR without refiling that information as an exhibit to the schedule.[147] To the extent that the existing schedules permit filers to include negative answers in the schedule, but not in the disclosure document sent to security holders, filers will continue to have the ability to omit that information from documents sent to security holders.[148]

At this time we are not extending the one filing satisfies all approach to encompass transactions involving the Securities Act and proxy rules as well as the tender offer and going-private rules. In the future, we may consider integrating the requirements further, to permit the satisfaction of the disclosure required under all four regulatory schemes with one filing.

We also are revising the rules that require filing persons to include a fair and adequate summary of the information required by the schedules in the disclosure document sent to security holders. Instead of specifying some items and excluding others, as the current rules do,[149] the revised rules simply require that the document given to security holders summarize all items in the schedule (except for exhibits).[150] As noted in the Proposing Release, this change is not intended to increase the amount of information that is given to security holders. Instead, it is intended to simplify the requirements. We expect filers to exercise their judgment in determining the specific information that must be included in the disclosure document sent to security holders to provide a fair and adequate summary. We are not, however, changing the current requirement that certain disclosure required in a going-private transaction be set forth in full in the disclosure document delivered to security holders.[151]

As a result of today's changes, filers no longer need to answer each item of the schedule with a statement that the required information is incorporated by reference from certain pages or sections of the primary disclosure document. Under the revised rules, it is sufficient to include a general statement in the schedule that all information in the disclosure document filed as an exhibit is incorporated by reference in answer to all or some of the items in the schedule. The revised schedules, as proposed, would include a cover page, any exhibits and the required signatures. Specific item numbers from the schedule must be included only to the extent necessary to provide information that is not in the disclosure document sent to security holders, but is required to be disclosed under an item in the schedule.[152] This change is designed to make the schedules easier to prepare. Of course, filers still must provide all the required information.[153]

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[141] One commenter urged us to codify the availability of a procedure for making acquisitions using securities registered on an acquisition shelf registration statement. While we are not codifying this procedure as part of this release, we remind offerors that the procedure continues to be available. *See* Form S–4, General Instruction H, and *Service Corporation International* (December 2, 1985).

[142] The format and instructions for Schedules 13E–3 and 14D–9 are revised so that they are consistent with new Schedule TO. These schedules refer to Regulation M–A for all substantive disclosure requirements. We did not propose, and are not adopting, any changes to the schedules used in connection with the multijurisdictional disclosure system for Canadian issuers (Schedules 13E–4F, 14D–1F and 14D–9F) (17 CFR 240.13e–102; 17 CFR 240.14d–102; 17 CFR 240.14d–103).

[143] New Schedule TO has boxes on the cover page to check to indicate whether the filing is an issuer tender offer, third-party tender offer, and/or going-private transaction. We are implementing conforming changes to the EDGAR filing tag system so that the type of transaction and filing persons are identified when viewing a document on EDGAR.

[144] For example, an affiliate engaged in a tender offer having a going-private effect can now file a Schedule TO that also serves as a Schedule 13E–3. All filing persons and applicable schedules must be identified on the cover page. Separate cover pages are not required. Of course, a Schedule 13E–3 must be filed independently when the underlying transaction is not a tender offer.

[145] Schedule TO also may be combined with an amendment to a previously filed Schedule 13D. *See* General Instruction G to Schedule TO. The ability to file a joint 13D amendment and tender offer statement is the same as currently permitted. *See* General Instruction E to Schedule 14D–1.

[146] General Instruction J to new Schedule TO.

[147] Documents filed electronically on EDGAR are readily available to security holders and the public (*e.g.*, through the Internet, our public reference room, brokers and investment advisors). This change also applies to going-private statements.

[148] General Instruction E to new Schedules TO and revised Schedule 13E–3 and General Instruction C to revised Schedule 14D–9.

[149] *See* current Rules 14d–6(e), 14d–9(c), 13e–3(e) and 13e–4(d) specifying the information that must be summarized or included in the disclosure document sent to security holders.

[150] Revised Rules 14d–6(d), 14d–9(d), 13e–3(e) and 13e–4(d).

[151] Items 7, 8 and 9 of current and revised Schedule 13E–3.

[152] For example, negative or ''not applicable'' responses or information that goes beyond what is summarized in the disclosure document must be disclosed under the appropriate item number in the schedule if not included in the disclosure document sent to security holders.

[153] *See* General Instructions E and F to new Schedule TO and revised Schedule 13E–3 and General Instructions C and D to revised Schedule 14D–9. We are eliminating the requirement in General Instruction F of current Schedule 13E–3 to

2. Streamline and Improve Required Disclosure

a. "Plain English" Summary Term Sheet

We proposed to require a plain English summary term sheet in all cash tender offers and all cash mergers, as well as going-private transactions. The disclosure documents in these transactions often can be difficult to understand, especially in the context of a business combination transaction where a vast amount of information may be available. We believe security holders should be provided with a concise, easy to read term sheet that highlights the most important and relevant information regarding an extraordinary transaction.

Accordingly, we are adopting the plain English summary term sheet requirement as proposed.[154] We are not adopting a plain English summary term sheet for transactions involving the registration of securities[155] because these transactions already are required to have a plain English summary, although the format may be somewhat different from the summary term sheet approach.[156] The summary term sheet must begin on the first or second page of the disclosure document, and must highlight the most important or material features of a proposed transaction.[157] This requirement applies to all issuer and third-party cash tender offers, cash mergers and going-private transactions. We believe the disclosure in these transactions can be improved through the use of a plain English summary term sheet.

In proposing this requirement, we did not mandate the specific items or questions that must be addressed in every case. Instead, we gave examples of information that most security holders would need when confronted with a tender offer or merger. Most commenters favored the proposed approach of keeping the requirement general and giving filers the flexibility to determine the issues that rise to the level of addressing in a plain English summary term sheet. We are adopting this approach.

As noted in the Proposing Release, in most cases, we believe bidders should address the following questions in the summary term sheet accompanying their cash tender offers:

- Who is offering to buy my securities?
- What are the classes and amounts of securities sought in the offer?
- How much is the bidder offering to pay and what is the form of payment?
- Does the bidder have the financial resources to make payment?
- Is the bidder's financial condition relevant to my decision on whether to tender in the offer?
- How long do I have to decide whether to tender in the offer?
- Can the offer be extended, and under what circumstances?
- How will I be notified if the offer is extended?
- What are the most significant conditions to the offer?
- How do I tender my shares?
- Until what time can I withdraw previously tendered shares?
- How do I withdraw previously tendered shares?
- If the transaction is negotiated, what does my board of directors think of the offer?
- Is this the first step in a going-private transaction?
- Will the tender offer be followed by a merger if all the company's shares are not tendered in the offer?
- If I decide not to tender, how will the offer affect my shares?
- What is the market value (if traded) or the net asset or liquidation value (if not traded) of my shares as of a recent date?
- Who can I talk to if I have questions about the tender offer?

As for merger proxy statements, we believe a summary term sheet should provide a brief outline of the particular matters proposed, the material terms of the proposals, including the parties to the proposed transaction, the consideration to be received by security holders, the board's recommendation on how to vote or their position regarding the transaction, the effect of a vote for and against each matter presented, including the effects of not voting, the procedures for voting and changing or revoking a vote, and the existence of appraisal rights.

Several commenters provided useful suggestions on other information that may assist security holders. We agree with these commenters that a plain English summary term sheet should address, to the extent applicable, the vote required to approve each matter presented, the number of votes, if any, already committed to vote in a particular way, any material interests of insiders or affiliates, as well as the accounting and federal income tax treatment of the transaction. In the context of a going-private transaction, we believe that the receipt of opinions, appraisals, or other similar reports[158] regarding the fairness of a transaction would be of material interest to security holders. In addition, the identity of the filing persons, including the affiliates engaged in the transaction, a description of their affiliation or relationship with the issuer, and their role in the transaction may be important disclosure. Of course, we do not attempt to provide an exhaustive list in this release of all the matters or issues that may be material to security holders warranting inclusion in a plain English summary term sheet. We leave that determination for filers based on the particular facts and circumstances of their transaction.

b. Item 14 of Schedule 14A Revised to Clarify Requirements and Harmonize Cash Merger and Cash Tender Offer Disclosure

Item 14 of Schedule 14A specifies the information required in proxy and information statements relating to extraordinary transactions.[159] We are revising Item 14 substantially as proposed, except that the revised item refers filers to the applicable disclosure requirements in Forms S–4 and F–4, instead of Forms C and SB–3, which are not being adopted at this time. This approach should make the item easier to understand, and harmonize the proxy and registration statement disclosure requirements. Since the disclosure and incorporation by reference requirements in Forms S–4 and F–4 are essentially the same as in current Item 14, this streamlined approach will not greatly modify the disclosure required in a merger proxy statement. We are retaining in Item 14 the existing

provide a cross-reference sheet showing where the responses are located.

[154] Item 1001 of Regulation M–A. For purposes of this requirement, plain English has the same meaning as in Rule 421(b) and (d).

[155] If a transaction is subject both to the registration requirements of the Securities Act and either Rule 13e–3 or the tender offer rules, a plain English summary term sheet is not required. *See* Item 1 of revised Schedule 13E–3 (17 CFR 240.13e–100) and new Schedule TO (17 CFR 240.14d–100).

[156] *See* Item 3 of Forms S–4 and F–4 and Rule 421(d) of Regulation C (17 CFR 230.421(d)). Effectiveness of a registration statement may be denied or a stop order issued when there has not been a bona fide effort to present information in a reasonably clear, concise and readable manner. *See* Rule 461(b)(1) of Regulation C (17 CFR 230.461(b)(1)); *see also, In the Matter of Franchard Corporation*, 42 S.E.C. 163 (1964).

[157] The required summary term sheet should present information in bullet-point format and may include cross-references to more detailed information found elsewhere in the disclosure documents provided to security holders, consistent with plain English principles.

[158] *See* current and revised Item 9 to Schedule 13E–3.

[159] 17 CFR 240.14a–101. Item 14 disclosure is required when a vote or consent is solicited on: (i) A merger; (ii) a consolidation; (iii) the acquisition of assets, a business or securities; (v) the sale or transfer of all or substantially all the assets of the registrant; (vi) a liquidation; or (vii) a dissolution. This item requires information about the transaction and each party to the transaction (*i.e.*, the acquiror and the target). The information specified in Item 14 may be incorporated by reference or physically included in the disclosure document depending on the extent to which the acquiror or target is eligible to use Form S–2 or S–3.

disclosure requirements applicable to investment companies.[160]

In addition, we are adopting several substantive changes regarding the information required for acquirors and targets under Item 14. All commenters that addressed the proposed changes to Item 14 believed they were appropriate. We continue to believe that in certain circumstances the disclosure requirements in Item 14 may be unnecessarily burdensome and inconsistent with the level of information that would be required if the same transaction was structured as an all-cash, all-share tender offer. Therefore, we are adopting the following proposed revisions:

- Item 14 is revised to clarify that financial statement and other information about the acquiror is required in a cash merger only if that information is material to voting security holders' evaluation of the transaction.[161] Similar to the need for a bidder's financial statements in a cash tender offer, information about the acquiror in a merger is generally not needed when target security holders are receiving cash and the acquiror has demonstrated its financial ability to satisfy the terms of the offer.[162]
- In cases where financial statement information for the acquiror would be material to a security holder's voting decision, acquiror information is required for only two years and not three, consistent with the treatment of tender offers.[163]
- The requirement to provide information about the target in a cash merger is eliminated when the acquiror's security holders are not voting on the transaction.[164] Most likely, target security holders will have information about the securities they already hold. As a result, security holders can receive a shorter disclosure document that is focused on the terms and effects of the transaction. This revision harmonizes the disclosure required in cash merger transactions with that required in all-cash, all-share tender offers.[165]

The changes adopted today do not change the current requirement to provide financial statements of the target and other company information when the acquiror's security holders are voting on the transaction, since those security holders may not know anything about the target. In addition, target information is required in merger proxies that are going-private or roll-up transactions. We believe that target security holders have a need for current financial statements of their company if it is subject to one of these types of transactions.

We are not adopting two proposed changes. Under the proposal, Item 14 would no longer permit information to be incorporated by reference from the ''glossy'' annual report sent to security holders. Further, we proposed to eliminate the instructions in Schedule 14A and Form S–4 that require filers to send the mandated disclosure document to security holders at least 20 business days before the meeting date or the expiration date of an exchange offer if information is incorporated by reference.[166] At this time we believe there still may be a number of security holders that do not have the ability to access information electronically, so we are not eliminating the 20 business day incorporation by reference provision.[167] We are retaining incorporation by reference from the glossy annual report because this information is delivered to security holders.[168]

c. Reduced Financial Statement Requirements for Non-Reporting Target Companies in Stock Mergers and Stock Tender Offers

The previous section addressed information requirements in cash mergers. We also have examined financial statement requirements in the context of stock mergers and stock tender offers. As we noted in the Proposing Release, financial statements of the target generally are required when registered securities are being offered. The rules currently provide special treatment when the target is not subject to the Commission's reporting requirements, but we believe these requirements can be further relaxed. Currently, the rules require the filing person (the acquiror) to provide financial statements of the non-reporting target going back three years.[169] We noted that providing three years of financial statements prepared in accordance with Regulation S–X[170] for a non-reporting company can be costly and burdensome to prepare. In some cases they may not be available. Therefore, we proposed to reduce the financial statements required for non-reporting targets when the acquiror's security holders are not being asked to vote on the transaction.

Most commenters believed that the proposed reduction was appropriate and would facilitate acquisitions of non-reporting targets. We continue to believe that the requirement to provide target financial statements can be curtailed, particularly because in many cases target security holders likely made their initial investment decision in the non-reporting company based on less extensive information than what is currently required. In addition, security holders are being offered securities in a public company for which there should be significantly more information available and a more liquid market to

[160] New Item 14(d) of Schedule 14A. We believe that this will be simpler for investment companies than referring to Forms S–4 and F–4, which generally are inapplicable to investment companies. We also have consolidated and conformed current Instructions 6 and 8 to Item 14 for investment companies. Instruction to paragraph (d) of Item 14 of Schedule 14A. The requirements that we are retaining for investment companies were not specifically tailored for investment companies, and we believe that it would be appropriate to reconsider these requirements in a future rulemaking project focused on the registration and disclosure requirements applicable to investment company business combination transactions.

[161] Revised Instruction 2(a) to Item 14 of Schedule 14A. Pro forma information about the transaction is not generally required in a cash merger where only the target's security holders are voting on the transaction.

[162] Even if the acquiror's security holders are voting, acquiror information may be omitted because the acquiror's security holders are presumed to have access to information about their own company. In this case, pro forma information about the transaction will still be required in accordance with Article 11 of Regulation S–X (17 CFR 210.11–01 through 17 CFR 210.11–03).

[163] Revised Item 14(c)(1) to Schedule 14A. If financial statements of the target are required, then three years of financial statements must be provided, consistent with the other requirements for financial statements of acquired companies.

[164] Revised Instruction 2(b) to Item 14 of Schedule 14A.

[165] No target information is required if target security holders are voting on a merger in which the consideration offered consists of acquiror securities that are exempt from Securities Act registration. Revised Instruction 3 to Item 14 of Schedule 14A.

[166] *See* Note D.3 to Schedule 14A; General Instruction A.2 to Form S–4; and General Instruction A.2 to Form F–4.

[167] We have stated that the 20 business day period must be complied with even if the documents incorporated by reference are delivered along with the disclosure document. *See* Release No. 33–6578 (April 23, 1985) (50 FR 18990) (Form S–4 adopting release). We are changing this interpretation. If filers furnish the information that is incorporated by reference with the disclosure document that is sent to security holders, they do not have to comply with the 20 business day requirement.

[168] Revised Item 14(e) to Schedule 14A (17 CFR 240.14a-101).

[169] *See* Item 17(b)(7) of Form S–4, Item 17(b)(5) of Form F–4 and Item 14(b)(3)(ii)(A) of Schedule 14A. These items specify the information required for non-reporting target companies in a business combination transaction. An acquiror must provide financial statements ''that would have been required to be included in an annual report to security holders'' had the non-reporting company been required to furnish an annual report that complies with Rule 14a–3(b) (17 CFR 240.14a–3(b)). This rule requires audited balance sheets for each of the two most recent fiscal years and audited statements of income and cash flows for each of the three most recent fiscal years prepared in accordance with Regulation S–X.

[170] The required balance sheet for the year preceding the latest full fiscal year and the income statements for the two years preceding the latest full fiscal year need not be audited if they have not previously been audited. The required financial statements must be audited to the extent practicable.

sell into. Therefore, we are reducing the financial statement requirement substantially as proposed.[171] In addition, where the non-reporting target is not significant to the acquiror and the acquiror's security holders are not voting on the transaction, we believe the financial statement requirements can be reduced even further.

Accordingly, we are eliminating the requirement to provide financial statements for the non-reporting target altogether when the acquiror's security holders are not voting on the transaction and the non-reporting target is not significant to the acquiror above the 20% level.[172] The security holders that purchased securities in the non-reporting company generally would be aware that they invested in a company that is not subject to our reporting requirements and they would not expect to receive the same level of financial information that is required for a public reporting company. Moreover, if the non-reporting company is not significant to the acquiror, we believe security holders would likely rely on the financial statements of the acquiror in making their voting or investment decision. Because a combination of an insignificant non-reporting target company and a public acquiror should not materially alter the financial condition of the acquiror, we believe that non-reporting target security holders are likely to rely on the required acquiror financial information alone.[173] In addition, the 20% threshold is the standard adopted in 1996 for the requirement of audited financial statements in filings made under the Securities Act and the Exchange Act for business acquisitions.[174]

Accordingly, we are revising the financial statement requirements for non-reporting targets when the acquiror's security holders are not voting on the transaction,[175] as follows:

- If a non-reporting company is being acquired in a business combination transaction, then financial statements for the latest fiscal year prepared in conformity with generally accepted accounting principles (''GAAP'') must be provided.[176]
- Also, if the non-reporting target security holders were previously provided with GAAP financial statements for either or both of the two fiscal years before the latest fiscal year, then GAAP financial statements must be provided for those years as well.
- If the non-reporting target is not significant to the acquiror in excess of the 20% level, then no financial information is required for the target.[177]

These revisions apply equally to foreign and domestic non-reporting target companies. If the target's financial statements are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP (foreign GAAP), a reconciliation to U.S. GAAP is required unless a reconciliation is unavailable or not otherwise obtainable without unreasonable cost or expense.[178]

The current requirement to provide ''audited'' financial statements for the non-reporting target remains the same. Financial statements for the latest fiscal year must be audited only to the extent practicable. Audited financial statements are not required for years before the most recent fiscal year if the target's financial statements were not previously audited.

We are not changing the current requirement that a resale registration statement include audited financial statements in accordance with Rule 3–05 of Regulation S–X.[179] Also, to the extent that a transaction is significant to the acquiror, audited financial statements would ultimately need to be provided under Item 7 of Form 8–K. Of course, if the acquiror's security holders are voting on the transaction, then the current financial statement requirements apply.

G. Tender Offer Rules Updated

In addition to the changes discussed above, some of which affect tender offers, we proposed to update the tender offer rules, which have not been revised since 1986. For the most part, commenters favored our approach to updating the regulations. As a result, these changes are being adopted, substantially as proposed.[180] The significant changes are discussed below.

We also solicited comment on whether the Private Securities Litigation Reform Act of 1995 (''PSLRA'') safe harbor for forward-looking statements should be extended to tender offers. We are not extending the PSLRA safe harbor to tender offers at this time. Given the relative infancy of the body of law interpreting the PSLRA generally and the safe harbor in particular, we do not believe that extending the reach of the safe harbor would be prudent. We note, for example, that we recently filed an *amicus curiae* brief out of concern about certain language in an appellate court decision regarding the application of the safe harbor.[181]

1. Bidders May Include a ''Subsequent Offering Period'' Without Withdrawal Rights

We are adopting the subsequent offering period rule with several modifications described below. Under the new rules third-party bidders may provide, at their election, a subsequent offering period during which security holders can tender securities into the offer without withdrawal rights. The purpose of the subsequent offering period is two-fold. First, the period will assist bidders in reaching the statutory state law minimum necessary to engage in a short-form, back-end merger with the target. Second, the period will provide security holders who remain after the offer one last opportunity to tender into an offer that is otherwise complete in order to avoid the delay and illiquid market that can result after a tender offer and before a back-end merger.

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[171] Since we are not adopting Forms C and SB–3, these changes are implemented in amendments to Forms S–4 and F–4.

[172] Determination of the significance of an acquisition to the acquiror is made in accordance with Rule 3–05 of Regulation S–X (17 CFR 210.3–05). *See* Release No. 33–7355 (October 10, 1996) (61 FR 54509) and Rule 1–02(w) of Regulation S–X (17 CFR 210.1–02(w)).

[173] This change is consonant with our revisions to Item 14 to eliminate the requirement to provide target financial statements in cash mergers when the acquiror's security holders are not voting on the transaction and the information is not material to the target security holders' voting decision.

[174] In Release No. 33–7355, we streamlined the requirements with respect to financial statements for business acquisitions. Among other things, the amended rules raised the thresholds of significance that determine whether financial statements of an acquired business must be provided in filings. These rule changes were intended to reduce impediments to registered offerings that may have caused companies to undertake private or offshore offerings instead. We believe the significance threshold for non-reporting targets should be the same in Forms S–4 and F–4 as under our other financial statement requirements. We may, however, consider revisiting this issue in a broader context in a future rulemaking proposal that addresses what the significance thresholds should be in light of the current accounting environment.

[175] These changes do not affect the financial statements required in roll-up transactions.

[176] Revised Items 17(b)(7) of Form S–4 and 17(b)(5) of Form F–4.

[177] Under these facts pro forma and comparative per share information is not required. *See* Rule 11–01(c) of Regulation S–X (17 CFR 210.11–01(c)).

[178] At a minimum, however, a narrative description of the material variations in accounting principles, practices and methods used in preparing the foreign GAAP financial statements from those accepted in the U.S. is required.

[179] A resale registration statement is used to register the resale of securities to the public by anyone who is deemed an underwriter within the meaning of Rule 145(c) with respect to the securities being re-offered.

[180] As proposed, we are adopting a technical change to Rule 432, which requires the prospectus disseminated to security holders in connection with an exchange offer to include certain information specified by the tender offer rules. The revised rule also clarifies that the requirement includes issuer tender offers. *See* current Rule 13e–4(d)(iv). The requirement is moved to revised Rule 432.

[181] *See* Memorandum of the Securities and Exchange Commission, Amicus Curiae, at 2, *Harris* v. *Ivax Corp.*, No. 98–4818 (11th Cir. Aug. 1999) (partially supporting a petition for rehearing and rehearing *en banc in Harris* v. *Ivax Corp.*, 182 F.3d 799 (11th Cir. 1999)).

The subsequent offering period may be disclosed in the bidder's initial offering materials, or in a subsequent amendment to the tender offer materials that is disseminated to security holders. In either case, the bidder's determination to include a subsequent offering period must be disclosed sufficiently in advance of the expiration of the initial offering period.

Commenters generally were favorable to the proposal, but many commenters criticized the advance notice requirement. They expressed the view that advance notice would create a ''hold-out'' problem with security holders waiting until the subsequent offering period to tender shares. In response to these comments, we are not adopting a specific requirement in the rule that the determination to add a subsequent offering period must be disclosed before the end of the initial offering period. Nevertheless, we continue to believe at this time that the addition of a subsequent offering period once an offer has commenced would constitute a material change to the terms of that offer. Thus, bidders must disseminate the new information to security holders in a manner reasonably calculated to inform them of the change sufficiently in advance of the expiration of the initial offering period (generally five business days).[182] After the Division of Corporation Finance gains practical experience with the operation of the subsequent offering period, the Division may decide, through staff interpretation, to shorten or possibly eliminate the requirement for advance notice.[183]

In short, we are adopting new Rule 14d–11, which permits bidders to include a subsequent offering period in a third-party tender offer during which no withdrawal rights are available,[184] so long as:

- The offer is for all outstanding securities of the class sought;
- The initial offering period (with withdrawal rights) remains open for at least 20 business days;
- *All* conditions to the offer are deemed satisfied or waived by the bidder on or before the close of the initial offering period;[185]
- The bidder accepts and promptly pays for all securities tendered during the initial offering period on the closing of the initial offering period;
- The bidder announces 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
- The bidder immediately accepts and promptly pays for all shares as they are tendered in the subsequent offering period.[186]

The rule, as proposed and adopted, permits bidders to use a subsequent offering period in both cash and stock tender offers.[187] Similarly, the rule permits bidders to offer either cash or stock in any planned back-end merger. There is no specific requirement that a minimum number of shares be tendered in the initial offering period. Of course, the same consideration must be paid in both the initial and subsequent offering periods.[188]

The new rule includes a requirement that bidders announce the results of the initial offering period (including the number and percentage of securities tendered) before 9 a.m. on the next business day following the close of the initial offering period.[189] We believe an announcement is necessary to inform remaining security holders whether the offer was successful and whether or not a back-end merger is imminent. Because of this requirement to announce the results before 9 a.m. on the next business day, the subsequent offering period must begin on that day. This will avoid any delay in the offer between the initial offering period and the subsequent offering period. We believe that this will prevent any confusion in the market as to whether the offering period is still open.

We proposed conditioning the subsequent offering period on the bidder stating its intention to engage in a back-end merger with the target. Commenters addressing this issue did not believe that this requirement was necessary. We are not adopting this requirement because we believe security holders may benefit from a subsequent offering period whether or not the bidder intends a back-end merger transaction.

As proposed, Rule 14d–1(e)(8) would have defined the subsequent offering period as a ten business day period following the initial offering period. Several commenters, however, recommended that bidders be permitted to determine the duration of the subsequent offering period. In response to these comments, we have decided to adopt a more flexible approach to the subsequent offering period. New Rule 14d–11 will allow the subsequent offering period to be a minimum of three business days and a maximum of 20 business days. Bidders could opt for a relatively short subsequent offering period and later extend the period if necessary. Any extension of the subsequent offering period must be made in accordance with Rule 14e–1(d).[190]

2. Bidder Financial Information Clarified for Cash Tender Offers

a. When a Bidder's Financial Statements Are Not Required; Source of Funds

We are clarifying when financial statement information of the bidder must be disclosed in a cash tender offer.[191] Currently, this information is

[182] *See* Release No. 34–24296 (April 3, 1987) (52 FR 11458).

[183] If a bidder announces a subsequent offering period and later decides not to provide the period, clearly this would be a material change in the offer's terms that must be disclosed in advance as provided in Release No. 34–24296. Commenters did not disagree with this view.

[184] We also are amending Rule 14d–7 to provide an exemption so the withdrawal rights required by section 14(d)(5) of the Exchange Act (15 U.S.C. 78n(d)(5)), which apply 60 days after the start of a tender offer, are not available during a subsequent offering period.

[185] The subsequent offering period may *not* be used if payment will be delayed for any reason. In the past we have stated that payment may be delayed for certain governmental regulatory approvals. *See* Release No. 34–16623 (March 5, 1980) (45 FR 15521). A subsequent offering period, however, cannot be used unless *all* conditions to payment have been satisfied or waived and the bidder pays for all securities tendered in the initial offering period promptly after the close of the initial offering period. Likewise, there cannot be any conditions to the offer during the subsequent offering period.

[186] New Rule 14d–11(e) and revised Rule 14e–1(c).

[187] If a bidder offers cash and securities with a limit on the amount of cash or securities that may be paid to security holders, then a subsequent offering period may not be used. The imposition of a cap on one or the other form of consideration could result in proration which, as discussed in the Proposing Release, is why we limited the subsequent offering period to offers for all outstanding securities.

[188] The initial and subsequent offering periods are all part of one tender offer. If a different price were paid to security holders it would violate the all-holders best-price rules as well as the subsequent offering period rule. *See* new Rule 14d–11(f), current Rule 14d–10(a)(2) and Release No. 34–23421 (July 11, 1986) (51 FR 25873).

[189] In response to a question in the Proposing Release, two commenters favored such a requirement.

[190] 17 CFR 240.14e–1(d). For example, if a bidder elects to provide a three business day subsequent offering period, and later determines that a longer period is necessary, the bidder could extend the subsequent offering period by up to 17 business days. The bidder would, of course, need to announce the extension no later than 9:00 a.m. on the fourth business day after the initial offering period closed, and the total duration of the subsequent offering period could not exceed twenty business days.

[191] If a bidder offers securities instead of or in addition to cash, then financial statements are material. The registration statement form for the securities offered will specify the financial statements required. If the bidder offers securities that are exempt from registration, the financial statements specified in Schedule TO would be filed.

required in a cash tender offer when the information is material to a security holder's decision whether to tender, sell or hold.[192] The instructions in Schedule 14D–1 provide some guidance on when financial statement information is material.[193] These instructions also specify the type of information that will satisfy the financial statement disclosure requirement.[194]

We noted in the Proposing Release that generally there are several factors that should be considered in determining whether financial statements of the bidder are material. Those factors are as follows:

- The terms of the tender offer, particularly terms concerning the amount of securities sought, such as any-or-all, a fixed minimum with the right to accept additional shares tendered, all-or-none, and a fixed percentage of the outstanding;
- Whether the purpose of the tender offer is for control of the subject company; [195]
- The plans or proposals of the bidder; and
- The ability of the bidder to pay for the securities sought in the tender offer and/or to repay any loans made by the bidder or its affiliates in connection with the tender offer or otherwise.[196]

We also noted that these factors are not exclusive, and not all factors are necessary to meet the materiality test. In order to provide more guidance to bidders, we are adopting a new instruction to Schedule TO specifying when the financial statements of a bidder are not material and do not have to be provided. Commenters generally supported the proposal, offering some suggestions on how to modify the instruction so that it achieves its intended purpose. We are, therefore, adopting the instruction with some minor changes. We believe that under the circumstances specified in the new instruction, the burden of providing the bidder's financial information in tender offer materials may outweigh the usefulness of the information to security holders.[197]

As adopted, Item 10 to new Schedule TO [198] includes an instruction stating that a bidder's financial statement information is not material when:

- Only cash consideration is offered;
- The offer is not subject to any financing condition; and *either:*
- The bidder is a public reporting company that files reports electronically on EDGAR; *or*
- The offer is for all outstanding securities of the target.[199]

Several commenters addressed the financing condition element to the instruction. Most of these commenters indicated that the status of a bidder's financing arrangements (*e.g.*, commitment letter, definitive financing in place, or sufficient funds on hand) is not determinative so long as the offer is not subject to a financing condition. We agree. We believe security holders may need financial information for the bidder when an offer is subject to a financing condition so they can evaluate the terms of the offer, gauge the likelihood of the offer's success and make an informed investment decision. Whether an offer is conditioned on obtaining satisfactory financing arrangements (*e.g.*, receipt of a commitment letter or execution of other definitive financing documents) or the actual receipt of funds from a lender,[200] the offer is considered subject to a financing condition and the bidder may not omit financial information in reliance on the instruction.

We also asked whether foreign companies whose financial statement information may not be readily available should be treated any differently. Foreign companies are permitted to file reports in paper and are not required to file electronically.[201] As a result, security holders may have more difficulty obtaining information for foreign bidders. Two commenters indicated that foreign bidders that file reports (*e.g.*, Form 20–F) [202] in paper should not be able to satisfy the third prong of the instruction. We agree that the instruction should take into account the availability of financial statement information for foreign bidders. If information is available on EDGAR (via the Internet and other sources), we believe there is less need to require disclosure of the bidder's financial statements in its tender offer materials. Therefore, we have revised this condition to state that the bidder must be a reporting company that files reports electronically on EDGAR.[203] Of course, foreign bidders that choose to file reports electronically on EDGAR can rely fully on this new instruction. Alternatively, a bidder that is non-reporting or files reports in paper may rely on the instruction if the offer is for all outstanding securities of the target.[204]

We also proposed to codify the current practice of providing net worth information when the bidder is a natural person. The one commenter that addressed this proposal supported it, but believed the requirement to provide ''appropriate disclosure'' when a bidder's net worth is derived from material amounts of assets that are not readily marketable or there are material guarantees and contingencies was too vague. Therefore, we are adopting this instruction, substantially as proposed, but with a clarification that the bidder must disclose the nature and approximate amount of the individual's net worth consisting of illiquid assets and the magnitude of any guarantees or contingencies that may negatively affect the natural person's net worth.[205] We believe this information is useful to security holders in evaluating a tender offer made by a natural person.

Regardless of the level of financial information that security holders

[192] Item 9 of Schedule 14D–1 and Item 7 of Schedule 13E–4.

[193] Instruction 1 to Item 9 of Schedule 14D–1.

[194] Rules 14d–6(e) (17 CFR 240.14d–6) and 13e–4(d) (17 CFR 240.13e–4(d)).

[195] Financial information can be material when a bidder seeks to acquire the entire equity interest of the target and the bidder's ability to finance the transaction is uncertain. Financial information also can be material when a bidder seeks to acquire a significant equity stake in order to influence the management and affairs of the target. In the latter case, security holders need financial information for the prospective controlling security holder to decide whether to tender in the offer or remain a continuing security holder in a company with a dominant or controlling security holder.

[196] Release No. 34–13787 (July 21, 1977) (42 FR 38341).

[197] We are not changing bidders' ability to incorporate by reference financial information into their tender offer materials. *See* Instruction 3 to Item 10 of new Schedule TO.

[198] Although proposed Item 10 to Schedule TO did not specifically address the need to provide financial information for a controlling entity that forms an entity for the purpose of making a tender offer, we have revised Item 10 consistent with the requirements currently in Item 9 to Schedule 14D–1. If a bidder is formed by a controlling person for the purpose of making an offer, then financial information for the parent must be provided.

[199] Instruction 2 to Item 10 of new Schedule TO.

[200] The same analysis applies for non-reporting bidders, such as private investors, partnerships or private equity funds. These private bidders often finance their tender offers with funds raised from limited partners through a process known as a ''capital call.'' If the private bidder's offer is conditioned on obtaining funds from limited partners, security holders or other members of the entity, the offer is deemed subject to a financing condition.

[201] Rule 100(a) of Regulation S–T (17 CFR 232.100).

[202] 17 CFR 249.220f.

[203] This prong of the instruction will not be deemed satisfied if the bidder's financial statement information is not available on the EDGAR system (*e.g.*, because the bidder is delinquent in its reporting obligations or the bidder has filed this information in paper under a hardship exemption).

[204] To the extent financial statements of a foreign bidder are required and are prepared under foreign GAAP, a reconciliation to U.S. GAAP is required unless a reconciliation is unavailable or not otherwise obtainable without unreasonable cost or expense. As noted above in Part II.F.2.c, bidders must provide, at a minimum, a narrative description of the material variations in accounting principles, practices and methods used in preparing the foreign GAAP financial statements from those accepted in the U.S. *See* n.178 above.

[205] Instruction 4 to Item 10 of new Schedule TO.

receive, a bidder's ability to pay for the securities is a material disclosure item. We believe the disclosure that security holders currently receive in this area can be improved by clarifying the ''Source of Funds'' item requirement for tender offers and going-private transactions. As proposed, we are revising this item to require disclosure of information regarding the specific sources of financing, any conditions to the financing, and the filing person's ability to finance the transaction through alternative means if the primary source of financing should fall through.[206]

b. Content of Bidder's Financial Statements in Cash Tender Offers; Financial Statements in Going-Private Transactions

In the Proposing Release we noted the disparity in the financial statements required in third-party tender offers, issuer tender offers, and going-private transactions. We are reducing the financial statement information required in third-party tender offers as proposed. This change harmonizes the requirements with those for issuer tender offers and going-private transactions.[207] The commenters that addressed this proposal supported it. We believe that the burden of providing three years of historical financial statements in a third-party cash tender offer outweighs the benefit to security holders.[208]

We also proposed to update the disclosure requirements for tender offers and going-private transactions. Currently, information regarding book value per share and the pro forma effect of the transaction on the company's balance sheet and book value per share (as of the most recent fiscal year end and the latest interim balance sheet period) may be required. We are reducing the required information, as proposed, to only the most recent balance sheet date.[209]

In addition, when financial statement information is required in tender offer and going-private transactions, the current rules permit filers to include summary financial information,[210] instead of full financial statements, in the disclosure documents sent to security holders. We proposed to update the summary information requirements to consist of the summarized financial information specified in Rule 1–02(bb) of Regulation S–X[211] as well as ratio of earnings to fixed charges, book value per share and pro forma data. The two commenters that addressed this proposal indicated that the additional information (redeemable preferred stock, minority interests, unconsolidated subsidiaries and 50 percent or less owned persons) called for by Rule 1–02(bb) is not relevant or useful to security holders, especially in cash tender offers.

In response to their concern, we have revised the summary requirement so that information regarding unconsolidated subsidiaries and 50 percent or less owned persons is not required. We continue to believe, however, that the information specified in Rule 1–02(bb)(1) (redeemable preferred stock and minority interests) may be relevant when the bidder's financial information is material[212] and the bidder elects to provide summary instead of full financial statements in the disclosure document sent to security holders. Under the current rules a fair and adequate summary includes ''shareholders'' equity.'' The additional specificity provided by Rule 1–02(bb)(1) is not inconsistent with the current requirements. Also, information regarding the existence of minority interests may be material to security holders if the filing person (bidder) holds substantial assets or derives substantial revenues from a consolidated subsidiary that is not wholly-owned. Accordingly, we do not believe that updating the disclosure requirements to reference the information specified in Rule 1–02(bb)(1) will result in the disclosure of irrelevant information. As this information may be material to security holders, we adopt an updated definition of summary financial information that is substantially as proposed.[213] These revisions also extend to third-party tender offers the requirement to disclose book value information when that information is material.[214]

We also proposed to clarify the reconciliation required when non-U.S. GAAP financial statement information is summarized in a foreign bidder's disclosure document. We believe that summary financial information must include a reconciliation to the same extent full financial statements must include a reconciliation to U.S. GAAP.[215] This reconciliation requirement is consistent with that required for the acquisition of a foreign non-reporting target company with foreign GAAP financial statements.[216]

c. Pro Forma Financial Information Required in Two-Tier Transactions

We believe security holders need pro forma financial information for a bidder and target on a combined basis when deciding whether or not to tender in the first tier of a two-tier transaction.[217] Security holders need pro forma financial information to make an informed investment decision because if security holders do not tender in an offer they may receive securities of the bidder in exchange for the securities they hold in the target at a later date in a back-end securities transaction. Bidders frequently disclose information regarding expected synergies and other financial information to effectively sell their transaction to the market. We believe that pro forma information may be necessary to balance the disclosure disseminated to security holders and the markets. In addition, disclosure of pro forma financial information is generally consistent with our free communications scheme.[218] We are, however, adopting a slightly less burdensome pro forma requirement than proposed in response to some of the concerns expressed by commenters.[219]

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[206] Item 1007 of Regulation M–A.

[207] When securities are offered the registration statement requirements prevail. *See* n.191 above. We also are reducing the financial statements required for acquiring companies in merger proxy statements from three to two years. *See* Part II.F.2.b above.

[208] Item 10 to Schedule TO and Item 1010(a) and (b) of Regulation M–A, as adopted, require financial statements for two fiscal years when the information is material.

[209] Item 1010(a)(4), (b)(1) and (3) of Regulation M–A. As proposed, this change also applies to merger proxy statements.

[210] *See* Rule 14d–6(e)(1)(viii) (17 CFR 240.14d–6(e)(1)(viii)); Instruction B to Rule 13e–4(d)(1)(iv) (17 CFR 240.13e–4(d)(1)(iv)); and Instruction 2 to Rule 13e–3(e)(3) (17 CFR 240.13e–3(e)(3)).

[211] 17 CFR 210.1–02(bb).

[212] *See* Part II.G.2.a above discussing when financial statement information is material.

[213] Item 1010(c) of Regulation M–A, Instruction 1 to Item 13 of revised Schedule 13E–3, Instruction 6 to Item 10 of new Schedule TO.

[214] Item 1010(a)(4), (b)(3) and (c)(5) of Regulation M–A.

[215] *See* Part II.G.2.a above.

[216] *See* Part II.F.2.c above.

[217] A ''two-tier transaction'' is a business combination structured as a cash tender offer followed by a back-end securities transaction, typically a merger, where remaining security holders of the target receive the bidder's securities as consideration.

[218] A requirement to disclose pro forma financial information in the first tier of a two-tier transaction extends the Division of Corporation's interpretive position that disclosure of certain material information known to the bidder regarding a planned back-end securities transaction would not result in ''gun-jumping'' under the Securities Act. *See* n.23 above.

[219] Instruction 5 to Item 10 of new Schedule TO. This instruction requires bidders to provide the financial data specified in Item 3(f) (comparative historical and pro forma per share data) and Item 5 (pro forma financial information required by Article 11 of Regulation S–X) of Form S–4 in the Schedule filed with the Commission. Bidders may

Three commenters generally supported the proposed pro forma requirement, expressing different views on the appropriate level of pro forma financial information and the circumstances under which the information should be required. Two commenters believed that the pro forma requirement would be burdensome and provide only a marginal benefit to security holders. Several commenters noted that external factors may affect a bidder's ability to prepare pro forma financial information in compliance with the proposed requirement. Some of these factors include: the lack of any agreement with the target regarding the type and amount of consideration to be offered to security holders in any back-end securities transaction; the hostile or negotiated nature of the transaction; and the results of the tender offer.

We recognize that it may be more difficult for bidders to prepare accurate and complete pro forma financial information when the target is not cooperating with the bidder. We also realize that bidders may decide later not to offer securities in a back-end transaction for a number of reasons. Nevertheless, to the extent that a bidder, at the time of the cash tender offer, intends to offer securities in a back-end securities transaction with the target, we believe such information would be material to target security holders.[220] In addition, bidders that intend to offer securities in a back-end transaction would most likely have prepared some level of pro forma financial information on the combined entity for their own negotiating and planning purposes. As a result, we do not believe the requirement to provide pro forma financial information should be unduly burdensome for the bidder. Therefore, we are adopting a requirement that bidders disclose pro forma financial information prepared in accordance with Article 11 of Regulation S–X, in addition to historical financial statements,[221] when they intend to engage in a back-end securities transaction following a cash tender offer.[222] We limit this requirement, however, in two important respects.

First, the requirement is limited to ''negotiated'' transactions (*i.e.*, management of the target is cooperating with the bidder). Generally, in negotiated transactions, bidders have access to internal financial information of the target necessary to prepare pro forma financial information.[223] In transactions where the bidder does not have access to the internal information necessary to prepare reliable pro forma financial information in compliance with Article 11 of Regulation S–X (*i.e.*, non-negotiated transactions), we are not requiring pro forma financial information. However, we encourage bidders to provide pro forma or other similar financial information that they consider useful and meaningful to security holders, regardless of whether the transaction is negotiated or not.

Second, if an acquisition of a target is not significant to the bidder, we do not believe that pro forma financial information for the transaction would be helpful to security holders. Therefore, we are only requiring bidders to disclose pro forma financial information in a first-step tender offer when the acquisition is significant above the 20% level.[224]

3. Target Is Required To Report Purchases of Its Own Securities After a Third-Party Tender Offer Is Commenced

Rule 13e–1 prohibits an issuer whose securities are the subject of a third-party tender offer from repurchasing any of its equity securities until information about the intended acquisition is filed and disseminated to security holders. We proposed to clarify the timing of the disclosure called for by the rule so that the required information is disclosed only *after* a third-party tender offer is made, when it is most relevant. We also proposed to rewrite the rule in plain English. We are now adopting the revised rule as proposed, but without a requirement to send information to security holders. We also provide an exclusion from the rule for periodic repurchases in connection with employee benefit plans and other similar plans that are made in the ordinary course and not in response to the third-party offer.

Several commenters suggested that we rescind Rule 13e–1 based on the relatively low number of filings received during the past several years. Although few filings are made under the rule,[225] we continue to believe that the requirement serves the useful purpose of informing the marketplace in advance that an issuer plans to repurchase its own equity securities in response to a third party tender offer. While some of the information required by the rule may be provided in Schedule 14D–9, that schedule could be filed as late as ten business days after commencement of a third-party offer. Therefore, we are adopting the rule substantially as proposed, but as a filing requirement only. The information would not be required to be sent to security holders.[226] This will eliminate the cost to issuers of mailing the information, but the information will be publicly available to the marketplace.

4. Tender Offer and Proxy Rules Relating to the Delivery of a Security Holder List and Security Position Listing Harmonized

We are adopting as proposed revisions to Rule 14d–5 to conform the tender offer dissemination requirements with the proxy dissemination requirements in Rule 14a–7.[227] The revised rule expands the scope of information included in a security holder list under the tender offer rules so that it is consistent with the security holder list requirements in the proxy rules. Under the revised rule, a target company that elects to provide a bidder with a security holder list instead of mailing the bidder's materials to security holders must disclose the most recent list of names, addresses and security positions of non-objecting beneficial owners (as well as record holders) it has in its possession, or subsequently obtains. The security holder list must be in the format requested by the bidder if it can be provided without undue burden or expense. The purpose of the amendment to the rule is to give bidders the same

provide only the summary financial information specified in Item 3(d), (e) and (f) of Form S–4 in the disclosure document sent to security holders.

[220] A bidder that intends to engage in a back-end securities transaction may not avoid the disclosure requirement by not disclosing its intentions because non-disclosure could be a material omission that renders other statements by the bidder false and misleading.

[221] The bidder must disclose the historical financial statements specified in Item 1010 of Regulation M-A. See Instruction 5 to Item 10 of new Schedule TO. Historical financial information for the bidder is necessary to present the pro forma financial information in context.

[222] The pro forma financial information requirement applies whether the first step is a partial offer or an offer for all outstanding securities. In both cases, a bidder could intend to engage in a back-end securities transaction with the target.

[223] As required by Article 11, the pro forma financial information disclosed in the first tier must be accompanied by clear and explanatory footnotes that address the nature of all material pro forma adjustments.

[224] Determination of the significance of an acquisition to the acquiror is made in accordance with Rule 3–05 of Regulation S–X. See Release No. 33–7355 (October 10, 1996).

[225] There is no schedule or form accompanying the rule. The required information is disclosed in a ''Rule 13e–1 Transaction Statement'' filed electronically on EDGAR under the submission-type SC 13E1.

[226] If a target is making an issuer tender offer and complies with the filing, disclosure and dissemination requirements of Rule 13e–4 before repurchasing any securities, the requirements of Rule 13e–1 would be satisfied without a separate Rule 13e–1 filing.

[227] 17 CFR 240.14a–7.

ability as target companies to communicate directly with non-objecting beneficial owners of securities.

Most commenters supported the proposal, with one commenter expressing concern on the mechanics of tracking transmittal letters. We do not believe that the revised rule would unduly complicate the tender process or the tracking of transmittal forms. Bidders would mail their tender offer materials to record holders, consistent with current practice, and record holders would then forward the materials to beneficial owners. Bidders also would have the option of supplementing their distribution by mailing directly to non-objecting beneficial owners set forth on the security holder list provided by the target. Transmittal forms would include instructions, as they do today, stating where to send transmittal forms (*e.g.*, forms should be returned to the record holder with directions to tender shares in the offer).

5. New Rule 14e–5: Revision and Redesignation of Former Rule 10b–13, the Rule Prohibiting Purchases Outside an Offer

Rule 10b–13 prohibits a person who is making a cash tender offer or exchange offer from purchasing or arranging to purchase, directly or indirectly, the security that is the subject of the offer (or any security that is immediately convertible into or exchangeable for the subject security), otherwise than as part of the offer. We proposed to clarify the rule's text, codify several interpretations and exemptions, and redesignate it as new Rule 14e–5. We are adopting the amendments substantially as proposed. In response to commenters' suggestions, we are adopting four additional exceptions. We also are implementing the changes proposed in the cross-border tender offers proposing release since those proposals are being adopted today.[228] With these two further exceptions regarding cross-border offers adopted today,[229] Rule 14e–5 has ten exceptions.

a. Redesignating Rule 10b–13 as Rule 14e–5

Former Rule 10b–13 is redesignated as Rule 14e–5. We originally promulgated Rule 10b–13 under Sections 10, 13 and 14 of the Exchange Act[230] to safeguard the interests of persons who sell their securities in response to a tender offer.[231] As stated in the Proposing Release, because the rule addresses conduct during tender offers, we believe it belongs with the other rules under Regulation 14E under the Exchange Act that address activities in the context of tender offers.[232] No commenters disagreed with this change, and we are adopting it as proposed.[233]

b. Clarification of Rule 14e–5; Prohibited Period

The amendments to Rule 14e–5 being adopted today do not alter the rule's basic terms. Instead, they modify the rule's text to more clearly set forth the covered activities. Rule 14e–5 will continue to protect investors by preventing an offeror from extending greater or different consideration to some security holders outside the offer, while other security holders are limited to the offer's terms.[234] Rule 10b–13 prohibited a person who is making a cash tender offer or exchange offer from purchasing or arranging to purchase, directly or indirectly, the security that is the subject of the offer (or any security that is immediately convertible into or exchangeable for the subject security), otherwise than as part of the offer. Similarly, Rule 14e–5 prohibits a covered person from purchasing or arranging to purchase any subject securities or any related securities except as part of the tender offer. Rule 14e–5 does not explicitly include the term ''exchange offer'' as former Rule 10b–13 did because in Regulation 14E the term ''tender offer'' includes offers to exchange securities for cash and/or securities.[235]

We are changing the language describing the time period of the rule's restrictions. As adopted, the restrictions of Rule 14e–5 start upon ''public announcement,'' which is defined in the rule as any oral or written communication by the offeror, or any person authorized to act on the offeror's behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer.[236] Although the language regarding the commencement of the rule's restrictions is different from the language in Rule 10b–13,[237] the scope is the same; the restrictions apply from the time holders of the subject securities, or the public more generally, are notified of the tender offer.[238]

We are adopting the proposed simplification of the language regarding the end of the rule's restrictions. Under Rule 14e–5, the restrictions end when the offer expires.[239] Under Rule 14d–11, a tender offer may be extended up to 20 days under specific circumstances without offering withdrawal rights,[240] thus giving security holders an additional opportunity to tender into the offer.

As adopted, Rule 14e–5 does not apply to purchases or arrangements to purchase outside of a tender offer during a subsequent offering period if the consideration is the same in form and amount. In the Proposing Release, we said we believed offeror purchases outside the offer during this subsequent offering period present the same concerns as during the initial offering period; therefore, we proposed that Rule 14e–5 restrictions would cover any subsequent offering period provided under proposed Rule 14d–11. Two commenters agreed with the proposal, and two others thought the rule should

[228] *See* Release No. 34–40678 (December 15, 1998 (63 FR 69136)) (the ''Cross-Border Proposing Release'') and the Cross-Border Adopting Release.

[229] These additional exceptions, one for purchases during cross-border tender offers and one for purchases by ''connected exempt market makers'' and ''connected exempt principal traders,'' are discussed in the Cross-Border Proposing and Adopting Releases.

[230] 15 U.S.C. 78j; 15 U.S.C. 78m; 15 U.S.C. 78n.

[231] Release No. 34–8712 (October 8, 1969) (34 FR 15836) (the ''Rule 10b–13 Adopting Release'').

[232] Section 14(e) of the Exchange Act confers on the Commission the authority to define and prescribe means to prevent fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer. *See United States* v. *O'Hagan*, 117 S. Ct. 2199, 2217 (1997) (holding that ''under section 14(e), the Commission may prohibit acts, not themselves fraudulent under the common law or section 10(b), if the prohibition is 'reasonably designed to prevent . . . acts and practices (that) are fraudulent''' (*citing* 15 U.S.C. 78n(e)).

[233] As proposed, we are amending Rule 30–3 delegating exemptive authority to the Director of the Division of Market Regulation, and replacing references to Rule 10b–13 with Rule 14e–5. We also are adding a parallel provision to Rule 30–1 (17 CFR 200.30–1) to delegate exemptive authority to the Director of the Division of Corporation Finance, and by operation of Rule 30–5(b) (17 CFR 200.30–05(b)), to the Director of the Division of Investment Management. The amended text of Rule 30–1 appears in the Cross-Border Adopting Release.

[234] *See* Rule 10b–13 Adopting Release.

[235] *See* n.12 above.

[236] *See* new Rule 165(f)(3) and revised Rules 13e–4(c) and 14d–2(b).

[237] Rule 10b–13 applies from the time the offer is publicly announced or otherwise made known to security holders until the offer expires. The phrase ''otherwise made known'' means any form of communication, other than public announcement, that notifies holders of subject securities of an offer.

[238] We asked whether the rule should apply if the offeror advises some but not all security holders that it intends to conduct a tender offer for the subject securities. Two of the three commenters that addressed this point believed that a communication to some security holders should not commence the restricted period. These two commenters opposed any such change because it would make negotiations impossible without triggering the rule. We agree with these commenters in that it is not appropriate for private negotiations that do not notify security holders more generally to trigger the rule.

[239] Expiration includes termination by the offeror as well as reaching the time the offeror is required, by the offer's terms, either to accept or reject the tendered securities.

[240] *See* Part II.G.1 above.

not extend to a subsequent offering period so long as the purchase price does not exceed the offer price. We now believe that the requirements of Rules 14d–11 and 14e–5 are sufficient to avoid any of the problems that Rule 14e–5 is designed to prevent. More specifically, under the terms of Rule 14e–5, any purchases made outside the offer during the subsequent offering period must be made using the same form and amount of consideration offered in the tender offer. Also, under the terms of Rule 14d–11, the offeror must immediately accept and promptly pay for all securities as they are tendered in the subsequent offering period, which eliminates any difference in the time value of money between those who tender and those who sell to the offeror outside the offer. Under these conditions, we believe those people who tender during a subsequent offering period will not be disadvantaged in relation to those whose securities are purchased outside of, but during, a subsequent offering period.

c. Persons and Securities Subject to the Rule

Scope of Persons Subject to the Rule

Rule 10b–13 applied to the person who made the offer, which had been interpreted to cover the offeror, the offeror's affiliates, and the offer's dealer-manager.[241] Under Rule 14e–5, the Rule 10b–13 term ''person'' is replaced by ''covered person'' to codify this interpretation. The definition of ''covered person'' we are adopting has several changes from the proposed definition. The proposal defined a covered person as: The offeror and its affiliates; the offeror's dealer-manager(s) and other advisors; and any person acting, directly or indirectly, in concert with them. Two commenters objected to including all advisors within the meaning of covered person as too broad. We agree, and have narrowed the scope of the advisor category.

Covered person, as adopted, means: The offeror and its affiliates; the offeror's dealer-manager and its affiliates; any advisor to the offeror, dealer-manager or their affiliates, if such advisor's 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.[242] These changes replace the broader proposed term ''other advisors'' with two narrower categories: affiliates of the dealer-manager; and advisors to the offeror, dealer-manager or their affiliates, if such advisor's compensation is dependent on the completion of the offer. These changes mean that advisors such as attorneys and accountants will not be affected by the rule where they have no stake in the outcome of the offer.

The proposed definition of an affiliate borrowed heavily from the definition in Rule 12b–2.[243] As proposed in Rule 14e–5, the term meant any person that ''directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the offeror.'' The only distinction between the two definitions is that the proposed Rule 14e–5 definition was limited to affiliates of the offeror whereas, Rule 12b–2 extends to the affiliate of other relevant persons.[244] In order to accommodate other changes from proposed Rule 14e–5,[245] we needed to broaden this definition to include affiliates of the dealer-manager as well as the offeror, so we are adopting the entire definition of affiliate in Rule 12b–2.

Scope of Securities Subject to the Rule

We are adopting the proposed changes from Rule 10b–13 regarding the scope and treatment of related securities in the definitions of subject securities and related securities. Rule 14e–5 applies only to offers for equity securities, just as Rule 10b–13 did. Moreover, Rule 14e–5, as with Rule 10b–13, prohibits purchases outside the offer of not only the subject securities,[246] but also related securities. ''Related securities'' are defined as securities that are immediately convertible into, exchangeable for, or exercisable for subject securities. Among other things, this clarifies that securities that are immediately ''exercisable for'' subject securities, such as options, are included in the types of securities that a covered person cannot generally purchase outside the offer.

d. Excepted Transactions

Exercise of Related Securities

Rule 10b–13 specified that if the person making the offer ''is the owner of another security which is immediately convertible into or exchangeable for the security which is the subject of the offer, his subsequent exercise of his right of conversion or exchange with respect to such other security shall not be prohibited by this rule.'' We are amending this provision as proposed.

When Rule 10b–13 was adopted, options were not nearly as common as they are today, and the text of this exception did not explicitly include the exercise of options. We believe the exercise of options acquired before announcement of the offer is no more likely to lead to undesirable effects than the exchange or conversion of other related securities, so we want to make it clear that the exercise of options is included in this exception. Thus, Rule 14e–5 will permit, as proposed, a covered person to convert, exchange, or exercise related securities, if the covered person owned the related securities before public announcement.

Purchases by or for Plans

The exception for purchases for plans is adopted as proposed. Since the adoption of Rule 10b–13, there has been an exception for purchases by the issuer of the target security (or a related security) under certain types of plans, by participating employees of the issuer or the employees of its subsidiaries, or by the trustee or other person acquiring the security for the account of the employees.[247] We are eliminating the references to outdated Internal Revenue Code provisions that were contained in Rule 10b–13 to define permissible plan purchases; instead, we are using the more expansive plan scope contained in the Commission's Regulation M. The exception now permits purchases of subject securities or related securities for any ''plan'' if the purchases are made by an ''agent independent of the issuer'' as these terms are defined in Regulation M.

Purchases during Odd-Lot Offers

We are adopting the proposed exception to permit purchases during an issuer odd-lot tender offer conducted in compliance with the provisions of Rule

[241] *See, e.g., Letter regarding Offers for Smith New Court PLC* (July 26, 1995) (''Smith New Court Letter''). *See also In the Matter of Trinity Acquisition's Offer to Purchase the Ordinary Shares and American Depositary Shares of Willis Corroon Group plc*, Release No. 34–40246 (July 22, 1998) [67 S.E.C. Docket 1320].

[242] In a negotiated transaction, we would consider the target company to be acting in concert with the offeror.

[243] 17 CFR 240.12b–2.

[244] Rule 12b–2 under the Exchange Act (17 CFR 240.12b–2) defines an ''affiliate'' of, or a person ''affiliated'' with, a specified person, as a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

[245] *See, e.g.*, Part II.G.5.d. below, where we extend the exception for intermediary transactions to include affiliates of the dealer-manager.

[246] ''Subject securities'' are defined in Item 1000 of Regulation M–A as ''the securities or class of securities that are sought to be acquired in the transaction or that are otherwise the subject of the transaction.''

[247] 17 CFR 240.10b–13(c).

13e–4(h)(5) under the Exchange Act.[248] This exception codifies a class exemption from Rule 10b–13 issued by the Commission in connection with a 1996 revision to Rule 13e–4(h)(5).[249] Under Rule 13e–4(h)(5), an issuer tender offer is excepted from application of Rule 13e–4 if the offer is directed solely to odd-lot security holders and provides ''all holders'' and ''best price'' protections to tendering security holders.

Purchases as Intermediary

We proposed to add an exception for unsolicited purchases by a dealer-manager that are made on an agency basis. We based this exception on a prior exemption [250] that allowed a dealer-manager to continue to conduct its customary brokerage (*i.e.*, agent) activities during a tender offer. These activities generally do not raise the concerns that proposed Rule 14e–5 is intended to address. In the Proposing Release, we asked if the exception should permit ''riskless principal'' transactions by dealer-managers as well. Two commenters answered this question and both agreed that the exception should be broadened to permit unsolicited purchases as a riskless principal by dealer-managers. One of the two thought it should extend to other financial advisors.

As adopted, we are broadening this exception in two ways from the proposal. First, we are including affiliates of the dealer-manager within the exception. Second, in addition to agency transactions, we are permitting purchases to offset a contemporaneous sale after having received an unsolicited order in the ordinary course of business to buy from a customer who is not a covered person, if the dealer-manager or affiliate is not a market maker.[251] We believe these changes appropriately accommodate a dealer-manager's and its affiliates' activities as intermediary without allowing the offeror to use the dealer-manager and its affiliates to facilitate the tender offer.

e. Additional Exceptions Being Adopted

We are adopting four exceptions that were not proposed specifically, although we either sought comment in the Proposing Release or received suggestions from commenters on them.

Purchases Pursuant to Contractual Obligations

In the Proposing Release, we asked whether an offeror should be permitted to purchase subject or related securities outside an offer if a purchase contract was entered into before public announcement of the offer and the per share purchase price is no higher than the offer consideration. Four commenters addressed this issue, and all agreed such purchases should be permitted. One commenter stated that it could not discern any public policy rationale for permitting purchases pursuant to conversions, exchanges or exercises but not pre-announcement contracts. We agree with the commenters.

As adopted, this exception is available only if: the contract was entered into before public announcement; the contract is unconditional and binding on both parties; and the existence of the contract and all material terms, including quantity, price and parties, are disclosed in the offering materials.[252] We are not requiring that the contract price be the same as the offer price because we view these contracts as the functional equivalents of options that have no such price restriction for their exercise under Rule 14e–5.

Basket Transactions

In response to a commenter's suggestion, we are adopting an exception for transactions in baskets of securities containing a subject security or a related security.[253] We are requiring that: the purchase or arrangement to purchase the basket be made in the ordinary course of business and not to facilitate the offer; the basket contains 20 or more securities; and covered securities and related securities do not comprise more than 5% of the value of the basket.[254]

We believe that transactions in baskets, following the terms of this exception, provide little opportunity for a covered person to facilitate an offer or for a security holder to exact a premium from the offeror. Facilitation of an offer includes purchases intended to bid up the market price of the covered or related security, and includes buying a basket to strip out the covered security in an effort to get the offeror the number of shares it is seeking.

Covering Transactions

In response to a commenter's suggestion, we are adopting an exception from Rule 14e–5 for purchases of subject and related securities that are made to satisfy an obligation to deliver arising from a short sale or from the exercise of an option by a non-covered person. This exception is available to any covered person, so long as the short sale or option transaction was made in the ordinary course of business, not to facilitate the tender offer, and before public announcement. We adopt this exception because we believe such purchases effected for the purpose of making delivery to another party warrant the same treatment as purchases made pursuant to contractual obligations.

Purchases by an Affiliate of the Dealer-Manager

In response to a commenter's suggestion, we are adopting an exception from Rule 14e–5 for purchases of subject and related securities by an affiliate of the dealer-manager.[255] This exception permits purchases or arrangements to purchase by an affiliate of a dealer-manager if:

- The dealer-manager maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of the federal securities laws and regulations;
- The dealer-manager is registered as a broker or dealer under Section 15(a) of the Exchange Act; [256]
- The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support

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[248] 17 CFR 240.13e–4(h)(5).

[249] Release No. 34–38068 (December 20, 1996) (61 FR 68587). This class exemption permitted ''any issuer or agent acting on behalf of an issuer in connection with an odd-lot offer to purchase or arrange to purchase the security that is the subject of the offer.'' The release also states that the exemption, among other things, ''will allow the issuer or its agent to purchase the issuer's securities to satisfy requests of odd-lot holders to ''round-up'' their holdings to 100 shares.'' 61 FR at 68587–8.

[250] *Letter regarding Reuters Holdings PLC* (August 17, 1993).

[251] *Cf.* Rule 10b–10(a)(2)(ii)(A) (17 CFR 240.10b–10(a)(2)(ii)(A)).

[252] This exception is not available unless the obligation under the contract is the purchase by the covered person. For example, a purchase necessitated by an obligation to deliver pursuant to a contract is not covered.

[253] The staff of the Division of Market Regulation has taken no-action positions under Rule 10b–13 under similar facts and circumstances. *See, e.g., Letter regarding Select Sector SPDRs* (December 22, 1998).

[254] We base this language on a similar provision in Rule 101(b)(6)(i) of Regulation M [17 CFR 242.101(b)(6)(i)].

[255] *Cf.* Rule 100(b) of Regulation M (17 CFR 242.100(b)). In the Proposing Release, we asked whether we should consider provisions like those contained in the U.K. City Code on Takeovers and Mergers (''City Code'') that permit market makers affiliated with the offeror's advisors to continue their market making functions when the market maker is sufficiently independent from the advisor and other protections are present. Three commenters agreed that some exception should be provided for market making activities, and one opposed an exception based on the City Code. This exception for purchases by an affiliate of the dealer-manager permits market making activities by affiliates of the dealer-manager.

[256] 15 U.S.C. 78o.

personnel) in common with the dealer-manager that direct, effect, or recommend transactions in securities; and

- The purchases or arrangements to purchase are not made to facilitate the tender offer.

This exception, based largely upon the definition of ''affiliated purchaser'' in Rule 100 of Regulation M, allows investment affiliates to continue their investment advisory activities without interruption, on the same basis as they do during distributions subject to Rule 101 of Regulation M.[257] We believe effective information barriers between the dealer-manager and affiliate prevent improper motives from influencing purchases by affiliates while permitting such affiliates to continue their normal advisory activities. We are limiting this exception to the affiliates of dealer-managers that are registered under Section 15(a) of the Exchange Act because the dealer-managers are subject to a high level of regulatory and reporting oversight.

III. Effective Date and Transition

The new rules become effective on January 24, 2000. This date has been selected to accommodate the need for EDGAR programming before some of these changes become effective. The new rules are applicable to transactions beginning on or after the effective date, as well as to transactions already in progress on that date. The following addresses the application of the rules to some specific situations.

A. Communications

As of the effective date, the new regulatory scheme for communications is in effect. Even if a registration statement, proxy statement or tender offer statement is filed before the effective date, persons may rely on the new exemptions for communications made on or after the effective date. Of course, they must comply with the conditions of the exemptions, including the filing of written communications.

B. Confidential Treatment of Proxy Material

If preliminary proxy material is filed confidentially as permitted by the current rules before the effective date, the filer may choose to continue relying on the current rules after the effective date until the material is published, sent or given to security holders in definitive form. In that event, so long as parties to the transaction do not make public communications exceeding what would be permitted by the pre-effective date rules, the preliminary proxy material may remain confidential. On the other hand, if the parties to the transaction choose to avail themselves of the new communications exemptions before providing the definitive proxy statement, they must re-file the preliminary material publicly.

C. Early Commencement

If a registration statement for an exchange offer is filed before the effective date of the new rules, and is not effective, the filer has the option of complying with the early commencement provisions as soon as the new rules become effective.

D. Disclosure Requirements and New Schedules

The disclosure requirements have changed in a number of respects. If a registration statement, tender offer statement or proxy/information statement is filed before the effective date, the disclosure requirements in existence at that time continue to be applicable until the transaction is completed. Amendments should continue to comply with those requirements, not Regulation M–A or the revised rules. If a tender offer schedule relating to a two-tier transaction is filed before the effective date, pro forma financial information will not be required in the cash tender offer materials, even if it would be required for an offer filed on or after the effective date. However, we encourage offerors to provide this information. Amendments to tender offers filed before the effective date for the new rules should continue to be filed as amendments to Schedules 14D–1 or 13E–4, not Schedule TO. Tender offers commenced on or after the effective date must be filed on Schedule TO.

E. Subsequent Offering Period

If a tender offer statement is filed before the effective date, the bidder may choose to provide a subsequent offering period beginning on or after the effective date. Of course, it must advise security holders of the decision to include a subsequent offering period in accordance with the timing discussed above, as this would be viewed as a material change. The announcement of a subsequent offering period may be made before the effective date.

F. Revised Security Holder List Rule for Tender Offers

A request for the security holder list on or after the effective date is governed by the revised rule, whether or not the tender offer statement was filed before the effective date.

G. New Rule 14e–5

All tender offers that are publicly announced before the effective date of the amendment and redesignation of Rule 10b–13 as Rule 14e–5 are governed by Rule 10b–13, even if the tender offer extends beyond the effective date. Rule 14e–5 only applies to tender offers publicly announced on or after the effective date of the changes.

IV. Cost-Benefit Analysis

We expect that the amendments adopted today will facilitate and enhance security holder communications, especially before a registration statement relating to a business combination transaction, proxy statement or tender offer statement is filed. The amendments also will update and simplify the rules and regulations applicable to business combination transactions, including tender offers, mergers, and similar extraordinary transactions. Accordingly, we expect the cost of compliance with the applicable rules and regulations will decrease as a result of these amendments.

In addition to permitting more communications with security holders, the amendments attempt to place cash and stock tender offers on a more equal regulatory footing. We also have integrated the forms and disclosure requirements applicable to issuer tender offers, third-party tender offers and going-private transactions while consolidating the disclosure requirements in one central location within the regulations. We expect that these changes will simplify compliance with the regulations. Further, the amendments will permit bidders to provide a subsequent offering period after the successful completion of a tender offer when security holders can tender their securities without having to wait for a back-end merger. The regulations are revised to more closely align the merger and tender offer requirements as well as update the tender offer rules to clarify certain requirements and reduce compliance burdens consistent with investor protection. We expect that these changes will reduce the compliance burden on registrants and generally facilitate the consummation of transactions.

In the Proposing Release we provided our preliminary cost-benefit analysis and requested that commenters provide their views on the specific costs and benefits associated with our proposals. We also requested that commenters provide any data supporting their views. While commenters addressed the potential costs and benefits of the

[257] *Cf.* Rule 100(b) of Regulation M.

proposals in general terms, none provided empirical data to support their views. We discuss below the expected benefits and costs of the revisions and focus on the groups of persons and entities that are likely to be affected by the changes adopted today.

A. Communications

Overall, the amendments should enhance price discovery and market efficiency by permitting companies to communicate earlier and more freely about proposed business combination transactions and other significant corporate events. Currently, provisions of the Securities Act and Exchange Act, including the Williams Act, restrict the dissemination of information before a registration, proxy or tender offer statement is filed. The amendments allow companies to communicate more freely with security holders both before and after the filing of a registration, proxy, or tender offer statement.[258] The revisions allowing more communications treat bidders and targets alike—both are free to communicate with security holders regarding the merits and potential risks of a proposed transaction.

We expect that the increased flow of information will assist investors in making better-informed tender or voting decisions. We recognize that under the regulatory scheme adopted today there is a risk some persons may attempt to ''condition the market'' with false, misleading or confusing information.[259] Nevertheless, we believe that investors will benefit from an increased flow of information and they will eventually receive a registration, tender offer or proxy statement before an investment, tender or voting decision must be made with respect to a particular transaction. As a result, we expect investors will have adequate opportunity to consider the full information in the mandated disclosure document together with any information disseminated earlier before needing to act on that information.

In addition, the increased flow of information will be subject to liability. Communications that are made at any time will be subject to the antifraud provisions of Rule 10b–5 under the Exchange Act, as well as to the antifraud provisions of Rule 14a–9 and Section 14(e) if a transaction involves the proxy or tender offer rules, respectively. Also, if the transaction involves the Securities Act, the communications will be subject to Section 12(a)(2) liability as well. In addition, all material information must be included in the registration statement that is ultimately declared effective; therefore the information will be subject to Section 11 liability. In the aggregate, the liability imposed on these communications is appropriate to discourage the dissemination of false or misleading information into the market while at the same time providing investors with more information about a proposed transaction on a timely basis. We do not expect that these amendments will present a significant burden to investors or offerors.[260] Although communications are subject to liability, the amendments essentially permit communications that would not otherwise be permitted today and parties have the option of whether or not to communicate more with security holders and the markets.

The amendments also should reduce the current regulatory uncertainty relating to security holder communications. Companies have indicated difficulty in complying with the current restrictions on communications while at the same time fulfilling their duties to make full and fair disclosure under Rule 10b–5 of the Exchange Act. By relaxing the current restrictions on communications, this regulatory tension should be minimized. This clarification is expected to benefit issuers and security holders alike.

One potential cost or risk of the amendments is that some security holders may make investment decisions based on information received before a complete disclosure statement containing the required information is filed. While some investors may make premature investment decisions, the same risk exists today under the current rules. For example, the tender offer rules currently limit communications with investors until an offer is formally commenced. The required disclosure statement, however, is not required to be filed until five business days after the announcement of an offer. In addition, the information required in the mandated disclosure document may not be received by security holders until several days after the material is filed. By allowing companies to publicly announce transactions without having to file mandated disclosure documents, together with the requirement that all written communications relating to a proposed transaction be publicly filed and contain a legend advising security holders to read the complete disclosure document when it is available,[261] we believe investors will have more information and more time to make an informed investment decision. Further, investors will receive a mandated disclosure document before the time they must decide whether or not to tender in an offer.

To protect investors from possible misleading information, we are adopting new Rule 14e–8 which specifically prohibits the announcement of a tender offer if the bidder does not intend to commence and complete the offer; intends to manipulate the market price of the bidder or target; or does not have a reasonable belief it will have the means to purchase the securities sought in the offer. This new rule should encourage only bona fide offers to be publicly announced and minimize the potential for dissemination of false or misleading information in the marketplace.

In addition to permitting more communications, we believe that the amendments will reduce selective disclosure of information because companies must publicly file all written communications relating to the transaction. This filing requirement will make written communications available to a broader base of investors than is currently the case. The amendments also should increase the uniformity and timeliness of information received by investors. We recognize, of course, that the amendments will not eliminate selective disclosure entirely. In fact, the amendments may encourage companies to communicate orally instead of in writing to avoid the filing requirement. Because the market will likely demand that information be reduced to writing and companies generally will want to disseminate information broadly in order to sell their transaction to the market, we expect that the communications scheme adopted will reduce selective disclosure overall.

The revisions also will permit significantly more communications under the proxy rules, regardless of whether the communications relate to a business combination transaction. Under the amended rules, companies and security holders may communicate more freely before having to furnish a written proxy statement.[262] The increased ability to communicate under the amendments adopted today applies equally to security holders and companies. As a result, we expect

[258] *See* new Rule 165 and revised Rules 14a–12, 14d–2 and 14d–9.

[259] As discussed below, we are adopting new Rule 14e–8 to specifically prohibit certain conduct that would mislead investors.

[260] Under the exemptions adopted, all written communications relating to a proposed transaction following first public announcement must be publicly filed.

[261] *See* new Rule 165(c) and revised Rules 13e–4(c), 14a–12(a), 14d–2(b), and 14d–9(a).

[262] No proxy card or form of proxy may be given or requested unless preceded or accompanied by a proxy statement.

security holders will receive more information regarding matters on which a vote may be solicited in the future. In addition, the revisions should result in the dissemination of information earlier than is currently the case, giving security holders more time to consider that information.

We are requiring companies to provide security holders with a short ''plain English'' summary term sheet in all cash mergers, cash tender offers, and going-private transactions.[263] We expect that the required summary term sheet will facilitate investors' understanding of the basic terms of a proposed transaction, allowing them to make better-informed voting and investment decisions. We do not expect the requirement to impose a significant burden on filers because the information required in a summary term sheet must be gathered to respond to existing disclosure requirements in any event. Further, most filers should be sufficiently experienced with the plain English requirements applicable to Securities Act filings.

B. Filings

The amendments should effectively reduce the cost of complying with many of the current disclosure and other regulatory requirements. We have integrated and streamlined the current disclosure requirements applicable to business combination and going-private transactions. To a large extent the amendments harmonize and integrate the disclosure requirements for tender offer, merger proxy, and going-private transaction statements. The various disclosure requirements now appear in one location and are written in a more reader-friendly manner. Also, the amendments permit the filing of one schedule, rather than two, to satisfy the tender offer and going-private disclosure requirements when both sets of regulations apply to a particular transaction.

Consistent with the free communications scheme adopted today, we are limiting the availability of confidential treatment of merger proxy statements. Under the amendments, filers will be permitted to file a merger proxy statement confidentially so long as the parties limit their public oral and written communications to the information specified in Rule 135 of the Securities Act. If the parties to the transaction elect to publicly disclose more information than that specified in Rule 135, the proxy statement must be filed publicly. We do not expect that this limitation on confidential treatment will impose significant costs on filers. The revised treatment of merger proxy statements is consistent with the current requirement to publicly file all other registration, proxy, tender offer and going-private statements. The same information must be filed regardless of whether confidential treatment is invoked by the filer.

We expect the amendments also will reduce the burden of complying with the merger proxy and tender offer requirements by, among other things:

- Clarifying the disclosure requirements;
- Clarifying that an acquiror's financial statements are required in all-cash transactions only when the acquiror cannot demonstrate a financial ability to satisfy the terms of the transaction or the information is otherwise material;
- Eliminating the requirement to provide target financial statement information in an all-cash merger when the acquiror's security holders are not voting on the transaction;
- Reducing from three years to as little as one year, and in some cases eliminating, the required financial statements for a non-reporting target company when the acquiring company's security holders are not voting on the transaction; and
- Reducing from three years to two the required financial statements for an acquiring company in cash mergers and third-party cash tender offers.

We are adopting, however, a new disclosure requirement that may impose an additional cost on acquirors in negotiated two-tier business combination transactions. If security holders will be offered cash first in a tender offer followed by securities in a back-end merger, an acquiror must disclose certain pro forma and related financial information for the combined entity in the cash tender offer materials. We do not expect that this requirement will impose a significant burden on acquirors because the same information would eventually be required for the back-end merger. The amendments require disclosure at an earlier point in time, when security holders are confronted with a cash tender offer and must decide whether to tender in the offer or wait to receive securities in the back-end. The pro forma information required will benefit investors and should not impose a significant burden on acquirors. Therefore, the costs associated with providing pro forma information is reasonable. We recognize, however, that some acquirors may have difficulty in generating reliable pro forma financial information in situations when the target is not cooperating with the bidder. In response to this concern, we have limited the pro forma requirement to negotiated transactions.

For the purposes of the Paperwork Reduction Act, Table 2 in Part VII below summarizes our estimate of the paperwork burden hours that parties would expend to comply with the amended rules. In arriving at these estimates we note that U.S. merger and acquisition activity in 1998 was valued in excess of $1.3 trillion.[264] These estimates include the burden hours incurred by companies from filing pre-filing communications. We have based these estimates on current burden hour estimates and the staff's experience with these filings. The estimates in the table indicate that parties would expend approximately 234,759 burden hours/year complying with the revised rules. If we assume that 70% of the burden hours would be expended by persons that cost the affected parties $85/hour (*e.g.,* professionals) and 30% of these burden hours would be expended by persons that cost $10/hour (*e.g.,* clerical support), then the proposals would cost approximately $14,691,250/year in internal staff time. We expect that a majority of the compliance burden will fall on professionals while approximately one-third of the burden will rest on clerical staff that will monitor and implement the compliance process.

For purposes of the Paperwork Reduction Act, we also estimate that parties would spend approximately $122,929,990/year on outside professional assistance to comply with the proposals. Thus, we estimate that affected parties would spend approximately $137,621,240/year to comply with the paperwork requirements of the amended rules. Applying the same cost estimates to the burden imposed by the current rules, we estimate that companies and affected parties spend approximately $163,268,490/year.[265] Note that these estimates do not attempt to quantify intangible benefits of the amended rules, such as the benefits to issuers and investors of enhanced communications

[263] Forms S–4 and F–4 are already subject to the plain English requirements; thus we are not requiring a summary term sheet for securities offerings.

[264] *See* Mergers & Acquisitions, The Dealmaker's Journal, 1998 Almanac (March/April 1999), at 42.

[265] For the purposes of the Paperwork Reduction Act, we estimate in Table 2 of Part VII the burden hours imposed on parties to comply with the current rules. Assuming (as we did for the proposed rules) that 25% of the hours required to comply with the rules are provided by corporate staff at a cost of $63/hour (70% of the expended corporate staff time cost $85/hour, whereas 30% of the expended corporate staff time cost $10/hour), and 75% of the hours required to comply with the rules are provided by external professional help at a cost of $175/hour, we estimate that affected parties spend approximately 1,110,670 burden hours/year * $147/hour=$163,268,490/year.

and possible improvements in price discovery, nor intangible costs.

C. Tender Offers

We are providing bidders with more flexibility regarding the timing of exchange offers. Currently, bidders may not commence an exchange offer until the related registration statement is effective. Under the amendments, bidders will be able to commence an exchange offer as soon as they file a registration statement, or on a later date if desired. Offerors will no longer need to wait for effectiveness to commence an exchange offer. We expect that this increased flexibility will encourage issuers to file their registration statements earlier, thereby creating an incentive to publicly disseminate more information sooner rather than selectively communicate with a limited number of security holders. In addition, we expect the attempt at balancing the regulatory treatment of cash and stock offers will enhance the attractiveness of offering securities, more so than is currently the case. The increased feasibility of offering securities as an alternative to cash should result in a more competitive market for target companies overall.

We realize that the ability to commence an offer early will likely shorten the period of time necessary to complete an exchange offer relative to the time currently required. We retain, however, certain investor protection mechanisms, including a requirement that a bidder may not purchase securities tendered in an exchange offer until the related registration statement is effective. In addition, the exchange offer may not expire until after the mandatory 20-business day tender offer period has elapsed. The bidder must disseminate a supplement to security holders containing all material changes to the information previously disseminated and security holders may withdraw tendered securities at any time until purchased by the bidder.

We also recognize that early commencement may increase the risk that bidders offering securities will need to disseminate supplements to disclose changes in material information. This may cause bidders to incur additional costs in redisseminating information and security holders will need to reconsider their investment decisions upon receipt of the new information. The risk is not unique to exchange offers, however, because bidders run the same risk today in cash tender offers when there is a material change in information. We do not expect that the costs associated with redissemination will be overly burdensome because early commencement is at the bidder's election. Bidders are not required to commence immediately upon filing. Instead, bidders can file a registration statement and wait for staff comments before disseminating offering materials and commencing the offer, thereby minimizing both the need for supplements and the costs associated with redissemination.

The amendments also permit bidders to purchase (at the stated offer price) securities from holders who did not tender their shares during the offer in a follow-on period called a ''subsequent offering period.'' We expect this change will minimize the delay security holders currently encounter in liquidating their investment in a target company when the bidder is successful in purchasing a significant or controlling interest in the target. We recognize that some security holders might wait to tender their shares until the subsequent offering period, thus creating a hold-out problem for some bidders. We do not believe, however, that the need to announce a subsequent offering period in advance will pose a significant hold-out risk because most bidders will not be willing to close the initial offering period until a sufficient number of securities have been tendered in the offer. Therefore, security holders will need to tender a sufficient number of securities into an offer before the bidder will close the initial offering period and purchase the securities tendered in the offer. As a result, the economics of the transaction will drive a sufficient number of security holders to tender. In addition, we note that bidders are not required to provide a subsequent offering period, but may do so at their election.

We are reducing the financial statement requirement in third-party cash tender offers from three years to two when the information is material. This change harmonizes the financial statement requirement in third-party tender offers with the requirements for issuer tender offers and going-private transactions. We expect that this reduction from three to two years of historical financial statements will lower a bidder's costs to comply with our rules, while continuing to give security holders adequate information to make investment decisions.

The amendments also allow bidders greater access to security holders in tender offers by enabling them to contact non-objecting beneficial owners if the target company maintains a list of these persons. The amendment is expected to give bidders the same ability as target companies to communicate directly with non-objecting beneficial owners of securities similar to that provided under the proxy rules. This revision should benefit both bidders and security holders because communications regarding tender offers will be more efficient than they are today. The amendments do not require targets to gather this information. Instead, the information must be provided only when the target has the information and elects to provide the bidder with security holder list information instead of mailing the tender offer materials for the bidder. Accordingly, we do not expect the revised rule will impose significant costs on target companies.

V. Commission Findings and Considerations

A. Exemptive Authority Findings

We find that it is appropriate, in the public interest and consistent with the protection of investors to exempt: (i) Persons making communications regarding planned business combination or similar takeover transactions from Sections 5(b)(1) and (c) of the Securities Act; and (ii) exchange offers commencing early from section 5(a) and (b)(2) of the Securities Act. We make these findings based on the reasons described in this release. In particular, we believe that investors will be better served if they are able to receive more information concerning business combination transactions before the time they must make an investment decision.

Our use of exemptive authority will allow companies to communicate more freely with security holders and the markets and will permit investors to receive more information in a timely manner. If security holders receive more information sooner, they will be able to better inform themselves before having to make an investment decision. In addition, our use of exemptive authority will help minimize the regulatory disparity between exchange offers and cash tender offers. If bidders can choose more freely between offering cash or securities as consideration in a business combination, the markets will operate more efficiently and security holders will benefit as a result.

In light of improved technologies that permit more and faster communications with security holders and the markets, and the increasing speed at which business combination transactions are consummated, we believe that removing restraints on communications will benefit investors. Therefore, we have found that persons making communications regarding these types of transactions should be free to communicate earlier, before a formal

registration statement is filed or a prospectus meeting the requirements of Section 10(a) of the Securities Act is delivered.

We realize that these exemptions will lead to significantly more communications, some of which could be incomplete in the absence of a mandated disclosure document. We believe, however, that investors will be adequately protected by our continuing requirement to furnish security holders with a complete disclosure document before an investment decision must be made. In addition, we believe that the level of liability imposed on these pre- and post-filing communications will be adequate to protect investors.

B. Effect on Competition

Section 23(a) of the Exchange Act [266] requires us, in adopting rules under the Exchange Act, to consider the impact those rules 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 from commenters on the impact of increased competition for capital in connection with business combination transactions. We also received no comments on whether the new rules, schedules and amendments will have an adverse effect on competition or will impose a burden on competition that is neither necessary nor appropriate in furthering the purposes of the Exchange Act. Harmonizing the requirements between cash and exchange offers removes burdens on competition. Our view, therefore, is that any anti-competitive effects of the new rules, schedules and amendments adopted today are necessary or appropriate in the public interest.

C. Promotion of Efficiency, Competition and Capital Formation

Section 2(b) of the Securities Act [267] and section 3(f) of the Exchange Act,[268] as amended by the National Securities Markets Improvement Act of 1996,[269] 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 must consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. We believe that harmonizing the regulatory requirements between cash tender and exchange offers will promote efficiency and competition. In addition, facilitating communications with security holders will promote efficiency and capital formation.

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis (''FRFA'') has been prepared in accordance with the provisions of the Regulatory Flexibility Act (''RFA''), as amended by Public Law 104–121, 110 Stat. 847, 864 (1996), 5 U.S.C. 604. The FRFA relates to the new rules, amendments, and schedules adopted today, which are primarily intended to enhance communications with security holders; harmonize the regulations affecting cash and stock tender offers; facilitate compliance with the rules and regulations associated with business combination transactions and similar extraordinary transactions; and promote investor protection.

A. Need for Action

Communications

Currently, the rules and regulations applicable to business combination transactions impose restrictions on communications during the period before a mandated disclosure document is publicly filed with us. These restrictions appear in the registration, proxy and tender offer rules.[270] Companies, security holders and other market participants have expressed an increasing desire to communicate and receive information about proposed business combination transactions before the time that a mandated disclosure document (*e.g.,* a registration, proxy or tender offer statement) is filed. This desire is partly attributable to the emergence of new and developing technologies that allow for faster and less expensive means to communicate. In addition, disclosure requirements under both the federal securities laws and applicable exchange rules and regulations may require disclosure. Further, participants to business combination transactions often feel compelled to promptly inform the marketplace, their employees, suppliers, and customers about a proposed business combination transaction that potentially could impact their relationships with these constituencies. We also have recognized that business combination transactions differ from capital-raising transactions to the extent that security holders may be forced to take cash or securities in exchange for their securities even though no action is taken with respect to the transaction.

Accordingly, we have decided to eliminate many of the restrictions imposed on communications before a mandated disclosure document is filed by adopting specific exemptions under each regulatory scheme that could apply to a business combination transaction. Revised Securities Act Rules 135 and 145 and new Rules 165, 166 and 425 permit more communications regarding a business combination transaction before a registration statement is filed. Revised proxy Rule 14a–12 permits more communications regardless of whether a business combination transaction is involved before a proxy statement must be filed. Revised tender offer Rule 14d–2 permits a bidder to communicate more information without having to formally commence its tender offer or file a tender offer statement. Revised tender offer Rule 14d–9 permits a target to respond to a bidder's announcement of a proposed tender offer before commencement of the offer without having to file a solicitation/recommendation statement.

In each case, the person making communications must file all written communications made in connection with or relating to the transaction on the date of first use. The written communications must contain a brief legend advising security holders to read the applicable mandated disclosure document when it is filed together with any other documents that may be available. Under the new regulatory scheme security holders must be furnished with the traditional mandated disclosure document before they must make an investment or voting decision. This new regulatory scheme facilitates the dissemination of more information to security holders at an earlier point in time, providing security holders with a greater opportunity to consider the information in light of all other information available, including the mandated disclosure document that must be furnished before action can be taken.

Balancing the Regulation of Stock and Cash Tender Offers

Currently, a bidder offering securities as consideration in an exchange offer may not commence the offer until a related registration statement is effective.[271] This differs in a significant

[266] 15 U.S.C. 78w(a)(2).

[267] 15 U.S.C. 77b.

[268] 15 U.S.C. 78c.

[269] Pub. L. 104–290, § 106, 110 Stat. 3416 (1996).

[270] For example, *see* section 5 of the Securities Act, Rules 14a–3, 14a–6, 14a–11 and 14a–12 (proxy rules) and Rules 14d–1, 14d–2 and 14d–3 (tender offer rules).

[271] *See* Rule 14d–2(a)(4) stating that commencement occurs when definitive copies of the prospectus/tender offer material are first published, sent or given to security holders.

respect from cash tender offers that may commence as soon as a tender statement is filed and the required information disseminated to security holders. This disparity in regulatory treatment of cash and stock tender offers may influence a bidder's choice of consideration offered in a tender offer. In order to provide bidders with more flexibility on the form of consideration to offer in a business combination transaction, we are revising the rules to permit the commencement of exchange offers before a related registration statement is effective.[272] A bidder, however, may not close its exchange offer and purchase the tendered securities until after the related registration statement is effective. Bidders also must deliver a preliminary prospectus containing all required information in addition to supplements or amendments that disclose material changes from the prospectus previously furnished. This balancing of the regulatory treatment of cash and stock tender offers will provide bidders with increased flexibility to choose between cash and securities as consideration in a business combination transaction without impairing the current level of investor protection afforded to security holders.

Harmonizing, Clarifying and Updating the Disclosure Requirements

In some cases the current rules relating to business combination transactions require differing levels and types of information based on how the transaction is structured. If a transaction is structured as a merger instead of a tender offer, the required disclosure may differ unnecessarily. For example, a fully-financed, all-cash merger generally requires three years of financial statements for the company to be acquired,[273] while a fully-financed, all-cash all-share tender offer generally will not require any financial statement information for either the bidder or the target unless that information is material.[274] In addition, there are other areas where the required level of information may differ unnecessarily. For example, issuer tender offers and going-private transactions generally require two years of financial statements while third-party tender offers require three years of financial statements, when material.

This disparity in required disclosure may be attributed in part to the fact that the disclosure requirements were not adopted at the same time, resulting in some minor inconsistencies or differences. The new and revised schedules[275] and disclosure items[276] serve to integrate the disclosure requirements, harmonizing the requirements to the extent practicable and appropriate. The revisions adopted will facilitate compliance with the disclosure requirements applicable to business combination transactions and going-private transactions while maintaining all substantive disclosure requirements appropriate to the transaction.

B. Objectives of the Rule Amendments

The new rules, schedules and amendments are expected to reduce compliance costs overall for all persons that are subject to our rules and regulations, benefiting both small and large business entities. As a result of the amendments adopted, security holders, including small entities, should receive more information on a timely basis. In addition, persons subject to our rules should have greater flexibility in structuring and completing tender offers, mergers, and other extraordinary transactions. Also as a result of the amendments, bidders should realize greater flexibility in selecting the form of consideration to offer in a tender offer (*e.g.*, cash or securities). We expect that our revisions harmonizing, clarifying and updating the disclosure requirements will facilitate compliance with the rules and regulations as well as improve the disclosure that security holders ultimately receive in business combination transactions.

C. Summary of Significant Issues Raised by the Public Comments

We requested comment with respect to the Initial Regulatory Flexibility Analysis (''IRFA'') that was prepared when the new rules, amendments and schedules were proposed. We did not receive any comments with respect to the IRFA.

D. Description and Estimate of the Number of Small Entities Subject to the New Rules

We adopted definitions of the term ''small business'' for the various entities subject to our rulemaking. Rule 157 under the Securities Act[277] and Rule 0–10 under the Exchange Act[278] provide that ''small business issuer'' includes an issuer, other than an investment company, that has total assets of $5 million or less as of the end of its most recent fiscal year. For purposes of the RFA, an investment company is a small business if the investment company, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[279]

Currently, we are aware of approximately 836 reporting companies that are not investment companies with assets of $5 million or less. In addition, there are approximately 320 investment companies that satisfy the ''small business'' definition. All of these companies could potentially be subject to at least some of the new rules, schedules, and amendments. We expect small businesses will be affected by these amendments to the extent that they are involved in a business combination transaction. In addition, small businesses may be affected by the amendments made to the proxy rules, which permit significantly greater communications with and among security holders. Small entities that are required to file registration statements, proxy statements, tender offer statements and other reports under the Securities Act, Exchange Act, and Investment Company Act will be affected by these amendments. Finally, small entities may be affected as shareholders in companies that are part of a business combination.

We have no reliable way of determining or estimating the number of reporting or non-reporting small businesses that may seek to rely on or would otherwise be affected by the new rules, schedules and amendments. We believe, however, that these amendments will substantially benefit both small and large entities to the extent they will substantially reduce current restrictions on communications and generally facilitate compliance with existing rules and regulations. In addition, because many of the amendments represent exemptions from existing rules and regulations, small businesses can decide whether the burdens imposed by the requirements (*e.g.*, the filing of written communications) outweigh the related benefits (*e.g.*, the ability to communicate more freely).

E. Projected Reporting, Recordkeeping, and Other Compliance Requirements

We believe that the new rules, schedules and amendments are primarily deregulatory in nature because they significantly expand the ability of businesses to structure and

[272] *See* new Rule 162 and revised Rule 14d–2(a).

[273] *See* Item 14 of Schedule 14A.

[274] *See* Item 9 to Schedule 14D–1.

[275] New Schedule TO (replacing Schedules 13E–4 and 14D–1) and revised Schedules 13E–3 and 14D–9.

[276] Regulation M–A, Items 1000 through 1016 and revised Item 14 of Schedule 14A.

[277] 17 CFR 230.157.

[278] 17 CFR 240.0–10.

[279] 17 CFR 270.0–10.

time their business combination transactions and communicate with security holders. In addition, security holders in general will be afforded a greater opportunity to receive information and communicate with other security holders. The resulting increase in flexibility to communicate will benefit companies as well as security holders.

Under the amendments, small businesses will report and file essentially the same information as they do today. One exception to this generalization, however, is that both large and small bidders are required to publicly file all pre-and post-filing written communications relating to proposed business combination transactions. This filing requirement is necessary due to the deregulation of pre-filing communications. Companies are not obligated to communicate with security holders, but to the extent that they do communicate in writing, those communications must be filed on the date of first use. The new rules, schedules, and amendments adopted today treat all persons and entities alike, and do not make any distinctions based on size.

F. Description of Steps Taken To Minimize the Effect on Small Entities

We are directed by the RFA to consider significant alternatives to proposals that would accomplish our stated objectives while minimizing any significant adverse economic impact on small entities. In connection with the proposals presented in the Proposing Release, the views expressed by commenters, and our extensive review of existing rules and regulations, we considered several possible alternatives, including:

- Establishing different compliance and reporting requirements or timetables that take into account the resources of small businesses;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rule for small businesses;
- Using performance rather than design standards; and
- Exempting small businesses from all or part of the requirements.

Because the new rules, schedules, and amendments are primarily deregulatory in nature, any different treatment of small business entities would likely be more burdensome to small business entities. The amendments significantly expand the ability of businesses to structure and time their business combination transactions and communicate with security holders, while maintaining investor protections. While we considered excluding smaller entities from the new rules, schedules, and amendments, we concluded that the benefits of the amendments should apply to all businesses regardless of their size. If small business were exempted, in most cases they would be subject to more rather than less regulation. Accordingly, we decided not to limit the new rules and amendments and their corresponding benefits to larger issuers.

Accordingly, we do not believe any benefit can be achieved by providing separate disclosure requirements for small issuers based on the use of performance rather than design standards.

VII. Paperwork Reduction Act

In November, 1998, the staff submitted the proposed new rules, schedules and amendments to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. Also, in accordance with the Paperwork Reduction Act, we solicited comment on the compliance burdens associated with the proposals. We did not receive any public comments that quantified the estimated paperwork burdens associated with the new rules, schedules and amendments. The comments we received primarily addressed the costs and benefits of the proposals in general terms. We discuss these general comments above in more detail.

The new rules, schedules and amendments will affect several regulations and forms that contain ''collection of information requirements'' within the meaning of the Paperwork Reduction Act of 1995.[280] 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 OMB control number. Table 1 below provides the titles for the affected collections of information under the Exchange Act, current OMB control numbers, where applicable, a summary of the collection of information, and a description of the likely respondents to each collection of information.[281]

TABLE 1: COLLECTIONS OF INFORMATION UNDER THE SECURITIES ACT AND EXCHANGE ACT

Title	OMB Control Number	Summary of the collection of information and description of likely respondents
Schedule 14A	3235–0059	If a vote of security holders is required, persons soliciting proxies with respect to securities registered under Section 12 of the Exchange Act must furnish security holders with a proxy statement containing the information specified in Schedule 14A. The proxy statement is intended to provide security holders with the information necessary to enable them to make an informed voting decision on any matters that will be acted upon at an annual or special meeting of security holders.
Schedule 14C	3235–0057	If a vote of security holders is required, but proxies are not being solicited, companies with securities registered under Section 12 of Exchange Act must send an information statement containing the information specified in Schedule 14C to every security holder that would be entitled to vote on the matters presented at a meeting at which a vote will be taken.
Schedule 13E–3	3235–0007	Companies or their affiliates engaging in specified transactions that cause a class of the company's equity securities registered under the Exchange Act to be: (1) Held by fewer than 300 record holders; or (2) de-listed from a securities exchange or inter-dealer quotation system must file and disseminate to security holders the information specified in Schedule 13E–3. This schedule requires detailed information addressing whether the filing persons believe the transaction is fair to unaffiliated security holders and why.
Schedule 14D–9	3235–0102	Issuers of securities registered under Section 12 of the Exchange Act that make a solicitation or recommendation to security holders regarding a third-party tender offer subject to Regulation 14D must file and send to security holders the information specified in Schedule 14D–9.

[280] 44 U.S.C. 3501 *et seq.*

[281] Although Regulations S–K and S–B do not actually impose reporting burdens directly on public companies, for administrative convenience, we have assigned each of these regulations one burden hour. The burden hours imposed by the disclosure regulations are included in the estimates for the forms that refer to the regulations.

TABLE 1: COLLECTIONS OF INFORMATION UNDER THE SECURITIES ACT AND EXCHANGE ACT—Continued

Title	OMB Control Number	Summary of the collection of information and description of likely respondents
Schedule 13E–4	3235–0203	Issuers of securities registered under Section 12 or reporting under Section 15(d) of the Exchange Act, and certain of their affiliates, must file and disseminate to security holders the information specified in Schedule 13E–4 when making a tender offer for any class of the issuer's equity securities.
Schedule 14D–1	3235–0102	Any person, other than the issuer, making a tender offer for equity securities registered under Section 12 of the Exchange Act, that would result in that person owning greater than five percent of the class of the securities subject to the offer, must at the time of the offer file and disseminate the information specified in Schedule 14D–1 to the issuer, security holders and competing bidders.
Schedule TO	3235–0515	Any person making a tender offer for securities that would have to file a Schedule 13E–4 or 14D–1 must now file and disseminate to security holders the information specified in Schedule TO, instead of Schedule 13E–4 or 14D–1.

The new rules, schedules, and amendments update and simplify the rules and regulations applicable to business combination transactions. The information required by these schedules is needed so that security holders can make an informed tender or voting decision with respect to tender offers, mergers, acquisitions, and other extraordinary transactions. We enhance communications between public companies and investors by providing companies with greater flexibility to determine when to file their registration statements involving takeover transactions, proxy statements, and tender offer statements. We also attempt to put cash and stock tender offers on a more equal regulatory footing; integrate the forms and disclosure requirements in issuer tender offers, third-party tender offers and going-private transactions; and consolidate the disclosure requirements in one location in the regulations. In addition, we allow bidders to accept tenders from security holders during a limited period after the successful completion of the tender offer; more closely align the merger and tender offer requirements; and update the tender offer rules to clarify certain requirements and reduce compliance burdens where consistent with investor protection.

The schedules and regulations affected by these changes set forth the public disclosures that offerors are required to make concerning business combination transactions. For the most part the disclosure requirements in the above schedules remain the same, with a few limited exceptions. Specifically, revised Schedules 14A, 14C, 13E–3, 14D–9, and new Schedule TO requires a brief ''plain English'' summary term sheet highlighting the most significant aspects of a particular transaction in all cash mergers, cash tender offers, and going-private transactions.[282] The amendments also reduce in certain instances the number of years of financial statements that are required in Schedules 14A and 14C for acquirors and companies being acquired in cash mergers. For example, Schedules 14A and 14C no longer require the financial statements of the target in a cash merger when the acquiror's security holders are not voting on the transaction.

New Schedule TO, which replaces current Schedules 13E–4 and 14D–1, harmonizes and clarifies the disclosure requirements in issuer and third-party tender offers. For example, currently when a third-party bidder's financial statement information is material to security holders, three years of financial statements are required while only two years is required for issuers making an issuer tender offer. New Schedule TO requires only two years of financial statements for the bidder if that information is material, regardless of whether an issuer or third-party is making the tender offer. In a negotiated two-tier transaction, Schedule TO will require the bidder to provide security holders with certain pro forma financial and other related information for the combined entity at the time of the cash tender offer. In addition, the amendments permit the filing of one schedule, rather than two, to satisfy the tender offer and going-private disclosure requirements when both sets of regulations apply to the transaction. As a result, the amendments are expected to reduce the number of filings required.

The information collection requirements imposed by the schedules and regulations are mandatory to the extent that companies are publicly-owned and engage in business combination transactions. There is no mandatory retention period for the information disclosed. The information gathered by these schedules and regulation is made publicly available, unless confidential treatment is available. Confidential treatment of information in preliminary merger proxy statements is retained to a limited extent.

As discussed in more detail in Part IV above, the amendments reduce the burden of complying with the disclosure and transaction requirements applicable to business combination transactions. We estimate that public companies will expend approximately 988,986 burden hours/year to comply with the new rules, schedules, and amendments.

Table 2 below summarizes our estimates of the burden hours that filers will expend to comply with the new rules, amendments and schedules. We expect compliance costs will be less than current costs because the amendments primarily integrate and streamline the disclosure requirements for business combination transactions. Our estimates include the burden hours that will be incurred by companies to file pre-filing written communications. We base these estimates on current burden hour estimates and the staff's experience with these filings. The estimates in the table indicate that filers will expend approximately 234,759 burden hours/year to comply with the amendments. In addition, as discussed in more detail below, we estimate that filers will spend approximately $122,929,990/year on outside professional help to comply with the amendments. The estimates are discussed in greater detail below.

[282] Forms S–4 and F–4 are currently subject to summary and plan English requirements. Therefore, we are not requiring a plain English summary term sheet for business combination transactions that are registered on one of these forms.

TABLE 2: BURDEN HOUR ESTIMATES

Schedule	Estimated burden Hours/filing		Estimated filings/year [283]		Estimated burden hours	
	Before revisions (A)	After revisions (B)	Before revisions (C)	After revisions (D)	Before revisions (E =A*C	After revisions (F)=B*D
14A	87.00	13.12	9,892	13,255	860,604	173,906
14C	87.00	13.12	253	339	22,011	4,448
13E–3	139.25	34.31	96	96	13,368	3,294
14D–9	354.25	64.43	258	353	91,397	22,744
13E–4	232.00	0.00	139	0	32,248	0
14D–1	354.25	0.00	257	0	91,042	0
TO	0	43.50	0	705	0	30,668
Rule 425 filings	0	0.25	0	10,628	0	2,657
Total	.....	.....	.....	.....	1,110,670	237,717

[283] The estimated filings/year are based on the number of filings in fiscal year 1998.

We expect that the amendments will reduce the number of burden hours required to file a full Schedule 14A from 87 hours today to 70 hours under the amendments.[284] Of the 70 hours, we estimate that 25% (17.5 internal burden hours) will be provided by corporate staff, and 75% (52.5 hours) by external professional help. Based on filings received in fiscal year 1998, we anticipate that companies and other filers will file approximately 9,892 full Schedule 14As/year. Under the amendments, companies and other filers also are required to file under cover of Schedule 14A any pre-filing written communications (in addition to the required proxy statement) concerning business combinations for cash.[285] Revised Rule 14a–12 requires filers to file their pre- and post-filing written communications and include certain information including a legend advising security holders to read the proxy statement. In fiscal year 1998, approximately 9,892 full Schedule 14As were filed. We estimate that approximately 34% of the full Schedule 14As filed will involve cash rather than securities.[286] We also estimate that filers, on average, will file one written communication (in addition to the required proxy statement) for each cash transaction. We estimate that a firm's corporate staff will expend approximately 15 burden minutes (0.25 internal burden hours) to file a written communication under the amended rules.[287] Thus, we estimate filers will file 9,892 full Schedule 14As/year (expending 17.5 internal burden hours/filing) and 3,363 written communications/year (expending 0.25 internal burden hours/filing). On average, filers will require approximately 13.12 internal burden hours to file 13,255 full Schedule 14As and written communications. In addition, we anticipate filers will spend, at an estimated $175/hour, approximately $9,188/filing in professional labor costs to file a Schedule 14A.[288]

We anticipate the amendments will reduce the number of hours required to file a full Schedule 14C from 87 hours today to 70 hours under the amendments. Of the 70 hours, we estimate that 25% (17.5 internal burden hours) will be provided by corporate staff, and 75% (52.5 hours) by external professional help. Based on filings in fiscal year 1998, we anticipate that companies and other filers will file approximately 253 full Schedule 14Cs/year. Under the amended rules, companies and other filers also are required to file under cover of Schedule 14C any pre-filing written communications (in addition to the required proxy statement) concerning business combinations for cash.[289] The amendments require filers to file their written communications and include certain information including a legend advising security holders to read the information statement. In fiscal year 1998, approximately 253 full Schedule 14Cs were filed. We estimate that 34% of the full Schedule 14Cs will involve cash rather than securities.[290] We estimate that filers, on average, will file one written communication (in addition to the required information statement) for each cash transaction. We estimate that a firm's corporate staff will expend approximately 15 burden minutes (0.25 internal burden hours) to file a written communication under the amended rules. Thus, we estimate filers will file 253 full Schedule 14Cs/year (expending 52.50 burden hours/filing) and 86 written communications/year (expending 0.25 internal burden hours/filing). On average, filers will require approximately 13.12 internal burden hours to file 339 full Schedule 14Cs and written communications. In addition, we anticipate filers will spend, at an estimated $175/hour, approximately $9,188/filing in professional labor costs to file a full Schedule 14C.[291]

[284] The numbers in Column B of Table 2 differ significantly from those in Column A of Table 2 for two reasons. First, the estimated burden hours in Column A include the estimated corporate burden hours and outside labor hours that filers would require to file each disclosure document. In Column B, we estimate only the corporate burden hours needed to file each disclosure document (we estimate separately the expense, in dollar terms, of outside labor). Second, the estimates in Column B include the estimated burden hours that bidders would require to file pre-filing communications. Because parties would require less time to file communications than full Schedule 14As, the average estimated burden hours in Column B are lower than in Column A.

[285] Under the amendments, bidders will file their pre- and post-filing written communications relating to a business combination transaction under Rule 425 in transactions where securities are offered as consideration.

[286] This estimate is based on data from the Securities Data Corporation indicating that security holders had received only cash in 34% of the merger transactions reported in 1996.

[287] We base this estimate on the burden imposed by a similar filing requirement under Item 901(c) of Regulation S–K for roll-up transactions.

[288] We base this estimate on 52.50 hours of professional labor/full Schedule 14A filing * $175/hour. In aggregate, we estimate that filers will spend $90,887,696/year to file 9,892 full Schedule 14As/year.

[289] Under the amendments, bidders will file under rule 425 pre- and post-filing written communications relating to a business combination transaction where securities are offered as consideration.

[290] This estimate is based on data from the Securities Data Corporation indicating that in security holders had received only cash in 34% of merger transactions in 1996.

[291] We base this estimate on 52.50 hours of professional laborfull Schedule 14C filing * $175/

Continued

The amendments clarify and make several technical changes to Schedule 13E–3. As a result, we anticipate a savings of two hours, from 139.25 hours/filing to 137.25 hours/filing, to file Schedule 13E–3 under the amendments. Of the 137.25 hours, we estimate that 25% (34.31 internal burden hours) will be provided by corporate staff, and 75% (102.94 hours) by external professional help. Based on filings in fiscal year 1998, we estimate filers will file 96 Schedule 13E–3s/year. In addition, we anticipate filers will spend, at an estimated $175/hour, approximately $18,015/filing in professional labor costs to file a full Schedule 13E–3.[292]

The amendments clarify and make several technical changes to Schedule 14D–9. As a result, we anticipate a savings of two hours, from 354.25 hours/filing to 352.25 hours/filing, to file a full Schedule 14D–9 under the amendments. Of the 352.25 hours, we estimate that 25% (88.06 internal burden hours) will be provided by corporate staff, and 75% (264.19 hours) by external professional help. Based on filings in fiscal year 1998, we anticipate that companies and other filers will file approximately 258 full Schedule 14D–9s/year. Under the amendments, companies and other filers also are required to file under cover of Schedule 14D–9 any pre- or post-filing written communications (in addition to the required proxy statement) concerning business combinations for cash.[293] The rule requires filers to attach their written communications and include certain information including a legend advising security holders to read the full recommendation statement. In fiscal year 1998, approximately 258 full Schedule 14D–9s were filed. We estimate that 37% of the full Schedule 14D–9s filed will involve cash rather than securities.[294] We estimate that filers, on average, will file one written communication (in addition to the required information statement) for each cash transaction. We estimate that a firm's corporate staff will expend approximately 15 burden minutes (0.25 internal burden hours) to file a written communication under Rule 425. Thus, we estimate filers will file 258 full Schedule 14D–9s /year (expending 88.06 internal burden hours/filing) and 95 written communications/year (expending 0.25 internal burden hours/filing). On average, filers will require approximately 64.43 internal burden hours to file 353 full Schedule 14D–9s and written communications. In addition, we anticipate filers will spend, at an estimated $175/hour, approximately $46,233/filing in professional labor costs to file a full Schedule 14D–9.[295]

Under the amendments new Schedule TO replaces current Schedules 13E–4 and 14D–1. Schedule TO harmonizes and clarifies the requirements in current Schedules 13E–4 and 14D–1. Based on the number of Schedule 13E–4 and Schedule 14D–1s filed in fiscal year 1998, and the number of hours required to complete them, we estimate that bidders will require approximately 309 hours to file a full Schedule TO under the amended rules.[296] Of the 309 hours, we estimate that 25% (77.25 internal burden hours) will be provided by corporate staff, and 75% (231.75 hours) by external professional help. Based on filings in fiscal year 1998, we anticipate that companies and other filers will file approximately 396 full Schedule TOs/year. Under the amendments, companies and other filers also will be required to file under Schedule TO all pre- and post filing written communications (in addition to the required tender offer statement) concerning all cash tender offers.[297] The amendments require filers to file their written communications with certain information including a legend advising security holders to read the tender offer disclosure statement. We estimate that filers, on average, will file one written communication (in addition to the required information statement) for each cash tender offer transaction. We estimate that a firm's corporate staff will expend approximately 15 burden minutes (0.25 internal burden hours) to file a written communication under the amendments. Based on data from fiscal year 1998, we estimate filers will file 396 full Schedule TOs/year (expending 77.25 internal burden hours/filing) and 309 written communications/year (expending 0.25 internal burden hours/filing).[298] On average, filers will require approximately 43.50 internal burden hours to file 705 full Schedule TOs and written communications. In addition, we anticipate filers will spend, at an estimated $175/hour, approximately $40,556/filing in professional labor costs to file a full Schedule TO.[299]

VIII. Statutory Basis and Text of Amendments

We are adopting amendments to the rules under sections 2(3), 5, 7, 8, 10, 12, 19 and 28, of the Securities Act of 1933, as amended, and sections 3(b), 4(e), 10(b), 13, 14, 18, 23(a), 24 and 36 of the Securities Act of 1934, as amended.

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegation.

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

Reporting and recordkeeping requirements, Securities.

Text of Amendments

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended 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.

* * * * *

§ 200.30–3 [Amended]

2. By amending paragraph (a)(6) of § 200.30–3 by removing the phrase

hour. In aggregate, we estimate that filers will spend $2,324,564/year to file 253 full Schedule 14Cs/year.

[292] We base this estimate on 102.94 hours of professional labor/full Schedule 13E–3 filing * $175/hour. In aggregate, we estimate that filers will spend $1,729,440/year to file 96 full Schedule 13E–3s/year.

[293] Under the amendments, bidders must file under Rule 425 any pre- or post-filing written communications in business combination transactions where securities are offered as consideration.

[294] This estimate is based on data from the Securities Data Corporation and *Mergerstat*, indicating that security holders received only cash in 37% of merger and tender offer transactions in 1996.

[295] We base this estimate on 264.19 hours of professional laborfull Schedule 14D–9 filing * $175/hour. In aggregate, we estimate that filers will spend $11,928,114/year to file 258 full Schedule 14D–9s/year.

[296] Offerors currently require 232 hours to complete Schedule 13E–4, and 354.25 hours to complete Schedule 14D–1. In fiscal year 1998, offerors registered 139 business combinations on Schedule 13E–4 and 257 business combinations on Schedule 14D–1. We estimate the number of burden hours to file a full Schedule TO will be [(139 Schedule TO filings that previously would have been filed on Schedule 13E–4 * 232 hours/Schedule TO filing that previously would have been filed on Schedule 13E–4) + (257 Schedule TO filings that previously would have been filed on Schedule 14D–1 * 354.25 hours/Schedule TO filing that previously would have been filed on Schedule 14D–1)—2 burden hours from simplication]/396 filings on Schedule TO = 309 hours/filing on Schedule TO.

[297] Under the new rules, bidders must file under Rule 425 any pre-filing communications in transactions where securities are offered as consideration.

[298] According to *Mergerstat*, in 1996 security holders received only cash in 78% of tender offer transactions.

[299] We base this estimate on 231.75 hours of professional labor/full Schedule TO filing * $175/hour. In aggregate, we estimate that filers will spend $16,060,176/year to file 396 full Schedule TOs/year.

''Rules 10b–13(d), 14e–4(c), and 15c2–11(h) (§§ 240.10b–13(d), 240.14e–4(c), and 240.15c2–11(h) of this chapter)'' and in its place adding ''Rules 14e–4(c), 14e–5(d), and 15c2–11(h) (§§ 240.14e–4(c), 240.14e–5(d), and 240.15c2–11(h) of this chapter)'', and removing the phrase ''to grant requests for exemptions from Rules 10b–13, 14e–4, and 15c2–11) (§§ 240.10b–13, 240.14e–4, and 240.15c2–11 of this chapter)'' and in its place adding ''to grant requests for exemptions from Rules 14e–4, 14e–5, and 15c2–11 (§§ 240.14e–4, 240.14e–5, and 240.15c2–11 of this chapter)''.

* * * * *

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

3. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u–5, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

4. By revising paragraph (a)(2) of § 229.10 to read as follows:

§ 229.10 General.

(a) *Application of Regulation S–K.*

* * *

(2) Registration statements under section 12 (subpart C of part 249 of this chapter), annual or other reports under sections 13 and 15(d) (subparts D and E of part 249 of this chapter), going-private transaction statements under section 13 (part 240 of this chapter), tender offer statements under sections 13 and 14 (part 240 of this chapter), annual reports to security holders and proxy and information statements under section 14 (part 240 of this chapter), and any other documents required to be filed under the Exchange Act, to the extent provided in the forms and rules under that Act.

* * * * *

5. By adding subpart 229.1000 consisting of §§ 229.1000 through 229.1016 to read as follows:

Subpart 229.1000—Mergers and Acquisitions (Regulation M–A)

Sec.

Subpart 229.1000—Mergers and Acquisitions (Regulation M–A)

§ 229.1000 (Item 1000) Definitions.

The following definitions apply to the terms used in Regulation M–A (§§ 229.1000 through 229.1016), unless specified otherwise:

(a) *Associate* has the same meaning as in § 240.12b–2 of this chapter;

(b) *Instruction C* means General Instruction C to Schedule 13E–3 (§ 240.13e–100 of this chapter) and General Instruction C to Schedule TO (§ 240.14d–100 of this chapter);

(c) *Issuer tender offer* has the same meaning as in § 240.13e–4(a)(2) of this chapter;

(d) *Offeror* means any person who makes a tender offer or on whose behalf a tender offer is made;

(e) *Rule 13e–3 transaction* has the same meaning as in § 240.13e–3(a)(3) of this chapter;

(f) *Subject company* means the company or entity whose securities are sought to be acquired in the transaction (*e.g.*, the target), or that is otherwise the subject of the transaction;

(g) *Subject securities* means the securities or class of securities that are sought to be acquired in the transaction or that are otherwise the subject of the transaction; and

(h) *Third-party tender offer* means a tender offer that is not an issuer tender offer.

§ 229.1001 (Item 1001) Summary term sheet.

Summary term sheet. Provide security holders with a summary term sheet that is written in plain English. The summary term sheet must briefly describe in bullet point format the most material terms of the proposed transaction. The summary term sheet must provide security holders with sufficient information to understand the essential features and significance of the proposed transaction. The bullet points must cross-reference a more detailed discussion contained in the disclosure document that is disseminated to security holders.

Instructions to Item 1001:

1. The summary term sheet must not recite all information contained in the disclosure document that will be provided to security holders. The summary term sheet is intended to serve as an overview of all material matters that are presented in the accompanying documents provided to security holders.

2. The summary term sheet must begin on the first or second page of the disclosure document provided to security holders.

3. Refer to Rule 421(b) and (d) of Regulation C of the Securities Act (§ 230.421 of this chapter) for a description of plain English disclosure.

§ 229.1002 (Item 1002) Subject company information.

(a) *Name and address.* State the name of the subject company (or the issuer in the case of an issuer tender offer), and the address and telephone number of its principal executive offices.

(b) *Securities.* State the exact title and number of shares outstanding of the subject class of equity securities as of the most recent practicable date. This may be based upon information in the most recently available filing with the Commission by the subject company unless the filing person has more current information.

(c) *Trading market and price.* Identify the principal market in which the subject securities are traded and state the high and low sales prices for the subject securities in the principal market (or, if there is no principal market, the range of high and low bid quotations and the source of the quotations) for each quarter during the past two years. If there is no established trading market for the securities (except for limited or sporadic quotations), so state.

(d) *Dividends.* State the frequency and amount of any dividends paid during the past two years with respect to the subject securities. Briefly describe any restriction on the subject company's current or future ability to pay dividends. If the filing person is not the subject company, furnish this information to the extent known after making reasonable inquiry.

(e) *Prior public offerings.* If the filing person has made an underwritten public

offering of the subject securities for cash during the past three years that was registered under the Securities Act of 1933 or exempt from registration under Regulation A (§ 230.251 through § 230.263 of this chapter), state the date of the offering, the amount of securities offered, the offering price per share (adjusted for stock splits, stock dividends, etc. as appropriate) and the aggregate proceeds received by the filing person.

(f) *Prior stock purchases.* If the filing person purchased any subject securities during the past two years, state the amount of the securities purchased, the range of prices paid and the average purchase price for each quarter during that period. Affiliates need not give information for purchases made before becoming an affiliate.

§ 229.1003 (Item 1003) Identity and background of filing person.

(a) *Name and address.* State the name, business address and business telephone number of each filing person. Also state the name and address of each person specified in Instruction C to the schedule (except for Schedule 14D–9 (§ 240.14d–101 of this chapter)). If the filing person is an affiliate of the subject company, state the nature of the affiliation. If the filing person is the subject company, so state.

(b) *Business and background of entities.* If any filing person (other than the subject company) or any person specified in Instruction C to the schedule is not a natural person, state the person's principal business, state or other place of organization, and the information required by paragraphs (c)(3) and (c)(4) of this section for each person.

(c) *Business and background of natural persons.* If any filing person or any person specified in Instruction C to the schedule is a natural person, provide the following information for each person:

(1) Current principal occupation or employment and the name, principal business and address of any corporation or other organization in which the employment or occupation is conducted;

(2) Material occupations, positions, offices or employment during the past five years, giving the starting and ending dates of each and the name, principal business and address of any corporation or other organization in which the occupation, position, office or employment was carried on;

(3) A statement whether or not the person was convicted in a criminal proceeding during the past five years (excluding traffic violations or similar misdemeanors). If the person was convicted, describe the criminal proceeding, including the dates, nature of conviction, name and location of court, and penalty imposed or other disposition of the case;

(4) A statement whether or not the person was a party to any judicial or administrative proceeding during the past five years (except for matters that were dismissed without sanction or settlement) that resulted in a judgment, decree or final order enjoining the person from future violations of, or prohibiting activities subject to, federal or state securities laws, or a finding of any violation of federal or state securities laws. Describe the proceeding, including a summary of the terms of the judgment, decree or final order; and

(5) Country of citizenship.

(d) *Tender offer.* Identify the tender offer and the class of securities to which the offer relates, the name of the offeror and its address (which may be based on the offeror's Schedule TO (§ 240.14d–100 of this chapter) filed with the Commission).

Instruction to Item 1003

If the filing person is making information relating to the transaction available on the Internet, state the address where the information can be found.

§ 229.1004 (Item 1004) Terms of the transaction.

(a) *Material terms.* State the material terms of the transaction.

(1) *Tender offers.* In the case of a tender offer, the information must include:

(i) The total number and class of securities sought in the offer;

(ii) The type and amount of consideration offered to security holders;

(iii) The scheduled expiration date;

(iv) Whether a subsequent offering period will be available, if the transaction is a third-party tender offer;

(v) Whether the offer may be extended, and if so, how it could be extended;

(vi) The dates before and after which security holders may withdraw securities tendered in the offer;

(vii) The procedures for tendering and withdrawing securities;

(viii) The manner in which securities will be accepted for payment;

(ix) If the offer is for less than all securities of a class, the periods for accepting securities on a pro rata basis and the offeror's present intentions in the event that the offer is oversubscribed;

(x) An explanation of any material differences in the rights of security holders as a result of the transaction, if material;

(xi) A brief statement as to the accounting treatment of the transaction, if material; and

(xii) The federal income tax consequences of the transaction, if material.

(2) *Mergers or similar transactions.* In the case of a merger or similar transaction, the information must include:

(i) A brief description of the transaction;

(ii) The consideration offered to security holders;

(iii) The reasons for engaging in the transaction;

(iv) The vote required for approval of the transaction;

(v) An explanation of any material differences in the rights of security holders as a result of the transaction, if material;

(vi) A brief statement as to the accounting treatment of the transaction, if material; and

(vii) The federal income tax consequences of the transaction, if material.

Instruction to Item 1004(a):

If the consideration offered includes securities exempt from registration under the Securities Act of 1933, provide a description of the securities that complies with Item 202 of Regulation S–K (§ 229.202). This description is not required if the issuer of the securities meets the requirements of General Instructions I.A, I.B.1 or I.B.2, as applicable, or I.C. of Form S–3 (§ 239.13 of this chapter) and elects to furnish information by incorporation by reference; only capital stock is to be issued; and securities of the same class are registered under section 12 of the Exchange Act and either are listed for trading or admitted to unlisted trading privileges on a national securities exchange; or are securities for which bid and offer quotations are reported in an automated quotations system operated by a national securities association.

(b) *Purchases.* State whether any securities are to be purchased from any officer, director or affiliate of the subject company and provide the details of each transaction.

(c) *Different terms.* Describe any term or arrangement in the Rule 13e-3 transaction that treats any subject security holders differently from other subject security holders.

(d) *Appraisal rights.* State whether or not dissenting security holders are entitled to any appraisal rights. If so, summarize the appraisal rights. If there are no appraisal rights available under state law for security holders who object to the transaction, briefly outline any other rights that may be available to security holders under the law.

(e) *Provisions for unaffiliated security holders.* Describe any provision made

by the filing person in connection with the transaction to grant unaffiliated security holders access to the corporate files of the filing person or to obtain counsel or appraisal services at the expense of the filing person. If none, so state.

(f) *Eligibility for listing or trading.* If the transaction involves the offer of securities of the filing person in exchange for equity securities held by unaffiliated security holders of the subject company, describe whether or not the filing person will take steps to assure that the securities offered are or will be eligible for trading on an automated quotations system operated by a national securities association.

§ 229.1005 (Item 1005) Past contacts, transactions, negotiations and agreements.

(a) *Transactions.* Briefly state the nature and approximate dollar amount of any transaction, other than those described in paragraphs (b) or (c) of this section, that occurred during the past two years, between the filing person (including any person specified in Instruction C of the schedule) and;

(1) The subject company or any of its affiliates that are not natural persons if the aggregate value of the transactions is more than one percent of the subject company's consolidated revenues for:

(i) The fiscal year when the transaction occurred; or

(ii) The past portion of the current fiscal year, if the transaction occurred in the current year; and

Instruction to Item 1005(a)(1):

The information required by this Item may be based on information in the subject company's most recent filing with the Commission, unless the filing person has reason to believe the information is not accurate.

(2) Any executive officer, director or affiliate of the subject company that is a natural person if the aggregate value of the transaction or series of similar transactions with that person exceeds $60,000.

(b) *Significant corporate events.* Describe any negotiations, transactions or material contacts during the past two years between the filing person (including subsidiaries of the filing person and any person specified in Instruction C of the schedule) and the subject company or its affiliates concerning any:

(1) Merger;

(2) Consolidation;

(3) Acquisition;

(4) Tender offer for or other acquisition of any class of the subject company's securities;

(5) Election of the subject company's directors; or

(6) Sale or other transfer of a material amount of assets of the subject company.

(c) *Negotiations or contacts.* Describe any negotiations or material contacts concerning the matters referred to in paragraph (b) of this section during the past two years between:

(1) Any affiliates of the subject company; or

(2) The subject company or any of its affiliates and any person not affiliated with the subject company who would have a direct interest in such matters.

Instruction to paragraphs (b) and (c) of Item 1005

Identify the person who initiated the contacts or negotiations.

(d) *Conflicts of interest.* If material, describe any agreement, arrangement or understanding and any actual or potential conflict of interest between the filing person or its affiliates and:

(1) The subject company, its executive officers, directors or affiliates; or

(2) The offeror, its executive officers, directors or affiliates.

Instruction to Item 1005(d)

If the filing person is the subject company, no disclosure called for by this paragraph is required in the document disseminated to security holders, so long as substantially the same information was filed with the Commission previously and disclosed in a proxy statement, report or other communication sent to security holders by the subject company in the past year. The document disseminated to security holders, however, must refer specifically to the discussion in the proxy statement, report or other communication that was sent to security holders previously. The information also must be filed as an exhibit to the schedule.

(e) *Agreements involving the subject company's securities.* Describe any agreement, arrangement, or understanding, whether or not legally enforceable, between the filing person (including any person specified in Instruction C of the schedule) and any other person with respect to any securities of the subject company. Name all persons that are a party to the agreements, arrangements, or understandings and describe all material provisions.

Instructions to Item 1005(e)

1. The information required by this Item includes: the transfer or voting of securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss, or the giving or withholding of proxies, consents or authorizations.

2. Include information for any securities that are pledged or otherwise subject to a contingency, the occurrence of which would give another person the power to direct the voting or disposition of the subject securities. No disclosure, however, is required about standard default and similar provisions contained in loan agreements.

§ 229.1006 (Item 1006) Purposes of the transaction and plans or proposals.

(a) *Purposes.* State the purposes of the transaction.

(b) *Use of securities acquired.* Indicate whether the securities acquired in the transaction will be retained, retired, held in treasury, or otherwise disposed of.

(c) *Plans.* Describe any plans, proposals or negotiations that relate to or would result in:

(1) Any extraordinary transaction, such as a merger, reorganization or liquidation, involving the subject company or any of its subsidiaries;

(2) Any purchase, sale or transfer of a material amount of assets of the subject company or any of its subsidiaries;

(3) Any material change in the present dividend rate or policy, or indebtedness or capitalization of the subject company;

(4) Any change in the present board of directors or management of the subject company, including, but not limited to, any plans or proposals to change the number or the term of directors or to fill any existing vacancies on the board or to change any material term of the employment contract of any executive officer;

(5) Any other material change in the subject company's corporate structure or business, including, if the subject company is a registered closed-end investment company, any plans or proposals to make any changes in its investment policy for which a vote would be required by Section 13 of the Investment Company Act of 1940 (15 U.S.C. 80a–13);

(6) Any class of equity securities of the subject company to be delisted from a national securities exchange or cease to be authorized to be quoted in an automated quotations system operated by a national securities association;

(7) Any class of equity securities of the subject company becoming eligible for termination of registration under section 12(g)(4) of the Act (15 U.S.C. 78*l*);

(8) The suspension of the subject company's obligation to file reports under Section 15(d) of the Act (15 U.S.C. 78o);

(9) The acquisition by any person of additional securities of the subject company, or the disposition of securities of the subject company; or

(10) Any changes in the subject company's charter, bylaws or other governing instruments or other actions that could impede the acquisition of control of the subject company.

(d) *Subject company negotiations.* If the filing person is the subject company:

(1) State whether or not that person is undertaking or engaged in any negotiations in response to the tender offer that relate to:

(i) A tender offer or other acquisition of the subject company's securities by the filing person, any of its subsidiaries, or any other person; or

(ii) Any of the matters referred to in paragraphs (c)(1) through (c)(3) of this section; and

(2) Describe any transaction, board resolution, agreement in principle, or signed contract that is entered into in response to the tender offer that relates to one or more of the matters referred to in paragraph (d)(1) of this section.

Instruction to Item 1006(d)(1)

If an agreement in principle has not been reached at the time of filing, no disclosure under paragraph (d)(1) of this section is required of the possible terms of or the parties to the transaction if in the opinion of the board of directors of the subject company disclosure would jeopardize continuation of the negotiations. In that case, disclosure indicating that negotiations are being undertaken or are underway and are in the preliminary stages is sufficient.

§ 229.1007 (Item 1007) Source and amount of funds or other consideration.

(a) *Source of funds.* State the specific sources and total amount of funds or other consideration to be used in the transaction. If the transaction involves a tender offer, disclose the amount of funds or other consideration required to purchase the maximum amount of securities sought in the offer.

(b) *Conditions.* State any material conditions to the financing discussed in response to paragraph (a) of this section. Disclose any alternative financing arrangements or alternative financing plans in the event the primary financing plans fall through. If none, so state.

(c) *Expenses.* Furnish a reasonably itemized statement of all expenses incurred or estimated to be incurred in connection with the transaction including, but not limited to, filing, legal, accounting and appraisal fees, solicitation expenses and printing costs and state whether or not the subject company has paid or will be responsible for paying any or all expenses.

(d) *Borrowed funds.* If all or any part of the funds or other consideration required is, or is expected, to be borrowed, directly or indirectly, for the purpose of the transaction:

(1) Provide a summary of each loan agreement or arrangement containing the identity of the parties, the term, the collateral, the stated and effective interest rates, and any other material terms or conditions of the loan; and

(2) Briefly describe any plans or arrangements to finance or repay the loan, or, if no plans or arrangements have been made, so state.

Instruction to Item 1007(d):

If the transaction is a third-party tender offer and the source of all or any part of the funds used in the transaction is to come from a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Act (15 U.S.C. 78c), the name of the bank will not be made available to the public if the filing person so requests in writing and files the request, naming the bank, with the Secretary of the Commission.

§ 229.1008 (Item 1008) Interest in securities of the subject company.

(a) *Securities ownership.* State the aggregate number and percentage of subject securities that are beneficially owned by each person named in response to Item 1003 of Regulation M–A (§ 229.1003) and by each associate and majority-owned subsidiary of those persons. Give the name and address of any associate or subsidiary.

Instructions to Item 1008(a)

1. For purposes of this section, beneficial ownership is determined in accordance with Rule 13d–3 (§ 240.13d–3 of this chapter) under the Exchange Act. Identify the shares that the person has a right to acquire.

2. The information required by this section may be based on the number of outstanding securities disclosed in the subject company's most recently available filing with the Commission, unless the filing person has more current information.

3. The information required by this section with respect to officers, directors and associates of the subject company must be given to the extent known after making reasonable inquiry.

(b) *Securities transactions.* Describe any transaction in the subject securities during the past 60 days. The description of transactions required must include, but not necessarily be limited to:

(1) The identity of the persons specified in the Instruction to this section who effected the transaction;

(2) The date of the transaction;

(3) The amount of securities involved;

(4) The price per share; and

(5) Where and how the transaction was effected.

Instructions to Item 1008(b)

1. Provide the required transaction information for the following persons:

(a) The filing person (for all schedules);

(b) Any person named in Instruction C of the schedule and any associate or majority-owned subsidiary of the issuer or filing person (for all schedules except Schedule 14D–9 (§ 240.14d–101 of this chapter));

(c) Any executive officer, director, affiliate or subsidiary of the filing person (for Schedule 14D–9 (§ 240.14d–101 of this chapter);

(d) The issuer and any executive officer or director of any subsidiary of the issuer or filing person (for an issuer tender offer on Schedule TO (§ 240.14d–100 of this chapter)); and

(e) The issuer and any pension, profit-sharing or similar plan of the issuer or affiliate filing the schedule (for a going-private transaction on Schedule 13E–3 (§ 240.13e–100 of this chapter)).

2. Provide the information required by this Item if it is available to the filing person at the time the statement is initially filed with the Commission. If the information is not initially available, it must be obtained and filed with the Commission promptly, but in no event later than three business days after the date of the initial filing, and if material, disclosed in a manner reasonably designed to inform security holders. The procedure specified by this instruction is provided to maintain the confidentiality of information in order to avoid possible misuse of inside information.

§ 229.1009 (Item 1009) Persons/assets, retained, employed, compensated or used.

(a) *Solicitations or recommendations.* Identify all persons and classes of persons that are directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations in connection with the transaction. Provide a summary of all material terms of employment, retainer or other arrangement for compensation.

(b) *Employees and corporate assets.* Identify any officer, class of employees or corporate assets of the subject company that has been or will be employed or used by the filing person in connection with the transaction. Describe the purpose for their employment or use.

Instruction to Item 1009(b):

Provide all information required by this Item except for the information required by paragraph (a) of this section and Item 1007 of Regulation M–A (§ 229.1007).

§ 229.1010 (Item 1010) Financial statements.

(a) *Financial information.* Furnish the following financial information:

(1) Audited financial statements for the two fiscal years required to be filed with the company's most recent annual report under sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m; 15 U.S.C. 78o);

(2) Unaudited balance sheets, comparative year-to-date income statements and related earnings per share data, statements of cash flows, and comprehensive income required to be included in the company's most recent quarterly report filed under the Exchange Act;

(3) Ratio of earnings to fixed charges, computed in a manner consistent with Item 503(d) of Regulation S–K (§ 229.503(d)), for the two most recent fiscal years and the interim periods provided under paragraph (a)(2) of this section; and

(4) Book value per share as of the date of the most recent balance sheet presented.

(b) *Pro forma information.* If material, furnish pro forma information disclosing the effect of the transaction on:

(1) The company's balance sheet as of the date of the most recent balance sheet presented under paragraph (a) of this section;

(2) The company's statement of income, earnings per share, and ratio of earnings to fixed charges for the most recent fiscal year and the latest interim period provided under paragraph (a)(2) of this section; and

(3) The company's book value per share as of the date of the most recent balance sheet presented under paragraph (a) of this section.

(c) *Summary information.* Furnish a fair and adequate summary of the information specified in paragraphs (a) and (b) of this section for the same periods specified. A fair and adequate summary includes:

(1) The summarized financial information specified in § 210.1–02(bb)(1) of this chapter;

(2) Income per common share from continuing operations (basic and diluted, if applicable);

(3) Net income per common share (basic and diluted, if applicable);

(4) Ratio of earnings to fixed charges, computed in a manner consistent with Item 503(d) of Regulation S–K (§ 229.503(d));

(5) Book value per share as of the date of the most recent balance sheet; and

(6) If material, pro forma data for the summarized financial information specified in paragraphs (c)(1) through (c)(5) of this section disclosing the effect of the transaction.

§ 229.1011 (Item 1011) Additional information.

(a) *Agreements, regulatory requirements and legal proceedings.* If material to a security holder's decision whether to sell, tender or hold the securities sought in the tender offer, furnish the following information:

(1) Any present or proposed material agreement, arrangement, understanding or relationship between the offeror or any of its executive officers, directors, controlling persons or subsidiaries and the subject company or any of its executive officers, directors, controlling persons or subsidiaries (other than any agreement, arrangement or understanding disclosed under any other sections of Regulation M–A (§§ 229.1000 through 229.1016));

Instruction to paragraph (a)(1):

In an issuer tender offer disclose any material agreement, arrangement, understanding or relationship between the offeror and any of its executive officers, directors, controlling persons or subsidiaries.

(2) To the extent known by the offeror after reasonable investigation, the applicable regulatory requirements which must be complied with or approvals which must be obtained in connection with the tender offer;

(3) The applicability of any anti-trust laws;

(4) The applicability of margin requirements under section 7 of the Act (15 U.S.C. 78g) and the applicable regulations; and

(5) Any material pending legal proceedings relating to the tender offer, including the name and location of the court or agency in which the proceedings are pending, the date instituted, the principal parties, and a brief summary of the proceedings and the relief sought.

Instruction to Item 1011(a)(5):

A copy of any document relating to a major development (such as pleadings, an answer, complaint, temporary restraining order, injunction, opinion, judgment or order) in a material pending legal proceeding must be furnished promptly to the Commission staff on a supplemental basis.

(b) *Other material information.* Furnish such additional material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

§ 229.1012 (Item 1012) The solicitation or recommendation.

(a) *Solicitation or recommendation.* State the nature of the solicitation or the recommendation. If this statement relates to a recommendation, state whether the filing person is advising holders of the subject securities to accept or reject the tender offer or to take other action with respect to the tender offer and, if so, describe the other action recommended. If the filing person is the subject company and is not making a recommendation, state whether the subject company is expressing no opinion and is remaining neutral toward the tender offer or is unable to take a position with respect to the tender offer.

(b) *Reasons.* State the reasons for the position (including the inability to take a position) stated in paragraph (a) of this section. Conclusory statements such as ''The tender offer is in the best interests of shareholders'' are not considered sufficient disclosure.

(c) *Intent to tender.* To the extent known by the filing person after making reasonable inquiry, state whether the filing person or any executive officer, director, affiliate or subsidiary of the filing person currently intends to tender, sell or hold the subject securities that are held of record or beneficially owned by that person.

(d) *Intent to tender or vote in a going-private transaction.* To the extent known by the filing person after making reasonable inquiry, state whether or not any executive officer, director or affiliate of the issuer (or any person specified in Instruction C to the schedule) currently intends to tender or sell subject securities owned or held by that person and/or how each person currently intends to vote subject securities, including any securities the person has proxy authority for. State the reasons for the intended action.

Instruction to Item 1012(d):

Provide the information required by this section if it is available to the filing person at the time the statement is initially filed with the Commission. If the information is not available, it must be filed with the Commission promptly, but in no event later than three business days after the date of the initial filing, and if material, disclosed in a manner reasonably designed to inform security holders.

(e) *Recommendations of others.* To the extent known by the filing person after making reasonable inquiry, state whether or not any person specified in paragraph (d) of this section has made a recommendation either in support of or opposed to the transaction and the reasons for the recommendation.

§ 229.1013 (Item 1013) Purposes, alternatives, reasons and effects in a going-private transaction.

(a) *Purposes.* State the purposes for the Rule 13e–3 transaction.

(b) *Alternatives.* If the subject company or affiliate considered alternative means to accomplish the stated purposes, briefly describe the alternatives and state the reasons for their rejection.

(c) *Reasons.* State the reasons for the structure of the Rule 13e–3 transaction and for undertaking the transaction at this time.

(d) *Effects.* Describe the effects of the Rule 13e–3 transaction on the subject company, its affiliates and unaffiliated security holders, including the federal tax consequences of the transaction.

Instructions to Item 1013:

1. Conclusory statements will not be considered sufficient disclosure in response to this section.

2. The description required by paragraph (d) of this section must include a reasonably detailed discussion of both the benefits and detriments of the Rule 13e–3 transaction to the subject company, its affiliates and unaffiliated security holders. The benefits and detriments of the Rule 13e–3 transaction must be quantified to the extent practicable.

3. If this statement is filed by an affiliate of the subject company, the description required by paragraph (d) of this section must include, but not be limited to, the effect of the Rule 13e–3 transaction on the affiliate's interest in the net book value and net earnings of the subject company in terms of both dollar amounts and percentages.

§ 229.1014 (Item 1014) Fairness of the going-private transaction.

(a) *Fairness.* State whether the subject company or affiliate filing the statement reasonably believes that the Rule 13e–3 transaction is fair or unfair to unaffiliated security holders. If any director dissented to or abstained from voting on the Rule 13e–3 transaction, identify the director, and indicate, if known, after making reasonable inquiry, the reasons for the dissent or abstention.

(b) *Factors considered in determining fairness.* Discuss in reasonable detail the material factors upon which the belief stated in paragraph (a) of this section is based and, to the extent practicable, the weight assigned to each factor. The discussion must include an analysis of the extent, if any, to which the filing person's beliefs are based on the factors described in Instruction 2 of this section, paragraphs (c), (d) and (e) of this section and Item 1015 of Regulation M–A (§ 229.1015).

(c) *Approval of security holders.* State whether or not the transaction is structured so that approval of at least a majority of unaffiliated security holders is required.

(d) *Unaffiliated representative.* State whether or not a majority of directors who are not employees of the subject company has retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for purposes of negotiating the terms of the Rule 13e–3 transaction and/or preparing a report concerning the fairness of the transaction.

(e) *Approval of directors.* State whether or not the Rule 13e–3 transaction was approved by a majority of the directors of the subject company who are not employees of the subject company.

(f) *Other offers.* If any offer of the type described in paragraph (viii) of Instruction 2 to this section has been received, describe the offer and state the reasons for its rejection.

Instructions to Item 1014:

1. A statement that the issuer or affiliate has no reasonable belief as to the fairness of the Rule 13e–3 transaction to unaffiliated security holders will not be considered sufficient disclosure in response to paragraph (a) of this section.

2. The factors that are important in determining the fairness of a transaction to unaffiliated security holders and the weight, if any, that should be given to them in a particular context will vary. Normally such factors will include, among others, those referred to in paragraphs (c), (d) and (e) of this section and whether the consideration offered to unaffiliated security holders constitutes fair value in relation to:

(i) Current market prices;

(ii) Historical market prices;

(iii) Net book value;

(iv) Going concern value;

(v) Liquidation value;

(vi) Purchase prices paid in previous purchases disclosed in response to Item 1002(f) of Regulation M–A (§ 229.1002(f));

(vii) Any report, opinion, or appraisal described in Item 1015 of Regulation M–A (§ 229.1015); and

(viii) Firm offers of which the subject company or affiliate is aware made by any unaffiliated person, other than the filing persons, during the past two years for:

(A) The merger or consolidation of the subject company with or into another company, or *vice versa;*

(B) The sale or other transfer of all or any substantial part of the assets of the subject company; or

(C) A purchase of the subject company's securities that would enable the holder to exercise control of the subject company.

3. Conclusory statements, such as ''The Rule 13e–3 transaction is fair to unaffiliated security holders in relation to net book value, going concern value and future prospects of the issuer'' will not be considered sufficient disclosure in response to paragraph (b) of this section.

§ 229.1015 (Item 1015) Reports, opinions, appraisals and negotiations.

(a) *Report, opinion or appraisal.* State whether or not the subject company or affiliate has received any report, opinion (other than an opinion of counsel) or appraisal from an outside party that is materially related to the Rule 13e–3 transaction, including, but not limited to: Any report, opinion or appraisal relating to the consideration or the fairness of the consideration to be offered to security holders or the fairness of the transaction to the issuer or affiliate or to security holders who are not affiliates.

(b) *Preparer and summary of the report, opinion or appraisal.* For each report, opinion or appraisal described in response to paragraph (a) of this section or any negotiation or report described in response to Item 1014(d) of Regulation M–A (§ 229.1014) or Item 14(b)(6) of Schedule 14A (§ 240.14a–101 of this chapter) concerning the terms of the transaction:

(1) Identify the outside party and/or unaffiliated representative;

(2) Briefly describe the qualifications of the outside party and/or unaffiliated representative;

(3) Describe the method of selection of the outside party and/or unaffiliated representative;

(4) Describe any material relationship that existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship between:

(i) The outside party, its affiliates, and/or unaffiliated representative; and

(ii) The subject company or its affiliates;

(5) If the report, opinion or appraisal relates to the fairness of the consideration, state whether the subject company or affiliate determined the amount of consideration to be paid or whether the outside party recommended the amount of consideration to be paid; and

(6) Furnish a summary concerning the negotiation, report, opinion or appraisal. The summary must include, but need not be limited to, the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the subject company or affiliate; and any limitation imposed by the subject company or affiliate on the scope of the investigation.

Instruction to Item 1015(b):

The information called for by paragraphs (b)(1), (2) and (3) of this section must be given with respect to the firm that provides the report, opinion or appraisal rather than the employees of the firm that prepared the report.

(c) *Availability of documents.* Furnish a statement to the effect that the report, opinion or appraisal will be made available for inspection and copying at the principal executive offices of the subject company or affiliate during its regular business hours by any interested equity security holder of the subject company or representative who has been so designated in writing. This statement also may provide that a copy of the report, opinion or appraisal will be transmitted by the subject company or affiliate to any interested equity security holder of the subject company or representative who has been so designated in writing upon written request and at the expense of the requesting security holder.

§ 229.1016 (Item 1016) Exhibits.

File as an exhibit to the schedule:

(a) Any disclosure materials furnished to security holders by or on behalf of the filing person, including:

(1) Tender offer materials (including transmittal letter);

(2) Solicitation or recommendation (including those referred to in Item 1012 of Regulation M–A (§ 229.1012));

(3) Going-private disclosure document;

(4) Prospectus used in connection with an exchange offer where securities are registered under the Securities Act of 1933; and

(5) Any other disclosure materials;

(b) Any loan agreement referred to in response to Item 1007(d) of Regulation M–A (§ 229.1007(d));

Instruction to Item 1016(b):
If the filing relates to a third-party tender offer and a request is made under Item 1007(d) of Regulation M–A (§ 229.1007(d)), the identity of the bank providing financing may be omitted from the loan agreement filed as an exhibit.

(c) Any report, opinion or appraisal referred to in response to Item 1014(d) or Item 1015 of Regulation M–A (§ 229.1014(d) or § 229.1015);

(d) Any document setting forth the terms of any agreement, arrangement, understanding or relationship referred to in response to Item 1005(e) or Item 1011(a)(1) of Regulation M–A (§ 229.1005(e) or § 229.1011(a)(1));

(e) Any agreement, arrangement or understanding referred to in response to § 229.1005(d), or the pertinent portions of any proxy statement, report or other communication containing the disclosure required by Item 1005(d) of Regulation M–A (§ 229.1005(d));

(f) A detailed statement describing security holders' appraisal rights and the procedures for exercising those appraisal rights referred to in response to Item 1004(d) of Regulation M–A (§ 229.1004(d));

(g) Any written instruction, form or other material that is furnished to persons making an oral solicitation or recommendation by or on behalf of the filing person for their use directly or indirectly in connection with the transaction; and

(h) Any written opinion prepared by legal counsel at the filing person's request and communicated to the filing person pertaining to the tax consequences of the transaction.

EXHIBIT TABLE TO ITEM 1016 OF REGULATION M–A [13E–3 TO 14D–9]

Disclosure Material	X	X	X
Loan Agreement	X	X	.....
Report, Opinion or Appraisal	X	.....	.....
Contracts, Arrangements or Understandings	X	X	X
Statement re: Appraisal Rights	X	.....	.....
Oral Solicitation Materials	X	X	X
Tax Opinion	.....	X	.....

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

6. The authority citation for part 230 is revised to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77r, 77s, 77sss, 77z–3, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

7. By revising § 230.135 to read as follows:

§ 230.135 Notice of proposed registered offerings.

(a) *When notice is not an offer.* For purposes of section 5 of the Act (15 U.S.C. 77e) only, an issuer or a selling security holder (and any person acting on behalf of either of them) that publishes through any medium a notice of a proposed offering to be registered under the Act will not be deemed to offer its securities for sale through that notice if:

(1) *Legend.* The notice includes a statement to the effect that it does not constitute an offer of any securities for sale; and

(2) *Limited notice content.* The notice otherwise includes no more than the following information:

(i) The name of the issuer;

(ii) The title, amount and basic terms of the securities offered;

(iii) The amount of the offering, if any, to be made by selling security holders;

(iv) The anticipated timing of the offering;

(v) A brief statement of the manner and the purpose of the offering, without naming the underwriters;

(vi) Whether the issuer is directing its offering to only a particular class of purchasers;

(vii) Any statements or legends required by the laws of any state or foreign country or administrative authority; and

(viii) In the following offerings, the notice may contain additional information, as follows:

(A) *Rights offering.* In a rights offering to existing security holders:

(*1*) The class of security holders eligible to subscribe;

(*2*) The subscription ratio and expected subscription price;

(*3*) The proposed record date;

(*4*) The anticipated issuance date of the rights; and

(*5*) The subscription period or expiration date of the rights offering.

(B) *Offering to employees.* In an offering to employees of the issuer or an affiliated company:

(*1*) The name of the employer;

(*2*) The class of employees being offered the securities;

(*3*) The offering price; and

(*4*) The duration of the offering period.

(*C*) *Exchange offer.* In an exchange offer:

(*1*) The basic terms of the exchange offer;

(*2*) The name of the subject company;

(*3*) The subject class of securities sought in the exchange offer.

(D) *Rule 145(a) offering.* In a § 230.145(a) offering:

(*1*) The name of the person whose assets are to be sold in exchange for the securities to be offered;

(*2*) The names of any other parties to the transaction;

(*3*) A brief description of the business of the parties to the transaction;

(*4*) The date, time and place of the meeting of security holders to vote on or consent to the transaction; and

(*5*) A brief description of the transaction and the basic terms of the transaction.

(b) *Corrections of misstatements about the offering.* A person that publishes a notice in reliance on this section may issue a notice that contains no more information than is necessary to correct inaccuracies published about the proposed offering.

Note to § 230.135: Communications under this section relating to business combination transactions must be filed as required by § 230.425(b).

8. By amending § 230.145 by revising paragraph (b) to read as follows:

§ 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.

* * * * *

(b) *Communications before a Registration Statement is filed.* Communications made in connection with or relating to a transaction described in paragraph (a) of this section that will be registered under the Act may be made under § 230.135, § 230.165 or § 230.166.

* * * * *

9. By adding § 230.162 to read as follows:

§ 230.162 Submission of tenders in registered exchange offers.

(a) Notwithstanding section 5(a) of the Act (15 U.S.C. 77e(a)), offerors may solicit tenders of securities in an exchange offer subject to § 240.13e–4(e) or § 240.14d–4(b) of this chapter before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules.

(b) Notwithstanding section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)), a prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) need not be delivered to security holders in an exchange offer subject to § 240.13e–4(e) or § 240.14d–4(b) of this chapter, so long as a preliminary prospectus, prospectus supplements and revised prospectuses are delivered to security holders in accordance with § 240.13e–4(e)(2) or § 240.14d–4(b) of this chapter, as applicable.

10. By adding § 230.165 to read as follows:

§ 230.165 Offers made in connection with a business combination transaction.

Preliminary Note: This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

(a) *Communications before a registration statement is filed.* Notwithstanding section 5(c) of the Act (15 U.S.C. 77e(c)), the offeror of securities in a business combination transaction to be registered under the Act may make an offer to sell or solicit an offer to buy those securities from and including the first public announcement until the filing of a registration statement related to the transaction, so long as any written communication (other than non-public communications among participants) made in connection with or relating to the transaction (*i.e.*, prospectus) is filed in accordance with § 230.425 and the conditions in paragraph (c) of this section are satisfied.

(b) *Communications after a registration statement is filed.* Notwithstanding section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), any written communication (other than non-public communications among participants) made in connection with or relating to a business combination transaction (*i.e.*, prospectus) after the filing of a registration statement related to the transaction need not satisfy the requirements of section 10 (15 U.S.C. 77j) of the Act, so long as the prospectus is filed in accordance with § 230.424 or § 230.425 and the conditions in paragraph (c) of this section are satisfied.

(c) *Conditions.* To rely on paragraphs (a) and (b) of this section:

(1) Each prospectus must contain a prominent legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also must explain to investors that they can get the documents for free at the Commission's web site and describe which documents are available free from the offeror; and

(2) In an exchange offer, the offer must be made in accordance with the applicable tender offer rules (§§ 240.14d–1 through 240.14e–8 of this chapter); and, in a transaction involving the vote of security holders, the offer must be made in accordance with the applicable proxy or information statement rules (§§ 240.14a–1 through 240.14a–101 and §§ 240.14c–1 through 240.14c–101 of this chapter).

(d) *Applicability.* This section is applicable not only to the offeror of securities in a business combination transaction, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction.

(e) *Failure to file or delay in filing.* An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) or (c) of the Act (15 U.S.C. 77e(b)(1) and (c)), so long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The prospectus is filed as soon as practicable after discovery of the failure to file.

(f) *Definitions.*

(1) A *business combination transaction* means any transaction specified in § 230.145(a) or exchange offer;

(2) A *participant* is any person or entity that is a party to the business combination transaction and any persons authorized to act on their behalf; and

(3) *Public announcement* is any oral or written communication by a participant that is reasonably designed to, or has the effect of, informing the public or security holders in general about the business combination transaction.

11. By adding § 230.166 to read as follows:

§ 230.166 Exemption from section 5(c) for certain communications in connection with business combination transactions.

Preliminary Note: This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

(a) *Communications.* In a registered offering involving a business combination transaction, any communication made in connection with or relating to the transaction before the first public announcement of the offering will not constitute an offer to sell or a solicitation of an offer to buy the securities offered for purposes of section 5(c) of the Act (15 U.S.C. 77e(c)), so long as the participants take all reasonable steps within their control to prevent further distribution or publication of the communication until either the first public announcement is made or the registration statement related to the transaction is filed.

(b) *Definitions.* The terms business combination transaction, participant and public announcement have the same meaning as set forth in § 230.165(f).

12. By adding § 230.425 to read as follows:

§ 230.425 Filing of certain prospectuses and communications under § 230.135 in connection with business combination transactions.

(a) All written communications made in reliance on § 230.165 are prospectuses that must be filed with the Commission under this section on the date of first use.

(b) All written communications that contain no more information than that specified in § 230.135 must be filed with the Commission on or before the date of first use except as provided in paragraph (d)(1) of this section. A communication limited to the information specified in § 230.135 will

not be deemed an offer in accordance with § 230.135 even though it is filed under this section.

(c) Each prospectus or § 230.135 communication filed under this section must identify the filer, the company that is the subject of the offering and the Commission file number for the related registration statement or, if that file number is unknown, the subject company's Exchange Act or Investment Company Act file number, in the upper right corner of the cover page.

(d) Notwithstanding paragraph (a) of this section, the following need not be filed under this section:

(1) Any written communication that is limited to the information specified in § 230.135 and does not contain new or different information from that which was previously publicly disclosed and filed under this section.

(2) Any research report used in reliance on § 230.137, § 230.138 and § 230.139;

(3) Any confirmation described in § 240.10b–10 of this chapter; and

(4) Any prospectus filed under § 230.424.

Notes to § 230.425: 1. File five copies of the prospectus or § 230.135 communication if paper filing is permitted.

2. No filing is required under § 240.13e–4(c), § 240.14a–12(b), § 240.14d–2(b), or § 240.14d–9(a), if the communication is filed under this section. Communications filed under this section also are deemed filed under the other applicable sections.

13. By revising § 230.432 to read as follows:

§ 230.432 Additional information required to be included in prospectuses relating to tender offers.

Notwithstanding the provisions of any form for the registration of securities under the Act, any prospectus relating to securities to be offered in connection with a tender offer for, or a request or invitation for tenders of, securities subject to either § 240.13e–4 or section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d)) must include the information required by § 240.13e–4(d)(1) or § 240.14d–6(d)(1) of this chapter, as applicable, in all tender offers, requests or invitations that are published, sent or given to security holders.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

14. The authority citation for Part 232 continues to read as follows:

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

§ 232.13 [Amended]

15. By amending § 232.13 in the first sentence of paragraph (d) by removing the phrase ''may be 'mailed for filing with the Commission' at the same time'' and adding in its place ''must be filed on the same day'' and by removing the phrase ''on a business day'' and adding in its place ''during the official business hours''.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

16. 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, 79l, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

§ 239.25 (Form S–4 [Amended]

* * * * *

17. By amending Form S–4 (referenced in § 239.25) by revising paragraph (b)(7) of Item 17 to read as follows:

[**Note:** Form S–4 does not and this amendment will not appear in the Code of Federal Regulations.]

Form S–4

* * * * *

Item 17. Information With Respect to Companies Other Than S–3 or S–2 Companies.

* * * * *

(b) * * **

(7) Financial statements that would be required in an annual report sent to security holders under Rules 14a–3(b)(1) and (b)(2) (§ 240.14b–3 of this chapter), if an annual report was required. If the registrant's security holders are not voting, the transaction is not a roll-up transaction (as described by Item 901 of Regulation S–K (§ 229.901 of this chapter)), and:

(i) The company being acquired is significant to the registrant in excess of the 20% level as determined under § 210.3–05(b)(2), provide financial statements of the company being acquired for the latest fiscal year in conformity with GAAP. In addition, if the company being acquired has provided its security holders with financial statements prepared in conformity with GAAP for either or both of the two fiscal years before the latest fiscal year, provide the financial statements for those years; or

(ii) The company being acquired is significant to the registrant at or below the 20% level, no financial information (including pro forma and comparative per share information) for the company being acquired need be provided.

Instructions:

1. The financial statements required by this paragraph for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited.

2. If the financial statements required by this paragraph are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20–F (§ 249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. when the financial statements are prepared on a basis other than U.S. GAAP.

3. If this Form is used to register resales to the public by any person who is deemed an underwriter within the meaning of Rule 145(c) (§ 230.145(c) of this chapter) with respect to the securities being reoffered, the financial statements must be audited for the fiscal years required to be presented under paragraph (b)(2) of Rule 3–05 of Regulation S–X (17 CFR 210.3–05(b)(2)).

4. In determining the significance of an acquisition for purposes of this paragraph, apply the tests prescribed in Rule 1–02(w) (§ 210.1–02(w) of this chapter).

* * * * *

§ 239.34 (Form F–4) [Amended]

18. By amending Form F–4 (referenced in § 239.34) by revising paragraph (b)(5) of Item 17, removing the instruction at the end of Item 17 and in its place adding a new instruction to paragraphs (b)(5) and (b)(6) to read as follows:

[**Note:** Form F–4 does not and this amendment will not appear in the Code of Federal Regulations.]

Form F–4

* * * * *

Item 17. Information With Respect to Foreign Companies Other Than F–2 or F–3 Companies.

* * * * *

(b) * * *

(5) Financial statements that would have been required to be included in an annual report on Form 20–F (§ 249.220f of this chapter) had the company being acquired been required to prepare such a report. If the registrant's security holders are not voting, the transaction is not a roll-up transaction (as described by Item 901 of Regulation S–K (§ 229.901 of this chapter)), and:

(i) The company being acquired is significant to the registrant in excess of the 20% level as determined under § 210.3–05(b)(2), provide financial statements of the company being acquired for the latest fiscal year in conformity with GAAP. In addition, if the company being acquired has provided its security holders with financial statements prepared in conformity with GAAP for either or both of the two fiscal years before the latest fiscal year, provide the financial statements for those years; or

(ii) the company being acquired is significant to the registrant at or below the 20% level, no financial information

(including pro forma and comparative per share information) for the company being acquired need be provided.

Instructions:

1. The financial statements required by this paragraph for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited.

2. If this Form is used to register resales to the public by any person who is deemed an underwriter within the meaning of Rule 145(c) (§ 230.145(c) of this chapter) with respect to the securities being reoffered, the financial statements must be audited for the fiscal years required to be presented under paragraph (b)(2) of Rule 3–05 of Regulation S–X (17 CFR 210.3–05(b)(2)).

3. In determining the significance of an acquisition for purposes of this paragraph, apply the tests prescribed in Rule 1–02(w) (§ 210.1–02(w) of this chapter).

* * * * *

Instruction to paragraphs (b)(5) and (b)(6): If the financial statements required by paragraphs (b)(5) and (b)(6) are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20–F (§ 249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. when the financial statements are prepared on a basis other than U.S. GAAP.

* * * * *

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

19. 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.

§ 240.10b–13 [Removed and reserved]

20. By removing and reserving § 240.10b–13.

21. By revising § 240.13e–1 to read as follows:

§ 240.13e–1 Purchase of securities by the issuer during a third-party tender offer.

An issuer that has received notice that it is the subject of a tender offer made under Section 14(d)(1) of the Act (15 U.S.C. 78n), that has commenced under § 240.14d–2 must not purchase any of its equity securities during the tender offer unless the issuer first:

(a) Files a statement with the Commission containing the following information:

(1) The title and number of securities to be purchased;

(2) The names of the persons or classes of persons from whom the issuer will purchase the securities;

(3) The name of any exchange, inter-dealer quotation system or any other market on or through which the securities will be purchased;

(4) The purpose of the purchase;

(5) Whether the issuer will retire the securities, hold the securities in its treasury, or dispose of the securities. If the issuer intends to dispose of the securities, describe how it intends to do so; and

(6) The source and amount of funds or other consideration to be used to make the purchase. If the issuer borrows any funds or other consideration to make the purchase or enters any agreement for the purpose of acquiring, holding, or trading the securities, describe the transaction and agreement and identify the parties; and

(b) Pays the fee required by § 240.0–11 when it files the initial statement.

(c) This section does not apply to periodic repurchases in connection with an employee benefit plan or other similar plan of the issuer so long as the purchases are made in the ordinary course and not in response to the tender offer.

Instruction to § 240.13e–1:

File eight copies if paper filing is permitted.

22. By amending § 240.13e–3 as follows:

a. By revising paragraphs (d) and (e);

b. Revising the heading of paragraph (f);

c. Removing the reference ''Chapter X'' in paragraph (g)(5) and in its place add ''Chapter XI'';

d. Removing the reference ''section 174'' in paragraph (g)(5) and in its place adding ''section 1125(b)''; and

e. Removing the reference ''section 175 of the Act'' in paragraph (g)(5) and in its place adding ''section 1125(b) of that Act''.

The revisions to § 240.13e–3 read as follows:

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

* * * * *

(d) *Material required to be filed.* The issuer or affiliate engaging in a Rule 13e–3 transaction must file with the Commission:

(1) A Schedule 13E–3 (§ 240.13e–100), including all exhibits;

(2) An amendment to Schedule 13E–3 reporting promptly any material changes in the information set forth in the schedule previously filed; and

(3) A final amendment to Schedule 13E–3 reporting promptly the results of the Rule 13e–3 transaction.

(e) *Disclosure of information to security holders.*

(1) In addition to disclosing the information required by any other applicable rule or regulation under the federal securities laws, the issuer or affiliate engaging in a § 240.13e–3 transaction must disclose to security holders of the class that is the subject of the transaction, as specified in paragraph (f) of this section, the following:

(i) The information required by Item 1 of Schedule 13E–3 (§ 240.13e–100) (Summary Term Sheet);

(ii) The information required by Items 7, 8 and 9 of Schedule 13E–3, which must be prominently disclosed in a ''Special Factors'' section in the front of the disclosure document;

(iii) A prominent legend on the outside front cover page that indicates that neither the Securities and Exchange Commission nor any state securities commission has: approved or disapproved of the transaction; passed upon the merits or fairness of the transaction; or passed upon the adequacy or accuracy of the disclosure in the document. The legend also must make it clear that any representation to the contrary is a criminal offense;

(iv) The information concerning appraisal rights required by § 229.1016(f) of this chapter; and

(v) The information required by the remaining items of Schedule 13E–3, except for § 229.1016 of this chapter (exhibits), or a fair and adequate summary of the information.

Instructions to paragraph (e)(1):

1. If the Rule 13e–3 transaction also is subject to Regulation 14A (§§ 240.14a–1 through 240.14b–2) or 14C (§§ 240.14c–1 through 240.14c–101), the registration provisions and rules of the Securities Act of 1933, Regulation 14D or § 240.13e–4, the information required by paragraph (e)(1) of this section must be combined with the proxy statement, information statement, prospectus or tender offer material sent or given to security holders.

2. If the Rule 13e–3 transaction involves a registered securities offering, the legend required by § 229.501(b)(7) of this chapter must be combined with the legend required by paragraph (e)(1)(iii) of this section.

3. The required legend must be written in clear, plain language.

(2) If there is any material change in the information previously disclosed to

security holders, the issuer or affiliate must disclose the change promptly to security holders as specified in paragraph (f)(1)(iii) of this section.

(f) *Dissemination of information to security holders.* * * *

* * * * *

§ 240.13e–4 [Amended]

23. By amending § 240.13e–4 by removing the reference:

a. ''Schedule 13E–4 [§ 240.13E–101]'' that appears in the introductory text of paragraph (a) and in its place adding ''Schedule TO (§ 240.14d–100)'';

b. ''Schedule 13E–4 [§ 240.13e–101]'' that appears in paragraph (a)(3) and in its place adding ''Schedule TO (§ 240.14d–100)'';

c. ''Schedule 13E–4 Issuer Tender Offer Statement (§ 240.13e–101),'' that appears in paragraph (f)(12) and in its place adding ''Schedule TO (§ 240.14d–100),'';

d. ''paragraph (a) of Item 9 of that Schedule'' that appears in paragraph (f)(12) and in its place adding ''Item 1016(a)(1) of Regulation M–A (§ 229.1016(a)(1) of this chapter)''; and

e. ''Schedule 13E–4'' that appears in the introductory text of paragraph (g) and in its place adding ''Schedule TO (§ 240.14d–100)''.

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

a. By revising paragraph (a)(4);

b. Redesignating paragraph (b) as paragraph (j);

c. Adding new paragraph (b);

d. Removing the reference ''paragraphs (c), (d), (e) and (f)'' in newly redesignated paragraph (j)(2)(i) and in its place adding ''paragraphs (b), (c), (d), (e) and (f)'';

e. Removing the reference ''paragraph (b)(1)'' in newly redesignated paragraph (j)(2)(ii) and in its place adding ''paragraph (j)(1)''; and

f. revising the section heading and paragraphs (c), (d) and (e).

The additions and revisions to 240.13e–4 read as follows:

§ 240.13e–4 Tender offers by issuers.

(a) *Definitions.* * * *

(4) The term *commencement* means 12:01 a.m. on the date that the issuer or affiliate has first published, sent or given the means to tender to security holders. For purposes of this section, the means to tender includes the transmittal form or a statement regarding how the transmittal form may be obtained.

* * * * *

(b) *Filing, disclosure and dissemination.* As soon as practicable on the date of commencement of the issuer tender offer, the issuer or affiliate making the issuer tender offer must comply with:

(1) The filing requirements of paragraph (c)(2) of this section;

(2) The disclosure requirements of paragraph (d)(1) of this section; and

(3) The dissemination requirements of paragraph (e) of this section.

(c) *Material required to be filed.* The issuer or affiliate making the issuer tender offer must file with the Commission:

(1) All written communications made by the issuer or affiliate relating to the issuer tender offer, from and including the first public announcement, as soon as practicable on the date of the communication;

(2) A Schedule TO (§ 240.14d–100), including all exhibits;

(3) An amendment to Schedule TO (§ 240.14d–100) reporting promptly any material changes in the information set forth in the schedule previously filed; and

(4) A final amendment to Schedule TO (§ 240.14d–100) reporting promptly the results of the issuer tender offer.

Instructions to § 240.13e–4(c):

1. Pre-commencement communications must be filed under cover of Schedule TO (§ 240.14d–100) and the box on the cover page of the schedule must be marked.

2. Any communications made in connection with an exchange offer registered under the Securities Act of 1933 need only be filed under § 230.425 of this chapter and will be deemed filed under this section.

3. Each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the tender offer statement when it is available because it contains important information. The legend also must advise investors that they can get the tender offer statement and other filed documents for free at the Commission's web site and explain which documents are free from the issuer.

4. See §§ 230.135, 230.165 and 230.166 of this chapter for pre-commencement communications made in connection with registered exchange offers.

5. ''Public announcement'' is any oral or written communication by the issuer, affiliate or any person authorized to act on their behalf that is reasonably designed to, or has the effect of, informing the public or security holders in general about the issuer tender offer.

(d) *Disclosure of tender offer information to security holders.*

(1) The issuer or affiliate making the issuer tender offer must disclose, in a manner prescribed by paragraph (e)(1) of this section, the following:

(i) The information required by Item 1 of Schedule TO (§ 240.14d–100) (summary term sheet); and

(ii) The information required by the remaining items of Schedule TO for issuer tender offers, except for Item 12 (exhibits), or a fair and adequate summary of the information.

(2) If there are any material changes in the information previously disclosed to security holders, the issuer or affiliate must disclose the changes promptly to security holders in a manner specified in paragraph (e)(3) of this section.

(3) If the issuer or affiliate disseminates the issuer tender offer by means of summary publication as described in paragraph (e)(1)(iii) of this section, the summary advertisement must not include a transmittal letter that would permit security holders to tender securities sought in the offer and must disclose at least the following information:

(i) The identity of the issuer or affiliate making the issuer tender offer;

(ii) The information required by § 229.1004(a)(1) and § 229.1006(a) of this chapter;

(iii) Instructions on how security holders can obtain promptly a copy of the statement required by paragraph (d)(1) of this section, at the issuer or affiliate's expense; and

(iv) A statement that the information contained in the statement required by paragraph (d)(1) of this section is incorporated by reference.

(e) *Dissemination of tender offers to security holders.* An issuer tender offer will be deemed to be published, sent or given to security holders if the issuer or affiliate making the issuer tender offer complies fully with one or more of the methods described in this section.

(1) For issuer tender offers in which the consideration offered consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 (15 U.S.C. 77c):

(i) Dissemination of cash issuer tender offers by long-form publication: By making adequate publication of the information required by paragraph (d)(1) of this section in a newspaper or newspapers, on the date of commencement of the issuer tender offer.

(ii) Dissemination of any issuer tender offer by use of stockholder and other lists:

(A) By mailing or otherwise furnishing promptly a statement containing the information required by paragraph (d)(1) of this section to each security holder whose name appears on the most recent stockholder list of the issuer;

(B) By contacting each participant on the most recent security position listing of any clearing agency within the possession or access of the issuer or affiliate making the issuer tender offer, and making inquiry of each participant

as to the approximate number of beneficial owners of the securities sought in the offer that are held by the participant;

(C) By furnishing to each participant a sufficient number of copies of the statement required by paragraph (d)(1) of this section for transmittal to the beneficial owners; and

(D) By agreeing to reimburse each participant promptly for its reasonable expenses incurred in forwarding the statement to beneficial owners.

(iii) Dissemination of certain cash issuer tender offers by summary publication:

(A) If the issuer tender offer is not subject to § 240.13e–3, by making adequate publication of a summary advertisement containing the information required by paragraph (d)(3) of this section in a newspaper or newspapers, on the date of commencement of the issuer tender offer; and

(B) By mailing or otherwise furnishing promptly the statement required by paragraph (d)(1) of this section and a transmittal letter to any security holder who requests a copy of the statement or transmittal letter.

Instruction to paragraph (e)(1): For purposes of paragraphs (e)(1)(i) and (e)(1)(iii) of this section, adequate publication of the issuer tender offer may require publication in a newspaper with a national circulation, a newspaper with metropolitan or regional circulation, or a combination of the two, depending upon the facts and circumstances involved.

(2) For tender offers in which the consideration consists solely or partially of securities registered under the Securities Act of 1933, a registration statement containing all of the required information, including pricing information, has been filed and a preliminary prospectus or a prospectus that meets the requirements of Section 10(a) of the Securities Act (15 U.S.C. (15 U.S.C. 77j(a)), including a letter of transmittal, is delivered to security holders. However, for going-private transactions (as defined by § 240.13e–3) and roll-up transactions (as described by Item 901 of Regulation S–K (§ 229.901 of this chapter)), a registration statement registering the securities to be offered must have become effective and only a prospectus that meets the requirements of Section 10(a) of the Securities Act may be delivered to security holders on the date of commencement.

Instructions to paragraph (e)(2)

1. If the prospectus is being delivered by mail, mailing on the date of commencement is sufficient.

2. A preliminary prospectus used under this section may not omit information under § 230.430 or § 230.430A of this chapter.

3. If a preliminary prospectus is used under this section and the issuer must disseminate material changes, the tender offer must remain open for the period specified in paragraph (e)(3) of this section.

4. If a preliminary prospectus is used under this section, tenders may be requested in accordance with § 230.162(a) of this chapter.

(3) If a material change occurs in the information published, sent or given to security holders, the issuer or affiliate must disseminate promptly disclosure of the change in a manner reasonably calculated to inform security holders of the change. In a registered securities offer where the issuer or affiliate disseminates the preliminary prospectus as permitted by paragraph (e)(2) of this section, the offer must remain open from the date that material changes to the tender offer materials are disseminated to security holders, as follows:

(i) Five business days for a prospectus supplement containing a material change other than price or share levels;

(ii) Ten business days for a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee, or other similarly significant change;

(iii) Ten business days for a prospectus supplement included as part of a post-effective amendment; and

(iv) Twenty business days for a revised prospectus when the initial prospectus was materially deficient.

* * * * *

25. By revising § 240.13e–100 to read as follows:

§ 240.13e–100 Schedule 13E–3, Transaction statement under section 13(e) of the Securities Exchange Act of 1934 and Rule 13e–3 (§ 240.13e–3) thereunder.

Securities and Exchange Commission, Washington, D.C. 20549

Rule 13e–3 Transaction Statement under Section 13(e) of the Securities Exchange Act of 1934 (Amendment No. __)

_____

(Name of the Issuer)

_____

(Names of Persons Filing Statement)

_____

(Title of Class of Securities)

_____

(CUSIP Number of Class of Securities)

_____

(Name, Address, and Telephone Numbers of Person Authorized to Receive Notices and Communications on Behalf of the Persons Filing Statement)

This statement is filed in connection with (check the appropriate box):

a. [ ] The filing of solicitation materials or an information statement subject to Regulation 14A (§§ 240.14a–1 through 240.14b–2), Regulation 14C (§§ 240.14c–1 through 240.14c–101) or Rule 13e–3(c) (§ 240.13e–3(c)) under the Securities Exchange Act of 1934 (''the Act'').

b. [ ] The filing of a registration statement under the Securities Act of 1933.

c. [ ] A tender offer.

d. [ ] None of the above.

Check the following box if the soliciting materials or information statement referred to in checking box (a) are preliminary copies: [ ]

Check the following box if the filing is a final amendment reporting the results of the transaction [ ]

CALCULATION OF FILING FEE

Transaction valuation*	Amount of filing fee

*Set forth the amount on which the filing fee is calculated and state how it was determined.

[ ] Check the box if any part of the fee is offset as provided by § 240.0–11(a)(2) and identify the filing with which the offsetting fee was previously paid. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

Amount Previously Paid: _____

Form or Registration No.: _____

Filing Party: _____

Date Filed: _____

General Instructions:

A. File eight copies of the statement, including all exhibits, with the Commission if paper filing is permitted.

B. This filing must be accompanied by a fee payable to the Commission as required by § 240.0–11(b).

C. If the statement is filed by a general or limited partnership, syndicate or other group, the information called for by Items 3, 5, 6, 10 and 11 must be given with respect to: (i) Each partner of the general partnership; (ii) each partner who is, or functions as, a general partner of the limited partnership; (iii) each member of the syndicate or group; and (iv) each person controlling the partner or member. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii) or (iv) of this Instruction is a corporation, the information called for by the items specified above must be given with respect to: (a) Each executive officer and director of the corporation; (b) each person controlling the corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of the corporation.

D. Depending on the type of Rule 13e–3 transaction (§ 240.13e–3(a)(3)), this statement must be filed with the Commission:

1. At the same time as filing preliminary or definitive soliciting materials or an information statement under Regulations 14A or 14C of the Act;

2. At the same time as filing a registration statement under the Securities Act of 1933;

3. As soon as practicable on the date a tender offer is first published, sent or given to security holders; or

4. At least 30 days before any purchase of securities of the class of securities subject to the Rule 13e–3 transaction, if the transaction does not involve a solicitation, an information statement, the registration of securities or a tender offer, as described in paragraphs 1, 2 or 3 of this Instruction; and

5. If the Rule 13e–3 transaction involves a series of transactions, the issuer or affiliate must file this statement at the time indicated in paragraphs 1 through 4 of this Instruction for the first transaction and must amend the schedule promptly with respect to each subsequent transaction.

E. If an item is inapplicable or the answer is in the negative, so state. The statement published, sent or given to security holders may omit negative and not applicable responses, except that responses to Items 7, 8 and 9 of this schedule must be provided in full. If the schedule includes any information that is not published, sent or given to security holders, provide that information or specifically incorporate it by reference under the appropriate item number and heading in the schedule. Do not recite the text of disclosure requirements in the schedule or any document published, sent or given to security holders. Indicate clearly the coverage of the requirements without referring to the text of the items.

F. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item unless it would render the answer misleading, incomplete, unclear or confusing. A copy of any information that is incorporated by reference or a copy of the pertinent pages of a document containing the information must be submitted with this statement as an exhibit, unless it was previously filed with the Commission electronically on EDGAR. If an exhibit contains information responding to more than one item in the schedule, all information in that exhibit may be incorporated by reference once in response to the several items in the schedule for which it provides an answer. Information incorporated by reference is deemed filed with the Commission for all purposes of the Act.

G. If the Rule 13e–3 transaction also involves a transaction subject to Regulation 14A (§§ 240.14a–1 through 240.14b–2) or 14C (§§ 240.14c–1 through 240.14c–101) of the Act, the registration of securities under the Securities Act of 1933 and the General Rules and Regulations of that Act, or a tender offer subject to Regulation 14D (§§ 240.14d–1 through 240.14d–101) or § 240.13e–4, this statement must incorporate by reference the information contained in the proxy, information, registration or tender offer statement in answer to the items of this statement.

H. The information required by the items of this statement is intended to be in addition to any disclosure requirements of any other form or schedule that may be filed with the Commission in connection with the Rule 13e–3 transaction. If those forms or schedules require less information on any topic than this statement, the requirements of this statement control.

I. If the Rule 13e–3 transaction involves a tender offer, then a combined statement on Schedules 13E–3 and TO may be filed with the Commission under cover of Schedule TO (§ 240.14d–100). See Instruction J of Schedule TO (§ 240.14d–100).

J. Amendments disclosing a material change in the information set forth in this statement may omit any information previously disclosed in this statement.

Item 1. Summary Term Sheet

Furnish the information required by Item 1001 of Regulation M–A (§ 229.1001 of this chapter) unless information is disclosed to security holders in a prospectus that meets the requirements of § 230.421(d) of this chapter.

Item 2. Subject Company Information

Furnish the information required by Item 1002 of Regulation M–A (§ 229.1002 of this chapter).

Item 3. Identity and Background of Filing Person

Furnish the information required by Item 1003(a) through (c) of Regulation M–A (§ 229.1003 of this chapter).

Item 4. Terms of the Transaction

Furnish the information required by Item 1004(a) and (c) through (f) of Regulation M–A (§ 229.1004 of this chapter).

Item 5. Past Contacts, Transactions, Negotiations and Agreements

Furnish the information required by Item 1005(a) through (c) and (e) of Regulation M–A (§ 229.1005 of this chapter).

Item 6. Purposes of the Transaction and Plans or Proposals

Furnish the information required by Item 1006(b) and (c)(1) through (8) of Regulation M–A (§ 229.1006 of this chapter).

Instruction to Item 6: In providing the information specified in Item 1006(c) for this item, discuss any activities or transactions that would occur after the Rule 13e–3 transaction.

Item 7. Purposes, Alternatives, Reasons and Effects

Furnish the information required by Item 1013 of Regulation M–A (§ 229.1013 of this chapter).

Item 8. Fairness of the Transaction

Furnish the information required by Item 1014 of Regulation M–A (§ 229.1014 of this chapter).

Item 9. Reports, Opinions, Appraisals and Negotiations

Furnish the information required by Item 1015 of Regulation M–A (§ 229.1015 of this chapter).

Item 10. Source and Amounts of Funds or Other Consideration

Furnish the information required by Item 1007 of Regulation M–A (§ 229.1007 of this chapter).

Item 11. Interest in Securities of the Subject Company

Furnish the information required by Item 1008 of Regulation M–A (§ 229.1008 of this chapter).

Item 12. The Solicitation or Recommendation

Furnish the information required by Item 1012(d) and (e) of Regulation M–A (§ 229.1012 of this chapter).

Item 13. Financial Statements

Furnish the information required by Item 1010(a) through (b) of Regulation M–A (§ 229.1010 of this chapter) for the issuer of the subject class of securities.

Instructions to Item 13:

1. The disclosure materials disseminated to security holders may contain the summarized financial information required by Item 1010(c) of Regulation M–A (§ 229.1010 of this chapter) instead of the financial information required by Item 1010(a) and (b). In that case, the financial information required by Item 1010(a) and (b) of Regulation M–A must be disclosed directly or incorporated by reference in the statement. If summarized financial information is disseminated to security holders, include appropriate instructions on how more complete financial information can be obtained. If the summarized financial information is prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, the summarized financial information must be accompanied by a reconciliation as described in Instruction 2.

2. If the financial statements required by this Item are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20–F (§ 249.220f of this chapter).

3. The filing person may incorporate by reference financial statements contained in any document filed with the Commission, solely for the purposes of this schedule, if: (a) The financial statements substantially meet the requirements of this Item; (b) an express statement is made that the financial statements are incorporated by reference; (c) the matter incorporated by reference is clearly identified by page, paragraph, caption or otherwise; and (d) if the matter incorporated by reference is not filed with this Schedule, an indication is made where the information may be inspected and copies obtained. Financial statements that are required to be presented in comparative form for two or more fiscal years or periods may not be incorporated by reference unless the material incorporated by reference includes the entire period for which the comparative data is required to be given. *See* General Instruction F to this Schedule.

Item 14. Persons/Assets, Retained, Employed, Compensated or Used

Furnish the information required by Item 1009 of Regulation M–A (§ 229.1009 of this chapter).

Item 15. Additional Information

Furnish the information required by Item 1011(b) of Regulation M–A (§ 229.1011 of this chapter).

Item 16. Exhibits

File as an exhibit to the Schedule all documents specified in Item 1016(a) through (d), (f) and (g) of Regulation M–A (§ 229.1016 of this chapter).

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)

Instruction to Signature: The statement must be signed by the filing person or that person's authorized representative. If the statement is signed on behalf of a person by an authorized representative (other than an executive officer of a corporation or general partner of a partnership), evidence of the representative's authority to sign on behalf of the person must be filed with the statement. The name and any title of each person who signs the statement must be typed or printed beneath the signature. See § 240.12b–11 with respect to signature requirements.

§ 240.13e–101 [Removed and reserved]

26. By removing and reserving § 240.13e–101.

§ 240.14a–4 [Amended]

27. By amending § 240.14a–4, paragraph (f), by removing the words '', or mailed for filing to,''.

28. By amending § 240.14a–6 as follows:

a. By revising paragraphs (b), (c), (e)(2) and (j),

b. Removing the note following paragraph (b), and

c. Adding paragraph (o) to read as follows:

§ 240.14a–6 Filing requirements.

* * * * *

(b) *Definitive proxy statement and other soliciting material.* Eight definitive copies of the proxy statement, form of proxy and all other soliciting materials, in the same form as the materials sent to security holders, must be filed with the Commission no later than the date they are first sent or given to security holders. Three copies of these materials also must be filed with, or mailed for filing to, each national securities exchange on which the registrant has a class of securities listed and registered.

(c) *Personal solicitation materials.* If part or all of the solicitation involves personal solicitation, then eight copies of all written instructions or other materials that discuss, review or comment on the merits of any matter to be acted on, that are furnished to persons making the actual solicitation for their use directly or indirectly in connection with the solicitation, must be filed with the Commission no later than the date the materials are first sent or given to these persons.

* * * * *

(e)(1) * * *

(2) *Confidential treatment.* If action will be taken on any matter specified in Item 14 of Schedule 14A (§ 240.14a–101), all copies of the preliminary proxy statement and form of proxy filed under paragraph (a) of this section will be for the information of the Commission only and will not be deemed available for public inspection until filed with the Commission in definitive form so long as:

(i) The proxy statement does not relate to a matter or proposal subject to § 240.13e–3 or a roll-up transaction as defined in Item 901(c) of Regulation S–K (§ 229.901(c) of this chapter);

(ii) Neither the parties to the transaction nor any persons authorized to act on their behalf have made any public communications relating to the transaction except for statements where the content is limited to the information specified in § 230.135 of this chapter; and

(iii) The materials are filed in paper and marked ''Confidential, For Use of the Commission Only.'' In all cases, the materials may be disclosed to any department or agency of the United States Government and to the Congress, and the Commission may make any inquiries or investigation into the materials as may be necessary to conduct an adequate review by the Commission.

Instruction to paragraph (e)(2): If communications are made publicly that go beyond the information specified in § 230.135 of this chapter, the preliminary proxy materials must be re-filed promptly with the Commission as public materials.

* * * * *

(j) *Merger proxy materials.* (1) Any proxy statement, form of proxy or other soliciting material required to be filed by this section that also is either

(i) Included in a registration statement filed under the Securities Act of 1933 on Forms S–4 (§ 239.25 of this chapter), F–4 (§ 239.34 of this chapter) or N–14 (§ 239.23 of this chapter); or

(ii) Filed under § 230.424, § 230.425 or § 230.497 of this chapter is required to be filed only under the Securities Act, and is deemed filed under this section.

(2) Under paragraph (j)(1) of this section, the fee required by paragraph (i) of this section need not be paid.

* * * * *

(o) *Solicitations before furnishing a definitive proxy statement.* Solicitations that are published, sent or given to security holders before they have been furnished a definitive proxy statement must be made in accordance with § 240.14a–12 unless there is an exemption available under § 240.14a–2.

§ 240.14a–11 [Removed and reserved]

29. By removing and reserving § 240.14a–11.

30. By revising § 240.14a–12 to read as follows:

§ 240.14a–12 Solicitation before furnishing a proxy statement.

(a) Notwithstanding the provisions of § 240.14a–3(a), a solicitation may be made before furnishing security holders with a proxy statement meeting the requirements of § 240.14a–3(a) if:

(1) Each written communication includes:

(i) The identity of the participants in the solicitation (as defined in Instruction 3 to Item 4 of Schedule 14A (§ 240.14a–101)) and a description of their direct or indirect interests, by security holdings or otherwise, or a prominent legend in clear, plain language advising security holders where they can obtain that information; and

(ii) A prominent legend in clear, plain language advising security holders to read the proxy statement when it is available because it contains important information. The legend also must explain to investors that they can get the proxy statement, and any other relevant documents, for free at the Commission's web site and describe which documents are available free from the participants; and

(2) A definitive proxy statement meeting the requirements of § 240.14a–3(a) is sent or given to security holders solicited in reliance on this section before or at the same time as the forms of proxy, consent or authorization are furnished to or requested from security holders.

(b) Any soliciting material published, sent or given to security holders in accordance with paragraph (a) of this section must be filed with the Commission no later than the date the material is first published, sent or given to security holders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14A (§ 240.14a–101) and the appropriate box on the cover page must be marked. Soliciting material in connection with a registered offering is required to be filed only under § 230.424 or § 230.425 of this chapter, and will be deemed filed under this section.

(c) Solicitations by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or

special meeting of security holders also are subject to the following provisions:

(1) *Application of this rule to annual report.* Notwithstanding the provisions of § 240.14a–3 (b) and (c), any portion of the annual report referred to in § 240.14a–3(b) that comments upon or refers to any solicitation subject to this rule, or to any participant in the solicitation, other than the solicitation by the management, must be filed with the Commission as proxy material subject to this regulation. This must be filed in electronic format unless an exemption is available under Rules 201 or 202 of Regulation S–T (§ 232.201 or § 232.202 of this chapter).

(2) *Use of reprints or reproductions.* In any solicitation subject to this § 240.14a–12(c), soliciting material that includes, in whole or part, any reprints or reproductions of any previously published material must:

(i) State the name of the author and publication, the date of prior publication, and identify any person who is quoted without being named in the previously published material.

(ii) Except in the case of a public or official document or statement, state whether or not the consent of the author and publication has been obtained to the use of the previously published material as proxy soliciting material.

(iii) If any participant using the previously published material, or anyone on his or her behalf, paid, directly or indirectly, for the preparation or prior publication of the previously published material, or has made or proposes to make any payments or give any other consideration in connection with the publication or republication of the material, state the circumstances.

Instructions to § 240.14a–12

1. If paper filing is permitted, file eight copies of the soliciting material with the Commission, except that only three copies of the material specified by § 240.14a–12(c)(1) need be filed.

2. Any communications made under this section after the definitive proxy statement is on file but before it is disseminated also must specify that the proxy statement is publicly available and the anticipated date of dissemination.

31. By amending § 240.14a–101 by removing the reference:

a. ''Soliciting Material Pursuant to § 240.14a–11(c) or § 240.14a–12'' on the cover page and in its place adding ''Soliciting Material under § 240.14a–12'';

b. ''Item 14(b)'' in paragraph (3) of Note D and in its place adding ''Item 14(e)(1)'';

c. ''In Items 13 and 14'' in the introductory text of Note E and in its place adding ''In Item 13'';

d. ''or to an 'other person' specified in Item 14(a) of this Schedule'' each time it appears in the introductory text of Note E; and

e. ''or other person'' each time it appears in Note E.

32. By amending § 240.14a–101 by removing the reference:

a. ''Rule 14a–11 (§ 240.14a–11 of this chapter.)'' in the introductory text of paragraph (a) of Item 4 and in its place adding ''Rule 14a–12(c) (§ 240.14a–12(c)).'';

b. ''Rule 14a–11 (§ 240.14a–11 of this chapter).'' in the introductory text of paragraph (b) of Item 4 and in its place adding ''Rule 14a–12(c) (§ 240.14a–12(c)).'';

c. ''Rule 14a–11 (§ 240.14a–11 of this chapter),'' in Instruction 1 to Item 4 and in its place adding ''Rule 14a–12(c) (§ 240.14a–12(c)),''; and

d. ''Rule 14a–11 (§ 240.14a–11 of this chapter).'' in the introductory text of paragraphs (a) and (b) of Item 5 and in its place adding ''Rule 14a–12(c) (§ 240.14a–12(c)).'' each time it appears.

33. By amending § 240.14a–101 by revising paragraphs (2) and (3) in Note G and Item 14 to read as follows:

* * * * *

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

G. *Special Note for Small Business Issuers*

(1) * * *

(2) Registrants and acquirees that relied upon Alternative 1 in their most recent Form 10–KSB may provide the following information (Question numbers are in reference to Model A of Form 1–A): (a) Questions 37 and 38 instead of Item 6(d); (b) Question 43 instead of Item 7(a); (c) Questions 29–36 and 39 instead of Item 7(b); (d) Questions 40–42 instead of Item 8; (e) Questions 40–42 instead of Item 10; (f) the information required in Part F/S of Form 10–SB instead of the financial statement requirements of Items 13 or 14; (g) Questions 4, 11, and 47–50 instead of Item 13(a)(1)(3); (h) Question 3 instead of the information specified in Items 101 and 102 of Regulation S–B (§ 228.101 and § 228.102 of this chapter); and (i) Questions 4, 11, and 47–50 instead of the information specified in Item 303 of Regulation S–B(§ 228.303 of this chapter).

(3) Registrants and acquirees that relied upon Alternative 2 in their most recent Form 10–KSB may provide the following information (''Model B'' refers to Model B of Form 1–A): (a) Item 10 of Model B instead of Item 6(d) of Schedule 14A; (b) Item 8(d) of Model B instead of Item 7(a) of Schedule 14A; (c) Items 8(a)(8(c) and Item 11 of Model B instead of Item 7(b) of Schedule 14A; (d) Item 9 of Model B instead of Item 8 of Schedule 14A; (e) Item 9 of Model B instead of Item 10 of Schedule 14A; (f) the information required in Part F/S of Form 10–SB instead of the financial statements requirements of Items 13 or 14 of Schedule 14A; (g) Item 6(a)(3)(i) of Model B instead of Item 13(a)(1)(3) of Schedule 14A; (h) Items 6 and 7 of Model B instead of the information specified in Items 101 and 102 of Regulation S–B (§ 228.101 and § 228.102 of this chapter); and (i) Item 6(a)(3)(i) of Model B instead of the information specified in Item 303 of Regulation S–B (§ 228.303 of this chapter).

* * * * *

Item 14. Mergers, consolidations, acquisitions and similar matters. (See Notes A and D at the beginning of this Schedule.)

Instructions to Item 14.

1. In transactions in which the consideration offered to security holders consists wholly or in part of securities registered under the Securities Act of 1933, furnish the information required by Form S–4 (§ 239.25 of this chapter), Form F–4 (§ 239.34 of this chapter), or Form N–14 (§ 239.23 of this chapter), as applicable, instead of this Item. Only a Form S–4, Form F–4, or Form N–14 must be filed in accordance with § 240.14a–6(j).

2. (a) In transactions in which the consideration offered to security holders consists wholly of cash, the information required by paragraph (c)(1) of this Item for the acquiring company need not be provided unless the information is material to an informed voting decision (*e.g.*, the security holders of the target company are voting and financing is not assured).

(b) Additionally, if only the security holders of the target company are voting:

i. The financial information in paragraphs (b)(8)—(11) of this Item for the acquiring company and the target need not be provided; and

ii. The information in paragraph (c)(2) of this Item for the target company need not be provided.

If, however, the transaction is a going-private transaction (as defined by § 240.13e–3), then the information required by paragraph (c)(2) of this Item must be provided and to the extent that the going-private rules require the information specified in paragraph (b)(8)—(b)(11) of this Item, that information must be provided as well.

3. In transactions in which the consideration offered to security holders consists wholly of securities exempt from registration under the Securities Act of 1933 or a combination of exempt securities and cash, information about the acquiring company required by paragraph (c)(1) of this Item need not be provided if only the security holders of the acquiring company are voting, unless the information is material to an informed voting decision. If only the security holders of the target company are voting, information about the target company in paragraph (c)(2) of this Item need not be provided. However, the information required by paragraph (c)(2) of this Item must be provided if the transaction is a going-private (as defined by § 240.13e–3) or roll-up (as described by Item 901 of Regulation S–K (§ 229.901 of this chapter)) transaction.

4. The information required by paragraphs (b)(8)—(11) and (c) need not be provided if

the plan being voted on involves only the acquiring company and one or more of its totally held subsidiaries and does not involve a liquidation or a spin-off.

5. To facilitate compliance with Rule 2–02(a) of Regulation S–X (§ 210.2–02(a) of this chapter) (technical requirements relating to accountants' reports), one copy of the definitive proxy statement filed with the Commission must include a signed copy of the accountant's report. If the financial statements are incorporated by reference, a signed copy of the accountant's report must be filed with the definitive proxy statement. Signatures may be typed if the document is filed electronically on EDGAR. See Rule 302 of Regulation S–T (§ 232.302 of this chapter).

6. Notwithstanding the provisions of Regulation S–X, no schedules other than those prepared in accordance with § 210.12–15, § 210.12–28 and § 210.12–29 of this chapter (or, for management investment companies, §§ 210.12–12 through 210.12–14 of this chapter) of that regulation need be furnished in the proxy statement.

7. If the preliminary proxy material incorporates by reference financial statements required by this Item, a draft of the financial statements must be furnished to the Commission staff upon request if the document from which they are incorporated has not been filed with or furnished to the Commission.

(a) *Applicability.* If action is to be taken with respect to any of the following transactions, provide the information required by this Item:

(1) A merger or consolidation;

(2) An acquisition of securities of another person;

(3) An acquisition of any other going business or the assets of a going business;

(4) A sale or other transfer of all or any substantial part of assets; or

(5) A liquidation or dissolution.

(b) *Transaction information.* Provide the following information for each of the parties to the transaction unless otherwise specified:

(1) *Summary term sheet.* The information required by Item 1001 of Regulation M–A (§ 229.1001 of this chapter).

(2) *Contact information.* The name, complete mailing address and telephone number of the principal executive offices.

(3) *Business conducted.* A brief description of the general nature of the business conducted.

(4) *Terms of the transaction.* The information required by Item 1004(a)(2) of Regulation M–A (§ 229.1004 of this chapter).

(5) *Regulatory approvals.* A statement as to whether any federal or state regulatory requirements must be complied with or approval must be obtained in connection with the transaction and, if so, the status of the compliance or approval.

(6) *Reports, opinions, appraisals.* If a report, opinion or appraisal materially relating to the transaction has been received from an outside party, and is referred to in the proxy statement, furnish the information required by Item 1015(b) of Regulation M–A (§ 229.1015 of this chapter).

(7) *Past contacts, transactions or negotiations.* The information required by Items 1005(b) and 1011(a)(1) of Regulation M–A (§ 229.1005 of this chapter and § 229.1011 of this chapter), for the parties to the transaction and their affiliates during the periods for which financial statements are presented or incorporated by reference under this Item.

(8) *Selected financial data.* The selected financial data required by Item 301 of Regulation S–K (§ 229.301 of this chapter).

(9) *Pro forma selected financial data.* If material, the information required by Item 301 of Regulation S–K (§ 229.301 of this chapter) for the acquiring company, showing the pro forma effect of the transaction.

(10) *Pro forma information.* In a table designed to facilitate comparison, historical and pro forma per share data of the acquiring company and historical and equivalent pro forma per share data of the target company for the following Items:

(i) Book value per share as of the date financial data is presented pursuant to Item 301 of Regulation S–K (§ 229.301 of this chapter);

(ii) Cash dividends declared per share for the periods for which financial data is presented pursuant to Item 301 of Regulation S–K (§ 229.301 of this chapter); and

(iii) Income (loss) per share from continuing operations for the periods for which financial data is presented pursuant to Item 301 of Regulation S–K (§ 229.301 of this chapter).

Instructions to paragraphs (b)(8), (b)(9) and (b)(10):

1. For a business combination accounted for as a purchase, present the financial information required by paragraphs (b)(9) and (b)(10) only for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, present the financial information required by paragraphs (b)(9) and (b)(10) (except for information with regard to book value) for the most recent three fiscal years and interim period. For purposes of these paragraphs, book value information need only be provided for the most recent balance sheet date.

2. Calculate the equivalent pro forma per share amounts for one share of the company being acquired by multiplying the exchange ratio times each of:

(i) The pro forma income (loss) per share before non-recurring charges or credits directly attributable to the transaction;

(ii) The pro forma book value per share; and

(iii) The pro forma dividends per share of the acquiring company.

3. Unless registered on a national securities exchange or otherwise required to furnish such information, registered investment companies need not furnish the information required by paragraphs (b)(8) and (b)(9) of this Item.

(11) *Financial information.* If material, financial information required by Article 11 of Regulation S–X (§§ 210.10–01 through 229.11–03 of this chapter) with respect to this transaction.

Instructions to paragraph (b)(11):

1. Present any Article 11 information required with respect to transactions other than those being voted upon (where not incorporated by reference) together with the pro forma information relating to the transaction being voted upon. In presenting this information, you must clearly distinguish between the transaction being voted upon and any other transaction.

2. If current pro forma financial information with respect to all other transactions is incorporated by reference, you need only present the pro forma effect of this transaction.

(c) *Information about the parties to the transaction.*

(1) *Acquiring company.* Furnish the information required by Part B (Registrant Information) of Form S–4 (§ 239.25 of this chapter) or Form F–4 (§ 239.34 of this chapter), as applicable, for the acquiring company. However, financial statements need only be presented for the latest two fiscal years and interim periods.

(2) *Acquired company.* Furnish the information required by Part C (Information with Respect to the Company Being Acquired) of Form S–4 (§ 239.25 of this chapter) or Form F–4 (§ 239.34 of this chapter), as applicable.

(d) *Information about parties to the transaction: registered investment companies and business development companies.* If the acquiring company or the acquired company is an investment company registered under the Investment Company Act of 1940 or a business development company as defined by Section 2(a)(48) of the Investment Company Act of 1940, provide the following information for that company instead of the information specified by paragraph (c) of this Item:

(1) Information required by Item 101 of Regulation S–K (§ 229.101 of this chapter), description of business;

(2) Information required by Item 102 of Regulation S–K (§ 229.102 of this chapter), description of property;

(3) Information required by Item 103 of Regulation S–K (§ 229.103 of this chapter), legal proceedings;

(4) Information required by Item 201 of Regulation S–K (§ 229.201 of this chapter), market price of and dividends on the registrant's common equity and related stockholder matters;

(5) Financial statements meeting the requirements of Regulation S–X, including financial information required by Rule 3–05 and Article 11 of Regulation S–X (§ 210.3–05 and § 210.11–01 through § 210.11–03 of this chapter) with respect to transactions other than that as to which action is to be taken as described in this proxy statement;

(6) Information required by Item 301 of Regulation S–K (§ 229.301 of this chapter), selected financial data;

(7) Information required by Item 302 of Regulation S–K (§ 229.302 of this chapter), supplementary financial information;

(8) Information required by Item 303 of Regulation S–K (§ 229.303 of this chapter), management's discussion and analysis of financial condition and results of operations; and

(9) Information required by Item 304 of Regulation S–K (§ 229.304 of this chapter), changes in and disagreements with accountants on accounting and financial disclosure.

Instruction to paragraph (d) of Item 14: Unless registered on a national securities exchange or otherwise required to furnish such information, registered investment companies need not furnish the information required by paragraphs (d)(6), (d)(7) and (d)(8) of this Item.

(e) *Incorporation by reference.*

(1) The information required by paragraph (c) of this section may be incorporated by reference into the proxy statement to the same extent as would be permitted by Form S–4 (§ 239.25 of this chapter) or Form F–4 (§ 239.34 of this chapter), as applicable.

(2) Alternatively, the registrant may incorporate by reference into the proxy statement the information required by paragraph (c) of this Item if it is contained in an annual report sent to security holders in accordance with § 240.14a–3 of this chapter with respect to the same meeting or solicitation of consents or authorizations that the proxy statement relates to and the information substantially meets the disclosure requirements of Item 14 or Item 17 of Form S–4 (§ 239.25 of this chapter) or Form F–4 (§ 239.34 of this chapter), as applicable.

* * * * *

34. By amending § 240.14c–5 by revising paragraphs (b) and (d)(2), and removing the note following paragraph (b) to read as follows:

§ 240.14c–5 Filing requirements.

* * * * *

(b) *Definitive information statement.* Eight definitive copies of the information statement, in the form in which it is furnished to security holders, must be filed with the Commission no later than the date the information statement is first sent or given to security holders. Three copies of these materials also must be filed with, or mailed for filing to, each national securities exchange on which the registrant has a class of securities listed and registered.

* * * * *

(d)(1) * * *

(2) *Confidential treatment.* If action will be taken on any matter specified in Item 14 of Schedule 14A (§ 240.14a–101), all copies of the preliminary information statement filed under paragraph (a) of this section will be for the information of the Commission only and will not be deemed available for public inspection until filed with the Commission in definitive form so long as:

(i) The information statement does not relate to a matter or proposal subject to § 240.13e–3 or a roll-up transaction as defined in Item 901(c) of Regulation S–K (§ 229.901(c) of this chapter);

(ii) Neither the parties to the transaction nor any persons authorized to act on their behalf have made any public communications relating to the transaction except for statements where the content is limited to the information specified in § 230.135 of this chapter; and

(iii) The materials are filed in paper and marked ''Confidential, For Use of the Commission Only.'' In all cases, the materials may be disclosed to any department or agency of the United States Government and to the Congress, and the Commission may make any inquiries or investigation into the materials as may be necessary to conduct an adequate review by the Commission.

Instruction to paragraph (d)(2): If communications are made publicly that go beyond the information specified in § 230.135, the materials must be re-filed publicly with the Commission.

* * * * *

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

a. By removing the reference ''Schedules 14D–1'' in the introductory text of paragraph (b) and adding in its place ''Schedules TO'';

b. Redesignating paragraphs (g)(1), (g)(2), (g)(3), (g)(4), (g)(5), (g)(6) and (g)(7) as paragraphs (g)(2), (g)(7), (g)(5), (g)(1), (g)(9), (g)(3) and (g)(6), respectively;

c. In newly redesignated paragraph (g)(1) removing the reference ''Rule 14d–3, Rule 14d–9(d) and Item 6 of Schedule 14D–1'' and in its place adding ''Rule 14d–3 and Rule 14d–9(d)''; and

d. Adding new paragraphs (g)(4) and (g)(8) to read as follows:

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

* * * * *

(g) *Definitions.* * * *

(4) The term *initial offering period* means the period from the time the offer commences until all minimum time periods, including extensions, required by Regulations 14D (§§ 240.14d–1 through 240.14d–103) and 14E (§§ 240.14e–1 through 240.14e–8) have been satisfied and all conditions to the offer have been satisfied or waived within these time periods.

* * * * *

(8) The term *subsequent offering period* means the period immediately following the initial offering period meeting the conditions specified in § 240.14d–11.

* * * * *

36. By revising § 240.14d–2 to read as follows:

§ 240.14d–2 Commencement of a tender offer.

(a) *Date of commencement.* A bidder will have commenced its tender offer for purposes of section 14(d) of the Act (15 U.S.C. 78n) and the rules under that section at 12:01 a.m. on the date when the bidder has first published, sent or given the means to tender to security holders. For purposes of this section, the means to tender includes the transmittal form or a statement regarding how the transmittal form may be obtained.

(b) *Pre-commencement communications.* A communication by the bidder will not be deemed to constitute commencement of a tender offer if:

(1) It does not include the means for security holders to tender their shares into the offer; and

(2) All written communications relating to the tender offer, from and including the first public announcement, are filed under cover of Schedule TO (§ 240.14d–100) with the Commission no later than the date of the communication. The bidder also must deliver to the subject company and any other bidder for the same class of securities the first communication relating to the transaction that is filed, or required to be filed, with the Commission.

Instructions to paragraph (b)(2)

1. The box on the front of Schedule TO indicating that the filing contains pre-commencement communications must be checked.

2. Any communications made in connection with an exchange offer registered under the Securities Act of 1933 need only be filed under § 230.425 of this chapter and will be deemed filed under this section.

3. Each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the tender offer statement when it is available because it contains important information. The legend also must advise investors that they can get the tender offer statement and other filed documents for free at the Commission's web site and explain which documents are free from the offeror.

4. See §§ 230.135, 230.165 and 230.166 of this chapter for pre-commencement communications made in connection with registered exchange offers.

5. ''Public announcement'' is any oral or written communication by the bidder, or any person authorized to act on the bidder's behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer.

(c) *Filing and other obligations triggered by commencement.* As soon as practicable on the date of commencement, a bidder must comply with the filing requirements of § 240.14d–3(a), the dissemination requirements of § 240.14d–4(a) or (b), and the disclosure requirements of § 240.14d–6(a).

37. By amending § 240.14d–3 as follows:

a. By removing the reference ''Schedule 14D–1'' in paragraphs (a)(1), (a)(2), (a)(2)(ii), the introductory text of (a)(3), and paragraph (c) each time it appears and adding in its place ''Schedule TO'';

b. Removing the phrase ''ten copies of'' in paragraphs (a)(1);

c. Removing the phrase ''Hand delivers'' in paragraph (a)(2), and adding in its place ''Delivers'', and

d. Revising paragraph (b) to read as follows:

§ 240.14d–3 Filing and transmission of tender offer statement.

* * * * *

(b) *Post-commencement amendments and additional materials.* The bidder making the tender offer must file with the Commission:

(1) An amendment to Schedule TO (§ 240.14d–100) reporting promptly any material changes in the information set forth in the schedule previously filed and including copies of any additional tender offer materials as exhibits; and

(2) A final amendment to Schedule TO (§ 240.14d–100) reporting promptly the results of the tender offer.

Instruction to paragraph (b): A copy of any additional tender offer materials or amendment filed under this section must be sent promptly to the subject company and to any exchange and/or NASD, as required by paragraph (a) of this section, but in no event later than the date the materials are first published, sent or given to security holders.

* * * * *

38. Amend § 240.14d–4 as follows:

a. By revising the section heading;

b. Adding an introductory text to § 240.14d–4;

c. Revising the introductory text of paragraph (a) and paragraph (a)(3);

d. Adding an Instruction to paragraph (a);

e. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d)(1) and adding a new paragraph (b);

f. Revising the heading of newly redesignated paragraph (d);

g. In the first sentence of newly redesignated paragraph (d)(1) removing the phrase ''paragraph (a) of''; and

h. Adding paragraph (d)(2) to read as follows:

§ 240.14d–4 Dissemination of tender offers to security holders.

As soon as practicable on the date of commencement of a tender offer, the bidder must publish, send or give the disclosure required by § 240.14d–6 to security holders of the class of securities that is the subject of the offer, by complying with all of the requirements of any of the following:

(a) *Cash tender offers and exempt securities offers.* For tender offers in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 (15 U.S.C. 77c):

* * * * *

(3) *Use of stockholder lists and security position listings.* Any bidder using stockholder lists and security position listings under § 240.14d–5 must comply with paragraph (a)(1) or (2) of this section on or before the date of the bidder's request under § 240.14d–5(a).

Instruction to paragraph (a): Tender offers may be published or sent or given to security holders by other methods, but with respect to summary publication and the use of stockholder lists and security position listings under § 240.14d–5, paragraphs (a)(2) and (a)(3) of this section are exclusive.

(b) *Registered securities offers.* For tender offers in which the consideration consists solely or partially of securities registered under the Securities Act of 1933, a registration statement containing all of the required information, including pricing information, has been filed and a preliminary prospectus or a prospectus that meets the requirements of section 10(a) of the Securities Act (15 U.S.C. 77j(a)), including a letter of transmittal, is delivered to security holders. However, for going-private transactions (as defined by § 240.13e–3) and roll-up transactions (as described by Item 901 of Regulation S–K (§ 229.901 of this chapter)), a registration statement registering the securities to be offered must have become effective and only a prospectus that meets the requirements of section 10(a) of the Securities Act may be delivered to security holders on the date of commencement.

Instructions to paragraph (b)

1. If the prospectus is being delivered by mail, mailing on the date of commencement is sufficient.

2. A preliminary prospectus used under this section may not omit information under § 230.430 or § 230.430A of this chapter.

3. If a preliminary prospectus is used under this section and the bidder must disseminate material changes, the tender offer must remain open for the period specified in paragraph (d)(2) of this section.

4. If a preliminary prospectus is used under this section, tenders may be requested in accordance with § 230.162(a) of this chapter.

* * * * *

(d) *Publication of changes and extension of the offer.* (1) * * *

(2) In a registered securities offer where the bidder disseminates the preliminary prospectus as permitted by paragraph (b) of this section, the offer must remain open from the date that material changes to the tender offer materials are disseminated to security holders, as follows:

(i) Five business days for a prospectus supplement containing a material change other than price or share levels;

(ii) Ten business days for a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee, or other similarly significant change;

(iii) Ten business days for a prospectus supplement included as part of a post-effective amendment; and

(iv) Twenty business days for a revised prospectus when the initial prospectus was materially deficient.

39. By amending § 240.14d–5 by revising paragraph (c)(1) to read as follows:

§ 240.14d–5 Dissemination of certain tender offers by the use of stockholder lists and security position listings.

* * * * *

(c) * * *

(1) No later than the third business day after the date of the bidder's request, the subject company must furnish to the bidder at the subject company's principal executive office a copy of the names and addresses of the record holders on the most recent stockholder list referred to in paragraph (a)(2) of this section; the names and addresses of participants identified on the most recent security position listing of any clearing agency that is within the access of the subject company; and the most recent list of names, addresses and security positions of beneficial owners as specified in § 240.14a–13(b), in the possession of the subject company, or that subsequently comes into its possession. All security holder list information must be in the format requested by the bidder to the extent the format is available to the subject company without undue burden or expense.

* * * * *

40. By revising § 240.14d–6 to read as follows:

§ 240.14d–6 Disclosure of tender offer information to security holders.

(a) *Information required on date of commencement.*—(1) *Long-form publication.* If a tender offer is published, sent or given to security holders on the date of commencement by means of long-form publication under § 240.14d–4(a)(1), the long-form publication must include the information required by paragraph (d)(1) of this section.

(2) *Summary publication.* If a tender offer is published, sent or given to security holders on the date of

commencement by means of summary publication under § 240.14d–4(a)(2):

(i) The summary advertisement must contain at least the information required by paragraph (d)(2) of this section; and

(ii) The tender offer materials furnished by the bidder upon request of any security holder must include the information required by paragraph (d)(1) of this section.

(3) *Use of stockholder lists and security position listings.* If a tender offer is published, sent or given to security holders on the date of commencement by the use of stockholder lists and security position listings under § 240.14d–4(a)(3):

(i) The summary advertisement must contain at least the information required by paragraph (d)(2) of this section; and

(ii) The tender offer materials transmitted to security holders pursuant to such lists and security position listings and furnished by the bidder upon the request of any security holder must include the information required by paragraph (d)(1) of this section.

(4) *Other tender offers.* If a tender offer is published or sent or given to security holders other than pursuant to § 240.14d–4(a), the tender offer materials that are published or sent or given to security holders on the date of commencement of such offer must include the information required by paragraph (d)(1) of this section.

(b) *Information required in other tender offer materials published after commencement.* Except for tender offer materials described in paragraphs (a)(2)(ii) and (a)(3)(ii) of this section, additional tender offer materials published, sent or given to security holders after commencement must include:

(1) The identities of the bidder and subject company;

(2) The amount and class of securities being sought;

(3) The type and amount of consideration being offered; and

(4) The scheduled expiration date of the tender offer, whether the tender offer may be extended and, if so, the procedures for extension of the tender offer.

Instruction to paragraph (b): If the additional tender offer materials are summary advertisements, they also must include the information required by paragraphs (d)(2)(v) of this section.

(c) *Material changes.* A material change in the information published or sent or given to security holders must be promptly disclosed to security holders in additional tender offer materials.

(d) *Information to be included.*—(1) *Tender offer materials other than summary publication.* The following information is required by paragraphs (a)(1), (a)(2)(ii), (a)(3)(ii) and (a)(4) of this section:

(i) The information required by Item 1 of Schedule TO (§ 240.14d–100) (Summary Term Sheet); and

(ii) The information required by the remaining items of Schedule TO (§ 240.14d–100) for third-party tender offers, except for Item 12 (exhibits) of Schedule TO (§ 240.14d–100), or a fair and adequate summary of the information.

(2) *Summary Publication.* The following information is required in a summary advertisement under paragraphs (a)(2)(i) and (a)(3)(i) of this section:

(i) The identity of the bidder and the subject company;

(ii) The information required by Item 1004(a)(1) of Regulation M–A (§ 229.1004(a)(1) of this chapter);

(iii) If the tender offer is for less than all of the outstanding securities of a class of equity securities, a statement as to whether the purpose or one of the purposes of the tender offer is to acquire or influence control of the business of the subject company;

(iv) A statement that the information required by paragraph (d)(1) of this section is incorporated by reference into the summary advertisement;

(v) Appropriate instructions as to how security holders may obtain promptly, at the bidder's expense, the bidder's tender offer materials; and

(vi) In a tender offer published or sent or given to security holders by use of stockholder lists and security position listings under § 240.14d–4(a)(3), a statement that a request is being made for such lists and listings. The summary publication also must state that tender offer materials will be mailed to record holders and will be furnished to brokers, banks and similar persons whose name appears or whose nominee appears on the list of security holders or, if applicable, who are listed as participants in a clearing agency's security position listing for subsequent transmittal to beneficial owners of such securities. If the list furnished to the bidder also included beneficial owners pursuant to § 240.14d–5(c)(1) and tender offer materials will be mailed directly to beneficial holders, include a statement to that effect.

(3) *No transmittal letter.* Neither the initial summary advertisement nor any subsequent summary advertisement may include a transmittal letter (the letter furnished to security holders for transmission of securities sought in the tender offer) or any amendment to the transmittal letter.

41. By amending § 240.14d–7 by redesignating paragraph (a) as (a)(1) and adding paragraph (a)(2) to read as follows:

§ 240.14d–7 Additional withdrawal rights.

(a) * * *

(2) *Exemption during subsequent offering period.* Notwithstanding the provisions of section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)) and paragraph (a) of this section, the bidder need not offer withdrawal rights during a subsequent offering period.

* * * * *

42. By amending § 240.14d–9 as follows:

a. By revising the section heading;

b. Redesignating paragraphs (a) through (f) as paragraphs (b) through (g);

c. Adding new paragraph (a); and

d. Revising the introductory text of newly redesignated paragraph (b) to read as follows:

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

(a) *Pre-commencement communications.* A communication by a person described in paragraph (e) of this section with respect to a tender offer will not be deemed to constitute a recommendation or solicitation under this section if:

(1) The tender offer has not commenced under § 240.14d–2; and

(2) The communication is filed under cover of Schedule 14D–9 (§ 240.14d–101) with the Commission no later than the date of the communication.

Instructions to paragraph (a)(2):

1. The box on the front of Schedule 14D–9 (§ 240.14d–101) indicating that the filing contains pre-commencement communications must be checked.

2. Any communications made in connection with an exchange offer registered under the Securities Act of 1933 need only be filed under § 230.425 of this chapter and will be deemed filed under this section.

3. Each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the company's solicitation/recommendation statement when it is available because it contains important information. The legend also must advise investors that they can get the recommendation and other filed documents for free at the Commission's web site and explain which documents are free from the filer.

4. See §§ 230.135, 230.165 and 230.166 of this chapter for pre-commencement communications made in connection with registered exchange offers.

(b) *Post-commencement communications.* After commencement by a bidder under § 240.14d–2, no solicitation or recommendation to

security holders may be made by any person described in paragraph (e) of this section with respect to a tender offer for such securities unless as soon as practicable on the date such solicitation or recommendation is first published or sent or given to security holders such person complies with the following:

(1) * * *

* * * * *

43. By amending § 240.14d–9 by removing the reference:

a. ''eight copies of'' in newly redesignated paragraph (b)(1);

b. ''14D–1'' in newly redesignated paragraphs (b)(2)(i) and (b)(3)(i) and in its place adding ''TO'';

c. ''Items 2 and 4(a) of Schedule 14D–9'' in newly redesignated paragraph (b)(2)(ii) and in its place adding ''Items 1003(d) and 1012(a) of Regulation M–A (§ 229.1003(d) and § 229.1012(a))'';

d. ''paragraph (a)(2) or (3)'' in newly redesignated paragraph (c)(2) and in its place adding ''paragraph (b)(2) or (3)'';

e. ''Items 1, 2, 3(b), 4, 6, 7 and 8'' in newly redesignated paragraph (d) and in its place adding ''Items 1 through 8'';

f. ''paragraphs (d)(2) and (e)'' in the introductory text of newly redesignated paragraph (e)(1) and in its place adding ''paragraphs (e)(2) and (f)'';

g. ''paragraph (d)(1)'' each time it appears in newly redesignated paragraph (e)(2) and in its place adding ''paragraph (e)(1)'';

h. ''14D–1 (§ 240.14d–101)'' in newly redesignated paragraph (e)(2)(i) and in its place adding ''TO (§ 240.14d–100)''; and

i. ''paragraph (e)(3)'' in newly redesignated paragraph (f)(4) and in its place adding ''paragraph (f)(3)''.

44. By adding § 240.14d–11 to read as follows:

§ 240.14d–11 Subsequent offering period.

A bidder may elect to provide a subsequent offering period of three business days to 20 business days during which tenders will be accepted if:

(a) The initial offering period of at least 20 business days has expired;

(b) The offer is for all outstanding securities of the class that is the subject of the tender offer, and if the bidder is offering security holders a choice of different forms of consideration, there is no ceiling on any form of consideration offered;

(c) The bidder immediately accepts and promptly pays for all securities tendered during the initial offering period;

(d) The bidder announces the results of the tender offer, including the approximate number and percentage of securities deposited to date, no later than 9:00 a.m. Eastern time on the next business day after the expiration date of the initial offering period and immediately begins the subsequent offering period;

(e) The bidder immediately accepts and promptly pays for all securities as they are tendered during the subsequent offering period; and

(f) The bidder offers the same form and amount of consideration to security holders in both the initial and the subsequent offering period.

Note § 240.14d–11: No withdrawal rights apply during the subsequent offering period in accordance with § 240.14d–7(a)(2).

45. By revising § 240.14d–100 to read as follows:

§ 240.14d–100 Schedule TO. Tender offer statement under section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934.

Securities and Exchange Commission,
Washington, D.C. 20549

Schedule TO

Tender Offer Statement under Section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934

(Amendment No. _____)*

_____

(Name of Subject Company (issuer))

_____

(Names of Filing Persons (identifying status as offeror, issuer or other person))

_____

(Title of Class of Securities)

_____

(CUSIP Number of Class of Securities)

(Name, address, and telephone numbers of person authorized to receive notices and communications on behalf of filing persons)

CALCULATION OF FILING FEE

Transaction valuation*	Amount of filing fee

*Set forth the amount on which the filing fee is calculated and state how it was determined.

[ ] Check the box if any part of the fee is offset as provided by Rule 0–11(a)(2) and identify the filing with which the offsetting fee was previously paid. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

Amount Previously Paid: _____
Form or Registration No.: _____
Filing Party: _____
Date Filed: _____

[ ] Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

Check the appropriate boxes below to designate any transactions to which the statement relates:

[ ] third-party tender offer subject to Rule 14d–1.

[ ] issuer tender offer subject to Rule 13e–4.

[ ] going-private transaction subject to Rule 13e–3.

[ ] amendment to Schedule 13D under Rule 13d–2.

Check the following box if the filing is a final amendment reporting the results of the tender offer: [ ]

General Instructions:

A. File eight copies of the statement, including all exhibits, with the Commission if paper filing is permitted.

B. This filing must be accompanied by a fee payable to the Commission as required by § 240.0–11.

C. If the statement is filed by a general or limited partnership, syndicate or other group, the information called for by Items 3 and 5–8 for a third-party tender offer and Items 5–8 for an issuer tender offer must be given with respect to: (i) Each partner of the general partnership; (ii) each partner who is, or functions as, a general partner of the limited partnership; (iii) each member of the syndicate or group; and (iv) each person controlling the partner or member. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii) or (iv) of this Instruction is a corporation, the information called for by the items specified above must be given with respect to: (a) Each executive officer and director of the corporation; (b) each person controlling the corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of the corporation.

D. If the filing contains only preliminary communications made before the commencement of a tender offer, no signature or filing fee is required. The filer need not respond to the items in the schedule. Any pre-commencement communications that are filed under cover of this schedule need not be incorporated by reference into the schedule.

E. If an item is inapplicable or the answer is in the negative, so state. The statement published, sent or given to security holders may omit negative and not applicable responses. If the schedule includes any information that is not published, sent or given to security holders, provide that information or specifically incorporate it by reference under the appropriate item number and heading in the schedule. Do not recite the text of disclosure requirements in the schedule or any document published, sent or given to security holders. Indicate clearly the coverage of the requirements without referring to the text of the items.

F. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item unless it would render the answer misleading, incomplete, unclear or confusing. A copy of any information that is incorporated by reference or a copy of the pertinent pages of a document containing the information must be submitted with this statement as an exhibit, unless it was previously filed with the Commission electronically on EDGAR. If an exhibit contains information responding to more than one item in the schedule, all information in that exhibit may be incorporated by reference once in response to the several items in the schedule for which

it provides an answer. Information incorporated by reference is deemed filed with the Commission for all purposes of the Act.

G. A filing person may amend its previously filed Schedule 13D (§ 240.13d–101) on Schedule TO (§ 240.14d–100) if the appropriate box on the cover page is checked to indicate a combined filing and the information called for by the fourteen disclosure items on the cover page of Schedule 13D (§ 240.13d–101) is provided on the cover page of the combined filing with respect to each filing person.

H. The final amendment required by § 240.14d–3(b)(2) and § 240.13e–4(c)(4) will satisfy the reporting requirements of section 13(d) of the Act with respect to all securities acquired by the offeror in the tender offer.

I. Amendments disclosing a material change in the information set forth in this statement may omit any information previously disclosed in this statement.

J. If the tender offer disclosed on this statement involves a going-private transaction, a combined Schedule TO (§ 240.14d–100) and Schedule 13E–3 (§ 240.13e–100) may be filed with the Commission under cover of Schedule TO. The Rule 13e–3 box on the cover page of the Schedule TO must be checked to indicate a combined filing. All information called for by both schedules must be provided except that Items 1—3, 5, 8 and 9 of Schedule TO may be omitted to the extent those items call for information that duplicates the item requirements in Schedule 13E–3.

K. For purposes of this statement, the following definitions apply:

(1) The term *offeror* means any person who makes a tender offer or on whose behalf a tender offer is made;

(2) The term *issuer tender offer* has the same meaning as in Rule 13e–4(a)(2); and

(3) The term third-party tender offer means a tender offer that is not an issuer tender offer.

Special Instructions for Complying With Schedule to

Under Sections 13(e), 14(d) and 23 of the Act and the rules and regulations of the Act, the Commission is authorized to solicit the information required to be supplied by this schedule.

Disclosure of the information specified in this schedule is mandatory, except for I.R.S. identification numbers, disclosure of which is voluntary. The information will be used for the primary purpose of disclosing tender offer and going-private transactions. This statement will be made 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, including 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. I.R.S. identification numbers, if furnished, will assist the Commission in identifying security holders and, therefore, in promptly processing tender offer and going-private statements.

Failure to disclose the information required by this schedule, except for I.R.S. identification numbers, may result in civil or criminal action against the persons involved for violation of the Federal securities laws and rules.

Item 1. Summary Term Sheet

Furnish the information required by Item 1001 of Regulation M-A (§ 229.1001 of this chapter) unless information is disclosed to security holders in a prospectus that meets the requirements of § 230.421(d) of this chapter.

Item 2. Subject Company Information

Furnish the information required by Item 1002(a) through (c) of Regulation M-A (§ 229.1002 of this chapter).

Item 3. Identity and Background of Filing Person

Furnish the information required by Item 1003(a) through (c) of Regulation M-A (§ 229.1003 of this chapter) for a third-party tender offer and the information required by Item 1003(a) of Regulation M-A (§ 229.1003 of this chapter) for an issuer tender offer.

Item 4. Terms of the Transaction

Furnish the information required by Item 1004(a) of Regulation M-A (§ 229.1004 of this chapter) for a third-party tender offer and the information required by Item 1004(a) through (b) of Regulation M-A (§ 229.1004 of this chapter) for an issuer tender offer.

Item 5. Past Contacts, Transactions, Negotiations and Agreements

Furnish the information required by Item 1005(a) and (b) of Regulation M-A (§ 229.1005 of this chapter) for a third-party tender offer and the information required by Item 1005(e) of Regulation M-A (§ 229.1005) for an issuer tender offer.

Item 6. Purposes of the Transaction and Plans or Proposals

Furnish the information required by Item 1006(a) and (c)(1) through (7) of Regulation M-A (§ 229.1006 of this chapter) for a third-party tender offer and the information required by Item 1006(a) through (c) of Regulation M-A (§ 229.1006 of this chapter) for an issuer tender offer.

Item 7. Source and Amount of Funds or Other Consideration

Furnish the information required by Item 1007(a), (b) and (d) of Regulation M-A (§ 229.1007 of this chapter).

Item 8. Interest in Securities of the Subject Company

Furnish the information required by Item 1008 of Regulation M-A (§ 229.1008 of this chapter).

Item 9. Persons/Assets, Retained, Employed, Compensated or Used

Furnish the information required by Item 1009(a) of Regulation M-A (§ 229.1009 of this chapter).

Item 10. Financial Statements

If material, furnish the information required by Item 1010(a) and (b) of Regulation M-A (§ 229.1010 of this chapter) for the issuer in an issuer tender offer and for the offeror in a third-party tender offer.

Instructions to Item 10:

1. Financial statements must be provided when the offeror's financial condition is material to security holder's decision whether to sell, tender or hold the securities sought. The facts and circumstances of a tender offer, particularly the terms of the tender offer, may influence a determination as to whether financial statements are material, and thus required to be disclosed.

2. Financial statements are *not* considered material when: (a) The consideration offered consists solely of cash; (b) the offer is not subject to any financing condition; *and* either: (c) the offeror is a public reporting company under Section 13(a) or 15(d) of the Act that files reports electronically on EDGAR, or (d) the offer is for all outstanding securities of the subject class. Financial information may be required, however, in a two-tier transaction. *See* Instruction 5 below.

3. The filing person may incorporate by reference financial statements contained in any document filed with the Commission, solely for the purposes of this schedule, if: (a) The financial statements substantially meet the requirements of this item; (b) an express statement is made that the financial statements are incorporated by reference; (c) the information incorporated by reference is clearly identified by page, paragraph, caption or otherwise; and (d) if the information incorporated by reference is not filed with this schedule, an indication is made where the information may be inspected and copies obtained. Financial statements that are required to be presented in comparative form for two or more fiscal years or periods may not be incorporated by reference unless the material incorporated by reference includes the entire period for which the comparative data is required to be given. *See* General Instruction F to this schedule.

4. If the offeror in a third-party tender offer is a natural person, and such person's financial information is material, disclose the net worth of the offeror. If the offeror's net worth is derived from material amounts of assets that are not readily marketable or there are material guarantees and contingencies, disclose the nature and approximate amount of the individual's net worth that consists of illiquid assets and the magnitude of any guarantees or contingencies that may negatively affect the natural person's net worth.

5. Pro forma financial information is required in a negotiated third-party cash tender offer when securities are intended to be offered in a subsequent merger or other transaction in which remaining target securities are acquired and the acquisition of the subject company is significant to the offeror under § 210.11–01(b)(1) of this chapter. The offeror must disclose the financial information specified in Item 3(f) and Item 5 of Form S–4 (§ 239.25 of this chapter) in the schedule filed with the Commission, but may furnish only the summary financial information specified in

Item 3(d), (e) and (f) of Form S–4 in the disclosure document sent to security holders. If pro forma financial information is required by this instruction, the historical financial statements specified in Item 1010 of Regulation M-A (§ 229.1010 of this chapter) are required for the bidder.

6. The disclosure materials disseminated to security holders may contain the summarized financial information specified by Item 1010(c) of Regulation M-A (§ 229.1010 of this chapter) instead of the financial information required by Item 1010(a) and (b). In that case, the financial information required by Item 1010(a) and (b) of Regulation M-A must be disclosed in the statement. If summarized financial information is disseminated to security holders, include appropriate instructions on how more complete financial information can be obtained. If the summarized financial information is prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, the summarized financial information must be accompanied by a reconciliation as described in Instruction 8 of this Item.

7. If the offeror is not subject to the periodic reporting requirements of the Act, the financial statements required by this Item need not be audited if audited financial statements are not available or obtainable without unreasonable cost or expense. Make a statement to that effect and the reasons for their unavailability.

8. If the financial statements required by this Item are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20–F (§ 249.220f of this chapter), unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, however, when financial statements are prepared on a basis other than U.S. GAAP, a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. must be presented.

Item 11. Additional Information

Furnish the information required by Item 1011 of Regulation M–A (§ 229.1011 of this chapter).

Item 12. Exhibits

File as an exhibit to the Schedule all documents specified by Item 1016 (a), (b), (d), (g) and (h) of Regulation M–A (§ 229.1016 of this chapter).

Item 13. Information Required by Schedule 13E–3

If the Schedule TO is combined with Schedule 13E–3 (§ 240.13e–100), set forth the information required by Schedule 13E–3 that is not included or covered by the items in Schedule TO.

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)

Instruction to Signature: The statement must be signed by the filing person or that person's authorized representative. If the statement is signed on behalf of a person by an authorized representative (other than an executive officer of a corporation or general partner of a partnership), evidence of the representative's authority to sign on behalf of the person must be filed with the statement. The name and any title of each person who signs the statement must be typed or printed beneath the signature. See §§ 240.12b–11 and 240.14d–1(f) with respect to signature requirements.

46. By revising § 240.14d–101 to read as follows:

§ 240.14d–101 Schedule 14D–9.

Securities and Exchange Commission,
Washington, D.C. 20549

Schedule 14D–9

Solicitation/Recommendation Statement under Section 14(d)(4) of the Securities Exchange Act of 1934

(Amendment No. _____)

_____

(Name of Subject Company)

_____

(Names of Persons Filing Statement)

_____

(Title of Class of Securities)

_____

(CUSIP Number of Class of Securities)

_____

(Name, address, and telephone numbers of person authorized to receive notices and communications on behalf of the persons filing statement)

[ ] Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

General Instructions:

A. File eight copies of the statement, including all exhibits, with the Commission if paper filing is permitted.

B. If the filing contains only preliminary communications made before the commencement of a tender offer, no signature is required. The filer need not respond to the items in the schedule. Any pre-commencement communications that are filed under cover of this schedule need not be incorporated by reference into the schedule.

C. If an item is inapplicable or the answer is in the negative, so state. The statement published, sent or given to security holders may omit negative and not applicable responses. If the schedule includes any information that is not published, sent or given to security holders, provide that information or specifically incorporate it by reference under the appropriate item number and heading in the schedule. Do not recite the text of disclosure requirements in the schedule or any document published, sent or given to security holders. Indicate clearly the coverage of the requirements without referring to the text of the items.

D. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item unless it would render the answer misleading, incomplete, unclear or confusing. A copy of any information that is incorporated by reference or a copy of the pertinent pages of a document containing the information must be submitted with this statement as an exhibit, unless it was previously filed with the Commission electronically on EDGAR. If an exhibit contains information responding to more than one item in the schedule, all information in that exhibit may be incorporated by reference once in response to the several items in the schedule for which it provides an answer. Information incorporated by reference is deemed filed with the Commission for all purposes of the Act.

E. Amendments disclosing a material change in the information set forth in this statement may omit any information previously disclosed in this statement.

Item 1. Subject Company Information

Furnish the information required by Item 1002(a) and (b) of Regulation M-A (§ 229.1002 of this chapter).

Item 2. Identity and Background of Filing Person

Furnish the information required by Item 1003(a) and (d) of Regulation M-A (§ 229.1003 of this chapter).

Item 3. Past Contacts, Transactions, Negotiations and Agreements

Furnish the information required by Item 1005(d) of Regulation M-A (§ 229.1005 of this chapter).

Item 4. The Solicitation or Recommendation

Furnish the information required by Item 1012(a) through (c) of Regulation M-A (§ 229.1012 of this chapter).

Item 5. Person/Assets, Retained, Employed, Compensated or Used

Furnish the information required by Item 1009(a) of Regulation M-A (§ 229.1009 of this chapter).

Item 6. Interest in Securities of the Subject Company

Furnish the information required by Item 1008(b) of Regulation M-A (§ 229.1008 of this chapter).

Item 7. Purposes of the Transaction and Plans or Proposals

Furnish the information required by Item 1006(d) of Regulation M-A (§ 229.1006 of this chapter).

Item 8. Additional Information

Furnish the information required by Item 1011(b) of Regulation M-A (§ 229.1011 of this chapter).

Item 9. Exhibits

File as an exhibit to the Schedule all documents specified by Item 1016(a), (e) and (g) of Regulation M-A (§ 229.1016 of this chapter).

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)

Instruction to Signature: The statement must be signed by the filing person or that person's authorized representative. If the statement is signed on behalf of a person by an authorized representative (other than an executive officer of a corporation or general partner of a partnership), evidence of the representative's authority to sign on behalf of the person must be filed with the statement. The name and any title of each person who signs the statement must be typed or printed beneath the signature. See § 240.14d–1(f) with respect to signature requirements.

47. By adding a note at the beginning of Regulation 14E (§ 240.14e–1 through § 240.14e–8) that reads as follows:

Note: For the scope of and definitions applicable to Regulation 14E, refer to § 240.14d–1.

48. By amending § 240.14e–1 by revising paragraph (c) to read as follows:

§ 240.14e–1 Unlawful tender offer practices.

* * * * *

(c) Fail to pay the consideration offered or return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of a tender offer. This paragraph does not prohibit a bidder electing to offer a subsequent offering period under § 240.14d–11 from paying for securities during the subsequent offering period in accordance with that section.

* * * * *

49. By adding § 240.14e–5 to read as follows:

§ 240.14e–5 Prohibiting purchases outside of a tender offer.

(a) *Unlawful activity.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with a tender offer for equity securities, no covered person may directly or indirectly purchase or arrange to purchase any subject securities or any related securities except as part of the tender offer. This prohibition applies from the time of public announcement of the tender offer until the tender offer expires. This prohibition does not apply to any purchases or arrangements to purchase made during the time of any subsequent offering period as provided for in § 240.14d–11 if the consideration paid or to be paid for the purchases or arrangements to purchase is the same in form and amount as the consideration offered in the tender offer.

(b) *Excepted activity.* The following transactions in subject securities or related securities are not prohibited by paragraph (a) of this section:

(1) *Exercises of securities.* Transactions by covered persons to convert, exchange, or exercise related securities into subject securities, if the covered person owned the related securities before public announcement;

(2) *Purchases for plans.* Purchases or arrangements to purchase by or for a plan that are made by an agent independent of the issuer;

(3) *Purchases during odd-lot offers.* Purchases or arrangements to purchase if the tender offer is excepted under § 240.13e–4(h)(5);

(4) *Purchases as intermediary.* Purchases by or through a dealer-manager or its affiliates that are made in the ordinary course of business and made either:

(i) On an agency basis not for a covered person; or

(ii) As principal for its own account if the dealer-manager or its affiliate is not a market maker, and the purchase is made to offset a contemporaneous sale after having received an unsolicited order to buy from a customer who is not a covered person;

(5) *Basket transactions.* Purchases or arrangements to purchase a basket of securities containing a subject security or a related security if the following conditions are satisfied:

(i) The purchase or arrangement to purchase is made in the ordinary course of business and not to facilitate the tender offer;

(ii) The basket contains 20 or more securities; and

(iii) Covered securities and related securities do not comprise more than 5% of the value of the basket;

(6) *Covering transactions.* Purchases or arrangements to purchase that are made to satisfy an obligation to deliver a subject security or a related security arising from a short sale or from the exercise of an option by a non-covered person if:

(i) The short sale or option transaction was made in the ordinary course of business and not to facilitate the offer;

(ii) In the case of a short sale, the short sale was entered into before public announcement of the tender offer; and

(iii) In the case of an exercise of an option, the covered person wrote the option before public announcement of the tender offer;

(7) *Purchases pursuant to contractual obligations.* Purchases or arrangements to purchase pursuant to a contract if the following conditions are satisfied:

(i) The contract was entered into before public announcement of the tender offer;

(ii) The contract is unconditional and binding on both parties; and

(iii) The existence of the contract and all material terms including quantity, price and parties are disclosed in the offering materials;

(8) *Purchases or arrangements to purchase by an affiliate of the dealer-manager.* Purchases or arrangements to purchase by an affiliate of a dealer-manager if the following conditions are satisfied:

(i) The dealer-manager maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of the federal securities laws and regulations;

(ii) The dealer-manager is registered as a broker or dealer under Section 15(a) of the Act;

(iii) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the dealer-manager that direct, effect, or recommend transactions in securities; and

(iv) The purchases or arrangements to purchase are not made to facilitate the tender offer;

(9) *Purchases by connected exempt market makers or connected exempt principal traders.* Purchases or arrangements to purchase if the following conditions are satisfied:

(i) The issuer of the subject security is a foreign private issuer, as defined in § 240.3b–4(c);

(ii) The tender offer is subject to the United Kingdom's City Code on Takeovers and Mergers;

(iii) 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 United Kingdom's City Code on Takeovers and Mergers;

(iv) The connected exempt market maker or the connected exempt principal trader complies with the applicable provisions of the United Kingdom's City Code on Takeovers and Mergers; and

(v) 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; and

(10) *Purchases during cross-border tender offers.* Purchases or arrangements

to purchase if the following conditions are satisfied:

(i) The tender offer is excepted under § 240.13e–4(h)(8) or § 240.14d–1(c);

(ii) 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;

(iii) The offering documents disclose the manner in which any information about any such purchases or arrangements to purchase will be disclosed;

(iv) 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

(v) The purchases comply with the applicable tender offer laws and regulations of the home jurisdiction.

(c) *Definitions.* For purposes of this section, the term:

(1) *Affiliate* has the same meaning as in § 240.12b–2;

(2) *Agent independent of the issuer* has the same meaning as in § 242.100(b) of this chapter;

(3) *Covered person* means:

(i) The offeror and its affiliates;

(ii) The offeror's dealer-manager and its affiliates;

(iii) Any advisor to any of the persons specified in paragraph (c)(3)(i) and (ii) of this section, whose compensation is dependent on the completion of the offer; and

(iv) Any person acting, directly or indirectly, in concert with any of the persons specified in this paragraph (c)(3) in connection with any purchase or arrangement to purchase any subject securities or any related securities;

(4) *Plan* has the same meaning as in § 242.100(b) of this chapter;

(5) *Public announcement* is any oral or written communication by the offeror or any person authorized to act on the offeror's behalf that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer;

(6) *Related securities* means securities that are immediately convertible into, exchangeable for, or exercisable for subject securities; and

(7) *Subject securities* has the same meaning as in § 229.1000 of this chapter.

(d) *Exemptive authority.* Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms or conditions, to any transaction or class of transactions or any security or class of security, or any person or class of persons.

50. By adding § 240.14e–8 to read as follows:

§ 240.14e–8 Prohibited conduct in connection with pre-commencement communications.

It is a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act (15 U.S.C. 78n) for any person to publicly announce that the person (or a party on whose behalf the person is acting) plans to make a tender offer that has not yet been commenced, if the person:

(a) Is making the announcement of a potential tender offer without the intention to commence the offer within a reasonable time and complete the offer;

(b) Intends, directly or indirectly, for the announcement to manipulate the market price of the stock of the bidder or subject company; or

(c) Does not have the reasonable belief that the person will have the means to purchase securities to complete the offer.

By the Commission.

Dated: October 22, 1999.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–28355 Filed 11–9–99; 8:45 am]

BILLING CODE 8010–01–P